Guarantees of trading and shipping contracts by third party associates or affiliates are common, and often drafted in unsophisticated language either as an attachment to, or contained in, the main body of the agreement. Shipping and trading contracts are regularly negotiated rapidly and by electronic communication. The risk is all too often to the clear interpretation and enforceability of the contract.

Shipping and trading contracts now often include guarantees from third parties. The haste with which these are concluded raises issues as to authority, and the applicable law and jurisdiction of any such guarantee. Added to the mix is whether an enforceable guarantee can be made through the same electronic communications used to conclude the shipping and trade contracts. This issue stems from Section 4 of the Statute of Frauds 1677, which is still in force today and remains in force in a variety of forms in a number of other jurisdictions. It provides that –

“No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorise.”

The reason for S4 was to avoid problems of having to decide who was telling the truth when guarantees were based upon oral contracts. With the explosion of e-mail communication the issues arise whether “e-mails” can be "in writing" and an e-mail signature can be a signature for the purposes of the Statute of Frauds. The Electronic Communications Act 2000 never amended the Statute of Frauds and it was considered that the question of intent would be a matter of conduct of the signatory as indicated to the reasonable person.

The recent Court of Appeal decision in Golden Ocean Group v. Salgaocar Mining Industries addresses the point. Golden Ocean alleged that it had concluded a long term charter party for the use of a vessel, The Golden Future, over a 10 year period. These obligations of SMI were said to be guaranteed by Mr Salgaocar. All negotiations for the charter party and the guarantee were conducted by e-mail via a broker. The freight market collapsed over the ensuing period and, although no formal signed charter party was concluded, GO argued that both a charter party and a guarantee had been concluded by reference to the exchanges of e-mails. Because of the collapse of freight market, the losses amounted to over US$50 million.

GO sought permission of the Court to serve proceedings against Mr Salgaocar overseas to enforce the guarantee. They had to demonstrate that it was “well arguable” that the series of e-mails could be an enforceable guarantee and signed to satisfy the Statute of Frauds. Various issues arose (including the broker’s authority), but on the question of whether or not a contract of guarantee evidenced by a string of e-mails could be enforced as being "in writing" for the purposes of the Statute of Frauds, the Court said that it could. That decision was appealed by the unsuccessful charterers before the Court of Appeal. The Court of Appeal affirmed the earlier decision and said:-

- There was no reason why a contract of guarantee could not be identified by reference to emails, or that collectively they should not be regarded as an agreement in writing for the purpose of the statute of frauds. Subject to the requirement of the signature, there was no objection to such an interpretation. This was a reflection of the modern world of commerce where email negotiation was quite common.

- With respect to signature, it was agreed by all parties and the Court that an electronic signature was sufficient and that a first name, initials or even a nickname would suffice to satisfy the signature requirement of the Statute of Frauds. In the commercial world involving chartering brokers it was recognised that communications with one and other are often undertaken in a familiar manner but which did not detract from the seriousness of the business and therefore that did not undermine the intent to authenticate the guarantee.
This issue was recently addressed in the case of *WS Tankship II BV v The Kwangju Bank Ltd* [2011], where the parties accepted that the word “signed” in the Statue of Frauds (in the judge’s words) “does not necessarily involve signature by an individual using pen and ink and that it suffices that the guarantor’s name is written or printed in the document”. The judge added that, on the facts of this case, the automatic insertion of the name of the bank in the header to a SWIFT message was a sufficient signature to satisfy the Statute of Frauds requirements. This was because the guarantor, by sending the message, had caused its name to be inserted into the document’s header, and he therefore found that it was the intent of the parties that the bank’s name would amount to such a signature. It was known by both parties that, in the context of a SWIFT transfer, the bank’s header would operate as a signature for these purposes. However, it should not be assumed that all digital signatures will be sufficient to satisfy this requirement. The automated nature of the electronic process may mean that it becomes difficult to argue ‘intent’. For example, it was found in *Mehta v J Pereira Fernandes SA* [2006], that the automatic insertion of an email address by an internet service provider was not sufficient to meet the Statue of Frauds requirements. The precise limits of what can amount to such a signature therefore remain to be determined.

**Lessons to take forward**

The decision stems from the manner in which a Court in the context of shipping and trading contracts will determine whether or not a binding agreement has been made. This would similarly apply to a guarantee when deciding whether or not the Statute of Frauds has been satisfied. If it is never to be the case that either party wish to use these exchanges as the basis of the agreement then this should be expressly in the communications, clearly understood, and maintained throughout the exchanges. The Statute of Frauds from 1677 has entered the 21st century.