

THE IMPACT OF TECHNOLOGICAL ADVANCES ON CONTRACT FORMATION IN SRI LANKA

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INTRODUCTION

Every human being born to this world will inevitably enter into contracts himself or herself or have others do so, on their behalf. Obtaining the basic needs of food, clothing and shelter, as well as securing education, training and employment all involve contracts. Therefore the journey from womb to tomb is strewn with contracts of a formal and informal nature.

While the need for contracting has existed since the beginning of time, the methods by which such contracts are formed have not remained constant but been subject to constant change. Informal verbal agreements have given way to more formal written contracts while major changes in contract formation occurred when it became possible to contract without the contracting parties being in the actual presence of each other at the same place and time. While the 'Postal Rule' postulated in *Adam v Lindsell* (1818) was the landmark case of such contract formation, the progressive development of communication mechanisms from telephones, telexes and facsimiles to internet, short messaging services (SMS) and e-mail have created more complex issues in identifying the moment of contract formation.

While several requirements need to be satisfied in order to create a legally valid contract, of key concern in the context of communication, is the time of communication of acceptance, as this marks the point which completes agreement and the commencement of a binding contract.

The Objectives of this research are

- To identify the areas where new issues regarding the point of creation of a contract have arisen due to technological innovations
- To understand how the law of Sri Lanka has developed to deal with these instances.

METHODOLOGY

This research is normative in nature. It will involve documentary analysis of relevant case law and statutory provisions in arriving at the conclusions to the study.

RESULTS AND DISCUSSION

Adam v Lindsell (1818) marked the first departure from the recognized rules of contract formation. The case postulated that in the event of communication of acceptance posting of the letter of acceptance was the point of acceptance, (and the place of acceptance) for the purpose of identifying the moment agreement was completed. Loss of mail and delays in the postal service were considered irrelevant and were the risk of the party who chose post as a medium of communication.

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Telex, fax and telephone communication which followed led to the realization that there could be instantaneous as well as non-instantaneous methods of communication when the contracting parties were not in each others' presence. Thus in *Entores v Miles Far East Corporation* (1955) the courts had to decide the point at which a valid contract was created, when communicating via telex. Lord Denning in his judgment highlighted the fact that when contracting through telephone and telex, the party sending the acceptance would know immediately whether the acceptance had been received at the other point or not. Therefore he held that the time and place where the acceptance was received was the relevant point at which the agreement would be deemed to be completed. He further held that if the one party in a telephone or telex transaction does not receive the acceptance (due for example to lack of paper or ink in the printer or an unclear telephone line) but does not request the information again the sender would, reasonably, believe that the acceptance has been received so that there would be a valid contract. The case of *Entores* thus distinguished non-instantaneous communication methods such as the post from instantaneous communications equating the latter with face to face transactions. This position was followed in the House of Lords decision of *Brinkibon Ltd v Stahag Stahl und Stahlwarehandels-gesellschaft mbH* [1982] and the Court of Appeal decision of *The Brimnes, Tenax Steamship Co Ltd v Owners of the motor vessel Brimnes*[1974]. Although the *Brimnes* dealt with termination by telex, it becomes relevant in terms of the rule it stated as to time of receipt of a telex, which it held to be the time the message is received by the relevant party. In this case, although notice of termination was sent during office hours of one working day, it was only seen by the other party on the next working day. However the termination was considered to be valid as at the time of receipt of the telex on the first day.

The most recent technological advances have come in the nature of the World Wide Web or internet which has opened the doors to a myriad of possible methods of forming contacts including online transactions and contracts formed through e-mail.

Quite often internet transactions take place via websites set up by various persons wishing to sell items or services online. When do such transactions mature into valid legal contracts? As Halberstam (2008) states, whether an advertisement to sell an item appearing online is an invitation to treat or an offer is an important question. He states that if it is an offer, most often it will have a button to 'accept' and that the contract will be completed by a click wrap which he states is similar to an offline signature. Thus in *Hotmail Corporation v Van Money Pie Inc* (1998) when a click wrap agreement of Hotmail which contained a term preventing use of e-mail accounts to distribute spam was violated by the defendants, they were held to be in breach of contract.

