
Acceptance of Offers by E-Mail – How Far Should the Postal Acceptance Rule Extend?

Kathryn O'Shea* and Kylie Skeahan**

Abstract

Since the inception of the postal acceptance rule in 1818, numerous alternative methods of communication have been developed, including the telephone, telex, telegraph, facsimile and e-mail. This article examines whether the postal acceptance rule will be applied to acceptances communicated by e-mail. In resolving this issue the authors consider how an e-mail is transmitted, the ambit of the postal acceptance rule and its underlying policy considerations and how the Courts have resolved this issue in relation to other modern forms of communication.

I. Introduction

It is well established that the general rule governing the acceptance of an offer is that acceptance is not effective until it is communicated to the offeror.¹ However, an equally well established exception to this general proposition is the postal acceptance rule. Although the postal acceptance rule is deeply entrenched within our legal system, the scope of the rule and its applicability to modern forms of communication are issues which have not been conclusively determined by the courts.

Since the initial formulation of the postal acceptance rule, communication technology has dramatically changed. As each new method of communication has emerged, the courts have been compelled to determine the applicability of the postal acceptance rule. The development of e-mail means that this issue has once again arisen for consideration. Due to the increase in the use of e-mail as a tool of commerce, it is essential that this issue be resolved to enable contracting parties to utilise this new technology with a degree of certainty.

* LLB (Hons) (QUT); Articled Clerk – Hoggood & Ganim, Solicitors & Notary; Part time tutor - Queensland University of Technology. Editors' note: QUT Medallist (1997 Graduation ceremony).

** B Info Tech (Dist), LLB (Hons) (QUT); Articled Clerk - Clayton Utz Solicitors; Part time tutor - Queensland University of Technology.

1 *Byrne & Co v Leon Van Tienhoven and Co* (1880) 5 CPD 344.

2. The Postal Acceptance Rule.

a. Development of the postal acceptance rule

The origin of the postal acceptance rule may be traced back to 1818 and the case of *Adams v Lindsell*.² The most renowned formulation of the rule is that propounded by Lord Herschell in *Henthorn v Fraser*, where his Lordship stated:

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.³

Essentially, the effect of the rule is that an offeree's acceptance will be effective the moment the acceptance is correctly posted and it is irrelevant whether the acceptance is delayed or in fact never reaches the hands of the offeror.⁴ The consequences which flow from the application of the rule are of particular importance in situations where either the time or place of formation of a contract are at issue. Indeed, the courts have been concerned with locating the place of formation of a contract in the majority of cases which have considered the applicability of the postal acceptance rule to 'modern' forms of communication.⁵

b. Exclusion of the postal acceptance rule

Although the rule is deeply entrenched in our legal system, it can easily be excluded by parties to a contract. The postal acceptance rule can be displaced if the parties either expressly or by implication from the terms of their contract require that acceptance be received by the offeror.⁶

The ease by which the rule can be excluded is exemplified by the case of *Bressan v Squires*.⁷ In this case, clause 1 of an option agreement provided that "This option may be exercised by you by notice in writing addressed to me at any time on or before 20th December 1972." The plaintiff posted a notice of exercise of the option addressed to the defendant on 18 December 1972, which the defendant received on 21 December 1972 (1 day after the prescribed time period). The plaintiff sued the defendant claiming that he had validly exercised the option to purchase the

2 (1818) B&Ald 681; The rule was first applied in Australia in the case of *Tooth v Fleming* (1859) Legge 1152.

3 *Henthorn v Fraser* [1892] 2 Ch 27 at 33.

4 *Ibid* ; *Household Fire and Carriage Accident and Insurance Company (Limited) v Grant* (1879) 4 ExD 216.

5 For example: *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327, *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1982] 1 All ER 293.

6 *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, *Elizabeth City Centre Pty Ltd v Corralyn Pty Ltd* (1994) 63 SASR 235, *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* [1994] 1 VR 74.

