

# ‘Writing’ Requirement in an Electronic Age and Policy Issues

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## Abstract

Certain contracts are required to be made in writing or evidenced in writing, with an implication that the contracts will be enforced only if they are in writing. Some laws also provide certain records to be prepared in writing or require specific notices to be provided or made available in writing. The goal of written contract and the requirement of writing generally are to avoid fraud by requiring written proof of the underlying agreement and give notice of the information to the contracting parties. The emergence of internet communication raises a question whether this medium can accomplish the purpose intended for the writing requirement under the law. This paper aspires to examine the appropriate policy as to whether electronic communication should or should not satisfy the writing requirement.

**Keywords:** restrictive policy, facilitative policy, writing requirement, electronic commerce

## 1. Introduction

The requirement for writing in contracts can be traced back to the English Statute of Frauds 1677. In 1677, the laws of evidence were in a comparatively undeveloped state, particularly the rules relating to the receipt of oral evidence (Bradgate, 2003 and Furmston, 2006). Through the writing and signature requirements, the Statute of Frauds sought to give some certainty in relation to evidence of specified transactions. Globally the writing requirement has been adopted in many statutes, the purpose being to provide evidence in the form of paper documentation. The widespread use of internet communication raises an issue whether the medium may be used to execute contracts or provide notices.

Internet communication offers unprecedented opportunities to create a global marketplace and many countries have grabbed the opportunity by introducing legislation related to electronic facilitation issues. The development of electronic commerce via the web necessitates a question whether the medium can be used to deliver information for which writing requirement is imposed under the law. There are two possible policy choices on this issue. A restrictive policy limits the satisfaction of the writing requirement only to paper writing. The policy arises from the varying reliability of electronic documents to satisfy certain functions of the paper writing such as the cautionary function. Alternatively, a more liberal policy would treat electronic documents on the same footing as paper writing. The policy derives its justification from the ability of electronic communication to present the information in readable forms. The question which arises is which of these two policies is more appropriate for e environment?

The answer to the above question may be determined by the context for which the writing is required. Policy impact analysis requires a different policy to be imposed for different application. The liberal policy perhaps is more desirable for the purpose of contract formation. The liberal policy would present potential benefit to customers, as with the efficiency of the electronic commerce the contract could be provided at a more competitive price. The restrictive policy on the other hand would entail a negative repercussion for the facilitation of electronic commerce. Industries involved in regulated contracts would not be able to take advantage of the enormous potential of internet communications, as contracts with the requirement of writing could not be provided on web sites or concluded via electronic mail. Conversely, in terms of the consumer protection issue, the restrictive policy brings positive impact, as paper writing will better guarantee the consumer's notification and, hence, attention to the information.

## 2. Paper Writing; What Are the Forms and Functions?

It may be noted that emphasis on the form approach can be seen in typical Interpretation Acts which define

writing in terms of the “representation of words *in visible form*”(Note 1). The form approach can also be found in the Principles of European Contract Law 1998 which states that the document should be “capable of providing *a readable record* of the statement on both sides” (Note 2). Other laws such as the Principles of International Commercial Contracts 1994 adopt both the form and the functional approach in defining writing, as reflected in the requirement that writing should “*preserve a record of the information contained therein* and is capable of being reproduced in *tangible form*” (Note 3).

The definition of writing raises a question whether the form of electronic document is equivalent to the paper medium. As stated above, paper writing exists in a visible and tangible form. The visible form of paper writing obviously denotes the visibility of the message to human eyes. It is said that electronic information or document exists in dual forms; the digital and the displayed. The digital form is a series of numbers and code, and the displayed form refers to the translated version of the numeric code done by appropriate computer software. It is generally believed that the displayed information is no different from paper writing in terms of its visibility to human eyes. The Law Commission has considered the displayed information as visible (Law Commission, 2001) and the view has been substantiated by other commentators (Reed, 1996, Lloyd, 2000, Werner, 2001 and Lloyd, 1997). On this basis, there should be no impediment to the electronic document constituting writing.

Unlike the issue of visibility, the issue of tangibility may pose a challenge to electronic communication. If visible form signifies the visibility of the information to human eyes, tangibility requires the information to exist in physical form. In paper writing, this refers to the paper and the ink. The displayed electronic information may only be visible but cannot be regarded as tangible, given that the information on the computer screen is not touchable in the same way as the information on paper. The computer system is a physical instrument, but it cannot be considered as the medium on which the information is written. Unlike the paper medium, a computer is merely a tool used to produce the electronic information. Nevertheless, if the tangible form is understood in terms of the ability of the information to be made tangible, an electronic document should find no difficulty in satisfying this tangibility form, given the possibility of the document being printed out in hard copies. Thus, in so far as the writing requirement is viewed in terms of the forms it takes, electronic documents are quite capable of constituting writing. This would support the first policy permitting the use of the electronic documents in contracts with the requirement of writing.

