DID YOU KNOW … SENDING CONTRACTUAL NOTICES BY EMAIL CAN BE DANGEROUS?

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KEY POINTS

• There are problems with using email as a form of communication because of the problems of proving delivery and the issue of ostensible authority.

• You should assume that communications made over email are likely to be binding.

INTRODUCTION

In today's technologically driven and fast–paced world, it has become common practice for parties to communicate to each other via email. However, although there can be many legal issues involved with sending an email communication, there are still no statutory or common law rules to rely upon. The Electronic Transactions Act 1999 (Cth) (with similar legislation enacted in each state and territory) is limited in its application to those laws specified in the regulations. Further, the principal objectives of the Electronic Transactions Acts are to confirm the validity of contracts made by electronic means and to ensure the legal requirements expressed by reference to records, documents and signature may be satisfied by electronic means. Thus, using email as a form of communication in the performance of the contract is still relatively ungoverned. Notwithstanding this, an email communication may be perceived as a formal issue of notice under the contract, may create contractual liabilities or may even lead to a breach of contract.

THE CONTRACT

The contract entered into between the parties should specify how contractual notices should be sent between the parties. Many contracts do not expressly permit email to be used as a mechanism to send a formal notice under the contract. However, the written contract can be added to and varied through the course of conduct of the parties in the performance of the contract. Emails may constitute a valid communication for the purposes of the contract particularly if the parties establish a pattern of conduct that uses email as a form of communication for contractual matters. This is important to note as communications made over email, including the issue of notices, may lead to binding commitments unless it is made clear that they are not intended to do so.

THE DANGERS OF USING EMAIL TO ISSUE CONTRACTUAL NOTICES

Using email to issue contractual notices can be dangerous because of the issues of:

• proving delivery; and

• ostensible authority.

Proving delivery

As yet, there are no statutory or common law rules about service by email to rely on. The Electronic Transactions Acts can provide some guidance as to when a notice sent by email will be deemed to be received. The Electronic Transactions Act 1999 (Cth) states that if the recipient provides the sender with its email address and thereby designated an information system, the time of receipt is when the email enters the designated information system, i.e. when it enters the recipient's mail server. On the other hand, if there is no designation of an information system, the time of receipt is when it comes to the attention of the recipient. That is, the recipient must actually receive the message and know of its existence for the communication to be deemed successful. However, as stated above, the Electronic Transactions Acts only apply in certain limited circumstances so the above rules cannot be taken as definitive.

Further, email communication can be compared to other forms of instantaneous communication such as a facsimile transmission. Case law has firmly established that in instantaneous communications, because it is as if parties are in each other's presence, a contract is not formed until the acceptance actually reaches the offerer, i.e. that receipt occurs when the fax reaches the recipient's fax machine.

Thus, although it seems clear that receipt will not occur until the email reaches the recipient, it is unclear if this occurs when the email enters the recipient's domain or when it comes to the attention of the recipient.

Other difficulties with proving delivery include the fact that email systems do not routinely provide an acknowledgement of receipt that is comparable to an answer back on a fax. A request for a delivery receipt from the sender does not generally give a reliable result.

There are also problems with email addresses. For example, if a sender receives a message saying that the email was undeliverable, then it could be argued strongly that the sender reasonably ought to suspect that the message has not been delivered. On the other hand, it may be determined

that delivery is to the recipient's domain, not to the recipient personally. If this is the case, it is up to the recipient to check their email box if they have agreed to accept notices by email. Ironically, therefore, if a sender sends a notice by email and gets an 'out of office' notifier from the recipient, the sender would have notice of receipt by the recipient and the fact that the sender had been notified that the recipient is out of the office may be irrelevant (in the same way that the addressee of a fax being out of the office is irrelevant to the time of receipt of the fax). The assumption would be that somebody else would read the recipient's email.

Further, the email address of a particular person is of no use potentially if that person has left the organisation. It may be difficult for the sender to rely on service if the 'owner' of the email address is no longer with the organisation. Conversely, if the sender receives a bounce back from the target stating that the person who is the 'owner' of the specified address has left the organisation, the sender could argue that it relied on valid service of the notice because a sender has evidence that the message has been received into the recipient's domain. However, if a bounce back gives apparently definite information that the email will not be read by the addressee, the effectiveness of the notice would have to be in question. At the recipient's end, depending on the organisation's arrangement with ex–employees, the organisation may not have any record of having received the email.

Ostensible authority

An employee may bind an organisation as the organisation's agent, even if the employee does not have the actual authority of the organisation to do as he or she did. An employee, while acting within his or her known, or if, not precisely known, ostensible authority can bind an organisation—for example by responding to a notice.

Binding commitments can be made by email communications even where the sender did not appreciate the effect of their email and/or did not have authority to make such a commitment. The same test applies to oral communications.

The test is not what the employer thought he or she was doing, but what a reasonable person in the position of the recipient of the email would have thought of the email. The danger is that because email is such an easy form of communication people do not always properly weigh their words and unlike an oral conversation those words remain accessible into the future.

SO WHAT SHOULD YOU DO?

We recommend that email is not used as a form of contractual communication because of the problems of proving delivery and the issue of ostensible authority.

In order to ensure that emails do not become a valid form of communication under the contract, if a party sends a notice by email the other party should reply to each communication by requesting a formal notice be sent pursuant to the applicable clause of the contract.

If email is to be used as a form of issuing contractual notices, we recommend that:

• email should be restricted to those notices that are unlikely to involve financial or other liability (although it may be difficult to ascertain what these will be and could ultimately create more problems);

• all email communication should be sent to and from one email address. This email address should be generic (e.g. generalcounsel@co.com.au);

• if the contract does not specify email protocol or the parties have allowed email communication by their conduct, a deed should be entered into which outlines the protocol for the issuing of contractual notices by email. This deed may:

  • outline the person all contractual notices should be sent to;

  • require that all contractual notices sent by email include a statement that this email is a formal notice under the applicable clause of the contract;

  • specify when an email notice is taken to be received (eg. 24 hours after the email was sent, unless the party sending the email knows or ought reasonably to suspect that the email was not delivered to the addressee's domain specified in the email address); and

  • include a requirement for a digital signature which can ensure authenticity.

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