CONTRACT BY TELEX — WHEN IS IT FORMED?

Brinkibon Ltd. v. Stahag StahUnd Stahlwarenhandelsgessellschajt, m.b.H.[1]

Introduction

DOES an acceptance by telex become effective, so as to create a contract, *when* and *where* it is despatched by the offeree (as in the case of a postal or telegraphic acceptance)?[2] Or does such an acceptance take effect only *when* and *where* it is received by the offeror (as in the case of an acceptance where the parties are in the presence of each other)?

In 1955 the English Court of Appeal in *Entores Ltd.* v. *Miles Far East Corporation*[3] adopted the latter proposition. But, as suggested by the present writer in 1981,[4] this will be true only in cases where the telex is being used in the conversational mode (or as what the *Restatement* would describe as, a "medium of two-way communication")[5] between the contracting parties. When this method is used, the parties or their telex operators are simultaneously present and transmitting at each side of the telex link.

A contract concluded by this mode closely resembles those concluded by parties dealing *inter praesentes,* since in both cases the offeree will usually know whether his attempt to communicate his acceptance was successful or not.[6] The only risk that the parties run is that of misunderstanding the other's communication, which however can be easily perceived and cleared up then and there. It is therefore proper to impose on the offeree, on pain of a finding of no contract, a duty to make a proper communication of his acceptance to the offeror. In the conversational mode of telex transmission therefore the acceptance will take effect on receipt.[7] This, it has been submitted,[8] is the true basis of the decision in the *Entores* case.

1 [1983] 2 A.C. 34.

2 See *e.g. Henthorn* v. *Fraser* [1892] 2 Ch. 27, *In re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7. Ch. App. 587, and *Household Accident Fire Insurance Co. Ltd.* v. *Grant* (1879) 4 Ex D. 216 — all cases of acceptances by post. Relevant contracts held to be formed *when* acceptance mailed *Cowan* v. *O'Connor* (1888) 20 Q.B.D. 640 — telegraphic acceptance. Contract held to have been formed at the *place where* the telegram was handed in to the person authorised to receive it for transmission to the offerer.
The rule laid down in the cases just cited is for convenience referred to as the "postal (or "posting") rule: see *e.g.* the *Brinkibon* case [1983] 2 A.C. 34 at pp. 41 and 43 where there is a reference to the "postal" and "posting" rule,

3 [1955] 1 Lloyd's Rep. 511.

4 Kasiraja, Contracting by Correspondence — The Pitfalls and The Pointers (1981) 2 M.LJ. cxv at pp. cxxxii-cxxxiii.

5 See *Restatement of Law, Second, Contracts,* section 65, "Acceptance by Telephone or Teletype:
"Acceptance by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptance where the parties are in the presence of each other."

6 *Per* Denning L.J., in the *Entores* case: *supra*., n. 2, at p. 515.

7 Unless, of course, the offeror is at fault. Here, as suggested by Denning L.J. in the *Entores* case ([1955] 1 Lloyds Rep. at p. 515), there will be a contract binding on the offeror. This means that in the case of the offerer's fault, the telex acceptance, even though transmitted by the conversational mode, will operate on despatch.

8 See Kasiraja *op. cit.* at pp. cxxxii-cxxxiii. See also *per* Denning L.J. in the *Entores* case (n. 2, at p. 515), whose pronouncement that acceptance by

The decision cannot however apply to the use of the telex as a non-conversational mode of contracting.[9] (Today this would seem to be by far the common method of telex communication). Here, while the sending party or his operator is present on his side of the telex link, there is no contracting party or operator present on the receiving side of the telex link. Contracts entered into by this mode, although instantaneous in form, are non-instantaneous in effect and therefore afford a closer analogy to those concluded by the letter and the telegram than to contracts *inter praesentes,* since an offeree who accepts by post or telegram cannot for a time know whether the offerer has received the acceptance or not. Similarly in the non-conversational mode of telex transmission, if the message were to be received on the receiver's machine in a garbled form, (on account of atmospheric disturbances or line resistance)[10] or even to be totally unreceived (on account, for example, of unexpected ink or ribbon failure, or a complete fading of what is technically called the micro-wave path — which is the path along which a radio wave is beamed), the offeree will be none the wiser. Here the question might well be whether such messages should be treated in the same way as a postal or telegraphic communication and governed by the same rules.[11]

The relevance of the issue just raised, the importance of the distinction between the conversational and non-conversational telex for solving the legal problems that could arise from contracting by telex, and the inapplicability of the ruling in the *Entores* case to the acceptance transmitted by the non-conversational mode, have all now received a measure of authoritative judicial recognition in the *Brinkibon* case.

