Chapter 6 - Effectiveness of Acceptance

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CHAPTER 6 EFFECTIVENESS OF ACCEPTANCE

INTRODUCTION

[6.1] The previous chapter described the basic problems related to the application of the offer and acceptance model in on-line transactions. Focusing on the differentiation between offers and invitations to treat in the case of websites and on the methods of communicating acceptance, it attempted to establish which of the acts performed or statements made by the parties constituted an offer and which constituted an acceptance. A central part of analysing the contract formation process and therefore a central part of this thesis is ascertaining the time of formation. Assuming that it has been determined which act constitutes acceptance, it must be examined when it becomes effective. Effectiveness on receipt is regarded as the principle, while effectiveness on dispatch, called the "postal acceptance rule" (the "PAR"), is regarded as the exception. This chapter attempts to make the choice between the principle and the exception in the case of acceptances communicated by electronic means ("the choice"). The next chapter continues the theme by attempting to define the terms "dispatch" and "receipt."

Contracts can be formed face-to-face or at a distance. Determining the moment of formation does not generally raise problems in the paradigm situation: in face-to-face dealings, one party speaks the other listens, the moment words are spoken, the other party hears them. Communication is actual and immediate. Acceptance is effective the moment it is manifested, there is no distinction between dispatch and receipt, or between receipt and notification.

When parties deal at a distance, the dispatch of acceptance may be distinct from its receipt. The delay is the result of spatial remoteness, its length derives from the method of communication. The implications of delay are twofold. First, generally an offer may be revoked until acceptance is received. The longer the delay, the greater the risk of revocation. Second, the delay creates a state of uncertainty for both parties, as neither knows whether and when a contract came into being.

When dealing at a distance the parties must use an intermediary or device in order to communicate. Dealings at a distance can be subdivided into those occurring with the intermediation of the post and those occurring with the intermediation of devices, which render the interaction similar to either

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1 Corbin para 3.25
2 Carter on Contract [03-150]
3 Carter & Harland [235]
When the existing rules were conceptualised, the methods of communicating at a distance were few. Apart from personal delivery, or the use of agents, the post was the only viable means of conveying acceptance. The distance between the parties always implied a delay between dispatch and receipt of the letter. The communication landscape has changed. Distance is no longer synonymous with delay. Internet-based methods of communication can reduce the interval between dispatch and receipt to the point of non-existence. This lack, or brevity, of delay is often accompanied by a high risk of non-delivery. Neither the principle, nor the exception, was designed to address such scenario. Despite the accumulated body of case law there are few decisive guidelines that could be applied to novel communication scenarios.

The judges in the leading cases, Entores Ltd v Miles Far East Corporation\(^5\) ("Entores") and Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH\(^6\) ("Brinkibon") did not anticipate that their reasoning would form the basis for evaluating the expansion of the PAR to email, instant messengers and web-applications. Although the above cases are cited in practically all discussions regarding the time of formation, it must not be forgotten, that “there is no absolute rule as to the time when an acceptance by fax, telephone or telex takes effect, but the question depends in each case on the facts and reasonable expectations of the parties.”\(^7\) In his famous speech, Lord Wilberforce stated that cases must be resolved “by reference to the intention of the parties, by sound business practice and … by a judgement where the risks should lie.”\(^8\)

This chapter opposes the wholesale approach submitting all electronic methods of communication under one rule. It attempts to establish which methods should be subsumed under the principle and which should be governed by the exception. For the sake of brevity, whenever a differentiation between the respective communication methods is not necessary, the term “electronic acceptance” is used.

It is suggested that the moment of formation should depend on the type of interaction provided by a given method. There are only two types of dealings: “at a distance” and “face-to-face.” Different methods enable a communication process resembling one or the other.

Throughout the discussion it must be remembered that the principle of receipt derives from face-to-face dealings, whereas the exception developed specifically around the post.\(^9\) It can also be assumed that a principle that originated from a perfect communication scenario cannot be automatically applied to govern different situations.

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\(^4\) See Restatement (Second) Contracts, para 64
\(^5\) [1955] 2 QB 327
\(^6\) [1983] 2 AC 34
\(^7\) Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 42; see also: B Coote, The Instantaneous Transmission of Acceptances (1971) 4 NZULR 331
\(^8\) Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 42
Roadmap

[6.2] This chapter further analyses the practical application of the offer and acceptance model in the online environment. Focusing on the effectiveness of acceptances, it commences with describing the principle of receipt and analyses the basic concepts used in its formulation. Attention is devoted to the tension between the “meeting of minds” and the objective theory of contract as well as to the division between dealings at a distance and face-to-face. Subsequently, the chapter presents the exception: the postal acceptance rule. A brief look is taken at its origins, justifications and criticism. The discussion of the principle and the exception is aimed at establishing the premises of their application to novel communication scenarios.

The discussion must be preceded with some general considerations: which technological factors must be included in the discussion? Should the effectiveness of electronic acceptances depend on specific elements of the communication infrastructure or on the devices used by the contracting parties?

Determining the moment of effectiveness of electronic acceptances is usually presented in the form of the question “does the PAR apply to email?” The arguments are therefore based on a reverse operation: “should the exception apply to electronic acceptances?” instead of “should the principle apply?” It might be argued that only the first question merits attention as the principle of receipt applies by default. Although it appears more appropriate to examine effectiveness in relation to the principle, not the exception, this chapter follows the “traditional” line of argumentation and tests the validity of the popular arguments against the application of the PAR to email. After analysing the technical assumptions underlying most arguments, some novel elements are introduced into the discussion. Email is compared to the post, to establish whether there are sufficient similarities to subsume it under the PAR. The relationship between reliability and risk allocation is explored.

Next, it is examined whether emailed acceptances “fit” under the principle. The focus is placed on the characteristics of face-to-face dealings. It is analysed, which methods of communication can replicate those characteristics. The solution provided in the Restatement (Second) of Contracts is analysed in some detail. Email is contrasted with instant messengers and web-based interactions.

The discussion centres around email as to-date legal analysis has focused almost exclusively on this method. Email also constitutes a useful point of comparison with other Internet-based communication methods. The chapter concludes with a summary of the analysis and combines it with the conclusions of the previous chapter.

Caveats and Clarifications

[6.3] While most of the theoretical ground has been covered by years of legal analysis, there are some “dormant” problems in the formulation of the principle. This chapter explores the grey area created by unexpected permutations of old elements in novel communication scenarios. It is not attempted to provide universal rules. As in the case of differentiating between offers and invitations, the moment of effectiveness depends on the intention of the parties. The question is one of identifying the additional factors that should be taken into account when making the choice between effectiveness on receipt and effectiveness on dispatch.

It could be expected that in light of the novel communication landscape, the PAR is facing its demise. If the PAR developed around letters and the post, why even examine the possibility of its application on-line? Upon closer examination, it turns out that the PAR may be facing its revival in relation to some electronic methods of communication. It cannot be discarded solely on the ground that everything on the Internet “happens fast.” Because messages are transmitted in the form of electrical impulses, the contract formation process is generally accelerated. Speed of transmission alone is not decisive. Moreover, the PAR forms part of the legal landscape in the United States, which are the biggest e-
commerce economy.\textsuperscript{10} Effectiveness on dispatch remains a valid option. Similarly, it does not suffice to state that the PAR is based on convenience. This view disregards the historical background of the rule and does not provide any guidance as to its potential application or rejection.

This chapter deals only with “effectiveness.” It does not attempt to define either “dispatch” or “receipt.” Such separation is dictated by the increased complexity of the communication methods and the necessity to isolate certain problems. The effectiveness of electronic acceptances raises different questions than the definition of “dispatch” or “receipt.” To date, such separation was not necessary as neither dispatch nor receipt warranted a separate legal analysis.

The communication landscape has not only changed but is still changing. It is often impossible to make broad statements about how things work in general. Such assumptions can only be made in relation to the division between email, instant messengers and web-based interactions.\textsuperscript{11} Even this division can be accused of some artificiality. A recurring thread in the discussion is the observation that it is often too soon to make certain assumptions, too soon to regard certain behaviours as reasonable. It is important not to over-exaggerate the exceptions, or treat certain exceptional situations as a rule. Both e-commerce and the Internet itself are still in their formative period. Different people use Internet-enabled communication methods differently. Different people have differing expectations as to the speed and reliability of the chosen method.

Determining the precise moment of contract formation has important implications.\textsuperscript{12} All on-line contracts are formed at a distance, with the contracting parties often being in two different jurisdictions. Absent agreement, the moment of formation may determine the applicable law of the contract, including its implied terms. As the place of formation depends on the place acceptance became effective, establishing where? must be preceded by establishing when?\textsuperscript{13} The moment of formation also directly affects the contents of the contract. It determines such contents “according to what the offeree knew or had notice of at the time of sending the letter of acceptance.”\textsuperscript{14}

This chapter does not discuss any of the model laws or conventions. None of them contains substantive rules governing the time of formation. Only Art 18 (2) CISG provides that acceptance becomes effective “at the moment the indication of assent reaches the offeror.” International uniformity or compliance with the CISG, however, are not the purpose of this analysis and would prejudice its outcome.

**THE PRINCIPLE**

\[6.4\] The principle can be formulated as follows: “acceptance must be communicated.”\textsuperscript{15} This statement is open to a wide interpretation, as communication can be tied to a number of events and does not indicate the specific moment that concludes the formation process.\textsuperscript{16} A further refinement of the term is required. The definition of “communication” depends on how far one departs from the classic “meeting of minds” and how much focus is placed on the objective theory of contract. On one hand, agreement is reached when the offeror knows that the offer has been accepted.\textsuperscript{17} On the other, offerees may not be able

\textsuperscript{12} Carter & Harland [236]
\textsuperscript{13} J Hogan-Doran, Jurisdiction in Cyberspace: the When and Where of On-line Contracts (2003) 77 ALJ 377
\textsuperscript{14} P Goodrich, above at note 9 p 15
\textsuperscript{15} Carter on Contract [03-310]
\textsuperscript{16} see: P H Winfield, Some Aspects of Offer and Acceptance (1939) 55 LQR 499 at 506 for a review of different systems of determining the moment of formation
\textsuperscript{17} Carter on Contract [03-310]; P Goodrich, Habermas and the Postal Rule (1996) 17 Cardozo L Rev 1457 at 1463
to ensure anything beyond the receipt of the letter or telegram and acceptance must be tied to an objectively ascertainable event.

