UPDATE ON THE LAW OF ELECTRONIC COMMUNICATION AND TRADING

by Berry Holding-Parsons

The Argos incident

Many of you will have read in the newspapers in September 1999 about the catalogue retailer, Argos, who offered televisions on their website for £3, rather than £299.99. What appears to have happened (I take this from the newspaper reports) is that they intended to round up the price from £299.99 to £300. A mistake was made and it was rounded down to £3. There were apparently a lot of acceptances at £3 a television, including one entrepreneurial gentleman who ordered 1,700! His saving would therefore be about £500,000.

What is the legal position? Did Argos take advice on offer and acceptance? Did they reply on the internet, "We accept your order"? Or did a computer do that automatically? Do they have a contract with their website operator to cover liability for mistakes? How are they placed under the misleading prices legislation?

I am not going to give a view about whether Argos will be forced to supply TVs for £3. But it does illustrate the first theme of this article: if you adopt e-commerce you should pay attention to the legal implications. This is not said in a negative sense. Nothing I say should discourage you from taking up e-commerce. However, you should understand that e-commerce is different to paper commerce and there are potentially different legal consequences.

E-commerce and insurers

Many insurers may think they are not involved in e-commerce. They may have a website but nothing more. In a recent survey of 25 insurers reported in *Insurance Times*, 10 of the UK's biggest insurers said that they view e-commerce as either "unimportant or not especially important" to their future business strategy. Two-thirds said they were not offering quotes from their websites and five of these said they had no immediate plans to do so. This survey confirms anecdotal evidence that many insurers are holding back on e-commerce.

However insurers are wrong if they think they can keep e-commerce at a distance. Because e-commerce is changing how business is done, insurers are effectively underwriting these changes, often without realising it. All policies need to be looked at afresh. So do proposal forms. Are brokers asking the right questions? Do they ask any questions about e-commerce at all? Do they know if an insured starts e-trading during the policy year?

Those of you who are issuing liability and other policies *are* involved in e-commerce but at one remove. What about business interruption policies? Or warranty

insurance? It is far better for insurers to find out all about their insureds now, rather than rely on non-disclosure defences in future that may not work.

So this is my second theme: if your insureds are doing e-commerce, so indirectly are you. Review *all* proposal forms and policies. Reinsurers, check what your insurers are doing.

What does e-commerce mean?

Introduction

It is easy to think of electronic commerce as merely *making* a contract electronically. In fact electronic commerce means EVERYTHING becomes electronic, from the making of the contract through to its carrying out.

This leads to the apparently simple question, "What is electronic commerce?". The answer is not simple, because the effects of the changing electronic scene appear everywhere.

In fact the market has been involved in e-commerce for some time.

E-commerce in the London insurance market

(i) Insurers are indirectly underwriting e-commerce, often without realising it.

(ii) Various proprietary networks at a retail level, eg Misys or Polaris, are in whole or in part e-commerce. They involve both the making of the contract and "back office" e-commerce.

(iii) There is a lot of back office e-commerce, ie transferring data in order to carry out the contract: eg the LPC (LIMNET/RINET/WISE etc) or the CLASS claims system. Back-office e-commerce offers immediate advantages of speed of transmission of data and cost savings. Even something so mundane as data being keyed in once can be a major saving.

(iv) So far there has been less e-commerce in making the contract. This is despite the various efforts made with EPS in 1996, which has never really taken off. Nevertheless there is now some e-commerce in commercial lines, eg the Benfields Cargoinsure website and the other websites they have since developed (Artinsure; Freightinsure; Internetinsure) or SVB's Fusion.

Definition of e-commerce

A working definition of e-commerce is, "the expression used to describe various types of transactions which rely on electronic transmission in one form or another

for communication and payment". Communication may be by various methods, eg by the internet, via a website, by e-mail or by a closed network.

Here are some examples of e-commerce:

(a) The easiest e-commerce transaction is where a customer orders a product from a website. The product is delivered separately. The sale will be subject to contractual terms which are set out on the website and are called a "click-wrap" contract, since the customer clicks on the website to indicate whether or not he wants to accept the contractual terms.

(b) A customer accesses a website and downloads digitally deliverable products, such as music or software.

