



## **DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING**

### **Safe Sales in Cyberspace**

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You work as in-house counsel for an established company that markets industrial goods worldwide, business-to-business (B2B). Your company is on the internet or about to get there. Your customers are moving online; your competitors already have sites on the World Wide Web. You would like to establish a dynamic electronic marketplace for your company's goods, and want to ensure that its entry into "e-commerce" is smooth and uneventful.

Or perhaps you work for a company that is focusing on its core business and streamlining its operations. You are looking for ways to improve overall efficiency and have seen the great opportunities that electronic sales and procurement have afforded several world-class manufacturing and industrial companies, wholesalers, and other organizations. You, too, would like your company to make a safe transition to e-commerce, and you are concerned that future online sales take place without derailing existing business.

How do you effectively handle this new phase in your company's growth and development? How do you venture safely into cyberspace?

### **Getting Started in E-commerce**

When you make the transition to e-commerce and start to design your company's e-sales infrastructure, you will be faced with many technical and strategic management issues, as well as a host of business and legal implications. The fact that your client has existing operations and sales channels may add to its strengths — or become hurdles on the road to cyberspace. Your company's distributors may have exclusive sales rights and feel threatened by plans for direct online sales. Your company's sales processes and documents may be readily applicable to global online trading and help you to manage operational risks contractually — or just the opposite. Most likely, your company's current corporate policies, practices, and procedures will assist you in making the e-transition a safe one, provided you take them into account at an early stage.

A company's virtual storefront represents its e-sales backbone, so installing appropriate legal architecture and contractual infrastructure from the start makes sense. To minimize corporate liability and maximize corporate rights, you must get involved with the cyberspace move as early as possible. With your legal training, you will have a view of potential problems and their avoidance that others on your company's e-commerce team may lack.

The good old rules of legal risk management and dispute avoidance are valid in cyberspace, but you may need to reinterpret them. As is customary, you will begin the risk-management process by identifying the risks:

what, why, and how problems may arise. The causes of potential problems will become the basis for your further analysis and treatment.

In this article, we will look at how to conduct B2B e-commerce on a global basis, and how to improve existing sales practices to achieve "safe sales in cyberspace." While our focus is on website sales, our discussion will apply generally to most electronic B2B transactions, whether they are conducted by proprietary systems and electronic data interchange (EDI), new generation mobile phones, or internet-based technology using email and websites. Many of our suggestions will apply to traditional international sales, but in some cases, we will raise issues that are unique to cyberspace.

### **The Safe Sales Concept**

We begin with a key concept: safe sales. Sales, as you know, are about promises. Promises are easy to make, but may be harder to keep in a complex, global context. Challenges that paper-based traders currently face may be exacerbated by the move to doing business online.

You will need a systematic approach to managing electronic presales and sales processes and documents, one that maximizes business opportunities and minimizes potential pitfalls, claims, and litigation. We will show you how you can use your virtual storefront to integrate quality assurance and risk management so that solid business transactions with predictable profits are systematically secured. By being proactive, you can build high quality contracts into your storefront and install appropriate architecture to respond to various customer and legal requirements. You can also embed preventive law in your website store structure, so that your virtual storefront helps to prevent claims and disputes from arising and eliminates or reduces their impact. For those risks that cannot be fully controlled or eliminated, you can build in transactional steps and contractual terms that seek to resolve problems quickly, minimize losses, and preserve business relationships.

We call this approach of building quality assurance, risk management, and preventive law into e-sales, "safe sales in cyberspace." The key legal mechanism to ensuring safe sales in B2B electronic transactions is the contract. Its main purpose, as we see it, is to help the parties reach their business goals and avoid disputes.

### **Contracts**

The general principle in traditional B2B dealings remains the same in electronic B2B dealings: the parties do business under whatever terms and conditions they agree upon. In practice, solutions to most of the legal difficulties raised by varying laws and jurisdictions in international sales and the use of new technologies can be provided by contracts. Even in cyberspace, when making B2B sales, a well-drawn contract is the roadmap to successful transactions and relationships.