When parties deal at a distance, communication need not be actual, it suffices that the offeree enables the offeror to take cognisance of acceptance, such as by delivering it to his address or telex machine, even if the latter are unattended.\textsuperscript{18} The requirement to communicate acceptance is therefore not absolute.\textsuperscript{19} Communication is actual and immediate only in face-to-face dealings. While a popular textbook statement is that acceptance must be communicated, it is common to refer to the principle of receipt. The principle appears more intuitive but is also more difficult to formulate in light of the objective theory of contract. A closer look must be taken at its constituent parts.

"Communication"

\textsuperscript{[6.5]} "Communication" is the imparting or interchange of information, the process of conveying information especially by electronic or mechanical means and the act of transmitting information by telephone, radio, etc.\textsuperscript{20} "Communication" can therefore denote notification or transmission. This distinction becomes important when comparing dealings at a distance with dealings face-to-face. "Communication" is traditionally associated with "receipt." "Receipt" can imply knowledge (bringing the fact of acceptance to the offeror’s mind)\textsuperscript{21} or the end of transmission (arrival at a machine).\textsuperscript{22} Hereinafter, when italicised, the term communication means notification.

"Means," "method" and "medium"

\textsuperscript{[6.6]} The term "medium" indicates an intervening substance through which an effect is produced or the channel of communication, such as speech or writing.\textsuperscript{23} "Medium" can also be a means of conveying information, a carrier of information, like paper or electric impulses. "Method" is described as a mode of procedure.\textsuperscript{24} In common parlance "medium" and "method" are synonymous with "means." The above terms are also used interchangeably with "device." As a result, it is unclear whether the choice depends on the devices, methods or media used to communicate acceptance.

Although used interchangeably, the above terms refer to different things. When the post is used, the letter is the physical carrier, the medium. The post is the method of transmission; there is no intermediating device. In the case of electronic messages the carrier of information takes the form of copper wires or fibre optics, the means, or devices, are computers and various network elements. The method can be described as one of the communication services like email, instant messengers or web-based communications. Sometimes the Internet itself is described as a medium. Hereinafter, "method" is used in its widest sense, without reference to any particular carrier, device or protocol.

\begin{itemize}
\item \textsuperscript{18} Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 42; Entores Ltd v Miles Far East Corporation [1965] 2 QB 327 at 331; Shelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela) [1995] 2 Lloyd’s Rep 249; Tenax Steamship Co Ltd v The Brimnes [Owners] [1975] QB 929; Anson v Trump [1998] 1 WLR 1404
\item \textsuperscript{19} Carter on Contract [03–310]; it is unclear whether "actual communication" requires that acceptance is brought to the offeror’s mind, see: Bressan v Squires [1974] 2 NSWLR 460 at 461
\item \textsuperscript{20} Macquarie Dictionary
\item \textsuperscript{21} Holwell Securities Ltd v Hughes [1974] 1 All ER 161 at 164; Carill v Carbolic Smoke Ball Co [1893] 1 QB 256 at 256, 269; Tallerman & Co Pty Ltd v Nathan’s Merchandise (Victoria) Pty Ltd (1957) 98 CLR 93; Tenax Steamship Co Ltd v The Brimnes [Owners] [1975] Q B 929 at 970
\item \textsuperscript{22} Shelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela) [1995] 2 Lloyd’s Rep 249; Tenax Steamship Co Ltd v The Brimnes [Owners] [1975] QB 929
\item \textsuperscript{23} Macquarie Dictionary
\item \textsuperscript{24} Macquarie Dictionary
\end{itemize}
"At a distance" and "face-to-face"

[6.7] Despite its importance, the distinction between dealings "face-to-face" and "at a distance" is not clear. How far apart should parties be to remain "at a distance"? Is "distance" synonymous with "absence"? The "shouting across the river with planes passing overhead" example, crucial to Lord Denning’s reasoning in Entores illustrates the difficulty of drawing the above distinction. His Lordship described the situation as parties making a contract in the presence of each other.25 How wide was the river? Not wide enough to prevent the parties from hearing each other and perceiving each other’s presence. It can be assumed that distance turns into absence when the parties can no longer monitor the communication process and require devices to enable communication. It could also be claimed that absence requires not only a spatial but also a temporal separation. This lack of a clear-cut distinction becomes important when attempting to compare dealings at a distance with those occurring face-to-face.

As the principle has always been approached in an intuitive fashion, rather than based on consistent criteria, it proves difficult to transplant onto novel communication scenarios.

THE EXCEPTION

[6.8] When parties deal at a distance and acceptance is communicated through the post, it becomes effective when the letter is posted.26 A contract is formed even though the letter is delayed, lost and never delivered.27 For the PAR to apply the letter must be properly addressed and deposited.28 Effectiveness on dispatch does not depend on subsequent successful delivery,29 the PAR does not have a retrospective effect from the moment of receipt to the moment of dispatch.30 Furthermore, dispatch need not occur at a time that would enable the letter to be received before expiry of the offer.31 Any occurrences after dispatch, including receipt itself, are irrelevant. The application of the PAR is, however, confined by the construction of the offer: it cannot lead to undesirable or absurd results, such as in cases where the requirement of actual communication must be presumed.32 Is it the post or the letter that invoke the exception? The letter is the physical carrier, or medium, the post is the method of transmission and delivery. The PAR does not apply when letters are delivered in person or by courier,33 or when parties deal face-to-face, even if they exchange letters. Assumedly, it is not the letter but the post, which underlies the exception. At the same time, in the early days telephones were

25 Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 332
26 Carter & Harland [231]; Henthorn v Fraser [1892] 2 Ch 27 at 33; Dunlop v Higgins (1848) 1 HLC 381 at 409
27 Carter & Harland [231]
28 Re London and Northern Bank: Ex parte Jones [1900] 1 Ch 220; Re Imperial Land Co of Marseilles, Townsend’s Case (1871) LR 13 Eq 148 at 150. In the United States, depositing a letter with prepaid postage with the post office raises a presumption that it reached its destination, see: Re Cameron Estate 130 A 2d 173 (Pa 1957). In England and Australia such presumption is absent.
29 Re Imperial Land Company of Marseilles (Harris’ Case) (1872) 7 Ch App 587 at 592, 597; Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 223
30 Re Imperial Land Company of Marseilles (Harris’ Case) (1872) 7 Ch App 587 at 592; Potter v Sanders (1846) 6 Hare 1
31 for opposite approach see: Equity Fire & Casualty Co v Traver 953 SW 2d 565 (1997)
32 Tallerman & Co Pty Ltd v Nathan’s Merchandise (Vic) Pty Ltd (1957) 98 CLR 93 at 111-112; Holwell Securities Ltd v Hughes [1974] 1 All ER 161; Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994] 1 VR 74; see also Corbin para 3.24
33 But see: Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 237
in the domain of the post office and both teleaxes and telegrams were sent from the post. Yet, no attempt was made to extend the PAR solely on the basis of postal intermediation.\textsuperscript{34}

Effectiveness on dispatch can also be regarded as a derivative of distance and the resulting delay. Consequently, the PAR could be considered whenever parties a) deal at a distance and b) use a method that involves an interval between dispatch and receipt. When the PAR was first conceptualised, distance always implied delay. There was also a direct relationship between the two factors: the greater the distance between the contracting parties, the longer the delay.

The PAR continues to generate academic debate and criticism. Admittedly, it is only in the area of its potential adoption to "more recent technologies where justifications for the rule retain their importance."\textsuperscript{35} It was also observed that "the postal exception may well be more significant than the standard rule."\textsuperscript{36} Despite being the exception, the PAR commands more academic attention then the principle and forms the basis of most analyses regarding the effectiveness of electronic acceptances.

The PAR was applied to telegraph,\textsuperscript{37} but not to telephone,\textsuperscript{38} telex\textsuperscript{39} or facsimile.\textsuperscript{40} It is argued that "this reluctance to extend the rule any further ... is proof that the law recognises what a radical departure from the fundamental principles of contract law this rule is."\textsuperscript{41} It must be noted, however, that in the US the PAR applies to communication scenarios that in Australia are governed by the principle of receipt.\textsuperscript{42}

