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FROM PHONES TO E-MAILS: THE CURIOUS CASE OF INSTANTANEOUS COMMUNICATION & LAW ON CONTRACT FORMATION

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ABSTRACT

Common law approaches to contract formation separate modes of communication into two distinct categories; instantaneous and non-instantaneous. This categorisation often relies on superficial differences drawn between them, namely the time taken between the dispatch and the receipt of a message. The categorisation has led to courts taking varied stances on how to determine when acceptance of an offer has taken place so as to become binding on the offeror. While the postal rule has been considered the golden rule in cases where the contracting parties opted for the postal service, the increasing ubiquity of forms such as e-mail have sent the universality of the principle into question. A detailed analysis of e-mail demonstrates how the continued prominence of this classification is no longer tenable, and modified versions of the postal rule drawn from an international framework must be developed.

Introduction

The acceptance of an offer has long-since formed the basis on contracting around the world. The perpetually perforating technology of communication has inspired a range of options an acceptor has to best convey their affirmation of an offer sent their way; the postal system now more than ever finds itself at tail-end of those options. This surmounting reliance on relatively novel forms of communication; the phone, e-mail, and now blockchain (facilitating the growth of smart contracts) throws what was once a reified principle of contracting, the postal rule, into immense doubt. The rule, stating that acceptance is effective upon its dispatch (and not its receipt), is hardly useful when considering that those two processes are now often near-simultaneous. Such forms of communication, where intended messages are transmitted near instantly, are known as modes of instantaneous communication. For the most part, the status of contracting through the phone or through telex has been settled in common law nations. Both methods are considered exceptions to the postal rule; acceptance is only held effective when it is received by the proposer. Where the perspective of law is far more ambiguous is with respect to communication via e-mail. Decisions regarding the status of e-mail contracting are rarely consistent because e-mail by nature can often be unpredictable. More importantly,

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this highlights a key issue; one of balance. The postal rule is one of merit meaning that it cannot be entirely disregarded, but it is also one requiring modification due to how several novel forms of communication simply cannot be categorised into categories that progressively appear arbitrary. In this vein, this paper aims to evaluate the continuance of the postal rule's hold on contracting before delving into the nuances of e-mail communication. This will help illustrate why a distinction between what is 'instantaneous' and what is not increasingly misses the point; more effort must be dedicated to developing a universal rule that bridges the gap between the two, based on an entirely distinct conception of communication.

The Postal Rule and its Discredited Justifications

The case for the postal rule and its blanket authority over all cases concerning questions of acceptance of communication and contract formation have garnered considerable blowback throughout the years, right from its inception in the English case of Adams v. Lindsell[3]. Since this monumental moment, numerous lines of rationale illustrate the great need for the postal rule's continued existence. However, this is a questionable notion; both communication technology and the very fundamentals of contracts have undergone immense change in more than 200 years since the rule's conception. While the postal rule is hardly flawed in its guiding principles, it may be quite the overstatement to state that all the advocacy for its continued status as the universal approach to communication is justified.

The presuppositions that many rely on when defending the postal rule and its continued application, in the past, have taken on a fairly predictable stance. Adams v. Lindsell attempted to explain why a "meeting of the minds" or consensus ad idem laid the foundation for the postal rule. Briefly put, the postal rule is a common law principle stating that acceptance is established at the moment it is dispatched. If the contract was formed at the very moment the acceptor dispatched their acceptance, then it logically follows that this would have occurred at a period when both parties intended to form a contract which would amount to the meeting of minds, a key factor of contract validity as per, for example, Section 10[4] and 13[5] of the Indian Contract Act, 1872. However, this has long-since been a point of contention. Practically speaking, such acceptance has not materially manifested to the proposer, and since decisions like that in Henthorn v. Fraser[6] deem a changed mind utterly redundant once the letter has been dispatched, to say that there the contracting parties would have "agreed to the same thing in the same sense"[7] and are on the same page, would be fallacious.

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[3] Adams v Lindsell [1818] 1 B & Ald 680.

[4] "What agreements are contracts—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

[5] "Consent" defined—Two or more persons are said to consent when they agree upon the same thing in the same sense."

