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2007

Chapter 11 - Conclusions

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CHAPTER 11 CONCLUSIONS

This thesis discussed the implications of Internet technologies for the process of contract formation. It attempted to present a more realistic view of networked communications based on the client-server model. It also attempted to determine what additional factors must be taken into account when applying the offer and acceptance analysis in the on-line environment.

The conclusions arrived at in this thesis are simple: the idiosyncrasies of open electronic networks must be taken into account when establishing the existence of agreement, its contents and its parties. The differences between the traditional methods and the on-line contracting process must be acknowledged. These differences, however, do not necessitate a new taxonomy of contract law, the introduction of new principles or any major modification of the offer and acceptance model. Textbooks on contract law need not be rewritten. The basic principles of contract law remain intact – irrespective of whether the contract was formed in a brick-and-mortar shop, at the negotiating table or by means of an interactive website equipped with server-side scripts.

Intention and consideration remain as the foundations of agreement. Analysis in terms of offer and acceptance remains a viable analytical tool. Contracts formed in open electronic networks are valid and enforceable because intention can be manifested in any manner and because formal requirements are in the modern law of contract the exception, not the rule; issues such as what constitutes “writing” are therefore of marginal significance. Although open electronic networks enable new methods of communication, they do not require the establishment of a parallel legal regime of contract formation.

The novelty of the transacting environment must, however, be both acknowledged and accounted for. The fact that textbooks on contract law need not be rewritten does not mean that the specific features, which characterise the on-line contract formation process can simply be ignored. These features relate to how contractual intention is communicated, or - to be more precise – transmitted and presented. Additional considerations arise with regards to the process of attribution.

Lawyers need not study textbooks on networking and data communications in greater detail in order to analyse the on-line contract formation process. They must, however, understand the client-server model, the concept of “layers” and the basic functioning of the communication methods enabled by open electronic networks. Above all, lawyers must not make assumptions which are based on a misunderstanding of the features of the on-line contract formation process. Analogies drawn by reference to the postal or the telephone systems may lead to incorrect results and cause prejudice to

the contracting parties. Lawyers and judges must be more “technology-sensitive” in order to determine which technological factors merit attention from a contract law perspective. The skill lies in being selective and not over-inclusive. The challenge lies in recognizing those aspects of networked communications that must be included in legal analyses. Another challenge is not getting carried away by technology.

Many of the existing problems, relating mainly to the incompatibilities between client applications and network environments of the contracting parties, will in time disappear. The Internet is still in its early days and many aspects of networked communications are still in their formative phases. In many instances it is too early to generalize or to give definitive answers.

To date, courts and legal literature have often failed to show any genuine appreciation of the complexity of issues arising with regards to networked communications. There has been a tendency to throw “all things Internet” into a single intellectual bin, with no distinctions being drawn between the various communication methods. From a contract law perspective, there is no Internet. There is email, there is the web, there are instant messengers. There are clients and servers; there are differences between the network environments and there are security concerns, which often translate into increased risks of non-delivery and the right to reject communications. All these factors introduce an additional layer of analysis.

In the majority of circumstances analogies are possible but somewhat futile because they do not facilitate the application of contract formation principles. Functional equivalents share a similar fate, the best example being digital signatures. The energy used to create analogies and functional equivalents is better spent on developing rules for allocating communication risks in heterogeneous network environments or determining the legal status of ISPs – part of the transmission infrastructure or part of the originating/terminating information system?

The automation of the contract formation process does not warrant any change to the law of contract. Theoretical “obstacles” to the validity of computer-generated contracts are easily removed or non-existent. A person is liable for any output, which originated from his or her computer. The protection from unplanned output and the limitation of the computer user’s liability are achieved on the basis of the objective theory of contract or the principles of mistake – without recourse to agency or separation theories.

Difficulties of remote authentication and the resulting problems of attribution can be relegated to questions of proof and evidence – not contract formation as such. Digital “signatures” are not signatures but a remote authentication technology based on a hybrid cryptosystem. Their role in identifying a contracting party is limited. Most importantly, their relevance to the success of e-commerce is negligible – at least from the perspective of individual users contracting on an inherently insecure network absent pre-existing agreement that would allocate risks for the unauthorized use of the private key.

The speed of transmission and the general acceleration of the contract formation process in the on-line environment should not be mistaken for presence. The fact that a message travels at a fast speed does not imply that the interactions between the parties are, as a matter of law, between parties dealing face-to-face. The over-zealous approximation of communications at a distance with those occurring face-to-face must be criticized. It takes more than instantaneous transmission to create a functional equivalent of presence. Additional factors are reliability, risk allocation and the two-way nature of face-to-face interactions. The simplistic division into instantaneous and non-instantaneous methods of communication is unhelpful. The focus must also be taken off the device used in the communication process and placed on the characteristics of this process. The key words are “on-line” and “real-time,” not “instantaneity” or “control.” As each Internet-based method of communication

differs in terms of immediacy, reliability and accessibility it is impossible to subsume them under one rule. It is also unhelpful to adopt a wholesale approach and speak of “electronic communications” in general.

The web-environment often increases the likelihood that contracting parties will be in disagreement as to what was actually said and done during the formation process. The differences in how intention is manifested introduce more uncertainty or complexity into the process of ascertaining the contents of a contract. The distributed nature of the contents presented on the web renders it difficult to determine the words that define the obligations of the parties. The interlinked character of HTML files makes it difficult to determine the source and scope of particular statements. The overabundance of “writing” - an unforeseen side-effect of broad definitions and a liberal approach as to what can constitute a “written document” – does not facilitate the application of those contract formation principles that assume that writing is accompanied by a tangible carrier. In the absence of a statutory definition, ultimately, whether a given website, email or instant message constitutes “writing,” is a question of fact and intention and – according to the model laws – the code the message was written in. On-line contracts create challenges not because of their electronic form but because many contract formation principles pre-suppose the existence of paper and assume minimal permanence or stability of their contents.

In light of the cognitive difficulties created by the web and the ease of transition between different environments (i.e. from purely informational to transactional) the transactional context must often be created by a notice that the use of a particular website is governed by a set of terms. Notice must be adequate, terms must be available. A separate (or additional) act of assent is, however, not required. Both “notice” and the “availability” of terms must be tailored to the novel environment. Web-technologies provide the perfect tools to ensure both. Accordingly, instead of demonizing the “electronic form” of on-line communications, the focus must be placed on those technologies which can serve to better communicate contractual terms.

Last but not least, the importance of incorporation procedures must be appreciated. The communication of terms often determines the existence of the contract. The effectiveness of incorporation presupposes not only “notice” and “availability” but also the ability to determine the precise moment of contract of formation. Terms must be communicated before acceptance. The close interrelationship between the effectiveness of acceptance, the incorporation of terms and the existence of a contract becomes more visible in the on-line environment. The introduction of communication rules into terms governing on-line transactions can be regarded as an attempt to counterbalance the “openness” of the on-line environment and the multiple novel risks introduced thereby.