



Chapter XXIII

The Law Vis-À-Vis Electronic Commerce

Assafa Endeshaw
Nanyang Technological University, Singapore

INTRODUCTION

A great deal of uncertainty surrounds the impact of the continuing growth of electronic commerce (e-commerce) on existing law. While commercial law has evolved over the centuries in response to the development of trade in goods and services, within or across nations,¹ the emergence of an electronic medium ('cyberspace') as an additional avenue for trade has pushed to the fore many questions: whether and how an adaptation of existing law would be possible, appropriate or sufficient to catch up with the problems thrown up by the new medium. For one thing, the nature and effects of transactions that would ordinarily have been taken for granted had they occurred on non-electronic media confound established notions of commercial law. Secondly, the unpredictability of the ultimate consequence of such transactions to the respective trading partners, who would be more likely to come from different jurisdictions, prompts scrutiny of pre-existing, widely accepted formulations in domestic trade law, custom and treaty among nations.

A major feature of the emergent situation is that the impact of e-commerce on the law has not been across the board, simply because e-commerce has not been developing evenly. Most transactions to date relate to the purchase of computer hardware or software or the supply of information of various types: plain news, financial data, entertainment, education, travel, advertisements, health and DIY tips. These items have one characteristic, namely the buyers' lack of interest in, or disregard of, any need to have to conduct checking or inspection prior to purchase or, at any rate, before delivery. In light of the general uncertainty surrounding the status of the online buyer and seller, the relevant law and of how it might be applied on behalf of a buyer claiming redress, the purchase of "safe" items acquires a precautionary significance. In other words, the very nature of the items involved in the transactions seems to rule out any fundamental failure that could surface at a later stage and necessitate the intervention of the law to resolve the consequences of that failure. Obviously, once money has passed from the buyer to the seller, the path to recovery of that money, let

alone further damages as would be expected under normal contract law, could be too complicated for the buyer to understand or pursue.

What makes the plight of an on-line buyer who seeks redress intractable is that solutions to on-line legal disputes are only just evolving in bits and pieces. New rules have begun to emerge in the form of statutory reforms in single jurisdictions or through case decisions on disputes arising from on-line transactions. However, the ambit and applicability of the evolving laws tend to be subject to time, the nature of the concrete problems they are meant to address, as well as the diverse contexts. Consequently, pre-existing laws have not undergone modification or replacement by the emergence of e-commerce in all respects, to the same extent, nor in every jurisdiction.

This chapter explores the nature of legal changes that have been propelled by the onset of e-commerce and the likely course of future developments. First, we present a brief summary of the impacts on contract law followed by a discussion on the liabilities arising from on-line transactions. Then, the focus is on issues of security and privacy of transactions. Finally, we cover the incipient forms of dispute resolution in e-commerce. The conclusion affirms that the law as applied to e-commerce is still in continuous flux and will take more time to acquire a definite shape. In particular, it underscores the urgency of meeting with the ever-apparent demand for an international treaty or agreement, at least parallel to existing treaties in contracts or sales.

CONTRACT LAW

The most important area of law that has been put to the test by the growth of e-commerce is, not surprisingly, contract law. It needs no emphasis that contract law is the foundation of commercial law.² However, the degree of change effected on existing rules of contract law or, even, the level of understanding of the problems that the new medium presents to contract law is not readily apparent across jurisdictions. So far, some elements of case law have been modified; a few statutory authorities have been amended but nothing comprehensive has surfaced in any country. Most changes have occurred in the U.S. prompted by the rising use of e-commerce in interstate trade. The rules developed in the context of interstate trade have had to be re-examined to accommodate e-commerce. Nevertheless, no approach has been adopted to consummate all efforts through an international solution.

In the area of new legislation, the UNCITRAL Model Law on Electronic Commerce has set the pace for all nations. Essentially, the Model Law provides for assimilation of electronic forms of contracting as well as electronic evidence to non-electronic ones; in short, it equates electronic (offers, acceptances and evidence for such) to non-electronic forms without indicating whether the legal consequences that arise will also be the same or different. While the assimilation of electronic forms of communications is a step in the right direction, it is submitted that the absence of any provision on the legality or validity of transactions is a major deficiency of the Model Law.³

The attempt to come up with a legislative solution to this problem has taken, in the U.S., the form of amending the Uniform Commercial Code, by introducing a new Article 2B. The draft has undergone various revisions (starting from 1996) partly because of the disparate views expressed to improve it and the lack of common understanding about its intended coverage.⁴ The latest draft was issued on February 1, 1999.⁵ An April 7, 1999 press release

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