[6] Henthorn v Fraser [1892] 2 Ch 27, 33. Here, the claimant has responded to an offer with an unconditional acceptance, before a withdrawal letter reached him. The Court of Appeal held in favour of the claimant and granted him specific performance, regardless of the posting of the withdrawal letter.

[7] The Indian Contract Act 1872 (No. 9 of 1872), s.13.

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Another justification suggested in Henthorn v. Fraser is the notion that since the proposer likely chose post as the preferred method of communication for a given transaction, then they have implicitly conceded to the inherent risks of the method and have undertaken a risk of delay or loss[8]. This is a fair point to make, but there has been no satisfactory explanation for why this line of thought cannot be applied to cases of instantaneous communication, such as over telex or phone calls. Some English cases like Holwell Securities Ltd v Hughes[9]; Household Fire and Carriage Accident Insurance Co Ltd v Grant [10] have also argued that the proposer can explicitly state that the dispatch rule will not apply to acceptance for a specific interaction. This is not a justification for the postal rule; it is a suggested method to circumvent the perceived inconvenience that the postal rule causes.

Yet another ubiquitous justification for the continued existence of the postal rule is that it prevents the endless chain of communication that will arise if the proposer would need to record receipt of the acceptance letter in order for the contract's formation. As per Law J in Adams v Lindsell:

> [If] the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to 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.[11]

This, quite frankly, amounts to hyperbole. As aforementioned, it is perfectly acceptable for the proposer to merely, for example, state that they do not wish to subscribe to the postal rule for a given transaction. In the same vein, there appears to be little explanation for why the proposer could not provide for a simple limit that prescribes acceptance as complete when it comes to the knowledge of the proposer.

Finally, a preliminary justification put forth is one that posits the postal service as analogous to an agent acting in the interests of both parties, as per orbitor from Household Fire and Carriage Accident Insurance Co Ltd v. Grant[12]. This would imply that the offeree, when using the post office to send their letter of acceptance, would amount to communication directly with the proposer. Kay LJ in Henthorn v Fraser himself highlighted the critical flaw in this reasoning; the post office is not an agent; it is merely a "carrier" that does not have any material effect on the contents or nature of the message. Indeed, according to most,[13] this notion has long since been discredited.

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[8] Henthorn v Fraser [1892] 2 Ch 27, 33.

[9] Holwell Securities Ltd v Hughes [1974] 1 WLR 155: The Court of Appeals stated that the postal rule is not applicable in every case. Here, the defendant explicated that a purchase option would be applicable by 'notice in writing,' implying that such notice of purchase would not be binding until the defendant took cognizance of the notice (which in this case, never arrived). Since this specification was made explicit at the time of contracting, the postal rule was held inapplicable.

[10] Household Fire and Carriage Accident Insurance Co Ltd v Grant [1874-800] All ER Rep 919. Established that contracting parties must consider the post as a valid mode of communication for the postal rule to apply.

[11] Adams v Lindsell [1818] 1 B & Ald 680.

[12] Household Fire and Carriage Accident Insurance Co Ltd v Grant [1874-800] All ER Rep 919.

[13] Elizabeth Macdonald, 'Dispatching the dispatch rule? The postal rule, e-mail, revocation and implied terms', (2013) 19 WJCLI.

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This is all to emphasise that the postal rule has never been utterly without shortcomings. Oftentimes, the argument is made that the rule appropriately suited the time period it was established in, when communication between those not in each other's immediate presence was far more unreliable and difficult than it is now. However, the above broaches the idea that the rule was consistently flawed; something that will be explored in more detail by looking into how the rule translated over into the realm of "instantaneous communication" and how its defences; those related to questions of revocation and economic efficiency, must be framed more as undesirable side effects of the rule—not its guiding principles. Analysing these concepts will assist in illustrating the need for a modified postal rule that is better suited to the nuances of modern communication.

