



Are Electronic Contracts and Electronic Signatures valid?

More and more people are looking to interact with each other in faster and more instant ways so as to overcome barriers of distance and time.

Traditionally when people have contracted with each other, they delivered a signed paper document to each other in person, or by delivery methods such as post or courier. Query, if this delivery is done by sending a copy of the signed paper document by fax or by email, is it a valid contract?

For a Contract to be validly formed, certain elements must be satisfied, namely:

1. There must be an offer setting out the terms of the contract,
2. An unequivocal acceptance of the offer must be communicated to the person who made the offer.
3. The contract must be supported by consideration eg; payment of price.
4. The parties must have intended to create legal relations.
5. All parties must have the legal capacity to effect the transaction

These same principles apply to electronic contracts. In NSW, The Electronic Transaction Act provides that a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

However, in addition to the usual requirements for a paper contract, a contract formed electronically is legally valid if;

1. The contract is stored appropriately and can be accessed after signing; and
2. There has been consent between the parties to receive information electronically, expressly or by implication.

One of the issues for electronic contracts relates to electronic signatures, and is the issue of evidencing the requirement of an intention to create contractual relations. This is so because the parties are not dealing with each other face to face (often with witnesses present) and cannot verify each other's identities through traditional means.

The NSW Court of Appeal recently considered the validity of an electronic signature in *Williams Group Pty Ltd v Crocker* [2016] NSWCA 265. In this case IDH Modular Pty Ltd opened a credit account with Williams Group and the directors of IDH, including Mr Cocker, appeared to affix their signature electronically to the credit account application, and to a guarantee which was witnessed by IDH's administration manager. The signatures had been inserted using 'Hellofax', an electronic password protected system that enabled users to sign documents electronically.

Mr Crocker had a username and password for the system but had not changed the password. Williams supplied goods to IDH but IDH went into liquidation without paying and Williams sued Mr Crocker on his guarantee. Mr Crocker



successfully defended the proceedings on the basis that although he had been a user of the Hellofax signature, he had not authorised the placing of his signature, and that an unauthorised person must have done so.

The Court found that for Mr Crocker to be bound by the electronic signature there would need to be tangible and convincing evidence that he actually authorised the placement of his electronic signature on the guarantee, or he represented to Williams that a particular person was properly authorised to use his electronic signature.

An electronic signature is a broad concept, and is any method which applies a signature to an electronic message. It is intended to be an electronic representation of your intent to sign. This may range from the typed name of the sender, to clicking “I Agree”, to a recording of you saying ‘yes’ during a recorded transaction, to a scanned image of the handwritten signature of the sender, or a handwritten biometric signature captured on a mobile device. Each type of electronic signature has its own level of security, but on the whole, is vulnerable to copying and tampering. A digital signature uses public and private key encryption technology to assist a person who receives a digitally signed message to accurately determine that the message was signed by the sender.

An electronic signature is recognised under Australian law as having the same effect as a handwritten signature, subject to the following qualifications;

1. There must be consent by the recipient to receive information electronically;
2. The method of signing must identify the person sending the information, and indicate that this person approves the content of the electronic document that has been signed; and
3. Having regard to all of the circumstances of the transaction, the method of signing must be as reliable as is appropriate for the purpose for which the electronic document was generated. Alternatively, evidence of identity of the signor, and their approval of the contents of the electronic documents, must be self-evident in the document or otherwise available in some other manner.

An electronic signature is sufficiently reliable if;

1. The means of creating their signature is linked to the person signing and no-one else;
2. The means of creating their signature was under the control of the person signing and no-one else;
3. Any changes to the signature are detectable;
4. Any changes to the document are detectable.

Conclusion

Whilst electronic signatures are legally valid, the difficulty in using an electronic signature becomes apparent when you are faced with the task of finding a way to prove the identity of the signor in a setting where the signature is not witnessed by another person. Digital signatures are one method to try and minimize these risks.

If you use, or are considering the use of electronic signatures and would like more information or need assistance on how to proceed, please call Michael Battersby or Ken Gray on 02 4731 5899 or email commercial@batemanbattersby.com.au.