

Syllabus

eCommerce Law

DRT 6455

Master of Laws (LL.M.) Business Law in a Global Context

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The following course is made of eight different themes teach in June 2008 from June 3rd to June 26th. Each of these lessons is suppose to be treating in about 3 hours but some overlaps may be made.

LESSON 1 –

Introduction to eCommerce Law

0 – Course Presentation

- Course Presentation
 - Presentation of teacher
 - Presentation of students
 - Presentation of course organization
 - Assessment
 - Calendar
 - Website
 - General
 - Etc.
 - Course Description
 - Lesson 1 – Introduction
 - Lesson 2 – Security and Law
 - Lesson 3 – eCommerce and Liability
 - Lesson 4 – eContract
 - Lesson 5 – Internet and Privacy
 - Lesson 6 – IT and Intellectual Property
 - Lesson 7 – Web 2.0 and Law
 - Lesson 8 – Electronic Dispute Resolution
 - Presentation of Lesson 1 (today June 3^{rd, 2008})
 - Definitions
 - Legal sources
 - Is IT Law different from more traditional areas ?

1 – Definitions

1-1-A – Law

1-1-A-1 – Law *is not* ...

1-1-A-1-1 – Law *is not* just a social norm

- Social norms

- More complex solutions
 - Aristotle => Law = substantial element (as a norm)
 - Plato => Law = education process (as a process)

1-1-A-1-2 – Law *is different* from Morality

- Classical vision (Jeremy Bentham)
- Modern vision
- Examples (Napster, etc.)

1-1-A-1-3 – Law *is different* from Justice

- Distinction
- Links between them
- Examples

1-1-A-1-4 – Law *is different* from Equity

- Distinctions
- Links between them
- Examples (IP, contract, etc.)

1-1-A-1-5 – Law *is not just* Law

- Classical secondary instruments
 - History
 - Comparative law
 - Philosophy
- Modern secondary instruments
 - Sociology
 - Political perspective
 - Management
 - Computer science

1-1-A-2 – Law *is* ...

1-1-A-2-1 – Law Functions

- Classical function = infraction management
- Modern function = promote eCommerce

1-1-A-2-2 – Law characteristics

- Generality
- Impersonality
- Permanent
- Political mechanism?

1-1-A-2-3 – Law categories

- Private law
 - Civil law
 - Commercial law
 - Consumer law
 - Criminal law

- Etc.
- Public law
 - Constitutional law
 - Taxation law
 - Administrative law
 - Etc.

1-1-A-2-4 – Political organization

- Legislative branch
- Executive branch
- Judicial branch

1-1-B-1 – eCommerce

- Depending from the structure
 - EDI
 - Marketplace
 - Point to point
- Depending from actors
 - B2B
 - B2C
 - B2G
 - C2C
 - Etc.
- eCommerce myths

1-1-B-2 – Security

- Advantages
- Inconvenient
- Myths

2 – Legal instruments

1-2-A – Constitution

1-2-B – Treaties

1-2-B-1 – “Real” Treaties

1-2-B-2 – “False” Treaties

1-2-C – Laws

- Definitions
- Characteristics

1-2-D – Regulations

- Definitions
- Characteristics

1-2-E – Jurisprudence

- Structure
 - Facts
 - Development
 - Conclusions
- Common law principles
 - *Stare decisis*
 - Quebec distinction
 - Distinction between *droit civil* and *common law*

1-2-F – Usages (and the notion of *lex electronica*)

1-2-F-1 – An old legal instrument ...

- Distinction between *usage* (trade usage) and *custom*
- Conceptual approach of trade usage
 - Usage as a norm
 - Usage as an implicit contract

1-2-F-2 – ... and its rebirth!

- Problems associated to others legal instruments (as laws, regulations, treaties, etc.)
- Substantial reasons
 - Common in commercial law
 - Common in international law
 - Common in technical areas
 - Common in variable areas
 - Example: : *T.J. Hooper case* (1932)
- Formal reasons
 - Flexibility
 - Vague

1-2-F-3 – Vague legal recognition

- Civil Code
- Outside of Law?
- Criteria
 - Old criteria
 - Need for new one?
- Rare jurisprudence using usage

1-2-G – Doctrine

- More and More Electronic Sources
- SSRN

3 – is eCommerce law different?

