



# A Critical Appraisal of the Sri Lankan Legal Regime Governing Electronic Communication of Offer and Acceptance under English Common Law and Electronic Transactions Act

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## Abstract

*This paper examines the legal framework governing the communication of offer and acceptance, considering both traditional and non-traditional means, under English Common Law. It also explores the challenges presented in the technological era. Additionally, the study analyzes the influence of the UNCITRAL Model Law on Sri Lankan jurisprudence. By conducting a systematic literature review, the paper highlights recent scholarly contributions. The common law rules on offer and acceptance have faced criticism due to their lack of clarity and their inability to address issues arising in electronic contracts. To address this, the research focuses on provisions of the UNCITRAL Model Laws and Sri Lanka's Electronic Transactions Act No.19 of 2006, examining how these modern laws address the timing of the communication between offeror and offeree via data messages. The findings provide valuable insights for entrepreneurs, traders, and stakeholders to effectively utilize electronic contracts and suggest avenues for future research in e-commerce. The paper concludes that comprehensive regulations encompassing data protection, privacy, security, intellectual property rights, dispute resolution mechanisms, consumer rights, and transaction transparency are crucial for the effective protection of e-transactions in Sri Lanka. By addressing challenges and concerns related to online trading, a more robust framework can be established.*

**Keywords:** Contract Formation , Electronic Commerce, UNCITRAL Model Law, Electronic Transactions

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## Introduction

It is virtually axiomatic that no modern nation can remain self-sufficient. Globalization has ensured that the movement of goods, services and people across borders takes place regularly, as a matter of course.<sup>1</sup> Thus, the emergence of ‘electronic commerce’ has radically changed the patterns and practices of the commercial world by opening new pathways. Electronic commerce has started to revolutionize spending habits and change the way how everyone does business<sup>2</sup>. The reasons for this are many and varied; globalization and dismantling trade barriers, the disposition of smart cards and the internet, etc. Admittedly, e-commerce has made significant changes in traditional contractual relationships as well. The internet has been identified as an effective medium not only for advertising and distributing product information but also for doing business transactions more efficiently. In this scenario, the traditional face-to-face, paper-based contracts turn less important. Instead, electronic contracts have become an essential part of our day-to-day life.

## Orthodox English Common Law Rules pertaining to the Communication of Offer and Acceptance: Adams vs Lindsell

In the absence of specific legislation on the law of contract, our legal system follows the English Common Law jurisprudence on the matter by virtue of section 3 of the Introduction to Civil Law Ordinance<sup>3</sup>. The English Common Law requires a clear assertion of

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1 Naazima Kamardeen, *Global Trade and Sri Lanka; Which way forward?*, Stamford Lake Publication, 2016 page 1.

2 B.A.R.R Ariyaratna, *Contracting in Cyber Space: A Comparative Analysis of Electronic Transaction Law in Sri Lanka*, 9<sup>th</sup>International Research Conference-KDU, Sri Lanka, 2016

3 Section 3 of the Civil Law Ordinance No.5 of 1852 reads as follows “ *In all questions or issues ....with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case..*”

'*Consensus ad idem* or assent' to presume the formation of a valid contract. The legal position is the same in private international law. The common law courts look at the external appearance of a transaction to discover the relevant point when the parties have exchanged the assent. It is an objective investigation of the facts and circumstances of each case. Moreover, the court considers the language the parties used to make an offer and accept. Awareness of the parties in relation to the material transaction is also relevant in determining the validity of a contract.<sup>4</sup> Prior to the invention of electronic devices and the internet, contractual assent was to be communicated via written letters or by word of mouth. The common law was ambiguous regarding the particular point of time upon which the parties' actual intention was communicated. Therefore, the author seeks to give a very brief outline of the English Common Law precedent governing relevant legal issues.

In *Adams vs Lindsell*<sup>5</sup>, the Court of Law was to determine the three crucial points of time when the acceptance of an offer was communicated; (1) when the letter of acceptance is put into the post-box, (2) when the letter of acceptance is delivered to the offeror's address, or (3) when the offeror actually reads the letter of acceptance. In the court's view, the first proposal was reasonably suited to the issue at hand and resolved that the acceptance communicated through the post reached the offeror upon the Act of posting. Posting a letter was considered an act of manifestation of the consent of the acceptor. The acceptor /offeree will not be required to adduce further evidence to prove his acceptance.

