

ICC Guide for eContracting

Contents

- B.1 How to apply ICC eTerms 2004
- B.2 The legal validity of ICC eTerms 2004
- B.3 The limits of ICC E-Terms 2004
- B.4 Who contracts on your behalf?
- B.5 With whom are you contracting?
- B.6 Constructing an electronic contract
- B.7 Technical Specifications
- B.8 Protecting Confidentiality
- B.9 Technical Breakdown and Risk Management

B.1 How to apply ICC eTerms 2004

As we shall see presently at paragraph B.2 below when discussing the validity of ICC eTerms 2004, there may well be some instances where mandatory legal rules within a particular jurisdiction create barriers to contracting electronically. In most instances, however, a clear expression of intention by contracting parties that they intend to be bound through an exchange of electronic messages will effectively indicate to arbitrators or judges deciding disputes between the parties that they willingly and freely entered into a contract through that medium. In most cases, therefore, there is no reason why the applicable law should set aside a contract simply because it was concluded electronically.

This is why ICC eTerms 2004 starts from the proposition that the parties agree that the use of electronic messages shall create a binding contract: see article 1.1. Arbitrators and judges need to be put on clear notice that the parties have agreed to that fundamental principle in ICC eTerms 2004 and it is very much up to the parties to make that intention clear.

There are three ways in which contracting parties can signify their intention to agree to ICC eTerms 2004:

[a] parties can, within the limits allowed by any mandatory rules of the applicable law (as to which see paragraph B.2 below), simply incorporate ICC eTerms 2004 by reference into any contract they agree through electronic means, e.g. by e-mail, or communication through a web application;

[b] parties can sign and exchange a paper version of ICC eTerms 2004, indicating the types of contract during which and the periods to which it will apply (e.g. all sale of goods contracts between the parties concluded between them over the next two years);

[c] parties can simply exchange electronic messages indicating that they agree to ICC eTerms 2004 and then proceed to contract through electronic means, raising a presumption through course of dealing that that is the way they wish to conduct their business.

Where parties feel comfortable that they are contracting with a counterparty used to contracting electronically and under an applicable law which easily accommodates e-contracting, then option [a] is recommended.

Where parties are particularly anxious about the validity of contracting electronically with certain counterparties under certain applicable laws, then option [b] is recommended.

Option [c] will have the same effect as option [a] in most jurisdictions, but presents more opportunity for argument than does option [a]. The applicable option should be selected by the parties in view of all of the circumstances of the transaction.

It should be emphasised that, even without the incorporation of ICC eTerms 2004, if the parties start performing a contract which they concluded through electronic means, most arbitrators and judges in most jurisdictions would usually find that a contract exists.

B.2 The legal validity of ICC eTerms 2004

Despite the general legal validity of electronic contracts, there are situations in which the applicable law requires contracts to be recorded on paper and signed in a certain format. Will ICC eTerms 2004 be effective when the law of such a jurisdiction is the law applicable to the contract between the parties?

It is easy to overestimate this concern. For one thing, the ever-increasing use of electronic contracting, with the cost savings it brings in its wake, shows that most jurisdictions either actively endorse or at least passively permit contracting through electronic means. Even where there are local laws which seem to assume the exchange of paper documents between contracting parties, they may not be mandatory and the effect of ICC eTerms 2004, when agreed to by the parties, is safeguarded by the basic principle of freedom of contract.

Nevertheless, in some legal systems mandatory rules, i.e. rules which cannot be avoided through simple contractual agreement, positively exclude electronic contracting by making the validity of a contract depend on the exchange of signed paper documents.

Where you are contracting in these circumstances, do not simply assume that you cannot contract electronically: persuade your counterparty of the economic advantages of electronic contracting and seek local legal advice not only as to whether the law permits e-contracting, but whether it actively prohibits it. If it does prohibit e-contracting, then that may be a good reason for agreeing with your counterparty on having your contract governed by a more accommodating legal system.

B.3 The limits of ICC E-Terms 2004

While it is important to emphasize the significance of ICC eTerms 2004, it is equally important to realise their limits. First and most obviously, they are not themselves the contract between the parties, setting out the substantive rights and obligations between them under an arrangement, for example, for the sale of goods or for the provision of a service. Thus, for example, the risk of malfunction in the transmission of messages will depend on the agreement of the parties and of the applicable law. Those terms will be contained in the contract itself, which ICC eTerms 2004 facilitate but does not replace.