\section*{Justifications}

\textbf{[6.9]} Textbook explanations of the PAR are often "straightforwardly cynical in tenor."\textsuperscript{43} The PAR is based on convenience,\textsuperscript{44} the provision of a sense of finality\textsuperscript{45} or simply regarded as arbitrary.\textsuperscript{46} It avoids an endless exchange of confirmations of receipt.\textsuperscript{47} and concludes the contract at the earliest possible moment.\textsuperscript{48} Historically, the justifications of the PAR have varied: the post office has been regarded as the common agent of the parties\textsuperscript{49} or the appointed agent of the offeror.\textsuperscript{50} Thus, communicating acceptance to

\begin{itemize}
  \item \textsuperscript{34} P H Winfield, above at note 16 p 14
  \item \textsuperscript{35} P Goodrich, above at note 17 at 1462
  \item \textsuperscript{36} C Douzinas, R Warrington, Posting the Law: Social Contracts and the Postal Rule’s Grammatology (1991) 4 Int’l J
    for Semiotics Law 115 at 123-125
  \item \textsuperscript{37} Cowan v O’Conner (1888) 20 QBD 640 at 642. PAR also extended to telegram, with little analysis in Island Properties Ltd v Entertainment Enterprises Ltd (1983) 146 DLR (3d) 505 (Nfld TD); Bruner v Moore [1904] 1 Ch 305; Re Viscount Supply Co (1963) 40 DLR (2d) 501 (Ont SC) at 505
  \item \textsuperscript{38} Entores Ltd v Miles Far East Corporation [1955] 2 QB 327; Aviet v Smith and Sears! Pty Ltd (1956) 73 WN (NSW) 274
  \item \textsuperscript{39} Entores Ltd v Miles Far East Corporation [1955] 2 QB 327; Express Airways v Port Augusta Air Service (1980) Qd R 543; Brinkobon v Stahag und Stahlwarenhandelgesellschaft mbH (1983) 2 AC 34
  \item \textsuperscript{40} Reese Bros Plastics Ltd v Hamon-Sabelco Australia Pty Ltd (1988) 5 PBR 97325 (NSW CA); Egis Consulting Australia Pty Ltd v First Dynasty Mines Ltd (A Company incorporated in Canada) [2001] WASC 22; Eastern Power v Azienda Communale Energia & Ambiente (1999) 178 DLR (4th) 409 (Ont CA); Molodyski v Vema Australia (1999) NSW Conv R 55-446; Twynham Pastoral Co Pty Ltd v Anburn Pty Ltd unreported SC NSW 15 Aug 1989
  \item \textsuperscript{41} S Hill, Flogging A Dead Horse – The Postal Acceptance Rule and Email (2001) 17 JCL 2 at 14
  \item \textsuperscript{42} Corbin para 3.25
  \item \textsuperscript{43} P Goodrich, above at note 17 p 1464
  \item \textsuperscript{44} Carter & Harland [235]; see also: K N Llewellyn, Our Case-Law of Contract: Offer and Acceptance II (1939) 48 Yale L.J 779 at 792-798; but see D H Evans, The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence (1966) 15 ICLQ 553 at 556-561, who cites 11 reasons for the rule.
  \item \textsuperscript{45} Adams v Lindsell (1818) B & Ald 681 at 683
  \item \textsuperscript{46} Corbin para 3.24; S Williston, A Treatise on the Law of Contracts, 4\textsuperscript{th} ed, vol 2, New York 1991, par 6:34
  \item \textsuperscript{47} Adam v Lindsell (1818) B & Ald 681
  \item \textsuperscript{48} Carter on Contract [03-390]
  \item \textsuperscript{49} Dunlop v Higgins (1848) 1 HLC 381; Wright v Bigg (1852) 15 Beav 592
\end{itemize}
the post equated communication to the offeror.\textsuperscript{51} The latter argument was replaced with the view that the post is only a carrier of letters.\textsuperscript{52} Another justification was the fiction of continuing assent\textsuperscript{53} but this view has long been abandoned.\textsuperscript{54}

Most explanations of the PAR combine choice, control and risk allocation: the offeror (who is the addressee of the acceptance) chose the post and should therefore bear the resulting risks.\textsuperscript{55} He or she could have protected him- or herself by stating that acceptance is effective upon communication.\textsuperscript{56} Furthermore, the offeree (who is the sender of the acceptance) has done all he or she can by posting the acceptance as instructed by the offeror.\textsuperscript{57} The justification for posting being the decisive moment is that the offeree has put the letter out of his or her control and done an extraneous act, which shows that each side is bound.\textsuperscript{58} An important explanation is the protection of the offeree: the PAR terminates the offeror’s power to revoke upon the occurrence of an event under the offeree’s control.\textsuperscript{59} Effectively, it extends the duration of the offer.\textsuperscript{60}

The PAR places the risk of transmission and receipt on the addressee. Once the letter is dispatched, the sender is “not answerable for casualties occurring at the post-office.”\textsuperscript{61} Logically, if control ceases, risk should cease.\textsuperscript{62} The risk borne by the offeror is small: he or she trusts a method, which in principle does not fail.\textsuperscript{63} Historically, posting was equated with certainty of delivery based on the reliability of the post.\textsuperscript{64}

\textsuperscript{50} Byrne v Leon van Tienhoven (1880) 5 CPD 344
\textsuperscript{51} Dunlop v Higgins (1848) 1 HLC 381; Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 221
\textsuperscript{52} Henthorn v Fraser [1892] 2 Ch 27 at 35-36
\textsuperscript{53} Cooke v Oxley (1790) 3 Times Reports 653
\textsuperscript{55} Dunlop v Higgins (1848) 1 HLC 381 at 398
\textsuperscript{56} A H Hudson, Retraction of Letters of Acceptance (1966) 82 LQR 170
\textsuperscript{57} Dunlop v Higgins (1848) 1 HLC 381 at 398; Re Imperial Land Co of Marseilles (Wall’s case) (1872) LR 15 Eq 18 at 25
\textsuperscript{58} Brogden v Metropolitan Railway Co (1877) 2 App Cas 666 at 669, 691. The assumption that a letter can be retracted formed the basis for dispensing with the mailbox rule in two controversial US Court of Claims cases. See Rhode Island Tool Co v United States 128 F Supp 417 (Ct Cl 1955); Dick v United States 82 F Supp 326 (Ct Cl 1949). These cases have not been followed. It is now generally accepted that the possibility of withdrawal alone is not a sufficient basis for dispensing with the PAR. See: P Fasciano, Internet Electronic Mail: A Last Bastion for the PAR (1997) 25 Hofstra L Rev 971 at 982; see also: C L Pannam, Postal regulation 289 and Acceptance of an Offer by Post (1960) 2 MULR 388. In Morrison v Thoelke 155 So 2d 889 (Fla CA 1963) it was stated that the change in postal regulations allowing withdrawal of a letter is an insufficient basis for dispensing with the mailbox rule.
\textsuperscript{59} Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 220; Re Imperial Land Co of Marseilles (Harris’ Case) (1872) LR Ch Ap 587 at 594; for an interesting explanation of the historical origins of the PAR see: P Goodrich, above note 9, who traces the rule to ecclesiastical law and the protection of the offeree.
\textsuperscript{60} R Craswell, Offer, Acceptance and Efficient Reliance (1996) 48 Stan L Rev 481 at 519
\textsuperscript{61} Re Imperial Land Co of Marseilles; Townsend’s Case (1871) LR 13 Eq 148 at 150; see also Dunlop v Higgins (1848) HLC 381
\textsuperscript{62} Dunlop v Higgins (1848) HLC 381 at 398
\textsuperscript{63} Household Fire and Carriage Accident Insurance Co v Grant (1879) LR 4 Ex D 216 at 223
\textsuperscript{64} Stidolph v American School in London Educational Trust Ltd (1969) 20 P & C R 802 at 805; S Gardner, Trashing with Trollope: A Deconstruction of the Postal Rules in Contract (1992) 12 Oxford J of Legal Stud 170 at 184; see also: I R Macneil, Time of Acceptance: Too Many Problems for a Single Rule (1964) 112 U Penn LR 947 at 958 speaking of likelihood of receipt; see also: Morrison v Thoelke 155 So 2d 889 (Fla App D2 1963), “…delay or misdirection of a letter of acceptance is beyond the realm of possibility.”
Two general observations must be made before proceeding. First, effectiveness on dispatch can hardly be regarded as an arbitrary choice: dispatch is the first objective manifestation of intention by the offeree. It is therefore fair to ascribe legal meaning to this particular event. Second, due to the difficulty in formulating the principle, the PAR can be regarded not as an exception to the principle of communication but only to the requirement of receipt. Due to the reliability of the post, the PAR assumes that the letter will be received and its contents communicated.

Without delving into the numerous criticisms of the PAR, which are described elsewhere, a number of arguments are made upfront. General criticism must be distinguished from arguments against its extension to electronic acceptances.

**Offeree protection?**

[6.10] Protection against revocation cannot be used as an argument against the PAR’s potential applicability to electronic acceptances. Unquestionably, the offeree can protect himself or herself by purchasing an option. At the same time, it can be the offeree who chose the method of acceptance and controls the communication process. As indicated earlier, a party can maintain the position of the offeree and prescribe the transaction procedure. The roles of offeror and offeree are often difficult to discern and arbitrary. Protection is unwarranted if the offeree retains mastery of the offer.

Despite this arbitrary role allocation, it can be assumed that one of the parties chose the method of acceptance. Admittedly - with the full realization of the implications of such choice, including the probability of successful receipt. It can be assumed that the other party deserves protection against the risks inherent in the method imposed by the other. In sum, it not necessarily the offeree who requires protection and the event one must be protected against is not necessarily revocation.

It is also claimed that the offeree can protect him- or herself by instantaneously communicating the acceptance to the offeror. This view disregards the question whether communicating acceptance by an instantaneous method is permissible. If all acceptances could, by default, be communicated by phone or instant messengers, offerees would be entitled to ignore requests regarding specific methods of acceptance. Furthermore, instantaneous methods of communication may be expensive or unavailable. There being no single widely accepted standard for instant messaging or Internet telephony and no centralized directory mapping names onto electronic addresses, offerees may be unable to accept by instantaneous means.

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65 R A Samek, A Reassessment of the Present Rule Relating to Postal Acceptance (1961) 35 ALJ 38 at 40
66 B Coote, above at note 7 p 337; nothing in the wording of Adams v Lindsell (1818) B & Ald 681 suggests that the PAR is an exception or derogation.
67 S Williston, above at note 46 para 6:32
68 Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 235 by Bramwell J; P Goodrich, above at note 18 at 1473
69 B Eisler, Default Rules for Contract Formation By Promise and the Need for Revision of the Mailbox Rule (1991) 79 Ky L J 557 at 566
70 Treitel p 25
71 See Chapter 5 [5.16]
72 W A Dewhurst & Co Pty Ltd v Cawrse [1960] VR 278 at 284
73 P Goodrich, above at note 9 p 15
74 B Eisler, above at note 69 at 567; A H Hudson, above at note 57 at 172
Intention?