Telex and Phone Calls: A Quest to Determine the Essence of a Common Rule

Three cases of immense significance may come to mind when determining the crux of communication between two parties; Entores v Miles Far Eastern Corp[14], Brinkibon v Stahag Stahl[15], and, for Indian scholars, Bhagwandas Goverdhandas Kedia v M/S Girdharilal Parshottamdas[16]. In order to truly understand whether or not the postal rule must or must not be extended to instantaneous methods of communication, determining a set of defining standards would be prudent. Examining these three cases in brief would be the first step to do so.

The first two cases were the first responders to new technological advances within the process of contract formation, forming the root of the English test of "instantaneous." This is where the English general approach was determined; the postal rule must not be extended to cases involving telexed acceptances, or acceptances via phone calls. Oddly enough, as pointed out by Elizabeth Macdonald in her own paper about the dispatch rule[17], the reasoning in both Entores and Brinkibon adds to the frustration as they do not go so far as to actually explain what exactly sets apart acceptance by instantaneous forms from those made through the post. For example, Denning LJ in the Entores decision stated that "the rule about instantaneous communications between the parties is different from the rule about the post" and that the contact would only be made when the acceptance reached the proposer without actually explaining what these differences are. Later, in the Brinkibon decision, Birkett LJ went on to say:

> In the case of Telex communications (which do not differ in principle from the cases where the parties negotiating a contract were actually in the presence of each other) there can be no binding contract until the offeror receives notice of the acceptance from the offeree.[18]

[14] Entores v Miles Far Eastern Corp [1955] 2 QB 327.
[15] Brinkibon v Stahag Stahl [1983] 2 AC 34.
[16] Bhagwandas Goverdhandas Kedia v m/s. Girdharilal Parshottamdas 1966 AIR 543.
[17] Elizabeth Macdonald, 'Dispatching the dispatch rule? The postal rule, e-mail, revocation and implied terms', (2013) 19 WJCLI.
[18] Brinkibon v Stahag Stahl [1983] 2 AC 34.

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Essentially, these cases laid down the principle of the "receipt rule"; that, in scenarios where acceptance has been transmitted through a medium like the telephone, radio or telex, then it would be effective only when it reaches the proposer, and not at the moment it is dispatched. While these cases dealt with acceptance via telex, Lord Wilberforce (in Brinkibon) extended this rule to telephone and radio.[19] The mutual, physical presence of parties was equivalent to parties communicating through these mediums. Of note, as one may notice, is that no judge in either case necessarily set out to establish an explicit "test" that establishes whether or not this exception to the postal rule should apply to a specific communication medium. Telex was not such a medium, it is one among others in a collection of mediums that did, which is why defining instantaneous communication is so difficult, across jurisdictions.
The bench in Entores did explicate, to a certain degree, why the basis of the postal rule cannot be thrown out the window and why the decisions in this (and other) case must not be unduly extended to all modes of communication. He referred to Household Fire Insurance Co. v Grant, where Thesiger L.J. spoke of the "balance of convenience"[20] that forms the basis of the postal rule, considering parties contracting over a great distance. The bench in Brinkibon also alluded to issues that would be caused in terms of how revocation would play out if the postal rule was disregarded[21].
These decisions, specifically in Entores, formed the basis of the Supreme Court of India's decision in Bhagwandas Goverdhandas Kedia v. m/s. Girdharilal Parshottamdas[22]. This case went on to become the point of reference for practically every single case[23] that includes circumstances wherein two parties contract over the phone. Briefly speaking, Bhagwandas addressed an issue of jurisdiction; in a situation where two parties were contracting on the phone, the acceptor in Khamgaon (Maharashtra) and the proposer in Ahmedabad (Gujarat), where exactly was the contract materialised? If applying the postal rule, the natural answer would be in Khamgaon, but as established, the SC bench disagreed; the majority decision utilised Entores' reasoning to conclude that the contract was actually formed in Ahmedabad, where the proposer "received" acceptance. There were numerous contentions raised with regards to this approach; for example, the Posts and Telegraphs Department was argued as equivalent to the "agent" role the postal service theoretically plays in communication via mail. However, this was dismissed entirely by the Court (and, to reiterate, this "agent" analogy is inherently flawed regardless, even within the context of the postal rule.)

