Are Form Requirements A Hurdle To Electronic Commerce?

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ABSTRACT

The issues most often identified as being in need of attention with the emergence of ecommerce via the internet communication are form requirements. This is because the perceived or actual barriers arising from the form requirements could influence the uptake of electronic commerce. The form requirements imposed under the law such as writing, deed, stamping etc raises a question whether these contracts can be conducted via the internet communication and whether the form requirements pose hurdles to the conclusion of the contract via the internet. This paper examines the capability of internet communication to satisfy the writing and other form requirements under the UK law.

Key words: writing, stamping, document, deed, e commerce.

Introduction

Formality requirements consisting of the writing, signatures etc were first introduced in the Statute of Frauds 1677. The requirements were justified by the contemporary rules of evidence and procedure at the time of the passing of the Statute of Frauds 1677 (Furmston, 2006). With the reform of the rules of evidence and procedure, the mischief of the Statute has been to a large extent removed. All of the formal requirements applicable to the contracts contained in the Statute of Frauds 1677 were repealed, with the exception of contracts for the creation or disposition of interests in land and contracts of guarantee. The emergence of ecommerce raises a question whether the form requirements could impede the conclusion of contract via the electronic mail, the web or the EDI.

The requirement under the statutes:

At present, only a number of statutes require the contracts to be made or contractual documents to be prepared in writing. These include leases for over three years (section 52 of the Law of Property Act 1925), contracts for the sale or other disposition of an interest in land (section 2 of the Law of Property (Miscellaneous Provisions) Act 1989), contracts of guarantee (section 4 of the Statute of Frauds 1677 as amended by Statute Law Revision Act 1883, Statute Law Revision Act 1948, section 1 of the Law Reform (Enforcement of Contracts) Act 1954, section 207 of the Law of Property Act 1925, section 1 of the Law Reform (Enforcement of Contracts) Act 1954), cheques and other bills of exchange (sections 3 and 83 of the Bills of Exchange Act 1882), bills of sale (Bills of Sale Act 1878 (Amendment) Act 1882), certain forms of insurance (sections 22 to 24 of the Marine Insurance Act 1906), assignments of a copyright (section 90(3) of the Copyright, Designs and Patents Act 198), deeds, wills and the transfer of shares. Credit contracts require that a “copy” of the agreement be given to consumers (section 6 of the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983).

The application of the statutory provisions requiring contracts to be made in writing in the context of the web and electronic mail is not entirely impossible, given the likelihood of contracts being made via these forms of communication. In fact, some contracts involving the writing requirement, such as electronic conveyancing, bills of lading, and insurance, have already been conducted electronically. Contracts of guarantee are also likely to be adopted by banks, given the widespread use of the internet banking. Assignment of copyrights, tenancy and partnership agreements could equally be carried out via electronic mail or the web.

In relation to land dealings, section 52 of the Law of Property Act 1925 provides that “all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed”. Section 53 requires “the creation or disposition of interest in land, a declaration of trust respecting any
land or any interest therein, and a disposition of an equitable interest or trust to be made in writing and signed”. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 also requires “contract for the sale or other disposition of an interest in land to be made in writing and by incorporating all the terms which the parties have expressly agreed in one document”. In relation to contract of guarantee, the Statute of Frauds 1677, section 4 as amended provides that “no action shall be brought against the defendant pertaining to any special promise to answer for the debt default or miscarriages of another person unless the agreement or some memorandum or note is in writing and signed”. In relation to bills of exchange, the Bills of Exchange Act 1882 sections 3(1) provides the meaning of the bill of exchange as “an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer”. Section 83(1) of the same Act defines a promissory note as “an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to bearer”. In relation to assignment of copyrights, the Copyright, Designs and Patents Act 1988, section 90 (3) provides that “an assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor”. In relation to solicitors’ remuneration agreements for both non-contentious and contentious business, Solicitors Act 1974, sections 57 and 59 provide that the agreement must be made in writing and signed by the party to be bound by it. Some statutory provisions do not necessarily require the contracts to be made in writing, but provide that certain legal rights or undertakings may only be created by written contracts. For example, in relation to compensation for improvements and goodwill on the termination of tenancies of business premises, the Landlord and Tenant Act 1927 section 17(2) provides that “the compensation applies to the tenancy created after the commencement of this Act, only if the contract is in writing and expresses the purpose for which the tenancy is created”. Writing may also be required under the Partnership Act 1890, section 2(d) where money is loaned to a person engaged in or about to engage in a business on terms that the lender shall be entitled to receive a rate of interest varying with profits, or to a share of the profits in the business. In the event of failure to comply with the requirement, the lender may be treated as a partner of the borrower and thus become liable as such.

The capability of internet communication as a medium of contract conclusion for contracts with the requirement of writing:

The capability of internet communication to be used as the medium of contract conclusion hinges on the meaning of writing in the relevant statute, if any. If the meaning is not provided, the issue has to be determined with reference to the meaning of writing under the Interpretation Act 1978 which is the statute of general application. In addition to the meaning of writing, the usability of these communication media as the medium of contract conclusion would also depend on their capability to meet other related requirements such as document, deed and stamping.