[6.11] The time of contract formation depends on the intention of the parties, in particular, on the construction of the offer. The search is, however, for a default rule - absent a clear expression of intention by the offeror. The only objective indication of intention is the choice of communication method. Arguments that the offeror could have protected him- or herself by requiring actual communication are therefore futile. They assume the offeror’s knowledge that a given method invokes the PAR. The PAR applies only where the post is “contemplated”. It applies because the post is used, not because effectiveness on dispatch is intended. It is questionable whether the offeror would have chosen the post if he or she realized the implications of such choice. Furthermore, intention cannot be imputed if the method of acceptance is imposed.

In sum, neither the protection of the offeree nor the intention of the offeror can serve as decisive criteria in applying or rejecting the PAR.

GENERAL CONSIDERATIONS

[6.12] Which technological factors merit attention in making the choice between the principle and the exception? The aim is to establish universal criteria that could withhold technological change and avoid the necessity of re-examining problems of effectiveness whenever a new method or communication device is introduced. Only non-variable factors can constitute such criteria. Factors that refer to the physical transmission itself and remain transparent to the contracting parties must be distinguished from those, which directly affect the communication process and serve to ascertain whether it resembles one of the default communication scenarios, i.e. face-to-face or at a distance.

As indicated in Chapter 2, email, instant messengers and the web “operate” on the application layer of the TCP/IP protocol stack and are independent of the connection type, intermediating hardware or transmission method. Most Internet users are only aware of the application layer, especially the web and email. From the user’s perspective, the Internet is transparent – except when network congestion calls it to his or her attention. While technological factors specific to the remaining layers could be ignored, some recur in legal arguments; others have a minimal impact on the quality of the communication process.

The following paragraphs examine whether the time of formation should depend on the communication devices, connection types, transmission media, communication methods or protocols.

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75 Carter & Harland [231]
76 M A Eisenberg, Expression Rules in Contract Law and Problems of Offer and Acceptance (1994) 82 Cal L Rev 1127
77 A H Hudson, above at note 56 at 172
78 Carter on Contract [03-360]
79 The Law of Contract par 2.230; Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 217, 227
80 Bressan v Squires [1974] 2 NSWLR 460
81 See Chapter 2
Transmission

[6.13] It is often stated that email travels in packets.83 So do all other messages on the Internet. After all, the Internet is a packet-switched network and the disassembly of the payload into packets at the transport layer is its inherent characteristic. Email, instant messengers and web-based interactions, however, provide different communication possibilities, which are unrelated to the manner of transmission. The claim that the “packetized” transmission of messages affects contract formation principles implies that different rules should apply depending whether the postal service carried a letter by train, submarine or spaceship. Such differentiation has, of course, never been made. Similarly, no one has ever questioned the comparison of telephone conversations to face-to-face dealings on the ground that the parties used mobile phones. Although there are substantial differences between the manner voice is carried over traditional telephone networks and mobile networks, the communication process is identical. Depending on which layer of the TCP/IP stack is examined, electronic acceptances take the form of text, strings of 1s and 0s or electrical impulses. Arguments cannot be constructed on the basis of an arbitrary selection of technical features, which are either layer-specific or apply to all Internet-based communications. To the contracting parties, packets are transparent and have no impact on the communication process. Arguments that email is instantaneous because it travels in packets are inherently flawed and must be rejected.

Furthermore, electrical impulses travel at different speeds over copper, coaxial or fibre-optic lines. The discussion of transmission speeds, popularly referred to as “instantaneity,” disregards issues of network latency. The physical carrier does not influence the communication process or the division into dealings at a distance or “as if” face-to-face. Differences of microseconds are not taken into account.

Connection type
[6.14] Parties may use dial-up or broadband connections. Each connection type provides different bandwidth thereby indirectly affecting the communication process. Not every connection is suitable for every communication method. For example, GPRS and dial-up connections may be inappropriate for VoIP as the bandwidth is too small for real-time voice applications. Both are, however, suitable for the use of instant messengers. Small bandwidth does not automatically preclude real-time interactions.

Intermediation

[6.15] All on-line communications are indirect. Indirectness can refer to the existence of multiple intermediaries, such as telecommunication carriers, or to the multiplicity of intermediating devices operating on various layers of the TCP/IP stack, like routers, switches, bridges and servers. The number and type of intermediating devices remains transparent to the parties and generally does not affect the communication process. Intermediaries closer to the end user may, however, influence the reliability and quality of the connection, as some ISPs guarantee a higher quality of service and more bandwidth. Similarly, the ownership of incoming and outgoing mail-servers affects the ability to dispatch and retrieve email messages as it implies control over server configuration.

Most importantly, the moment of formation cannot depend on the communication devices used by the parties. The reasons for this bold statement are numerous. First, one communication process can combine multiple devices: a message may originate on the phone and terminate on a telex machine. The originating device may differ from the terminating device.84 Which side of the transaction should be

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84 See: Express Airways v Port Augusta Air Services [1980] QdR 543, where acceptance was sent by telegram to the Post Office and then via telex to the offeror; Douglas J held, without a detailed explanation, that acceptance was
decisive: the offeree’s or the offerors? Second, due to a growing trend for convergence, one device can combine the functionalities of multiple devices. The distinction between phones and computers becomes blurred: most mobile phones carry the computing power of early personal computers. Telephone calls can originate on personal computers and terminate on fixed lines or mobile phones, email and instant messengers can be sent and received from mobile phones. As a result, the traditional focus on the communication devices used in contract formation must be abandoned.

**Method and Protocol**

[6.16] The resemblance of the communication process to either dealings at a distance or face-to-face depends on the method used to exchange contractual statements. The characteristics of such method depend on its underlying protocol(s). The relationship between “method” and “protocol” must be briefly explained. Email, Instant Messengers and web-based communications can be regarded as “methods,” whereas SMTP, OSCAR, XMP and HTTP are protocols. Each communication method relies on one or more protocols: Internet email uses SMTP, web-based communications are based on HTTP. Instant messengers lack a single standardized protocol, but share common features and provide an identical communication process. Moreover, email may use HTTP and web form input can be transmitted via HTTP or SMTP. The choice between the principle and the exception cannot be based on the protocol alone because different protocols can yield the same type of communication and some methods combine protocols underlying other methods. Protocols remain transparent to the user, whereas the method is chosen depending on the specific communication goal at hand, including the urgency of reply or the ability to reach the other party in real-time. Despite the foregoing, protocols must be examined to determine the characteristics of the respective methods.

In sum, the moment of contract formation cannot depend on the type of connection, medium of transmission, protocol or the intermediating devices. These factors are transparent to the contracting parties, unpredictable or purely random. Senders have no control over how their messages are transmitted and received. Addressees may not know how a message originated. All communications over open electronic networks occur in packets. The moment of contract formation cannot depend on the computer or device used for a particular transaction. Most importantly, this moment cannot be based on variables: the transfer of an acceptance may involve multiple devices, protocols, connection types and transmission media. The permutations between the aforementioned factors are numerous and can be different on each side of the communication channel. While bandwidth and network latency have a minimal impact on the quality of the communication process, they are not determinative of the type of communication: whether it resembles face-to-face or at a distance interactions. The focus remains on the application layer and the three main methods of exchanging contractual statements.

**DOES THE PAR APPLY TO EMAIL?**

[6.17] It is commonly stated that the receipt rule applies to instantaneous methods of communication, the PAR, where acceptance is communicated by a non-instantaneous method. Arguments against the application of the PAR to electronic acceptances are usually based on “instantaneousness” and “control.” It is unclear, however, whether instantaneousness refers to transmission or communication. It is also unclear to what extent the application of the exception depends on the communication devices used by.
the parties. Control relates to the sender’s ability to ensure receipt, which in turn is associated with knowledge of successful or failed receipt. Additional factors are risk allocation and reliability.

The following paragraphs test the technical assumptions of the arguments against the extension of the PAR to email. Following the traditional line of reasoning, the answer to the question “does the PAR apply to email?” requires the examination (a) whether email is instantaneous, and (b) whether the sender has control of the communication process.

**Being “instantaneous”**

[6.18] The alleged instantaneousness of email is the predominant reason most commentators refuse to subsume it under the exception. The term is used with little precision: email is called “absolutely,” “not completely,” “nearly,” “almost,” “virtually,” “more or less” or “in fact” instantaneous. Only few commentators suggest that email is not instantaneous. As the term is used to justify the choice between the principle and the exception and has important legal consequences a more clear and consistent meaning is desirable.

Is “instantaneous” a legal or a technical term? A legal definition permits a liberal approach and the adaptation of the term to the purposes of a given argument. A technical approach forces a more disciplined analysis. Interestingly, even if a purely “legal” definition is adopted, it must be admitted that instantaneousness is a question of fact. Maintaining a division between instantaneous and non-instantaneous methods of communication implies that at some stage courts will have to justify this division. A technical confrontation is unavoidable.

The term instantaneous means “occurring with no delay.” Another definition states: “occurring, done or completed in an instant.” Simultaneous refers to events “existing, occurring, or operating at the same time.” “Delay” and “instantaneousness” can be regarded as different sides of the same coin: if communication is instantaneous there is, logically, no delay. Qualifiers like “virtually,” “almost” or “more or less” permit the existence of some delay. How much delay is tolerable for communication to remain instantaneous?

The delay between dispatch and receipt comes in varying degrees. It ranges from days, in the case of horse-carts, to microseconds in the case of some electronic communications. Premising the PAR

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88 Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 337
91 Carter & Harland (232)
92 Carter on Contract [03-360] [03-390]
93 Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at [ ]
94 P Fasciano above at note 58 at 973; D Capps, Electronic Mail and the Postal Rule (2004) 15 ICCLR 207 207 at 208; V Watnick, above at note 83 at 182; L Davies, above at note 85 at 102
95 P Fasciano, above at note 58 at 1000
96 S Hill, above at note 41 at 24; Wilmot, Christensen & Butler [3.475], stating that certain methods will be regarded as instantaneous communication for the purposes of contract formation.
98 Macquarie Dictionary
99 As mentioned by Lord Wilberforce in Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 42
100 Macquarie Dictionary
exclusively on the length of delay necessitates a gradation: if the delay is longer than “x” acceptance is effective on dispatch, otherwise acceptance is effective on receipt.

