

## **VALIDITY OF ONLINE CONTRACTS**

### **WHAT ARE CONTRACTS**

A contract is an agreement or an exchange of promises between two or more people. The agreement can be on behalf of individuals or on behalf of the companies in which the individuals represent.

### **PURPOSE OF CONTRACTS**

Contracts, especially commercial transactions are founded on the belief by both parties that the agreement would be legally enforceable. The parties need to ensure that they can hold each other accountable for the promises made.

For a contract to be enforceable it must be valid, this means that there must be an offer, an acceptance of that offer, consideration, and no valid defense to formation.

In totality a valid contract reflects the understanding of both parties, there must be mutual assent – a meeting of minds – in respect of the main terms of the agreement.

Both oral and written contracts are enforceable in a court of law provided they are legally valid.

### **WHAT ARE ONLINE CONTRACT**

An online contract is simply a contract that was not formed orally or on a face-to-face basis. It is a written contract formed over the internet or emails.

The general principles of contracts reflect its validity and enforceability; due to the mode of communication between the parties, these contracts are often plagued with several defenses to formation.

### **DEFENSE TO FORMATION ISSUES COMMON IN ONLINE CONTRACTS**

- Mutual Assent

One problem that is usually involved in electronic and online contracts is that one party may argue that they did not accept the terms of the offer or were unaware of the full terms of the contract.

The courts have addressed these issues in different ways depending on the type of online contract as discussed below.

- **Minors**

Another problem is enforcement of contracts with minors. A minor can unilaterally void a contract based on the fact that he or she is not of legal age and, therefore, not legally bound by the contract.

It is difficult however to ascertain a person's age when dealing over the Internet. It will therefore be prudent to request that the users of a website or purchasers of online services and products confirm by clicking a button that they are, indeed, over the age of 18. It may also be wise to require monetary payments in forms a minor may not have access to such as credit card payments.

Whilst this may not completely eliminate the problem, it is likely to reduce the number of contracts with a minor. A court may also be less inclined to allow the minor to void the contract.

### **TYPES OF ONLINE AGREEMENTS OF CONTRACTS**

There are generally three categories on online agreement

#### **Shrink-wrap Agreements**

Shrink wrap contracts are license agreements or other standardized terms and conditions which are contractual in nature but can only be read and accepted by the customer after opening the product. In boxed software there will usually be a notice that by tearing open the shrink-wrap, the user assents to the software terms enclosed within.

The customer has the right to either accept or reject the terms of the contract, there is no room for negotiation, and therefore it is an end user agreement. For example if you buy the Microsoft Office software or download the Adobe Reader software, to use the product, you will have to accept or reject the standard terms. If you reject the terms you will be unable to use the software as there is no option to negotiate the terms.

The continuous use of the software or a website with such an agreement will constitute the user's agreement to the site's terms and conditions.

Generally, the courts have held that these agreements are enforceable as long as proper notice (i.e. the opportunity to read the terms) is provided to the website or software user.

#### **Click-wrap Agreements**

A click-wrap agreement requires the reader to click through to read the terms of the agreement. Most click-wrap agreements require the end- user to manifest his or her agreement by clicking an "ok" or "agree" button.

The terms of service or license do not always appear on the same webpage or window, but are always accessible before acceptance. The main issue for the court is whether the terms of service are visible and/or accessible to satisfy the notice requirement.

In a recent ruling, the court has found it enforceable even if hidden behind a hyperlink because the link was "highlighted" in a different color, therefore conspicuous enough that a reader should have clicked on it and read it.

Examples of these are websites that ask the reader to read a set of terms and conditions governing the activities on the site and to agree to those terms and conditions before making a purchase or obtaining the service offered by the website. Once they agree the users are bound by the terms even if they did not read this before the agreement.

### **Browse-wrap Agreements**

Browse-wrap refers to contracts or license agreement covering access to or use of materials on a website or downloadable product. In this instance the terms and conditions are simply posted on the website and the user is not required to manifest assent by clicking an 'okay' or an 'agree' button, the user is simply assumed to have agreed to the terms by continuous usage of the website or by downloading the product's software.

Courts that have ruled on the issue have held that the validity of a browse-wrap agreement primarily depends on whether a website user has actual or constructive notice of the terms and conditions prior to using the website or other product. The courts are generally hesitant to enforce these agreements, unless the terms are presented in such a way that it is very visible to all users to an extent that it would amount to constructive notice.

### **LAW AND JURISDICTION APPLYING TO A PARTICULAR CONTRACT**

The internet is a powerful tool which allows businesses to reach customers around the world and to buy and sell services and products; ecommerce is therefore a global activity.

The laws of different countries will generally be involved in these contracts and many would conflict with each other.

Even if operating with the United States alone, there are 50 states with different sets of rules. If you trade in Europe there are several countries that make up the European Union (EU). Several have countries their own laws even though the EU has tried to unify many of those laws.

