

“Information Technology Law - With Specific Reference to E-Commerce”

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ABSTRACT

The Electronic Commerce Act, 2000 relates to the creation of contracts made electronically. It codifies elements of the existing common law of contract and implements much of the EU Directive on Electronic Signatures 1999/93/EC. The Act has no application to a will, power of attorney, sale of land but provides that contracts may not be denied legal effect simply because they are in electronic form. In the formation of a contract, the offer, acceptance (cancellation or revocation) may be communicated electronically (unless otherwise agreed between the parties).

The Act provides that the acceptance of an offer may be made by electronic means and normal contractual rules apply and contains complex provisions setting out the time and place where an electronic communication may be deemed to have been dispatched and received. Key definitions to note are as follows: An ‘Electronic Signature’ is defined as data in electronic form which authenticates the originator. An ‘advanced electronic signature’ a signature which is uniquely linked to the signatory, identifies the signatory and any change to the data can be detected.

Keywords: *Electronic Communication, Electronic Signature, Contracts, Electronic Form*

Introduction

Where information must be given in writing such as a contract of guarantee, this may be given in electronic form by e-mail or otherwise. Where a person is required to sign a document, this may be given in electronic form (s.13). An ‘electronic signature’ is ‘data in electronic form which authenticates the originator’. Contracts were deemed to be signed by the electronically printed signature of the sender in an email in *Golden Ocean Group Ltd v Salgaocar Mining Industries* [2011]. In this case, the High Court (UK) held that a chain of e-mail correspondence can give rise to a binding contract of guarantee. The parties held detailed negotiations about the terms of a contract and guarantee by exchanging emails and intended their emails to lead to a formal document but the High Court held that emails showed agreement on the important points and thus a legally binding contract was created. The emails satisfied the Statute of Frauds in that the guarantee was in writing and signed.

Contract Formalities

Emails contain a variety of information which may be used to authenticate it, such as the sender’s address in the header. Where contracts are to be made under seal an advanced electronic signature must be use (i.e. a signature which is uniquely linked to the signatory, identifies the signatory and any change to the data can be detected. In *J Pereira Fernandes SA v Mehta* [2006] the defendant was a Director of a company that owed the plaintiff a sum of money. The plaintiff brought a petition to wind up the company; in response an e-mail was sent to the plaintiff

which purported to promise that in return for a stay in the proceedings the defendant would personally guarantee the debt. The e-mail was not signed by the defendant but was ‘...described in the header as having come from nelmehta@aol.com’. This is something that is inserted automatically. It is not inserted by the sender. Section 4 of the *Statute of Frauds* provides that ‘no action shall be brought ... Unless the agreement...[is] in writing and signed by the party to be charged therewith...’. Therefore it was important to know if this e-mail amounted to a signed document. It was held that the email address is the ‘equivalent of a fax or telex number’ and did not amount to a signature. He further held that:

‘I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference.... if a party or a party’s agent sending an e-mail types his or her or his or her principal’s name to the extent required or permitted by existing case law in the body of an e-mail, then in my view that would be a sufficient signature for the purposes of s 4’.

Other provisions

Consumer transactions may be made electronically and will be protected by consumer legislation. The courts may not deny the admissibility into evidence of documents, information, communications and contracts simply because they are in electronic form. If information is required to be kept in its original form, it may be kept in electronic form (providing its integrity and accessibility is assured). If information is required to be retained or produced, by law or contract, then this may be done in electronic form. The Law of Defamation applies to the Internet.

European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013

European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 transposes the Consumer Protection Directive into Irish law and came into effect on the 13th of June 2014. The Directive acknowledges that the potential for cross border distance selling which should be one of the main tangible results of the internal market has not been exploited. It therefore establishes rules on the information to be provided for distance contracts (over the internet), off-premises contracts (at a person’s workplace or home for example) and other types of contracts. It also regulates the right to withdraw from distance and off- premises contracts.

The Regulation applies to contracts between a trader and a consumer. A trader must provide the consumer with the contract or confirmation of the contract within a reasonable time of concluding the contract in the case of a distance and off-premises contract. It sets out in the Schedules detailed information to be supplied to consumers. A consumer is defined as a natural person who is acting for purposes which are outside the person’s trade, business, craft or profession and a trader as a natural or legal person who is acting for purposes related to the person’s trade, business, craft or profession and includes any person acting in the name or on behalf of the trader.

Consumer information for off-premises contracts and distance contracts.

Before a consumer will be bound by an off-premises contract or distance contract (e.g. sales contracts, service contracts (other than for passenger transport services) and contracts for the supply of digital content not supplied on a tangible medium e.g. downloaded media, the trader must provide the consumer with the following information (similar information as above except with a right to cancel):

- (a) the main characteristics of the goods or services
- (b) the identity of the trader
- (c) if the trader is acting on behalf of another trader, the geographical address and identity of that trader
- (d) the geographical address at which the trader is established, and the trader’s telephone number, fax number and e-mail address to enable the consumer to contact the trader quickly and communicate with the trader efficiently
- (e) the geographical address of (i) the place of business of the trader, if different from the address provided in accordance with paragraph (d), and (ii) where the trader acts on behalf of another trader, the place of business of that other trader, if different from the address provided in accordance with paragraph (c) to which the consumer can address complaints
- (f) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated
- (g) any additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such charges may be payable
- (h) in the case of a contract of indeterminate duration or a contract containing a subscription –
- (i) the total costs per billing period, or,