Relevant Facts of the Brinkibon Case

In the *Brinkibon* case, the House of Lords had to consider whether leave should be given to serve a writ outside jurisdiction. Under Order 11, r. l(l)(f) and (g) of the Rules of the Supreme Court in England, such leave will be given if the contract sued on was made, or if breach of such contract had occurred, in England.[12] The contract itself was for the supply of steel by S, an Austrian company having no place of business in England or Wales, to B, an English company. It was concluded by an exchange of telex and telephonic communications[13] between the parties. Its relevant terms were: the steel was to be delivered in five equal monthly instalment c. & f. Alexandria on liner terms; and payment was to be made by revolving letter of

telex operates on receipt is based on the clear assumption that both ends of the telex link are being simultaneously manned when the acceptance is transmitted. See also *per* Birkett, L.J. (footnote 2, at p. 516) and Parker, L.J. (footnote 2, at 518), both supporting the same assumption.

9 This, as the *Restatement* implies (see *ante,* footnote 5), will be the one-way telex and seems, in accordannce with business practices, a more common form of contracting than the conversational mode.

10 *Post,* p. 171.

11 As suggested in [1981] 2 M.L.J. at pp. cxxxii-cxxxiii.

12 In support of its contention that there was a proper case for service out of the jurisdiction, the plaintiff (referred to for convenience as B later on in the text) relied, in the courts below and in the House of Lords, on the two grounds contained in Order 11 r. l(l)(f) and (g). Robert Goff J., it would seem, upheld both grounds. Mocatta J. accepted the first but rejected the second.
The Court of Appeal rejected both. It was in these circumstances that B brought these proceedings to the House of Lords by way of appeal on leave given by the Appeal Committee of the House.

13 *Per* Lord Wilberforce at p. 40, and Lord Brandon at p. 45.

credit. Before the House, counsel for B, which had brought suit for breach of contract against S, conceded that the final offer, which was in fact a counter-offer, had been made by S's telex transmitted from Austria. However, B's counsel contended, acceptance of this counter-offer took effect in England. This contention was based on two alternative grounds. First, in response to S's counter-offer, B had instructed its bankers in London to open a letter of credit in Vienna; this amounted to acceptance by conduct; and it took effect in London. Second, B had sent a telex acceptance from London to S confirming the opening of the letter of credit; the contract was therefore made in London. The House unanimously rejected both contentions.

The first was rejected because the giving of instructions to the London bankers had not been notified to S. It could not therefore amount to an acceptance. The second contention was rejected because the telex acceptance to S confirming the opening of the letter of credit had taken place directly between principals;[14] it should be treated as an instantaneous communication; and, in accordance with the rule in the *Entores* case, was not effective until received by the counter-offeror S in Vienna. The contract was therefore made outside the jurisdiction.[15]

Comment

The decision of the House of Lords has some notable features. It applied the rule in the *Entores* case that a telex acceptance operates on receipt but stressed that it was not a universal rule. The rule would apply, as Lord Wilberforce[16] stated, "[w]here [in a telex communication] the condition of simultaneity is met". It would therefore follow that in a case *where this condition was lacking* (as for example in the case of the non-conversational telex message), a different rule such as that the communication operates on transmission (not receipt) could apply on the postal or telegraphic analogy.

The judgments in the *Brinkibon* case proceed on the assumption that the telex acceptance in question was transmitted by the conversational mode. This seems particularly evident from the combined effect of Lord Wilberforce's and Lord Eraser's pronouncements on this point.[17] Lord Wilberforce spoke of the case as being a "simple case of instantaneous communication between principals",[18] while Lord Fraser assumed that the receipient S's machine was being manned by his *operator* (not the principal).[19] This could therefore mean that both sides of the telex link were being simultaneously manned *(either by* the principal *or* his operator). If this interpretation is correct, the *Brinkibon* case cannot be regarded as an authority on the effect of acceptance by the non-conversational mode. This conclusion could

14 At p. 42 but see also p. 43.

15 A further ground relied on by B for permission to serve the writ outside the jurisdiction, but not relevant for present purposes, was based on Order 11, r. 1 (g). It was that the breach of contract occurred in England. The House held that the claimed breach lay in the failure of S to open the requisite performance bond, and to deliver the steel, under the contract. Each of these, the House observed, should have been performed outside the jurisdiction. And failure to do them must be similarly located.

16 With whom the other Law Lords agreed: *per* Lord Wilberforce at p. 42.

17 *Per* Lord Wilberforce, at p. 42 and *per* Lord Fraser of Tullybelton at p. 43.

18 At p. 42. Lord Brandon at p. 50 agreed.

19 At p. 43.

further be reinforced by Lord Wilberforce's pronouncement,[20] with which the other Law Lords agreed:

> Since 1955 the use of telex communication has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.

To the examples adduced by Lord Wilberforce in the pronouncement just reproduced, it is not stated what rule will apply. Nevertheless, it seems evident that it will *not* be the rule in the *Entores* case. This is because the examples given share a common feature (not applicable to the factual situation contemplated by the pronouncements in the *Entores* case):[21] the messages referred to in the examples (although instantaneous in form) are non-instantaneous in effect, being subject to the delay inherent in communications by the letter, telegram,[22] or the non-conversational telephone message.[23]

It is now relevant to outline some of the problems that can occur, and have beset the business community, when contracting by telex:

1. On account of atmospheric or similar disturbance, a telexed offer, acceptance, counter-offer, rescission or repudiation reaches the recipient with a character or figure or two changed causing misunderstanding among the parties. In such a case, is the

[20] *Ibid*., at p. 42.

