Page 1353 - 1359 **DOI:** *https://doij.org/10.10000/IJLMH.113945*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 6

2022

Classification of Email as a Form of Non-Instantaneous Communication

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ABSTRACT

It is imperative to regulate the time, place and method of formation of contracts since they can create a domino effect of technicalities. These could include the liabilities, contractual obligations, the rights of either party to the contract, and also the jurisdiction a matter would fall under in case of discrepancy. To navigate this minefield of potential hassle, the Indian Contracts Act, 1872, hereafter referred to as the ICA, does recognise that a separate procedure must be entertained for non-instantaneous modes of communication, particularly mail or post, commonly known and hereafter referred to as the 'Postal Rule'. This paper's primary purpose is to analyse whether Email as a method of communication of proposal and acceptance, should be classified as instantaneous or non-instantaneous. As a result, another topic in focus will be to what extent, if at all, the Postal Rule applies to emails. This will necessarily include a discussion about the technological aspect of emails, to better our understanding of the true nature of the medium. We will also be analysing the effects such strict classification would have on email contracts, followed by some remarks concluding the discussion presented in the paper.

Keywords: *Contracts, Emails, Postal Rule, Non-instantaneous Communication.*

I. INTRODUCTION

The layman's understanding of a contract formation involves two parties sitting face to face, negotiating terms and conditions and then signing on a sheet of paper to finalise that agreement. While this would indeed be considered a valid contract, a contract is essentially just any legally enforceable agreement, and such procedural formality is just that- a formality.

> *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.*[2]

While there are conditions and requirements set out for the manner of communication of such an agreement, their being written on paper or signed upon clearly aren't essential conditions. As such, there is no reason for an agreement communicated over email, or any other

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[2] Section 10, Indian Contracts Act, 1872

 [ISSN 2581-5369]

contemporary medium to not be legally enforceable.

Furthermore, while the Indian Contracts Act 1872 does not explicitly mention Emails in any manner, it is necessary to understand that Emails also come under the purview of the Information Technology Act 2000. Through a 2008 amendment, the following was added to ec 10A of the IT Act 2000-

> *"Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."*[3]

This amendment has clearly given electronic contracts full authority in the legislative purview. Even though emails may be considered a form of quasi-informal communication used by businesses to negotiate or frivolously inquire through, the law clearly confers upon such communication the intent of contract formation. As such, the requirements an electronic contract must qualify are the same as those for any other contract as prescribed by the ICA. The following highlight themselves as the essentials-

- An agreement [consensus] between the parties involved [4]
- A consideration of legal value flowing from the promisee [5]
- Legal eligibility of parties to enter into the contract (all parties should be of legal age and sound mind) [6]
- The object of the contract be lawful i.e., not against public policy or in perpetuation of that which isn't legally permissible. [7]

As long as an electronic contract satisfies the above conditions, the court will treat is as legally binding and there can be no question against its validity.

II. TYPES OF MODES OF COMMUNICATION

With the legitimacy of electronic contracts established, the next topic in focus is the classification of emails as a method of communication between a pure binary- instantaneous or non-instantaneous. This is because as far as the Indian Contracts Act is concerned, the only real

[3] Section 10A, Information Technology Act 2000
[4] Section 2h, Indian Contracts Act, 1872
[5] Section 2d, Indian Contracts Act, 1872
[6] Section 11, Indian Contracts Act, 1872
[7] Section 23, Indian Contracts Act, 1872

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difference arises in whether the postal rule as pertaining to communication of offer, acceptance and revocation, would apply to emails or not. That leads us to the next topic of discussion- does email being an electronic mode of communication by itself qualify it to be instantaneous?

This reasoning would be far too simplistic. The advent of the internet has indeed made communication much simpler than it used to be, and mediums such as phone calls and telex can be classified undoubtedly as instantaneous. In phone calls, there may be a virtual delay caused by the network and service provider, but even that is usually minimal and exceptional. So all things considered, there is no reason to differentiate it from an actual in-person conversation. In instant messaging, if both parties can view the other's online status, as well as the read receipts, then such a medium might also be considered instantaneous, especially since the medium implies an expectation of quick (instant) responses. However these same standards fail Email as a means of instantaneous communication. There is neither any inherent provision to allow one to check the online status of the other party, nor a way to determine if the other party has read or even received the message. This same conundrum arose in the case of physical post or mailed letters and was resolved by the drafting of the Postal Rule, which brings us to the next question- what difference does it make if the principles of the Postal Rule were to apply?

