

LETTER TO THE EDITOR

Sir,

Julien Hofman's interesting article 'The Moving Finger: SMS, On-Line Communication and On-Line Disinhibition' (Volume 8, 2011, pp179-183) draws salutary attention to the risks of a hasty but valid resignation from employment effected by the sending of an SMS message.

The applicable law (that of South Africa) requires such a resignation to be in writing. That requirement was held to be satisfied by an SMS message by reason of a broad statutory provision, based on the UNCITRAL Model Law on Electronic Commerce, which provides that a requirement for writing is satisfied by a data message which is accessible for subsequent reference.

Mr Hofman draws attention to the different approach adopted by the UK Electronic Communications Act 2000. He commends its approach of enabling Ministers to make specific provision for different cases through the exercise of policy discretion, which he contrasts favourably with the more sweeping approach of the South African legislation.

Mr Hofman's readers might incidentally be led to suppose that the UK legislation operated against a background in which electronic communications were not to be treated as being in writing unless Ministers had provided that this should be their effect. As that is not the case, I hope you will allow me space to correct any misunderstanding which may have arisen.

United Kingdom law has very few requirements for writing (and as it happens they do not include resignations from employment). The main ones are for dealings with interests in land, for guarantees and for consumer credit documentation. The field was reviewed comprehensively by the Law Commission, which in December 2001 published *Electronic Commerce: Formal Requirements in Commercial Transactions – Advice from the Law Commission*. (Available from <http://lawcommission.justice.gov.uk/publications/795.htm>)

The Law Commission's Advice deserves reading in full, and no summary from me could replace it, but at the risk of considerable over-simplification I think the Commission's view of what amounts to writing could

be represented by the maxim, 'If you can read it, it's in writing.' At para 3.42 the Advice summarises two conclusions:

- (1) E-mails (and attachments) and website trading are capable of satisfying a writing requirement, but EDI is not.
- (2) Digital signatures, scanned manuscript signatures, typing one's name (or initials) and clicking on a website button are all methods of signature which are capable of satisfying a signature requirement.

At para 3.43 the Advice continues:

'We have acknowledged above that, to date, there has been some lack of consensus on these issues. We hope that our analysis will prove convincing and that past doubts will be replaced by common agreement.'

I have followed this subject with considerable interest since 2001, and in my view the hope modestly expressed by the Law Commission has been amply fulfilled. There is no longer any material doubt that an electronic communication (including an SMS message) is in writing.

The result is that the Ministerial powers granted by the Electronic Communications Act 2000 to which Mr Hofman draws attention are not needed to enable electronic communications to satisfy a requirement for writing (and have not been used for that purpose).

Having differed from Mr Hofman about the implications of the UK legislation, I should perhaps add that I entirely accept that the modern explosion of electronic communications has widespread social implications. I welcome Mr Hofman's contribution to working them out.

Yours truly,

Nicholas Bohm