- (ii) where such contracts are charged at a fixed rate, the total monthly costs, or
- (iii) where the total costs cannot reasonably be calculated in advance, the manner in which the price is to be calculated
- (i) the cost of using the means of distance communication used for the conclusion of the contract where that cost is calculated other than at the basic rate
- (j) the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or perform the service
- (k) where applicable, the trader's complaint handling policy
- (l) where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with Regulation 17
- (m) where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation of the contract and, in the case of distance contracts, if the goods by their nature cannot normally be returned by post, the cost of returning the goods
- (n) where the consumer exercises the right to cancel after having made a request in accordance with Regulation 21, that the consumer is liable to pay the trader reasonable costs in accordance with that Regulation
- (o) where a right to cancel the contract does not apply under Regulation 13, the information that the consumer will not benefit from that right or, where applicable, the circumstances in which the consumer loses the right
- (p) in the case of a sales contract, the existence of a legal obligation on the trader to supply goods that are in conformity with the contract
- (q) where applicable, the existence and conditions of after-sale customer assistance, after-sales services and commercial guarantees
- (r) the existence of relevant codes of practice, as defined in section 2 of the Consumer Protection Act 2007 and, where applicable, how copies of such codes can be obtained
- (s) the duration of the contract where applicable or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it
- (t) where applicable, the minimum duration of the consumer's obligations under the contract
- (u) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader
- (v) where applicable, the functionality, including applicable technical protection measures of digital content
- (w) where applicable, any relevant interoperability of digital content with hardware and software of which the trader is, or can reasonably be expected to have been, aware
- (x) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject, and the methods for having access to it.

Additional requirements for distance contracts concluded by electronic means.

If the contract places the consumer under an obligation to pay, the trader must make the consumer aware in a clear and prominent manner and directly before making the order the information specified above in (a), (f) to (h) (s) and (t). The trader must ensure that the consumer when placing an order explicitly acknowledges that the order implies an obligation to pay otherwise the consumer will not be bound by the contract. Buttons that are clearly labelled with 'order with obligation to pay' or a similar formulation indicating that the order entails an obligation to pay.

A trader will commit an offence where he does not do any of the above. In a distance contract a trader who concludes a distance contract with a consumer must provide the consumer with confirmation of the concluded contract on a durable medium. The confirmation should contain all the information specified above (in Schedule 2) prior to the conclusion of the contract unless he has already provided the information prior to the conclusion of the contract. In the case of digital content not supplied in a tangible medium where applicable the confirmation must include the consumer's acknowledgement of the loss of the right to cancel the contract. The confirmation must be provided within a reasonable time after the conclusion of the contract and at the latest at the time of the delivery or before the performance of a service or supply to digital content not supplied on a tangible medium. Again, where a trader does not comply with these obligations he will commit a criminal offence.

Right to cancel distance contracts and off-premises contracts

A consumer may cancel the contract prior to the expiry of the cancellation period without giving any reason and subject to some exceptions will not incur any costs. This right does not apply to inter alia

- (a) a service contract or contract for digital media that has been performed with the consumer's agreement and acknowledgement that he will lose the right once the contract has been fully performed
- (b) contracts for the supply of goods or services whose price is dependent on fluctuations in the financial market
- (c) the supply of non-prefabricated goods made on the basis of an individual choice the consumer or goods clearly personalised
- (d) goods liable to deteriorate or expire rapidly
- (e) the supply of sealed goods that are not suitable for return for health and hygiene reasons or sealed audio, video recordings or software that are unsealed after delivery
- (f) contracts for the supply of newspapers or magazines with the exception of subscription contracts
- (g) public auctions
- (h) contracts for passenger transport services, accommodation other than for residential purposes, car rental services, catering or services related to leisure activities.

In the case of service contracts, contract for the supply of digital content not supplied on a tangible medium, the cancellation period expires after 14 days from the day on which the contract is concluded. In the case of sales contracts the cancellation period generally expires after 14 from the day on which the consumer acquires physical possession of the goods.

In the case of contracts for multiple goods, the expiry period is 14 days from the delivery of the last of the goods. If the trader does not provide information on the right to cancel as required in paragraph (l) of Schedule 2, the cancellation period expires in 12 months.

Model cancellation forms are set out in Part B of Schedule 3 in the Regulations. In the event of a cancellation, the trader must reimburse all payments, including any delivery payments received from a consumer within 14 days after being informed.

This may be withheld until receipt of the goods in a sales contract or the consumer has supplied evidence that he has sent the goods back whichever is first. Any trader not complying with these provisions will commit a criminal offence. The consumer must send back the goods no later than 14 days from the day on which he informed the trader of his decision to cancel the contract

and he is obliged to bear the costs of doing so unless the trader agreed to bear the costs or he failed to inform the consumer that the consumer has to bear those costs.

The consumer must take reasonable care of the goods prior to returning them and is liable for any diminished value resulting from the handling of the goods.

Unsolicited goods and services

The absence of a response from the consumer following the supply of unsolicited goods or services does not constitute consent to the provision of consideration for the goods or services or the return or safekeeping of the goods. The consumer may treat the goods as an unconditional gift.

Criminal penalties

A trader found guilty of an offence under the Regulations will be liable on summary conviction to a class A fine or 12 imprisonment and on indictment to a fine not exceeding €60,000 or 18 months imprisonment or both.

Any waiver by a consumer of a right provided for in the Regulations will have no effect and a term which restricts the rights under the Regulations will not be binding on the consumer.

Conclusion and Recommendations

In the case of off-premises, generally the information should be provided on paper or if the consumer agrees on another duration medium. In the case of distance contracts, the information should be made available in a plain and intelligible language and in a way appropriate to the means of distance communication used. All the information above forms part of the contract and cannot be altered with the agreement of the trader and the consumer. In the case of contracts concluded through a website, the trader must ensure that the website indicates clearly and legibly

and at the latest at the beginning of the ordering process, whether any delivery restrictions apply and which means of payment are accepted.

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