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# EFFECTIVE TRANSACTIONS ON-LINE

# LIABILITY FOR ON-LINE STATEMENTS

**PAPER PRESENTED TO**
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P O Box 10842 • 11-17 Bolton Street • Wellington • New Zealand • Ph. + 64 (4) 472 3023 • Fax. + 64 (4) 471 1833
also at Auckland Ph. + 64 (9) 307 5957 • www.wigleylaw.com

This paper deals with the effect of transactions online and liability for online statements and was first presented at the New Zealand Law Society Business On-line Seminar. It deals with online transaction risk, the Electronic Transactions Act and liability for online statements such as for defamation etc. Risks and solutions are covered.

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## 1 EFFECTIVE CONTRACTING

1.1 There is little doubt under current law in New Zealand – and in most overseas countries – that an on-line contract (including website orders and email exchanges) can be just as binding as a written, oral, or faxed

contract.[1] Of course there are different requirements where statute calls for agreements in writing[2].

**1.2 Electronic Transactions Act: Little impact on contract validity**

1.3 Whatever residual doubt there might be about the binding nature of on-line contracts will be removed by the Electronic Transactions Act, if enacted in its current form. Section 8 confirms that information such as contracts and their terms would not be denied legal effect solely because they are in electronic form.

1.4 It is important to note that the Electronic Transactions Act will have little impact on general contract terms and their validity. The on-line equivalent of "postal acceptance" rule issues would be dealt with in sections 9-13 (in a way which is not entirely clear). The rest of the Act deals solely with what are called "legal requirements". Section 15(2) defines "legal requirement" as a requirement in an Act, regulation, etc. Most contract issues such as offer and acceptance and the mode of contracting are governed by common law not by statute. Other than the effect of specific statutes on contracts, such as consumer protection-oriented legislation (eg: the Consumer Guarantees Act), the main part of the Act does not apply to contract validity and contract terms. [3]

**1.5 What are the real issues?**

1.6 As it is very likely a Court would enforce an on-line contract, what are the real issues, particularly for a supplier selling goods and services on-line?

1.7 Generally, the real and practical issues are:

1.7.1 Is there a binding contract?
1.7.2 If there is a binding contract, what are its terms?

1.8 In the commercial world, there won't often be an issue as to whether or not there is a binding contract. It would be rare for a Court to be asked to address this issue. It is clear in most cases. In deciding whether there is a contract, the Court can often look at various bits of evidence. Even if the on-line evidence is patchy, there will generally be other evidence to confirm the existence of the contract, such as the supply of goods or

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[1] The Courts have readily accepted fax and telex contracts (see for example *Reese Bros Plastics Ltd v. Hamon-Sodelco Australian Pty Ltd* [1988] 5 BPR 11, 106) and there is no reason in principle why on-line contracts should be approached differently.

[2] For a description of developments in this area, including implications of the definition of "writing" in the Interpretation Act 1999, see C. Nicoll and P. Jones *E-Commerce Law*, CCH, 1999 at para 11-500 to 11-520. See also the Electronic Transactions Bill (dealt with later in this seminar).

[3] It can be argued that Section 27 has wider application in relation to retention of documents. It's unlikely that's intended, however, and that should be fixed before enactment.

services, payment for the goods and services, and so on. Usually also, there won't be an issue as to whether the agreement is so uncertain that it's unenforceable.

1.9 So, generally, the real issue will be: what are the terms of the contract? Usually, this is important for suppliers as they want to (a) minimise their liability for claims for damages; and (b) ensure other key terms are incorporated in the contract. Often what at first blush seem to be key terms to record are in fact less important than other terms such as limitation of liability. For example, price (at first sight an important issue) will usually be self-evident, uncontroversial, and low risk for a supplier, compared to limitation of liability. Generally, it is paid at the outset (or, in the overall scheme, it is not as big a risk area compared to potential large claims against the supplier).

**1.10 Onerous Terms**

1.11 Compounding the question of what terms apply is the onerous terms issue. Not only must the supplier prove that the relevant terms are incorporated in the contract, but also that so-called onerous terms (often this will include limitation of liability) have been particularly drawn to the attention of the purchaser.[4]

1.12 So, to minimise supplier's legal risk, ultimately the true focus can revolve around ensuring that onerous key terms such as limitation of liability are incorporated in the supplier's contract with the purchaser. This requires up-front notification of the onerous terms to the purchaser.