### **Choice of Law and Dispute Resolution**

What makes legal sense offline usually makes legal sense online, too. It is not wise to rely on statutes and other laws for implied contractual terms and default rules. Due to the confusion over which law applies in cyberspace, it is important for you to be proactive and choose the law that will govern your website sales. If you do not, you could find your electronic contracts or some of their key terms deemed invalid, or unanticipated obligations, liabilities, or remedies imputed to your contracts.

The U.S. Uniform Commercial Code may or may not be applicable to your cyberspace sales. The fact that a transaction occurs online does not affect its applicability, but the fact that you may now be dealing with foreign buyers and international sales does. Cyberspace has no borders, so you must consider the legal framework for transactions beyond the United States. What used to be local business may suddenly reach the world.

Several attempts at promulgating uniform rules for electronic commerce have been made, but consensus has

not been reached, even within individual countries, let alone globally. The United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC), World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), and European Union (EU), among others, are working to coordinate a legal framework. So far, however, no universally accepted international rules or regulations covering e-commerce exist.

Those of you involved with global sales of goods will encounter the Convention on Contracts for the International Sale of Goods (CISG), which is now the uniform international commercial code of more than 50 countries, including the United States.<sup>8</sup> When a contract falls within the scope of the CISG, the contract is automatically governed by it, unless the parties indicate otherwise. In accordance with CISG Article 11, a contract of sale does not need to be concluded in, or evidenced by, a writing and is not subject to any other requirement or form. Thus, the CISG covers cyberspace sales.

Fortunately, freedom of contract prevails in B2B transactions in a vast majority of countries and industries.<sup>9</sup> You and your buyer can, and should, write your own law through your contract. Bear in mind that you can set aside the default rules of the law applicable to your contracts because, in most cases, those rules are not mandatory.<sup>10</sup>

If you have already updated your company's export sales terms to respond to the CISG and the requirements of your target markets, you will be able to apply them to your online export sales without much redrafting. If you have designed your terms around the commercial code applicable to domestic contracts, however, you may need to amend certain provisions with the CISG in mind. Your terms regarding notifications, warranties, and limitation of liabilities and remedies, for example, may need modifying.<sup>11</sup>

You will want to choose your dispute resolution forum with care, making sure its decisions will be legally enforceable in the appropriate jurisdiction, taking into consideration the location of your customers and their assets. Counsel advising companies engaged in international contracts usually prefer arbitration. You may obtain standard clauses and checklists of key points to include in arbitration provisions from the American Corporate Counsel Association and reputable arbitration institutions. When choosing arbitration, you will want to make sure that the countries in question are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>12</sup>

### **Commitment Control and Contract Formation**

Striving to keep up with the speed of competition and with new technologies, your company's e-commerce development team may not be too interested in contract formation or old concepts like "offer" and "acceptance." But as counsel, you should be. In cyberspace, contracts take on added significance: Customers from different countries, with different expectations, customs, and laws suddenly have access to your products or services. In cyberspace, you can no longer operate on a handshake.

The casual approach that many people take to cyberspace may mean that customers who are unfamiliar with law assume erroneously that email correspondence cannot create a binding commitment. Even sophisticated businesspeople may mistake the internet for a world apart from the "real world," and assume that the usual laws do not apply.<sup>13</sup> The fact is, businesspeople often regard informal email arrangements and business correspondence as noncontractual events; consequently they may not give quotations, proposals, and other presales documents the attention they merit, believing such writings to be revocable and without obligation.

This attitude can be dangerous to your company's legal health, and you need to guard against it. Such electronic documents can and do develop into legally binding contracts. People new to e-commerce may be surprised to learn that, in certain circumstances, even a one-sided piece of correspondence can constitute a legally binding offer or acceptance.

One of the first things you need to decide upon when setting up your website — and thinking about safe sales — is at what point during the transaction process should your company become legally bound. While you will want your website to be as user-friendly as possible, you may wish to retain for your client the right to elect to sell or not to sell and certain other choices. For example, you may want your client to be able to choose the customers and countries it serves, when it must make delivery, and on what terms. A threshold question to ask is: When your company advertises its products online, is it making an offer to sell or is it inviting customers to offer to buy?

