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Are Manitoba contracts that only exist in an electronic or digital form enforceable? What are the requirements for enforceability in Manitoba?

The area of law regarding electronic contracts is quite new and not at all settled. An understanding of the meaning of electronic and digital signatures as well as principles of contract law is a must for addressing issues such as legality, trustworthiness of the messages and the rules of conduct for parties involved in e-commerce.

1. Electronic and Digital signatures

These terms have been used interchangeably leading to considerable confusion. Suffice it to say that a digital signature is a type of electronic signature.

The term "**electronic signature**" is a generic, technology-neutral term. There exist different types of electronic signatures that a person can choose from to associate with the electronic document. Some of them such as a typed name at the end of an email message, a digitized form of a handwritten signature, a personal identification number, or a unique password are more commonly used than digital signatures.

"**Digital signatures**" are a specific type of electronic signature. Digital signatures are unique to a particular signer; they are capable of verification, and capable of determining whether the record to which they are applied was changed after it was signed.

A useful legal definition of what constitutes an **electronic signature** is found in *The Electronic Commerce and Information Act* of Manitoba [Act]. It is defined as electronic information that a person has created or adopted in order to sign an electronic document. While the definition is useful, the Act does not specify technological requirements for an electronic signature.

2. Forms of electronic signature that meet the basic legal requirement of a signature

If used appropriately and with the requisite intent, all forms of electronic signatures should act and constitute a legal signature. Not every electronic commerce law stipulates which technology must be used to create valid, authentic, and reliable electronic documents. *The Personal Information Protection and Electronic Documents Act* of Canada is an example where such technological requirements are stipulated.

How a digital signature works: advantages and disadvantages

The foundation of a digital signature is technology called public-key cryptography, which employs an algorithm using two different but mathematically related 'keys'. A private key is used for creating a digital signature or transforming data into a seemingly unintelligible form, and a public key is used for verifying a digital signature or returning the message to its original form. The private key ties the digital signature to the user and to every single bit of the document. Thus, once the message summary is recovered with the user's public key, the originator and the integrity of the document can be determined. However, since this technique is relatively new and expensive, it is not in widespread use.

3. Legality of Electronic Contracts

The Electronic Commerce and Information Act of Manitoba states: “A contract shall not be denied legal effect or enforceability merely because an electronic document was used in its formation”. It is important to understand that the *Act* itself does not necessarily make contracts formed by electronic communications valid and enforceable. To create a legally binding contract the legal rules of contract formation must be satisfied. The *Act* lists actions such as touching a computer screen, clicking on a computer screen or speaking as means to electronically communicate the offer, acceptance or other matter, efficient for the formation of a legally binding contract unless the parties agree otherwise. Additionally, the *Act* defines the place of sending and receiving of an e-contract. Yet, the *Act* is of no assistance in determining the moment a legally binding contract arises. For example, a contract made by mail becomes legally binding as soon as the notice of acceptance is posted in the mail (“postal acceptance rule”). In turn, in several civil law jurisdictions a legal contract arises only when the acceptance reaches the offeror (“reception theory”). In addition to these discrepancies, Canadian contract law doesn’t require a contract to be in writing, never mind signed, where in some civil law jurisdictions a contract is legally binding only if it is signed. The global nature of e-contracts adds uncertainty to this already complicated state of affairs. Therefore, when an e-contract is made between parties from different jurisdictions, it is important to identify which proper law (the law governing the formation of the contract) will apply and which court will have jurisdiction to adjudicate disputes arising out of the contract.

Conclusion

Unfortunately, there is no easy or simple resolution of the legal and practical issues presented by electronic contracts. The differences and inconsistencies between electronic commerce laws in Canada and other jurisdictions coupled with various technical requirements present additional difficulties. One cannot with certainty state when and how a legally binding contract is formed, or which laws will apply and jurisdiction will govern. It is prudent, when possible, for contracting parties to address legal and business risks, and resolve uncertainties by supplementing electronic commerce laws by incorporating their own private-ordering rules into the contract.