Recent Developments In Legal Recognition And Validity Of Electronic Contracts – A Critical Analysis

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Abstract:
New communication systems, technological advancements, rapid development of e-commerce and transactions have made tremendous changes in all walks of life. Though there are advantages, people are still highly reluctant to carry on or involve in a trading activity in the electronic medium due to lack of legal protection. To facilitate e-commerce, there are laws available both at the national level and international level. The fast growth of e-commerce environment largely depends on the level of confidence traders in the online environment gain, with regard to legal validity and enforceability of electronic contracts. With respect to legality of electronic contracts, various legislative enactments and different judicial approaches have originated from various jurisdictions. In this article, an attempt has been made to look at the legislative approaches towards legalizing electronic contracting and judicial pronouncements determining the legal recognition and validity of electronic contracts.

Keywords: e-contracting, click-wrap agreement, browse-wrap agreement, shrink-wrap licenses

Introduction
Online Commerce has become common place in the last few decades. The fundamental principles of contract law have been extended to the electronic commerce happening in the online environment. Traders in the market place have already embraced the new opportunities by creating global meeting places and online platforms like eBay, Amazon, Alibaba which are well known electronic commerce websites doing absolute trading in the cyber environment. The major electronic contracts well recognized happening in the electronic environment are categorized as Shrink wrap agreements, click wrap agreements and web wrap or browse wrap agreements. The method of contracting is taken into consideration to determine the type of electronic contract concluded.

Shrink wrap agreements derive its name from the plastic wrapper of products. Shrink wrap is usually applicable for software packages. Software sold in the market are wrapped with plastic and it includes a notice stating that by opening the package, the buyer agrees on to the terms and conditions enclosed. These types of shrink wrap agreements contains a good number of clauses originating from the seller like forum selection clause, choice of law, arbitration clause, indemnity, warranties, disclaimers and so on. In other words, this type of contract can be known as end-user license agreement or terms of use agreement. The major criticism of the shrink wrap licenses is that the user or consumer without knowing the exact terms and conditions will be made bound by the terms upon using the product.

Click wrap agreements derive their name, where the online user or consumer click the button I agree or I accept, onscreen. This is considered as an electronic affirmation given by the user to the terms and conditions posted in the website by the online seller. It gives a clear affirmation that the user had already read the terms and conditions listed on the website, understood and know the legal consequences of signing. The acceptance issued usually happens before receiving the goods. The online seller also takes appropriate steps to notify the user directly that there are terms and conditions which may bind the user upon using the website or downloading the contents of the website. In this type, the terms and conditions are displayed at the very start of the process of contract formation. The online user has been given an option to choose by way of type and click or clicking the icon, where the
vendor provides a clear and unambiguous choice, the user will be made bound by the terms and conditions.

Web wrap or browse wrap agreements refers to a situation where the entire agreement does not appear on the screen until the purchaser takes initiatives to know the terms by clicking the hyperlink provided by the website owner. Unlike click wrap agreements, there is no direct notice or actual notice given to the online user, browse wrap agreements are susceptible to challenge for lack of proper notice. The user of the website should be aware that there might be some terms and conditions which may bind him while using or accessing somebody’s website. The user should take appropriate steps to find out what terms and conditions are they, where are those, etc. the website owner may place a link to the terms and conditions through a hyperlink or the terms may be placed in the webpage anywhere and there is no provision created that the user must agree the terms and condition for having access to the product or contents of the website.

Legislative frameworks:

As rapid development takes place in the digital medium based on technological advancements, people were highly reluctant to conduct business or conclude a contractual transaction in the electronic environment due to lack of effective legal protection. The major challenges confronted for facilitating electronic commerce and electronic governance are: writing requirements and recognition of electronic signatures.

Laws were made by countries to provide legal protection for e-transactions both at the national and international level taking into consideration the fast growth of international trade through electronic commerce. In a good number of countries, we do have an exclusive legislation which deals with electronic commerce or transactions based on their international trade agreements.

At the United Nations level, the United Nations Commission on International Trade Law (UNCITRAL) established in the year 1966, is the main legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years, UNCITRAL’s business is the modernization and harmonization of rules on international business.

Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include:

- Conventions, model laws and rules which are acceptable worldwide
- Legal and legislative guides and recommendations of great practical value
- Updated information on case law and enactments of uniform commercial law
- Technical assistance in law reform projects
- Regional and national seminars on uniform commercial law.

A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international document which is adopted by member states for the uniformity of the law at the international level.

