Rediscovering the Rules for Communication of Contract Law in Bangladesh: Legal and Philosophical Perspective

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Abstract

The governing law for the rules of contracts in our land Bangladesh was enacted with a view to defining and amending certain parts of the law relating to contracts. Due to rapid modernization in the method of communication, in this modern age, we really need to know what should be the appropriate rules for communication of contract in case of communication using digital technologies e.g. E-mail. The modern modes of communication can be said to be the modernized form of the available methods of communication. The fundamental aim of this article is to shed some lights on the available methods of communication and find out the rules with regard to the digital technologies e.g. E-mail.

Introduction

After the enactment of the Contract Act,1872 for defining and amending certain parts of the law relating to contract[1], almost 150 years have passed. In this drawn out stretch of time, innovation has been produced and it has gone far. In this 150 years span of time, technology has given us speeder modes of communication e.g. Telephone, telegraph, e-mail etc. But it is a matter of fact that any precise rule for the method of communication using digital technologies e.g. E-mail is yet to be discovered.

There is a genuine level headed discussion among the researchers of the law of contract whether the established rules governing instantaneous and postal communications are adequate enough for modern use. Researchers of this branch of law has not turned out with a specific choice yet. The objective of this article is to find out the appropriate rule of communications taking guide lines from the advanced legal systems like England, Canada, India, Singapore and Australia and being influenced by the competing philosophy of the rules of contract law. Here it will likewise be demonstrated that communication utilizing cutting edge advances can be said to be the modernized form of either instantaneous or postal method of communication. Moreover, some lights will be shed on the existing rules for communication in the Contract Act,1872.

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1 This is said in the preamble of the Contract Act,1872.

In the modern world, there are many modern contractual doctrines which govern the rules regarding contract law. They are-

(i)Market- individualism
(ii)Consumer- welfarism

The Market Philosophy demonstrates the function of the law of contract as the facilitation of competitive exchange, which demands clear contractual ground rules and transactional security.[2] As per this philosophy, it is important for those who enter into market to know where they stand. This means the ground rules of contract should be made clear. So these two things, i.e. The ground rules and transactional security are inter-related. The Postal Acceptance Rule of communication is an exception to the general rule of contract law that acceptance of an offer takes place when it is communicated. Under this rule, the acceptance takes effect when the letter of acceptance is posted. It is not necessary for the offeror to know that his offer is been accepted. *The Postal Acceptance Rule (PAR)* is a model for market individualism in the sense that it is clear and simple. Moreover, according to this rule, both the parties of the contract know where they stand.[3] Contract's concern to avoid market inconveniences is a measure of its commitment to the market-individualist policy of facilitating market dealing.[4]

Consumer-welfarism attempts to feed reasonableness and sensibility into the contractual rules. It is a policy of consumer protection and for the principles of fairness and reasonableness in contract. As per this philosophy, the welfare of the consumer is the top most priority in case of making rules.

Apart from the above two ideologies, the utilitarian approach of the rule makers around the world also play a vital role in the creation of the contractual rules and principles. As per this utilitarian philosophy, the prime object is to ensure maximum benefit for the maximum number of people. This ideology is dependably in the psyche of the administrators all around the globe as the officials need to make those tenets which can come into advantage for the most extreme number of individuals.

In our triumph to discover the appropriate rules in case of communication via modern technologies e.g. E-mail, Telephone or Telegraph, we will keep these ideologies in our mind.

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2 Linda Mulcahy, Contract Law in Perspective, Routledge Publication, 5th Edition,p.34; Here ground rules mean the rules for the thin dividing line of offer and invitation to treat, the rules for contracts made by the minors or the rules in restraint of trade, the rules related to contingent contracts or the rules of quasi contracts. The main theme of the term 'transactional security' is that both the parties should know where they stand in the contract. The market nonconformist rationality manages these two essential components.

3 There is also a fallacy here. In case of postal acceptance rule, the contract is concluded even before the offeror knows about the acceptance. There may be one justification that while offering, the offeror knows that the contract will be concluded even before his knowledge of the acceptance of offer.