7 [1974] 2 NSWLR 460.

defendant's property. The issue before the court was whether the notice had been validly given within time, which necessarily involved consideration of the applicability of the postal acceptance rule. Chief Justice Bowen held that in the circumstances of the case and upon a true construction of the option agreement, clause 1 of the agreement required actual notice to be given to the defendant on or before 20th December 1972 to effect a valid exercise of the option.⁸ Accordingly, the material date to be considered was the date of receipt by the defendant of the notice of exercise and not the date of posting by the plaintiff. Since the defendant did not receive the notice until 21 December 1972, it was held that the option had not been validly exercised by the plaintiff.⁹

It has also been suggested by several judges that the rule can be excluded by virtue of the circumstances of a particular case. In *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd*, Dixon CJ and Fullagar J stated:

The general rule is that a contract is not completed until acceptance of an offer is actually communicated to the offeror, and a finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act: see *Henthorn v Fraser* per Kay LJ. In that case as in *Household Fire & Carriage Accident Insurance Co (Ltd) v Grant*, it was easy to draw such an inference, but, in such a case as the present, where solicitors are conducting a highly contentious correspondence, one would have thought that actual communication would be regarded as essential to the conclusion of agreement of anything. However, the understanding of counsel was plainly based on a contrary assumption and the case must be dealt with on that assumption.¹⁰

Similarly, in the case of *Holwell Securities Ltd v Hughes*, Lawton LJ suggested that the postal acceptance rule "probably does not operate if its application would produce manifest inconvenience and absurdity...".¹¹ He stated that:

In my judgment, the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other.¹²

In light of the above comments, it would prima facie appear that if the circumstances are such as to indicate that the offeror and offeree could not have

8 *Ibid* at 463.

9 This follows the earlier decision of the English Court of Appeal in *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161.

10 (1957) 98 CLR 93 at 111-112.

11 [1974] 1 All ER 161 at 166.

12 *Ibid* at 167.

intended the postal rule to apply, then the postal rule will be displaced. Although the correctness of this proposition has not been authoritatively determined by the courts,¹³ it would appear to be consistent with the fact that for the postal rule to apply the parties must have contemplated that the post might be used as a means of communicating the acceptance of an offer.

3. Policy Underlying the Postal Acceptance Rule

The postal acceptance rule was initially formulated as an attempt to provide some degree of certainty to an offeree accepting an offer by post. In support of the postal acceptance rule, the courts maintained that if the general rule relating to acceptance of an offer is applied to an acceptance sent by post, then an offeree would never truly be certain of the existence of a binding contract until the offeror communicated the fact of receipt of the letter of acceptance. This justification was utilised by the court in *Adams v Lindsell*, where it was held that:

...if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on, *ad infinitum*.¹⁴

Although this logical justification enjoys popularity, as the postal system became increasingly efficient the courts were compelled to examine further policy considerations in order to determine whether the postal acceptance rule should be retained. In the latter stage of the nineteenth century the courts formed the view that the postal acceptance rule could be justified on the grounds of agency. It was argued that the post office was the agent of the offeror and offeree and that consequently, acceptance must be viewed as complete upon delivery to the post office. This argument was partially dispelled by Kay L.J in *Henthorn v Fraser*:

That reason is not satisfactory. The Post Office are only carriers between them. They are agents to convey the communication, not to receive it...The difference is between saying 'Tell my agent A, if you accept' and 'Send your answer to me by A.' In the former case A is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by letter, knowing nothing of its contents. The Post Office are only agents in the latter sense.¹⁵

In modern times, it would appear that the agency justification for the postal acceptance rule can be completely disregarded. The most persuasive reason for wholly rejecting the justification based on agency has been stated by Simon Gardner,

13 See *Bressan v Squires* [1974] 2 NSWLR 460 at 462.

14 *Adams v Lindsell* (1818) 1 B & Ald 681 at 683.

15 [1892] 2 Ch 27 at 35.

who correctly argues that an offeror's agreement to use the post as a means of communicating acceptance "...surely does not establish a relevant agency. Even if it is possible to regard the post office as his agent to carry the letter (which still seems unreal, with a prepaid letter), there is surely no agency to receive it and so conclude a contract on his behalf, which is what would be needed to justify the rule."¹⁶

The most frequently cited justification for retention of the rule is that of business convenience, which stems from the need to create certainty in contractual relations. If acceptance is complete upon proper posting, this effectively allows the offeree to structure his or her affairs on the basis that a binding contract is formed on postage.¹⁷ Additionally, it has also been held that upon posting an acceptance the offeree has done all that he or she can do to communicate acceptance to the offeror and should therefore not be held responsible for any events which may occur after the offeree effectively loses control over the letter of acceptance.¹⁸

Although the business convenience justification has been the subject of criticism on the basis that it unfairly favours the interests of the offeree, Thesiger LJ in the case of *Household Fire Insurance Company v Grant*¹⁹ presents a persuasive case in favour of the postal acceptance rule on this basis:

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offeror, if [he] chooses, may always make the formation of the contract which [he] proposes dependant upon the actual communication to [himself] of the acceptance. If [he] trusts to the post [he] trusts to a means of communication which, as a rule, does not fail, and if no answer to [his] offer is received by [him], and the matter is of importance to [him], [he] can make inquires of the person to whom [his] offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offeror, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which dispatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until [he] has received notice that his letter of acceptance had reached its destination.²⁰

16 S Gardner 'Trashing with Trollope : A Deconstruction of the Postal Rules in Contract' (1992) 12 *OJLS* 170, 173.

17 *Re Imperial Land Co of Marseilles (Harris' Case)* (1872) 7 Ch App 587, *Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344.