[19] Brinkibon v Stahag Stahl [1983] 2 AC 34.
[20] Household Fire Insurance Co. v Grant [1874-800] All ER Rep 919.
[21] Brinkibon v Stahag Stahl [1983] 2 AC 34.
[22] Bhagwandas Goverdhandas Kedia v m/s. Girdharilal Parshottamdas 1966 AIR 543.
[23] Garware Nylons Limited v Swastik Yarns (1997) 99 BOMLR 497; S.K Contractor and Engineers v Hindustan Petroleum Corporation Limited (2008) ARBLR 263 DELHC; A.B.C. LAMINART PVT. LTD. & ANR. v A.P. AGENCIES, SALEM 1989 AIR 1239; World Wrestling Entertainment Inc. v M/s. Reshma Collection 2014 Indlaw DEL 2917; Quadricon Private Limited v Bajarang Alloys Limited AIR 2008 BOMHC 88; Choice Hotels International Incorporation v M. Sanjay Kumar and another 2015 Indlaw DEL 6193; Sadhana Arun Kothari and Another v Raj Bhalla 2007 Indlaw MUM 386; Triveni Oil Field Service Limited v Oil and Natural Gas Commission 2006 Indlaw DEL 1602.

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Of primary significance is Justice Hidyatullah's dissenting opinion. Justice Hidyatullah actually mentions the key shortcoming of Entores, the facet that throws a wrench in the uniform applicability of a rule covering instantaneous communication. Lord Denning, for example, was not pushed to establish a "test" or reified principle using exact language that was more or less beyond interpretive doubt[24]. At its core, Indian Contract law is regulated by the Indian Contract Act of 1872, and Justice Hidyatullah's concern that this "new" approach to mediums like telex or the telephone was not alluded to anywhere within the act so as to justify the Indian contracting environment[25] is a fair one. However, the main contention lies in the suggestion that the drafters of the Act, in 1872, provided for the language of the act to address future developments that would likely affect contracting in India. This, if true, would essentially mean that deviating from or adapting the principles in the act to address new technological advancements would be misguided. This premise does not entirely hold up.

It would be entirely unreasonable to expect rules and regulations drafted in 1872, meant to suit the conditions and needs of a specific time period so clearly distinct from the centuries after it, to remain applicable to today's scenario with perfect precision. As a matter of fact, the rapid rate at which technology develops was pointed out by Justice Shah. The fundamentals of contract law, naturally including the rise of different communication modes, do not exist in a bubble; they must respond to, at minimum, the most influential of external changes. The aim of the Indian Contract Act is to govern contracts; it cannot achieve this objective if it is immune to amendments. Change via precedent, while undeniably valuable and a central feature of the common law system, is but a short-term solution that avoids the root of the problem. The lack of a clear definition of instantaneous communication, and a uniform test or set of conditions that govern how different communication modes should be characterised, or indeed, if such a differentiation should exist, has and will continue to severely hinder how contracting takes place. An example of the sheer uncertainty created by the distortion of principals is the case of communication through e-mail.

E-mail and the Case for the Postal Rule

Contract formation through e-mail is, unfortunately, far less of a clear-cut case than its telex and telephone counterparts. There currently exists no singular approach to whether or not e-mail communication must subscribe to the postal rule or to the receipt rule that governs contract formation through the mediums previously discussed. There is significant confusion as to what exactly constitutes a virtually instantaneous medium, and it would be worth discussing the primary justifications that advocate for the applicability of the postal rule in order to come to a weighted conclusion. However, the primary objective is merely to demonstrate how inadequate the division between instantaneous and non-instantaneous communication is; it is in the case of e-mail that the numerous deficiencies of the current approach materialise.

The speed of the internet and surmounting technical advances have often been cited when advocating for the application of the Receipt Rule for e-mail contracting. However, something

[24] Entores v Miles Far Eastern Corp [1955] 2 QB 327.
[25] Bhagwandas Goverdhandas Kedia v m/s. Girdharilal Parshottamdas, 1966 AIR 543.