4 Ewan McKendrick, Contract Law: Text, Cases, and Materials, Oxford University Press, 5th Edition, p.12

Communication in Contract Law

Communication plays the central role in the formation of a contract. The effectivity of proposal, acceptance and revocation is impractical without communication. The rules of communication in contract law can be divided into there main classes:

(i) The General Rule
(ii) The Postal Acceptance Rule
(iii)The Instantaneous method of communication

(i) The General Rule of communication

The General Rules regarding communication have been enumerated in the section 3 of the Contract Act,1872, the governing law of contract in Bangladesh. According to this section communication of proposal, acceptance and revocation can be made by two ways[5]:

(i) By the act or omission of the concerned party which intended it,

(ii) By the act or omission of the party which though didn't intend it clearly, but it has the effect of such communication of proposal, acceptance or revocation.

One important point is that communication has to have certain level of magnitude or certain level of intensity. Over the years legal system influenced by the English Common Law have been influenced by the decision given by famous jurist Lord Denning. In the case of ***Entores vs. Miles Far East Corporation[6],*** Lord Denning decided the required level of intensity or magnitude of communication and held that

> "if an oral acceptance is drowned out by an overflying aircraft, such that the offeror cannot hear the acceptance, then there is no contract unless the acceptor repeats his acceptance and aircraft has passed over."[7]

(ii)The Postal Acceptance Rule

The Postal Acceptance Rule is an exception to the general rule of communication. It is a rule of contract law that says if an offer is made in such a manner that it would be reasonable to assume that another person would accept the offer by placing a letter or other writing in the mail, then acceptance is deemed to have occurred when the writing was placed in the mail, not when it was received by the person making the offer.[8]

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5 Dr. Muhammad Ekramul Haque, Law of Contract, Law Lyceum, 2nd Edition, p.79
6 Entores Ltd v Miles Far East Corporation [1955] EWCA Civ 3
7 Ibid.
8 'Mailbox Rule', <http://financial-dictionary.thefreedictionary.com/Mailbox+rule>, last accessed on: 25.04.2016

The Postal Method of Communication was initially articulated in the famous case of **Adams vs. Lindsell**[9]. In this case, The defendant wrote to the claimant and offered to sell them some wool and asked for a reply 'in the course of post'. The letter was being delayed in the post. After receiving the letter the claimant posted a letter of acceptance the same day. Later on, because of the delay the defendants assumed that the claimant was not interested in the wool and sold it on to a third party. The claimant sued for breach of contract. Whether there was any binding contract between the claimant and the defendant was the issue of the contract. If the acceptance was effective when it arrived at the address or when the defendant saw it, then no contract would have been made and the sale to the third party would amount to revocation of the offer. However, the court held that the offer had been accepted as soon as the letter had been posted. Thus, in **Adams v Lindsell**[10] there was indeed a contract in existence before the sale of the wool to the third party, even though the letter had not actually been received by the defendant. In the case of **Household Fire Insurance Co. Vs. Grant (1879)**[11], it was held that the rule of postal method of acceptance will also work even though the letter of acceptance is never received. Then in **Henthorn vs. Fraser (1892)**[12], it was observed that this postal rule of acceptance even applies where the letter of acceptance is received after notice of revocation of the offer is being sent.

Even after all these flaws, **Adams v Lindsell** has been reinforced recently by **Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft GmbH [1983]**[13]where it was held that acceptance is effective when it is placed in the control of the Post Office, ie. placed in a post box or handed to an officer of the post. This judgment is also in line with section 4 of The Contract Act,1872. In Bangladesh, the rules regarding communication via post can be divided into two parts:

a. Communication of Proposal
b. Communication of Acceptance

Communication of proposal is complete when it comes to the knowledge of the person to whom it is made. So, here the criterion is only one, i.e., it must come to the knowledge of the person to whom it is addressed. For example, if A makes an offer to B via post and B has received the offer, then we can say that the communication of offer is complete.