18 *Dunlop v Higgins* (1848) 1 HL Cas 381; *Re Imperial Land Co of Marseilles (Wall's Case)* (1872) LR 15 Eq 18.

19 (1879) 4 ExD 216.

20 *Ibid* at 223-224.

Although it has been argued that the efficiency of the modern postal system undermines the traditional policy considerations used to justify the postal acceptance rule, the rule has not been abandoned and will still apply to acceptances communicated by post if the parties to the contract contemplate that the post may be used as a means of communicating acceptance. However, as discussed below, the courts have shown an unwillingness to extend the scope of the rule to modern, virtually instantaneous forms of communication.

4. Modern Forms of Communication

Technology has rapidly advanced since the 1800's when the postal acceptance rule was initially formulated. Prior to the advent of e-mail and the Internet, communication technologies such as the telephone, telex, telegram and facsimile had been developed. As each of these technologies became a tool of commerce the courts were forced to grapple with the application of the postal acceptance rule.

a. Telephone

In *Entores v Miles Far East Corporation*²¹ Denning LJ drew a distinction between the telephone and the postal system on the basis that communications via the telephone are virtuously instantaneous and are therefore analogous to face to face negotiations between the offeror and offeree. It is well established that acceptance of an offer by telephone is subject to the general rule that acceptance is not effective until communicated to the offeror.²²

b. Telegrams

The application of the postal acceptance rule to telegrams (or telegraphs as they are also known) was first addressed by the English Courts in *Cowan v O'Connor*.²³ This case held, with remarkably little reasoning or justification, that where an acceptance is communicated to an offeror by telegram, a contract is formed when the telegram is given to the post office for dispatch.²⁴ This decision is based on the assumption that the sending of a telegram is analogous to the mailing of a letter, however it has been criticised in subsequent decisions²⁵ due to the inadequacy of the reasons provided by the court. The applicability of the postal acceptance rule to telegrams was also assumed in the case of *Bruner v Moore*,²⁶ but again the Court failed to provide comprehensive reasons for the adoption of this position.

21 [1955] 2 QB 327 at 332.

22 The New Zealand case of *Union Steamship Co v Ewart* (1893) 13 NZLR 9 applies this principle.

23 (1888) 20 QBD 640.

24 *Ibid.*

25 See *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1986] WAR 244 at 251 per Master Seaman QC.

26 [1904] 1 Ch 305 at 316.

Despite this lack of judicial reasoning, subsequent decisions have proceeded upon the basis that acceptance by telegram will be complete when it is given to the post office.²⁷ Consequently, it appears that the postal acceptance rule will extend to communication of an acceptance by telegram.

c. Telexes

The extension of the postal acceptance rule to modern forms of communication has primarily been considered in relation to telexes. In *Entores v Miles Far East Corporation*²⁸ it was held that a telex is a “virtually instantaneous” method of communication.²⁹ As a result, when an acceptance is sent by telex “it is not until [the offeree’s] message is received that the contract is complete”.³⁰

The decisive factor which motivated Lord Denning’s decision not to extend the application of the postal acceptance rule to telexes is the ability of the contracting parties to ascertain whether the acceptance has been received by the offeror. He reasoned that where an instantaneous method of communication is used, usually one party will know if some part of the acceptance has not been received, which effectively removes the risk of a party proceeding upon the mistaken assumption that an acceptance has been communicated. This reasoning circumvents the policy considerations (such as certainty and business convenience) which have traditionally been relied upon to support the existence and continued application of the postal acceptance rule.

In 1982 the House of Lords reconsidered this issue in the case of *Brinkibon Ltd v Stahag Stahl mbH*.³¹ In this case Lord Wilberforce recognised the extensive and differing uses of telex communication.³² He also noted that in some instances, there may be considerable delay between the time when a message is sent by the offeree and the time that it comes to the attention of the offeror:

The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or default at the recipient’s end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons.³³

While no universal rule can apply to all situations, the case before the court

27 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1982] 1 All ER 293 at 295.

28 [1955] 2 QB 327.

29 *Ibid* at 332.

30 *Ibid*.

31 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1982] 1 All ER 293.

32 *Ibid* at 296.