The Common Law makes it clear that where a contract is formed *inter presente*, the communication of the assent by both offeror and offeree takes place simultaneously. However, when a contract

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4 L E. Trakman and K Sharma, The Binding Force of Agreements to Negotiate in Good Faith, The Cambridge Law Journal Vol. 73, No. 3 (November 2014), p. 598

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

is formed *inter absentes*, by the usage of non-instantaneous communication tools, the exchange of assent manifests at a different point in time. The English Common Law principles are paradoxical on the issue of communication of assent: The first rule says, “parties must have full knowledge of communicated acceptance for a formation of a valid contract”,<sup>6</sup> and the second rule, the postal rule, says a valid contract can be formed even without the knowledge of an offeror, i.e. the Act of positing an acceptance constitutes the communication of acceptance. The author submits that the Common Law rules on the communication of contractual assent are ambiguous and unsuitable for the modern commercial world. However, with the modern technological invention of e-postal services, one can track the whereabouts of letters, and an offeree can ascertain with certainty if and when the letter of acceptance reaches the offeror. Therefore, *David Pugsley* strongly believes that the Receipt Rule should be recognized as a valid rule to regulate the communication of assent of the parties to a contract. “*We should therefore recommend that as a general rule, in accordance with the reasonable expectations of the man on the Clapham omnibus and the fundamental principles of the modern law of contract, a letter of acceptance should take effect, and the contract should therefore be complete when the offeror receives the letter.*”<sup>7</sup>

## **Law governing the Modern Form of Contract: Instantaneous and Near- Instantaneous Contracts**

Though there are some similarities between postal and e-mail communications, the common law courts do not treat them as the same communication medium. E-mails are not considered an instantaneous communication tool. The courts are reluctant to apply

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<sup>6</sup> Victor Morawetz, *The Elements of a Contract*, *American Bar Association Journal*, 1925, Vol. 11, No. 2pp. 87-90

<sup>7</sup> D Pugsley, ‘Postal Contracts’ (1976) 11 *Irish Jurist* 3, 6.

postal rules to e-mail communications. They preferred to apply the receipt rule<sup>8</sup> for the transmission of assent to take place via e-mail. In *Chwee Kin Keong v Digilandmal*,<sup>9</sup> the court was in favour of applying the receipt rule for the e-mail communication of offer and acceptance. It suggested that the “*general (or recipient) rule ought to govern e-mail transactions*” and even suggested that the possible abolition of the postal rule must be seriously considered. Therefore, the recipient rule is more convenient and relevant in instantaneous and near-instantaneous communications. A similar view was adopted in the case of *Jafta v Wildlife*.<sup>10</sup>

In *Entores v Miles Far East Corp*<sup>11</sup> the question of communication of an acceptance arose in the context of telex, an instantaneous form of communication. The English Court of Appeal held that a contract made using an instantaneous mode of communication is only complete when the offeror receives the acceptance. Accordingly, under instantaneous communication, the external manifestation of assent reaches the offeror when the acceptance message reaches him. Yet, there is another legal question to be resolved. **When** does an acceptance really ‘reach’ the offeror?

Lord Justice Denning’s observations suggest that “...in the case of ‘true’ *inter praesentes* situations, the matter of communication is a non-issue, as the parties are in one another’s presence (either physically or virtually) and there will be no contract until the offeror perceives the acceptance through one or more of his senses. However, in the case of *inter absences* when the parties actually communicate their approval by an external manifestation of action

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8 SWB Hill, ‘*Email contracts—When is the contract formed?*’ (2001) 12 Journal of Law and Information

9 *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2004] SGHC 71

10 *Jafta v Ezemvelo Kzn Wildlife* [1st July 2008] D204/07 “*[t]he assumption that postal contracts are concluded when a letter or telegram of acceptance is handed at the post office cannot apply to acceptance by e-mail or SMS because communication differs substantially.*”

11 *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327

either by way of posting or other forms of communication.”<sup>12</sup>

## **Inadequacy of the English Common Law to govern the Instantaneous and Non-Instantaneous Communication**

Though e-mail communication is faster than posting, it is not genuinely real-time. An e-mail is transmitted instantly from the acceptor to the offeror, and reaching the other end might take some time. At the same time, there is no universal rule to ascertain whether the person receiving the e-mail is aware of the arrival of the same. There is a gap between the reception of an acceptance e-mail and when the offeror became aware of the acceptance. Therefore, many scholars argue that e-mail communications are not truly an *inter praesentes* form of communication, nor are they *interabsences* communications<sup>13</sup>.

