

5 Business Advantages of Electronic Service Provider Contracts

Monthly Webinar Series
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Free Monthly Webinar Series

Every month James River presents a new 30 minute Webinar on every-day contracts issues faced by businesses of all sizes. Pick up some practical advice. No registration required. Visit www.jamesriverllc.com for dates & times, dial in information and slide downloads.

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5 Business Advantages of Electronic Service Provider Contracts

Introduction

- Working Definition of e-Contracts
 - Contractual rights created by electronic communications
 - Includes many types: electronic documents; e-mails and IM; click-thru; browser-wrap; EDI
 - Webinar discussion assumes: 1) Web based click-thru contract containing standard terms 2) for doing business in the US only 3) that is accessed over the public Internet 4) by a signer using a personal log in who has been notified of readiness and 5) agrees by electronic means without biometric electronic signature or digital signature
- Theme
 - e-Contracts are enforceable and can be used for B2B services
 - e-Contracts offer strategic and tactical business advantages
 - Questions about proof in court and differing laws
 - Vendor products vary widely, don't capture many advantages

5 Business Advantages of Electronic Service Provider Contracts

Enforceability

- Basic Requirements for Online e-Contracts in US
 - Agreement:
 - Two Steps: 1) Agree to electronically agree; 2) Agree to terms
 - Provide method of acceptance including way to review for "correctness"
 - Provide "link or logically associate" between terms and acceptance
 - Transmission:
 - To a "system" 1) designated by customer, 2) under control of customer and 3) in a readable format
 - Appearance:
 - Do not visually obscure online terms or bury under multiple links
 - Avoid confusion between terms and other content on site, i.e., advertising

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Enforceability

- Basic Requirements for Online e-Contracts in US cont.
 - Archiving:
 - Provide ability for customers to save copy
 - Preserve original terms and record of signature or acceptance action
 - Not Required:
 - Biometric electronic signature
 - Security technology, i.e., digital signature
 - Unique signer ID, i.e., SSN

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Enforceability: 3 Big Issues

- Jurisdiction Laws
 - Legal writing requirements, e.g., record documents in land records
 - e-commerce regulations, e.g., long distance learning
 - e-Contract frameworks
- Authentication (Admissibility as Evidence in Court)
 - Issue of 1) evidentiary proof and 2) legal-technical requirements for e-Signatures
- e-Signatures in International Legal Frameworks
 - US: *Easy*. Has open, broad requirements
 - UN: *Moderate*. UNCITRAL Convention on Use of Electronic Communications in International Contracts requires that signature identify "party" (individual signer?)
 - EC: *Hard*. European Commission Directive on Electronic Signatures requires an "advanced" signature to 1) be uniquely linked to the signer and 2) identify the signer. Requires PKI, biometrics. Also recognizes legality of plain electronic signatures similar to US, but legality not by statute.

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1. Quicker Conclusion

- More than speed of delivery of copies, speaks to 1) efficiencies in drafting and 2) psychology of presentation
- Assembly
 - Online contracting drives practice of using standard contracts or hierarchy of standard provisions (*First best reason for e-Contracts*)
 - Supports mapping of specific versions and terms to particulars of transactions, e.g., service offering, customer, jurisdiction, etc.
 - Customer itself can assemble contract, e.g., choose service offering, enter legal entity info and points of contact
 - Greater sense of control for customer
 - Saves sales personnel from collecting internal customer information
- Cost Savings
 - Eliminates repetitive, time consuming and inconsistent manual process
 - Opens up contract production to sales and other departments (with authorization)

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1. Quicker Conclusion

- Presentation Psychology
 - May be considered subtle but is very significant to sales personnel
 - No document (*Second best reason for e-Contracts*)
 - Nothing passed around to invite mark up and negotiation
 - No creating multiple discussions threads and working drafts
 - Log in information for purposes of acceptance is personal to an individual
 - Direct communication with the authorized signatory
 - Customer expects to see final version online

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2. Flexibility in Supporting Processes

- Conform to providers business model and accommodate customer's sourcing processes
- Hybrid paper-electronic contracts
 - Just as enforceable
 - E.G., Agree to master terms online, customer cuts paper purchase orders referencing contract
- Multi-party contracts
 - Avoid coordination of multiple negotiations and signatures
 - E.G., OEM company white label site allows reseller's customers to purchase online from both on OEM's site
- Customer internal approval process
 - Perceived conflict with online contracting
 - E.G., Password to each person in approval chain for review and signature, either one to one or under workflow rules

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3. "Browser-wrap" e-Contracts