The following are the important texts originated from the work of UNCITRAL:

1) UNCITRAL Model Law on Electronic Transferable Records (2017)

The Model Law on Electronic Transferable Records (MLETR) aims to enable the legal use of electronic transferable records both domestically and across borders. The MLETR applies to electronic transferable records that are functionally equivalent to transferable documents or instruments. Transferable documents or instruments are paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring possession of the document or instrument.

Electronic transferable records are a fundamental component of a paperless trade environment, which may make an important contribution to trade facilitation.
Electronic transferable record is functionally equivalent to a transferable document or instrument if that record contains the information required to be contained in a transferable document or instrument, and a reliable method is used to: (a) identify that electronic record as the electronic transferable record; (b) render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and (c) retain the integrity of that electronic record.


This is a document publication which analyses the main legal issues arising out of the use of electronic signatures and authentication methods in international transactions. Part one provides an overview of methods used for electronic signature and authentication and their legal treatment in various jurisdictions. Part two considers the use of electronic signature and authentication methods in international transactions and identifies the main legal issues related to cross-border recognition of such methods. It has been observed that, from an international perspective, legal difficulties are more likely to arise in connection with the cross-border use of electronic signature and authentication methods that require the involvement of third parties in the signature or authentication process.


The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.

The objective and relevance of this convention is that, certain formal requirements contained in widely adopted international trade law treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the United Nations Convention on Contracts for the International Sale of Goods (CISG) may pose obstacles to the wide use of electronic communications. The Electronic Communications Convention is an enabling treaty whose effect is to remove those formal obstacles by establishing equivalence between electronic and written form. Moreover, the Electronic Communications Convention serves additional purposes further facilitating the use of electronic communications in international trade. Thus, the Convention is intended to strengthen the harmonization of the rules regarding electronic commerce and foster uniformity in the domestic enactment of UNCITRAL model laws relating to electronic commerce, as well as to update and complement certain provisions of those model laws in light of recent practice. Finally, the Convention may provide those countries not having yet adopted provisions on electronic commerce with modern, uniform and carefully drafted legislation.

The Electronic Communications Convention builds upon earlier instruments drafted by the Commission, and, in particular, the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures. These instruments are widely considered standard legislative texts setting forth the three fundamental principles of electronic commerce legislation, which the Convention incorporates, namely non-discrimination, technological neutrality and functional equivalence.

4) UNCITRAL Model Law on Electronic Signatures (2001)

The Model Law on Electronic Signatures (MLES) aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures. Thus, the MLES may assist States in establishing a modern, harmonized and fair legislative framework to address effectively the legal treatment of electronic signatures and give certainty to their status.


The Model Law on Electronic Commerce (MLEC) purports 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. In particular, it is intended to overcome obstacles arising from statutory provisions that may not be varied contractually by providing equal treatment to paper-based and electronic information. Such equal treatment is essential for enabling the use of paperless communication, thus fostering efficiency in international trade.

6) Recommendations to Governments and international organizations concerning the legal value of computer records (1985)

UNCITRAL adopted a recommendation to Governments and international organizations elaborating legal texts relating to trade suggesting that they should review the rules within their competence relating to automatic data processing with a view to eliminating unnecessary obstacles to the use of automatic data processing in international trade. In most of the countries in the world, UNCITRAL model law is well adopted and used as a Model Law to be incorporated into the domestic law.

Judicial Recognition and Validity of electronic contracts:

The judicial approach to click-wrap, shrink-wrap and browse-wrap contracts in United States relies on the statutory legislation “Uniform Commercial Code”

The question on the validity and enforceability of Click-wrap agreements first time raised in 1996 which was decided by the American Court in 1998 in the case of Hotmail Corporation v. Van$ Money Pie Inc. This is the first case implicitly holding that a click-wrap contract, specifically a “terms of service” e-mail agreement, is valid. In this case, the Court has held that “to use plaintiff’s service defendants, after being afforded the opportunity to view the Terms of Service, clicked on a box indicating their assent to be bound thereby.”

In another case, Intel Corp. v. Hamidi (Court of Appeal), the court for northern district of California indirectly upheld the validity of such licenses where it said, "that the defendant is bound by the terms of the license as he clicked on the box containing "I agree" thereby indicating his assent to be bound". In the case of Groff v. America Online, the court affirmed the validity of a click-wrap agreement entered into by America Online, Inc. ("AOL") and one of its customers. In its decision, the court twice indicated its belief that plaintiff and defendant were parties to a binding agreement. The court indicated this belief when it rejected plaintiff's contention that he was not bound by the forum selection clause because he was not aware it was in his agreement with AOL.