1.13 A common on-line approach is to simply refer to terms of trade generally, at a point where the purchase is "click-accepted", or put terms of trade at the foot of a website page. But this does not cut the mustard. Cross-reference to those onerous terms needs to be put somewhere where it can clearly be seen by the person signing. There needs to be a close and obvious link between "signing" (click-accept) and the reference to the terms.

1.14 This is anathema of course to sales people. Selling their wonderful widgets, yet being asked by the lawyers to be upfront about potential deficiencies and excluding liabilities, is not easy. But it may be the only way to safeguard the supplier, legally.

1.15 A common sales cry is: "We have never been sued before so why would we be sued now". Nonetheless, the risk is still there. The supplier – with advice from its lawyers – needs to make a judgment call on this. As we develop below, the job of getting the onerous terms sufficiently accepted by the customer is not an easy task. Prudently advised suppliers will weigh up the risk.

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[4] *Pronet v. Clear Communications*, unreported, Salmon J, 13 September 2001, CP123/98.

**1.16 Type of customer and/or product dictates approach**

1.17 Risk differs according to the type of customer and the type of goods and services. For example, it is unlikely that domestic consumers will sue a supplier. The dollars involved won't be enough, the domestic customer won't have enough money to sue, and so on. Of course there will be some cases where there is particular risk (eg: some health-related products and products sold into litigation-risky countries such as the United States). But for most goods and services sold to domestic consumers, the risk will be low. In any event, there will often be compulsory consumer liabilities under legislation internationally, such as our Consumer Guarantees Act.

1.18 Often an on-line supplier to domestic customers will – rightly - decide to cut corners and take the sort of approach seen on many vendors' websites.

1.19 The real risk faced by vendors in those circumstances (business-to-consumer sales) are complaints about the quality of the goods and services, possible PR risk and so on, rather than high dollar litigation risk.

1.20 Often that will be the case too with suppliers to small businesses and even some suppliers to large businesses (take the sale of stationery, for example).

**1.21 Business to Business**

1.22 However, things change as the dollar value of the sales increases and/or the risk associated with sales of goods and services increases. For example, a bolt for a 747 might cost only a few dollars yet carry multi-million dollar risk. The supplier should be more vigilant in those cases about ensuring that its terms are accepted in the agreement.

1.23 What should the B2B supplier do to minimise its risk and increase the prospect of a Court accepting that its limitation of liability provisions have been incorporated in the agreement? Where the risk is high, the supplier should be hesitant to cut corners. Sometimes the risk of trading on-line will be too high. The supplier would be best to revert to traditional hand-signed agreements. For on-going sales programmes, one good option is an initial hand signed agreement, followed by individual on-line orders (may be by email) under the umbrella of that agreement.

**1.24 Proving that it was the customer that accepted the terms**

1.25 A major problem with on-line contracts is the difficulty a supplier faces in proving that an on-line customer has effectively click-accepted the

agreement, including terms such as limitation of liability. It needs to be remembered that the supplier may be in Court in circumstances where a Court will endeavour to find ways to get around its limitation of liability provision. The supplier may have a hard time in showing that someone properly authorised on behalf of the purchaser has in fact click-accepted the agreement.

1.26 It is very common for such on-line “click-accept” deals to be completed, not by someone authorised by the company, but by an unauthorised third party. For example, the licenses for software installed at a large bank will often be click-accepted by independent computer support people (ie: by people that can’t contractually bind the bank). And it is common for sales people selling substantial goods and services to complete the on-line order form for the customer, rather than the customer itself completing it. Even if the supplier takes the useful step of requiring the name and occupation of the person click-accepting to be inserted on-line, the supplier still faces proof problems. It is easy for a customer to say it did not click-accept, and hard for a supplier, pushing to get a Court to accept its liability limitations, to prove otherwise.

1.27 With high risk and/or high dollar value goods and services, the right decision often will be that this is not a risk worth taking.

**1.28 Practical Solutions**

1.29 Until there is widespread use of digital signature technology, [5] in those cases, it may be safer for the supplier to get a signed up agreement. This is a pity as on-line ordering is a clean and quick sales process, which can integrate seamlessly with the supplier’s back office functions.

1.30 There are ways hassle can be minimised and additional hurdles reduced in the sales process. For example, the order form can be set up on-line. It is completed on-line, then click-accepted. It can be electronically dispatched in this way to the supplier. The supplier’s back office provisioning and sales processes can be automatically populated.