33 *Ibid*.

involved a direct communication between the contracting parties and it was therefore held that the acceptance was not effective until communicated to the offeror. However, Lord Wilberforce did note that in cases where there is some delay, the point of acceptance of the contract "must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie."³⁴ This statement appears to provide courts with a degree of flexibility in determining the point of acceptance of an offer.

As a result of the above authorities, it is well established that the postal acceptance rule will not apply to acceptances communicated by telex.

d. Facsimiles

Although there has been no detailed judicial analysis on the application of the postal acceptance rule to facsimiles, in several recent decisions Australian courts have proceeded upon the assumption that as a facsimile transmission is a virtually instantaneous method of communication, acceptance of an offer will not be effective until it is received by the offeror.³⁵

In *Hamon-Sobelco Australia Pty Ltd v Reese Bros Plastics Limited*,³⁶ Smart J of the Supreme Court of New South Wales did not give specific consideration to the application of the postal acceptance rule to facsimiles, however his Honour did make the following comments in relation to the application of the rule:

Consequent upon the decisions in *Mendelson-Zeller v T&C Providores* [1981] 1 NSWLR 366 at 369, *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 at 332-334 and *Brinkibon Ltd v Stahag Stahl* etc [1983] AC 34 at 42 it was common ground that telex and facsimile transmissions were forms of instantaneous or near instantaneous methods of communication and that with these the contract is made where the acceptance is received.³⁷

The comments of Smart J have been referred to by the Victorian Supreme Court in the case of *Tallangalook Pty Ltd v Duketon Goldfields NL*,³⁸ although again this issue was not extensively considered. The court noted:

Counsel for the plaintiffs (but not for the defendant) addressed me briefly on the question of when and where contracts are formed in a case where acceptance is made by facsimile, although he was unable to find authority precisely on point (as opposed to cases

34 *Ibid* at 296 and 302.

35 *Tallangalook Pty Ltd v Duketon Goldfields NL* (Unreported) SCVic 13 February 1997; *Hamon-Sobelco Aust Pty Ltd v Reese Brothers Plastics Ltd* (Unreported) SCNSW 18 February 1988; *Reese Brothers Plastics Ltd v Hamon-Sobelco Aust Pty Ltd* (1988) 5 BPR 11,106.

36 (Unreported) SCNSW 18 February 1988, which was approved on appeal in *Reese Brothers Plastics Ltd v Hamon-Sobelco Aust Pty Ltd* (1988) 5 BPR 11,106.

37 (Unreported) SCNSW 18 February 1988 at 6.

38 (Unreported) SCVic 13 February 1997.

in which telexes have been exchanged). The answer, I think, is that the contract is formed when and where the acceptance is received. So much was assumed by the New South Wales Court of Appeal in *Reese Bros Plastic Ltd v Hamon-Sobelco Australia Pty Ltd...*³⁹

Given the obvious similarities between communications via facsimile and telex, this approach seems logical and is likely to be followed in future decisions.

e. Combination of Technologies

Despite the apparent ease with which Courts have been able to categorise new methods of communication as either “instantaneous” or “non-instantaneous”, two relatively recent decisions have demonstrated the confusion which may occur when several methods of communication are used to accept an offer.

In the case of *Express Airways v Port Augusta Air Services*,⁴⁰ the Queensland Supreme Court was confronted with a situation where a telegram containing an offeree’s acceptance was sent by the Post Office as a telex to the telex machine of the offeror. The problem encountered by the court was that the postal acceptance rule had been held to apply to acceptances communicated by telegram, but not to acceptances communicated by telex.

Due to the absence of authoritative case law, Douglas J relied upon the views of Professor Winfield,⁴¹ who maintained that the operation of the postal acceptance rule would be excluded by communication of the contents of a telegram by telephone. Although Douglas J noted that this was contrary to the views of other textbook writers, he held that the communication of a telegram by telex would also exclude the postal acceptance rule.⁴²

This reasoning was considered but not followed by the Supreme Court of Western Australia in *Leach Nominees Pty Ltd v Walter Wright*,⁴³ where an acceptance that was contained in a telex given over the telephone to the post office was to be transmitted via a public telex facility. Unlike Douglas J, Master Seaman QC was reluctant to be guided by the views of Professor Winfield.⁴⁴ In holding that the postal acceptance rule applied, Master Seaman QC was heavily influenced by the fact that once an offeree has communicated an acceptance to a telex operator to be transmitted via a public telex facility, he or she would not know whether the acceptance has been received by the offeror.⁴⁵

39 *Ibid.*

40 [1980] Qd R 543.