A technical analysis

[6.19] Technically, email is an asynchronous, non-real-time, delayed access, store-and-forward method of communication.\footnote{101} Email messages are exchanged independently of each other, without establishing a simultaneously contiguous end-to-end traffic path between the contracting parties. Email systems comprise mail-clients, which are the originators and final destinations for messages, and mail-servers, which relay messages along the transmission path. The protocol underlying email, SMTP, is characterised by intermediate storage, message queuing, delays, retransmission and delivery attempts, which are usually abandoned after 4-5 days.\footnote{102} The transmission between intermediating mail-servers may be very fast or “almost instantaneous.” There is, however, no instantaneous transmission between the originating and the destination mail-clients: email messages do not travel instantaneously from the computer of the sender to the computer of the addressee.\footnote{103} Instantaneity can only refer to the speed of transmission between some of the relaying mail-servers. Furthermore, email is both a “store-and-forward” and a “store-and-retrieves” transmission mechanism. In store-and-forward, the network stores the message, until the receiving machine is ready to receive the message. In store-and-retrieve, the network (or the machine) stores the message until the user retrieves it.\footnote{104}

Email communications are characterised by a number of delays.\footnote{105} The first occurs between the moment the message is composed on the mail-client and the moment it is dispatched from the mail-server. The dispatch from the mail-server onto the transmission path is periodic,\footnote{106} similar to placing a letter in a mailbox and subsequent collection by a postal employee. The frequency of dispatch depends on the configuration of the mail-server. The second delay relates to the transmission process itself. The transmission may be delayed by network congestion or mail-server unavailability. Although the transfer between the first and the last mail-server is unlikely to occur without any delay, such delay may in fact be minimal. The third relates to the interval between the message entering the final mail-server and the moment it is accessed or retrieved by the addressee. It resembles the interval between the moment the letter is placed in the addressee’s mailbox and the moment it is retrieved.

It must also be noted that mail-clients request (i.e. pull), messages from mail-servers.\footnote{107} This operation is performed automatically, by configuring mail-clients to poll mail-servers at pre-determined intervals, or manually. An example is the “send/receive” function in the mail-client “Outlook.” Similarly, Apple Mail can be set to “check for new email” from one minute to one hour. Even with always-on


\footnote{102}RFC 2821, Simple Mail Transfer Protocol (2001) J Klensin, ed, pp 5, 10, 57

\footnote{103}Messages can travel from the sender’s mail-server to the addressee’s mail-server if they are in the same transport service environment, which is not the case if the parties communicate over an open electronic network; see: RFC 2821, p 6

\footnote{104}See: Toh See Kiat p 51

\footnote{105}J Hogan-Doran, above at note 13 at 384

\footnote{106}RFC 1123, Requirements for Internet Hosts – Application and Support, R Braden ed, (1989) p 58

\footnote{107}Technologies like blackberry or so-called push-email, enable the “pushing” of messages to the terminating device. They rely on the classic architecture but interpose an additional server between the incoming mail-server and the end-user. The message is pushed to the terminating device because the addressee previously configured a server or device to do so.
broadband connections, retrieval occurs periodically, as there is no permanent open session between the mail-client and the incoming mail-server resulting in the immediate display of new messages. It is the addressee who determines the frequency and manner of receipt.

The client-server architecture impacts on the instantaneousness of communication in the sense that there is no direct client-to-client transmission of messages and in that messages must be requested and retrieved by mail-clients from mail-servers. In light of the characteristics of the underlying protocols and the practical functioning of email it appears technically incorrect to call it a method of instantaneous communication.

Being “in control”

[6.20] The second argument against subsuming email under the PAR relates to “control.” The PAR assumes that upon posting the letter, senders lose control and cannot be held liable for any subsequent events. If senders retained control and were able to guarantee receipt, there would be no justification for making acceptance effective on dispatch. “Control” need not consist in the possibility to influence transmission by determining the exact route of a message or the moment of its delivery. It relates to the outcome of the communication process: knowledge whether receipt occurred or not.

Treitel combines “control” with “instantaneousness”: the PAR cannot apply to instantaneous methods of communication because “the acceptor will often know at once that his attempt to communicate was unsuccessful.” Citing Entores and Brinkibon, he states that the sender is responsible to make a proper communication, “[b]ut a person who accepts by letter which goes astray may not know of the loss or delay until it is too late to make another communication.” As a result, “control” is premised on the ability to ensure receipt or, at least, the possibility of knowing whether receipt occurred. It remains unclear, whether such knowledge should relate to successful or to failed receipt. Ensuring receipt presumes notice of communication failure, whereas confirmation of receipt appears to be a question of proof and non-repudiation. It effectively absolves the sender of any further obligations relating to the communication of acceptance.

A preliminary question arises: can the fact of receipt be determined without the addressee’s participation? This problem is illustrated in Lord Denning’s example of two clerks sending telex messages between offices in London and Manchester. It is assumed that both parties are present at their machines and that the addressee co-operates in ensuring receipt. Lord Denning insists that the sender knows, or has reason to know, that his or her acceptance has not been received. Lord Denning fails to note that once the message leaves the originating machine, the “reason to know” must be provided by the addressee or by the addressee’s machine in the form of an automatically generated notification.

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106 Commentators claiming that email is instantaneous may have been mislead by the speed of intra-company communications, when messages are transmitted within the same LAN. See: Fasciano, above at note 58 at 1001
107 The implications of the client-server architecture for the time of formation are discussed in Chapter 7. The purpose of this discussion is not establishing when receipt occurred but whether email is instantaneous
108 Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216; see also: Chiswick & Kelman p 79
109 S Hill, above at note 41 at 17; Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 43 per Lord Fraser of Tulybelton
110 Treitel p 26
111 Treitel p 26
112 “Unlike in the case of post the sender does not conclude their participation in the sending of a message at the time of first dispatch.” See: S Hill, above at note 41 at 25, Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 333, J Hogan-Doran, above at note 13 at 381
113 Greenstein & Feinman p 157; Ford & Baum pp 340, 341 for a discussion of non-repudiation of delivery and confirmation of receipt.
114 Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 333
Addressees may not be able to detect communication failures even if they await acceptances. It is not a question of correctly maintaining or attending the terminating device, there can also be a problem in the transmission channel. In such scenario, the addressee will not inform the sender of the communication failure. Senders can learn of communication failures, only if notifications to that effect are generated automatically, without the participation of the addressee. The “control” argument loses much of its force when the sender’s knowledge of failed or successful receipt depends on the discretion of the addressee or on the technical capabilities of his or her terminating device.

As the control argument seems to rely on the ability to obtain confirmations of receipt or failure notifications, it must be established whether such notifications are generated in the case of electronic methods of communication.

It is often claimed that in the case of email senders know within a short period of time whether a message has been received. This argument assumes that an inherent feature of email communications is the generation of acknowledgements of receipt or failure notifications. The following paragraphs test the veracity of this assumption by examining the protocols underlying email.

SMTP & Delivery Status Notifications

Theoretically, SMTP requires that the relevant mail-server or gateway issue a failure notification whenever a message cannot be delivered. A detailed analysis of the protocol and its extensions reveal a slightly different picture. Delivery Status Notifications (“DSN” or “notification,” popularly called “bounce message”) indicate conditions like: failed, delayed, or successful delivery, temporary failure or the gatewaying of a message into an environment that may not support DSNs. It is incorrect to assume that DSNs are always issued by the addressee’s mail-server. It is also incorrect to assume that notifications are generated automatically.

First, a notification is not issued if it was not requested. Senders may not be able to issue such requests as their email applications or mail-servers may not provide this feature. Second, the addressee’s mail-server may not support the generation of DSNs or may not be configured to do so. Technical capability must be distinguished from actual configuration. Notification requests may not be honoured. Furthermore, even if a mail-gateway supports the relevant SMTP extension, the mail system on the other side may not generate positive delivery notifications. A “relayed” notification is produced, indicating that no DSN can be sent. It cannot be overemphasized that SMTP does not always deliver the message to its final destination, i.e. the mail-server of the addressee. It may relay it into a different transport environment in which messages are no longer transported via SMTP. Effectively, senders are informed that their message reached some point in the transmission channel and that no DSN can be issued. Third, a notification may not be delivered because of a non-functional return address. Fourth, DSNs may be forged as easily as ordinary email. Most importantly, notifications are generally not issued because of security reasons, as they enable the validation of hosts on a network.

118 see also: Household Fire and Carriage Accident Insurance Co Ltd v Grant (1879) LR 4 Ex D 216 at 224
119 RFC 2821, pp 4, 61
121 RFC 3461, p 6
122 RFC 3461, p 21
123 RFC 3464, p 16
124 RFC 3464, p 21
125 RFC 3461 p 11
126 RFC 3464 p 22
Interesting situations arise when delay notifications are issued. As they can be received immediately after dispatch of the original message, it could be claimed that communication is instantaneous. The very notification, however, informs that the message is delayed and therefore communication cannot be instantaneous. DSNs may also be issued with substantial delay after the inability to deliver is discovered. What is the status of an acceptance when a delivery failure notification arrives after 2 days? To complicate matters, Apple Mail offers a “bounce message” option, enabling recipients to return messages: “it will appear that the message was sent to an incorrect address.” Addressees can generate failure notifications and deny receipt in order to prevent the formation of a contract. DSNs appear to be more an instrument of abuse than a method of controlling the communication process.

