

Best Practices in Electronic Contracting

After the enactment by Congress of the Electronic Signatures in Global and National Commerce Act (E-Sign¹) and the enactment by Michigan and other states of the Uniform Electronic Transaction Act², the use of electronic contracting has become commonplace. However, it has also become clear that basic contract rules have been taken for granted. A recent 9th Circuit Court decision is illustrative of the need to consider appropriate practices in electronic contracting. In the case of *Douglas v US District Court for Central District of California*³, the court dealt with the issue of the effectiveness of modified contract terms. In the *Douglas* case, a telecommunications provider changed the terms of its service by posting modified contract terms on its Web site. When a dispute arose, it sought to bind the customer to the modified terms but could not show that *Douglas* had received notice of the modified contract provisions or had the opportunity to assent to or reject the terms. The court held that parties to a contract have no obligation to check terms posted on a Web site and that contract terms cannot be unilaterally modified without obtaining the other party's consent. The *Douglas* decision reminds us that basic contract principles apply equally to electronic contracts, and the following article discusses some of the current views on best practices.

Electronic Contracting Practices

It's a safe bet to say that almost every business lawyer has at least one client that has either bought or sold something online. The growth of e-commerce predictably led to the increasing use of electronic contracts, but laws or regulations to guide lawyers, or their clients, on acceptable contracting principles lagged behind.

It is important to remember that most electronic contracting laws do not affect the substantive law of contracts. Rather, their general purpose is to validate electronic contracts, signa-

tures, and records without changing the substantive application of such contracts. Set forth below is a summary of best practices for online contracts using a typical buyer/seller arrangement with your client acting as the seller who is requesting third-party buyers to purchase its widgets online. Your seller-client wants you to draft the online sales contract for the widgets. Here are some recommendations on basic electronic contract principles.

Typical Contract Rules Apply

Just because a contract exists only online instead of on paper, all the normal substantive contract rules still apply. This means you still have to consider principles of offer and acceptance, the statute of frauds, consideration, and all other basic contract rules when advising your client.

Provide the Opportunity to Review Terms

For a contracting party to functionally agree to electronic contracts, the buyer must be able to access and review the terms.

- **Automatic Access to Terms:** In order to signify the buyer's acceptance to the contract, the buyer should be prompted to click a button or icon that clearly indicates to the buyer that it will be bound by the terms of the contract. This can be accomplished by using a button saying "I Agree," "I Accept," or a similar term of acceptance. Before the buyer signifies acceptance of the contract, however, the better practice is to require that the contract terms either appear automatically on the buyer's screen, or the buyer must be required to click on an icon or hyperlink that accesses the terms. In other words, the buyer must be able to read every term to which he or she will be bound before he or she agrees to such terms.

- **Ease of Access:** The agreement should be displayed on the buyer's screen so as to give the buyer sufficient opportunity to review the contract terms before proceeding. The buyer should be able to read the terms at his or her own pace and should not be timed out. If the terms occupy more than one computer screen, the buyer should be able to navigate forwards and backwards within the terms by scrolling or changing pages.
- **Subsequent Access:** Once the buyer reviews the terms, those terms should remain accessible to the buyer for further reference. The buyer must be able to either save or print the contract terms.

Display Terms Clearly

- **Format and Content:** The terms of the contract should be clear, readable, and in legible font both on the screen and in hardcopy format if the buyer should choose to print the contract.
- **Consistent Information:** Information provided to the buyer elsewhere on the seller's Web site or in marketing materials should not contradict the agreement terms.

Determine Assent

- **Notice of Consequences of Assent:** Immediately preceding the place where the buyer signifies agreement, there should be a statement drawing the buyer's attention to the effect of the agreement, such as: "By clicking 'Yes' below, you acknowledge that you have read, understand, and agree to be bound by the terms above" or "These terms are a legal contract that will bind you as soon as you click the following assent button."
- **Mandatory Viewing of Terms:** The buyer should not have the

option of hitting the “I Agree” button, or otherwise assenting to the contract terms, without having been presented with an opportunity to review the terms. The better practice is to require the buyer to scroll through to contract terms before giving assent. The seller can place the acceptance button at the end of the contract, at least requiring the buyer to navigate past the terms before assenting.

- **Clear Words and Method of Assent:** The words of assent to the terms should be clear and unambiguous, such as “I Agree.”
- **Clear Method of Assent:** The method of signifying assent should be clear. Examples include providing buttons such as “Yes” or “I Agree” (in response to a question of “Do you agree?”) or requiring buyers to type in specified words such as “I Agree.”

Provide an Opportunity to Correct Errors

The assent process should provide a reasonable method to avoid, or to detect and correct, errors likely to be made by the buyer in the assent process. A summary of the terms of the contract that appears before the “I Agree” button is one such means.

Provide an Opportunity to Reject Terms and Spell out the Consequences

- **Choice between Assent and Rejection:** The buyer should be given a clear choice between assenting to the terms of the contract and rejecting them and should be told the consequence of choosing rejection. The buyer should have the option to reject the terms at the end of the process when final assent is requested.
- **Clear Words of Rejection:** The buyer’s rejection option should be as clear as the assent method, clicking a button or typing terms

such as “I do not agree,” “No,” or “I decline.”

- **Consequence of Rejection:** If the buyer rejects the agreement terms, that action should have the consequence of preventing the buyer from obtaining the benefit of the bargain he or she would have been entitled to if the buyer had accepted the terms of the contract. The buyer should not be able to complete the transaction without agreeing to the terms.

Keep Records to Prove Assent

- **Accurate Records:** The seller should maintain accurate records of the content and format of the electronic agreement process, documenting what steps the buyer had to take in order to gain access to particular items and what version of the agreement was in effect at the time. If necessary for proof, link the buyer’s identity to his or her assent by maintaining accurate records of the buyer’s identifying information, the buyer’s electronic assent to the terms, and the version of the terms to which the buyer assented.
- **Accurate Record Retention:** Records must be retained in a format that accurately depicts the contract as it was created in the original contract and in a form that can be accurately reproduced and provided to anyone with a legal right to access the information.

Request the Buyer’s Consent to Amend the Contract

The *Douglas* case reminds us that a seller providing services cannot change the terms of its contract simply by posting notice of an amendment to the contract on the seller’s Web site. This is because parties have no duty to continually monitor the other party’s Web site for possible changes to a contract. Best practices dictate that the seller requests and obtains a buyer’s consent in order to amend the contract. Regardless of

the terms of any particular contract, a seller must do something more than simply post an amended contract on its Web site to give “notice” to buyers of a contractual change.

Implementing these contract principles into your consultations with clients can help ensure your clients will begin their online relationship with a good start and guard against problems in the future.

NOTES

1. P.L. 106-229, 15 USC § 7001 et seq.
2. MCL 450.831 et seq.
3. 495 F3d 1062 (9th Cir. 2007).



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