

Contracts typically require “written notice” to be issued for certain situations. During the coronavirus disease 2019 (COVID-19) pandemic, many countries are in lockdown, with many working from home.

Practically, this means there is limited to no access to physical mailboxes or mail services, with business dealings being conducted predominantly over electronic correspondences (“emails”).

Whether emails will be acceptable as written notice will typically depend on the terms of the contract, as well as the governing laws of the contract, including:

- (1) Whether the contract expressly includes or excludes emails as written notice
- (2) Whether the laws of the governing law jurisdiction include or exclude emails as “written”

Whether the Contract Expressly Includes or Excludes Emails as Written Notice

Certain scenarios where the contract does not “expressly” include or exclude emails and is, therefore, seemingly ambiguous would include:

- Where the contract does not include a clause that expressly states that email communications are permissible or included
- Where the “Notices” clause stipulates that notices and communications shall be addressed to a physical location address but does not include an email address

An express exclusion of emails as written notice would require a specific clause with wording to such effect and not merely that the contract does not contain permissive language or contemplate permitting emails. However, the Notices clause of a contract must be strictly followed and, therefore, the precise wording will dictate whether an email notice will be acceptable. For example, if a clause states that notices under the contract “must” be sent to a specified physical location address, an email notice will not meet this requirement.

Whether the Laws of the Governing Law Jurisdiction Include or Exclude Emails as “Written”

Referencing the Interpretation Acts¹ of both the UK and Singapore as examples, “writing” includes printing, lithography, typewriting, photography and other modes of representing or reproducing words or figures in visible form. Emails would fall within the description of a reproduction of “words or figures in visible form”.

We would also refer to any written laws that are intended to facilitate or recognise electronic transactions and communications. For example:

- The Singapore Electronic Transactions Act provides that “information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record,” and includes provisions on the time of despatch and the time of receipt of an electronic communication
- Under the Singapore COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020, the prescribed mode for service of a notification for relief from contractual obligations² is first by email, failing which some other form of internet-based mechanism (such as through social media accounts), and if the aforementioned electronic communications mechanisms are not possible, by prepaid registered post to a physical location address

Beyond COVID-19

The Notice provision tends to be a “boilerplate” clause, which is given little attention. The current COVID-19 pandemic lockdowns bring to the forefront a practical interpretation question of whether email notices are acceptable under a contract.

Going forward, for the sake of certainty, it is advisable to carefully consider:

- (a) Whether to expressly allow for (or exclude) emails for notices and communications in the contract
- (b) If emails are acceptable for notices and communications, whether there is a need to exclude certain types of communications from email communications

¹ Which apply to the construction and operation of Acts of Parliament and other instruments/written laws.

² Pursuant to the Singapore COVID-19 (Temporary Measures) Act 2020.

There are risks relating to emails that need to be considered, such as email accounts being hacked or accessed without authorisation or emails being lost in cyberspace or overlooked due to the amount of emails received or ending up in junk mail. However, this does not necessarily mean that emails are riskier than conventional “wet ink” correspondence, since wet ink correspondence will have its own unique risks, such as forgery or getting lost in the mail. The advantages of emails, including the ease and speed of communication, may outweigh the risks depending on the nature of the business, operations or contract. Some of the risks could also be mitigated by making provisions in the contract.

If email communications are acceptable, this should be expressly provided for in the contract. Parties should also remember to include an email address in the Notice clause (or given the nature of emails, parties may wish to include more than one email address to ensure that someone will receive the email on time). However, this will mean that parties need to remember to keep track of such email addresses and ensure that if the email address ceases to be used (for example, if the relevant employee leaves the company), notification is sent to the counterparty to update the contact details and emails to that email address will remain functional to receive emails and be checked by another employee or forwarded to another functioning email address for an adequate period.

Parties should seek legal advice if their existing contracts are “ambiguous” as to whether emails constitute written notice under the contract, and consider whether to amend their existing contracts to expressly provide for email notices and communications. Parties should also seek legal advice and assistance to consider and prepare Notices clauses to provide for email notices and communications.

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