In case of face to face to transaction the rule is simple, i.e., when the words constituting the acceptance are uttered, the communication of acceptance will be complete as soon as the other party listens to it. In case of any postal communication following instances happen simultaneously: A letter of acceptance is first posted; it arrives some times later; and later again, it is actually read by the recipient. The

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9 Adams v Lindsell (1818) 1 B & Ald 681
10 Ibid.
11 Household Fire Insurance Co. Vs. Grant (1879) LR 4 Ex D 216
12 Henthorn vs. Fraser (1897) 2 Ch 27
13 Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft GmbH [1983] 2 AC 34

question arises: When does it actually take effect? Therefore, in case of postal transactions problem arises. In Bangladesh the postal method of communication with regard to 'acceptance' is completed in two phases. The communication of acceptance becomes complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor[14]. Then again communication of acceptance will be complete as against the acceptor when it comes to the knowledge of the proposer. In a Bangladeshi case **Sahana Chowdhury and another vs. Md Ibrahim Khan and others**[15] it was decided that, without the communication of acceptance, there can be no contract at all.[16]

For example, A makes an offer to B via post and B wants to accept it. Therefore, B sends the letter of acceptance. The communication of acceptance is completed against A when B puts that letter in the mail box so as to be out of the power of the acceptor.[17] So, A is bound by the terms of the contract from that moment and he cannot revoke that offer anymore. But B can still revoke his acceptance. He can revoke his acceptance till A receives the letter of acceptance[18].

From the mother case law of Postal Acceptance Rule[19], it can be observed that the communication of acceptance becomes complete as soon as the letter of acceptance is posted and the contract is concluded at the same moment, even if the letter does not reach the destination ever. In case of English Law, there is no option for revocation of acceptance. This is the point where English Postal Acceptance Rule of communication is fundamentally different from the Bangladeshi one. In Bangladesh, a contract is concluded in the first phase of the communication of acceptance,i.e., when the letter of acceptance is posted. Revocation of acceptance can be done by a speedier means of communication in Bangladesh and India.

This rule of communication leaves open some loop holes. There are usually three consequences as identified by Mindy Chen-Wishart in his Contract Law[20].

Firstly, Postal Rule of communication binds the offeror even before and even without the knowledge of the acceptance. It is effective, even if its arrival is delayed, and even if the letter is lost so that he never actually receives the acceptance.[21] The risk lies solely with the offeror.

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14 Section 4 of the Contract Act,1872

15 Sahana Chowdhury and another vs. Md Ibrahim Khan and others 21 BLD (AD) 79

16 Chitty also expressed the same view in his book 'Chitty on Contracts', 28th Edition, at p. , para 2-041.
Similar view was seen to be held in the case of Bangladesh Muktijoddah Kalyan Trust represented by the Managing Director vs. Kamal Trading Agency & others 18 BLD (AD) 99; Holwell Securities Ltd. Vs. Hughes(1974) 1 All ER 161 (CA); Bhagwandas Goverdhandas Kedia vs. Girdharlal Parshottamdas AIR 1966 SC 543

17 Section 4 of the Contract Act,1872

18 Section 5 of the Contract Act,1872

19 The case of Adams vs. Lindsell is said to be the mother case law of the postal acceptance rule.

20 Mindy Chen-Wishart, Contract Law, Oxford University Press, 1st Edition, p.89

21 See for example, Household Fire & Carriage Accident Insurance Co Ltd. Vs. Grant (1879)

Secondly, The offeror cannot revoke his offer after the offeree's acceptance is posted even though the offeror has not yet received it, i.e., he has no knowledge of the acceptance. In **Byrne vs. Van Tienhoven (1880)**, On October 1st Van Tienhoven mailed a proposal to sell 100 boxes of tin plates to Byrne at a fixed price. On October 8th, Van Tienhoven mailed a revocation of offer, however that revocation was not received until the 20th. In the interim, on October 11th, Byrne received the original offer and accepted by telegram and turned around and resold the merchandise to a third party on the 15th. Byrne brought an action for non-performance. Some questions of Law arose: Was a valid contract formed? Does a withdrawal of an offer have any effect before it is communicated to the person to whom the offer was sent? It was held that the mailbox rule does not apply to revocation; revocation sent by post does not take effect until received by offeree. An offer cannot be revoked after it has been accepted.