(c) Parties conclude a contract by e-mail correspondence. This may be for the supply of goods or services or for some other commercial agreement. E-mail is used to set out the parties' intentions in the same way as mail or fax.

Another way of looking at e-commerce is to say that there are three types, business to business, business to consumer and consumer to consumer. Argos falls into the business to consumer heading. If a consumer is involved, there will be some different legal consequences. In practice for the next few years, the big growth in e-commerce will be in business to business e-commerce.

It is important to make a proper analysis of what is happening technically, since this may affect the legal conclusion. As you will see when I deal with the formation of an electronic contract in detail, it is important for a lawyer to know if a contract is formed instantaneously or not. Some systems are a mixture of technological methods: for example you may make a contract through a website but the closing of premium and claims happens through EDI.

The development of e-commerce law

Introduction

For business, e-commerce is a revolution. The principles of e-commerce apply to each industry, which has to apply them to its particular situation. Insurance is no different in following the general principles of e-commerce but with variations, eg utmost good faith, the presence of brokers, etc.

For lawyers, e-commerce is not a revolution, since it does not alter the principles of law. Indeed the law adapts easily to new technology, as it has to telexes and faxes. But it does mean going back to first principles of law and applying them to the new facts of e-commerce. E-commerce lawyers need, in John Major's phrase, "to go back to basics".

Unlike insurance law, there is as yet no settled "e-commerce law". It is found by bringing together many legal disciplines. Therefore this article is not an update: it is rather an introduction to a subject, which is in the process of being developed.

A checklist of legal topics that compose e-commerce law

For those of you who are not lawyers, I set out below a checklist of many of the legal topics that affect e-commerce. The checklist illustrates how an e-commerce business problem may involve a number of different legal topics. For example libel has obvious links with freedom of expression and speech. Or the site of the server may have consequences both for jurisdiction and for tax. Hence an e-commerce lawyer needs to be a generalist, rather than a narrow specialist.

E-COMMERCE LAW CHECKLIST

1. ***Pre-contractual issues***

- *Marketing/advertising (eg comparative advertising; inaccurate advertising; unlawful competitions);*
- *Illegality (gambling/pornography/alcohol (eg minors)/English language in France/export restrictions);*
- *Insurance company regulation/Financial Services Act.*

2. ***Consumer protection***

- *Are you involved in business to consumer e-commerce? If so, extra rules may apply.*

3. ***E-contracts***

- *Making the contract: offer and acceptance;*
- *When is the contract made?*
- *Open and closed systems (with closed systems, a lot of the terms of the contract have been agreed already);*
- *Must a contract be written on paper?*
- *Must a contract be signed on paper?*

4. ***Security***

- *Security, ie ensuring data is kept confidential;*
- *Authenticity, ie ensuring it comes from whom it says it comes;*
- *Integrity, ie ensuring it has not been tampered with.*

Many people feel that security is a problem but this is more a technological rather than a legal issue. The law can be used to correct a breach of security

but, of course, that is too late. People worry that commercial secrets can be given away and that credit card or bank account details can be misused. There are technological answers to these worries, eg encryption and digital signatures.

In any event you take risks at the moment, eg to give your credit card details over the telephone to a theatre booking agency. The potential for misuse is there but you trust the agency not to misuse it. After sensible consideration of the risks, there is no reason why you should not do the same with e-commerce.

5. *Websites*

These create a type of e-contract (a bit like buying in a supermarket is a special type of purchase contract).

(a) Contractual

- *Terms and conditions with the purchaser: how to display them and impose them on the purchaser; how to link them with physical delivery of goods; disclaimers;*
- *Legal certainty versus consumer friendliness;*
- *Monitor your site constantly.*

(b) Intellectual property

- *Copyright in your website contents;*
- *Infringement of other people's copyright;*
- *Development agreements with website designers; maintenance and updating agreements if outsourced; parallel running with paper systems;*
- *Liability;*
- *Linking/framing/metatagging/trolling; disclaimers on links to other websites;*
- *Domain names and trade marks.*

