

An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts: is your Website ready?

On November 9, 2006, the Minister of Justice, Yvon Marcoux, introduced Bill 48, entitled *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts* (hereinafter, the "Bill").

The Bill is based on the Internet Sales Contract Harmonization Template agreed on by the provinces further to the Agreement on Internal Trade.

The Bill proposes amendments to the *Consumer Protection Act*¹ (hereinafter, the "Act") in the following four areas:

- distance contracts, the rules of which would henceforth mainly apply to the field of retail sales on the Internet, particularly with respect to chargebacks of transactions carried out on the Internet;
- the prohibition of mandatory arbitration clauses in consumer contracts;
- the prescription applicable to civil lawsuits based on consumer contracts; and
- the classification of certain household appliances, the repair of which will be subject to the provisions of the Act.

This newsletter summarizes the provisions of the Bill pertaining to consumer contracts entered into through the Internet, which are categorized as distance contracts. These provisions will apply to purchases made on the Web by consumers located in Québec, irrespective of the jurisdiction where the website is operated or hosted.

By Luc Thibaudeau



The concept of distance contract

The new Section 54.1 proposed under the Bill provides that a distance contract is "a contract entered into without the merchant and the consumer being in one another's presence and preceded by an offer by the merchant to enter into such a contract". This concept already existed in the Act.

Mandatory information

The first category of proposed amendments concerns mandatory information, which is required to be disclosed to the consumer prior to entering into a contract. That information is specified in the Bill as follows:

- "the merchant's name and any other name under which the merchant carries on business;
- the merchant's address;
- the merchant's telephone number and, if available, the merchant's fax number and technological address;
- a detailed description of goods or services that are to be the object of the contract, including characteristics and technical specifications;
- an itemized list of the prices of the goods or services that are to be the object of the contract, including associated costs charged to the consumer and any additional charges payable under an Act;
- a description of any possible additional charges payable to a third party, such as customs duties and brokerage fees, whose amounts cannot reasonably be determined;
- the total amount to be paid by the consumer under the contract and, if applicable, the amount of instalments and the terms of payment;
- the currency in which amounts owing under the contract are payable;
- the date on which, or the time within which, the merchant's principal obligation must be performed;
- if applicable, the mode of delivery, the name of the carrier and the place of delivery;

¹ R.S.Q., Ch. P-40.1.



- the applicable cancellation, rescission, return, exchange and refund conditions, if any;
- any other applicable restriction conditions.”

Except for certain operational difficulties that merchants doing business on the Web will experience, the foregoing list contains no surprises at first glance.

However a closer analysis of the Bill raises numerous issues: not only does it require that the foregoing information be disclosed before the contract is entered into, but it must also be displayed “prominently and in a comprehensible manner” and brought “expressly to the consumer’s attention”.

Another new requirement is that a merchant who offers products, items or services on his Website must, prior to a contract being entered into, “provide the consumer with an express opportunity to accept or decline the proposal and to correct any errors”.

These are stringent requirements and merchants doing business on the Web and seeking to reach consumers in Quebec will have to ensure that they comply with them when the Bill comes into force. Indeed, the double (or triple) requirement to (1) disclose, (2) prominently and in a comprehensible manner, and (3) expressly bring the mandatory information to the consumer’s attention, is not only redundant but may also compel many merchants doing business on the Web to review the design, mode of operation and infrastructure of their Websites. It is also appropriate to consider the following issues. What criteria will be used? How can a merchant demonstrate that the information has not only been disclosed to the consumer in a timely fashion but that it has also been presented “prominently and in a comprehensible manner” and brought “expressly to the consumer’s attention” and that the latter has been provided with “an express opportunity to accept or decline the proposal and to correct any errors”?

Other requirements applicable to contracts entered into on the Internet

The contract must mention the date it is entered into and the consumer’s name and address. However, it seems that for contracts entered into on the Internet, the fulfilment of the requirement to include the consumer’s name and address may be his responsibility. “Anonymous” shopping is now over!

The Bill also indicates that when the contract is preceded by a written offer, the merchant must “present the information in a manner that ensures that the consumer is able to retain it and print it”. The merchant is therefore required to preserve any evidence that would demonstrate that the consumer requested the printing of such information. It will constitute, for the merchant, one of the elements of evidence establishing that the contract has been entered into in accordance with the provisions of the Bill.

The Bill indeed provides that the merchant must send a copy of the contract to the consumer within 15 days after the contract is entered into, in a manner that ensures that the consumer may retain it and print it. The merchant doing business on the Web will have to ensure that the consumer who entered into a contract for the purchase of products or services can easily print a paper copy of the contract, which, in our opinion, will have to include all the above-mentioned mandatory information, and also obtain from the consumer clear documentary evidence indicating that such information was disclosed to him in an appropriate and timely fashion, that is, before the contract was entered into. In addition, the merchant will have to review the operating mode and technical aspects of his Website in order to introduce some means of retaining evidence demonstrating that the consumer was given the opportunity to request the printing of a copy of the offer and/or of the contract and acquaint himself with all the mandatory information.