Some statutes, for examples the Copyright, Designs and Patents Act 1988 and the Bills of Exchange Act 1882 provide for the definition of writing. Section 178 of the Copyright, Designs and Patents Act 1988, which defines writing to “include any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded, and written shall be construed accordingly” has been said to include digital information (Reed, 1996). The definition is broad enough to encompass electronic mail, web and communication without a screen display, such as a fully automated transaction between computers in Electronic Data Interchange (EDI). The acceptability of these communications to constitute writing is desirable in the light of their capability to present readable information to recipients. By contrast, section 2 of the Bills of Exchange Act 1882 which provides “written includes printed, and writing includes print” has been said to exclude electronic communications, as reference to printing in the definition indicates that the provision contemplates writing to be in tangible form (Reed, 1996).

Another statute, the Land Registration Act 2002 which repeals the Land Registration Act 1925 deals specifically with electronic conveyancing. Through Chapter 8 of the Act, it deems the electronic document to be in writing so long as the parties ensure that the electronic document states the time and date when it takes effect, contains the electronic signature of both parties and each electronic signature is certified. Thus the Land Registration Act 2002 defines what would qualify as writing in terms of the attachment of the time and date and the use of certified electronic signature. This specific meaning of writing is designed to achieve the identification of the person making the registration and the integrity of the document. The meaning of writing is to be applied in the specific context of electronic conveyancing. Hence, electronic communication not complying with this specific meaning of writing, such as web and electronic mail without the use of certified electronic signatures, could not be used to conclude electronic conveyancing contracts. It may be thought that the requirement of certified electronic signature as a condition of fulfilment of the definition of writing is not appropriate to all cases. It would impose unnecessary cost on the contracting parties, and high security in terms of the identification and the integrity of the document may well not be necessary to low-value transactions. For
online e-land transaction, the requirement of the use of certified electronic signature is desirable given the significance of the transaction and is justified for the purpose of fraud prevention.

Other statutes in relation to the requirement of writing in contract conclusion do not define the meaning of writing. For these statutes, the question whether the web and electronic mail could be used as the medium of contract conclusion would have to be answered with reference to the Interpretation Act 1978.

The statutory meaning of writing under the Interpretation Act 1978:

The meaning of writing is provided in Schedule 1 Interpretation Act 1978, which applies unless the wording of a statute provides or indicates to the contrary. The word writing is defined under the Interpretation Act 1978 to:

"include[s] typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly".

The meaning of writing as provided in the phrase "other modes of representing or reproducing words in a visible form" is relevant to the issue under consideration. This meaning would be important to the consideration whether electronic information via the web, electronic mail and EDI could satisfy the definition under the Act; they would only be writing provided that they can reproduce words in visible form.

The Law Commission (2001) has established that only the displayed information as visible, and the digital information in its electronic form is not. Accordingly the position under the Interpretation Act 1978 is that only the displayed information would satisfy the requirement of visibility, whilst the digital information in its electronic form would not.

Based on the above meaning of visibility, communication with a screen display such as electronic mail and the web would satisfy the requirement of writing under the Interpretation Act 1978, as they are visible. Communication without a screen display, such as a fully automated transaction between computers in Electronic data Interchange (EDI) would not meet the writing requirement. Thus there may be an obstacle in the use of EDI to conclude a contract with a requirement that it be in written form.

Despite the Law Commission’s opinion on EDI, it may be thought that an exception should probably be made with regard to the digital information in EDI on the basis that the computer programs understand the communications. This argument may be possible on two grounds; firstly, the instances of methods of recording given in the provision of the Interpretation Act 1978, i.e. typing, printing etc provide no indication that the media containing writing should only be viewable by human eyes. Secondly, it is plausible to argue that visibility to computer programs is also acceptable as definition of writing on the basis that computers can be considered as agents to human users. This argument may be acceptable based on Thornton v. Shoe Lane Parking where Denning MR considered the automatic machine issuing the tickets as “a booking clerk in disguise”. The machine was viewed as capable of acting as agent to the proprietor through which an offer may be made. In his analysis of offer and acceptance in the contract by the machine Denning MR said: “The offer is made when the proprietor of the machine holds it out as being ready to receive the money”. The position of a computer does not vary much from that of the machine, where both have been programmed to understand the instruction from users. Without the screen display, the software running on the receiving computer is capable of understanding the communication and processing and executing the contract.

It may be noted that whilst EDI may be treated as writing under the above alternative argument, i.e. by broadening the ability of being seen to the computer program, EDI would also fit the definition of writing under international legislation without difficulty. Article 6 of the UNCITRAL Model Law on Electronic Commerce 1996 readily accommodates EDI in its definition, as long as the digital information is accessible for subsequent use. Article 6 states:

“Where the law requires information to be in writing, that requirement is met by the data message if the information contained therein is accessible so as to be usable for subsequent reference”.

