

VARYING OR CANCELLING AN AGREEMENT BY E-MAIL

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A non-variation clause is a contractual provision which restricts the variation or cancellation of an agreement. It usually stipulates that no variation or consensual cancellation of the agreement in which it is contained will be of any effect unless reduced to writing and signed by the parties.

INTRODUCTION

Clauses of this type have been recognised as enforceable since the *Shifren* judgment in 1964¹, and are a standard feature of all kinds of commercial agreements. The primary advantage they confer is that they ensure certainty in relation to the contents of an agreement – an advantage that has been held to accrue to both contracting parties regardless of their respective positions of strength.² Thus, except where public policy may require otherwise – for example where a party invokes a non-variation clause for purposes other than the vindication of legitimate rights³ or where the interests of minor children take precedence⁴, non-variation clauses will almost always be upheld.

THE UNCERTAINTY RAISED BY ECTA

The promulgation of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) has raised an element of uncertainty that has not yet been satisfactorily resolved by our courts. The question mark relates to the variation or cancellation of an agreement by means of e-mail; specifically, whether an exchange of e-mails between the parties would meet the standard requirements imposed by non-variation clauses of being "in writing" and "signed".

On the first part of the question, the answer is clearly "yes". Section 12 of ECTA provides that -

"A requirement in law that a document or information must be in writing is met if the document or information is -

- > in the form of a data message; and
- > accessible in a manner usable for subsequent reference."

¹ *Shifren and Others v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 (2) SA 343 (O)

² *Brisley v Drotskiy* 2002 (4) SA (SCA) 1

³ *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM)

⁴ *GF v SH AND OTHERS* 2011 (3) SA 25 (GNP)

An e-mail satisfies this requirement. The question of whether an exchange of emails would be considered to be "signed by the parties" is however more difficult to answer. ECTA differentiates between two kinds of signatures in relation to data messages such as e-mails. The first is an "electronic signature", meaning "data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature". This would, in our view, include any indication of the sender's identity. The second is an "advanced electronic signature", meaning an electronic signature which results from a process which has been accredited by the .za Domain Name Authority as provided for in section 37 ("Accreditation of authentication products and services"). Suffice it for present purposes to state that most e-mails do not incorporate an advanced electronic signature, but do indeed contain an electronic signature.

This is where the difficulty arises, because section 13(1) of ECTA provides as follows:

"Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used."

This immediately raises the question of what is meant by "required by law". Is an advanced electronic signature required only when it is a statute that requires a signature – for example, the Alienation of Land Act? Or would a contractual non-variation clause also constitute an instance in which a signature is "required by law", thereby rendering an ordinary electronic signature inadequate?

A CASE STUDY

In the recent case of *Wilberry (Pty) Ltd v Spring Forest Trading 599 CC*⁵, the court had to grapple with an alleged consensual cancellation of an agreement containing a non-variation clause by means of an exchange of e-mails. Although not specifically stated in the judgment, it appears to be common cause that the e-mails did not include advanced electronic signatures, but did include electronic signatures. The relevant e-mails followed a meeting at which the applicant had orally presented the respondent with certain alternatives regarding the termination or continuation of their contractual relationship. In the first e-mail, the respondent sought clarity on the options presented in the meeting. In the second e-mail, the respondent sought further clarity in relation to the option referred to by the applicant in the meeting as "cancel the agreement and walk away", and specifically whether any further legal claims would lie if the respondent were to choose that option.

In the third and fourth e-mails, the applicant clarified that, subject to the payment of arrear rentals by the respondent, there would be no further claims if the respondent chose to cancel the agreement and walk away, and that the respondent was free to do so if it had paid all arrear rentals. In the fifth e-mail, the respondent notified the applicant that it had chosen to cancel the agreement and walk away. It was common cause between the parties that the arrear rental was paid in full only in the following month.

The applicant contended that the agreement remained of full force and effect, relying *inter alia* on the non-variation clause. The respondent contended that the exchange of e-mails constituted a written and signed consensual cancellation, arguing that the requirement of the non-variation clause that any consensual cancellation be in writing

and signed was not a requirement imposed by a law but merely by the relevant agreement. The applicant contended that section 13(1) of ECTA should be interpreted to include not only statute law, but also instances in which the parties had imposed their own formalities by way of contract, because the common law itself requires compliance with such formalities.

The court noted that in order for the e-mail exchanges to meet the requirements of the non-variation clause, it first had to be established that the parties were *ad idem* that the e-mails were intended to constitute a written cancellation. The court held that *in casu* there was nothing to show that the e-mails were intended to constitute anything more than enquiry and clarification. Presumably what is meant by this is that the applicant's third and fourth e-mails were not intended to constitute an offer that was capable of acceptance by the respondent in the fifth e-mail (as the respondent purported to do). In addition, although not specifically articulated by the court, it seems clear that if the respondent chose the "cancel the agreement and walk away" option without first paying the arrear rental due, this would not constitute an acceptance of the applicant's cancellation offer on its terms.

The court however went on to contaminate its reasoning with circularity, holding that the lack of attempt by either party to have the purported cancellation agreement reduced to writing and signed, knowing that the non-variation clause required this, indicated a lack of intention that the e-mails should constitute a cancellation. This is begging the question. If the e-mails themselves had constituted a written and signed cancellation, then no further document would have been required.

DEFINING 'REQUIRED BY LAW' AND INTERPRETING SECTION 13

The question of what is meant by "required by law" in section 13(1) – and specifically whether this includes a requirement imposed by a non-variation clause, so that only an advanced electronic signature will suffice – was not specifically addressed by the court. The following statement was however made *obiter*:

"However, had the parties been *ad idem* to that the e-mail exchange communications would constitute written cancellation agreement, surely the signature requirement would have been met by e-mails exchange" (*sic*).

At the risk of stretching the court's reasoning beyond what was intended, this appears to take the view by implication that an exchange of e-mails not incorporating advanced electronic signatures, but merely electronic signatures, will meet the signature requirement of a standard non-variation clause. In our submission, this must be the correct position. It is implicit in the wording of section 13(1) that it is referring to an individual specific law, not the common law generally ("[w]here the signature of a person is required by law and such law does not specify the type of signature" – emphasis added). The implication is that it is only in respect of a signature requirement imposed by "a law" (i.e. a statute) and not by "the law" (generally) that an advanced electronic signature is required.

In addition, section 13(1) must be interpreted in its proper context. Section 13(1) is an exception to the general position under section 13(2), which states as follows:

“Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.”

If the intention of section 13(1) were that an advanced electronic signature is required when a signature is required in terms of any legal provision whatsoever, including a contract or the common law, then section 13(2) would be substantially gutted of any meaning, and an “electronic signature” would be legally useless – which is clearly contrary to the intention of section 13(2) as well as ECTA as a whole.

Considering the increasing ascendancy of e-mail as a means of communication and transaction, it is to be hoped that the courts will clarify this question in due course, and will do so in a way that does not place the excessive burden of an “advanced electronic signature” on parties wishing formally to vary or cancel their agreements by e-mail in the face of a non-variation clause.

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