Message Disposition Notifications

[6.22] Message Disposition Notification (“MDNs” or “read receipts”) are sent by mail-clients or mail-gateways to report the disposition of a message after successful delivery. They can inform of several conditions: display, printing, deletion or refusal to provide an MDN. MDNs are generated only upon specific request. Not all mail-clients provide the option to issue such request. This begs the question: should the time of formation vary depending on the email application used? Only those senders who can request MDNs could be said to control the communication process.

MDNs can be generated manually or automatically. In the former case, recipients consent to the generation of the MDN on a per-message basis, in the latter, by setting a global preference. In other words, MDNs are not self-generated by the receiving system by default. The recipient’s consent is always required. Most importantly, the recipient is always free to ignore or deny such a request.

In sum, the generation of both DSNs and MDNs depends on recipients acquiescing to requests for such notifications and on the technical ability of their systems to generate such. For “knowledge of receipt” to support the control argument, all senders would have to be able to request and all delivering mail-servers or mail-clients would have to automatically, immediately and unconditionally generate notifications or confirmations. There is, however, no universal rule that DSNs and MDNs are generated whenever messages cannot be delivered or are delivered. Due to increasing security concerns and differences between mail-clients and mail-servers it is impossible to make any general assumptions.

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128 RFC 3461, p 14
129 Apple Mail 1.3.11 (v622/623), option available from “Message” menu
131 RFC 3798, p 2
132 See IMP version 2.2. The receipt of a confirmation depends on many factors outside of IMP’s control. For example, some mail-servers remove return receipt requests from mail before it reaches the recipient, some mail-clients allow users to select if return receipts should be honoured. Available at: www.horde.org/faq/user/imp/index.php#i2
133 RFC 3798, p. 13, note that if it is impossible to obtain such consent, e.g. the user is not online, an MDN should not be sent; p 4. In the case of IMAP, MDNs may not be sent if the same message store is accessed from different locations, see: RFC 3503, Message Disposition Notification (MDN) profile for Internet Message Access Protocol (IMAP), A Melnikov (2003)
134 RFC 3798, p 4
135 RFC 3798, p 6
136 RFC 3798, p 3
137 mainly due the possibility of discovering hosts on the network, see: RFC 3834, Recommendations for Automatic Responses to Electronic Mail, K Moore (2004) p 15
A final point must be made in relation to the “control” argument. The purpose of the PAR was to prevent an ad infinitum exchange of confirmations of receipt. Introducing MDNs and DSNs into the discussion creates the very situation the exception was designed to avoid. Apart from extending the contract formation process, acknowledgements of receipt raise a number of additional problems. Absent prior agreement, recipients have no obligation to confirm receipt. They can speculate at the sender’s expense by refusing to acknowledge receipt of what would otherwise be a valid acceptance. Much depends on whether the effectiveness of the acceptance is conditional upon being acknowledged. What is the status of an “unconfirmed” acceptance? Depending on the answer to this question, effectiveness may shift to the moment of acknowledgement or create a state of uncertainty for both parties. Acknowledgements may also be issued with a substantial delay or in a form, which is different from that of the acceptance. In sum, the offeree’s request for the offeror to acknowledge receipt of acceptance in a specific form within a specified time, distorts the contract formation process and gives the offeror the possibility to manipulate the moment of formation by delaying or refusing to acknowledge the receipt of acceptance.

There being no general obligation to confirm receipt or notify of failed receipt on the addressee’s side, it cannot be assumed that such acknowledgements or notifications will be issued. It is incorrect to claim that the sender of an email controls the communication process.

Reliability and Risk Allocation

[6.23] The two assumptions underlying the arguments against extending the PAR to email depend on a number of technical factors. While it remains debatable whether email is instantaneous, it can be assumed that senders are not in control of the communication process – at least with regards to the possibility to establish successful or failed receipt. It could therefore be claimed that the PAR should apply to email. Before arriving at this conclusion it must be examined whether email communications resemble those occurring via the post. The latter constitute the default scenario underlying effectiveness on dispatch. A comparison with the post reveals that there are other factors, apart from “control” and “instantaneity,” that must be taken into account.

Email and postal communications are structurally similar in the sequence of events: dispatch, transmission, intermediate storage and retrieval. Both are characterized by delayed access: an interval between the moment the message is received (end of transmission), and the moment the message is retrieved or accessed (notification). Both require the performance of an additional step to read the message or letter. The difference between them consists in the duration of transmission between the originating and the destination distribution platform. As email is transmitted in the form of electrical impulses, not carried by trains and aeroplanes, the delay between dispatch and receipt is shortened.

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139 D Capps, above at note 94 at 207
140 See: MLEC Art 14, “Acknowledgement of receipt” and the commentary thereto. See also: Cheshire & Fifoot [3.48]
141 See: MLEC Art 14 (3): “where the originator has stated that the message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received”. Art 14 (4) deals with the situation where the originator has not stated that the message is conditional upon receipt of an acknowledgement. In the latter situation, he must perform a number of steps, such as requesting the other party to confirm within a specified time, before he can treat himself as relieved from the legal implications of his message, if any. See: Guide to Enactment para 96.
142 Cheshire & Fifoot par 3.44, who state that electronic communications have some parallels with old-fashioned letters: “perhaps the postal rule will have a renaissance”; see also: S Christensen, Formation of Contracts by Email – Is it Just the Same as the Post? (2001) QUT LJJ at 33, who describes email as an “electronic version of the postal system.”
143 S Hill, above at note 41 at 21
The most important difference, however, is reliability. Reliability is a function of the risks inherent in the communication method and the ability to manage those risks. Unlike in the case of the post, the sender of an email does not trust a means which as a rule does not fail. The risk of receipt was placed on the offeror if such risk was minimal. Does this allocation remain justified if the risk increases? While not every properly addressed letter reaches its destination, the likelihood of successful receipt of an email is smaller than in the case of a posted letter. The post is associated with reliability and a quality of service prescribed by statute. The number of reasons precluding an email from reaching the intended mailbox, while transmission speeds and general Internet accessibility increase, the reliability of email is decreasing.

The more risks are involved in a specific communication method, the less reliable the method and the more important it is to establish rules of risk allocation. The risk of failed communication can be borne by either the offeree (sender) or the offeror (addressee). These risks are non-existent in face-to-face dealings. Whereas the principle of receipt is not designed to allocate risks, the PAR was conceived to deal with situations where due to the reliability of the post those risks are minimal. Both are difficult to map onto communication scenarios characterized by numerous novel risks.

Knowledge of successful or failed receipt is less important when a method is reliable. The fewer the risks involved, the greater the likelihood of receipt and the smaller the need for acknowledgements or failure notifications. If a method is reliable, arguments built around the “ability to ensure receipt” become redundant. If the method is less reliable, the risk of failed receipt increases. So does the necessity to confirm receipt or notify of communication failures.

The PAR is based not only on the possibility to commence performance at the earliest moment, but also on the need to avoid an exchange of acknowledgements. Effectiveness on dispatch is fair to the offeror (addressee) if the method is reliable. It seems less fair to the offeror if the likelihood of receipt decreases. Effectiveness on receipt combined with unreliability is not fair to the offeree (addressee). The only way to protect the latter is to require offerors to acknowledge receipt or notify them of communication failures. Otherwise, the offeree cannot commence performance or re-send the acceptance. This, however, leads to the very situation the PAR was designed to avoid: circular communications. It also requires that offerors be able to detect failed communication attempts and/or that their terminating

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144 Carter & Harland [232]; see also: Australia Post Annual Report 2004/05, p 19. Reliable, on-time delivery is a regulated performance standard prescribed by the Australian Postal Corporation Act 1989, section 28 (c). In 2004/2005 Australia Post delivered 94.9 % of domestic letters on time or early - against the regulated 94 % target. “Of the letters that did not meet our timetable standard, nearly all were delivered by the following day.” Independently monitored results show that 98.3 % of domestic letters were delivered on time or within one extra day. As stated by Lord Esher MR in Kemp v Wanklyn (1894) 1 QB 583 at 585: “The Post Office is the authority which, under its statutory powers, determines the ordinary course of the post - that is to say, how the letters shall be carried, and at what time they shall, as a general rule, be delivered within any particular district to the persons taken as a body who reside in that district.” See also: Bowman v Durham Holdings Pty Ltd (1973) 131 CLR 8 at 13

145 See Chapter 7 [7.11]

146 T Moors, Email Dependability, School of Electrical Engineering and Telecom, University of New South Wales, Australia, available at: www.eet.unsw.edu.au/~timm; K Martin, The Time Has Come to Ditch Email, The Register, SecurityFocus Published 1st June 2006: “[E]mail is a terrible mess. It’s dangerous, insecure, unreliable, mostly unwanted and out-of-control.” available at: http://www.theregister.co.uk/2006/06/01/ditch_email/print.html; J E Dunn, Yahoo accused of poor email service Tests find half its servers are shut down, Techworld 13 April 2006, available at www.techworld.com


148 J D Gregory, above at note 117 at 489

149 Sh Christensen, above at note 142 at 30
devices automatically generate failure notifications. As indicated earlier, these technical requirements are difficult to fulfill. Furthermore, acknowledgements of receipt and failure notifications, unless generated entirely without the participation of the addressee, enable speculation and distort the contract formation process. Neither the principle nor the exception produce a result that is fair to both parties.

Ultimately, the time of formation cannot depend exclusively on the statistical probability of receipt or on the length of the interval between dispatch and receipt. This would imply that the longer the delay or the more reliable a method in terms of delivery statistics, the greater the justification for effectiveness on dispatch. The length of delay and delivery statistics are subject to change and difficult to quantify. Both “reliability” and “instantaneity” constitute variable factors and necessitate the introduction of a gradation. Neither can form a decisive criterion for choosing between the principle and the exception.

It remains questionable whether email is instantaneous. The sender of an email has no control over the communication process, unless a number of technical conditions are met. Although structurally similar to postal communications, email is not as reliable as the post and increases the need for acknowledgements of receipt and failure notifications. It is difficult to state with confidence whether it can be subsumed under the exception. How does it fit under the principle?