41 PH Winfield ‘Some Aspects of Offer and Acceptance’ (1939) 55 *LQR* 499, 513.

42 Trietel *The Law of Contracts* 4th ed Butterworths London 1970, p19; *Chitty on Contracts* 24th ed Sweet & Maxwell London 1977 para 64.

43 [1986] WAR 244.

44 *Ibid* at 251.

45 *Ibid* at 251 - 252.

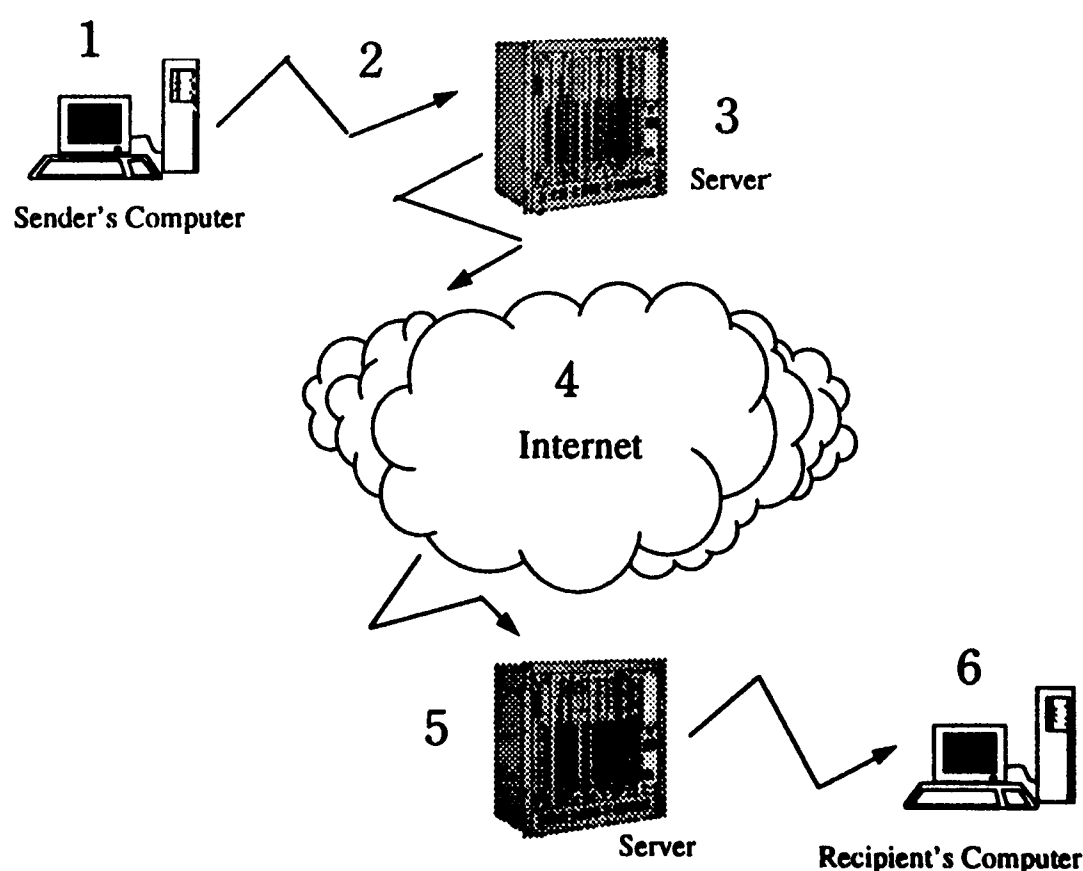
5. E-mail and the Postal Acceptance Rule

In light of the above discussions, the inevitable question remains: Will the courts apply the postal acceptance rule to e-mail communications? The answer to this question seems dependant upon whether the courts classify e-mail as a virtually instantaneous method of communication.

a. What is e-mail?

Essentially, 'e-mail' is a generic term that is used to describe a variety of forms of electronic messaging. Technically, a distinction may be drawn between EDI⁴⁶ and e-mail on the basis that EDI involves the exchange of data as opposed to text-based messages. However, for the purposes of this article, the term 'e-mail' is referred to in its generic sense as it is unnecessary to maintain the above distinction in the context of an analysis of the legal implications of using e-mail as a mechanism to form contracts.

Before embarking on an analysis of the legal principles relating to the formation of contracts and their applicability to contracts purportedly formed by e-mail, it is essential to examine the process involved in sending an e-mail. There are various methods by which an e-mail may be transmitted by a sender to a recipient and perhaps the most commonly employed method is transmission via the Internet. The illustration below displays the passage of an Internet e-mail, however it is also possible to have a direct e-mail link between two computers.