In Caspi v. Microsoft, Caspi had agreed to the Microsoft networks click wrap agreement, which had contained a choice of forums clause that stated all disputes would be brought in court in King County, Washington. Later when a dispute arose, Caspi claimed that the entire click-wrap shouldn’t be enforced because it was unconscionable. However, the reviewing court disagreed because there was no fraud, no unequal bargaining power, and Caspi had affirmatively agreed to the terms of the click-wrap. An example of the effective use of clickwrap agreements may be shown in the Forrest v. Verizon case. In this case, the customer was upset over that particular clause and claimed that Verizon had not provided them with notice of this term. The customer had assented to a clickwrap agreement that was within a scroll box. Across the top of the clickwrap agreement were the words “PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY.” The user was required to click that they agreed to the Terms of Service before they could continue with the completion of the transaction. The court cited the basic principle of contracts that when someone signs a contract they had an opportunity to read, they should be bound to the agreement, regardless of whether they actually read the contract.

In similar fashion to Forrest v. Verizon, courts have continued to reinforce these contractual notions found in clickwrap agreement in DeJohn v. The .TV Corporation, the Court holds that plaintiff entered into a binding online click-wrap agreement by clicking an ‘I Agree’ icon, which indicated he had read, understood and agreed to the terms of the parties' contract. The contract's terms were available for review online by clicking on a link which appeared on the Register.com website just above the ‘I Agree’ icon.
In the case of Motise v. America Online, the reviewing court enforced aspects of terms agreement against a customer of AOL. The customer’s stepson, who had never seen or agreed to the terms, was found to be a sub-licensee of the customer and was thereby bound to the same terms as the customer. In light of these cases, lengthy legal clickwrap agreements that require user confirmation are enforceable, as long as a responsible user has consented.

In Hubbert v. Dell, customers using Dell’s website were shown the words: “All sales are subject to Dell’s Terms and Conditions of Sale” recurrently and were provided with an obvious hyperlink to the terms agreement. When a dispute arose over whether a customer was provided notice of the terms, the reviewing court made clear that repeated exposure of this nature would put a reasonable person on notice, as long as it was presented directly and unambiguously. Click-wrap agreements do have the inherent protection that repeated use of or interaction with a website indicates a certain level of awareness of existence and therefore notice.

In the case of Scherillo v. Dun & Bradstreet, a reviewing court enforced a clickwrap agreement against the user Scherillo. Scherillo argued, that despite the fact that he checked a “yes” box in relation to the terms agreement, he had not meant to do so. Therefore, he felt as if he had not consented. However, the court disagreed, stating that the terms agreement was reasonably communicated, and based on the evidence a reasonable person would not have clicked yes to consent unless they actually consented.

The seminal case regarding enforceability of shrink-wrap licenses was Step-Saver Data Sys., Inc. v. Wyse Tech. Step-Saver purchased a software program called Multi-Link from TSL for resale. Step-Saver would place telephone orders for 20 copies of Multi-Link at a time. TSL took the order on the phone and promised to ship the goods. Each Multi-Link software package contained a shrink-wrap license that disclaimed all express and implied warranties and limited remedies to replacement of the Multi-Link program. Multi-Link caused serious problems for the end users to whom Step-Saver had resold the software. These customers brought suit against Step-Saver, which, in turn, sued TSL over the software defects. TSL raised the disclaimer and limitation of remedies contained in the shrink-wrap license as its defense.

Arizona Retail Sys. v. Software Link, Inc. is nearly identical to Step-Saver and follows a similar analysis. Coincidentally, the case even involved the same defendant, TSL. As in Step-Saver, Arizona Retail Store (ARS) was an offeror that placed orders by phone, and the offeree, TSL, promised shipment of the goods. The court followed the Step-Saver rationale that the parties had formed a contract before TSL insisted on the terms of the shrink-wrap license.

The law governing shrink-wrap licenses took a dramatic turn in ProCD, Inc. v. Zeidenberg. The court held the shrinkwrap license enforceable.