Thirdly, Where a postal acceptance is lost in the post, the offeror may believe that, since no reply has been received, the offeree does not wish to accept. He may refrain from performing the contract and later on make another contract with another person even before the arrival of the letter of acceptance. So, it creates the chance or opportunity for injustice which a rule of law should not do.

Even after all these loop-holes the postal rule has been justified by reference to implied authorization[22],control[23], business expediency[24] and agency[25]. Treitel in his The Law of Contract pointed out several justifications for the application of Postal Acceptance Rule.[26]

Firstly, It is said that the Post Office is the agent of the offeror so that communication to the agent is as good as communication to the offeror. However, it has also been argued that, the post office is an agent to transmit the message not to receive its contents.

Secondly, It is said that the offeror who initiates negotiations through the post should assume the risk that the acceptance letter may be delayed or lost. However, postal negotiations may as likely be initiated by the offeree. Use of the post is not unusual and may be the most sensible method of communications in the circumstances. But it is unclear why the offeror should assume the risk of any delay or loss.

Thirdly, It is said that the offeree is less likely to detect that his acceptance letter has gone astray because he expects his letter to arrive in the normal course of time and expects no further communication to conclude the contract. In contract, the offeror is expecting a response and so is more likely to make enquiries if he does not hear

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22 Household Fire & Carriage Accident Insurance Co v Grant(1879} 4 Ex D 216 (Grant).
23 Dunlop v Higgins (1848) 1 HLC 381 (Dunlop).
24 Household Fire & Carriage Accident Insurance Co v Grant(1879} 4 Ex D 216 (Grant)
25 Stocken v Collins (1848) 7 M & W 515; Henthron v Fraser [1892] 2 Ch 27 (Henthron)
26 See generally, Treitel,The Law of Contract, Sweet and Maxwell, 24-5

from the offeree. That is, the offeror is the best risk-avoider. However, the offeror may equally interpret the absence of a response as a rejection of his offer.

Fourthly, It is said that the offeror can always contract out of the postal acceptance rule by stipulating that acceptance only takes effect when it is 'actually' communicated to the offeror.

However, all the above reasons are not convincing enough for the proper justifications of Postal Acceptance Rule. In this regard we can quote Mindy Chen-Wishard,

> "In truth, no convincing reasons support the weight of the postal acceptance rule. Nevertheless, while there is no particular reason for preferring the offeree or the offeror, the law must come down on one side or the other in the interest of certainty, rather like the decision about which side of the road cars should drive on. However, a rigid application of the postal acceptance rule can yield a binding contract although the parties were never objectively in agreement."[27]

Bramwell LJ in **Household Fire and Carriage Accident Insurance Co Ltd. Vs Grant(1874)**[28]said that he would prefer the ordinary rule of communication to apply equally to acceptance by post. In his powerful dissenting judgment he says that, the harm he perceives in the postal rule will be obviated only by the rule being nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But Bramwell LJ's dissenting opinion clearly creates a chance of injustice to the offeree. In case the accepting mail is lost or delayed, the offeree will be in clear disadvantage though mails via post rarely get lost or get delayed. This is an exceptional situation. But in case of normal situation, Bramwell LJ's guideline can be a way-out for the offeror.

(iii) Instantaneous Mode of Communication

The term 'instantaneous' means rapid, direct, in a flash and quick. Instantaneous mode of communication is that mode of communication where contract is done as if the parties were completing it face to face. In this method of communication, the contract is only complete when the acceptance is 'actually' received by the offeror and contract is made at the place where the acceptance is received. It has also been affirmed by the majority of the judgment in the Indian case of **Bhagwandas Goverdhandas Kedia vs. Girdharilal Parshottamdash[29].** But in the same case there was a dissenting judgment by J. Hidayatullah. The dissenting judge, stressing on literary interpretation of Indian Contract Act observed that the laws in the

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27 Mindy Chen-Wishart, Contract Law, Oxford University Press, 1st Edition, p.90