46 EDI refers to Electronic Data Interchange or Electronic Document Interchange.

1. E-mail is composed by sender
2. Sender activates command to "send" e-mail.
3. E-mail is stored on sender's ISP's⁴⁷ server.
4. The e-mail is transmitted over the Internet. This may involve the e-mail being transferred between numerous servers before it reaches the recipient's ISP.
5. The e-mail is stored on the recipient's ISP's server until it is downloaded by the recipient.
6. The recipient reads the e-mail.

Internet e-mail is, in many ways, similar to the process which occurs when sending a letter via the conventional postal system. Once a message is "sent" or "posted" by the e-mail sender it may pass through a variety of different computer systems owned by a number of third parties. At the time of sending the e-mail the sender has no means of knowing the path that the message will take before it is received by the recipient's computer system. Quite often this involves the e-mail being sent between countries or States notwithstanding the fact the sender and recipient may be in adjacent buildings. Key similarities between the systems of communication are the intervention of third parties and the inability to foresee the pathway of the message or letter once it is "sent" or "posted".⁴⁸

However, where organisations make extensive use of EDI a direct e-mail link may be established between them. This arrangement is more akin to facsimiles as the two computer systems are directly connected over telephone lines.

b. Control over e-mail messages

There are a wide variety of commercial e-mail software packages currently available on the market and it is not intended to examine the full functionality provided by each available software package. However, for present purposes it is important to note the possible extent of control and status monitoring which a sender has over his or her e-mail messages. In relation to other methods of communication, issues of control and knowledge have proven to be decisive factors in determining the applicability of the postal acceptance rule.⁴⁹

Many modern e-mail systems allow a sender to monitor whether an e-mail has been received, opened or deleted by the recipient. Like facsimiles, these confirmation messages do not provide conclusive evidence of receipt, however they provide at least some information about the status of the e-mail. Depending upon the e-mail system involved, the sender may be advised of the time when the e-mail is received by the recipient's ISP, downloaded to the recipient's computer system or actually

47 Internet Service Provider.

48 Issues of distinction between the systems, such as retraction and status monitoring are considered below.

49 For example, see the discussion in relation to telexes by Denning LJ in *Entores v Miles Far East Corporation Pty Ltd* [1955] 2 QB 327.

opened by the recipient. It is also possible for users to delete e-mails which have been sent but not yet opened by the intended recipient depending upon the restrictions imposed by the recipient's ISP and computer system. To a large extent the sender is in control of the e-mail up until the point it is read by the recipient, or at least is able to monitor the progress of the e-mail.

While the functionality provided by e-mail systems varies, it is unlikely that a Court will make a determination regarding the applicability of the postal acceptance rule based solely upon the functionality of the particular system used by the sender.

c. Is e-mail instantaneous?

There has been a considerable amount of conjecture to date as to whether e-mail is or should be considered to be an instantaneous form of communication. This debate has largely been driven by the 20th century cases which have shown a tendency to determine the applicability of the postal acceptance rule by classifying all means of communication as either instantaneous or non-instantaneous.

There appears to be some confusion as to what is required to constitute a "virtually instantaneous" communication.⁵⁰ Recently, it has been suggested that issues such as incorrect addressing of e-mail, failure to read e-mail by recipients and delay in the internal distribution of e-mails by organisations demonstrate that e-mail is not an instantaneous means of communication.⁵¹ With respect, these factors are external to the e-mail communication network and are not determinative of the "instantaneous" nature of e-mail communications.

Where there is a direct link between computers it is suggested that the e-mail system is a virtually instantaneous form of communication notwithstanding the fact that there may be delays between the sending and receipt of an e-mail message. In this arrangement the e-mail does not pass into the control of third parties and the only delay which may be experienced results from either the processing power of the computer systems used or the bandwidth of the communication network. There is a strong argument analogous to that applied to telexes that this form of communication is virtually instantaneous.

However, with Internet e-mail (which provides a greater degree of flexibility of use) considerable delays may occur between when a message is sent and when it is received by the recipient. These delays result from the complex path over which the e-mail is sent. For example: If person A in Australia sends an e-mail message to person B in the United States of America, usually there will be no direct link between the computer systems. However, for the message to be sent by A to B a link must be found. In a simple situation, this link could occur through C's computer system as C's system may have links to both A and B's systems. However, in the majority

50 This is the test applied in *Entores v Miles Far East Corporation Pty Ltd* [1955] 2 QB 327. It was accepted in the case of telex, that sending and receiving a message did not occur simultaneously, however it was accepted as an instantaneous means of communication.

