



E-Commerce and Online Contracts

Online shopping is now widely accepted by both consumers and businesses. Just like buying a product in store creates a contract between the Retailer and the Customer, so does an online purchase.

For a contract to be formed, 5 requirements must be met. There must be an offer; acceptance of that offer; consideration; an intention of create legal relations, and the parties must have legal capacity to effect the transaction.

How do these apply to an Online Contract, and what are the things that Retailers can do to avoid problems with online contracts?

Offer:

The display of goods in a shop window, with a price, is not an offer to sell the goods but rather is an invitation to treat, or a willingness to deal. It is the Customer who approaches the counter with the goods and makes the offer. Displaying goods on a website with a price can be the same. Online Retailers should include in their website disclaimers which classify the web pages themselves as invitations to treat.

Acceptance:

If the Online Retailer's website is the invitation to treat, and it is the Customer who makes the offer, the contract is created when the online Retailer accepts the Customer's offer. But how, when and where is the contract accepted?

Courts have developed 2 rules for traditional contracts to determine the moment when contract acceptance occurs for contracts that are not made by both parties physically meeting (eg in the Shop), but made by Customers sending their offer to the Retailer, as happens in an online purchases. The rules are the Postal Rule and the Receipt Rule. Under the Postal Rule, the contract is created when the letter accepting the offer is posted by the Customer to the Retailer. The Receipt Rule applies to situations of continuous communications between the parties. Under the Receipt Rule, the contract is only created when acceptance is communicated by the Retailer to the Customer.

But which rule applies to contracts formed online (ie by email or internet)?

If the acceptance of the offer is by email, at first glance, it may fall under the Postal Rule because it is unusual for the sender of the email to receive initial feedback concerning its delivery, and the sender has no control over the message once sent. On the other hand, given that emails can be lost or corrupted on route, it may be unreasonable to apply the Postal Rule, which states the contract is formed when the email is sent.

If the acceptance is made online on a website, the Receipt Rule would apply as the website and internet offer real time instantaneous communication as the sender has instant feedback.



If the Receipt Rule applies, and the Retailer's acceptance doesn't create the contract until received by the Customer, a problem for the Retailer arises if the Customer is in a different jurisdiction (ie interstate or overseas). The law that may apply to the contract is the law of the location where the contract is formed, which is the location of the Customer. If any legal action arises out of the online contract, the Retailer may have to deal with that action in another state or overseas.

To deal with this, the Retailer's Terms and Conditions can specify that acceptance takes place when the Retailer's communication (eg email or website) is sent, therefore making the Postal Rule apply, meaning the contract is formed in the Retailer's location. As a back-up, the Retailer's terms and conditions can give the Retailer the choice of the law of which location is to apply.

Consideration:

Consideration is something of value that converts a mere agreement into a legally enforceable contract. It is the money paid over by the Customer, and the goods delivered by the Retailer. There is no issue that the contractual requirement for there to be consideration is met by an online contract under which goods and money are exchanged.

Intention to Create Legal Relations:

This intention is presumed in a commercial transaction, but can be rebutted or disputed. When the Customer is in the Retailer's store, the Customer's intention can readily be established by the Retailer confirming it with the Customer. But how is this achieved for an online purchase?

To confirm the Customer's intention in an online purchase, the Retailer's website should take the Customer through at least 3 steps, namely:

1. The Customer should be given notice of the Retailer's terms and conditions before the contract comes into existence. There are 3 ways to give this notice:
 - (a) inclusion of a statement on the Retailer's website that the contract is subject to the Retailer's terms and conditions, without stating if they can be found on the website, and if so, where;
 - (b) inclusion of a statement on the Retailer's website that the contract is subject to terms and conditions and providing a hyperlink to those terms and conditions;
 - (c) incorporate a dialogue box on the web page which contains the terms and conditions in full.
2. The use of an "I have read the terms and conditions" tick box which must be ticked by Customers before they can proceed with the transaction.
3. The use of "I agree" and "I decline" buttons on the web page, so that the Customer is given a choice, but cannot conclude the transaction unless they agree.

The inclusion of a mere statement only that terms and conditions apply without displaying them may not provide sufficient notice or intention. The hyperlink method of notice, followed by steps 2 and 3 is called 'browse-wrap'. The dialogue box display of the terms and conditions, followed by steps 2 and 3 is called "clickwrap". Clickwrap is likely to be the most effective. In any event, the Retailer should ensure that its terms and conditions comply with the Australian Consumer Law, and that any unusual or harsh terms and are highlighted so as to draw attention to them.



Identity and Capacity:

The identity and capacity of a party (eg if the party is a minor) to enter into the online transaction can be very difficult to determine and verify as the parties are not dealing face to face. For this reason identity and role certification is of crucial importance. In one sense, the extent of identity and role certification depends on the value and risk associated with the online transaction. The higher the volume and risk, the greater the level of certification. At its simplest, requiring the online Customer to complete personal details (such as name, address, phone, email, date of birth) and secure payment methods (credit card, paypal, EFT) will provide some detail as to identity and capacity, but cannot ensure that these details have been provided with the person's knowledge and authority and without misuse or fraud.

For larger transactions which involve more documentation, an issue is that the only evidence of the contract will be computer generated documents relating to the transaction. The risk to the parties in an e-commerce transaction is that a party can amend, or even remove data without being detected. One solution to this problem is the use of digital signature technology. Digital signatures not only verify the contents of a message and the identity of a signatory, but also enable a party to check that the document was in fact sent by that particular person, and whether it has been changed.

Conclusion

Whilst contracts can readily be formed online or by electronic means, if you are involved e-commerce it is important that you understand and get the basic contract element right so that your contract is effective and protects you.

If you are involved in e-commerce and would like more information or need assistance on how to proceed, please call Michael Battersby or Ken Gray on 02 4731 5899 or email commercial@batemanbattersby.com.au.