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critical to remember is that with regards to e-mail transmission, there does indeed exist a gap between the dispatch of an e-mail and the time of its receipt, albeit a much shorter one than that of the postal service. A distinction between the speed of a communication medium and this gap must be drawn; leading English telex case Brinkibon v. Stahag Stahl attempts to broach the necessity of this difference[26]. Broadly speaking, the UN Convention on the Use of Electronic Communications in International Contracts[27] (Article 10.2) outlines the "accessibility" approach to classifying a communications method as instantaneous, explaining that a consideration of whether or not the e-mail could have been accessed at a certain time (considering office hours) is key to determine the time of receipt. Firewalls, security concerns and protection alongside spam filters lead to doubt around non-receipt with regards to e-mail. All-in-all, instantaneous travel does not imply instantaneity between dispatch and receipt. If this is the case, then there exists a case for why e-mail is not a form of instantaneous communication and must be subject to the postal rule.

As a matter of fact, analogising the path of a letter of acceptance and an e-mail of acceptance is an approach that is more sensible than critics of the postal rule would like to admit. When sending an e-mail, the acceptor must first login to their mailbox and draft a message in accordance with the rules of the specific e-mail provider they are a user of. A key detail in this process is the premise that so long as the service's network is not excessively loaded and the recipient's e-mail address is correctly entered, the time period taken for the recipient to receive the e-mail in their mailbox would be practically negligible[28]. However, the idea that a perfect set of conditions must be in play, dependent on both the sender's lack of negligence in entering the correct e-mail ID and circumstances beyond their control, for communication to take place in an ideal amount of time is naturally applicable to communication via post. In addition to this, regardless of whether or not the e-mail is successfully sent, the fact remains that the recipient must log in to their mailbox and open the mail. This is particularly imperative when considering that e-mails are stored by a Mail User Agent (MUA) that is used to read and send e-mails; an example of an MUA would be Gmail or Outlook, until the recipient opens their MUA to check their e-mails. There are innumerable factors that could affect the integrity of this transmission; internet quality (on both ends), the average frequency at which the recipient checks their e-mail, network failure, incorrect entry of e-mail addresses, other matters of basic human error, and the physical distance between the sender and the recipient. Generally speaking, when an e-mail is sent internationally, it goes through different regional internet service providers before reaching its destination; its delivery will take longer than a regional e-mail. While one may consider these differences negligible, it remains true that these variances

[26] Brinkibon v Stahag Stahl [1983] 2 AC 34; In this case, Lord Wilberforce suggested that the Receipt Rule cannot be applied blindly to all variants of telex/other novel forms of communication. Numerous errors or ambiguities could contribute to why a mode of communication typically considered 'instantaneous,' may not be as fast as assumed. Therefore, questions of whether the rule may apply can only be addressed with reference to the parties' intentions and accepted business practice.

[27] United Nations on the Use of Electronic Communications in International Contracts, Treaties art. 10.2, 1 March, 2013, 2898 U.N.T.S 515.

[28] Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2.

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(often unpredictable in nature) must be considered when attempting to discern if e-mail is a form of instantaneous communication. There is little concrete justification for why an e-mail should be considered any different from discarded or unopened mail. In such cases, where a recipient has been sent a letter of acceptance via post but has neglected to open their mail, the postal rule shall remain applicable. The proposer would find themselves bound to the contract. if that is to be the case, then it would be unreasonable to place the acceptor in a situation where their acceptance is conditional on the offeror's receipt of their assent for the same reasons as opined in Adams v. Lindsell.

The security of the information sent is also questionable, in an era where data protection remains in flux. Many e-mail services use a cryptographic protocol known as "Transport Layer Security" (TLS), which encrypts e-mails in transit. However, this only protects messages that are being transmitted, not when stored in an inbox or device. There remains a chance that when travelling across multiple mail servers, an e-mail could be modified at each server before it reaches its final, intended location. While many modern MTA's maintain a rigid Sender Policy Framework, which allows a domain to record and regulate which servers can send mail from that domain so as to minimise such risk, there continue to exist real issues in this regard. The SPF record only considers the return-path of a given e-mail, not its origin address. This is essentially the e-mail equivocation of a letter's return address, specifying where the mail must be returned to. This specific process is not subject to an encryption mechanism and is further affected by forwarding; if an e-mail is forwarded, this breaks the SPF chain and the e-mail fails the SPF check.