III. THE POSTAL RULE- ORIGIN AND EXPLANATION

To answer this, we must delve into the history of the postal rule and the purpose behind its creation. The primary reason for the rule's existence is the presence of a third party or middle-man, in this case the post office/post man, which results in some finite amount of time being taken to transmit any offer, acceptance or revocation amongst parties. This delay may seem insignificant however it can have far reaching ramifications on the rights and responsibilities of the concerned parties. For example, when a letter of acceptance is posted but not yet delivered to the offeror, an argument may ensue as to who is bound by that acceptance; and if the terms of the agreement are violated during that time period of transmission, who would be held liable.

This discrepancy was resolved in the case of *Adams v Lindsell*[8] in which the defendant had offered to sell a certain amount of wool to the plaintiff, and this intent had been communicated via post. This letter was posted by the defendant on 2nd September 1817 and received by the plaintiff on 5th September 1817. The defendant had also imposed a time constraint till 7th September to move the goods. The plaintiff then posted a letter of acceptance as a reply on the same day they received the offer, i.e. 5th September 1817, which was delivered to the plaintiff on 9th September 1817. However, the plaintiff had already sold the specified quantity of wool

[8] (1818) 106 ER 250

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mentioned previously, to another buyer on 8th September 1817, a day before the letter of acceptance was delivered.

The court held that the acceptance is valid and binding from the moment that the letter is posted, not when it is received by the defendant. Since the plaintiff posted the acceptance within the time frame stipulated by the defendant, the contract was formed and has to be upheld. Now if this situation hadn't been addressed with a principle tailored specifically to it, we would have treated this to the same standard as modes of instantaneous communication which operate on the "receiving rule", meaning all correspondence is considered valid/binding only when it comes to the knowledge of the intended receiver, not when it is delivered by the other party. This judgement also clarifies what the courts feel to be the essential element of contract formation, which is intent to enter into contract. In postal communication, the intent of the offeror to enter into a contract is cemented from the moment they send an offer, and intent of the acceptor is cemented when they send the acceptance. There is no requirement of knowledge of the acceptance to reach the offeror since the contract was originally their idea and their part of the formality has been completed upon the posting of the initial offer letter.

Another possible discrepancy in case of communication via non-instantaneous means is the time and place of contract formation, since this would govern the jurisdiction in case of a suit. In the case of *Bhagwandas v Girdharilal*[9], it was held that for instantaneous means of communication such as telephone or telex, the place of contract formation is the place where the acceptance is received (in this case heard) by the offeror. It was also said that this standard does not apply to non-instantaneous means. So, for communication via post, Section 4 of the ICA was interpreted as meaning that the contract comes into effect as soon as the acceptance is put in transmission and out of the control of the acceptor. The place where the letter is posted, i.e. wherever the acceptor is posting it from, becomes the place where the contract has been formed. Knowledge of it reaching the offeror is not an essential condition unlike in telephonic and other instantaneous means of communication.

IV. DIFFERENCE BETWEEN INSTANTANEOUS AND NON-INSTANTANEOUS COMMUNICATION

A summarisation of the difference between the two modes can be found in *Entores v Miles Far East Corporation*[10], in which Lord Denning stated for instantaneous communications that-

> *"…the rule about instantaneous communications between parties is different from the rule*

[9] AIR 1966 SC 543
[10] (1955) 2 Q.B.D. 327

about post. The contract is only complete when the acceptance is received by the offeror; and the contract is made at the place where the acceptance is received."

The following differences can be inferred from this statement and the previous discussions.

Subject\Classification	Instantaneous	Non-instantaneous
Nature	Treated as a face-to-face interaction between only the relevant parties with no middle-man.	Is delayed communication between parties, which involves a third-party agent to transmit messages.
Time of contract formation	When acceptance comes to the knowledge of the offeror.	When acceptance is put in transmission to the offeror, out of the control of the acceptor.
Place of contract formation	Where the acceptance is received by the offeror.	Where the acceptance is put in transmission by the acceptor.