28 Household fire and carriage Accident Insurance Co Ltd. Vs Grant(1874) 4 ExD 216

29 Bhagwandas Goverdhandas Kedia vs. Girdharilal Parshottamdash 1966 AIR 543

subcontinent should not be moulded by English dicta whereas we have our own law, held that

> "when acceptor put his acceptance in transmission (in form of telephonic conversation) to proposer as to be out of his power to recall (According to section 4 of the Indian Contract Act 1872), communication of acceptance was complete and proposer was bound by contract so formed, however quick the transmission."[30]

Then again, In the famous English case **Entores Ltd. Vs. Miles Far East Corporation,** Lord Denning held that

> "it is the duty of the acceptor to ensure acceptance to be audible, heard and understood by the offeror."[31]

Most of the new means of communication may be said to be the modernized form of instantaneous method of communication. On the basis of the simultaneity, instantaneous method of communication, Mindy Chen Wishart[32] classified into 2 different types. They are-

i. Two way instantaneous
ii. One way instantaneous

In case of two way instantaneous method of communication,e.g. Telephone conversation or face-to-face conversation, both the parties are present and conditions for simultaneity are met and the general rule applies here. Acceptance takes place when and where it 'actually' comes to the knowledge of the offeror. In this case, No delay is seen to be happened in between sending and 'actual' receiving of the acceptance. Lord Denning gave three different illustrations in his famous judgment of **Entores Ltd. Vs. Miles Far East Corporation(1955)[33]-**

a. If a face-to-face oral acceptance is drowned out by a noisy aircraft flying overhead, the offeree must repeat his acceptance once the aircraft has passed;

b. If the telephone goes 'dead' before the acceptance is completed, the offeree must telephone back to complete the acceptance;

c. If the offeror does not catch the clear and audible words of an acceptance or the printer receiving a telex runs out of ink, but the offeror does not bother to ask for the message to be repeated, it is the offeror's own fault that he did not get the acceptance and he will be bound.

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30 Ibid.
31 Entores Ltd. Vs. Miles Far East Corporation.
32 Mindy Chen-Wishart, Contract Law, Oxford University Press, 1st Edition, p.87
33 Entores Ltd v Miles Far East Corporation [1955] EWCA Civ 3, cited from Contract Law by Mindy Chen Wishart.

As we can see, Lord Denning always favored the offeror where neither party of the contract can be blamed.. He commented:

> "...the offeror without any fault on his part does not receive the message of acceptance - yet the sender of it reasonably believes it has got home when it has not - then I think there is no contract."

In case of one way instantaneous method of communication, e.g. Telex, Telegram etc. the condition of simultaneity is not met. Here both the parties are not present at the same time. Here the message arrives instantaneously. But the recipient is not necessarily at the other end ready to receive the message. Question may arise when and where the acceptance has taken place. Three possibilities arising here can be mooted:

a. Acceptance takes place when the message is sent. This is an injustice to the offeror since he may not know about it at that time. This creates a similarity with Postal Acceptance Rule.

b. Acceptance takes place when the message 'actually' comes to the knowledge of the offeror. This is an injustice to the offeree as it gives the offeror too much control over whether and when the contract is been concluded. Moreover, the offeror may try to revoke the offer even after the acceptance without even opening the message of acceptance. This is an example of sheer injustice.

c. Acceptance takes place when in all circumstances a reasonable offeror would access the message received.

From these 3 possibilities, third one seems the best as a rule as it balances both the parties' interest. But this raises another question: When a reasonable offeror would access the message. For this reason, communication using instantaneous means of communication can be divided into two classes:

a. Communication to a business during the office hours
b. Communication to a business outside the office hours

There are judicial authorities with regard to the communication to a business during office hours and outside the office hours. In the case of **Brinkibon Ltd vs. Stahag Stahl GMBH [1983]**[34], it was decided that except by post, notice of acceptance received in working hours are deemed to be read immediately. Then, in the case of

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34 Brinkibon Ltd vs. Stahag Stahl GMBH [1983] 2 AC 34

Mondial Shipping and Chartering B.V. Vs. Astarte Shipping Ltd. (1996)[35], it was held that the receipt of a contractual notice should be deemed to take place at the start of the next working day if it was received and stored outside normal working hours.

