

Insights and Commentary from Dentons

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This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

Enforceable contracts via email

The question as to whether emails constitute an enforceable contract has been asked in courts across the globe. The Statute of Frauds is continually used in defence of contracts created through conversational email, prohibiting actions to enforce contracts not signed in writing.

In a recent case, a Canadian court referred to a series of emails negotiating the sale of a condo unit as being equivalent to a recorded telephone conversation¹. There was considerable merit to that observation. The informality and speed of the medium makes negotiations by email much more like a conversation than a series of traditional letters.

This article examines three cases - one from the UK, the US and Canada - in which the Statute of Frauds was pleaded as a defence to the enforceability of contracts created (or allegedly created) by conversational email. In jurisdictions where it has not been repealed, the Statute of Frauds prohibits actions to enforce types of contracts, unless those contracts be documented in writing and signed by the guarantor, transferor or their agents². Given the informality of the exchanges, it is natural the defendants attempted to use the Statute of Frauds as a defence to enforcement.

Guarantees negotiated by commercial agents

Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd,³ the English Court of Appeal concluded that an exchange of emails could constitute a guarantee⁴. The owner of the ship (Golden Ocean) negotiated to charter a ship to the chartering arm (Trustworth) of the alleged guarantor (SMI). The negotiations were protracted, taking place primarily through the parties' brokers. The brokers negotiated an agreement, which was never signed and ultimately repudiated. The critical email exchange begins after Hall (broker for Golden Ocean) responded to Hindley (broker for SMI) regarding some additional terms. Hindley wrote⁵:
Following back from Golden Ocean on the MOA. In the end I did not

mention anything about pulling the tail shaft to them, as on reviewing the VLCC we did with them it was in there ... anyway they agree to all. Salgaocar's changes except deposit which I think quite right – do you know if it is already drawn up. If not suggest we put it in or otherwise do an addendum. Deposit seems very fair especially considering Salgaocar has the option on when to exercise. Can I confirm this?

To this email, Hall responded⁶:
Yes. Confirm the 5 days that's fine. Cd u send me recap - with todays date? Suggest to Golden Ocean we agree the same date for C/P. Can you get additional clause put in C/P as don't think same has been drawn up yet though happy for it to be an appendum. I'm rather hoping we can agree that vessel is Golden Beijing as Salgaocar liked the name!

Hindley 'signed' his email by typing his first name 'Guy'. Hindley then reported to his client that 'we are all done!⁷ Although there is no mention of a guarantee in this exchange, previous exchanges regarding the price included the notation 'a/c Trustworth Pte Limited Singapore fully guaranteed by Salgaocar Mining Industries Goa⁸.

The alleged guarantee was in writing even if it were necessary to piece together multiple documents. Tomlinson L.J. accepted that it was entirely commonplace that 'terms agreed early on are not repeated verbatim later in the exchanges⁹. Regarding signature requirements, the informality did 'not detract from the seriousness of the business they are conducting¹⁰.' Hindley typed his name, Guy, 'to indicate that it came with his authority and that he took responsibility for the contents¹¹.'

Settlements negotiated by lawyers

Waddle v Elrod¹² involved the settlement of a dispute regarding ownership of real property. Waddle had sold the property to a third party but before that sale closed, the purchaser discovered that Waddle had already disposed interest to her niece, Elrod. In the ensuing litigation, Waddle alleged undue influence against Elrod and the return of her interest. Before trial, Elrod's lawyer, Greg, and Waddle's lawyer, Mary Beth, exchanged the following emails about a settlement¹³:

*Greg,
This confirms that we have settled this case on the following terms: Elrod deeds property interest back to Waddle, Both parties sign full release, Waddle bears no court costs. Let me know if I have correctly stated our agreement.
Thanks,*

And:
*That is the agreement. I understand that you will draft the deed and take a shot at the court's order. No admission of guilt is to be included.
Greg Reed*

Elrod tried to resile from the agreement by relying on the Statute of Frauds¹⁴. The Supreme Court of Tennessee held that the emails satisfied the 'in writing' requirement¹⁵. As to the signature, the main issue was whether 'Greg Reed' satisfied the electronic signature requirements of the Uniform Electronic Transactions Act (Tennessee) ('UETA')¹⁶. The UETA defines 'electronic signature' to include an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record¹⁷. The court concluded that 'Greg Reed' was sufficient.

Sale of condo unit by unsophisticated seller

Kijiji is an online classified advertising platform - its UK counterpart being Gumtree. In the Canadian case of *Druet v Girouard*¹⁸, Druet placed an advertisement on Kijiji to rent out a condo unit she owned. Girouard saw the advertisement and offered to purchase the unit. The two then began to negotiate by email. The key portion of the exchange began with a counteroffer by the purchaser¹⁹:

Thank you Kelty, I will meet you half way @ 155000.00 and pay legal fees and assume existing mortgage.