1.31 The purchaser can then be required to print out a hard copy of the document, hand sign it and then send or fax it to the vendor. Consider locking in the form (eg: as a pdf document rather than a Word document that a customer can edit).

1.32 For sales people, this approach has the advantage of concluding the contract when the customer click-accepts, with the transaction verified by handwritten signature later. Obviously, the vendor needs to have good systems to ensure it receives the signed document and that this document is retained. For some organisations, this is a real hassle. A

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[5] For a more detailed summary of encryption and digital signatures see Butterworth’s *Electronic Business and Technology Law* at para 6.8.

judgment call could be to stick with on-line contracts even for substantial transactions, because of the risk that hard copies won't be kept.

**1.33 Scroll through Terms?**

1.34 One option that is sometimes used is to set up the site so that the customer must scroll through the terms, or some variation on that theme. This is not a strong approach in itself as it may not answer the key point of drawing specific reference to onerous terms.

**1.35 Offer or invitation to treat?**

1.36 When drafting on-line contracts, consider whether the site should be drafted as an invitation to treat (giving the supplier the option to pull out of the deal) or an offer (in which case, the "click-accept" completes the contract). The latter course simplifies the sales process, but also locks in the supplier to deals it might not want to fulfil (eg: because it has run out of stock or the sale is to a country where the goods or services are illegal). A half-way house (which helps protect the supplier yet streamlines the process) is to set up the website as a conditional offer. By "click-accepting", the purchaser accepts the agreement, but the supplier reserves the right to pull out within a certain number of days.

**1.37 Email Contracts**

1.38 Contracts can be and often are concluded by exchange of emails. Our Court of Appeal has telegraphed how far it will go to find and enforce agreements from slim material, even on high-dollar value and complex matters, between commercial people.[6] The informal and rapid nature of email communications heightens the risk that businesses could get locked into complex agreements and have terms imposed on them which they would not otherwise want.

**1.39 Which Country's Law Governs the Contract?**

1.40 Where international sales are envisaged, the terms should state which country's law applies.[7] While there is a natural inclination to use New Zealand law, the marketplace may dictate use of the law of a foreign jurisdiction (eg: the law of a State in the United States).

1.41 In an ideal world, the supplier would get advice in each target market country. Ideally, for example, there would be a check on particular statutory obligations. There are potential traps. A good example is

6 *ECNZ v. Fletcher Challenge* (2001) 7 NZBLC 103 477.

7 For B2B sale of goods, consider whether to address internationally applicable terms, such as industry specific terms and the Vienna Convention for International Sale of Goods 1980 (see the Sale of Goods (United Nationals Convention) Act 1994)

Australia's equivalent of our Consumer Guarantees Act, namely, particular provisions of their Trade Practices Act. Just as we can contract out of our Consumer Guarantees Act, so can there be contracting out in respect of sales to the Australian market. But it is critical to use the format envisaged by the Trade Practices Act (which revolves around categories of remedies for which responsibility is excluded).

1.42 However, usually such offshore review will be uneconomic and the supplier may elect to take the risk. For high-dollar value and/or high-dollar risk products, legal advice might be obtained in key markets.

1.43 The Electronic Transactions Act (when enacted) will resolve "postal acceptance" type of issues. This is significant in relation to the applicable law of the contract (which is often governed by where the contract was concluded unless the contract states otherwise).

**1.44 Other suppliers' websites are a great help**

1.45 One of the great things about the internet is that the on-line contract material of other suppliers in the same industry can be reviewed and concepts incorporated into our own agreements. Take account, of course, of any intellectual property issues such as copyright in the relevant country. If, for example, Californian law is chosen, it could be useful to look at the websites of large suppliers into that market of comparable products, to see what they have done.

**1.46 Retention of Evidence**

1.47 On-line contracts are concluded in a variety of ways ranging from email exchange through to contracts concluded under a website order form process. Suppliers will want to be able to prove the basis on which they entered agreements (sometimes the reverse will apply!) It is very common for records (electronic or hard copy) to be lost, websites and on-line order forms to be changed in ways in which the supplier cannot prove later which terms applied, and so on. In the real world, it is easy enough to set up systems which retain the information (including electronic auto-archiving of transactions). But in practice it can be difficult to ensure that this information is retained over time. However, particularly for high risk goods and services, the supplier would be wise to retain sufficient information to be able to prove what happened at a later stage. For most purposes, retention of electronic records is fine.