It is evident that the offeror, in instances where non-instantaneous means of communication are used, also becomes the sufferer. While that may seem unfair, the mode of communication is the offeror's own choice and as such, the risks arising from the use of non-instantaneous means must be borne by the offeror alone.

V. EMAILS- INSTANTANEOUS OR NON-INSTANTANEOUS?

Now that the differences and essentials for classifying a mode as instantaneous or non-instantaneous have been established, the question of whether emails should be considered instantaneous can be addressed. One of the primary reasons why telephone and similar means are considered instantaneous is the lack of a third-party which serves as a relay of messages. Once a connection is established, there is no external agency affecting communication.

The process of sending an email, however, makes it evident that it is more similar to a posted letter than it is to a phone call. First, the sender drafts the message, which can remain unsent for as long as the sender pleases. Upon confirming their intent to send the letter by clicking on the relevant button, the email is then transmitted via the relevant servers and reaches the intended

receiver's server. These servers are hosted by each of the parties' Internet Serivce Provider which may or may not be the same company. Regardless, once this process is complete, the Internet Service Provider then makes it possible for the intended recipient's inbox to retrieve the original message. This is virtually identical to how a physical letter would be written by the sender, handed over to the postal service, transported by the service to the necessary regional office, and then posted to the intended receiver's address by a postman. In both cases, once delivered, it is not necessary for the intended receiver to ever open the message. They may never even get to know of the existence of such a message. A physical letter could be misplaced or ruined by the postal service, while unexpected server issues could result in non-delivery of an email or it being sent in a scrambled, indecipherable format. Also, these steps that an email undergoes during delivery offer vast scope for delays and issues, thus disqualifying it as an *instantaneous* means of communication.

If we consider the condition of the existence of a third-party for non-instantaneous means of communication, the Internet Server Provider's role fulfils that requirement. While one may argue that the server acts as an agent of the sender, it is in-fact an independent entity, usually a privately owned commercial organisation. This raises another similarity since the post man is also an independent authority who provides the service of delivering letters, but not necessarily delivers the letters on behalf of the sender, or as an agent of the sender. Once a letter is handed to the postal service, it is considered to be beyond the control of the sender. Similarly, once the sender clicks on the "send" button, it must be considered to be beyond the authority of the sender since it is now in the hands of the Internet server Provider.

These above mentioned points are not just based on logic but also finds judicial backing in a Singapore Court matter of *Chwee Kin Keong v Digilandmall.com Pte Ltd*[11]. The presiding judge in their learned judgement concluded that-

> *"... unlike a fax or a telephone call, [email] is not instantaneous. Emails are processed through servers, routers and internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient accesses the email, but in this respect email does not really differ from mail that has not been opened."*

This judgement lends credence to the stance that emails are not dissimilar to post in the eyes of the law, and it would not be unreasonable to apply the postal rule to contract formation through emails.

[11] (2005) SGCA 2

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VI. CONCLUSION

The classification of emails as a method of non-instantaneous communication has been a grey area of the present legislation regulating contracts in India. Considering that emails are one of the most convenient methods for businesses to formally communicate with each other, they are a popular medium for sharing offers and concluding contracts. As has been extensively argued in this paper, the most reasonable classification for emails is as a non-instantaneous mode of communication. The following details the effect of application of the Postal rule to emails-

The time of contract formation will be the time of delivery of acceptance from the acceptor's email address.

The place of contract formation will be the place from which the acceptance was emailed by the acceptor.

The offeror will be bound by the acceptance even if they never opened/read the email, or were aware of such a message's existence.

The Postal Rule's application to emails has raised arguments of obsolescence considering the fact that the rule was drafted more than a century before the concept of emails was even envisioned, however it comes down to proverb of "why fix something that isn't broken". It is easy to say that more legislation is required, but when the present legislation, through some interpretation and application of logic, can provide an adequate framework, then it must be utilised as such.

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 [ISSN 2581-5369]