In addition to form, writing requirement may also be understood with reference to its function. This raises a question whether the functions served by paper writing can reliably be achieved in the context of internet communication. It may be noted that the functional analysis can be seen with the UNCITRAL Model Law on Electronic Commerce 1996(Note 4). This analysis requires electronic documents to be treated as writing if they are capable of satisfying or if they outperform the functions found for the paper writing. The functions of paper writing could be categorized into three broad categories; firstly, providing records of the intent of the parties pertaining to the nature of the contract, secondly, providing permanent records for future reference and finally, the cautionary function(Note 5). The three purposes could not be effectively materialized if the contract were made orally. The first function-providing record of the intent of the parties is elucidated below.

### 2.1 Recording the Intent of the Parties

The Model Law acknowledges this function where paper writing is designed to “finalize the intent of the author of the writing and provide a record of that intent” and to “provide that a document would be legible by all” (Note 6). Internet communication has no difficulty in satisfying this function; it records the information or details of contractual terms, which can be viewed either on the screen display or in hard copy format. Thus, the web, electronic mail and communication without a screen display, such as a fully automated transaction between computers in Electronic Data Interchange (EDI) can be used as adequate methods of contract conclusion, just like the paper medium.

### 2.2 Providing Evidence and Permanent Records of Transaction

In the context of the paper medium, the purpose of the writing requirement emphasizes the need for the writing to be permanent and capable of being referred to by the parties at a later date(Note 7). This function can be discussed in terms of the transmission and storage of the electronic message. With regard to transmission, the tampering of the message can be prevented through the use of the high technology electronic signatures, such as the biometric and the digital signature. The technology can detect any interference with the message whilst it is in the course of transmission. Nevertheless, in terms of storage, there may be difficulty with the retention of the electronic message. For example, the message in electronic mail cannot be retrieved in the event of the closure of the account, such as due to the failure to pay the subscription fee or by the failure to use the account within a stipulated period of time. As for the web communication, the agreement available in the web server does not

guarantee this function, as it is alterable unilaterally. The agreement may not provide a permanent record, since it is subject to changes made by the web proprietor, and the changes are hardly detectable by web users. Further, a web site may be inaccessible, closed or suspended. A web site would not be available if it is suspended, such as in the event of non-payment of the fee by the proprietor.

The ability of the electronic medium in satisfying this function may be inferred from the position in England. The English law has used the concept of a durable medium in a number of legislations (Note 8) which indicates the focus on the evidential function. The concept of durable medium is defined as:

“any instrument which enables a consumer to store information addressed personally to him in a way *accessible for future reference* for a period of time adequate for the purposes of the information and which allows *the unchanged reproduction of the information stored*” (Note 9).

Because of the varying ability of a web communication to secure the evidential function, web communication was not regarded as a durable medium. Durable medium may however include electronic mail (Note 10).

Nevertheless, despite the above position, information saved in the hard drive under the user's control can facilitate future reference. Information, both on electronic mail and the web can be made available on the hard disk for later reference. It could be argued that given the ability of the information being saved in hard drive, electronic mail and the web should not present an obstacle to the satisfaction of the evidential function.

### 2.3 Cautionary Function

Paper writing is meant to help parties to be aware of the implications of their contractual undertakings (Note 11). It puts one party on notice that a contractual commitment is being undertaken (Bradgate, 2003). The electronic medium does not achieve the cautionary function as effectively as the paper medium. Given its ephemeral feature, the presentation of information through the screen display may not produce equivalent mental impact to the paper medium. The use of the browse wrap in web communication, where the user is only referred to the document by means of a link, could probably impede the cautionary function; often the user has the choice to ignore the documents. The performance of the cautionary function is better satisfied if the information presented on web site is displayed to the user in such a way that the user has no way to bypass it. Through the use of a click wrap for example, the user cannot proceed unless he has confirmed his acceptance of the agreement. Unless such a mechanism is adopted, the use of electronic medium may be less adequate and the paper medium would be more desirable if the cautionary function is to be effectively secured.

### 3. The Policy Choice in the Context of Contract Conclusion

It is thought that electronic documents should be acceptable for the purpose of contract conclusion. Electronic documents not only exist in forms equivalent to the paper writing, in terms of visibility and their ability of being made tangible, but are also capable of satisfying the functions of the paper writing. The first function, which relates to providing records of the intent of the parties, could be found with the electronic communication, where the details of the agreements could be displayed or understood by the computers. The second function, i.e. the evidential function is not fully secured by the electronic mail and the web, but this problem could be resolved by the ability of the information to be made available in another medium, such as hard disks. The cautionary function to a certain extent can be achieved through the click wrap mechanism, as noted above. In light of these, it may be thought that the use of the electronic medium should present no difficulty for the purpose of contract conclusion, so that an offer and acceptance involving contracts with the form requirement of writing should be allowed to take place via the electronic medium. The policy accepting the electronic documents as fulfilling the writing requirement can be seen in the UNCITRAL Model Law on Electronic Commerce 1996 and the Electronic Commerce Directive (Note 12). The legislation provides equivalent treatment of paper writing to electronic documentation (Note 13).