If the merchant cannot offer such a service through his Website, a printed copy of the contract and/or the offer must then be mailed to the consumer. It would then be appropriate to consider using registered mail to obtain evidence of delivery of a copy of the contract.

Cancellation of the contract

To the extent that the merchant fails to comply with one or more of these requirements, the consumer may cancel the contract within seven days after receiving his copy of it. If the consumer was unable to print the contract and no paper copy was sent to him within the 15-day time limit, the time limit for cancelling to contract is extended to 30 days.

The Bill provides for other situations that may result in the cancellation of a contract entered into through the Internet. Let us review these situations.

Firstly, the contract may be cancelled at the consumer’s request if the merchant fails to perform his principal obligation within 30 days after the date for doing so specified in the contract or any later date agreed on in writing by the consumer and the merchant, or within 30 days after the contract is entered into in the case of a contract that does not specify such a date. Under the Bill, “The merchant’s principal obligation is presumed to have been performed if the merchant **attempted** to perform it on the date specified in the contract, on a later date agreed on in writing by the consumer and the merchant, or on the date specified in a notice sent to the consumer within a reasonable time, but was prevented from doing so by the actions or negligence of the consumer”. Not only is this provision nebulous but it also seems that it would have been appropriate, in the case of the sale of products or items, to specify that the merchant is presumed to have performed his obligation when he ships the ordered products or items to the consumer.

Secondly, in the case of a contract for transportation, lodging or catering services, or for tickets to an event, the consumer may cancel the contract if the merchant fails, by the date specified in the contract or any later date agreed on in writing by the consumer and the merchant, to provide the consumer with documents enabling the consumer to receive the services or attend the event.

The cancellation of the contract is made by simply sending a notice to that effect to the merchant. No form of notice is suggested under the Bill and no specific means for sending the notice is prescribed.

The contract is cancelled by operation of law as of the date of the cancellation notice. The Bill does not provide merchants with any means of contesting the cancellation notice, which may lead to certain abuses by consumers.

Cancelling a contract entered into through the Internet will also entail the cancellation of any accessory contract and of any warranty or security agreed to in consideration for the amount payable under the contract, including any credit contract. Therefore, must we assume that the use by a consumer of a credit card at the time the contract is entered into would constitute a credit contract entered into at the same time as the main contract? Whatever the answer may be, it is important to note that the Bill also includes provisions pertaining to the chargeback of any amount debited to the credit card account used by the consumer at the time of entering into the contract.

Chargeback provisions

If, within 15 days following the cancellation of the contract (i.e. the date on which the cancellation notice was sent), the merchant has not made a refund to the consumer, the latter may send a chargeback request to the issuer of his credit card. The request must be made in writing. No form of chargeback request is provided under the Bill, but the Bill stipulates that the request must contain the

following information: “(a) the credit cardholder’s name; (b) the credit card number and expiry date; (c) the merchant’s name; (d) the date the contract was entered into; (e) the amount charged to the credit card account; (f) a detailed description of the goods or services that are the object of the contract; (g) the reason for cancelling the contract; and (h) the date of cancellation and the means used to send the cancellation notice.” To say the least, the consumer’s burden is not very onerous.

The Bill also imposes certain obligations on credit card issuers. A credit card issuer that receives a chargeback request must:

(a) acknowledge its receipt within 30 days; and (b) chargeback the amount debited and cancel all credit card charges in connection with the contract and any accessory contract, within 90 days following receipt of the request or within two complete periods of statements sent by the credit card issuer (approximately 35 days each), whichever comes first.

It will be interesting to see what will be the reactions of credit card issuers to these proposals. Indeed, the chargeback of transactions has been the subject of self-governance by credit card associations. Furthermore, the constitutionality of these provisions of the Bill may be questionable since most credit card issuers are banks and their activities are governed exclusively by the federal Parliament.

In addition, considering the fees associated with chargeback requests, which are charged to the merchants, it would have been advisable that the Bill propose more rigid and precise provisions with respect to the refund policies of merchants doing business on the Web, in order to avoid an increase in chargeback requests.

Lastly, the Bill provides that the Office de protection du consommateur may make regulations for determining additional cases in which a contract entered into through the Internet may be cancelled. The Office de protection du consommateur may also make regulations pertaining to other situations in which a consumer may request a credit card chargeback following cancellation of a contract entered into through the Internet, and specifying the mandatory information to be included in chargeback requests. This is therefore a matter to be followed up.

Conclusion

In summary, it is advisable for merchants doing business on the Web to undertake, without delay, a review of their Website and the way it operates, as well as a diligent review with a view to ensuring compliance with the foregoing new provisions, which may come into force very shortly.

For additional information on the subject, please contact Mr. Luc Thibaudeau at 514 877-3044 or any other member of our business law team or electronic commerce team.

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any question pertaining to this newsletter**

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