Hajri (2011) comments that usually in online transactions an order form has to be filled online and the seller is required to inform acceptance of the order, so that the online advertisement is most often only an invitation to treat. Hajri cites the example of Argos who in 1999 mistakenly advertised their televisions of £ 299.99, as £2.99, but who escaped liability as the advertisement was only considered an invitation to treat. However clear terms and conditions to which the buyer assents when entering into the contract can prevent pricing errors leading to valid contracts being formed at low prices. Thus in 2003 Amazon.com was able to cancel contracts where computers of £274.99 were mistakenly marked £7.32, on discovery of the error. However in a similar situation in 2002, when Kodak advertised £300 camera's mistakenly at £100 and orders for over 2000 cameras were accepted the company went ahead and honoured these contracts. In the Singaporean Court of Appeal case of *Chwee Kin Keong and others v Digilandmall. Com Pte Ltd* (2005) where due to an employee's error, printers of \$3864 were marked at \$66 and e-mails confirming the acceptance of the offers to buy had been sent to the buyers the courts declared the contracts void on grounds of mistake.

The issue also arises as to whether e-mail and online transactions should be dealt with in an equal manner. E-mail contracts are often used in the modern business world. Controversy has arisen as to whether such contracts are legally valid and if so whether they should be considered instantaneous or whether the postal rule should apply to them. Issues arise as to what happens if the e-mail is sent but not read for sometime or if the message is not communicated to the intended person by the person who reads it, or is deleted by mistake or the e-mail arrives in the night or outside business hours. The fact that contracts can be formed by an exchange of e-mails has been recognized through case law including *NBTY Europe Ltd. (formerly known as Holland & Barrett Europe Ltd) v Nutricia International BV* [2005] where the court upheld the validity of a settlement agreement reached through offer and acceptance made by e-mail. In *Olivaylle Pty Ltd v Flottweg GmbH Co CGAA* (2009) decided in the Federal Court of Australia Logan J stated obiter that an e-mail contract was completed when the electronic acceptance reached the buyer, i.e. when it entered the buyer's information system. However this position has not been conclusively decided to date.

While both the cases of *Chwee Kin Keong and others v Digilandmall. Com Pte Ltd* (2005) and *Olivaylle Pty Ltd v Flottweg GmbH Co CGAA* (2009) considered e-mail to be almost instantaneous, VK Rajah JC in *Chwee Kin Keong* stated that internet sales were more likely to be considered instantaneous than e-mails, while web advertisements were most likely to be considered as invitations to treat.

With access to internet and e-mail becoming available on mobile telephones and the increased availability of computer facilities as well as internet connectivity in homes as well as laptops, and palmtops which ensure access at any place and at any time while on the move these modes of communication are in reality more likely to be instantaneous. However Rajah J.C. seems to consider e-mails as being less likely to be instantaneous given the process through various routers and service providers it must traverse to get from one party to the other.

In the case of *Marine Star (Pvt)Ltd. v Amanda Foods Lanka (Pvt) Ltd.* (2007) Justice Chitrasiri of the Commercial High Court of Colombo after a due consideration of both the Electronic Transactions Act and the Evidence Ordinance decided that a Short Message Service (SMS) could also be used as a legally valid document. While this judgment did not directly deal with contract formation but with admissibility of electronic evidence, it is contended that this case could be used as a foundation to prove the existence of contracts formed via SMS in the future

Many of the contentious issues surrounding electronic contracting have been answered in Sri Lanka in a very timely manner with the introduction of the Electronic Transactions Act No 19 of 2006 which in chapter 3 (sections 11-17) deals with electronic contracts. This Act is based on the United Nations Commission on International Trade Law or UNCITRAL's Model Law on Electronic Commerce of 1996. Accordingly Section 11 recognizes the enforceability of electronic contracts, while section 12 states that a message would be considered to have originated by a person if it has been originated by him, by someone authorized by him or by an automated information system. Section 13 states that an electronic communication can be acknowledged through any method of acknowledgement and that if acknowledgement is a requirement failure to do so will lead to the communication losing validity. Section 14 of this Act is important because it identifies the time and place an electronic communication takes place. Section 14(1) sets out two rules, to identify the time of dispatch of an electronic communication. If the message is sent to another person in the same information system, the time of dispatch is the time it is received by that other person, but if it goes to someone outside the particular information system dispatch occurs when the message leaves the original sender. Section 14(2) deals with time of receipt of a communication, which would be the time relevant to acceptance of a contract. Here there are 3 possible times of receipt; first if the receiver has mentioned the information system to which the

