

MAKING CONTRACTS IN CYBERSPACE

The explosive growth of the Internet has far outpaced the creation of laws tailored to govern electronic commerce. Until the state and federal legislatures and courts provide guidance, business owners conducting online commerce should be wary. This article discusses some of the legal issues that business owners should consider before offering or accepting contracts through the Internet.

Verifying A Bona Fide Transaction

Traditionally, contracts are made between the parties either in person, by telephone, or in writing. Each of these methods gives the parties some assurance that they are entering into a bona fide transaction (or some ability to verify that the transaction is bona fide). The same level of assurance may not be present when parties transact business with strangers entirely by electronic means, such as by email or through a Web site. You cannot be certain, just from an email message or a Web site, that you are dealing with a particular person or whether that person is authorized to transact business with you.

Making sure that you are dealing with someone who has the proper authority is extremely important. If you do business with someone who does not have the proper authority, their employer might be able to legally renege on the deal. Hopefully, this problem will soon be relieved by digital signature and digital authorization technology. Until then, you may need to obtain assurance through more traditional methods, such as confirmation of a deal on a hard copy signed by the parties.

Communicating Consent

Many Internet vendors use "point and click" agreements on their Web site. A "point and click" agreement usually states that the customers will show their consent to the vendor's terms and conditions by clicking on a particular icon that is transmitted to the customer's computer screen by the vendor's computer. Whether a customer legally consents to a deal simply by clicking on an icon is still uncertain.

Under classic contract law, parties are not deemed to have consented to a transaction unless they did so knowingly and intentionally. In the electronic world, a customer might claim that they did not have an opportunity to review the terms and conditions before they clicked on the icon or that they clicked accidentally.

Like any vendor, Internet vendors should clearly and conspicuously display their contracts before providing any goods or services. Likewise, Internet

customers should not order or accept any goods or services before reviewing the vendor's contract. If the terms are longer than one screen, vendors should consider requiring customers to continue by clicking on an icon. Also, vendors should consider requiring customers to show their final consent by clicking on two different icons (all this clicking undermines the merit of customers' claims that they clicked by mistake). Vendors should always keep a record of all the clicks. Just to be on the safe side, vendors still might want to resort to the old fashioned method of sending hard copies to customers as written confirmation. If vendors do not provide hard copies, customers might want to confirm their orders by a hard copy.

Resolving Disputes

Whenever you deal with customers or vendors who are not located in the same state as your business, selecting the location in which disputes will be resolved is always an issue. For example, if you have customers in California, you may be unable to sue them in Illinois unless they agree to such suits in advance. You may also have trouble applying Illinois law to disputes with your California customers unless they agree in advance to use Illinois law. When placed within contracts, these are known as "forum selection" and "choice of law" clauses. Forum selection and choice of law issues may become particularly significant as you conduct more business across the Internet. Simply from an email message or a hit on your Web site you may not even know where the person or business you are dealing with is located-whether in your own state or even your own country. (You should obtain this information before buying or selling anything.)As a vendor, you should consider including forum selection and choice of law clauses within your terms and conditions. As a customer, you should be wary of those clauses, lest you consent to suit in a distant forum under its laws.

Conclusion

The Internet offers exciting business opportunities. It also contains pitfalls. Be careful, and happy surfing!