



# ECOMMERCE AND THE NEW ROLE OF THE LAWYER



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**How new technologies influence the way of contracting and doing commerce in Latin America.**

New technologies, such as the Internet, apps and new payment methods, have definitely made life easier. Simply think of all the information that is available to us with just one click: According to expert data from Nortel Networks, it is estimated that more information is generated in just two days than all the information that has been produced since the beginning of the human existence up until the year 2003. It is also estimated that 34 hours of video are uploaded per minute on YouTube and that there are approximately more than 4 billion cell phones that have access to the internet, causing the Internet to be considered as the third largest economy in the world.

The process of globalization and approach that new technologies have provided for commercial transactions undoubtedly has revolutionized the role traditionally played out by the lawyer, as our clients demand from us new skills and knowledge in order for us to effectively be a companion and guide that provides legal and business advice needed and thus giving certainty and legal security to our customers without obstructing the rapid pace that today's trade requires.

This situation even prevails in Latin American countries, where the Roman-Germanic rights apply, with a rigid legal system, whose main source is the law, but which, with respect to trade activities, has gradually opened the doors to a legal system where "good faith", customs and practices, and what is not prohibited, take control of the agreements between the parties.

In these circumstances, the traditional way of establishing the will of the parties in a private contract has evolved with the use of technologies in such a way that any expression of will can be given:

(i) via telephone, (ii) by means of telecommunication, (iii) postal service or (iv) by electronic means, giving rise to the fact that the exchanges of communications between the parties take particular relevance; both for the formation of the contract and when the contract is already in effect.

The above being that other documents such as the purchase order, letter of credit, invoice and the various addendums that can be reached between the parties, gain relevance without having to terminate the original contract.

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## 1. NEW FORMS OF COMMERCIAL TRANSACTIONS DERIVED FROM THE USE OF TECHNOLOGIES.

To get into these new forms of contract in commerce, derived from the use of technologies, we can make two major distinctions: (i) The business to business "B2B" transactions and (ii) The business to consumer "B2C" transactions.

### **A) BUSINESS TO BUSINESS "B2B" TRANSACTIONS**

In these cases, the new rule is the commercial transactions drive that does not encounter any barrier derived from the territory, due to the ease of communication that new technologies allow.

Broadly speaking, we can mention the following characteristics of this trade among B2B:

- a) A new space has been opened for informality but with full recognition of "the word" and the "good faith". With which we speak of the disuse of pre-established sacramental forms to establish the rights and obligations of the parties, since in the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention 80) it was established that the principle of good faith reigns and the written contract is not required, as it may be proven by any other means.
- b) The attributes and personal characteristics of each exporter and importer have taken on relevance: charisma, experience, intuition, seriousness, congruence, caution and loyalty, among other profiles.
- c) It is necessary to analyze the multiple factors and circumstances of the human, economic, political, technological and logistic nature.
- d) Given the physical distance between the parties, new reference actors have emerged, such as commercial research agencies, tax I.D. and certification services such as timestamping, with which the certification service provider grants authenticity to trade actions concluded by electronic means, through the application of algorithms that assure that a certain document has not been altered

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from its creation until the moment in which it is presented, granting certainty of the content.

- e) New models of mercantile solidarity have emerged (between the supplier, the manufacturer, the transporter, the cargo consolidators, the customs brokers).
- f) A preferred place is given to the uses and practices of international trade (lex mercatoria or law merchant), such as the ICOTERMS, the UCP600 (Uniform Practices and Uses for Documentary Credits), and the UNIDROIT principles (Principles on International Commercial Contracts of 1994).

### **B) BUSINESS TO CONSUMER "B2C" TRANSACTIONS**

The habits of Internet users and the activities they perform on the Internet have been considered by law, in such a way that the UNCITRAL (United Nations Commission for International Trade Law), has focused on implementing international norms to regulate electronic commerce, which is an industry that grows year after year and whose profits amount to billions of dollars.

