

HIT 'SEND' AND HOPE? REDUCING YOUR RISKS WHEN USING EMAIL FOR CONTRACTUAL COMMUNICATIONS

Owen Hayford, Partner
Clayton Utz, Sydney

The use of email for formal contractual communications is fraught with legal and technical risks. Even so, it has become common practice for contracting parties to send contractual communications via email. This article highlights some of the risks and outlines some options for reducing them.

WHEN IS YOUR EMAIL TAKEN TO HAVE BEEN RECEIVED?

As yet, there is no universally applicable rule about service by email to rely upon. The *Electronic Transactions Acts* of the States and Territories provide a default position. They provide that, unless it has been otherwise agreed between the parties:

(1) if the addressee of the email has designated an information system for the purpose of receiving electronic communications, emails will be taken to have been received when the electronic communication enters that designated information system;

(2) if there is no designated information system, emails will be taken to have been received when they come to the attention of the addressee.

There is however a level of uncertainty and impracticability about these options. In the first option, there are issues as to how a sender can prove when the email entered the relevant server.

For example, whilst the sender of an email can request a delivery receipt, a recipient can set up his or her email system so that delivery receipts are never issued, even if the sender requests one. Also, emails caught in the recipient's firewall will be taken to have been received even though the email has not actually been delivered to the recipient's inbox. Further, if a sender gets an 'out of office' notifier from the recipient, the recipient would be taken to have received the email, as the 'out of office' message indicates that the email was received by the recipient's domain.

However, the default positions can be varied by agreement between the parties. Accordingly, there are a variety of other ways by which the parties can stipulate when an email is taken to be received, including:

(a) at the time the email is sent by the sender—however, email communication is not always instantaneous. There are often delays between the time an email is sent and the time it is received;

(b) a specified period after the time it is sent by the sender—but what if the email is not received within the specified time, or is not received at all?; or

(c) the time shown on the automatic receipt notification received by the party sending the email from the recipient.

A SOLUTION

To avoid the difficulties identified above, you may wish to consider option (c), whereby the time of receipt is deemed to be the time shown on the automatic receipt notification received by the sender from the recipient. An automatic receipt notification is different to a delivery receipt, as it is automatically generated and sent by the recipient's email system, whether or not the sender has requested it.

This option overcomes the problem of emails being deemed received when they are caught in the recipient's firewall, as the automatic receipt notification can be set up so it only generates a receipt once an email has passed through the firewall and arrived in the recipient's inbox.

To implement this option, each contracting party needs to agree to set up its email system so that the appropriate receipt notifications are automatically sent to the senders. The obligation to do this can be recorded in the contract itself.

The process for determining the deemed time of receipt where the sender and recipient are in different time zones should also be considered. Even if each party usually conducts its business in the same time zone, there may be occasions when one party wishes to send the other a communication from a different time zone. One solution is for the deemed time of receipt to be the time in the place to which the email is sent equivalent to the time shown on the sender's automatic receipt notification (unless received outside of business hours in that place, in which event it would be deemed to be received at the commencement of the next business day).

ONUS ON SENDER

By adopting option (c), the onus falls on the sender to ensure that it receives and retains the receipt notification so that it can prove the time of receipt. If the sender does not receive the automatic receipt notification, the onus would then be on the sender to resend the communication (perhaps by another method such as a fax) or confirm that the recipient did in fact receive the message.

To assist senders, each party can agree to use reasonable

endeavours to ensure that its email system automatically sends a notification to the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient, for example if it gets caught in the recipient's firewall or if the recipient's email system has 'gone down'. This notification will alert the sender of the need to re-send the communication, perhaps by an alternative method.

CONSIDER USING A SPECIAL PROJECT MAILBOX

Sending automatic receipt notifications will generate a lot of email traffic if the recipient receives a lot of emails. Accordingly, you will want to set up your email system so that the automatic receipt notifications are only sent when emails are received from specified senders. To address this issue, parties may wish to establish special project mailboxes (e.g. projectnotices@company.com.au) to and from which formal contractual notices can be sent. Other advantages of such a system include:

- the ability to give alternative persons access to the special project mailbox as circumstances demand;
- the elimination of the need to change the email address if the person nominated to send and receive contractual email communications is replaced during the life of the contract; and
- adding a degree of formality to the email communication, by requiring contractual emails to be sent to and from the special email address.

TECHNICAL RISK MITIGANTS

There can be technical issues with using email for contractual communications. For example, emails can easily be altered by

the receiver. Also, the parties' electronic systems may have different capabilities eg. one party may send an attachment in a form that cannot be opened by the other party.

Measures which can be adopted to reduce some of the technical risks include:

- recording in the contract agreed formats for email attachments, so that all parties have the software required to open and read the attachment;
- lifting firewall restrictions and ensuring the mail server does not trap emails from specified sources;
- creating a 'loop-back' service that, at a predefined period of time (for example every 90 minutes from 7am to 7pm), sends a test email to the other party's domain and monitors for a receipt notification. If a receipt notification is not received within a predefined period of time is automatically sent to a designated employee to investigate.

'FORMAL' V 'INFORMAL' COMMUNICATIONS

Consideration should be made of the fact that an employee may bind an organisation as the organisation's agent, even when the sender did not appreciate the effect of their email and/or did not have authority to make such a communication.

One potential solution is for the parties to draw a distinction in the contract between formal and informal communications, with only the former to be treated as a communication under the contract. The contract would stipulate the requirements for how a formal communication is sent. For example, the parties may decide that formal email communications must be in the form of a .pdf of a signed letter, and that only the signed letter (and any other attachments to

the email which are referred to in the letter) will be treated as a formal communication—with any text in the body or subject line of the email not forming part of the formal communication.

Informal communications, such as oral communications and communications sent by email which are not formal communications, would not be treated as communications under the contract.

OTHER SUGGESTED RISK MITIGATIONS

To further reduce the risks associated with contractual email communications, you might also consider:

- requiring your employees to sign a document formally acknowledging the procedures which they are to follow when sending formal and informal communications on behalf of the organisation; and
- adjusting any automatic disclaimer which appears with your emails, to make it consistent with any arrangements you have put in place for the sending of contractual communications by email.

FINAL REMARKS

Given the risks associated with sending contractual communications by email, parties are often best advised to use alternative methods of communication for contractual communications. However, where the convenience of email demands that this form of communication also be available, there are steps which can be taken to reduce the risks.

Owen Hayford's article was previously published in Clayton Utz's *Project Insights*—September 2008. Reprinted with permission.
