

Contracts by Fax: Are They Legitimate?

As the use of faxes to send and receive information increases, the potential pitfalls require business users to pay great care to both legal error and technical problems.

Faxes are common place in daily business dealings: a request for information about a new service, spare parts ordered for a faulty machine and even documents relating to the purchase of a property are all transmitted by fax.

But electronic transmission of information challenges existing legal rules. Businesses that use facsimile technology to make contracts need to be attentive in order to avoid legal problems that may arise.

To summarise:

- A legally binding contract can be made by fax.
- To ensure formal documentary evidence of the contract (especially with contracts for the sale or purchase of real estate), original documents should also immediately be forwarded by mail or delivered by courier.
- Transmission difficulties and corruption of information may affect a fax message and prevent a valid contract being formed.
- The sender generally bears the risk of non-receipt or message corruption.

Contract Formation

A contract is a legally enforceable agreement between two or more parties to undertake certain obligations. In order for the contract to exist there must be both an offer and an acceptance of that offer. Contract rules require communication of the acceptance of an offer in a final and unqualified manner.

The acceptance can effectively and validly be communicated by fax and the contract will be formed at the time and place of receipt of the acceptance.

However, especially with contracts dealing with land, an original of the document or letter should follow the fax.

Validity of Signatures on Facsimile Documents

Documents sent by facsimile machines can have the same legal effect as original signed documents. The transmission by fax of a document containing a signature should be sufficient to authenticate the document in the majority of cases.

Admissibility in Court Proceedings

Policy relating to rules of evidence require that original documents are tendered in court, subject to a number of exceptions. The policy intent is to minimise opportunities of forgery and fraud.

Originals of documents transmitted by fax should be kept to satisfy this "best evidence" rule.

Errors or Defects in Transmission

The use of fax machines allows for almost instantaneous communication but technical difficulties may cause practical and legal problems where the message fails to arrive in complete form or at all. Messages may also be garbled, sections omitted or the paper supply to the machine may run out without signalling that fact to the sender.

Fax machines may send a verification of receipt even if the document has not printed out. At present where a facsimile machine is used the sender bears the risk of non-receipt, subject to issues of negligence and lack of good faith by the receiver.

Thermographic fax paper may fade with time and should be photocopied to provide a reliable permanent record.

Recommended Procedures to Minimise Risk

- As a sender of a fax, be aware that you generally bear the risk of non-receipt or message corruption.
- As the recipient of a fax of a contract document, always insist that the original is promptly forwarded to you in addition to the fax.
- For any important papers where the original is not forwarded, photocopy the fax (in the case of thermographic paper) to provide a reliable and permanent record.
- Implement appropriate office administration procedures (including an "in/out" fax log) to assist in verifying the sending and receipt of faxes.

Electronic Data Interchange - Another New Technology

Electronic data interchange (EDI) allows computer to computer transfer of documents and replaces the physical exchange of common paperwork such as purchase orders, bills of lading and invoices. It is being used increasingly by business as a step towards completely paperless transactions. Recent research by Coopers and Lybrand of Australia's top 1000 companies found that almost 50% had either implemented EDI or were planning to do so.

Because there is no paper documentation, EDI poses special legal problems including issues of contract formation, liability, authentication, stamp duty payment and document retention. In some countries agreements between trading partners are used to give both prior authorisation of EDI transactions and also to set standard terms and conditions. A draft agreement of this type is presently being considered by an Australian working party.

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