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memo

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To: GISB Contract Subcommittee Participants

From: Ian MacLean

Re: GISB Contract Amendment and Transaction Procedures

At the April 23, 2001 meeting of the GISB Contract Subcommittee, concerns were expressed that the Oral Transaction Procedure was not intended to be used to make significant amendments to the Base Contract. I understand that concern and, while the subcommittee did not reach a final conclusion on this issue at its April 23 meeting, this paper has been drafted on the basis that the Oral Transaction Procedure should not be capable of implementing significant non-commercial amendments to the Base Contract.

In the current draft of the contract, sections 1.2, 1.3, 1.4, 2.6 and 13.4 contain provisions that deal with the effect of the Oral Transaction Procedure or with how the Contract can be amended. These provisions are not currently aligned with one another. The lack of alignment revolves around the following three issues:

1. Does the Oral Transaction Procedure need to be selected in order for a telephone conversation to override the Base Contract?
2. Does a conversation need to be recorded for it to have effect under the Base Contract?
3. What constitutes a "writing" and what is meant by a document being "signed" or "executed"?

Effect of Oral Agreements

Section 2.6 defines the Contract to include transactions that the parties have entered into through an EDI transmission or by telephone if and only if the parties have selected the Oral Transaction Procedure. However, the last sentence of section 1.3 states that, in the event of a conflict among the terms of the Contract, a recorded conversation takes priority over the Base Contract and the General Terms and Conditions, regardless of whether or not the Oral Transaction Procedure has been selected. As well, section 1.4 states that (i) each party waives any claim that a telephonic transaction is invalid under laws that require a writing and (ii) all recordings of telephone conversations can be introduced as evidence and used to prove oral agreements between the parties. Again, this provision applies regardless of whether or not the parties have selected the Oral Transaction Procedure.

I recommend that sections 1.3 and 1.4 be clarified so that telephone conversations take priority and can be introduced into evidence only if the Oral Transaction Procedure has been selected.

Recording of Conversations

Section 1.3 states that, in the event of a conflict among the terms, a recorded conversation takes priority over the Base Contract and the General Terms and Conditions. In sections 1.2 and 2.6, there is no requirement for a telephone conversation to be recorded in order for it to be effective. This would appear to create a situation where, if the Oral Transaction Procedure is selected, an unrecorded telephone conversation does create a binding agreement but section 1.3 does not deal with what priority that binding agreement has if it conflicts with other terms of the contract. A decision is needed from the subcommittee as to whether or not a telephone conversation must be recorded in order for it to create a binding agreement under the Oral Transaction Procedure.

What Constitutes an Executed Writing?

As a result of the discussion at the April 23 meeting, wording has been added to the Oral Transaction Procedure to the effect that terms which modify or supplement the Base Contract or General Terms and Conditions do not form part of the Contract unless agreed to in writing. However, the fourth sentence of the same section states that any EDI transmission or telephone conversation in which there is an offer and an acceptance constitutes an agreement of the parties and any such transaction shall be considered a writing and to have been signed. The drafting appears to produce a potentially circular interpretation.

In my view, the circularity can be removed and the agreement clarified by dealing with this issue in Section 1.3 instead of the Oral Transaction Procedure. In proposing language to deal with this issue, I have had to make some assumptions with respect to the subcommittee's intentions regarding the first two issues discussed in this working paper, but the wording can be modified relatively easily if my assumptions regarding those issues are not correct.

I would propose that the recently-added last sentence in Section 1.2 (Oral Transaction Procedure) be deleted. In Section 1.3, I would propose that the last two sentences be deleted and replaced with the following:

“The entire agreement between the parties shall consist of those provisions contained in (i) a binding and effective Transaction Confirmation, (ii) where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, a recorded telephone conversation, (iii) the Base Contract, and (iv) these General Terms and Conditions. In the event of a conflict among the terms of the Contract, the terms shall govern in the priority listed in the preceding sentence except that, notwithstanding section 1.2, the Base Contract can be supplemented by an EDI transmission, a recorded telephone conversation or a Transaction Confirmation, but the Base Contract cannot be contradicted, superceded or rescinded, in whole or in part by an EDI transmission, a recorded telephone conversation or a Transaction Confirmation that has come into effect through the passage of time.

In addition the last sentence of section 13.4 requires modification to read:

“Notwithstanding Sections 1.2 and 1.4, the Base Contract may be amended only by a writing executed by both parties. A binding agreement made in accordance with the applicable Transaction Confirmation Procedure may be amended by a writing executed by both parties or in accordance with the applicable Transaction Confirmation Procedure.”

Ian MacLean

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