The electronic commerce has forced each country to reform their legislations in order to regulate activity in which the excess of formalities would only cause the industry to halt, but the lack of certain elements would generate the juridical insecurity for both parts.

The topics that have been put on the table with the emergence of electronic commerce (e-commerce) are: (i) the processing of personal data, (ii) advertising on the Internet, (iii) the contracting of electronic services, (iv) online payment, (v) the use of electronic signature, (vi) billing, (vii) intellectual and industrial property rights on websites, among others.

The States have intervened to ensure the protection of the weakest, since in the great majority of e-commerce transactions a purchase agreement contract is used. Therefore, in the elaboration of this type of contracts, the following aspects must be taken into account:

- a) Provisions that ensure consumer protection.
- b) Rules that respect healthy competition.
- c) Flexible mechanisms in case of a change of circumstances.
- d) Establish mediation means in case of conflict.

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## 2. THE NEW ROLE OF THE LAWYER

Given the characteristics previously mentioned, in accordance to the changes brought about by the use of new technologies in commerce, the lawyer of our times requires the following skills:

- a) We must be creative, innovative, empathetic and open writers. Be ready to listen to our customers and from the information they give us, generate documents free of obsolete formulas.
- b) The lawyer like his client, must be preventive, entrepreneur and must play multiple roles.
- c) The lawyer becomes an instrument of international justice. From the drafting of the legal document that translates the rights and obligations of the parties, the lawyer must ensure access to the means of dispute settlement between the parties, regardless of one country's legislation or the other's.
- d) The lawyer must be a mediator, with negotiating skills. Nowadays, management models for legal problems aimed at finding quick and low-cost solutions for the benefit of the clients are imposed.
- e) It is necessary to look the common good, the lawyer is a social agent, who looks for alternative solutions, without there being a winner and a loser, and who specializes in mediation.
- f) The technology must be at the service of the lawyer, and the lawyer in turn, at the service of the client.
- g) It is necessary to provide fast and consecutive attention as well as easy to understand words. Give immediate solutions and deliveries without complications.

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### 3. CHALLENGES FOR LATIN AMERICAN LEGISLATIONS

In general, in Latin America, important reforms have emerged to introduce mediation as a form of conflict settlement between parties, which, as we have already mentioned, we consider the most convenient means for new commercial transactions.

However, since traditional litigation continues to prevail, we suggest certain modifications to recognize the application of new technologies in commercial relationships. Mainly because in the majority of the legislations of Latin America, the existence of electronic means of proof or the form in which it must carry out its relief is not foreseen, therefore, the lawyers assimilate the data messages to other types of evidence such as documentaries, even, more specialized lawyers tell us that this type of evidence must be offered as expert evidence and that a computer expert is to determine if the data messages are authentic and if their content has not been altered.

However, in the absence of a written contract, the main means of proof available are conversations via email or other electronic means such as whatsapp or via chat within the seller's website; for this reason, local legislations must recognize this type of media as means in which the terms of a contract were negotiated and they must be valid, given that both parties in good faith offer and accept questions related to the contract. In this sense there is a Model Law promoted by UNCITRAL, which establishes that if local laws require that the contract must be granted in writing, electronic communication will act as such and will have the same effects as if the communication were in written.

On the other hand, technological developments also need to push law evolution, since nowadays, emerging issues such as electronic signatures, online tax payments or even electronic trials are being incorporated, both lawyers and judges alike intend to continue applying obsolete criteria and laws in a similar way, when what is required is for both lawyers and judges to know the way in which businesses are being transformed as well as the benefits of technologies, so as to base themselves on that in case there is a lawsuit, and thus use vanguard criteria.

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## **FINAL THOUGHTS**

We have to understand that we live in a new technological world derived from the digital revolution. And that, since technological innovations are constantly changing the way in which commercial transactions take place, we as lawyers must understand and include technology to simplify our lives, always looking after the legal security our client's commercial transactions, protecting their interest and patrimony.