The law is unsettled when the acceptance in e-mail actually reaches the offeror’s e-mail server. Is it when it reaches the server of the offeror? (constructive knowledge) or Is it when the offeror is actually notified of the e-mail and reads it (actual knowledge)? The answer to this question does not seem to have been settled in the common law world<sup>14</sup> In *Brinkibon v Stahag Stahl*<sup>15</sup>, the court was of the view that “[n]o universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgement where the risks should lie.” It is a well-settled law in

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12 *Entores Ltd v Miles Far East Corporation* [1955] 2 QB Pg. 332-33

13 K O’Shea and K Skeahan, ‘Acceptance of Offers by E-Mail—How Far Should the Postal Acceptance Rule Extend?’ (1997) 13 Queensland University of Technology Law Review 247, 259.

14 *Thomas & another v BPE Solicitors* [2010] EWHC 306 (Blair J)—“Once one sets aside the “postal rule” as inapplicable to emailcommunications, the question whether an email acceptance is effective when it arrives, or at the time when the offeror could reasonably be expected to have read it, is not a straightforward one, and does not appear to be settled by authority.”

15 Lord Wilberforce, in *Brinkibon Ltd v Stahag Stahlund StahlwarenhandelsgesellschaftmbH* [1983] 2 AC 34

the context of postal communication of acceptance that the offeror has constructive knowledge of the acceptance, at the moment when the letter is put into the post-box. Similarly, acceptance occurs in e-mail communications within working hours which is sufficient to attribute constructive knowledge of the acceptance to the offeree.

### **The Doctrine of Fault-based Analysis**

In *Entores v Miles Far East Corp* Denning LJ expressed his view supporting fault-based analysis which reads as follows:-

*“In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But, suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance but nevertheless does not trouble to ask for them to be repeated: ..... so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound because he will be stopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it..”<sup>16</sup>*

In the above-mentioned case, it is emphasized that via e-mail communications, the contract comes into force even if the offeror does not know the acceptance and has no knowledge of the acceptance, as the acceptance message was not communicated owing to the fault of the offeror. It is further stated that if the acceptance is not clear, it is the responsibility of the offeror to make it clear, or he must ask the offeree to repeat it, which will enable the offeree to know that the acceptance was not properly

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<sup>16</sup> Denning LJ, in *Entores v Miles Far East Corp*[1955] 2 QB 327

communicated to the offeror. Otherwise, the offeror will be at fault and the doctrine of estoppel will be applied to him by saying that he does not aware of the acceptance or denying the acceptance.

This idea of constructive knowledge can be considered as an exception to the general rule that to conclude that there is assent in instantaneous communications, an acceptance ought to be communicated to the offeror. As well, absence of fault on the part of the offeror no contract will come into existence. It is stressed that assent is the fundamental factor in forming a valid and enforceable contract rather than a meeting of minds.

## **The Model Law and the Convention governing the Communication of Offer and Acceptance**

Provisions of the UNCITRAL<sup>17</sup>Model Law governing the instantaneous communication neither the Model Law nor the Convention<sup>18</sup> seeks to set out substantive rules for forming a contract. However, they do help to judge when electronic communication is dispatched and received. The Model Law provides that “[u]nless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator.”<sup>19</sup> According to the Model Law, the time of receipt of a data message will be determined based on whether the addressee has designated an information system for the purpose of receiving the messages. Thus, a relevant provision of the Model Law says that the addressee has designated an information system for the purpose of retrieving data messages, and receipt occurs at the time when the data message enters that designated information system<sup>20</sup> If the message is sent to an

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17 <sup>15</sup> United Nations Commission on International Trade Law 1996

18 United Nations Convention on the Use of Electronic Communications in International Contracts, (The Convention-2005)

19 UNCITRAL Model Law, Art 15(1).

20 Ibid, Art 15(2)(a) and (b).



information system not designated by the addressee, then receipt occurs only when the addressee retrieves it.<sup>21</sup>

## **Provisions of the Convention Governing the Communication of Data Message**

According to Art 10(2) of the Convention, electronic communication is presumed to be capable of being retrieved by the addressee the moment it reaches the addressee's 'electronic address. The drafting committee was to wrestle with the actual "concerns over the security of information and communications in the business world have led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees." <sup>22</sup> However, they could not provide one solution to the issue at hand when such data messages reach the intended receiver. In their recommendation, the drafting committee suggested, "It was noted that the presumption of receipt of data message...could be rebutted in cases when security or other devices would prevent the communication from being retrieved. It was further argued that the operation of the presumption would allow greater flexibility in assessing facts, should there be arguments as to whether a communication had been received or not".