51 B Clark 'The E-Mail Acceptance Rule' (1997) June *Proctor* 13.

of situations the e-mail will have to pass through a large number of computer systems owned by third parties before the message sent by A is able to reach B. At each link in this chain there is the possibility of delay either due to the processing power of the computer system, technical faults or bottlenecks in communication lines. This parallels to a degree the possibility of delay in the postal system. It is possible for a delay of hours or even days to occur between when an e-mail is sent and when it is received even if the sender and recipient are in close proximity. The delay which may be experienced when sending an e-mail message via the Internet may therefore give rise to the suggestion that this method of communication is not virtually instantaneous.

In light of the above analysis, it becomes apparent that it is difficult to classify e-mail as either an “instantaneous” or “non-instantaneous” means of communication. However, despite the possibility that a delay may occur between the sending and receipt of an e-mail message, given the decisions of the courts in relation to telexes and facsimiles it is most likely that the courts will conclude that e-mail is a “virtually instantaneous” method of communication. E-mails are transmitted via the telephone network at the same speed as facsimiles and the time delays which are experienced when sending an e-mail are generally shorter than the delays which occur when sending a letter via the conventional postal system⁵². The transmission time of an e-mail message may vary, however the delays which may be experienced are often brief and unlike the postal system, are unrelated to the physical distance between the offeror and the offeree.

It is therefore probable that the courts will expand the notion of virtually instantaneous communications to encompass communications transmitted by e-mail.

d. Application of the postal acceptance rule to e-mail

If it is concluded that e-mail is a virtually instantaneous method of communication, the consequence which generally flows from this conclusion is that the postal acceptance rule will not apply to acceptances transmitted by e-mail.

However, an argument which may be raised in support of the application of the postal acceptance rule is that the offeree should not be held responsible for any faults which occur after he or she has transmitted the message of acceptance. The foundation of this argument is that the offeree has effectively lost control over the acceptance and has done everything possible to communicate acceptance to the offeror. Implicit in this argument is the assumption that the offeror should bear the risk of problems which may occur after the e-mail is transmitted by the offeree.

In light of the functionality provided by available e-mail systems, this argument is unconvincing. An offeree may be able to monitor the progress of an e-mailed acceptance and may also be able to retract it up until the time when it is opened by

52 It is however conceded that in exceptional circumstances this may not be the case as it is possible for an e-mail transmission to take longer to reach a recipient than a letter sent by post.

the offeror.⁵³ Effectively, the offeree retains a degree of control over the acceptance until it is read by the offeror. This shift in the balance of power undermines the majority of policy considerations which have been used to justify the existence of the postal acceptance rule. It should also be borne in mind that an offeree can easily make a telephone call to confirm that the e-mail acceptance message has in fact been received by the offeror. He or she can therefore ascertain when a binding contract is formed and can structure his or her affairs accordingly.

The success and sheer volume of commercial transactions which are currently conducted over the Internet indicate that contracting parties do not need a rule such as the postal acceptance rule to overcome any delays experienced in communicating by e-mail. Moreover, in recent decisions the courts have displayed an unwillingness to extend the application of the postal acceptance rule to modern, virtually instantaneous methods of communication. This position has been expressly recognised by Hedigan J of the Supreme Court of Victoria in the case of *Nunin Holdings v Tullamarine Estates*, where he stated:

Recent authority has been concerned with the more modern methods of virtually instantaneous communication, preferring to confine the postal acceptance rule strictly enough to its original sphere and, subject always to the parties' intentions, applying the primary principle that acceptance must be actually communicated to be effective...⁵⁴

It therefore seems probable that in accordance with the general rule which governs the acceptance of offers, an acceptance which is sent by e-mail will not be effective until it is communicated to the offeror.

e. When is communication complete ?

If it is accepted that the postal acceptance rule does not apply to e-mail, an acceptance which is sent by e-mail will only be effective once it has been *communicated* to the offeror. However, an issue which has not been satisfactorily determined by the English or Australian Courts is the point at which communication occurs.

In true forms of instantaneous communications, such as where parties are in each others' presence or are communicating by telephone, communication occurs when the acceptance is heard⁵⁵ by the other party. In these situations the message travels directly between the parties and there is no facility for delay of the message between the parties.⁵⁶

This issue is not as easily determined where the message is not directly relayed

53 This is dependant upon the functionality of the e-mail system used by the sender and the access permitted by the recipient's computer system.

54 [1994] 1 VR 74 at 83.

55 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1982] 1 All ER 293 at 295.