1-3-A – Evolution or Revolution?

- Factual perspective
- Historical perspective
 - Michel Serres
 - Different generations of Internet (from web 1.0 to web 2.0)
- Technological perspective
- Legal resistances to change

1-3-B – Conceptual perspectives

- Lessig and ways to control cyberspace
 - Law
 - Market
 - Social norms
 - Technology
- Barlow and the virtual anarchy
- Easterbrook and the *statu quo* theory

1-3-C – Our position

- Technical Law = Revolution
 - Substantial differences
 - “Law of the Horse”
 - New Concepts
 - Technological Neutrality
 - Functional Equivalent
 - Etc.
 - Formal Differences
 - IT Law and the importance of “process”
 - New Laws
- Techniques of Law = Evolution
 - Old Tools
 - Fictions
 - Presumptions
 - Olds Concepts to reconsider
 - Example of “Contract Law”
 - Example of “Trade Usages”

LESSON 2 – Legal Security Management and Analysis of *An Act to establish a legal framework for information technology* (Quebec)

1 – Illustrations of Innovation

2-1-A – New Risks

2-1-B – New Technologies

2-1-C – New Advantages

2-1-D – New Inconvenients

2-1-E – New Objectives

2-1-F – New Words

2-1-G – New Laws

2 – Guiding Principles

2-2-A – Technological Neutrality

- Definition

- Quebec
- Canada
- Comparison with others jurisdictions
- International Documents

2-2-B – Functional Equivalent

- Definition
- Application
 - Writing
 - Signature
 - Original
 - Copy
- Comparison with others jurisdictions
- International Documents

2-2-C – Integrity

- Definition
- Application
- Civil Law Concept

2-2-D – Writing

- Definition
- Criteria
 - Integrity
 - Usable for subsequent reference
- Quebec
- Canada
- Comparison with others jurisdictions
- International Documents

2-2-E – Signature

- Definition
- Criteria
 - Intention
 - Identity
 - Reliability
- Quebec
- Canada
- Comparison with others jurisdictions
- International Documents
- Biometric Limitations

2-2-F – Original

- Definition
- Criteria
- Quebec
- Canada
- Comparison with others jurisdictions
- International Documents

3 – Managing Technology-Based Documents in a Secure Manner

2-3-A – How to transfer a technology-based document to another medium?

- Definition
- Examples
- Legal Conditions

2-3-B – How to retain a technology-based document?

- Definition
- Examples
- Legal Conditions

2-3-C – How to ensure that a technology-based document is accessible at all times?

- Definition
- Examples
- Legal Conditions

2-3-D – How to ensure the transmission of a technology-based document is accessible at all times?

- Definition
- Examples
- Legal Conditions

4 – Using Technology-Based Documents as Evidence

2-4-A – Main Principles

- General Admission of Technology-Based Documents
- Example of *An Act to establish a legal framework for information technology* (Quebec)
- Example of UNCITRAL Convention

2-4-B – Example of email as Legal Evidence

- Admissibility
- Probative Force
- Presumptions
 - About environment
 - About document providing from Companies
 - others
- Jurisprudence in Quebec
- Jurisprudence in other Jurisdictions

2-4-C – Conclusions

- Complexity
- Revolution = Documentation

5 – Legal Management of Digital Signature

2-5-A – Different Legal Regime

2-5-B – Different Kind of Signatures

2-5-C – Different Actors involve in Signature Process

2-5-D – Different Documentations need for Digital Signature Management

2-5-E – Conclusion

- Complexity
- Applicable in some Precise Situations

LESSON 3 –

eCommerce and Liability

1 – Hosting Services Provider Liability

3-1-A – General Principle: Intermediaries Non-Liability

- Definition
- Exceptions
- Examples
 - eBay Case
 - Yahoo! Case
 - Etc.