## **Introduction of Electronic Transactions Act No.19 of 2006**

UNCITRAL Model Laws and the United Nations Convention on the Use of Electronic Communications in International Contracts play a significant role in introducing a uniform legal framework in Sri Lanka. Sri Lanka has introduced the Electronic Transaction Act No.19 of 2006 as a significant piece of legislation which broadly addresses the issues in electronic transactions in the country. The

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<sup>21</sup> Ibid Art 15(2)(a)(i).

<sup>22</sup> UNICTRAL, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts (Explanatory Note on Convention), para 185

Sri Lankan Electronic-Transaction Act enshrines three major principles of Convention and Model Laws: technology neutrality, functional equivalence and party autonomy. The principle of technology neutrality is ensured by the Act stating

that technology would not be given preference when applying the law<sup>23</sup>. The preamble to the ETA states that it is *an Act to facilitate the formation of contracts....in electronic form*. As well, Section 2 of the Act ensures that establishing legal certainty, reliability and public confidence with regard to electronic transactions is the main objective of the Act. These provisions simply align with the objectives of UNCITRL Model law as well as the Convention.

Section 11 of the Act says offer and acceptance may be exchanged using the electronic form and just because it is in electronic form a contract shall not be denied legal validity. It is apparent that this section has recognized the legal validity and the enforceability of Electronic Contracts. Similarly, Article 11 of the ECC recognizes an online invitation to treat which ought to be included in our law. Section 14 of the Act and Article 15 of the UNCITRAL Model Law enshrine a similar view of the time and place of dispatch and receipt of electronic communications. Accordingly, dispatch of a data message takes place at the place of business of the originator and is deemed to be received at the place of business of the addressee. This section confirms the proper communication of the offer and acceptance.

Section 3 of the Electronic Transaction Act confirms the legal validity of electronic records as well section 4 provides that the requirement of writing shall be satisfied by a data message or any other form of electronic communication. Another important arrangement is that section 7 of the Act gives legal validity to electronic signatures as similar to the written form of signature.

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<sup>23</sup> Saleem Marsoof, *Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation*, Law College Law Review 2006

Also, Section 17 (d) of the Act states a contract should not be treated as invalid as there was no act done by a natural person or the action done by an automated message system. This section gives effect to the electronic form of communication as same as any act done by a natural person.

Hence, the above-provided discussion gives a clear overview that the Domestic Law ( Electronic Transaction Act) is enacted with the view of unifying it with international Model Law and strengthening international and national e-Commerce. However, there are lacunas in the enacted Act which curtail achieving its full potential. For instance, The Evidence (Special Provisions) Act No. 14 of 1995 governed the evidence pertaining to contemporaneous audio and video recordings as well as computer evidence in Sri Lanka<sup>24</sup>. However, the Electronic Transaction Act (ETA) explicitly excluded the application of the Evidence Ordinance (Special Provisions) Act to any transaction falling under the purview of the Electronic Transaction Act. In 2017, an amendment was introduced to the Act to establish a specific framework for the admissibility of data messages, electronic documents, electronic records, and communications under the Act. This amendment aimed to address various deficiencies and shortcomings in the previous provisions.<sup>25</sup>

The primary objectives behind the introduction of this amendment were to achieve the following:

(i) Provide greater legal certainty to e-commerce providers operating within the country. This was intended to create a more favorable environment for electronic business transactions and promote the growth of e-commerce. (ii) Ensure the validity and enforceability of electronic contracts. By establishing a specific regime for the admissibility of data messages, electronic documents, electronic records, and communications, the amendment aimed to eliminate

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<sup>24</sup> ss 4, 5 of Evidence (Special Provisions) Act No. 14 of 1995.

<sup>25</sup> ETA; Section 22.

uncertainties surrounding the legal status of electronic contracts and enhance trust and confidence in online transactions. (iii) Facilitate cross-border trade. The amendment sought to align Sri Lanka's legal framework with international standards for electronic transactions. This was intended to promote seamless cross-border trade by enabling the recognition and acceptance of electronic records and communications in international transactions, thereby reducing barriers and enhancing efficiency<sup>26</sup>.