The hazards of online selling were illustrated in the United Kingdom in autumn 1999 when the retail company Argos mistakenly displayed on its website ([www.argos.co.uk](http://www.argos.co.uk)) a 21-inch television for sale for £3 (as computed from 2.99), instead of the intended £299. In less than a day, several hundred televisions were reportedly ordered. As if this were not trouble enough for Argos, one of its prospective customers worked for a London law firm, which threatened to take legal action.<sup>14</sup> While it can be argued that displaying a product on a website at a certain price is merely an invitation to the customer to offer to buy the item, an alternative view is that it is an offer to sell, and that the customer accepts the offer upon placing an order.<sup>15</sup>

You can set up your online sales system so that your company does not commit itself in an uncontrolled way or too early. If it suits your business objectives, you can first introduce your products or services and your terms, and then have your customer make an offer to purchase based on your terms. This enables you to reserve the right to accept the offer, subject to credit checking, product availability, or other relevant conditions. In this case, you will want to make sure that your system does not automatically respond to all purchase orders (offers to purchase) by immediately sending an email acceptance message. Instead, you should only acknowledge receipt of orders in the first instance and include appropriate disclaimer language in your contract sales terms.

Depending on the design of your website's sales system, your customer may make a purchase by clicking an "I accept " or "OK" button that means either "I offer to buy" or "I accept your offer," and so may or may not bind your company to a contract. In structuring your website for B2B sales, the choice is yours, but you should be aware of the alternatives so that your e-commerce team can make an informed decision, and communicate that effectively to your customers.

### **Customer Registration and Contract Terms**

It is not enough for you to draft your sales terms; your terms must also become part of your contracts. Here, again, you have several options, best exercised when your website is structured in collaboration with business, technical, and legal people.

You may choose to use your website to create an extranet, or business-partner network, in which only those customers that have entered into a pre-existing contractual relationship with your company, and have had sufficient credit checking, where necessary, would be authorized to place orders. Or you may open up your sales to any customers who register on your site. This decision will be influenced by the average order price, and the necessity to implement customized credit or delivery and installation provisions for your customers.

Customer registration of some type usually precedes any website sale. This benefits both parties, particularly when the parties wish to establish a long-term relationship with reduced transaction costs. During the registration process and/or later as part of the ordering process, the prospective customer goes through steps that present the terms of use and/or the terms of sale. Your customers must accept these terms — often by clicking an "I agree" button — before you grant them access to the content, service, or product on your website.

To ensure an enforceable sales contract that incorporates your terms using the "click wrap" approach, your prospective customer must be allowed to review the terms before agreeing to them, and be able to accept or

reject them. Your customers can bind themselves to a contract electronically by sending email, transmitting information on an order form, or by clicking on an agreement displayed at your website. This is your choice.

To avoid uncertain outcomes and unfavorable results, you will want the terms defining the parties' rights and obligations to be explicit. You and your customers have a common interest in knowing what you are supposed to do and what you are entitled to receive. You will also want to allocate risks fairly, and to predict the outcome in the event of a breach of the contract.

## **B2B Versus Consumer E-Sales**

You have probably heard the statement that "on the internet, no one knows you are a dog." Or, phrased another way, "on the internet, no one knows if you are a consumer or a business customer." If your products are suitable for both consumer and business sales, your e-commerce team may see great benefits to keeping your e-sales infrastructure the same for both. You must discourage them from doing so.

While it may seem to make business or technical sense to treat all customers the same, you need to remind your decision-makers that your company will lose contract opportunities available to the B2B sales arena if it elects to do so. You should not volunteer to give up the freedom of contract that you have in B2B sales. The costs and other consequences of potentially limitless liabilities and remedies offered to consumers are not commonly (or knowingly) accepted in B2B dealings. Your shareholders, financing institutions, and insurance carriers would probably argue strongly against such excessive e-risk-taking, too.

