

The Obsolescence of the Postal Rule in HK

INTRODUCTION

Offer and acceptance are salient components in the formation of any valid contract. A contract is not made until the offeree communicates his acceptance to the offeror.¹ However, the postal rule² is regarded as an exception to this general principle. The rule dictates that when parties conclude a contract via post, the acceptance is deemed effective not upon actual communication, but from the moment the letter was posted. This allows the offeree to proceed with his or her personal/business affairs on the assumption that a valid contract has been concluded.³

In recent years, the advent of electronic communication has much reduced the postal rule's practical importance.⁴ In looking at contracts concluded electronically, this article analyses several judicial precedents and makes the observation that the postal rule is but marginally relevant to business and commerce in Hong Kong ('HK').

THE ELECTRONIC TRANSACTIONS ORDINANCE

There is no ordinance specifically mentioning the postal rule's application to e-contract formation in HK. Perhaps the most relevant ordinance in this respect is the Electronic Transactions Ordinance ('ETO'),⁵ section 19 of which provides precise guidelines defining a validly sent and received electronic record. However, the ETO does little to address the question of when exactly such electronic records, if assumed to be valid acceptances of offers, take legal effect to conclude an e-contract. To expose the minimal extent to which the postal rule applies to e-contracts in HK, it is necessary to examine how courts have viewed its electronic relevance.

JUDICIAL ATTITUDES TOWARD THE POSTAL RULE'S ELECTRONIC APPLICATION

The most recent HK case that sheds light on the issue is that of *Emirates Shipping Line DMCEST v. Trans Asian Shipping Services PVT Ltd.*⁶ The case concerned defendants situated in India, who entered into a contract via email with the plaintiffs located in HK. The court had to decide the precise location of contract formation in order to determine the appropriate laws governing it. It was held that an offer by email is only effectively communicated to the other side upon the receipt of the email, and not upon it being sent.⁷

In *Susanto Wing Sun Co. Ltd. v. Yung Chi Hardware Machinery Co. Ltd.*⁸, the court was faced with a similar issue in relation to a contract concluded over facsimile. The contract in question was concluded in Taiwan and not in HK because it was there where the defendants received the plaintiffs' acceptance. The court remarked that 'the rule relating to communication by telex is now well settled and the same rule must, in...

¹ *Latec Finance Pty Ltd v. Knight* [1969] 2 NSW 79 at 81.

² *Adams v. Lindsell* [1818] 1 B & Ald 681.

³ *Byrne & Co. v. Leon Van Tienhoven & Co.* [1880] 5 CPD 344.

⁴ Lisa Spagnolo, *CISG Exclusion and Legal Efficacy* (Kluwer Law International 2014).

⁵ Cap 553.

⁶ [2015] HKEC 2548.

⁷ *Emirates Shipping Line DMCEST v. Trans Asian Shipping Services PVT Ltd* [2015] HKEC 2548.

⁸ [1989] 2 HKC 504.

[this] judgment, apply to communications by facsimile'.⁹ These cases seem to reaffirm the rule relating to near-instantaneous communications that acceptance takes effect upon actual communication to the offeror.

It is important to also consider the instantaneousness of e-contracting (especially in relation to email), as the courts have tended to limit application of the postal rule to acceptances communicated non-instantaneously.¹⁰ Scholars have suggested that issues such as incorrect addressing, recipients' failures to read emails, and delays in distribution demonstrate that email is not instantaneous¹¹, while others contend that such external factors are not determinative of instantaneousness.¹² However, considering the court's reasoning and recent decision in *Emirates*, it is probable that HK courts will expand the scope of "near-instantaneous" communications to encompass email.¹³ The receipt rule would likely extend to contract formation via other electronic means as well, such as fax, telex, and instant messaging.

In *Chwee Kin Keong v. Digilandmall.com Pte Ltd*,¹⁴ a recent case before the Singapore High Court, the general rule that acceptance by email and other modes of electronic communication is effective when the message is received by the offerer,¹⁵ was again reasserted. This serves as a highly persuasive primary source guiding future HK courts adjudicating disputes of e-contract formation.

A LARGELY OBSOLETE RULE

As the authorities demonstrate, the postal rule is, to a large extent, obsolete in HK's e-business environment. Notably, e-commerce is set to develop rapidly and will account for an ever-increasing proportion of world trade.¹⁶ Businesses in HK are displaying a stronger reliance on electronic communications, which at the same time diminishes the use of the post as a mode of business correspondence. It remains to be said, however, that because the postal rule stands as the binding common law principle for contracts concluded via post, it nonetheless retains a slight degree of contemporary application in HK.

Although the postal rule still stands as a binding legal principle, modern judicial attitudes have revealed its irrelevance in contexts of electronic contract formation. Considering the increasingly dominant presence of e-commerce in HK and the courts' reluctance in allowing the rule's electronic application, it is apparent that in relation to contracts concluded electronically, the postal rule is of marginal relevance, and its application may be properly considered a modern obsolescence.

⁹ *Susanto Wing Sun Co. Ltd. v. Yung Chi Hardware Machinery Co. Ltd.* [1989] 2 HKC 504.

¹⁰ *Entores Ltd. v. Miles Far East Corporation* [1955] 2 QB 327; *Brinkibon Ltd. v. Stahag Stahl Und Stahlwarenhandels – Gessellschaft mBH* [1983] 2 AC 32.

¹¹ B Clark "The E-Mail Acceptance Rule" (1997) June *Proctor* 13.

¹² Kathryn O'Shea and Kylie Skeahan, 'Acceptance of Offers by E-Mail – How Far Should the Postal Acceptance Rule Extend?' [1997] QUTLJ 247.

¹³ See *Nunin Holdings v. Tullamarine Estates* [1994] 1 VR 74. Though not binding on HK courts, it serves as highly persuasive authority.

¹⁴ [2004] SLR 594.

¹⁵ Semble, *Chwee Kin Keong v. Digilandmall.com Pte Ltd* [2004] SLR 594, [97]-[99].

¹⁶ Richard Burton, 'E-commerce, the need for independent ratings to facilitate B2B' in *Digital Economy: Virtual Threat or Golden Opportunity* (HK Echo 2001).

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