56 However, would the situation be different if the acceptance was left on the answering machine or voice mail of the offeror? See B. Coote 'The Instantaneous Transmission of Acceptances' (1971) 4 *NZULR* 331.

to the offeror as is the case with telex, facsimile or e-mail communications. In these situations it is possible for the message to be placed within the custody and control of the offeror by delivery to its telex or facsimile machine or its e-mail server, but not to come to the attention of the offeror for some time. The following question therefore arises: Is mere receipt of the message into the offeror's custody sufficient for communication to occur, or is the further step of knowledge required?

Some guidance on this issue can be found in the judgement of Lord Denning in *Entores*.⁵⁷ In this case, Lord Denning thought that the only situations in which an offeror is bound by an acceptance communicated by a virtually instantaneous means of communication which he or she has not received, is where the non-receipt is due to the offeror's fault.⁵⁸ In this situation, the offeror is estopped from denying communication. This approach adequately addresses the concerns of fraud and system failure. (For example: where an offeror deliberately abstains from receiving knowledge of the acceptance, the offeror is estopped from denying that communication has occurred).

However, where the e-mail is lost through a system fault or failure there are several possible outcomes. The functionality of current e-mail systems may alert the offeree to the fact that the message has not been delivered, in which case the offeree would be required to repeat the acceptance. If, despite the system failure, the offeror's system maintains a log of messages received, it would appear to be incumbent on the offeror to request retransmission. If, however, due to the fault of neither party a message is not received, it appears that no binding contract would be formed.⁵⁹

If this interpretation is followed, it seems that acceptance will not occur until the offeror has actual knowledge (or would be in a position to have actual knowledge but for its own act or omission) of the acceptance.

In the context of e-mail communications it has been suggested⁶⁰ that acceptance occurs at the point where the e-mail is received by the offeror's computer system on the basis of an analogy with telegrams. With respect, this analogy does not provide a great deal of assistance. As acceptance by telegram is effective when the offeree gives the telegram to the post office, if this analogy is applied, an acceptance sent by e-mail would be effective when the e-mail is communicated to the offeree's e-mail server, as opposed to the offeror's.

The argument in favour of acceptance upon actual communication is supported by the functionality provided by e-mail systems. As some e-mail systems allow a sender to retract a message up until the point when it is opened by the recipient, it would seem appropriate that acceptance should not occur until the message is read.⁶¹

57 *Entores v Miles Far East Corporation Pty Ltd* [1955] 2 QB 327 at 333.

58 *Ibid.*

59 *Ibid.*

60 C Reed 'Advising Clients on EDI Contracts' (1994) 10(3) *Computer Law & Practice* 90; C Reed 'EDI - Contractual and Liability Issues' (1990) 6(2) *Computer Law & Practice* 36.

61 However, this argument is not the same for facsimiles and telexes where it is not open for the sender to retract the message once it has been sent.

To decide otherwise could lead to the absurd consequence that an offeree may be legally bound by an acceptance which has been retracted by the offeree prior to the offeror gaining knowledge of the acceptance.⁶²

6. Practice Points

Despite the strong arguments outlined above against extending the postal acceptance rule to e-mail communication, the law in this area "is very much in its infancy".⁶³ Consequently, contracting parties cannot predict with any certainty when an acceptance transmitted by e-mail will be effective. However, this uncertainty can be avoided by parties to a contract if they exclude the operation of the postal acceptance rule.

Although it is often assumed that a binding contract will not come into operation until the e-mail message is received by the offeror,⁶⁴ to avoid any uncertainty the terms of an offer should clearly specify when an acceptance of the offer will be effective. The uncertainty surrounding the applicability of the postal acceptance rule to e-mail communications can easily be avoided by careful drafting.

7. Conclusion

In summary, while the postal acceptance rule remains deeply entrenched in our legal system, it is unlikely that the Courts will extend the scope of this rule to encompass acceptances communicated by e-mail. Consequently, the general rule that governs the acceptance of offers will apply and an acceptance which is sent by e-mail will not be effective until it is communicated to the offeror. This conclusion is consistent with the approach taken with other forms of virtually instantaneous communication and accords with the current policy of the Courts to restrict the scope of the postal acceptance rule.

62 The Courts have struggled with this issue in the case where an offeree retracts an acceptance sent by post by a faster means of communication. *Dunmore v Alexander* (1830) 9 Sh (Ct of Sess) 190; *Wenkheim v Arndt* (1873) 1 JR 73.

63 C Reed 'Advising Clients on EDI Contracts' (1994) 10(3) *Computer Law & Practice* 90 at 96.

64 *Ibid* at 93 and EDI Association Electronic Data Interchange Agreement.