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Welcome to the Autumn/Winter edition of *Commercial eSpeaking*. We hope that you find the articles in this e-newsletter are both interesting and useful to your business.

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Making sure they're valid

Have you entered into a contract recently via electronic communication? Did you consider whether the communications were legally valid? Historically, one would expect that a handwritten signature was a necessity of a valid contract. The reality is that the way we do business has changed markedly in recent years, and every day many people and businesses enter into contracts without exchanging hard copy documents evidenced by the parties' signatures… CONTINUE READING

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Not as powerful in business as imagined

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The next issue of Commercial eSpeaking *will be published in early Spring.*

E-commerce Contracts

Making sure they're valid

Have you entered into a contract recently via electronic communication? Did you consider whether the communications were legally valid? Historically, one would expect that a handwritten signature was a necessity of a valid contract. The reality is that the way we do business has changed markedly in recent years, and every day many people and businesses enter into contracts without exchanging hard copy documents evidenced by the parties' signatures. This article looks at the validity of electronically conducted contracts – with or without signatures.

E-commerce contracts

Contracts created via electronic communications, or better known as 'e-commerce contracts', have become increasingly popular in business practice. You may be wondering if you can enter into a contract via email, text, or even social media? The answer is yes you can. Provided certain requirements are met, e-commerce contracts are enforceable. Just like any other form of contract, e-commerce contracts require an offer, acceptance and an exchange of value, all of which can be recorded electronically. There are however a few things to be wary of.

Text, email or social media contracts

Entering into contracts via text, email or social media may be convenient, but they carry a higher degree of risk. These communication exchanges are often quick and scant consideration can be given to the conditions. This can lead to an unclear and uncertain agreement, and possibly not the agreement you thought were agreeing to. It's always best to sit down with the other party, discuss all possibilities and contact us to draft up a written agreement for you that deals with those possibilities and other items you may not have thought of. This will also enable you to confirm the identity of the person you are communicating with.

A signature may be a necessity

There are some documents, however, that must be physically signed in hard copy. These documents include Powers of Attorney, or Enduring Powers of Attorney; affidavits; Wills; and requirements to produce or serve a warrant of search or seizure. The Property Law Act 2007 also requires that some specific property contracts be in writing and signed. These include the sale and purchase of land; trusts that relate to land and take effect in the lifetime of the settlor of the trust; and contracts of guarantee.

The modern signature

Although a signature isn't a requirement for some contracts, it's a useful tool to prove the parties' intentions to enter into a contract. But how can you sign electronic documents? It's possible to print out documents and then physically sign them. But it's also possible to sign the document 'electronically' with an e-signature. An e-signature is a digital image of your signature that's then inserted electronically onto the document. The Electronic Transactions Act 2002 has paved the way for e-commerce contracts. It enables an e-signature to be accepted provided certain requirements are met. An e-signature must clearly and sufficiently identify the person signing, and clearly and sufficiently indicate the person signing approves of the information to which the signature relates. The signature must also be appropriate and reliable given the purpose and circumstances in which the signature is required. Where a contract must be witnessed the same requirements apply to the e-signature of witnesses.

Coping with the modern signature

It's important that if you enter into an e-commerce contract you are aware of what's necessary to complete those contracts. If you are planning on entering into an e-commerce contract and want to use an electronic signature make sure the signatures used meet the electronic signature requirements. If the signatures fall short of the requirements, the contract may be invalid and, ultimately, result in financial loss. If you are unsure of the requirements we can work with you to make sure your contract is valid. ■

Powers of Attorney

Not as powerful in business as imagined

A power of attorney allows you to appoint someone (the attorney) to look after your affairs. It's a common mistake for company directors to think their personal attorneys can look after a company's affairs in their absence. This article looks what business people should do if they anticipate enforced absences from their company.

You're a sole director and you plan to be overseas or in hospital. Someone must look after your affairs during your absence. The solution appears deceptively simple: ask your lawyer to draw up a power of attorney which gives someone you trust (the attorney) the authority to act legally on your behalf.

You expect that your attorney will be able to wear all the hats you wear. When you own and operate your own company you wear many hats: director, employee and shareholder. On a day-to-day basis these distinctions don't affect how you conduct your company's affairs. It's your business. It's your livelihood. It's personal.

So it's a common mistake for company directors to think their personal attorneys can look after their company's affairs while they're away. The following example should unravel the confusion.

The business scenario

Imagine you have a friend who needs surgery and appoints you as her attorney to look after her affairs during her recovery. Your friend is also the director of a publicly listed company. If your instincts serve you well, you wouldn't assume you could attend the next company board meeting and vote on important strategic and financial decisions.

Your instincts tell you that those sorts of company directors are voted onto a company's board by shareholders because of their personal attributes: acumen, experience, personality and expertise.

The law reflects these understandings and applies them to all companies: big or small. The law does this because, as a general rule, those who have legal obligations of a personal nature should not delegate their duties to an attorney.

