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Old Wine in a New Bottle? The Application of the Postal Acceptance Rule in Sri Lanka

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I. Introduction

The postal acceptance rule or postal rule represents the wisdom of common law judges in the 19th century when the postal system was considered to be the main mode of business communication in distance transactions. It sets an exception to the receipt rule that the acceptance must be communicated to the offeror. It upholds the notion that “the acceptance is complete as soon as it is posted”.² However, with the development of information and communication technology at the end of the 20th century and 21st century with the near absolutism of postal communication among people, a controversy has arisen as to what extent the postal rule should be applied.

The application of the postal rule depends on one central question: whether the form of communication is instantaneous or not. Generally speaking, in an instantaneous method of communication, negotiation takes place between the offeror and the offeree in each other’s presence. In such a situation, the general rule is that the acceptance must be communicated to the offeror for agreement to occur. Conversely, in the case of non-instantaneous communications such as post, a contract is concluded once the acceptance has been sent by the offeree to the offeror. The question that arises here is what modes of communication are instantaneous? It is noted that some modes of communication that are equivalent to face-to-face communication such as telephone and video conferencing fall within the instantaneous category. However, a controversy arises in a context where the courts interpreted some distance modes such as telegram, telex³ and facsimile⁴ as instantaneous. With the invention of email in 1971 by Raymond Tomlinson, another question had arisen as to whether emails are a digital equivalent to post so that the postal rule should be applicable.

Some claim that the postal rule applies to email communications while the same view is met with opposition. Divergence among these views showcases the ambiguity of the law and stands as a

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

³ See *Entores v Miles Far East Corporation* [1955] 2 QB 327 and *Brinkibon Ltd. v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34.

⁴ *Reese Bros Plastics Ltd v Hammon-Sobelco Australia Pty Ltd* (1988) 5 Butterworths Property Reports [97325]

grey area worthy of further discourse. This paper examines to what extent the postal rule is applicable to email communications in Sri Lanka. In so doing, this paper explores the rationale behind the rule and the state of ambiguity pertaining to the rule being applied to emails. It further analyses whether and to what extent the Sri Lankan Electronic Transactions Act, No. 19 of 2006 (as amended) embraces the application of postal rule into email communications.

II. Normative Foundation of Postal Acceptance Rule

An offer and an acceptance represent an essential element of a contract: *consensus ad idem* or meeting of minds. In other words, it indicates that sufficient mental and physical elements of an agreement exist. When the parties contract *inter presentes*, there is no dispute as to the specific time at which the contract is made or acceptance takes effect. In such circumstances, by protecting the offeror, the recognition or ascertainment theory which indicates that acceptance is effective only when it has been communicated to the offeror is applicable. Nonetheless, in the case of postal communication, the law believes that the “offeror has impliedly waived the requirement that actual communication of the acceptance is necessary.”⁵

The postal acceptance rule was created in 1818 by *Adams v Lindsell*⁶ on the basis that in the absence of the postal rule, a contract would never be formed by post. The House of Lords held that “... for if defendants were not bound by their offer when accepted by plaintiffs until the answer was received, then the plaintiffs ought not to be bound till they had received the notification that defendants had received their answer and assented to it. And so it might go on *ad infinitum*.”⁷ To be explicit, if the postal rule is not applicable then an offeree should not be bound until the offeror confirms that he or she has received the acceptance. This leads to an endless exchange of confirmations of receipts. This had prejudicially impacted the business efficacy in the 19th century in a context where postal communication was the main, quickest and only mode of distant communication. The recognition of post offices as common agents of the parties further facilitated the postal rule.⁸ Thus, the creation of postal rule represents the judicial wisdom of common law

⁵ *Entores v Miles Far East Corporation* [1955] 2 QB 327.

⁶ 1818 1 B&A 681.

⁷ 1818 1 B&A 681 at page 683.