**DOES THE PRINCIPLE APPLY TO EMAIL?**

[6.24] The principle of receipt derives from the paradigm situation of face-to-face dealings. There is no justification for effectiveness on dispatch if the communication process displays the same characteristics as dealings between parties who transact in each other’s presence. These characteristics must therefore be established. Subsequently, it must be determined which communication methods enable a communication process that is similar to face-to-face dealings.

Dealings face-to-face provide instantaneous communication: the manifestation of acceptance is concurrent with its notification. There is no delay between “dispatch and receipt” and between “receipt and notification.” The communication process is interactive: bi-directional, synchronous, imparting not only immediate knowledge of receipt but also ensuring a communication process without the dependencies inherent in dealings at a distance. No acknowledgements are necessary, senders know about receipt without the addressee’s participation. Both parties monitor and control the communication process, neither requires protection from the possibility of failed receipt. This is illustrated by Lord Denning’s examples in Entores: shouting across the river, with planes passing overhead, and talking over the phone with the line going dead in the middle of the conversation. In both instances the “sender” knows of the miscommunication without the participation of the other party because failures in transmission become immediately apparent. Face-to-face dealings are characterized by a parity in the communication process.

Are email communications sufficiently similar to face-to-face dealings to apply the principle? On one hand, email can be compared to the post, the main similarity being the existence of intermediating distributing platforms, periodic transfer and the mechanics of message dispatch and retrieval. On the other, email does not involve a substantial delay between dispatch and receipt in the way the post does.

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150 Chissick & Kelman p 80
151 “In a two-way communication, one party can determine readily whether the other party is aware of the first party’s communication, through immediate verbal response or, when the communication is face-to-face, there are nonverbal cues. When the communication is not instantaneous and is not face-to-face, there is much greater uncertainty as to whether the other party is aware of a particular transaction.” M S Baum, H H Perritt, Jr, Electronic Contracting, Publishing and EDI Law, New York 1991, p 321
152 Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 333, 334
153 assuming that the relevant points in the communication infrastructure between which the delay is measured are the mail-servers, see Chapter 7
such interval being one justification for the PAR.\textsuperscript{154} Furthermore, if both contracting parties attend their computers and regularly poll their mail-servers for new messages, it could be claimed that they can exchange messages “as if” they were having a conversation.

To determine which communication methods resemble dealings face-to-face, a number of issues must be examined. First, the difference between “transmission and “communication” is revisited, including their dependence on devices; second, the two-way nature of face-to-face dealings is discussed.

\textbf{Transmission and communication}

\textbf{[6.25]} Communications over the phone are treated like face-to-face dealings.\textsuperscript{155} This treatment, however, is only justified if both parties simultaneously use the device. When messages are left on answering machines it cannot be claimed that the communication process approximates the quality of face-to-face dealings.\textsuperscript{156} Communication is delayed due to the very fact that the other party is not present and only later accesses the message, assuming such technical possibility exists.\textsuperscript{157} According to Coote, the mere use of an instantaneous mode of transmission is never decisive by itself. “It would always be necessary to know in addition whether the parties were thereby placed in instantaneous communication with each other.”\textsuperscript{158} Devices providing instantaneous transmission need not provide instantaneous communication. Instantaneous transmission does not endow the communication process with the characteristics of face-to-face dealings as it does not provide one of the most important characteristic of such dealings: simultaneous awareness.\textsuperscript{159} While simultaneous awareness is not a prerequisite of a valid contract, it can serve to distinguish dealings at a distance from dealings face-to-face. The delay between receipt and communication is inherent in methods that do not require the presence of the addressee.

Communication devices can be used in multiple ways. Devices that operate automatically, like telex, can be attended by both parties thereby rendering the communication process similar to face-to-face dealings. Devices like the telephone, which is traditionally associated with the simultaneous presence of both parties, may also be used in a way that delays communication, such as when one party leaves a message on the answering machine for later retrieval.

In the case of email, instantaneousity relates to the speed of transmission to the addressee’s mail-server, it does not imply that the addressee immediately accesses or retrieves the message. When an emailed acceptance arrives at the mail-server, the addressee need not be present at his computer and the computer need not be on-line.\textsuperscript{160} The message need not be automatically and immediately delivered to the mail-client. Instantaneous communication is only possible on the assumption that both parties attend their machines and regularly request messages from their respective mail-servers.

An important clarification must be made. It is beyond doubt that receipt can occur outside of business hours or if the device is unattended or malfunctions.\textsuperscript{161} The present discussion, however, is not aimed at establishing when receipt occurs, but on determining when dealings at a distance can be equated with dealings face-to-face and whether such equation can be based on a specific intermediating device. If receipt is the legally relevant event, occurrences precluding receipt on the addressee’s side are

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\item \textsuperscript{154} Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 48 per Lord Brandon
\item \textsuperscript{155} Aviet v Smith & Searle Pty Ltd (1956) 73 WN (NSW) 274; Express Airways v Port Augusta Air Services [1980] Qd R 543; W A Dewhurst & Co Pty Ltd v Cawrse [1960] VR 278
\item \textsuperscript{156} Furmston, Norisada, Poole p 55; H B Thomsen, B S Wheble, above at note 147 p 133
\item \textsuperscript{157} R Nimmer, above at note 10 at 223, who implies that delayed access prevent application of the face-to-face analogy.
\item \textsuperscript{158} B Coote, above at note 7 at 342
\item \textsuperscript{159} D M Evans, above at note 44 at 555
\item \textsuperscript{160} See: SMTP Internet Draft, Internet Mail Architecture, D Crocker (2005) pp 3, 4
\item \textsuperscript{161} Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 AC 34 at 42
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disregarded. Receipt is either deemed or the addressee is estopped from denying it. \[^{162}\] If, however, acceptance are effective on dispatch, receipt is irrelevant altogether.

**Two-way**

\[^{[6.25]}\] An important characteristic of face-to-face dealings is their two-way nature. This is reflected in the Restatement (Second) of Contracts: “[a]cceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.” \[^{163}\] “Substantial instantaneousness” requires transmission without any substantial lapse of time. \[^{164}\] “two-way,” an interaction among the parties, so that “ambiguities and misunderstandings, if perceived, can be cleared up on the spot.” \[^{165}\] Accordingly, instantaneousness is only one of two necessary elements for the interactions to resemble face-to-face dealings. Despite the use of the term “medium” in relation to the telephone, it must be assumed that the Restatement refers to communication devices or methods in general.

The Restatement applies the PAR to situations where the parties are not in each other’s presence and the means of communicating acceptance involves a delay between dispatch and receipt. As in the case of “control,” the two-way characteristic is related to the possibility to obtain a confirmation of receipt or failure notification: “[a]n important premise upon which those rules are predicated is the notion that delayed media, such as mailed writings, do not provide either party the ability to verify in a timely fashion that receipt of a message has occurred and that the message as received is without errors.” \[^{166}\] The receipt rule should apply where the means of communication is instantaneous and bi-directional, the postal exception - where communication is time-delayed and unidirectional. \[^{167}\]

This approach is also reflected in Lord Wilberforce’s reasoning in Entores, who mentioned telephone alongside radio communications, not telex. \[^{168}\] Although in the case of radio, the parties cannot speak simultaneously on the same channel, every disruption is detected immediately and a repeat can be requested while the communication is still in progress. \[^{169}\] In the case of e-mail, the sender does not know whether the message has been received. \[^{170}\] As with letters, there is no feedback from the addressee or automatic notification of successful or failed receipt. Technically, email is a one-way method of communication. The two-way characteristic can be “re-created” if both parties attend their computers, regularly poll their mail-servers and automatically and immediately generate confirmations of receipt. The generation of notifications or confirmations presupposes certain technical capabilities of the addressee’s system and the addressee’s general willingness to co-operate, that is – communicate in real-time. The recreation of the two-way quality may therefore not be possible.

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\[^{162}\] Entores Ltd v Miles Far East Corporation [1955] 2 QB 327 at 333
\[^{163}\] Restatement (Second) Contracts, Par 64
\[^{164}\] Restatement (Second) Contracts, Par 64 comment a; see also: R Nimmer, above at note 10 at 222
\[^{165}\] Restatement (Second) of Contracts Par 64 comment b
\[^{167}\] S M Waddams, The Law of Contracts, 3\(^{rd}\) ed, Toronto 1993, pp 73, 74; A A Macchione, Overview of the Law of Commercial Transactions and Information Exchanges in Cyberspace – Canadian Common Law and Civil Law Perspectives (1996) 13 CIPR 129 at 133,134; see also Vocabulary of Terms for Broadband Aspects of ISDN, ITU-T Recommendation I.113 (06/97) which distinguishes between conversational services and messaging services. The former are characterised by a bi-directional exchange by means of real-time (no store-and-forward) information transfer, whereas the latter offer communication via storage units with store-and-forward message handling.
\[^{168}\] Brinkibon v Stahag und Stahlwarenhandelsgesellschaft mbH [1983] 2 A C 34 at 41
\[^{169}\] In the case of radio communication, which are technically one way at a time, custom has developed a distinctive way of communicating: every sentence after which a reply is expected is finished by the word “copy” or “over.” Parties often re-confirm by “do you read me?” questions.
\[^{170}\] Fasciano, above at note 58 at 1002
Email compared to Instant Messengers and Web-applications

[6.27] The difficulty in treating email communications at par with face-to-face dealings becomes apparent when email is compared to instant messengers and web-applications.

Instant Messengers

[6.28] In principle, dealings via instant messengers occur in real-time as both parties must be on-line to exchange messages. A message is typed and immediately appears on the screen, becoming visible to both parties at the same time.\(^{171}\) Dispatch and receipt are simultaneous; communication is instantaneous. Both parties monitor the communication process in real-time: if a message cannot be delivered, there is an immediate notification to that effect or the message does not appear on the screen. The communication process is interactive, instantaneous and two-way.\(^{172}\) Not only can senders ensure receipt, assuming that the immediate failure notification is interpreted as such, but also actual communication.