Your intuition also tells you that your attendance at a board meeting would be unfair to shareholders. The law also reflects this instinctive need to protect shareholders. The purpose of a limited liability company is to give shareholders (i.e. investors) a limit on their liability (equal to the price for their shares) should things go wrong while giving them a fair degree of influence over their investment. For example, they choose the directors and the directors cannot allow the company to enter into major transactions or alter shareholders' rights without sufficient shareholder approval.

This balance works because the law treats a company, for business purposes, as if it was a real person. The shareholders own it and the directors are responsible for the day to day management.

The SME model

This will all seem rather artificial if you're the sole director and principal shareholder of a smaller company. But if you enjoy the benefits of trading through a limited liability company it's important to acknowledge all the nuances that come with it.

So if you're a sole director and you plan to be overseas or in hospital, your company will need to appoint someone (or another company) to look after your company's affairs during your absence. It's an important nuance but it's a straight forward solution allowed by the Companies Act. If a company appoints an attorney its powers, as a company, are delegated as if the company were a real person. And like a real person, your company can grant:

» A general power of attorney that allows the attorney to look after all the company's money and property, or

» A specific power of attorney that allows the attorney to manage specific matters or transactions (such as the leasing of a property).

Again, this solution appears deceptively simple. The company's attorney will be able to conduct the company's affairs as if the attorney has the director's approval. And if the company's actions suggest a breach of the director's duties to the shareholders or creditors the director may be held responsible. So it's important to appoint an attorney you can trust. It's also vital to talk with us about the nuances of company law. ■

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Business Briefs

Employment Relations Amendment Bill

The Employment Relations Amendment Bill (ERAB) introduced to Parliament on 26 April 2013 contains amendments to the Employment Relations Act (ERA) that go further than previously proposed. A few noteworthy points are:

» The Employment Relations Authority members will be required to give an oral decision, or indication of its preliminary findings, at the conclusion of an investigation hearing.

» Flexible working arrangement requests are to be extended to all employees when their employment begins.

» Greater scope for employers to withhold information, particularly where information is about an identifiable individual other than the affected employee; evaluative or opinion material compiled for the purpose of making a decision that will, or is likely to, have an adverse effect on the continuation of the employee's employment; or about the identity of the person who supplied the evaluative or opinion material.

» Rather than rest and meal break entitlements being decided by reference to the hours worked by an employee, the amendments simply require employers to provide their employees with a 'reasonable opportunity' for 'rest, refreshment and attention to personal matters'. Also, the obligation to provide breaks will not have to be met where employers cannot reasonably do so, having regard to the nature of the employee's work, for example, an air traffic controller.

The ERAB also contains changes to Part 6A (continuity of employment provisions) and the collective bargaining provisions of the ERA. A copy of the ERAB can be found **here**. ■

Consumer Law Reform Bill

The Consumer Law Reform Bill (CLRB) is expected to come into force this year. This new legislation will make major changes to various consumer laws which will affect all consumers and most businesses. The CLRB introduces a new prohibition under the Fair Trading Act 1986 (FTA) on the use of 'unfair contract terms' in standard form consumer contracts. The classic examples that may be subject to the prohibition are contracts that contain a 'take it or leave it' provision if you want to use the service such as contracts for electricity or gas and telephone lines. The regime will not be directly enforceable by consumers. Instead it will rely on the Commerce Commission seeking a declaration from the court that a term in a standard form contract is unfair. In deciding whether a term in a standard form consumer contract is unfair the court must be satisfied that the term:

» Would cause a significant imbalance in a parties' rights and obligations under the contract

» Is not reasonably necessary to protect the legitimate interests of the party who would be disadvantaged by the term, and

» Would cause detriment to a party if it were applied, enforced or relied on.

It will be an offence under the FTA for a person in trade to 'apply, enforce or rely on an unfair contract term' with the maximum penalty per offence for companies being increased to $600,000. It would seem, however, that an offence won't be committed by a party unless they continue to use a term in a standard form consumer contract after it's been declared unfair by the court. ■

Misconduct outside the workplace – It's not Hallwright

Generally, what your employee does outside of their working hours usually stays outside of working hours. The exception is where your employee's conduct impacts on your reputation as an employer or gives cause for concern about your employee's suitability. The Employment Relations Authority recently considered such out of work conduct[1] in deciding whether the dismissal of Mr Hallwright (a senior investment analyst at Forsyth Barr) was justified following his conviction of causing grievous bodily harm with reckless disregard for hitting another motorist with his car outside of work hours. The Authority considered that while Mr Hallwright had the ability to perform some elements of his job, his media profile had been tarnished by his conduct and he could not continue with the public-facing aspects of his role. Also, as Mr Hallwright's duties were carried out at a senior level, his own reputation, integrity and behaviour were relevant to the overall perception of the way Forsyth Barr conducted its business, and therefore he had bought his employer into disrepute. This case shows that there must be a clear link between an employee's out-of-work conduct and their employment to justify disciplinary action. The conduct should also relate to the employee's ability to do their job. ■

1 *Hallwright v Forsyth Barr Ltd* [2013] NZERA Auckland 79.