Rules for Website Communication

Websites are the electronic equivalent of displays, advertisements or catalogues of products for sale.[36] In the English law, as well as according to Bangladeshi Law, a website, in general, constitutes an 'invitation to treat.'[37] It gives the site provider to retain 'freedom of contract' as the offer will come from the customer. There is an opportunity for the site provider to avoid the contract with online buyers in excluded jurisdictions. Moreover, the stock of the site provider may be limited. This is why websites are in general considered as invitation to treat as the offer would come from the customer himself and the site provider may accept it or not as per his ability.

As websites are, in general, treated as an invitation to treat, the communication of the offer will be done by the offeror when the customer at the check out state will click on the relevant instruction to place the order according to the general rule of communication from section 3 of the Contract Act, 1872. As per this section, communication of offer are deemed to be made by any act(here clicking on the check out state link) of the party proposing it, by which he intends to communicate such proposal or which has the effect of communicating it.

Then again, following section 3 of the Contract Act, 1872, the acceptance of the proposal will take place as soon as the website authority, after due processing, confirms the orders. The contract will be concluded when the credit card of customer is being charged. Now whether the acceptance can be revoked is an 'open-ended question'. Nothing is said about it any where in the Contract Act. There are no case laws available in this matter in Bangladesh. Therefore, a particular problem may arise because of the inadvertent mispricing of goods in the online. But there are instances which involves offers which are "too good to be true". One receiving such offer cannot cannot just 'snap it up'. Even if he does, the offeror may revoke his offer in spite of the fact that the offer has been accepted.[38]

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35 Mondial Shipping and Chartering B.V. Vs. Astarte Shipping Ltd. (1996) [1995] C.L.C. 1011

36 For details, see Jill Poole, Text Book on Contract Law, Oxford University Press, 12th Edition, p.43

37 Products offered on websites are considered as offers under French and Dutch Law. For details see, Jan M Smits, Contract Law: A Comparative Introduction, Edward Elgar Publishing Limited, 2014 Edition, p. 49

38 See for details, Donald A. Wittman, Economic Analysis of the Law: Selected Readings, John Wiley & Sons, 2008 Edition, p.73

For example, in the **Chwee Kin Keong vs. Digilandmall.com Pte. Ltd**[39], Defendant was selling IT products over internet in Singapore. The HP laser printer was advertised on the Defendant's website and on the website of HP for $3,854. Due to the mistake on part of one of the employee of a related company, the price of printer was altered to $66 on the website, which was not noticed by any of the employee. The Appellants (there were six appellants) discovered this price and ordered more than 100 printers each. After discovering the Company rectified the mistake and sent an e-mail stating that it will not complete this order. The Court held that (also considering the background of the appellants) that they had a constructive knowledge about the mistake in the pricing of the product. As this is one instance of 'snap it up', therefore, even after the acceptance by the defendant had the right to revoke his offer. So, in case of unilateral mistakes in websites, if it involves instances of 'snap it up', an offer can be revoked even after the acceptance of the offeree.

Rules for all other modern technologies

In the Twenty-First Century, modern technology dominates and prevails in this modern world. After the enactment of the Contract Act in 1872, the world has had the opportunity of using modern technology in case of communication and it has been developed at a tremendous speed. Lord Wilberforce J. agreed that modern technology is developing so fast that it is not possible for law to set any fixed rule for regulating the communication via modern technologies. In the dicta of the famous case **Brinkibon Ltd vs. Stahag Stahl GMBH**[40], Lord Wilberforce recognized this difficulty in modern methods of communication saying,

> "No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie ...."

Law can never be as fast as the modern technology. Modern technologies change within a second. But it takes a long period of time to enunciate any rule of law. This is why in case of making rules with regard to all other modern technology, the guide line provided by Lord Wilberforce may be followed, i.e., deciding the time of completion of contract by reference to the intention of the parties.

