



The power of consent

by Robert C. Worthington

In most of the developed world, it is possible to form a legally binding contract by electronic means, opening up a whole new set of opportunities and challenges.

Public purchasing has vigorously embraced the e-revolution with initiatives ranging from electronic information provision all the way to full-blown electronic contracting and competitive bidding. A complete examination of the legal challenges to be faced and overcome is beyond the scope of this column, but there are aspects of e-contracting that can be examined in bite-sized pieces, in particular – one that appears to be ignored by the builders of the information super-highway – exclusion of liability clauses.

Exclusion of, and limitation of, liability clauses are used by all of us in one form or another, primarily because they are necessary. Without them, selling or buying any goods or services would be prohibitively expensive. Some activities would be impossible if the full and complete risks had to be included in the price, i.e., insurance would be so expensive that it would be completely unavailable for even moderately high-risk activities. If public and private business is to be affordable, some exclusion of liability is useful – even absolutely necessary – but the age-old question is “how far can you go in limiting and excluding potential liability?”

In law, it has always been possible to consent to something that would otherwise attract legal liability. The legal principle involved, *volenti non fit injuria* (he who consents can not receive an injury), is alive and well in electronic contracting. Theoretically, if a computer user knowingly waives their right to sue the website operator in advance by expressly or impliedly consenting to known risks, then the user will have no lawsuit if they are injured by one of those known risks.

In practice, the legal issues which can arise from waiving one's legal rights by consent range from whether the person knowingly waived their rights and what risks were actually waived, to the limits to which this legal principle can be allowed, in fairness, to apply. In determining whether the exclusion is effective, the wording of the waiver, the knowledge of the person agreeing, the method of the person's agreement (written, verbal, electronic), the manner of the person's agreement (written, verbal or by notice), all play a factor in the decision, as well as the overall fairness of, for example, being able to waive liability at all for something which the person seeking the waiver charges a fee to do.

It appears the courts are also paying attention to the way in which the waiver is brought to the attention of the person waiving liability. The court will still most often enforce such clauses when they are signed after the opportunity to be read was provided but, if such a clause is carefully and simply worded, printed large and highly prominent to the average user's eye, it can be more effective to limit or waive liability. In a recent case in British Columbia, even the size of print on the computer screen, the colours and the design of the notice borders were all considered by the court to have increased the enforceability of the clause.

Consent to no legal liability (exclusion) or limited liability through a carefully worded clause, even if agreed to by the user, may not be effective in all circumstances. The courts can declare the exclusion clause or waiver to be void. It is rare for the courts to do so in signed contracts, unless the cost of avoiding the harm was small in comparison to the severity of the harm, the clause was hidden or deceptively worded, or special circumstances exist (e.g., consumer purchase, agency or partner relationship), but it has occurred.

For unsigned exclusion warnings, (e.g., on signs, backs of tickets, websites and receipts), enforceability problems occur more frequently, primarily because of a lack of adequate notice to the person who was waiving liability, thus causing a court to question whether the person truly consented to waiving liability.

When it comes to providing information on a website, downloading a competitive bid solicitation or submitting a bid electronically, purchasers and webmasters are assuming that the exclusion of liability clauses buried deep in the website are going to be effective. There may be a rude awakening if a court decides not enough was done to bring the consent to waive liability to the user's attention. Some public websites don't even waive their liability for the vast number of potential glitches and gremlins that electronic delivery can create.

Equally vexing are those websites that exclude all liability of any kind while at the same time charging a fee for providing the information or service. Can one exclude all liability for a complete failure to deliver a service which one charges for, in advance? Past court cases have called this a fundamental breach of contract and ignored the exclusion clause. Will they do the same for some of these “all the risk is yours” clauses on websites?

The short answer is that we don't know yet. There are no Canadian cases saying whether they will or won't work. In the meantime, use them; just don't put all of your faith in them.

You can improve the enforceability potential of such a clause by:

- putting your exclusion out front, in clear, specific language;
- making explicit reference to negligence and anything else you want to avoid;
- putting the exclusion on all written material (promotion and pre-event);
- using large lettering, bright colours, bordering on the exclusion clause; and
- if operating through a website, require the user both to scroll through the text and then click on the “I Accept” icon.

Until then, be careful what you click on, you just might exclude your rights. ☞

Robert C. Worthington is president of Worthington & Associates Ltd (www.purchasinglaw.com), a Vancouver-based company specializing in business education and training in purchasing law. He has lectured on law for public and private corporation in-house seminars, as well as at the University of British Columbia. He is the author of the Purchasing Law Handbook and several legal texts.