1.48 Repeating, it is often in the context of a supplier relying upon a limitation of liability provision (or equivalent) that the supplier is having to use scanty evidence of what happened at the time. So it is easy enough for a court to make a decision adverse to the interests of the supplier if the evidence is poor.

## 2 LIABILITY FOR ON-LINE STATEMENTS

2.1 There are a number of ways in which a vendor of goods and services or someone providing information on-line can end up being liable for erroneous on-line statements. We'll call this group "information providers" in this paper. There are some quirky differences between the law applicable to on-line statements and similar statements made in the hard-copy world. The key difference however is the greatly magnified degree to which statements are repeated to others and the much greater risk of offshore exposure. This risk increases as statements originating in New Zealand might breach offshore law. For example, the foreign court could say the statement was published in that country when it was downloaded there[8].

2.2 For most information providers, it will be uneconomic to check the risk in each potentially affected country, although that may be prudent for key risk countries where the products are higher risk.

### 2.3 Straightforward Solution

2.4 A simple rule of thumb to minimise risk is to encourage information providers to ensure the on-line statements they make are accurate and that they don't overclaim what their goods and services are capable of achieving. Similarly, negative comments about competitors' products and other people need to be sustainable. In short, statements and claims should be true. This will almost always protect an information provider in New Zealand. Truth will not always protect the information provider in every country overseas (for example, truth is not a full defence to defamation claims in all countries). But it will certainly greatly minimise the risk.

### 2.5 Disclaimer

2.6 It should also be emphasised to the information provider that, generally, a disclaimer (such as in a site policy, a contract, etc.) will not effectively exclude all liability. An example is the misleading and deceptive conduct exposure under Section 9 of our Fair Trading Act and Section 52 of Australia's Trade Practices Act. It is unlikely that a disclaimer about statements made in website promotional material will be effective (for the simple reason that this is a statutory liability and it is not possible to contract out of that liability).

2.7 Often, our Fair Trading Act will apply where website statements are erroneous. There could be other grounds of exposure too, such as *Hedley Byrne* negligent mis-statements (although *Hedley Byrne* makes it

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[8] A good example in a defamation context is *Gutnick v. Dow Jones* [2001] VSC 305, which is being appealed to the High Court of Australia.

clear that a disclaimer sufficiently drawn to the attention of the reader will be effective to exclude liability).

**2.8 Defamation**

2.9 Generally, defamation will not be a particular risk area for information providers, simply because statements won't usually be made which are defamatory. Two areas to watch out for:

2.9.1 A company can be a plaintiff in a defamation action.[9] So, disparaging comments about a competitor company and its products can be defamatory. This risk is answered by encouraging information providers to ensure such statements they make on-line are accurate.

2.9.2 Some information providers host chat sites (for example, they host discussion groups and information sites for their customer base). It is likely that the information provider will be liable for any defamatory statement posted by someone such as a customer (even though it has no control over this, other than after-the-event deletion). This follows by analogy from the liability of (a) radio stations for statements made live by callers during talkback shows, and (b) TV stations for statements made in live programmes[10]. It is unlikely that the information provider can rely upon our Defamation Act's Section 21 innocent dissemination defence. The information provider should routinely check and delete risky messages.

**2.10 Linked Sites**

2.11 The information provider can end up being exposed in unexpected ways. For example, there is at least a risk (unresolved so far) of liability for defamatory statements, or misleading statements in breach of the Fair Trading Act, on sites to which the information provider's site is linked[11]

2.12 People should be aware of the extra risks, consider the position and then draft accordingly. Risks range across the spectrum.

2.13 Almost all implicit obligations can be overridden in the agreement. This is an area where careful legal advice is needed.

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[9] See Burrows and Cheer *Media Law in New Zealand* 4th ed. at pge 19.

[10] *Russell v Radio i Ltd*, SC Auckland, A 590/74 (1976); *Thompson v ACTV* (1996) 141 ALR 1.

[11] See, for example, *International Telephone Link Pty Ltd v. IDG Communications Limited* (1999) 1 NZECC (Digest) para 7-001 and para 1.2.25 in McBurnie and Levinson *Contract: Sales of Goods Over the Internet* (Law Book Co. 2001).

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