The Debate of E-mail: Which method should be followed

There has been a long debate on whether e-mail is a form of instantaneous mode of communication or a form of postal method of communication . But in this question our stand point is that e-mail is unique form of communication. It has similarities and dissimilarities with both instantaneous mode of communication and postal method of communication. But as we have stated earlier that rules of contract law

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39 Chwee Kin Keong vs. Digilandmall.com Pte. Ltd [2005] 1 SLR 502: [2005] SGCA 2

40 Brinkibon Ltd vs. Stahag Stahl GMBH [1983] 2 AC 34

should satisfy two fundamental policies or doctrines, i.e., the doctrine of Market Individualism and the doctrine of Consumer Welfarism. Apart from these two doctrines, all the rules of every branch of law is generally drafted taking the Utilitarian Approach. For these three policies of law, it is to be stated that in case of E-mail communication, instantaneous method of communication should be followed. It will be discussed here under:

Around the world, in several jurisdictions, E-mail is been considered at times as a means of Postal Method of Communication and at times as a means of Instantaneous Method of Communication. The communication of acceptance via E-mail is neither completely a form of postal method of communication nor completely a form of instantaneous method of communication. It can be proved by showing the similarities and judicial decisions from several jurisdictions, with E-mail in favor of both postal method of communication and instantaneous method of communication.

The main similar feature of E-mail with postal method of communication is that in both the cases there is intervention of third parties and there is inability to foresee the pathway of the message once it is sent or posted. Internet Service Provider (ISP) acts as a bridge as like as post master or clerk of the post office. In both the cases messages are usually returned to the sender if the end address is incorrect. There is possibility of losing the e-mail and the mail via post due to uncertainty of acceptance of the acceptor. Then again, if speed is the reason for which, postal method of communication should not applied, then it can be definitely said that it can take days for the persons to read the e-mail. It was even pointed out in the Singaporean case **Chwee Kin Keong vs. Digilandmall.com Pte. Ltd.**[41] that, "as like as the postal mails, there can be gap in time between dispatch and deemed receipt in case of E-mail." In a recent Indian Case **P.R. Transport Agency vs. Union of India & Others**[42] it was held that postal acceptance rule is not completely outdated; it can still apply to the modern non-instantaneous methods of communication.[43] Till any amendment to the Contract Act,1872 or any new law with regard to communication of contract via e-mail comes into force, the fact that parliament have not legislated on the subject may suggest that it is their intention for the traditional postal rule to apply.

E-mail also has got similarities with Instantaneous Method of Communication. Like other instantaneous method of communication, e-mail is also a very fast way of communication and where the effect is almost instant, the same rules should apply.[44] It was held in the case of **Thomas vs. BPE Solicitors**[45]**.** In the **Entores' Case**, Lord Denning held that a telex should be considered to be a form of instantaneous form of communication resulting in acceptance by telex being effective only once it was

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41 Chwee Kin Keong vs. Digilandmall.com Pte. Ltd. [2005] 1 SLR(R) 502

42 P.R. Transport Agency vs. Union of India & Others AIR 2006 AII 23

43 Ibid.

44 Thomas vs. BPE Solicitors [2010] All ER (D) 306 (Feb)

45 Ibid.

received by the offeror and postal rule is not applicable in this point.[46] Later on recently in a Canadian Case **Inukshuk Wireless Partnership v. NextWave Holdco LLC (2013)**[47] the Superior Court of Justice, Ontario has held that "An e-mail is no different than a fax. Both are instantaneous communications."

So, from the above reasoning it can be observed that E-mail as a modern form of communication is very similar to both the Postal Method of Communication and Instantaneous Mode of Communication and there are authoritative texts on the sides both of these two.