It is noted that the policy supporting the use of electronic documents will face problems in the event the agreement is also required to be attested, or posted or stamped. It is thought that these impediments, which may be found in certain legal systems such as Malaysia, should not defeat the liberal policy facilitating the use of electronic document (Kadir, 2008).

### 4. The Policy Choice in the Context of Important Consumer Information

The above policy arguing for the acceptability of the electronic documents as writing may well not be appropriate for certain contexts of consumer information. A restrictive policy would be more desirable for the purpose of providing important consumer information, such as notices pertaining to the existence of the rights of cancellation and withdrawal, default and repossession (Note 14). Cancellation and withdrawal rights are important information as they inform consumers of their rights if they are not happy with the transactions. In

addition, the information has to be acted upon within a limited time. Consumers who have applied for certain regulated loans have a short time, called a cooling-off period, to change their minds. If the information pertaining to the cancellation rights is given via the electronic mail, there is a possibility that the information will not be notified to consumers, or is only notified when there is no longer the opportunity to exercise the right. Equally, the prospective purchaser has limited time to exercise his rights of withdrawal so long as the returned agreement has not been signed by the lender. The time period is very short and once the creditor has signed the agreement it becomes 'executed' and the consumer cannot then withdraw. Default and repossession notices are also important information as they act as reminders or warnings of the consumer's failure in performing his or her obligation. Similar to the cancellation and withdrawal rights, consumers have limited time to respond to default and repossession notices. The cautionary function is particularly required for the purpose of providing this information and the above discussion indicates that the electronic medium does not effectively secure this function. It is believed that the use of electronic mail for presenting this information to consumers is inadequate. The essential quality of the information as well as the uncertainties of access to electronic mail warrants the receipt of the notices in paper form.

The restrictive policy is not quite necessary for the purpose of providing general information, such as the description of the main characteristics of the goods or services, the price of the goods or services and the delivery costs. Indeed, requiring this information to be given on paper would defeat the purpose of electronic commerce.

There are considerable problems if important information-the cancellation and withdrawal rights, default and repossession notices- are allowed to be sent via the electronic mail. There is no guarantee that the consumers will continue to have access to or be accessible at a particular electronic mail address. Consumers can have numerous electronic mail accounts which can result in less monitoring of messages. There is a possibility that the electronic mail account will be permanently closed by the service provider if the account is not used for a period of time. Even if one electronic mail address is used, many consumers do not check electronic mail on a regular basis. There could be severe problems with reliance on electronic mail. The business sender does not always know of the problem with the message, such as in a situation where the electronic mail account has been closed, and the delivery of the bounced back message is not automatic. Often the sender will not know that the consumer has not received an essential notice. Spam has become such a problem for electronic mail that filters or other mechanisms to withstand the assault often wrongly delete important messages. Even if the notice reaches the consumer's computer, it may be so buried in spam that the consumer never knows of the message. By contrast, a consumer can easily sort through paper mail and throw out the unsolicited junk mail without risking the loss of important notices. In addition, electronic mail sometimes comes with attachments which the consumer's computer cannot read. Finally, consumers may no longer have access to the internet, which is highly possible given that the default of payments is a result of financial difficulty. It may be thought that because of the importance of the information, it is far better to require the presentation of the information in paper form.

Commentators generally support the policy that consumers should receive important information in paper form. Brownsword and Howells (1999) agreed that the paper medium has the effect of bringing home to the consumer the seriousness of the commitment, or the awareness of certain rights. There may be a risk that, if the information is given on the web site or via electronic mail, the seriousness or the awareness would not be as apparent to the consumer, and the cautionary function would be lost. The information should be brought home to the consumer in a way that is strikingly different from that encountered on a visit to a supplier's site. Providing the information in paper medium is more likely to cause the consumer to consider the terms. Consumers may react differently to a letter through the post than to an electronic mail. Howells and Weatherill (2005) observed that postal communications were more difficult to overlook or destroy than electronic communications. Nordhausen (2005) also concurred, admitting that it is very easy to "ignore, delete, or 'lose' in the general electronic deluge information sent by electronic mail". It might well be felt appropriate that insistence on the use of the paper medium be imposed to give the consumer the opportunity of reflection.