[21] See particularly *per* Denning, L.J. [1955] 1 Lloyd's Rep. at p. 515.

[22] [1981] 2 M.L.J. at p.cxvi. See also [1983] 2 A.C. at pp. 43 and 48, where both Lord Fraser and Lord Brandon refer to the delay or interval of time that separates the despatch and receipt of a letter or telegram as a reason for applying the postal rule.
Significantly, no reference is made in the judgments to the intervention of a third party, such as the postal authority, as a basis for the application of the postal rule. As suggested in [1981] 2 M.L.J. at p. cxvi, the role of the 3rd party is to show that it is difficult to place causal responsibility on the offeree for any accidents in the post. This, it is submitted, is its only relevance to the postal rule. The rule, it has been suggested in [1981] 2 M.L.J. cxv, originated from an entirely different consideration: the need to protect the offeree from the uncertainty (that always arises from the delay involved in a non-instantaneous communication) as to whether his attempt to communicate his acceptance has been successful, or even if successful, whether such communication has been effected *before* the offerer has attempted to withdraw the offer.

[23] As, for example, a telephonic acceptance spoken by the offeree into a recording device maintained at the offerer's side of the telephone link to receive incoming messages in his absence. If, unknown to the offeree, the device has failed and the acceptance in consequence fails to reach the offerer, the acceptance, it is submitted, is nevertheless capable of being effective so as to create a contract on the analogy of the lost postal acceptance rule in the *Household Fire Insurance Co.* case (1879) Ex. D. 216: See also [1981] 2 M.L.J. at p. cxxxiii.

message to take effect in the form in which it was transmitted or that in which it was received by the recipient? This could depend on whether the *Henkel* v. *Pape*[24] line of cases previously considered by the present writer[25] in connection with the telegraphic message garbled in the course of transmission will be relevant or not.

2. The despatched message may fail to arrive at all or to be recorded on the receiver's machine owing to a complete fading of the micro-wave path,[26] or the recipient's machine may have unexpectedly run out of paper or the ribbon on his machine may have unexpectedly broken. If such a message were an acceptance, is there a contract? This will depend on whether the acceptance is to be effective on despatch on the analogy of the rule relating to the acceptance lost in the post.[27]

3. A telexed acceptance that has been introduced into an electronic store and forward system maintained by the offerer or provided by an independent third party (such as Telecoms in the case of the Prisnet system) for onward transmission to the offerer fails on account of the system's malfunction to reach the offerer. Does the analogy of the lost postal acceptance rale apply here too?[28]

The impact of the problems just outlined can be crucial in the case of the non-conversational as distinct from the conversational telex message. This is because in the case of the former, unlike the case of the latter, ambiguities and misunderstandings cannot be cleared up then and there either by the party or his operator.

[24] (1870) L.R. 6 Ex. 7.

[25] In [1981] 2 M.L.J. at cxviii-cxix.

[26] *Ante,* p. 169.

[27] As in the *Household Fire Insurance Co.* case.
Most machines in Singapore, it would seem, are modern enough to be equipped with a safety cut-off device that automatically will turn off the reception if the paper on the receiver's machine ran out. The calling party will therefore (owing, technically speaking, to the failure to receive the answer-back code from the receiver's machine) be put on inquiry that something is probably amiss on the receivers side and be required to establish a re-connection or pursue further inquiries. In such a case therefore, the calling party will be in a position to know that his attempt to communicate has been unsuccessful. Therefore, if he is the offeree, he cannot (for the reason suggested earlier) invoke the rule referred to in the text and claim that there is a contract despite the non-receipt of the acceptance.
However, not all machines have this safety device, particularly those in other parts of the world. In the case of such machines, the answer-back from the receiver's machine will be forthcoming, despite the accident, without the caller being any the wiser.
It is therefore submitted that the following pronouncement of Lord Fraser ([1983] 2 A.C. at p. 43) in support of the rule that a telex acceptance is effective on receipt by the offerer (not on despatch by the offeree) will not apply to telex messages duly transmitted to but not received on machines that do *not* have the above safety device:

> … a party (the acceptor) who tries to send a message by telex can generally tell if his message has not been received on the other party's (the offerer's) machine, whereas the offerer, of course, will not know if an unsuccessful attempt has been made to send an acceptance to him. It is therefore convenient that the acceptor, being in the better position, should have the responsibility of ensuring that his message is received.

[28] Under the rule in the *Household Fire Insurance Co.* case?

In each of the three situations referred to above, the problem is one of finding the appropriate analogy in the common law of contract and working out, in terms of available or adapted legal doctrine, a fair and just adjustment of the risks involved in contracting by telex. The question here is: is not the postal or telegraphic analogy the right one for the purpose of the non-conversational telex?

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