information must be sent, receipt occurs the moment it enters that system; secondly if the message is sent to another address of the receiver (but not the system mentioned) receipt occurs when the person actually retrieves it; thirdly if no information system is mentioned receipt occurs when the message enters the system of the intended receiver. Section 14(3) defines the place of dispatch as that of the sender while the place of receipt is that of the receiver or addressee. Section 17 ensures the validity of electronic contracts, signatures and even contracts formed through automated systems without human intervention. It should also be noted that section 23 excludes transactions such as those for immovable property, creation of a bill of exchange, wills, power of attorney and certain trusts from the application of the Act. Thus it would appear that time of contract formation can be identified by using section 14, to identify the time of receipt and dispatch of an acceptance as Section 26 of the Act includes offer and acceptance within the meaning of communication.

In the UK the Electronic Commerce (EC Directive) Regulations 2002 sets out rules which must be followed when transacting with consumers within European Union member states. It requires the retailers or service providers to supply information including an explanation of the technical steps required to place an order as well as clear details regarding price, service provider, terms and conditions of the contract, acknowledgement of the order and how to amend input errors when placing an order. These guidelines protect the consumer as remedies for their breach are also included. However there are presently no such regulations protecting consumers entering into electronic contracts in Sri Lanka.

CONCLUSIONS

It is clear that due to technological developments, issues regarding contract formation have required revisiting. The new modes of communication, which enable communication even without human intervention, out of working hours and twenty four hours of the day lead to complexities in identifying when, and where contracts are finalized. The old rules are at times inadequate to cover emerging situations especially with the advent of the World Wide Web. While the judiciary has offered some answers to these complex issues, legislation has taken the welcome step of clarifying some of the issues as to time and place of dispatch and receipt of communication. Interestingly Sri Lanka which is viewed as a country which is normally slow to bring about legislative change has been proactive in this respect and has kept abreast with countries such as the US, China and Singapore in providing some answers to a still evolving area of law although safeguards such as those provided in the UK are still lacking. The issue also still remains as to whether internet transactions, especially e-mails, should be dealt with under the postal rule or whether it has now evolved into an instantaneous method of communication. It is this point that would enable a clear application of the law set out in the Electronic Transactions Act.

However it is noteworthy that the concept of freedom to contract, which even the above provisions of the Electronic Transactions Act keeps untouched, enables a person to avoid the difficulties which maybe encountered in use of modern technology to form contracts, by a careful drafting of the contractual terms and clearly expressed modes of ascertaining the time and place of formation of a contract.

REFERENCES

Adams v Lindsell [1818] EWHC KB J59

Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH [1982] 1 All ER 293

Chwee Kin Keong and others v Digilandmall.com Pte Ltd
[2005] 1 SLR(R) 502; [2005] SGCA 2

Electronic Commerce (EC Directive) Regulations 2002

Electronic Transactions Act No 19 of 2006

Entores v Miles Far East Corporation [1955] EWCA Civ 3

Hajri, J. Offer and Acceptance Online. <http://www.seqlegal.com/blog/offer-and-acceptance-online> posted on line by Taylor, A in 2011 and accessed on 11th August 2013

Halberstam, S. (2008). How to Contract Online; <http://www.weblaw.co.uk/articles/how-to-contract-online/> accessed on 10th August 2013

Hotmail Corporation v Van Money Pie Inc (1998) WL 388389 (N.D.Cal.)

Marine Star (Pvt)Ltd. v Amanda Foods Lanka (Pvt) Ltd (H.C. Civil 181/2007 (MR))

NBTY Europe Ltd. (formerly known as Holland & Barrett Europe Ltd) v Nutricia International BV [2005] EWHC 734 (Comm) Q B D (Commercial Court)/[2005] 2 Lloyd's Rep 350

Olivaylle Pty Ltd v Flottweg GmBH Co CGAA (No4) (2009) FCA 522

The Brimnes, Tenax Steamship Co Ltd v Owners of the motor vessel Brimnes [1974] 3 All ER 88