- Evolution of "Terms of Use" into online service contract terms
- Probable future of commerce
- Basic Requirements are 1) opportunity to review terms and 2) "assent"
 - Assent is indirect acceptance, can take many forms
- Enforceable
 - Register.com v. Verio (2nd Cir. 2004, use of search bots on site was acceptance of site terms of use)
 - Cairo, Inc. v. Crossmedia Services, Inc. (ND Cal. 2005, use of search bots imputed agreement to online terms)
- Non-conformance with e-Contract legal framework will need to be resolved
- Firm Footing
 - Use for short term commoditized services
 - E.G., email reminding customers of annual maintenance service, direct customers to visit Web with terms posted on site, call or email to set up appointment, remind customers to view terms

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4. Unilateral Change Clauses

- Established in Dot Com boom for Web hosting and other Internet services
- Some case law on unilateral changes in online contracts world:
 - Yes. Change clause in online contract covering all terms and expressly not giving notice not invalidated by California court in *Comb v. PayPal* (ND CA 2002)
 - Not point of decision
 - Court recognized need for one sided bargaining based on "business realities"
 - No. Change without notice in online contract ruled illegal in *Douglas v. Talk America* (9th Cir. 2007)
 - No. Change clause covering all terms invalidated by integration clause in *Stenzel v. Dell* (ME Supreme Ct. 2005)

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4. Unilateral Change Clauses

- Firm Footing
 - "Pushing the envelope", may invalidate entire contract as "illusory"
 - Only employ where there are "compelling business reasons"
 - Always provide notice, either advance or contemporaneous
 - Limit change to administrative terms, e.g., decrease frequency of audits
 - If service or price terms to be changed:
 - Justify changes as required by nature of service or changing business conditions, e.g., discontinue portion of service due to customer dissatisfaction
 - Specify objective method for change, e.g., benchmark against 3rd party market survey
 - Provide mitigating offset which serves as "consideration," e.g., discontinue service, offer customer discounted service by alternative provider
 - Termination by customer may or may not be required depending on other factors

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5. Support Contract Management & Compliance

- Enormous cost and lost value occurs due to lack of contract management (*Third best reason for e-Contracts*)
- Contracts are an overlooked tool in implementing financial and other GRC compliance programs
- e-Contracts are a superior means of implementing management and compliance
- Strategies
 - Create online customer portals and integrate e-Contract terms with work orders, service levels and performance metrics, payments, reporting and legal notices
 - Exercise user administration over ordering, reporting and noticing actions, e.g., only customer employee designated in contract can log in and accept order
 - Incorporate Financial and GRC controls in contracts and integrate with auditing
 - E.G., Service provider and customers can track fulfillment of customer required security monitoring, auditing certifications, etc.

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Electronic Contracting Products On Market

- Products focus on distribution and EC signature requirements, otherwise don't capture most of the advantages
- e-Contracting can be implemented using simple Web technology
- Type Name
 - Echosign--SaaS. Email/Web format. Sign by typing name. Mashup with Salesforce.
 - Sertifi--Saas. White label. E-mail/Web format. Sign by typing name and email address in overlay box on document. Value is works with over 300 document file formats (PDF, Word, HTML etc.). Distracting long and legalistic Terms of Service link next to signature block.
 - DocuSign--SaaS. Email/Web format. Sign by selecting one of several cursive fonts and typing name. Signature accompanied by hash encryption ID number and certificate of completion (time stamp). 3 attribution methods: 1) email 2) "out of band" access code 3) 3rd party ID challenge Q's. Electronic yellow sticky tabs used to identify authorized signer. API for mashup with other on demand applications.
- Actual Signature Using Mouse
 - AssureSign--SaaS. Email/Web format. Sign by hand using mouse and cursor pen to write signature in overlay box on document.

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Electronic Contracting Products On Market

- Thumbnail Graphic of Signature
 - silanis--Enterprise On Premise. Sign by pasting thumbnail graphic of actual signature on electronic document. Audit trail of signing and signer's ID generated as part of document. Attribution done through log in or PKI. Document hash encryption. Marketed to governments. Accommodates multiple approval processes.
- Signature Pad
 - Penflow--SaaS and On Premise. Integrated with Word or PDF. Sign by hand using signature pad. Signature previously captured and bio dynamics analyzed, signature compared as time of signing. Document hash encryption. PKI keys issued by company for signature verification.
 - Interlink--Enterprise On Premise. Sign by hand using signature pad.
- Document Management
 - Ariba--SaaS. Non e-Contracting. Essentially document management systems with rules based contract clause assembly and approval system. Contract repository, and dashboard with key info fields. Procurement oriented. Mentioned for back end capabilities not provided by others.

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Conclusion

- *Good:* e-Contracting is enforceable and need only use simple Web technology
- *Neutral:* e-Contracting does not solve business value, risk management or service level issues
- *Neutral:* Definition of e-signature and proof of authentication evolving
- *Bad:* e-Contracting not skillfully implemented can violate good faith contract principles