

**Global IT Law
E-Contracting
December 30, 2016**

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E-Contracting Case Study

Dole is an online retailer of consumer electronic goods. Earlier this month, its site was hacked and the price on several popular products reduced to 1% of the regular cost. As word quickly spread, thousands of consumers purchased the latest smartphones and laptop computers for pennies on the dollar. Dole has refused to honour the online contracts and will not ship the products. It argues that there was no completed contract and the consumers were aware that the pricing was in error.

The affected consumers have hired a lawyer and plan to file a class action lawsuit. Dole has advised the class action lawyers that it will challenge the lawsuit on the grounds that its website terms and conditions state that users of the site waive the right to file class action lawsuits. The lawyers respond that:

1. They do not believe the website terms and conditions are enforceable
2. In the event they are, state consumer law does not allow businesses to force consumers to contract out of their class action rights

E-Contracting Case Study

Please consider the fact situation and be prepared to discuss:

1. Are the consumer purchases a binding agreement?
2. Is the website terms enforceable?
3. Can the website terms override state consumer law?

Online Contracting

- Statute/Models
- Caselaw

E-commerce Law

What It Means You Click “I Agree”

- Paper vs. electronic
- Certainty in contract/presumptions
- Computer made contracts
- Form vs. substance

E-commerce Law

What It Means You Click “I Agree”

- The *Uniform Electronic Commerce Act (Canada)*
- Modeled after UNCITRAL Model Law
- ULCC sponsored initiative
- Approved September 1999 (less Quebec)

E-commerce Law

What It Means You Click “I Agree”

- Electronic Signature Law, 2001
 - Certified e-signature authority
- Electronic Commerce Law, 2008
 - E-commerce + ISP liability
 - Fails to pass Knesset

E-commerce Law

What It Means You Click “I Agree”

Section 5 - Legal Recognition

Information shall not be denied legal effect or enforceability solely by reason that it is in electronic form.

E-commerce Law

What It Means You Click “I Agree”

Section 1 - Definitions

"electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by **electronic, magnetic or optical means or by any other means** that has capabilities for creation, recording, transmission or storage similar to those means and "electronically" has a corresponding meaning.

E-commerce Law

What It Means You Click “I Agree”

Section 6 (1) - Use Not Mandatory

Nothing in this Act requires a person to use or accept information in electronic form, but a person's consent to do so **may be inferred from the person's conduct.**

- Email on business card?
- Transact on the Web?

E-commerce Law

What It Means You Click “I Agree”

Section 20 (1) - Formation & operation of K

... an offer or the acceptance of an offer... may be expressed

(a) by means of an electronic document; or

(b) by an action in electronic form, **including touching or clicking on an appropriately designated icon or place on a computer screen** or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

E-commerce Law

What It Means You Click “I Agree”

Section 21 - Involvement of Electronic Agents

A contract may be formed by the interaction of an electronic agent and a natural person or by the interaction of electronic agents.

E-commerce Law

What It Means You Click “I Agree”

Section 22 - Errors with Agents

An electronic document made by a natural person with the electronic agent of another person has **no legal effect and is not enforceable** if the natural person made a material error in the document and

- (a) the electronic agent did not provide the natural person with an **opportunity to prevent or correct the error**;
- (b) ... **notifies the other person** of the error...;
- (c) ... takes reasonable steps...to **return the consideration** received...
- (d) ... not used or received any material benefit or value from the consideration...

E-commerce Law

What It Means You Click “I Agree”

Section 23(1) - Sending Presumption

Unless the originator and the addressee agree otherwise, an electronic document is sent when it **enters an information system outside the control of the originator** or, if the originator and the addressee are in the same information system, when it becomes capable of being retrieved and processed by the addressee.

E-commerce Law

What It Means You Click “I Agree”

Section 23(2) - Receipt Presumption

An electronic document is presumed to be received by the addressee,

(a) when it **enters an information system designated** or used by the addressee for the purpose of receiving documents of the type sent **and it is capable of being retrieved** and processed by the addressee; or

(b) **if the addressee has not designated or does not use an information system** for the purpose of receiving documents of the type sent, when the addressee **becomes aware of the electronic document** in the addressee's information system and the electronic document is capable of being of being retrieved and processed by the addressee.

What about the cases?

Clickwrap Contracts

- Shrinkwrap commonly used method of licensing
- *North American Systemshops* casts doubt on enforceability
- *ProCD v. Zeidenberg* turns tide in the U.S.

Clickwrap Contracts

- *Rudder v. Microsoft Corp.* (Ontario - 1999)
 - MSN forum selection clause enforceable
 - Concerns for e-commerce expressed
 - Note that this means Canadian participants and non-Canadian law
- *Kanitz v. Rogers Cable* (Ontario - 2002)
 - User agreement enforceable
 - Terms can be changed on website
- Not all online contracts enforceable
 - AOL cases show complication of non-negotiated agreements & fear of race to the bottom
 - *Ticketmaster v. Tickets.com* -- need to click
 - *Specht v. Netscape Communications* - enforceability of browsewrap

Clickwrap Contracts

Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin (SCC 2007)

The implied precondition of accessibility is a useful tool for the analysis of an electronic document. Thus, a clause that requires operations of such complexity that its text is not reasonably accessible cannot be regarded as an integral part of the contract. Likewise, a clause contained in a document on the Internet to which a contract on the Internet refers, but for which no hyperlink is provided, will be an external clause. **Access to the clause in electronic format should be no more difficult than access to its equivalent on paper.**

The evidence in the record shows that the consumer could access the page of Dell's Web site containing the arbitration clause directly by clicking on the highlighted hyperlink entitled "Terms and Conditions of Sale". This link reappeared on every page the consumer accessed. When the consumer clicked on the link, a page containing the terms and conditions of sale, including the arbitration clause, appeared on the screen. **From this point of view, the clause was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page.**

Clickwrap Contracts

Century 21 Canada v. Rogers Communications – 2011 BCSC

“where notice of the Terms of Use is established along with the knowledge that using the Website will serve as agreement to the Terms of Use, then I am satisfied that agreement is proven. As noted in the browse wrap cases, the act of proceeding further into the website is sufficient to communicate agreement. I find that Zoocasa’s conduct formed a contract. It is not a case of a contract being imposed without their assent.”

The Facebook Cases

Facebook Biometric vs. Douez

Douez

- Sponsored stories
- Forum selection clause vs. BC Privacy Act
- Court rules clause is “valid, clear and enforceable”
- Nothing explicit in the statute to override

Facebook Biometric

- Tagged suggestions w/facial recognition
- Clickwrap vs. Browsewrap contracts
- Choice of law – “fundamental policy”

Implementation Guidance

- Visibility
- Clear assent
- Force person to initial
- Cautious use of links
- Opportunity to review transaction
- Cautious use of presumptions

Policy Questions

- Unilateral amendment -- what rights for consumers?
- Uniformity? -- need for an international treaty?
- Capacity to contract? -- kids online
- Consumer protection issues -- information disclosure
- Mobile contracting