6. *Jurisdiction/choice of law*

- *Closed system/open system;*
- *Site of server.*

7. *Data protection/privacy*

- *Cross-border transfer of data.*

8. *Libel*

- *Harassment, etc.*

9. *Freedom of expression and speech*

10. Tax (including VAT)

- *Where is the server? Does this have tax consequences?*

11. Convergence

- *Merging of PC/TV and internet*

12. ISPs

- *Terms and conditions of access;*
- *Control of subject matter - Demon case;*
- *Liabilities of ISPs.*

13. Employers' vicarious liability for employees

- *E-mail/Internet policies?*
- *Breach of copyright.*

14. Crime

- *Computer Misuse Act 1990;*
- *Intellectual property offences;*
- *Data Protection offences;*
- *Fraud.*

15. Evidence

- *Admissibility;*
- *Are you storing your electronic documents carefully, in such a way that you can prove your reinsurance case 15 years later?*

16. Competition

- *Access to the internet.*

17. E-payments

18. European laws

- *E-commerce directive.*

Because the making of an e-contract is the key to e-commerce, I will expand on the third topic, e-contracts.

E-contracts

Making the contract: offer and acceptance

There are basic principles in English law which decide whether a contract has been formed and when. A contract is formed when an offer is made and accepted; there must be consideration (usually money) and the parties must have intended to be legally bound by the contract.

How does this apply to a website? A trader who uses a website will not want his website contents to constitute an offer in the strict legal sense, capable of acceptance by a mere click. He will not want to be contractually committed to an unknown buyer, or to supply if his goods are out of stock, or to supply a country which he is forbidden to supply. Thus he will want the website to be not an offer but an invitation to treat. Websites must therefore state clearly that the supplier will not be legally bound by a reply from the prospective customer. They should say that they will inform the prospective customer of their acceptance of the offer, once they have checked the availability of goods. The trader should make sure that the website contains the terms which it says must govern the contract. The format of the response should be such that the transaction will be on the seller's terms only.

When is the contract made?

A contract is normally made when an unequivocal acceptance of an offer is communicated to the person who made the offer. E-commerce is not exactly analogous to communication by post, fax and telex, so parties cannot be sure yet how the courts will approach the question of a contract. An acceptance made by telex is made when the telex is received, since transmission is instantaneous. An acceptance made by post is deemed to occur when the letter is posted, rather than when it is actually received, since transmission is not instantaneous. The acceptor does all he can once he posts his acceptance; the offeror takes the risk of non-delivery, since he chose to deal by post.

Although there are no decisions, I suspect the common law will adopt the postal rule for e-mail contracts. With both post and e-mail, delivery of the acceptance is entrusted to a third party, over whom the acceptor has no control. In both cases there is some delay between posting the acceptance or clicking the "accept" button and the acceptance being received by the offeror.

With contracts made via a website, I suspect the common law may find that the reply is instantaneous and therefore apply the telex rule.

However, a European directive is being considered, which may be in force by about 2002. This is likely to say that the contract is made when the website owner has acknowledged the buyer's acceptance and when that acknowledgement has been received by the buyer.

Thus the law as to when a contract is made has not yet been settled. Insurers should limit legal risk by an express on-screen agreement, even though this may not seem user friendly. This is particularly important with insureds outside England and Wales, to increase the chances that English law and jurisdiction is established.

Until the case law is absolutely certain, practical advice is to make sure that acknowledgements are confirmed by conventional methods, phone or fax.

What are the legal risks of e-commerce?

The risks of e-commerce are not exactly the same as for paper commerce, even if business is done in exactly the same way. But of course the whole point is that e-commerce is not done in exactly the same way.

You have got used to law being settled, more or less. The next five years will see a revolution in business. So it will in commercial law. Correct use of legal and technical advice will be important in successful e-commerce. Everyone concerned, insurers and lawyers, will need to have an open mind and embrace the new ideas. The only certainty is that those who want to keep things as they were will be disappointed. There is some legal risk until e-commerce law is more settled. However, insurers are used to risk and they should be able to deal with legal risk, provided they are fully aware of it.

Berry Holding-Parsons, Partner: Ralph Hume Garry

This paper was presented at the BILA 35th Anniversary Annual Conference, 24th September 1999

[E-commerce law is developing all the time. Berry believes BILA can help those involved to exchange information. He would be pleased to hear of new developments at his e-mail address, bhp@ralphhumegarry.com]