



# Early days for e-contracting

by Robert C. Worthington

Electronic commerce can be a disruptive technology to the established rules of law. It can greatly enhance people's ability to access, store, manipulate and transmit information, but its greatest benefits (speed and instantaneous transmission) are potentially a curse. E-users can "go global" in a nanosecond. In the process, they can make apparently legally binding and enforceable contracts and, by being able to do so, have raised a host of new challenges for the paper-based rules of law.

Can a person effectively make a contract electronically – and if so, how? Must people be involved, or can computers make a contract binding upon people? What are the terms that govern such a contract? What if things go wrong? What if the contract needs to be enforced? Whose laws apply? Where does the wronged party sue? If a wronged party does get a judgment from a court, how do they enforce that judgment?

While still "early days" for e-contracting, especially in Canada, the law has fashioned some answers, including some that are home grown. Unfortunately, with each country creating its own rules, those rules can conflict which, when dealing with technology that ignores national borders, could be a problem.

In Canada, there aren't yet many court cases on e-contracting and none on e-bidding. Those we have seem to indicate that the courts are open to e-contracting as a method of forming a contract ... but are still insisting upon adherence to their paper-based rules.

We now know that if you point and click on the "I Agree" button on a website, you have formed a binding contract. (*Rudder et. al. v. Microsoft Corporation* [1999] O.J. No. 3778). We know that, in Canada, you must have first seen all the terms and conditions of the contract you are agreeing to before you will be legally bound to those terms and conditions. (*North American Systemshops v. King* [1989] 97 A.R. 46, Alta Q.B.). Unfortunately, the US has decided the opposite, i.e., one can become bound to a contract without first seeing all the terms. Thus in Canada, shrink-wrap contracts (where the terms are inside the box and the buyer must buy the product before seeing them) are unenforceable, but in the US, they are enforceable.

In Canada, everyone can lawfully make e-contracts – private or public, personal or corporate (provincial *Electronic Commerce Acts*, federal *Personal Information Protection and Electronic Documents Act*) – but e-contracting cannot be forced upon anyone; it must be consented to, either expressly or impliedly (*Section 3, Electronic Commerce Acts*). How that consent is obtained and whether it can be withdrawn once given, we don't yet know.

If the legislative requirements for correction of "material errors" are present, e-contracts can be formed by electronic agents (computers) without human intervention (provincial *Electronic Commerce Acts*, e.g. Section 21 in Ontario). Exactly how errors made by computers in the contracting process can be corrected (assuming they can be corrected), we don't yet know.

We know that the parties can and should specify which jurisdiction will govern the contract. Given the significant differences between some countries' laws, it can be of critical importance. We know that the

courts, if they believe unfairness occurred in the choice of jurisdiction, can ignore that part of the contract and hear the case where they are. We don't yet know what will happen if two courts in different countries claim jurisdiction over the same dispute. Jurisdiction shopping is already well established in e-contracting due to differing regulatory regimes. If jurisdiction choice is overturned for unfairness in the contract reasons, does this also bring in the different regulatory rules of that other country? E-sellers hope not but they don't know. What will happen when a serious mistake occurs in forming an e-contract? Can we have pure e-bidding without the "consent" of bidders? How should an Owner conduct a competitive procurement with both Canadian and American bidders when the governing laws are totally different?

Even within Canada, some provinces, Quebec particularly, have different laws. Will language laws apply to a website-advertised RFP issued from another province?

How it will all unfold, we don't know. We make informed guesses, based upon principles of law and other similar legal jurisdictions' decisions, but they're guesses nonetheless. ☞☞

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