



INTERNATIONAL INSTITUTE OF CONSTRUCTION ARBITRATORS (IICArb)

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ELECTRONIC SIGNATURES AND EMAIL

Why we should email with even more care

Electronic signatures have long been a debate, especially regarding how binding or non-binding they can be. A recent case helped clarify what has seemingly become a maze of conflicting interpretations of the law.

However, a more recent consideration was whether an email constitutes a binding agreement and further whether the email signature is a signature include an acceptable form of signing. This was dealt with in the case of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash & Another 2015 (2) SA 118 (SCA)*.

In terms of section 13(3) of the Electronic Communications and Transactions Act 25 of 2002 (“ECTA”) :

“Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if:

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

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated."

Moreover, Spring Forest clarified that "required by law" in section 13(1) means required by statute and does not extend to a signature requirement imposed by the agreement. Further, the typewritten names of the parties at the foot of their emails, complied with the definition of "electronic signature" and fulfilled the function of a signature.

Thus, where a contract requires a written and signed document for a valid agreement to vary, an exchange of emails (which constitutes writing in terms of ECTA) with the parties' typewritten names at the bottom would comply with the requirements section 13(3) and would suffice.

In *Global and Local Investments Advisors (Pty) Ltd v Fouche* 2021 (1) SA 371 (SCA) (18 March 2020), the issue for determination was whether the Global & Local Investments Advisors (Pty) Ltd, a financial services provider, breached a mandate specifically if it was authorised to invest and manage money entrusted to it by Mr Nickolaus Ludick Fouché, by releasing funds in response to fraudulent emails.

The court found that Spring Forest is distinguishable from this case for the following reasons: "The authority of the persons who had written and sent the emails was not an issue in that case as it is in the present case. The problem, in that case, was whether an exchange of emails between the contracting parties could satisfy the requirement imposed by them in the contract that 'consensual cancellation of their contract be 'in writing and signed by the parties. There was no dispute regarding the reliability of the emails, accuracy of the information communicated or the identities of the persons who appended their names to the emails. In the present case, the emails in issue were, in fact, fraudulent. They were not written nor sent by the person they purported to originate. They were fraudulent as they were written and dispatched by person or persons without the authority to do so. Therefore, they are not binding on Mr Fouché."

Nevertheless, in light of Global and Local, parties entering into a contract that requires a signature for any purpose should be alert to specify whether or not an electronic signature will be compliant. If so, it would be pertinent to determine what form of electronic signature will be acceptable. Failing this, the good old email could very well vary same.