Not only is the identity of your customer — consumer or business — important, but making your identity known is also key. It is a surprisingly common habit of online sellers to make themselves hard to identify. Even with nothing to hide, companies often fail to state their full name and address on their websites or hide them on some remote page or corner. If prospective customers only find a generic domain name and email address, how do they know with whom — and which country — they are dealing?

This situation is expected to change and more information will be required in the European Union, when the draft Directive on Electronic Commerce, which covers both consumer and business transactions, takes effect. The Directive was accepted by the European Parliament on May 4, 2000, and the EU Member States have 18 months from that date to implement the Directive into national law.<sup>16</sup> The Directive is mandatory in consumer transactions, but complying with it is not required in B2B commerce, with some exceptions. (If you are dealing with consumers or collecting personal data within the EU, you need to know about several other directives, listed in the notes.<sup>17</sup>)

Regardless of the legal requirements that apply to your e-sales, we recommend that you adequately identify your company as the seller, and clearly set out the steps that your customers must follow to enter a contractual relationship with your company.

## **Prices and Payment**

There is no point in sales, however safe, if you do not get your price right, or if you do not get paid. In traditional domestic sales, the buyer and the seller usually use the same currency, are familiar with the taxes and costs involved, and know how to proceed in case of nonpayment. This may no longer be true with your newly established worldwide cyberspace sales.

Taxation issues can be particularly difficult in online transactions, because the law is in a constant state of flux. The Organization for Economic Cooperation and Development has ambitiously undertaken to standardize the global taxation system for e-commerce, and several other international initiatives are also in progress.<sup>18</sup>

The ongoing debate as to which electronically delivered products should be considered goods, and which should be considered services, continues. This question determines which sales are governed by the CISG, and which tax regime applies. Goods are generally taxed at the buyer's location, while services are usually taxed at the supplier's location. It may be easy for posted items to escape the sales-tax loop, but more difficult for electronically ordered heavy equipment to fall outside the buyer's tax regime, given that customs officers can simply refuse to release items from the docks if sales tax is not paid.<sup>19</sup>

You have a number of payment systems available to you as an electronic trader, including payment by credit cards, SWIFT or CHAPS electronic transfers, letters of credit, bank transfers, and various forms of digital cash. Depending on the system you choose, your company may need to consider foreign currency exchange — the costs involved and security options available — and set a price on the risk of delays in payment and nonpayment.

Payment need not be offered in money. One of the more recent developments in cyberspace trade is bartering: exchanging goods for goods or services for services or even goods for services. Finding parties interested in such deals used to be complex. But now, using data matching technology, the whole world can find your surplus goods within seconds and offer goods or services in exchange.

Some companies are now using internet auction facilities to auction off excess stock to the highest bidder. Where payment is not made in money but in goods or services, concerns present in barter transactions arise, such as whether two separate sales occur in such deals and whether they fall under the applicable domestic commercial code(s) or the CISG. As in classic barter (or countertrade) transactions, problems related to the applicable law and to the parties' performances can be avoided through appropriate contractual terms clarifying each party's obligation to deliver, to hand over documents, to take delivery, to acquire title in the goods and so on, to the use of appropriate contractual terms.

We recommend that you use the same formula that you are currently using for reviewing existing payment terms in your global cyberspace sales. Your terms will need to specify the amount that needs to be paid (including the currency used); where payment needs to be sent (whether payment is made before the goods are sent or when they are received, which may mean a difference of several weeks, even in today's international commerce); when the payment is due (the due date) and how payment must be made (SWIFT transfer, documentary letter of credit, or other terms); and what will happen if payment is not made in time. The same formula can be used for reviewing your delivery terms: You and your customer must have an understanding about what needs to be delivered and when (the exact date), whether delivery occurs upon shipment or arrival, and whether time is of the essence.

If the CISG governs your electronic-sales contracts, you will have a right to interest on overdue payments. The CISG does not specify a rate, however. Inasmuch as the interest rate is a frequent subject of CISG litigation, we advise you to address it in your contract terms.