Critically, these security risks and transmission variations make e-mail an undoubtedly risky and unpredictable form of communication with a distinct period between the dispatch and receipt of a message; much like those inherent within the postal system. As aforementioned, a key justification of the postal rule is that it attempts to allocate risk appropriately, placing the responsibility of a potential loss or delay on the offeror; regardless of perceived fault. The postal rule ensures a relative consistency in how the law is applied to questions of effective communication during contract formation and has its roots in economic efficiency. Unfortunately, as has been observed, the very basis of the postal rule does not evade criticism and may not be entirely valid. This means that merely equivocating e-mail to the postal service would not necessarily imply that the postal rule must be applied to e-mail with no question.

Many of these dimensions have been highlighted in other works.[29] Centrally, it is difficult to extrapolate from the above in any material way; how would one allocate e-mail, with all its procedural nuances, into either "instantaneous" or "non-instantaneous" means of communication. While the transmission time of an e-mail is variable, potential delays are significantly shorter than those that arise from post, and is also often unrelated to the physical distance between the proposer and acceptor; besides the negligible. The acceptor would also be able to track the progress of a given e-mail and would theoretically be able to retract it until the point it is opened by the proposer, depending on the functionality of the MUA used by the

[29] Marwan Al Ibrahim, Ala'eldin Ababneh & Hisham Tahat, 'The Postal Acceptance Rule in the Digital Age' (2007) 2 JICLT 47, 48-49.

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sender and recipient[30]. In this sense, the acceptor/offeree maintains a level of control over the status of the acceptance notice, undercutting this justification of the postal rule. Additionally, assuming that the proposer and acceptor both have access to the internet and telephone services, it would not be unreasonable to expect the recipient to simply contact the proposer and follow-up on the status of their e-mail. This is in line with the information theory of contract formation, found in South African contract law[31] and also known as Kenntnisnahmethorie in German law[32]. Under this rule, the offeror is required to take notice of acceptance, in the same way required for oral contracts in most common law countries. This is especially in light of the immense volume of commercial transactions that now take place over the internet; extending the postal rule to e-mail alone would be peculiar.

This inherent confusion regarding the status of e-mail is indicative of how increasingly difficult it is to categorise new technologies into "instantaneous" and "non-instantaneous"." These traditional classifications have always suffered from a level of arbitrariness, an observation that is highlighted by the constant proliferation of technology. Newer technology, such as developments within blockchain and the growth of "smart contracts," often combine features of multiple communication mediums and are a far-cry from what current contracting principles were intended to govern. However, acknowledging the convenience and certainty the postal rule entails, this paper is inclined towards the institution of a "modified postal rule," that could potentially guide contract formation in the short-run.

The Case for a 'Modified Postal Rule' and the CISG

Practically speaking, to restrict the basis of the postal rule only to the communication via the postal service may not be the best approach. The postal rule is not without merits, especially with regards to the revocation issue. It is in light of this sentiment that this paper puts forth the "modified mailbox rule."

The idea of a modified rule is inspired by the mention of the same in the United Nations Convention on Contracts for the International Sale of Goods (CISG)[33], also known as the Vienna Convention. The CISG requires receipt of by the offeror for the acceptance to be enforced. Article 14 of the 1978 Draft of the CISG[34] put forth a compromise position between the Common Law approach to revocation and the Civil Law irrevocability of offers and acceptance. Unlike under the postal rule, where revocation must reach the offeree before acceptance is dispatched, the dispatch of acceptance creates an irrevocable offer and not a contract. With regards to electronic means of communication, such as e-mail or instant message, the determination of the receipt time before which the offer becomes irrevocable is subject to domestic laws governing electronic communication, which, universally speaking,

[30] Kathryn O'Shea & Kylie Skeahan, 'Acceptance of Offers by E-Mail - How Far Should the Postal Acceptance Rule Extend' (1997) 13 QUTLJ 247.