The leading case in the area of browse-wrap agreements is Specht v. Netscape Communications Corp. Specht received a free download of Netscape's "Smart Download" software that enhances the downloading files from the Internet. In a class action, the plaintiffs charged that Netscape had used the software to obtain web usage information from Smart Download users in violation of their privacy. The browse-wrap terms included an arbitration clause. The software was available on Netscape's web site as well as from other free download sites. On Netscape's site, the link to the browse-wrap terms was not visible in the first window view, but only visible if the user scrolled down the screen further. On non-Netscape sites, the Smart Download software could be obtained with any links to the browse-wrap contract terms whatsoever. Netscape's site did not require users to click the browse-wrap link. It merely stated, "Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software." The court ruled that "please review" was an invitation and not a condition, and thus could not constitute the assent necessary to make the arbitration enforceable.
Recent Developments:

In a very recent case of Meyer v. Uber Technologies, Inc. (2017), plaintiff filed a putative class action alleging that Uber engaged in illegal price fixing. After the district court denied Uber's motion to compel arbitration, holding that plaintiff did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber's Terms of Service when he registered. The Second Circuit vacated the district court's judgment, holding that the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law, and plaintiff's assent to arbitration was unambiguous in light of the objectively reasonable notice of the terms. The court remanded to the district court to consider whether defendants have waived their rights to arbitration and for any further proceedings.

The facts of the case are: In 2014, plaintiff Spencer Meyer downloaded onto his smartphone a software application offered by defendant Uber Technologies, Inc. (“Uber”), a technology company that operates, among other things, a ride-hailing service. Meyer then registered for an Uber account with his smartphone. After using the application approximately ten times, Meyer brought this action on behalf of himself and other similarly situated Uber account holders against Uber’s co-founder and former Chief Executive Officer, defendant Travis Kalanick, alleging that the Uber application allows third-party drivers to illegally fix prices. The district court joined Uber as a defendant and denied motions by Kalanick and Uber to compel arbitration. In doing so, the district court concluded that Meyer did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber’s Terms of Service when he registered. The district court held that Meyer therefore was not bound by the mandatory arbitration provision contained in the Terms of Service.

When Meyer registered for an account, the Terms of Service contained the following mandatory arbitration clause:

Dispute Resolution

“You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, Disputes) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding. Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this Dispute Resolution section will be deemed void. Except as provided in the preceding sentence, this Dispute Resolution section will survive any termination of this Agreement.”

The major issue in this case raised in the district court was, before an agreement to arbitrate can be enforced, the district court must first determine whether such agreement exists between the parties.

To form a contract, there must be "mutual manifestation of assent, whether by written or spoken word or by conduct," (Specht). California law is clear, however, that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." The court observed that,

“one way in which we have previously distinguished web-based contracts is the manner in which the user manifests assent — namely, "clickwrap" (or "click-through") agreements, which require users to click an "I agree" box after being presented with a list of terms and conditions of use,
or "browse-wrap" agreements, which generally post terms and conditions on a website via a hyperlink at the bottom of the screen.”

"Browse-wrap encompasses all terms presented by a website that do not solicit an explicit manifestation of assent. Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browse-wrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions."

In the interface at issue in this case, a putative user is not required to assent explicitly to the contract terms; instead, the user must click a button marked "Register," underneath which the screen states "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with hyperlinks to the Terms of Service and Privacy Policy.

The District court determined that an agreement to arbitrate exists where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law.

But the Appellate court disagreed with the district court's determination that the location of the arbitration clause within the Terms and Conditions was itself a "barrier to reasonable notice." It was observed that, the Terms of Service were available only by hyperlink does not preclude a determination of reasonable notice. It was observed that, “Clicking hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else.”

The court finally concluded that the Uber App provided reasonably conspicuous notice of the Terms of Service.

Conclusion

In addressing the validity of the electronic agreements, the courts have noted that the essential ingredient to formation of a contract is the mutual assent between the contracting parties. Various cases discussed stands for the proposition that online contracts should be held to the same standards as other written agreements. The terms agreed therein must be noticeable and conspicuous. In today’s electronic driven commercial landscape, the courts were subjected to determine the enforceability of electronic agreements. Courts approaches towards the legal recognition and validity of electronic contracts are mixed. As discussed by the U.S. court in the recent case, the District court and the court of appeal looked into the factual situations to determine whether the user has been given a clear and conspicuous reasonable notice about the terms and conditions of service. But the court, on appeal, reversed the decision of the district court and concluded that the company provided reasonably conspicuous notice of the Terms of Service. From this it is well evident that the law is not really certain in terms of validating and enforcing the electronic contracts. It depends on various factors which may contribute to the situations and circumstances to determine validity and enforceability of online agreements.

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