Review of Online Sales Contracts

Simon Minahan considers issues relevant to risk-managed online sales to an international market, and examines how to minimise some of the risks inherent in the multi-jurisdictional, international marketplace of the internet.

By now, the bulk of organisations who might be likely to do any significant business online are probably already there. Chances are, though, that they got there in a rush and without much input from their lawyers. Even if they did take advice about their online activities at the time of entering the world of e-commerce, there is a good chance that the experience of doing business online has not been entirely what was anticipated – both by them and their advisers.

Of course, there will always be newcomers to the online trading environment. The 'dot.com bubble' may have burst, but the functionality of the internet, the cost effectiveness of its reach and the fact that a good portion of the market is there already will see e-commerce continue to attract new players. So there is merit in reviewing legal aspects of online trading arrangements, in particular contractual and related instruments. As ever in commercial legal service, the exercise is one which is intrinsically about risk assessment and management. And as ever in risk management, one needs to make an assessment of the field of risk, identifying its characteristics and potential problem areas.

In international commerce, issues of jurisdiction and enforceability are always paramount. In online transactions, these issues can be fiendishly confounded. It can be practically impossible, if the client is trading into the market at large, to predict particular jurisdictional issues in advance, but it pays to at least try to identify the areas of possible difficulty and the best means of avoiding or limiting them.

This article considers these issues in light of the *United Nations Convention on International Sales of Goods*[1] (***CISG***) and certain local laws. For the purposes of discussion, it is assumed that the products for sale online are not controversial, in the sense of meeting the definition of 'goods' (eg software), and are thus covered by the CISG.

CONTRACT FORMATION

First, consider the architecture of your online deal-making. Is your client offering and the other party accepting? Or is your client inviting offers, and reserving the power of acceptance? Will systems for ordering and processing of orders be automatic, or will there be intermediate human review before acceptance?

Electronic communication is a valid medium for contract under the *Electronic Transaction (Victoria) Act 2000* (Vic) (***ETA***) and its Commonwealth and interstate equivalents,[2] all of which follow the UNCITRAL Model Law. (Many other countries have also used the UNCITRAL Model Law as a basis for their own electronic transactional law.) These acts seek to achieve technological neutrality in transactions. Accordingly, subject to the parties' intentions, most digital 'documents' and transactions are given the same legal status as paper documents and transactions.

Under the ETA, if the parties consent (expressly or implicitly), there is no impediment to forming a contract by electronic communication. Note, too, that the ETA also provides some default rules as to the time and place of offer and acceptance. Notably, the place of a party's server will not be relevant to the analysis. However, the ETA does not specify the rule to be applied in determining the question of the actual place of formation of a contract. Further, while the ETA may desire technological neutrality, the rules as to offer and acceptance are not technologically neutral – the rule for acceptance by post is different from that for acceptance by 'instantaneous communication', the former being ruled by the time and place of dispatch, and the latter by receipt.[3]

In this regard it is submitted that the 'instantaneous communication' rule, rather than the postal rule, is applicable within Australia. This means that the contract is formed where the acceptance is received. In view of this, it is obviously desirable – if local jurisdiction is desired with respect to the governing law of the contract – to have purchasers cast in the role of accepting your client's offer.[4]

The ETA provides that assent will be effective if:[5]

(a) a method is used to identify the assenting person's signature and to indicate that person's approval of the information communicated;

(b) the method is reliable (note that reliability will be assessed in the context of the technology available at the time); and

(c) the person to whom the signature is required to be given consents to that method.

Note, though, that the onus of proving assent is on the party seeking to enforce the contract, and in the standard computing environment there will always be (for the foreseeable future) evidentiary issues surrounding non-repudiation of online contracts.

Article 14 of the CISG defines 'offer' as having to be addressed to a specific person or persons and sufficiently definite as to the goods in question and their price. It must evince an intention to be binding upon acceptance. The same principle applies, *mutatis mutandis*, for 'acceptance'.

Article 24 of the CISG provides that:

> 'an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence'.

This is in essence a 'reception' regime. Clearly, email was not in the minds of the drafters of the CISG. Equally clearly, however, the CISG was intended to cover all cases. Reading together the personal delivery requirement of this Article with s 13 of ETA, it seems tolerably clear that any offer will be sent when it leaves a party's information system and will be deemed to be personally delivered when it enters the recipient's information system.[6] It is therefore submitted that the CISG and Australian law are complementary.