A number of clarifications must be made to avoid oversimplifications of the communication process via instant messengers and to illustrate the difficulty of replicating the characteristics of face-to-face dealings.

First, virtually all IM applications display so-called presence indicators, which inform whether a person is on-line or off-line. Users can also design their own descriptions. Status information indicates whether a particular person can or desires to be contacted.\(^{173}\) Some indicators change automatically, i.e. when a person is inactive for a predefined time the status turns to “idle” or “away,” others are changed manually, such as “do not disturb.” As a result, senders can tailor their communication behaviour to the addressee’s presence information. To complicate matters, whenever an addressee is on-line then – irrespective of his or her status as “away,” “idle” or “busy” – some IM applications can still technically receive messages. “Away” does not automatically imply that the addressee is “off-line.” As many computers remain on-line for months and parties do not log-off their IM applications, the “away” or “busy” status can be interpreted as an unwillingness to communicate. In other words, despite the technical ability to receive messages, the addressee’s status indicates delayed communication. Much depends on the wording of the specific status indicator.

Furthermore, some applications provide the option of “deliver now” or “deliver later” in the event the addressee is not online. Another variation is the possibility to send messages despite the addressee’s off-line status. Although a failure notification is displayed instantly, the message is delivered once the addressee returns on-line. In principle, senders know whether their messages are received and whether the addressee is on-line.

Second, IM applications differ in their treatment of addressee inaction. It may be the case that when a message appears on the screen, no failure notification is issued, yet no reply from the addressee is forthcoming. Some IM applications display information when the other party is typing, others don’t. Accordingly, absent failure notification the sender may not know why the addressee is not replying. The sender knows, however, that the message has been successfully delivered. Situations like these illustrate the inability to fully replicate the qualities of face-to-face dealings absent actual physical presence. As mentioned above, the latter is not a prerequisite of receipt, but an assumption of face-to-face dealings.

\(^{171}\) Differences of micro-seconds are disregarded.
\(^{172}\) Ch P Morrison, Instant Messaging for Business: Legal Complications in Communication (2004) 24 J L & Com 141 at 142, 143; see also: R Nimmer, above at note 10 at 222
Third, most popular instant messaging applications provide video conferencing as well as the possibility to place voice calls. In both cases, the communication process displays even more resemblance to face-to-face dealings. With increasing bandwidth it will become easier to fully replicate the characteristics of such interactions by ensuring visual contact.\footnote{H B Thomsen, B S Wheble, above at note 147 p 139}

Although there are technical differences between email and instant messengers, either method can be used in ways resembling the other: email can be used to exchange messages in real-time, when both parties attend their computers, instant messengers can be used for delayed communications when senders type messages for later delivery. Despite such possibilities and the numerous permutations introduced by presence information, it can be assumed that as a general rule, instant messaging applications provide instantaneous two-way communication, whereas email is one-way and its instantaneous character depends on a number of variables, including the length of permitted delay as well as mail-server and mail-client configuration. The communication process enabled by instant messengers unquestionably resembles face-to-face dealings.

Before moving on to web-based interactions, some further observations about the relationship between email and instant messengers must be made. Email is instantaneous in comparison to the post. Its speed is relative and depends on what it is compared to. There are also two groups of users. Those who are familiar with Internet-enabled communication methods and those who have acquired Internet skills later in life and are generally not comfortable with new technologies. The latter group perceives email as fast and essentially does not use instant messengers; the former regards email as slow and prefers instant messengers and text messaging.\footnote{T Van Riper, Instant Messenger Etiquette, available at www.forbes.com/2006/08/22/leadership-bizbasics-messaging} Taking into account today’s fast paced business environment, a delay of even five minutes may appear unacceptable to many. The focus of the business community and software suppliers, like IBM or Microsoft, is shifting to those methods of communication that enable instant communication. They key words are “on-line,” “presence detection” and “real-time” — the instantaneity of transmission is taken as a given.

Last but not least, it is possible to combine email and instant messengers. Gmail.com can serve as an example: being a web-based application it is accessible from any browser, without the need to download a separate email or instant messaging client. Users can chose between email and instant messaging from the same interface, depending on the specific communication goal at hand (e.g. urgency of reply, necessity to ensure immediate notification) and the communication status of the addressee, which is permanently displayed.

Web-based interactions

\[6.29\] As indicated in Chapter 5, web-based communications differ from to email and instant messengers and, due to the inherent immediacy of response, raise few problems with regards to effectiveness. The web was designed not as a method of communication but as a system of information retrieval. The interactivity of many websites is the result of applications running on the server- or client side.\footnote{See Chapter 3 [3.8], Chapter 8 [8.24]} A distinction between downloading a website and interacting with a website must be made. “Downloading” consists of requests for a particular resource and a response in the form of delivery of that resource.\footnote{RFC 2616, Hypertext Transfer Protocol -- HTTP/1.1 (1999) R. Fielding et al, sections 1.4, 4.1,} If the resource, generally in the form of a website, cannot be delivered, an error code is displayed. If the request in the form of typing in a URL or activating a link is treated as the dispatch of a message, then the response from the mail-server must be regarded as immediate. The process can be described as two-way:
users requesting web-sites can monitor the responses from the web-server in real-time.\textsuperscript{178} Depending on
the bandwidth, the requested resource “appears” on the screen with varying speed.

In the case of server-side or client-side applications, the process is not confined to information
retention but bears signs of interactivity. Users not only request websites but provide input by filling out
forms or activating buttons thereby actively modifying the contents of websites displayed (i.e. sent) in
response to their requests. Irrespective of whether user input is processed on the client- or on the server-
side, the response from the website is immediate and can be monitored by the user in real-time. Most
importantly, as the transmission of user input and the manner of its processing are prescribed and
controlled by the web-merchant, it must be assumed that the latter bears all the risks of failed receipt.
Although responses may be delayed by seconds, or even minutes in cases of server overload or slow
connections, the interaction can still be described as instantaneous and two-way. The delay may be
perceptible, but the communication process can still be monitored.

A comparison of email, instant messengers and web-applications demonstrates the difficulty of
subsuming all three under one rule.

\textbf{Conclusions}

\textbf{[6.30]} The question “should the PAR apply to email?” must be replaced with “which electronic
communication methods resemble dealings face-to-face and which fit better under the at a distance
category?” Instantaneity and control can be regarded as two of many characteristics of face-to-face
dealings and are not the only factors to be taken into account when making the choice between the
principle and the exception. The focus must be shifted from the speed of transmission and the control
of the communication process to the question whether the communication process is interactive and real-
time. If the interaction resembles face-to-face dealings, the application of the principle is unquestionable.
The PAR can only be debated if the interaction between the parties does not resemble face-to-face
dealings and one of the parties deserves protection from the risks of the communication method chosen by
the other.

If email was instantaneous, opponents of extending the PAR should be indifferent to what rule
applies, because dispatch would be simultaneous with receipt. The differentiation would matter only with
regard to the place of formation. Due to the un-reliability of email the choice between the principle and
the exception is crucial not because of the length of delay but because the increased risks of
miscommunication. Placing the risk of receipt on the sender is unfair whenever receipt depends on the
unpredictable workings of the transmission channel and the participation of the addressee. Acceptances
should therefore become effective on dispatch when the sender cannot guarantee receipt and the method
of acceptance is imposed by addressee.

The “traditional” classification into “instantaneous” and “non-instantaneous” must be
abandoned. As all Internet-based communication methods can be described as instantaneous, the choice
between the principle and the exception must be based on other criteria. The focus should be shifted from
communication devices to the characteristics of the communication process. The latter resembles either
dealings face-to-face or dealings at a distance. Due to the increasing complexity of the communication
landscape, this simple division should remain the starting point for all analyses. The decisive factors are
the characteristics of the communication process, not the means of achieving such.

Neither the principle nor the exception fit the new permutations introduced by email – speed of
transmission coupled with unreliability and lack of control. An important consideration is the “reliability”
of a given method of communicating acceptance as well as the fact who chose or imposed such method.

\textsuperscript{178} J Hogan-Doran, above at note 13 at 384
The party who chose a particular method of communicating acceptance should bear the risks inherent in its operation, including that of failed receipt.

If the method of acceptance is prescribed and indicated as exclusive, the offeror should bear the risks inherent in this method. The offeree is protected as acceptance becomes effective once the requested act is done. If there is a technical possibility to immediately learn of a communication failure, as in the case of web-based interactions or instant messengers, the offeree must re-send the acceptance. If the method is not prescribed but the circumstances of the offer indicate that acceptance must be communicated, offerees should choose a method that guarantees communication. Offerees may take into account the offeror’s presence information and select the method of communicating acceptance accordingly. The choice will also be based on the time left to communicate acceptance.

If the method is not prescribed, then – assuming it is reasonable in light of the offer – the offeree should ensure that the offeror knows that acceptance has taken place. It is in the offeree’s interest to commence performance at the earliest moment and avoid doubts as to the precise time when acceptance becomes effective.

The method of acceptance is chosen with the specific communication goal at hand. If the offeror must be reached in real-time and communication must be ensured, the offeree is likely to choose the phone or an instant messaging application, provided such methods are permissible. As Internet-based technologies enable the detection of the offeror’s presence and communication status, offerees can tailor their response to this information. If an immediate response is required, it is questionable whether the offeree would email the acceptance.

It is impossible to state one universal rule encompassing all acceptances communicated via email. The latter, although technically not instantaneous, can provide a communication process resembling face-to-face dealings. The ultimate decision lies in how much weight is given to such factors as “reliability” and who chose email to communicate acceptance. In the case of instant messengers and web-based interactions, however, it can be stated with confidence, that there is no other option but effectiveness on receipt.