⁸ *Dunlop v Higgins* (1848) 1 HLC 381.

judges in resolving distant business conflicts and removing uncertainty from the process of formation of contracts.

Explaining the rationale of the postal rule, Lord Herschell in *Henthorn v Fraser* stated that “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.”⁹ This is in line with the expedition theory which provides that ‘the contract is complete as soon as the acceptor has irrevocably sent the correspondence announcing acceptance out of his or her power or control.’¹⁰ Accordingly, the application of the postal rule depends on two factors, namely, the non-instantaneousness of the mode of acceptance and the issue of control. While the receipt rule is applied to instantaneous methods of communication, the postal rule only applies to non-instantaneous modes of communication such as the postal system which do not occur, are done or are completed in an instant. Further, the control aspect of this rule relates to the sender’s ability to ensure that the correspondence is received. As such, the postal rule presumes that once a letter is posted, the sender loses control over the information and is not liable for any subsequent events.

As stated, the postal rule provides that a contract is formed when the offeree posts the letter, not when the offeror actually receives it. This suggests that the offeror bears the risk “even if the letter goes astray and is lost” or “takes longer time to reach the offeror”.¹¹ However, the application of the postal rule may be displaced where it was not contemplated by the parties that the post can be used as a method of acceptance.¹² In addition, the postal acceptance rule is not applicable if its application would produce manifest inconvenience and absurdity, or if the parties either expressly or impliedly by the terms of their contract require that acceptance be received by the offeror.¹³ Furthermore, the postal rule does not apply where the letter was posted wrongly, where the offeror’s address was wrong or where proper postage is not carried.¹⁴

⁹ [1892] 2 Ch 27 at 33.

¹⁰ CG Weeramantry, *The Law of Contracts: Being a treatise on the law of contracts as prevailing in Ceylon and involving a comparative study of the Roman-Dutch, English and customary laws relating to contracts* (Stamford Lake Publication, 1967) 149.

¹¹ *Household Fire and Carriage Accident Insurance Co Ltd v. Grant* (1878–79) LR 4 Ex D 216

¹² *Holwell Securities Ltd v. Hughes* [1974] 1 WLR 155

¹³ *Ibid*, See Also in *Dunlop v Higgins* [1848] HLC 381 which suggests that once the sender has posted the letter he/she is “not answerable for casualties occurring at the post-office.”

¹⁴ *Re London and Northern Bank, ex parte Jones* [1900] 1 Ch 220

Whereas the postal rule was created by the common law judges, this rule has been embraced by the South African and Sri Lankan courts despite the application of Roman-Dutch Law. As stated in *Cape Explosives Word Ltd v South African Oil and Fat Industries Ltd*¹⁵ “as those of our Roman-Dutch jurists who have written on the subject differ in opinion, we should now lay down that where in the ordinary course the post office is used as a channel of communication and written offer is made, the offer becomes a contract on the posting of the letter of acceptance”. In Sri Lanka, to the best of the author’s knowledge, there is no reported case law on the application of the postal rule in the context of offer and acceptance. However, in *University of Ceylon v Fernando*, in determining serving notices under Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance, Basnayake CJ stated that “where the post is used as a medium of transmitting the prescribed notice, the applicant is required to do nothing more than send, in due time, a properly addressed prepaid, letter containing the name and address of the opposite party.”¹⁶ An identical situation occurred in *Joseph v. Sockalingam Chetty*¹⁷ where Garvin ACJ and Jayewardene J held that “they are entitled to presume that a letter which they were satisfied was properly directed and is proved to have been handed to the postal authorities for transmission reached its destination in due course and that it was received by the person to whom it was addressed.” Additionally, in *Boulton v Vallipuram Pillai*,¹⁸ applying the rationale behind the postal rule Garvin AJ stated that “where a creditor asks a debtor to forward money due by post and the money is so transmitted, the risk of loss during transmission by post is on the creditor.” None of these cases referred to the postal rule in the context of offer and acceptance of a contract. Nonetheless, accepting the rationale of postal acceptance indicates that postal rule is still a part of Sri Lanka.