However, there has been some divergence under the CISG regarding the situation where the buyer and the seller each stipulate mutually incompatible terms in their communications. Accordingly, it is as well to specify (in pre-contract or contract documents, as the case may be) what will be treated as an offer and how acceptance is to be communicated, to avoid arguments about first versus last 'shots' or the cancelling out of terms.

Note further that Articles 12 and 13 of the CISG, which discuss the requirement of writing in contracts, do not contemplate electronic data as writing – but the ETA or the contract itself are capable of addressing this deficiency. As noted above, under the ETA, a digital signature will be effective if its reliability is 'appropriate for the purposes for which the information was communicated'.[7] The precise meaning of this statement remains to be defined; it does not, for example, preclude a 'click-wrap' assent from being effective, but it does not secure the effectiveness of such assent either. If assent is to be by way of 'click-wrap', then care needs to be taken to satisfy the principles in the 'ticket' cases – still the best authority to the likely direction of Australian law in the absence of a specific 'click-wrap' decision. US decisions such as *Specht*[8] and *Verio*[9] also give good indications of the likely (and common sense) requirements such as prominently displaying terms and conditions online and making sure that no 'click' indication of assent can be given without the customer seeing the relevant terms and conditions. Note also that this can be an issue for enforceability of given terms, as well as for the formation of the contract as a whole.

As a corollary to this, it is important to make sure that your client's identity is clearly made known online – a lot of companies seem to regard their formal identity and location as some kind of secret once they start doing business on the internet. Don't let them jeopardise sales with such 'coyness'!

WARRANTIES

Be aware of the operation of local statutes – especially the *Trade Practices Act 1974* (Cth) – even though it is an international online transaction that is in issue. Pay special attention to this if it is intended to select local law as the applicable law of the contract. Under the CISG, limitation and exclusion of liability is possible, and the CISG ought to be considered, and particular limitations or exclusions specified, in the sale terms.

PAYMENT

Obviously, international online sales may have to deal with a number of complexities concerning payment and delivery. Currency and method of payment need to be considered and stipulated. Methods may include credit card, SWIFT or CHAPS electronic transfers, letters of credit, bank transfers and various form of digital cash, such as Paypal.

Tax is potentially tricky for all concerned – even the tax authorities themselves! The general rule of thumb is that goods are taxed at the place of purchase/ delivery, and services at the supplier's location. However, this is still being debated with respect to electronic taxation and there are real dangers of multiple taxation events. Specialist advice and careful drafting is strongly recommended in this regard. That said, a change from tried and true payment arrangements will not generally be necessary.

The amount and manner of payment need to be stipulated, as do whether payment is to be made before or on delivery, and the usual terms of payment and delivery such as FOB (note the varied definitions under the CISG). Also, while the CISG does provide for interest if a payment is late, it does not specify a default rate of interest – this should be done expressly in the contract to avoid adding the long list of litigants under the CISG who have argued this point.

DISPUTE RESOLUTION

If your client opts for arbitration, try to ensure that the other party's home country is a signatory to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[10] in order to secure recovery. Aside from this, one needs to meet the usual issues in contracting for arbitration such as compliance with local statute requirements, and ensuring that 'click-wrap' assent (if applicable) is informed and therefore good.

CHOICE OF LAW

Any choice of law or forum clause needs to be reasonable to be enforceable. This means it should have a reasonable nexus to the transaction. Generally, stipulating the supplier's jurisdiction is regarded as reasonable, whereas selecting a deliberately inconvenient jurisdiction is not.

Note, however, that many jurisdictions have differing views as to jurisdiction and the nomination of choice of law. For instance, US 'long arm' statutes and the 'purposeful availment test'[11] differ from Australian rules regarding service out of the jurisdiction, which require a nexus, as well as analogous authority such as *Gutnick*.[12] Note also the need in online agreements to make any particular clauses concerning dispute resolution clear and the subject of informed assent, in order to ensure enforcement.

Under the CISG, the matter of acceptance is not relevant to the determination of operative legal jurisdiction; rather, it is the location of performance which governs the contract. Articles 31 and 57 point to this being the business location of the seller – but again it is not sensible to leave this to default operation of the CISG or any other law. Both the applicable law and forum should be stated expressly. At the very least, if the CISG is being left to apply by default, your client's place of business should be stated in the contract.

CONCLUSION

Review of online contracting needs, and proper documentation in light of the CISG and the relevant Australian law, will repay the initial effort involved by

avoiding a lot of potential pitfalls that come with online international selling. Of course, the proof of success will be in the absence of problems, a quality sometimes mistaken by clients as an indication that there were no problems in the first place. Consolation lies in the fact that it is (in this context at least) better to be misunderstood than to misunderstand!