An English Authority regarding the matter is available. It is in the case of **Bernuth Lines Ltd. Vs. High Seas Shipping Ltd. (2005)**[48] which is popularly known as the **Eastern Navigator Case.** In this case it was decided that E-mail is 'virtually instantaneous' and so it is not subjected to Postal Acceptance Rule.[49] In the case of **Thomas and another vs. BPE Solicitors (2010)**[50]**,** it was held that e-mail acceptances are effective only when received by the offeror. It is one of the characteristics of instantaneous method of communication. In the case of **Chwee Kin Keong vs. Digilandmall.com Pte. Ltd.**[51] decision was based on the fact that the receipt rule has greater global acceptance and e-mail is very different to postal method of communication. In an Australian Case, **Olivaylle Pte. Ltd. Vs. Flottweg GMBH and Co.(2009)**[52] it was decided that e-mail is often a form of near instantaneous communication. Apart from all these judicial authorities, people use e-mail as a speedier means of communication and they expect it to have an immediate effect. If we take the utilitarian approach, i.e., if we want to ensure maximum benefit for maximum number of people, we should take the side of the instantaneous method of communication. Because people who use e-mail as a means for communicating terms of contract, uses it only for its instant work-ability or instant effectivity. Again, the leading competing theory for the rules of law of contract 'consumer welfarism' wants to feed reasonableness in all the rules of contract law and it highly values the expectations of the people in general. People in general wants e-mail to work immediately. Moreover, E-mail was invented for the purpose of communicating with other people immediately. So, in case of contractual communication via e-mail, it should take immediate effect. For all these reasons, though E-mail has got several similarities with Postal Method of Communication and no authority ever regarded e-mail as a completely instantaneous method of communication, rules of instantaneous method of communication should be followed. The level of the intensity of communication must be kept in mind. The required level of intensity of communication of acceptance, as mentioned earlier in

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

47 Inukshuk Wireless Partnership v. NextWave Holdco LLC et al, 2013 ONSC 5631

48 Bernuth Lines Ltd. Vs. High Seas Shipping Ltd. (2005) (1 Lloyds Rep 537)

49 Ibid.

50 Thomas and another vs. BPE Solicitors (2010) EWHC 306 (Ch)

51 Chwee Kin Keong vs. Digilandmall.com Pte. Ltd. [2005] 1 SLR(R) 502

52 Olivaylle Pte. Ltd. Vs. Flottweg GMBH and Co.(2009) KGAA (No 4) (2009) 255 ALR 632

Entores Case[53], is that the acceptance is to be audible, heard and understood by the offeror. So, It is the duty of the offeree to check whether the e-mail is been properly sent to the offeror.

Taking the reasonable approach, if we dissect the whole process of E-mail communication, it can be seen that after the sender of the e-mail presses 'send' and the message reaches the other computer almost immediately like the instantaneous methods of communication. The receiver of the message may or may not be there. But the message was received in the receiver's mailbox almost immediately. As the receiver may not be present there, the message may not come to the knowledge of the offeror. This is the characteristic of one way instantaneous method of communication.

If we apply rules of instantaneous method of communication in case of e-mail, several problems still may arise. For example, a party to the business transaction may send an e-mail outside the office time of a company. If we follow instantaneous form of communication, contract will be binding after that e-mail is been sent. But actually none of that company will know about that acceptance. It can be a major problem in case of business transactions. To solve this problem, rules for one way instantaneous method of communication must be followed as it balances both the parties' interest.

Impact of this study in Bangladesh

There has been no research works on the communication of contracts using modern technologies in the Bangladeshi perspective. The available texts on this issue are all foreign materials and none of them are from Bangladeshi perspective. The analysis made in this work is basically based on the rules followed in the mature legal systems around the world like UK, Singapore, Australia and Canada. As we do not have any particular law in this area of contract law, if there is any dispute, we can certainly follow the approach taken in this article.

Conclusion

Most of the available research works on 'communication of contracts' typically explains similarities of digital modes of communication with the existing modes of communication,i.e., postal rule of communication or instantaneous mode of communication. Most importantly, none of the research article, even the foreign articles, gave importance to the philosophical doctrines behind the rules of contract law. They totally ignored the competing ideologies while discovering the appropriate rules for communication of contract using digital technologies. In this work, we have tried to bridge this intellectual gap using philosophical doctrines with foreign persuasive authoritative texts pronounced in foreign disputes and tried to bridge this gap. So, it is recommended that the approach taken in this article should be followed while adjudicating any contractual dispute.

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