## **Customer and Legal Requirements**

In traditional offline sales, most businesses have established policies and practices for launching new products or entering new markets. Suppliers carry out contract and design reviews and reviews of product requirements to make sure they identify, understand, and meet applicable standards before committing themselves to customers. Companies review sales and marketing materials, labels, packaging, manuals, warnings, instructions, contracts, warranties, and disclaimers. These checkpoints and practices may be based on the ISO 9000 Quality Management System Standards. They exist to ensure that businesses meet customer and legal requirements and produce goods that are suitable for export and import, safe, and fit for sale and use in the countries in question. They also secure compliance with in-house requirements determined to avoid excessive costs and liabilities.

How much of this review process should occur when you decide upon your website sales structure? What happens to your safety network in cyberspace sales?

The need for meeting applicable requirements and for adhering to accepted corporate policies and procedures prevails even when a business makes the transition to cyberspace. Like any other promotional, sales, and marketing materials, your website materials need to be reviewed for accuracy, and for assurance that no excessive promises or warranties are inadvertently made. Your contract and design review teams, regulatory affairs experts, product safety coordinator, and outside advisers can help you in this process. Working with them, you will be better equipped to determine, for example, what the European Union directives or European CE marking requirements mean and when they apply, and then to direct your website offerings and other operations accordingly. Your review teams, quality and risk managers, and other people knowledgeable in these matters can become your allies in designing and maintaining your safe sales program. Like you, they are likely to endorse the idea of having your website work to ensure that your company continuously meets or exceeds customer and legal requirements, and avoids unexpected liability exposure.

In today's business environment, speed is key; in cyberspace, even more so. If you are slow in launching your e-sales service and in entering e-commerce, you will lose market opportunities. If your website is slow or difficult to use, you will lose customers. Nonetheless, by bearing in mind safe sales when designing your e-business models, you will be ahead of those companies that make considerable investments in a cyberspace venture only to discover that they will need to spend more time and money to accommodate the legal regime.

## Conclusion

The internet facilitates electronic trade by reducing transaction costs and opening up new markets. Unlike people, technology has the capacity to work tirelessly, providing a 24x7 storefront to service the needs of your customers. But it also poses new risks. Your virtual sales force can add to your company's problems and liability exposure or it can support your company's business strategy and help you to control its commercial destiny. It's up to you.

If your web sales data or documents contain mistakes or if you fail to deliver on promises because of deficient business or legal practices, your company may experience unexpected costs, dissatisfied customers, and other negative consequences. You do not want your e-sales contracts to be vulnerable to guesswork, gap-filling laws, and implied terms. Such failings can hamper the development of trust in business relationships and in doing business electronically.

Through a well-structured website with built-in safe contracting steps that help you to manage expectations and risks, you can remain in charge of whether, when, and to whom you make legally binding commitments. A well-structured website, using explicit contract terms, can generate business — and predictable profits — for years to come. With your legal experience and insight, you can educate your e-commerce team to recognize options and make full use of your choices.<sup>20</sup>

As your e-commerce program takes off, you will have a whole new range of issues to consider, including how to handle success! Issues such as the scale of your IT infrastructure and the robustness of your internal systems and processes will come to the fore. Many unfortunate examples of being "too successful" occurred during the 1999 holiday trading season when companies proved incapable of processing and fulfilling their customer orders in time for Christmas. Similar concerns may arise in a B2B context.

The popular media often depicts the road to global e-commerce as smooth and inevitable. Plenty of commercial service providers and consultants claim to provide turnkey solutions and full-service packages. We are not suggesting that e-commerce is this easy.

Implementing an effective cyberspace strategy for your company may involve complete business-process

reengineering, including a reevaluation of the ways in which sales take place. There may even come a time when goods and services merge into a more seamless continuum, and business models change radically to encompass new paradigms. In this revolutionary era of e-commerce, "sales" may cease to exist as we now know them, being replaced by memberships, bartering, and loyalty schemes. In the meantime, your website's legal architecture should assist your company in making its transition to global B2B e-sales a safe one.

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