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1 [1988] ATS 32.

2 *Electronic Transactions Act 1999* (Cth), *Electronic Transactions Act 2000* (NSW), *Electronic Transactions (Queensland) Act 2001* (Qld), *Electronic Transactions Act 2003* (WA), *Electronic Transactions Act 2000* (SA), *Electronic Transactions Act 2001* (ACT), *Electronic Transactions (Northern Territory) Act 2000* (NT), *Electronic Transactions Act 2000* (Tas).

3 See the ETA s 13.

4 However, this leaves the purchasers with the last word, which is not always for the best and may present issues under the CISG. Ideally, the contract documentation needs to include a choice of law clause. This matter is in the hands of the parties, since they may provide any rule they like on this point.

5 ETA s 9(1).

6 Note though that Part III of the CISG constitutes a variation of the reception regime, by allowing sending parties to rely on an interrupted communication. This is nearer the 'dispatch theory', and should be specifically considered and modified if desired.

7 ETA s 9(1)(b).

8 *Specht & Ors v Netscape Communications Corp & Anor* 306 F 3d 17.

9 *Register.com, Inc v Verio, Inc* 126 F Supp 2d 238.

10 [1975] ATS 25. See www.uncitral.org/english/status/index.htm for a list of member states.

11 See eg *International Shoe Co v Washington* (1945) 360 US 310 and *State v Granite Gate Resorts, Inc* (1997) 568 NW 716.

12 *Dow Jones & Company v Gutnick* (2002) 194 ALR 433.

You Can't Stop the Music

Peter Mulligan examines music piracy and parallel importation issues in the context of the recent case *Universal Music Australia v ACCC*.

The rise of the internet and globalisation of markets means that the recording industry in Australia is facing new and challenging threats to its existence. The ability to parallel import CDs and other sound recordings as well as the growth in music piracy through use of file-sharing networks are just some of the challenges the industry is learning to deal with.

At the time of the changes to Australian copyright law permitting parallel imports of sound recordings, the recording industry responded aggressively. While the industry claimed that its actions were intended to discourage music piracy and free-riding on local investment, the Federal Court recently found the conduct of two record companies to be in breach of the *Trade Practices Act* 1974 (***Act***) and imposed heavy penalties both on the companies and their executives.

The case is *Universal Music Australia v Australian Competition and Consumer Commission*[1] and concerned the conduct of Universal Music, Warner Music (the ***Record Companies***) and their senior executives. The Record Companies were each fined $1 million and the executives $45,000.

PARALLEL IMPORTATION OF SOUND RECORDINGS

In July 1998 the *Copyright Act* 1968 (***Copyright Act***) was amended by the *Copyright Amendment Act (No 2)* 1998 (***Amendment Act***) to remove the prohibition on the importation of sound recordings without the consent of Australian copyright owners or licensees. This enabled Australian wholesalers and retailers of CDs and other sound recordings to import stock from overseas provided the manufacture of the overseas recordings had not infringed copyright law in the overseas country and had been carried out with the consent of the copyright owner.

The effect of the change in laws was to open up to international competition the wholesale market for the supply of CDs in Australia.

The Amendment Act was introduced to give effect to the recommendations of the Prices Surveillance Authority report, "Inquiry into the Prices of Sound Recordings".[2] The report had concluded that the prices paid by Australian consumers for sound recordings was too high. One of the recommendations was the repeal of the parallel importation provisions of the Copyright Act in relation to recordings made in countries providing levels of protection for musical works and sound recordings comparable to those in Australia.[3]

The policy behind the legislation was explained at the time in the Second Reading Speech of the Attorney General:

> "The Bill will exempt the importation of non-pirate copies of a sound recording from infringement of copyright in either the sound recording or the works recorded on the recording. It will thereby remove the ability of copyright owners to control the market for each imported copy of a sound recording."[4]

Under the amendments, it is now permitted to import, sell and commercially deal with "non-infringing copies" of sound recordings. A "non-infringing copy" is defined (in a new section 10AA of the Copyright Act) as, essentially, a copy that has been made:

(i) without infringing any law of the country in which it was made that protected copyright in any musical or other work used in the sound recording; and

(ii) with the consent of the producer of the original sound recording, or other person who was the copyright owner.

THE ACTION AGAINST THE RECORD COMPANIES

Around the time of the parallel importation amendments, the Record Companies began to step up the lobbying of their CD retailers. There were visits by senior executives of the Record Companies to many of the large retailers as well as some of the smaller ones.

In July 1998 the Chairman of Warner Music sent a letter to all retailers referring