Equally, the Principles of International Commercial Contracts 1994 (UNIDROIT) would probably encompass EDI in its definition of writing, as the communication can well preserve a record of the information and it is capable of being reproduced in tangible form, i.e. the print out. Article 1.10 states:

"writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form”.

The same conclusion in relation to the capability of EDI to constitute writing can well be maintained under the Principles of European Contract Law 1998 (PECL). EDI is capable of providing a readable record and hence fulfilling the requirement of its definition in Article 1:301(6) which states:

'Written' statements include communications made by telegram, telex, telefax and electronic mail and other means of communication capable of providing a readable record of the statement on both sides".
In relation to the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG), although the law has made no provision for the use of internet communications in its definition of writing in Article 13 which states:

“writing includes telegram and telex”, nevertheless, the web, electronic mail and EDI could be argued to satisfy the writing requirement by virtue of the convention’s intent, purpose and support from other articles (Hill, 2003).

With the enactment of the Electronic Communications Act 2000, the writing requirement does not pose any hurdle any more. Section 8 gives the power to the minister to make an order to modify almost any law in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage (instead of other forms of communication or storage) for any purpose mentioned in subsection (2). Those purposes include, as provided in sub section (2), the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument. It may be commented that the Act does not provide a cost effective solution in removing the impediment of writing as there are large numbers of instances of the writing requirement in the corpus of UK statutes (Reed, 1996). Nevertheless, given the above argument that the definition of writing under the Interpretation Act 1978 accommodates most of electronic communication, there would be no need to make a regulation under section 8 of the Electronic Communications Act 2000 confirming the capability of the web, electronic mail and EDI to satisfy the writing requirement.

It is noted above that in addition to the requirement of writing, the usability of the electronic communication as the medium of contract conclusion would also depend on their capability to meet other related requirements such as document, deed and stamping.

The requirements of document, deed and stamping:

The requirement of writing often comes together with the requirements that the contract be stated in documents, made by deed or duly stamped. For example the requirement of a document can be seen in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which requires contract for the sale or other disposition of an interest in land to be made in writing and by incorporating all the terms which the parties have expressly agreed in one document. The requirement of a document should present no difficulty to electronic communication, given the flexibility of its meaning in case decisions. Courts have regarded a computer database and word processing file as documents for the purpose of discovery under the law of evidence.

The requirement of a deed is provided under section 52 of the Law of Property Act 1925 which provides that all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. In the context of land transaction, these requirements do not pose an obstacle to the use of electronic media. The Land Registration Act 2002 which creates the framework for electronic conveyancing deems electronic documents to be deeds, and both could be prepared in electronic form.

In relation to the stamping requirement, the requirement takes three forms; the stamp duty, the stamp duty land tax and the stamp duty reserve tax. First, the stamp duty takes the paper form. This is provided in section 27 Stamp Duties Management Act 1891 which states: the expression "stamp" means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee; the expression "stamped" is applicable as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto. Second, the stamp duty reserve tax is done electronically. The stamp duty reserve tax was first introduced in 1986; the main purpose was to cover paperless share transactions on agreements to transfer 'chargeable securities' for consideration in money. The main provisions are in the Financial Act 1986, section 87 and the supporting Regulations, i.e. the Stamp Duty Reserve Tax Regulations 1986. However, if a paper transaction is drawn up and duly stamped, the transaction will fall within the Stamp Duty legislation, i.e. the Stamp Act 1891. Third, stamp duty land tax is also done electronically, involving documents evidencing land transactions effected on or after 1 December 2003. The stamp duty land tax makes the transition from impress on paper to a transaction tax payable whether or not there is any paper used and transactions will be chargeable regardless of where the transaction takes place and whether or not any of the parties are present in the UK. The only requirement is that the subject matter of the transaction is land situated in the UK. The rules for the new land transaction duty are set out in Points 4 and 5 of the Finance Act 2003 and in Schedules 3 to 20. On implementation, the Act will replace the Stamp Acts of 1891 and supersede much intervening legislation. The rationale of the stamp duty land tax is to prevent unlawful avoidance, ensure fairness in liability to duty and prepare for electronic conveyancing. Unlike the stamp duty, the stamp duty land tax is a tax on transactions and not documents, a move that will facilitate electronic conveyancing. Thus, the stamping requirement does not constitute a barrier to the use of the electronic medium for contract conclusion; the English law facilitates online stamping, as with the case of the stamp duty land tax and the stamp duty reserve tax.
Concluding remarks:

Electronic information via the web and electronic mail would readily satisfy the Interpretation Act 1978 requirement of visibility. There are two conflicting views with regard to the position of EDI; on the one hand, it would not satisfy the requirement of visibility due to the lack of display feature in the communications according to the view of the Law Commission. On the other hand, it may qualify as writing if the computer software were to be considered as an agent of human users. The second view is not entirely impossible, given the ability of the computer program to process and action the digital information. If the second view were to be preferred, EDI could be used to effectuate a contract which is required to be made in writing. Section 8 can be used to resolve ambiguity, if any, pertaining to the form requirements under the UK law.

References