III. Technological Advancements and Postal Acceptance Rule

The progressive development in technology and communication which led to the invention of telexes, e-mail and the internet, has created issues in relation to contract formation. Courts have

¹⁵ (1921) C.P.D. 244.

¹⁶ *University of Ceylon v Fernando* 1957 59 NLR 08

¹⁷ *Joseph v. Sockalingam Chetty* 32 NLR 59.

¹⁸ *Boulton v Vallipuram Pillai* 1921 23 NLR 218

been faced with the issue of interpreting whether the aforementioned modes, mainly telex and e-mail, are instantaneous or not, and also whether instantaneous communications fall under the postal rule. In general, the applicability of the postal rule depends on first the nature of the communication used by the parties, whether it is *inter absentes* or *inter presentes*, and secondly whether the mode of communication is instantaneous or not. For instance, if instantaneous electronic communications such as video conferencing are considered to be *inter presentes*, the parties can communicate with each other without a lapse of time. Therefore, the contracts become concluded at the time when the offeror is made aware of the offeree's acceptance. Accordingly, there is no room for the application of the postal rule. Nevertheless, some modes of communication such as emails create doubt as to whether the postal acceptance rule is applicable in determining the time and place of receipt.

IV. Extending postal acceptance rule to emails

The application of the postal rule to contract formation by email is clearly a legal paradox. There is no agreement whatsoever among the courts or scholars over the way in which the acceptance must be communicated through emails.¹⁹ This entire debate however, centres around the question whether the emails fall under the category of the instantaneous modes of communications as per the ruling in *Entores Ltd v. Miles Far East Corporation*. If the answer to this question is in the affirmative, postal rule does not apply to emails.

One of the main arguments made in favour of the application of the postal rule to emails is that the process of communication via email is quite similar to sending a letter by post.²⁰ For instance, once an email is sent, it is stored in an internet service provider's (ISP) mailbox and cannot be retrieved by the sender.²¹ Thus, it is out of the control of the sender. Like letters, emails also have to go

¹⁹ Delphine Defossez, 'Acceptance sent through email; is the postal rule applicable?' (2019) 11 (1) Law, State and Telecommunications Review 23, 26 < <https://doi.org/10.26512/lstr.v11i1.24847>> accessed 10 July 2021

²⁰ Eliza Mik, 'The Effectiveness of Acceptances Communicated by Electronic Means, or — Does the Postal Acceptance Rule Apply to Email?' (2009) 26 Journal of Contract Law 1, 16 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046851> accessed 10 July 2021

²¹ Paul Fasciano, 'Internet Electronic Mail: a Last Bastion for the Mailbox Rule' (1997) 25 Hofstra Law Review 971, 1001 < <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1973&context=hlr>> accessed 10 September 2022

through various web-junctions such as servers, routers and internet service providers.²² This establishes the non-instantaneousness of correspondence. Overall, the nature of emails satisfies the prerequisite for the application of the postal rule given its instantaneousness and the issue of control.²³ Accordingly, in e-mail communication, the addressee would be unaware of the fact of whether the e-mail was successfully delivered or not depending on the sending and receiving settings, and thus, corresponds to the digital version of the ordinary-mail requiring the application of postal rule.²⁴

However, an overwhelming majority of scholars have taken the opposite view. Their main argument is that a literal interpretation of Lord Denning's holding focuses on virtual instantaneous methods.²⁵ Hence such communications do not have to be absolutely or completely instantaneous like a face-to-face or telephone conversation.²⁶ This argument can be found in Lord Brandon's judgment in *Brinkibon v Stahag Stahl GmbH*²⁷ where his lordships held that postal rule is applicable where there is bound to be a *substantial* delay between the sending and the receipt of the acceptance.²⁸ Thus, a delay of a few minutes in an email communication clearly does not prevent it from being instantaneous.²⁹ Following this line of argument, in *David Baxter Edward Thomas and Peter Sandford Gander v BPE Solicitors*³⁰, it was held that the postal rule does not apply to emails as it is instantaneous. It is also argued that unlike letters by post, when an email is delayed or failed to deliver, the offeree will immediately get to know about it through a 'read and delivery receipts' notification.³¹