In the United Kingdom for example, the proper law is determined by the Rome Convention, in the United States the proper law is determined by the principles laid down in the constitution for determining personal jurisdiction.

There are, however, some common factors used to determine jurisdiction

## Domicile

The Domicile of a defendant is important and sometimes a crucial factor in determining jurisdiction.

The jurisdiction that would apply to a defendant domiciled in the United States is governed by the State's Long arm Statute and the Constitution. A defendant resident in the EU is governed by the Brussels Convention and a defendant resident in European Free Trade Association (EFTA) state is governed by the Lugano Convention.

These statutes and convention will determine the venue and law in which a person can be sued based on where he or she resides.

## Where a contract has taken place

Another means of determining jurisdiction is to take into account where the contract has taken place. It is however sometimes difficult in internet contracts to determine the location of contract formation.

For example if it is considered that contract takes place at the delivery place, it is sometimes difficult to determine where delivery took place. If we consider an electronic data such as download of music or picture, it can be agreed that the delivery took place at the recipient's server. However the seller may find this unpredictable, hence unfair because this server may not even be in the country of the recipient's domicile.

Another consideration is that the delivery takes place at the seller's website, in situations where the recipient downloads or collects the data from the website. The recipient may also find this unpredictable though it may at least be possible to localize the server unless the packets are originated from different servers.

Physical location of the recipient may be a logically acceptable venue for contract formations. It is also sometimes difficult for the seller to determine this location. For example a travelling customer may access his computer server from abroad with many programs such as "Go to My PC" or "Team Viewer", how does the seller then know where the recipient was at the time of contract. The recipient may have been in China accessing his United States based home computer.

To avoid the issues described above in respect of law and jurisdiction, it is important for the seller, service provider and website owners to have properly drafted terms and condition that govern the contractual relationship of the parties to afford at least some degree of predictability.

## PROPERLY DRAFTED THE TERMS AND CONDITIONS

A good terms and condition would contain at least the following:

- **Choice of Forum** This is the provision in the contract that allows the parties to stipulate and, agree in advance, (with certain limitations) the jurisdiction that any lawsuit between them arising from the contract shall be litigated. Usually the forum of choice will be where the website owner is located.
- **Choice of Law** This term of a contract is where the parties specify that any dispute arising under the contract shall be determined in accordance with the law of a particular jurisdiction hence choice of law. Usually the choice of law would be that which the attorney who drafted the terms is familiar with or is most advantageous to the website owner.
- **Limitation of Liability** This provision clause permits the website owner to reduce, eliminate, or cap the potential for damages or other legal remedies should there be a breach of contract.
- **Indemnification** This allows the website owner to shift the liability of any loss to the other party by requesting that that party compensate for loss or damage in case of a specified loss (e.g. losses resulting from the use of website content) incurred by the website owner. This is usually sensible for affiliate marketing.
- **Attorneys' Fees and Costs** In many jurisdictions such as the United Kingdom, the loser in civil lawsuits is usually required by the court to pay the winner's fee, however this is not so in the American judicial system where each party is generally required to pay his or her own legal fees regardless of case outcome. The clause allows the parties to agree in advance that the losing party will pay the legal fees of the winning party.

### **ATTEMPTS TO UNIFY THE LAW**

As previously stated, ecommerce is a global activity touching many states and countries. There have therefore been several attempts to unify the law to afford more predictability for contracts.

However, many countries and states continue to maintain their own laws and jurisprudence and thus the conflict of law remains. An internet trader is advised to have a well drafted standardized terms and conditions as described above.

For the purpose of completeness some of the attempted unifying laws are briefly described below.

- **Common Law** – Common law is used where there are no statutory provisions covering a particular issue. It is derived from case law. However, because the

Case law is based on judicial opinions; they will differ from country to country and state to state.

- **Uniform Commercial Code (UCC)** – The UCC is a United States code aiming for unity of law amongst states that have adopted the code and applies to a contract involving the sales of goods. However adoption of the code is not obligatory.
- **Uniform Computer Information Transactions Act (UCITA)** – Adopted in Maryland and Virginia and covers licensing contracts in computer information, but does not cover sales.
- **Uniform Electronic Transactions Act (UETA)** – This is merely a procedural law. It defines and validates electronic signature, confirms enforceability of electronic contracts, and confirms that electronic records satisfies the statute of frauds.
- **Electronic Signatures in Global and National Commerce Act (E-Sign)** – E-Sign is a United States federal law applicable in all fifty states. The law reaffirms the position that e-commerce and e-contracts are potentially as binding as traditional contracts and commerce.
- **The United Nations Convention on the International Sale of Goods (CISG)** - CISG applies to international sales of goods involving US parties and participants from other countries that have also adopted the CISG and primarily based on the French *Civil Code*.
- **UNCITRAL's Model Law on Electronic Commerce** - (MLEC) is designed to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce. It has not been adopted by the United States

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