Then, after an email about visiting the unit, the seller responded²⁰:

Hi Marc,

Sorry for the late reply – I've been thinking about it. I will accept your offer. How would you like this to go?

Thanks,

Kelty

Druet backed out, stating that her boyfriend (not a co-owner) had been away and was unwilling to sell at that price. The court had no problem joining the emails to satisfy the 'in writing' requirement²¹. The court ducked the issue of whether typing Kelty constituted a signature for the purposes of the Electronic Transactions Act ('ETA')²². The ETA defined 'electronic signature' broadly²³. The court commented that the sufficiency of the signature may depend on extrinsic circumstances and the form of the writing²⁴: 'one has to wonder whether legal determinations regarding satisfaction of the signature requirement are strongly influenced by the merits or so-called 'equities' of a particular case. This leads us to pose another question: Will satisfaction of the signing requirement in electronic form be dependent on the circumstances of each case? For example, would it make a

difference that the parties downloaded from the internet a standard form agreement of purchase and sale and used that document to circumscribe their negotiations, as opposed to an exchange of quick-fire emails? In the case of the electronic standard form agreement, would the law accept as a valid signature the person's first or last name only? By contrast, would the law reach the same conclusion if the facts involved a series of email exchanges? The questions posed lead one to ask whether the form of the writing is as important, or more important, than the form of the signature. In turn, we cannot help but ask whether there is an overlap between the intention to authenticate a document and its contents and the intention to create legal relations.'

The court focused on intention and employed a 'reasonable bystander' test, concluding that facts pointed against such an intention, including that the parties had been unrepresented by professionals and the emails referred to the future preparation of an agreement of purchase and sale.

Conclusion

The primary purpose of the Statute of Frauds was to reduce the risk of fraud and perjury associated with oral testimony. It has long been recognised that the requirements of the Statute of Frauds must be interpreted flexibly to avoid it being a tool of inequity. As the cases demonstrate, the Statute of Frauds poses no great hurdle to the enforcement of contracts created through email - even informal email. The court is more likely to inquire into intention to protect the unwary from being bound to certain valuable contracts²⁵.

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1. 2012 NBCA 40 (CanLII) [<http://canlii.ca/t/fr44r>] para 41.
2. E.g. Statute of Frauds, 1677 c. 3 (Regnal 29 Cha 2), s. IV; [<http://www.legislation.gov.uk/aep/Cha2/29/3/content>]; Statute of Frauds, RSO 1990, c S.19, s. 4 [<http://canlii.ca/t/2qb>].
3. [2012] EWCA Civ 265 (BailII) [<http://www.bailii.org/ew/cases/EWCA/Civ/2012/265.html>] ["Golden Ocean"].
4. Golden Ocean came before the court to set aside permission to serve the defendant ex juris in Goa. The Court came to the same conclusion in *Pintar Manufacturing Corp v. Consolidated Wholesale Group Inc*, 2011 ONCA 805 [<http://canlii.ca/t/fqf0p>]. After offering to provide a guarantee, there was further email exchange culminating in the creditor asking for the guarantee. The motions judge stated that the alleged guarantor responded to this request 'I will personally guarantee the debt to Pintar in full. Chris Hinn': 2011 CarswellOnt 15670 (SCJ) (Westlaw). The Court of Appeal recorded the response as ending 'Signed Chris'.
5. [2011] EWHC 56 (Comm) (BailII) [<http://www.bailii.org/ew/cases/EWHC/Comm/2011/56.html>] at para 20.
6. *Ibid* at para 21.
7. *Ibid* at para 22.
8. *Ibid* at para 9.
9. *Supra* note 4, at para 22.
10. *Ibid* at para 32.
11. *Ibid*.
12. 2012 WL 1406451 (Tenn. Apr 24, 2012) (Westlaw).
13. *Ibid* at *3.
14. Tenn. Code Ann. § 29-2-101(a)(4) (Supp.2011).
15. *Supra* note 11, at *7.
16. § 47-10.
17. § 47-10-102(8).
18. *Supra* note 3.
19. *Ibid* at para 7 (edited).
20. *Ibid* at para 9 (edited).
21. *Supra* note 18, at para 3.
22. SNB 2001, c E-5.5 (since repealed and replaced but not with respect to the provisions referred to herein).
23. *Ibid* at s. 1(1).
24. *Supra* note 18, at para 30.
25. Compare, *supra* note 11, at para 4, where the Tennessee Supreme Court stated that this was a purpose of the Statute of Frauds.