With technological developments, it has become vital to revisit and make necessary judicial and statutory changes regarding contract formation. Quite interestingly, Sri Lanka, which is usually

²² Hon Justice Saleem Marsoof, 'Modern Day Contracting; E-Commerce, M-Cash & what-Next?' 6 < <https://www.academia.edu> > accessed 10 October 2022

²³ Mik E, 'The Effectiveness of Acceptances Communicated by Electronic Means, or — Does the Postal Acceptance Rule Apply to Email?' (2009) 26 Journal of Contract Law 17.

²⁴ *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2.

²⁵ E Allan Farnsworth, *Farnsworth on Contract* (New York, Aspen, 3rd ed, 2004), vol I, para 3.22

²⁶ Christina Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer Contracts' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Oxford, Hart Publishing, 3rd ed, 2009) 105

²⁷ *Brinkibon v Stahag Stahl GmbH* [1983] 2 AC 34

²⁸ Furthermore, in *JSC Zestafoni v Ronly Holdings Ltd*, it was held that fax transmissions should be regarded as instantaneous despite the fact that they are subject to short delays similar to those involved in the sending of emails

²⁹ Simone Hill, 'Flogging a Dead Horse – The Postal Acceptance Rule and Email' (2001) 17 Journal of Contract Law 151 < <http://www.austlii.edu.au/au/journals/JILawInfoSci/2001/4.html> > accessed 10 October 2022

³⁰ *David Baxter Edward Thomas and Peter Sandford Gander v BPE Solicitors* [2010] EWHC 306 (Ch)

³¹ David Bainbridge, *Introduction to Computer Law* (Harlow, Pearson Education, 6th ed, 2008) 363

behind in evolving and bringing in legislative changes, has been active in this context. The Electronic Transactions Act (ETA), No.19 of 2006 can be regarded as one of the pioneer statutes which provides the necessary legal environment for electronic transactions. This was enacted to enable provisions of the UNCITRAL Model Law on Electronic Commerce (1996) and amended in 2017 to further harmonise the law in line with the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC). As Honorable Justice Marsoof opined, “it has succeeded to a great extent in facilitating electronic transactions, which will in turn help to transform a paper-based society in which all important records had been maintained for centuries in registries and record rooms to an electronic society.”³²

The legal validity of the electronic contracts is recognized under section 11 of the ETA, which provides that “unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed in electronic form.” Further, section 17 (c) provides that “the accepted principles of common law relating to contracts that the offeror may prescribe the method of communicating acceptance, shall not be affected by anything contained in chapter III of the Act.”³³ This leaves room for the application of common law rules such as the postal rule. However, the ETA like most of the legislation around the world is absolutely silent about the application of the postal rule to the modern form of contracts. In other words, although the ETA defines the exact time of the dispatch and receipt of acceptance under sections 14 (1)³⁴ and (2) (a) (i)³⁵, (ii)³⁶ of the ETA, the crucial issue, namely whether the contract is formed when acceptance is dispatched as per postal rule or when it is received by the offeror as per general rule is not answered in the ETA.

³² Hon Justice Saleem Marsoof, ‘Electronic transactions in the modern world: An analysis of recent Sri Lankan Legislation’ (2006) Law College Law Review 108. <www.academia.edu> accessed 10 October 2022.

³³ Section 17 (c) [emphasis added]

³⁴ Section 14 (1) states that Unless otherwise agreed to between the originator and the addressee, the dispatch of a data message, occurs when it leaves an information system under the control of the originator.

