Challenges with online contracting – another case and some tips

This is our second article on this topic following our article To read or not to read… online Ts and Cs. Or Hamlet.[1] *We also deal with hard copy contract implications in addition to online contracts. Contrary to the approach of many lawyers, getting terms incorporated in the contract may be more important than nice crafting of the terms themselves.*

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The supplier in the *Allen Fabrications* case[2] – on which there is a very good commentary by Darise Bennington in December's NZ Lawyer In-house[3] – was lucky to be able to rely on its limitation of liability (LOL) clause.

The case involves hard copy material in relation to two overlapping contractual scenarios. We'll deal with that first and then translate it to the online environment.

Hard copy – Scenario 1

Typically of suppliers to commercial customers, the customer bringing the claim had signed a credit application form with Ts and Cs attached. Well, the Court concluded that was likely but that wasn't certain. Trouble was, the supplier had mislaid the original paperwork. Often where that happens, a supplier won't be able to prove its case at the time that really counts: when it sues or is sued. No written contract retained = not enough proof. Often the supplier will be in a hostile environment (a court may not want to see it rely upon its LOL, for example). The supplier in this case was able to produce enough evidence to show that the credit application and Ts and Cs were probably signed, and that was enough. Generally that would be unusual.

We've been involved in many contract dispute cases where the fact that the supplier couldn't find the contract meant that it lost. Very frequently, companies don't have good systems for retaining those documents, and making sure they are actually signed, and completed correctly. They need to be retained for when the rubber hits the road: bringing or defending a claim. That talks to the need for good systems. We don't often see that in our work.

Hard copy – Scenario 2

The supplier also wanted to rely on terms written on the back of regular commercial documents such as invoices. Based on the cases around contract terms being incorporated due to the course of dealing, the court allowed this. Given there were over 250 such documents over time, and other facts, the court could arrive at this conclusion.

In Scenario 1, because the form was signed, all terms became part of the contract. But where the documents are not signed – or there is no similar direct buy-in – a term is not binding if it is too "onerous". That applies in Scenario 2. The *Allens* case has a useful summary on the modern application of the onerous terms authorities. But relying on arguments such as course of dealing, and then upon problems around onerous terms, is usually too flaky for suppliers. In other words, that detail should only come into play for litigators dealing with legacy problems, not for those drafting the contracts (in relation to which one of the big points – often overlooked – is to make sure the terms are actually incorporated).

Scenario 1 – translating for online

Online equivalents of the credit application and Ts and Cs acceptance are commonplace. The click-accept process is well known and there are variations (some of which can be considered where higher levels of assurance are needed).

One of the unresolved points is whether click-accept is like hand-signing a contract, so that the onerous terms regime doesn't apply. It would be unwise to rely on that at this stage.

There are other reasons for caution that are related to that point. When the rubber hits the

road (i.e. when the supplier must rely on the terms during or leading up to litigation), will the supplier be able to prove things like:

- The click-accept;
- The click-accept was done by someone who can bind the customer, following the attribution rules in cases like *Fleming v Securities Commission*.[4] Just because someone is named as click accepting doesn't mean that the supplier can prove it was them. It is commonplace for people to use someone else's name. The onus of proof is on the supplier. There's no handwritten signature to conclusively prove the point, and the environment may well be hostile to the supplier;
- That the particular terms and related material were click-accepted. This material can change quite a bit over time (websites rarely remain static including on relevant pages). Plus it can be hard to show, years later, what material was online at the relevant time. And that has to be the perspective in deciding what to do: the position in a few years' time when people have moved on, online documents have moved around and so on. This is a big problem, and emphasises the need for organisations to keep great records (ideally streamlined and comprehensive such as auto-archiving).

Scenario 2 – translating for online

We expect cases to develop as to whether web pages – such as the common reference to Ts and Cs at the foot of a web page – can become binding by course of dealing. Very likely there will be the onerous term regime anyway. That all sounds too risky for suppliers to overly rely upon.

Plus there are similar challenges around proving the case (who read what; what was on the website at the time and so on).

What's important

Striving to get the online terms incorporated (and for hard copy too) is challenging. If risk is low (it often will be low for consumer sales where there is no systemic risk beyond one-offs) is it necessary to go overboard, given that this is likely to make the sales process a lot harder? A bolt sold to a DIY'er carries very different risk from a bolt sold for a Boeing 747. Where the risk is bigger and the customer is commercial, more care may be needed to get it right for when the rubber hits the road.

Maybe handwritten signing will be the only choice, although the initial agreement can be handwritten and the rest can be online. Boeing can get a hand-signature for an agreement for supply of parts, and then the customer orders the bolt online, as envisaged by the initial agreement. That's a win both ways.

We think this "what's important" type of analysis is important, having regard to the position when it really counts. We see those things often overlooked. Yet as lawyers we can't do a relevant and good job without the assessment.

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1. http://www.wigleylaw.com/assets/Uploads/To-read-or-not-to-read.pdf

2. *Allen Fabrications v ASD Limited* [2012] EWHC 2213.

3. *A treasure trove of contractual issues,* by Darise Bennington, http://www.nzlawyermagazine.co.nz/CurrentIssue/NZLIHIssue4/4NZLIH5/tabid/4938/Default.aspx

4. *Fleming v Securities Commission* [1995] 2 NZLR 514.

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