3-1-B – Other Intermediaries Liability

- Referral Services
- Retention Services
- Archiving Services

2 – Editor Liability

3-2-A – Traditional Media Rules

3-2-B – Traditional Liability Rules

3-2-C – Examples

3 – Transmission provider Liability

3-3-A – General Principle: Intermediaries Non-Liability

- Definition
- Exceptions

3-3-B – Examples

4 – Blogger Liability

3-4-A – Blogger Liability

- Definition
- Exceptions

3-4-B – Commentaries Liability

- Definition
- Exceptions

5 – Certification Services Provider Liability

3-5-A – Certification Authority Liability

3-5-B – Subscriber Liability

3-5-C – Relying Party Liability

3-5-D – Others Liability Consideration

6 – Electronic Payment Process Liabilities: Example of Credit Card Organization

3-6-A – Bank Liabilities

3-6-B – Merchant Liabilities

3-6-C – Consumer Liability

3-6-D – Possible Future Obligations

LESSON 4 –

eContract

1 – Generality

4-1-A – Definition

4-1-B – References

4-1-C – Historical Perspectives

2 – Formalism and eContract

4-2-A – UNCITRAL Convention (*United Nations Convention on the Use of Electronic Communications in International Contracts* (2005) (CUECIC))

- Objectives
 - Remove legal **obstacles** to eCommerce
 - Remove Uncertainty
 - Provide Uniform Solutions
- Main Issues
- Formal Requirements
 - Writing
 - Signature
 - Original

4-2-B – eContract Formation

- UNCITRAL Minimalist Approach
- Time and Place of Conclusion
- Automated Contract

3 – eConsent

4-3-A – Communication

- Principle
- 10 Pathologies
- Solutions

4-3-B – Acceptance

4-3-B-1 – « Shrinkwrap »

4-3-B-2 – « Signwrap » or interference between Paper and Electronic

4-3-B-3 – « Clickwrap »

4-3-B-4 – « Linkwrap » or *Dell Case*

4-3-B-5 – « Changewrap »

4-3-B-6 – « Browsewrap »

4-3-B-7 – « Rollingwrap »

LESSON 5 –

IT and Privacy

1 – Internet and Privacy in General

5-1-A – Generality

5.1.A.1 – Legal References about Internet and Privacy

- *Personal Information Protection and Electronic Documents Act (Schedule 1) (Federal)*
- Protection of personal information in the private sector, An Act respecting the, R.S.Q. c. P-39.1
- C.c.Q
- Legal framework for information technology, An Act to establish a, R.S.Q. c. C-1.1
- Etc.

5.1.A.2 – New Situations and old Laws

5.1.A.3 – Definitions

5.1.A.4 – International Situation

5-1-B – Main Principles

5-1-B-1 – 10 General Principles

- Accountability
- Identifying Purposes
- Consent
- Limiting Collection
- Limiting Use, Disclosure, and Retention

- Accuracy
- Security
- Openness
- Access
- Challenging Compliance

5-1-B-2 – 10 Specific Principles

- Obligation to publish a privacy policy
- Identification and publication of different purposes
- Consent Management
- Cookie usage
- Access process
- Security Management
- List of personal information used by a company
- Special situations management
- Applicable law
- Access by mail to the privacy department

2 – IT and Privacy at Workplace

5-2-A – Presentation of Internet and Email Usage in Workplace

- Internet Usage
 - Infringement huge potentiality
 - Employer control huge potentiality
- Search for a legal balance
 - Legal references
 - Jurisprudence

5-2-B – Practical Solutions

- Employer arguments
 - Efficiency
 - Confidentiality
 - Intellectual Property
 - Ability to control work
 - Loyalty
- Employee arguments
 - Dignity
 - Reasonability
 - Discrimination
- Practical organization
 - Notice
 - Control modality
 - Proportionality
 - Others
- Employer limitations
 - Privacy expectation
 - Reasonability
 - No surveillance as a pretext
 - Proportionality
 - Burden of proof
- Employee considerations
 - Aggravating factors

- Exonerating factors
- Privacy policy example
 - Formal element
 - Substantial elements

LESSON 6 –	IT and Intellectual Property
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1 – Internet and Copyright

6-1-A – Uncertain Copyright Fundamentals

6-1-A-1 – Uncertainty

- Human rights *versus* commercial rights
- Common law *versus* “droit civil”
- Property *versus* usage rights

6-1-A-2 – Certainty: Search for a Balance

6-1-B – Copyright Conditions

6-1-B-1 – Originality

6-1-B-2 – Fixation

6-1-C – Copyright Protection

6-1-C-1 – Patrimonial Rights

- Reproduction Rights
- Rights of Communication to the Public

6-1-C-2 – Moral Rights

6-1-C-3 – Protection Modalities

- Duration
- Formalities
- Exceptions

6-1-D – Copyright and New Technologies: Who will pay?