³⁵ Section 14 (2) (a) (i) states that If the addressee has designated an electronic address for the purpose of receiving electronic message (or e document etc) receipt occurs when the such electronic message becomes capable of being retrieved by the offeror.

³⁶ Section 14 (2) (a) (ii) states that if the offeror has not designated an electronic address for the purpose (no email address was mentioned) for the purpose receiving electronic data message (...etc) receipt occurs when the said electronic message becomes capable of being retrieved by the offeror AND the offeror becomes aware that the said electronic message has been sent to that address.

As postulated by the Act, if the addressee has designated an electronic address,³⁷ the time of acceptance would be the time at which the said information becomes capable of being retrieved by the originator whilst it will be the time at which the originator becomes aware, when an electronic address is not being designated or has indicated another electronic address.³⁸ It is presumed that the message is capable of being retrieved if it reaches the addressee's electronic address.³⁹ Therefore, as provided by section 14 (2) (a) (ii) if the addressee has designated an electronic address for the purpose of receiving the message, once the message enters the particular electronic address the acceptance is complete whether or not the addressee is aware of that. The question that arises here is whether this provision keeps room to apply the postal rule. On the one hand, this may be considered as a non-application of traditional recognition or ascertainment theory. On the other hand, this closely resembles the expedition theory which states that acceptance is complete when the offeree transmits the notification of acceptance to the offeror. However, since the provision postulates that the message should reach the addressee's electronic address, this can be regarded as a circumstance that does not facilitate the application of the postal rule.

In a nutshell, while Section 14 (2) (ii) b of the ETA states that the electronic message is presumed to be capable of being retrieved by the offeror when it reaches the electronic address of the offeror, it does not state whether the acceptance occurs when it reaches the offeror or leaves the control of the offeree. The reason for this confusion may be that Sri Lanka has adopted the UN Convention on the Use of Electronic Communications in International Contracts 2007 (ECC). Thus, the aforementioned provisions of the ETA represent verbatim adoptions of Article 10 (1) and (2) of the ECC. The intention of the framers of the ECC was to avoid any mention of postal rule in the convention for the sake of preventing a clash with the laws of different countries.⁴⁰ Unfortunately,

³⁷ According to section 26 of the ETA "electronic address" means a communication network or an electronic mailbox, telecopy device or a designated portion or location in an information system that a person uses to receive a data message, electronic document, electronic record or any communication

³⁸ See Section 14 (2) of the ETA.

³⁹ Section 14 (2) (ii) (b) of the ETA

⁴⁰ Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (United Nations) 2007. < <https://www.parliament.gov.fj/wp-content/uploads/2017/02/ECC-Convention-2005.pdf> > accessed 10 October 2022; See also Amelia Boss and Wolfgang Kilian, The United Nations Convention on the Use of Electronic Communications in International Contracts: An In-Depth Guide and Sourcebook (Austin, Texas, Wolters Kluwer, 2008) 349

the legislatures of the ETA did not fill this loophole when they incorporated ECC into domestic law.

V. Conclusion

It is true that the common law paved the way for the establishment of the postal rule as an exception to the receipt rule by addressing the non-instantaneous nature of the postal system. However, society and technology have evolved, and the law has to adapt to accommodate new situations. With the development of technology, contract law has been subject to various modifications. Electronic and instantaneous communication has brought about the question as to whether the postal rule is applicable in these circumstances. Though the law has addressed the changes brought by the electronic era through cases and statutes, there is still room for development. In reference to the postal rule, it seems that the technology is developed so much that almost every communication has become instantaneous, thus rendering the application of the postal rule unnecessary. Although some consider media such as emails as non-instantaneous because messages have to go through a server, the postal rule has never been applied there. Though it is similar to posts technically, there is hardly any delay in the emails, making it fair to consider it instantaneous. Even the legislative instruments in Sri Lanka and the international level largely evade from the application of the postal rule to emails. As such, the necessity for the postal rule is decaying in the present and soon it will be time to bid adieu.