Secondly, ICC eTerms 2004 do not resolve all the possible issues which may arise regarding the conclusion of the contract. Thus, for example, if the parties each have their own standard terms and conditions (STCs), with each party intending to contract under its own STCs rather than under those of its counterparty, the issue as to which of the two STCs applies will be answered not by ICC eTerms 2004 but by the law applicable to the contract.

The central point here is that the purpose of ICC eTerms 2004 is to provide uniform terms that allow the parties to contract electronically without running the risk of one or other of them later raising the electronic nature of their contract as a ground for its invalidity.

B.4 Who contracts on your behalf?

Although the nature of e-contracting presents fewer legal problems than might at first be imagined, there are some risks which necessarily go with the benefits of the new technologies, namely speed and ease of use. If electronic contracting is easy and quick, may it perhaps be too easy for a company to find itself bound by a contract before it is really ready to commit itself? This may be especially relevant for SMEs and companies not accustomed to electronic contracting.

This issue raises three related matters, namely (1) who within your company can contract electronically; (2) can an electronic system bind your company to a contract; and (3) what happens when the wrong button is keyed (i.e. when one party commits an error during the contracting process).

Authority to contract electronically

A company cannot bind itself to a contract without the assistance of a physical person who speaks for it and every company will have its own internal rules as to who among its officers or employees has, as between them, the power to bind the company towards third parties.

It is important, however, to realize

[i] that in many legal systems, a company can be bound towards a counterparty if an officer or employee acting on its behalf appears to that counterparty to have the authority to so act, even if he does not actually have that authority under the company's internal rules; and that

[ii] whether or not that is the position, i.e. whether or not apparent authority is enough to bind the company, depends on the applicable law of agency.

As a result, the ease with which physical persons can contract electronically may increase the risk of a company finding itself bound to a contract through the actions of an officer or employee acting outside the confines of his authority. In a sense some of these risks are no different in the paper world: an employee can also make unauthorised use of company letterhead and exceed his authority in contracting on behalf of his company. However, a keyboard may be more vulnerable to unauthorised use, and a company would be well-advised therefore to take the following precautionary steps:

[a] employees need to be reminded regularly of their signing privileges and internal policies and procedures should clearly explain who can contract electronically and for what amount;

[b] employees need to be reminded regularly that their electronic communications can create rights and obligations for the company, and that they should therefore exercise caution and take internal advice before sending e-mails which might be interpreted as indicating the commitment of the company to a particular contract.

Automated e-contracting

The technology exists to allow companies to communicate with each other electronically with minimal or no human intervention in each transaction, a means of interaction sometimes referred to as "automated contracting". We have long been used to contracting using machines (for example, transactions using vending machines). "Automated contracting" goes one step further in that it involves both counterparties acting through machines, for instance in "just-in-time" arrangements.

Again, the perception that electronic contracting is riskier than contracting in the physical world may be worse than the reality, since computers can be secured against unprogrammed (or "unauthorised") transactions through careful and professional software design, which can be approved and modified only by officers and employees of sufficiently high responsibility, authority and expertise.

Inadvertent e-contracting

The steps described above should guard as much against unauthorised e-contracting as against inadvertent e-contracting, i.e. against a human being (or even a machine) keying a confirm button in error. A dose of caution is always a useful antidote to the risk of being too trigger-happy on the keyboard or click-happy with the mouse.

The importance of careful web site design cannot be over-estimated in this regard. Web sites that are ambiguous or unclear are traps for the unwary, and companies wishing to make use of the benefits of e-contracting need to design their web sites such that the terms they contain are clear to the user when he or she is about to enter into a contract. Using unambiguous language with a "legal" ring to it (such as "offer" and "acceptance") helps to alert users that they are entering a "commitment" zone and that they should therefore consider carefully whether they truly intend to bind themselves by contract. Consider, for example, building into your website a final step alerting your counterparty that he is about to commit himself, such as requiring that he click a button marked "I agree" before concluding the contract.

B.5 With whom are you contracting?

If it is important to alert officers and employees in-house about issues of authority to contract electronically, it is even more important to alert them to the importance of identifying the counterparty with whom they appear to be communicating. In electronic contracting, which frequently operates in different jurisdictions and across different time-zones, employees may be less familiar with the means of identifying the counterparty: moreover, websites can be spoofed and e-mail addresses can be impersonated.