[31] Tana Pistorius, 'From Snail Mail to E-Mail - A South African Perspective on the Web of Conflicting Rules on the Time of E-Contracting' (2006) 39 CILJSA 178, 192-3.

[32] Tana Pistorius, 'From Snail Mail to E-Mail - A South African Perspective on the Web of Conflicting Rules on the Time of E-Contracting' (2006) 39 CILJSA 178, 192-3.

[33] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

[34] United Nations Convention on Contracts for the International Sale of Goods, Art. 14, 1980, 1489 U.N.T.S. 3.

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could be the United Nations Convention on the Use of Electronic Communications in International Contracts[35], or the 1996 Model Law on Electronic Commerce. The latter defines "receipt" as the moment the transmission is available for download/viewing by the recipient and is retrieved by the addressee[36]. Critically, both parties are able to rectify these regulations by formal inclusion in a respective agreement. The receipt rule recommended by the CISG also allows for the acceptor/offeree withdraw their acceptance if their withdrawal gets to the proposer before or at the same time as the notice of acceptance, while an overtaking withdrawal would still be effective.

The CISG also attempts to make a solid distinction between communication mediums not by just dividing different modes as and when they come to notice, but by the characterisation and involvement of third-party transmitters to determine the duration of the offer[37]. If the offer is communicated through instantaneous modes, including telex, telephone, e-mail, or instant message, then the duration begins when the offer reaches the offeree. While this addresses communication of offers and not acceptance, this still helps demonstrate how it is possible to use international commerce or transaction codes to develop a better classification of communication mediums with specifically tailored regulations that can assist contracting in all scenarios, regardless of the mode of transmission. The CISG especially does a much better job than domestic law because it acknowledges the need for flexibility in a way that accommodates the needs of contracting parties and, since it is intended for cross-border international commercial transactions, emphasises how uniformity and accommodation of case-specific circumstances is possible.

With specific regards to acceptance, the CISG actually does not differentiate between instantaneous and non-instantaneous modes of communication; it takes a singular approach for all transacting modes. This leads to certainty in application and interpretation for all those involved in contracting. As established, constantly trying to use case precedent to uphold or expand on the intrinsically arbitrary division between only two categories; instantaneous and non-instantaneous communication modes, is misguided and practically obsolete. Courts evidently find great difficulty when attempting to apply Common Law principles with regards to virtual or electronic forms of communication, and adopting an approach that is neutral to the mode of transmission and subscribes to functional equivalency would assist uniformity. At the end of the day, the legal effect of any message required for contract formation is the same. Technology changes incredibly quickly, and legislation or regulations around E-contracting must be media neutral. In this way, even adopting a "modified mailbox rule" specifically for mediums like e-mail is little but a short-term solution.

[35] United Nations on the Use of Electronic Communications in International Contracts, Treaties art. 10.2, 1 March, 2013, 2898 U.N.T.S 515.

[36] United Nations Commission on International Trade Law, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996; New York: United Nations 1997.

[37] Christoph Glatt, 'Comparative Issues in the Formation of Electronic Contracts'(1998) 6 IJLIT 34.

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Conclusion

With all that has been explored, one key premise is elucidated; the point in time that demanded a distinction between instantaneous and non-instantaneous communication is long gone. What this arbitrary categorisation of mediums does is throw the principle of acceptance into blatant ambiguity. If anything, this exploration of the nuances of e-mail as a tool of transaction is testament to how most ubiquitous modes of communication do not fit perfectly into either side of this antiquated binary. With how rapidly the technology of communication evolves, expecting contract law to constantly absorb changing notions of how acceptance occurs would be unfeasible. Short-run solutions do tend to take the form of modified versions of existing rules but all this does is deny the existence of a perpetual obscurity in contract law. It has been observed that international rules of commerce and contracting do, to an extent, adhere to more media neutral approaches. To advocate for the regional adoption of these standards is hardly a stretch of the imagination. Oftentimes, to acknowledge that an age-old rule has grown into redundancy is understandably faced with reluctance. However, it is only by such acceptance can the law of contracts become a mammoth prepared to face the challenges of changing times.

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