- Intermediaries (P2P)
 - Napster Case
 - Kazaa Case
- Consumers (users)
 - In Canada: BMG Case
 - Different in US and Europe
- Blank support
- Internet Services Providers

6-1-E – Future Changes to Canadian Copyright Act

- Rights of communication to the public enlargement
- Circumvention of effective technological measures

- ISP denouncement

2 – Internet and Trademark

6-2-A – Trademark Fundamentals

- Definition
- Examples
- Conditions

6-2-B – Trademark and Domain Names

6-2-B-1 – Presentation

- Definition
- Geographical domain name
- Generic domain name

6-2-B-2 – Dispute Resolution about “Cybersquatting”

- Efficient process
- 3 main principles to respect
- Large jurisprudence

6-2-C – Trademark and Metatag

- Definition
- US Jurisprudence
- Canadian Jurisprudence

3 – Internet and Patent

6-3-A – Generality

6-3-B – Business Method Patent Problematic

LESSON 7 –

Law and Web 2.0

1 – Web 2.0 Presentation

7-1-A – Definition

7-1-B – Characteristics

- Iteration
- Open (Free + Open) technologies
- Iconoclast

2 – Legal Risks

7-2-A – Facebook Example: List of Potential Legal Risks

- Intellectual Property
 - Copyright
 - Reproduction

- Rights of Communication to the Public
 - Moral rights
 - Cession (see Facebook Contract)
- Trademark: Trademark and free expression
- Patent
- **Libel**
- **Right to one's image**
- Privacy
 - Example of Facebook contract
 - Consent
- Blog liability
- Security
- eContract
- **Advertising law**
- **Hate Propaganda**
- etc.

7-2-B – Libel

- 1457 CCQ
- 35 CCQ
- Person
- Speech
- Fault
- Link between fault and injury
- Examples

7-2-C – Right to one's image

- Principle
- Situation in a Crowd: *Aubry Case*

7-2-D – Advertising Law

- New danger
- False or misleading representations
- Advertising for persons under 13

7-2-E – Hate Propaganda

7-2-F – Special Situations

LESSON 8 –	Electronic Dispute Resolution
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1 – Electronic ADR (Alternative Dispute Resolution)
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8-1-A – Justifications for Electronic ADR

- Small conflicts on Internet
- International conflicts on Internet
- Bad agreement is better as a good trial
- Imprecision of Law
- Technical aspect of conflicts on Internet
- Etc.

8-1-A – CyberMediation

8-1-A-1 – Main Experiences

- Ombuds Online Office
- Cybertribunal

8-1-A-2 – Changes in Comparison of Traditional Mediation

- Difficult to do mediation with no social link
- Difficult to do mediation about very small conflict

8-1-A-3 – Cybermediation in the Future

8-1-B – Cyberarbitration

8-1-B-1 – Justifications of Arbitration Popularity

- Class action
- Cost
- Confidentiality
- Relevant for technical question
- Time
- Less formalism

8-1-B-2 – Main Experiences

- Cybertribunal
- Virtual Magistrate
- Cyberarbitration.com
- Webdispute.com
- BBBonline.com
- ICANN
- CIRA

8-1-B-3 – Material Limits

- Arbitrability
- *Dell Case*
- Change in the *Consumer Protection Act*
- New York Convention (1958 – art. 5)
- *Hill v Gateway* (1996)

8-1-B-4 – Formal Limits

- Writing
- Signature
- Place of the Arbitration
- Clause by Reference (as in *Dell Case*)

2 – International Private Law and Internet

8-2-A-1 – Generality

8-2-A-2 – Canadian Approach

8-2-A-3 – Quebec Approach

- Contractual Relationship
- Non-Contractual Relationship
- Specific situations

8-2-A-4 – American Approach

8-2-A-5 – European Approach

8-2-A-6 – International Approach

8-2-A-6 – Specific Approaches