Again, it is important not to exaggerate the risks, since common sense is also required in the paper world in identifying the party from whom a sheet of letterhead appears to originate. It is true, however, that the ease and speed of e-contracting may lull your employees into an unwarranted sense of security. Thus, it is often useful to take precautionary steps such as the following:

[a] Brief employees authorised to contract electronically in the basic skills of checking on the authenticity of e-mails, e.g. contacting the party through alternative means, checking contact details on other media, verifying a electronic signature, etc.

[b] Putting in place recognised authentication procedures, such as specified formats, identifying phrases, specific-use e-mail addresses, encryption and electronic signatures.

Clearly, the type and extent of the procedures to be put in place in this regard will differ based on the resources and technical expertise available, the parties' exposure to risk, and the volume and types of transactions concluded.

B.6 Constructing an electronic contract

When looking at the limits of ICC eTerms 2004 at para B.3 above, we saw that eTerms do not themselves provide the parties with the contractual terms for the transaction which they wish to conclude: they simply facilitate the conclusion of that transaction through electronic means. Having agreed to contract electronically, the parties must then consider what business they actually wish to transact and under what terms. In a real sense, this is no different to what parties do in the paper world: having decided to do business, say, through a series of face-to-face meetings and eventually through the exchange of signed paper documents, the parties will draft a contract recording the terms, the rights and the obligations, to which they want to commit themselves. Those terms will on occasion be contained in a one-off, tailor-made contract and on other occasions in a standard form contract intended for frequent use.

Likewise in the electronic world, business will need to give thought as to how to anticipate terms which they are likely to use in a routine fashion, how to draft terms which will differ from contract to contract, and how to "construct" an electronic vehicle or web site which allows for both. How precisely this is done will differ from business to business, depending obviously on the resources available but also on whether the company's transactions are more frequently routine or one-off. The speed and savings which the new technologies promise are more likely to be realised if care and attention are invested at the early stages of designing websites, software, and business processes which impact on the conclusion of electronic contracts.

The following are a number of terms which one would normally expect to find in most well-drafted electronic contracts, whether on a web site or through a series of electronic messages:

- the identity (legal name) and applicable geographic location of the business,
- relevant registration or identification numbers, etc.
- contact details for a designated representative of the business (including mail, e-mail, telephone and fax details),
- similar contact details for any agents used,
- language or languages of the agreement and of associated information, and language or languages in which communications regarding the contract are to be exchanged,
- the allocation of costs of communication and whether they are calculated at other than the basic rate,
- the period for which the offer or the price remains valid,
- where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently,
- description of the main characteristics of the goods or services to be provided,
- the price of the goods or services including all taxes,
- delivery terms and costs, where appropriate, for example a selected Incoterm,
- the terms of payment, terms relating to conditions, warranties, guarantees, after-sales service, remedies and redress, e.g. return and/or refund policy, options for withdrawal or termination, return, exchange, damages etc.
- terms relating to restrictions, limitations or conditions of purchase, geographic or time restrictions, product or service use instructions including safety and health-care warnings,
- terms relating to the confidentiality of information transmitted between the parties and liability for its breach,
- technical/security parameters of communications/exchanges,
- ways to verify representations concerning membership in any associations or self-regulatory schemes,
- applicable law and jurisdiction,
- alternative dispute resolution.

One of the practical differences between contracting through paper and e-contracting is that in a very real way the electronic medium is the message: for example, a web site is as much a marketing tool as it is a means of contracting. The design and lay-out of the above information therefore need to be professional, clear and easy to use. In designing your web site or other mechanisms for electronic contracting it is useful to bear the following in mind:

[a] make sure that information is easy to find: users of a web site or an e-service should be able easily to find and navigate through significant legal terms without having to travel through the whole contract on every search;

[b] make sure that related terms are gathered together in one electronic place and logically structured: it will be noted, for example, that the terms described above have been clustered into separate and cognate families, making it easier for the user to gain an overall picture of his rights and responsibilities in different areas of the contract;

[c] make sure that the web site contains early on an easy-to-use flow for the contract and the contract process: the entry page of the website, or a page as close as possible to the entry page, should contain the overall structure of the contract with easy hyper-links to particular areas for ready reference to specific terms.

B.7 Technical Specifications

In designing a web site or other mechanisms for electronic contracting, it is useful to bear in mind a number of technical issues relating to document format, e.g. file size, stability, integrity and replicability.

