EMAIL CONTRACTS AND EMAIL RISKS

PAPER PRESENTED TO
NEW ZEALAND COMPUTER SOCIETY
“THE LAW OF IT” SEMINARS

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Most contracts can be concluded by email: the real issue is the degree of risk involved. Wigley & Company address the contractual and risk issues with emails.

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1. Online Contract Law: Introduction

1.1 New Zealand law most relevant to online issues is mainly developed as case law by Judges. Statutes are less relevant generally although there are some special cases (e.g. sale of goods and services to residential consumers are usually covered by the Consumer Guarantees Act). Judge-made contract law is very flexible and responds to changing times, technologies etc. The Courts had no difficulty in accepting that contracts could be concluded by fax and telex.

1.2 It's very likely they will have no difficulty in concluding that contracts can be made by exchange of emails. A more comprehensive summary of many of the issues in this paper is set out in my attached June 2002 seminar paper for the New Zealand Law Society.

1.3 Even where statutes apply, generally the online position is similar to that in the "traditional hardcopy world". There are some quirky differences to watch out for. We will touch on some of these during this seminar series. For example, while copyright law is largely the same whether online or in the traditional world, there are some differences, for which legislative change is desirable.

1.4 Much of the law works by analogy. For example, principles applicable in one area can be applied elsewhere. Email contracts and email risks are a good example of the sort of issues that apply elsewhere. For example, we will later develop later online contracts in a website/electronic commerce context. But much of the discussion about email contracts applies also to websites and E-commerce. We will develop these themes over this seminar series.

2. Electronic Transactions Bill

2.1 This new legislation, when enacted, will hardly affect most email contracts and risks. The key focus of the Act is the fulfillment of particular statutory requirements, many of which do not apply to usual commercial dealings. There are some specific default contract rules in the Act but they will generally not apply in practice.

2.2 The Act will confirm – broadly – that traditional law principles generally apply to electronic communications. But that's the case anyway. So don't hold your breath for the new Act – it's not going to make much difference in normal business.[1]

3. Email Contracts

3.1 As Sally Callender notes in her paper, except in unusual circumstances where a statute says otherwise (eg sale of land), contracts can take any form (for example, written, oral, fax, email, or any combination of those methods). Often, even the most complex contracts recorded "on the back of an envelope" will be enforced by the Courts.

3.2 Many deals between suppliers and purchasers are concluded by email exchanges every day. They don't have to look like fancy lawyer's agreements. "Send me Windows 2000"; "Sure that'll be $2. It's on its way"; "Cheers". There's a legally binding contract. Less care is often taken in emails than would otherwise be taken in other communications.

3.3 To be fully legally safe, often there's a lot to think about. But often the risk is low and it doesn't matter too much what is said (if things go wrong the downside is not great).

3.4 But sometimes it's important to get it right. For example, a software supplier will often want to limit its liability to a customer. It's easy for a quick exchange of emails to mean that the supplier's standard limitation of liability is not included in the contract. To be included, the contract terms must do more than just exist somewhere. They must adequately be brought into the contract. There must be specific and sufficient reference to those terms. Sometimes the supplier has to go overboard in drawing particularly onerous terms to the attention of the customer. There's more detail about this in my NZLS paper.

4. High dollar high risk contracts

4.1 Often the risk for providers is low and so corners can be cut when contracting. Email exchanges, oral agreements etc. in those cases have minimal risk, commercially and legally.

4.2 But in high dollar value contracts, complex deals, and even low dollar contracts which involve high risk, suppliers (and sometimes customers)

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[1] See the more detailed description in my attached NZLS paper.

should take care to tie down all the contract details. In those situations, generally it would be too risky to conclude the deal on-line.

4.3 One of the problems, for example, is proving later that the person purporting to send an email signing up for the agreement in fact is that person and he or she is authorised on behalf of the company. Until there is more widespread acceptance of technology such as digital signatures, it is far safer to go back to old fashioned hand signing of agreements. One option, in situations where there are repeated orders, is to sign up a handwritten contract at the outset, which provides for individual orders (or even contracts) to be concluded by email. This is a good model, for example, for on-line procurement.

5. Disclaimers and other ways of minimising risk

5.1 Sally has identified several approaches in her introductory paper, which apply also to emails. If you are particularly concerned to ensure that you do not get stuck in an agreement unwittingly, or want to keep negotiations private (so the Courts do not see them) look at adding "without prejudice" at the start of the email. This is something lawyers do a lot when deals are being negotiated, and the protection is equally applicable to others as well.

5.2 Emails, like faxes, often have a disclaimer at the foot. Ours reads, for example:

> *"This email and any accompanying documentation may contain privileged and confidential information. If you are not the intended recipient, your use of the information is strictly prohibited."*

5.3 It's helpful to have something like this although we are not sure it makes a great deal of difference in most situations.

5.4 Later in this series, we'll deal with the situation where employees use the employer's computers to send and receive emails, employer's exposure, and possible solutions.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on "both sides of the fence", and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

We welcome your feedback on this article and any enquiries you might have in respect of its contents. Please note that this article is only intended to provide a summary of the material covered and does not constitute legal advice. You should seek specialist legal advice before taking any action in relation to the matters contained in this article.

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