Some legislation(Note 15) resolves the issue of the inability of the electronic medium to secure the cautionary function for this purpose through the consent requirement, where the use of the electronic medium in the giving of information is allowed subject to prior consent by the recipient. The consent requirement is to be used with two conditions; that the intended recipient actually agreed to receipt of the notice by electronic mail, and that the particular form of electronic mail used could be read by the recipient (New Zealand Law Commission, 1999). It is thought that the protection provided by the consent requirement is not as effective as paper-based writing. The conditions resolve some of the problems identified above; however, the presentation of the important notices in paper form would better protect the consumer's interest to be notified of the information.

There are two ways of procuring consent from consumers in electronic form. Consent may be required to be in the form of 'opt-in' or 'opt-out'; the opt-in requires the individual to actively consent to receiving the information via the electronic medium. This is achieved when the individual ticks a box to indicate consent to receive the information via the electronic mail. The opt-out consent is obtained where the individual is given the opportunity to object and does not take it up. Generally, an un-ticked box is presented and the user ticks to signify objection. The use of the opt-out by the vendor could lead to a greater chance of ignoring the message if the failure to tick the opt-out box is due to carelessness by consumers. It is thought that the consent approach may not be the best policy. Even with the opt-in system, or where consent is required to be given in paper document (New Zealand Law Commission, 1999), it does not necessarily guarantee the notification of the electronic message. The use of the consent requirement could not provide adequate protection and the requirement that the information be sent in paper form provides a more effective protection as it better guarantees customers' attention to the information.

## 5. Concluding Remarks

This paper examines the appropriate policy with regard to whether electronic documents should or should not be permitted to constitute writing. The argument indicates that the liberal policy is largely appropriate for contract conclusion, given the capability of the electronic documents to satisfy the visibility and tangibility forms, and given their ability to record the intent of the parties. The restrictive policy is required for providing important consumer information. The discussion demonstrates that this context necessitates insistence on the paper writing and the use of electronic mail should be inadequate.

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## Notes

Note 1. See section 2 of the Interpretation Acts of England (1978) which defines writing 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”. See also section 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) of Malaysia. The definition of writing has been amended in 1997 in which writing was defined to include “electronic storage or transmission”.

Note 2. Article 1:301(6) 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*”.

Note 3. 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”.

Note 4. Paragraph 48 Guide to the Enactment states that “in the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of writings in a paper-based environment”.

Note 5. The Guide to Enactment 1996 of the UNCITRAL Model laws on Electronic Commerce enumerated the functions of the paper writing as follows:

- (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves;
- (2) to help the parties be aware of the consequences of their entering into a contract;
- (3) to provide that a document would be legible by all;
- (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction;
- (5) to allow for the reproduction of a document so that each party would hold a copy of the same data;
- (6) to allow for the authentication of data by means of a signature;
- (7) to provide that a document would be in a form acceptable to public authorities and courts;
- (8) to finalize the intent of the author of the "writing" and provide a record of that intent;
- (9) to allow for the easy storage of data in a tangible form;
- (10) to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and
- (11) to bring legal rights and obligations into existence in those cases where a "writing" was required for validity purposes. See Paragraph 48 Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce 1996.

Note 6. Items 3 and 8 in paragraph 48 Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce 1996.

Note 7. See items 1 and 4 in paragraph 48 Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce 1996.

Note 8. E.g. the Consumer Protection (Distance Selling) Regulations 2000 and the Financial Services (Distance Marketing) Regulations 2004.

Note 9. The Financial Services (Distance Marketing) Regulations 2004. See also the Insurance Mediation Directive 2002/65 Article 2(12).

Note 10. See the view of the Office of Fair Trading. The view is meant only as a guide. See <http://www.offt.gov.uk>. See also Sinead Lavelle, “The Distance Selling Regulation in Practice”. Available: [http://www.efc.ie/publications/legal\\_updates/articles/corpbank/distance\\_selling.html](http://www.efc.ie/publications/legal_updates/articles/corpbank/distance_selling.html), who viewed that electronic mail would be sufficient to satisfy the requirement of the durable medium where electronic mail is accessible to the relevant consumer.

Note 11. See item 2 in paragraph 48 Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce 1996.

Note 12. Directive 2000/31/EC.

Note 13. Article 6 of the Model Law states:

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

Article 9 of the Directive states that:

Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

Note 14. See for example the Malaysian Hire Purchase Act 1967, the Direct Sales and Anti-Pyramid Scheme Act 1993 and the Pawnbrokers Act 1972.

Note 15. New Zealand Law Commission and the Australian Electronic Transaction Act 2000, section 8. Nevertheless the New Zealand Law Commission treated the requirements of ‘registered post’ and ‘personal service’ as exceptions, where the use of the electronic communication should not be acceptable to replace the paper requirements.