Electronic Contracting II
Formation of Electronic Contracts

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Topics

• Basic contract law and its changing face
  – Requirements of a valid contract under contract law
  – How to fulfill those requirements in electronic setting?

• Legal approaches
  – Practical implications
  – Is there any different between non-electronic contract formation and electronic contract formation?
Contract Requirements

• Offer and acceptance = Agreement
• Legal intention
• Capacity
• Consideration
Offer and Acceptance: main issues

• Legal requirements as to content
  – "Meeting of the minds"
  – Legal intention
    • Consciousness of making contract
• Effectiveness of communication
  - Place and time of effectiveness
  - Revocation and withdrawal
Main Issue 1

- A contract is legally formed when a binding offer is duly accepted
- What are the requirements of legally binding offer and valid acceptance?
Electronic Offer

- A statement made with intention to be bound
- Specific, comprehensive and capable of immediate acceptance
- Not an invitation to treat or request for information
- Offer?
  - Automated email quotations and pricing
  - Posting on newsgroups or lists
  - Web pages of e-business
Electronic Acceptance

- An unequivocal and unconditional response to offer
- Written acceptance and acceptance by conduct
- Silence is not usually considered as acceptance
  - Possible exceptions
- Acceptance?
  - Browsing/Accessing/Using
  - Clicking/Downloading
  - Linking
  - Automated email replies
  - Automatic downloading
New wrap contracts

- Shrink-wrap
- Click-wrap
- Browse-wrap
- Download-wrap
Legal approach

- E-Commerce Directive (ECD)
  - Article 11
- MLEC
- CUECIC
ECD article 11

- Placing of the order
- Obligation to provide acknowledgement of receipt without undue delay
- Provision of appropriate, effective and accessible technical means to correct input errors
Order

- Steps to conclude contract
- Offer or acceptance?
- Status of the website
  - Offer or invitation to treat?
  - Compare to article 11 CUECIC
- Acknowledgement of receipt
  - Acceptance or mere acknowledgement of receipt?
  - Legal effects
Acknowledgement of Receipt

- Effect of acknowledgement
- MLEC:
  - Request
  - Form of acknowledgement
  - Does not deal with legal consequences
Opportunity to correct input error

- ECD article 11
  - A requirement for double clicks?
  - No clear consequences of failure to provide

- CUECIC article 14
  - Right to withdraw if certain conditions are met
Main Issue 2

• An offer or acceptance is effective when it is communicated
• When is the message effectively communicated?
  – Rules on message communication
Message Communication – Rules

- Declaration Rules
- Receipt Rules
- Postal / Dispatch Rules
- Information / Knowledge Rules
- Combination
E-Message Communication – Issues

• Application of communication rules
  – When is an e-message considered sent/dispatched/transmitted or received?
  – When is an addressee considered to have gained knowledge of the communicated message?
ECD article 11 – Time of receipt

"When the parties to whom they are addressed are able to access them"

- Accessibility
- Receipt rule
MLEC article 15 – Time of receipt

- Offer and acceptance as data messages
- Time of receipt:
  - When it *enters* the designated information system
  - If the data message is sent to an information system of the addressee that is not the designated information system, when the data message is *retrieved* by the addressee
  - If the addressee has not designated an information system, when the data *enters* an information system of the addressee.
CUECIC article 10 – Time of receipt

- When it becomes *capable of being retrieved* by the addressee at an electronic address designated by the addressee.

- If it is sent to another electronic address, when it becomes *capable of being retrieved* by the addressee at that address and the addressee *becomes aware* that the e-communication has been sent to that address.

- ”Capable of being retrieved” = when it *reaches* the addressee’s electronic address.

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Is there any different between the formation of e-contracts and non e-contracts?

- Formal inclusion of requirement of opportunity to correct input errors within contract formation procedure
- Additional criterion for establishing effective message communication
  - Accessibility
  - Retrieveability