[a] File size is important in both transmission and archive. If the file format adds significant memory overhead then consideration needs to be given to the impact which this may have on both transmission (broadband) and archiving. This may be true where picture files are used to capture images of documents.

[b] Document images provide stability in terms of document format and appearance. Other document types (word-processing files) may change or alter formats as a result of different versions of the programme being used to create and retrieve or view the document. Issues of backwards compatibility are most important here as well as whether the program and media format continue to be supported.

[c] It is possible that for legal, fiscal or commercial reasons, you may need to preserve e-contracts for a certain period. With this in mind, consideration must be given to the stability of the format, how to prove the integrity of the document and its formatting and how to assure the ability to replicate both. New XML style/format sheets and other technological advances may help address these issues, but again parties must consider their applicability to any particular situation and the ability of the parties to utilize and support the technology. Because of the greater technology complexity, a number of third parties are developing hosting and storage/archiving solutions to assist businesses with these requirements. Imaging of documents and digital signing of documents or document images are also being used.

B.8 Protecting Confidentiality

The old adage that information is power acquires particular significance in the world of e-contracting. Information is frequently commercially sensitive or legally restricted, for example personally identifiable information (PII), requiring confidential treatment, yet its electronic habitat is freely available and possibly

more than usually vulnerable. In designing an application for e-contracting, such as a web site, it is consequently important to consider carefully issues of confidentiality.

First, the following decisions need to be made at a senior level at design stage:

[a] what information is to be posted on the web site,

[b] what information is to be required of counterparties,

[c] whether that information is to be freely accessible on the web site or whether it will appear only on restricted access and, if so, how access will be restricted and monitored.

These decisions need to be applied not only to information transmitted and received at the moment the contract is first made, but also to information transmitted and received during the life of the contract.

Secondly, it is important to alert officers and employees within the company of the potential liability which the company, its partners and customers might face if information is disseminated in an unauthorised way. Moreover, that liability may in certain circumstances be governed (and quantified) not by the law of the contract but by the law of another country. It is prudent, therefore, for companies to have in place clear internal procedures restricting the sharing of information posted and acquired through an e-contracting application.

Thirdly, the contract itself needs to deal with matters of confidentiality and liability for its breach. There is no one-size-fits-all clause that appropriately protects information: confidentiality clauses must be tailored to the nature and significance of the information as well as to the legal framework in which the parties are operating. However, in drafting an appropriate confidentiality clause, it may be helpful to consider the following matters:

[a] What type of information is covered by the contract: sensitive, confidential, personally identifiable, mission critical?

[b] What security requirements would you require for this information and does the contract create equivalent obligations to protect the information?

[c] Did the information originate from a third party and, if so, are there obligations owed towards that third party?

[d] To the extent that intellectual property or trade secret rights are involved, are there appropriate protections in place?

[e] Are there specific legal requirements relating to this information or any restrictions on its transfer in either party's jurisdiction; if so, have you met those requirements?

B.9 Technical Breakdown and Risk Management

Business has long managed risk, through a judicious blend of assessing it, mitigating it where possible, hedging against it through indemnity or insurance, and making determinations of acceptable risk - a sophisticated process of risk management which far pre-dates electronic technology. While it is important therefore to recognise the risks particular to the new technologies, it is important not to exaggerate the

dangers or to think that they cannot be handled through the same process of risk management which has long allowed commerce to thrive on earlier challenges and opportunities.

In general, decisions relating to risk and its mitigation should involve senior management and ICT-related risks should be integrated into the overall corporate risk assessment in order to ensure that appropriate priority is given to them. In assessing such risks, it would be helpful to give detailed attention to the following questions:

- What are the risks to the company arising out of the use of a particular type of technology? Thus, for example, what would happen if certain information was lost, damaged, or revealed, both in terms of liability to counterparties and in terms of adverse publicity?
- Which of such risks may be acceptable?
- Which of such risks may be unavoidable?
- What steps can be taken to minimize risk through technical, procedural or contractual means, or through insurance cover? Thought should be given to relatively simple steps which might be taken: for example, can transmission failure be guarded against simply through requiring confirmation of receipt?
- What are the costs involved in such steps?
- Is the potential for certain risks sufficiently small, or is the harm that could result so attenuated, that the risks do not justify the costs of countermeasures?

The answers to these questions should be sought and given by senior management, with such assistance as they require from staff well-equipped and trained not only in electronic technology but also in the assessment of risk. Moreover, such decisions and the reasons for them need to be recorded and periodically reviewed.