Nevertheless, it is important to note that the Act does not specifically address the procedures for dispute resolution and settlement in the context of e-commerce transactions. As a result, the traditional resolution and settlement processes outlined in the Judicature Act No.2 of 1978 (as amended), the Civil Procedure Code Nos. 2 of 1889 (as amended), and the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 continue to govern the resolution of disputes arising from e-commerce transactions in Sri Lanka. These acts serve as the primary procedural laws for handling disputes through the established judicial system.

E-contracts present several significant differences from traditional contracts, as the buyer or consumer cannot physically interact with and examine the product in real-time. This gives rise to various challenges in electronic transactions, including concerns regarding quality, performance, brand, color, size, price, quantity, and more. Unlike in traditional commerce, the buyer relies heavily on the seller's contract terms in e-contracts, which are often structured as unilateral contracts<sup>27</sup>. Consequently, the clauses in these contracts tend to be skewed in favor of the sellers. Since there is typically no regulatory authority specifically dedicated to e-commerce

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<sup>26</sup> Electronic Transactions (Amendment) Act, No. 25 of 2017.

<sup>27</sup> Alison S. Brehm & Cathy D. Lee,(2015) ; 'From the Chair: "Click Here to Accept the Terms of Service"', American Bar Association (Jan 2015), Vol. 31 No. 1, Available at: <[http://www.americanbar.org/publications/communicationslawyer/2015/january/click\\_here.html](http://www.americanbar.org/publications/communicationslawyer/2015/january/click_here.html)> accessed on.....

(such as the Consumer Affairs Authority), unfair or restricted trade practices may occur frequently. As a result, e-commerce faces numerous challenges, such as receiving goods that are not suitable for the buyer's intended purpose, insufficient cooling-off periods, difficulties with returns and refunds, issues with defective goods, and several other related problems.

Due to the absence of specific dispute settlement mechanisms in the Electronic Transaction Act of Sri Lanka, traditional civil dispute settlement methods have been adopted to resolve disputes arising from e-commerce transactions. These methods primarily include traditional litigation, which involves resolving disputes through court proceedings. Additionally, alternative dispute resolution methods, such as arbitration, mediation, collective agreements, and industrial courts, are also utilized for dispute resolution in the context of e-commerce transactions. These mechanisms provide avenues for parties to seek resolution outside of the traditional court system, offering flexibility and potentially faster and more cost-effective means of settling disputes<sup>28</sup>.

## Conclusion

This paper aims to bring attention to the existing gap and underscores the critical need for comprehensive laws to address the evolving challenges in the e-commerce landscape. The study convincingly illustrates that the current legal framework governing e-commerce in Sri Lanka is insufficient in effectively facilitating and promoting electronic commerce. With the advent of new challenges in the digital realm, the existing laws have proven inadequate in meeting the demands of the e-commerce sphere. To enhance and invigorate the e-commerce sector in Sri Lanka, it is crucial to incorporate international standards into national legislation. By adopting and implementing these standards through various legislative measures,

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<sup>28</sup> Ariyaratna, Ruwanthika. (2020). 'Consumer Dispute Resolution in B2C E-commerce in Sri Lanka: A Comparative Legal Analysis'.

the country can foster a conducive environment for the growth and development of e-commerce. This would enable Sri Lanka to keep pace with global advancements in e-commerce and unlock its full potential in the digital marketplace. With the objective of achieving the desired level of uniformity and certainty, the United Nations Commission on International Trade Law (UNCITRAL) has drafted the Convention on the Use of Electronic Communications in International Contracts (e-Contracting Convention). It is optimistic fact to note that Sri Lanka is at the forefront of this effort to bring greater harmony to the law, which has been hailed as one of the most significant recent developments in international electronic commerce law. The enactment of the Act enabled Sri Lanka to be among the first three countries to sign the Convention.

Indeed, implementing online trading regulations is a crucial step forward in effectively governing e-commerce platforms registered in Sri Lanka. Such regulations would provide a clear legal framework and guidelines for e-commerce activities, ensuring consumer protection, fair trade practices, and the overall integrity of online transactions. By introducing specific regulations tailored to the unique characteristics of e-commerce, Sri Lanka can address the challenges and concerns associated with online trading more effectively. These regulations can cover a wide range of aspects, including data protection, privacy, security, intellectual property rights, dispute resolution mechanisms, consumer rights, and transparency in online transactions. By establishing comprehensive online trading regulations, Sri Lanka can create a trusted and reliable e-commerce ecosystem, promoting economic growth and safeguarding the interests of all stakeholders involved.