CONTRACTING IN CYBERSPACE

LEGALITY OF E-CONTRACTS

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Overview

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Overview

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  - CP(FT)A
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Legality of E-contracts

What is an e-contract?

- An agreement created and accepted in electronic form, i.e. no paper or hard copies are used or required.

- e.g. you write out the terms of a contract on your computer, send these terms by email to a business associate, who replies by email to accept them and, voila, an e-contract is formed.
Legality of E-contracts

How are e-contracts formed?

- Negotiated
- Pre-negotiated
- Non-negotiated
Legality of E-contracts

Negotiated e-contracts:

- Fundamentally similar to traditional written contracts

- Just using a different medium (i.e. the internet or some other form of electronic communication means) to propose, negotiate and confirm agreement to the terms
Legality of E-contracts

Pre-negotiated e-contracts:

- Classic example: Electronic Data Interchange ("EDI")
- Two or more networked trading partners
- Communicating using pre-agreed protocols
- Protocols typically agreed in a master contract
- Trading process automated
Legality of E-contracts

Non-negotiated e-contracts:

- Imposition of standard terms and conditions
- Accepted by some means (e.g. “click-through” or by conduct)
- User/customer has no means of objecting
Legality of E-contracts

Fundamental Issues

• Dealing with digitized information
  - Conflict with “paper” laws
• Faceless
  - Issues of attribution & authority
• External networks
  - Issues with despatch and receipt
• Authenticity
  - Issues with integrity & fraud
Legality of E-contracts

Recognition of digital information (ETA)

- Singapore Electronic Transactions Act (Cap 88) (‘ETA’)

Legality of E-contracts

Core ETA provisions

• Electronic records not denied effect solely because of their form (s6)
• Electronic records which can be retrieved satisfy any requirement for writing (s7)
• Electronic signatures satisfy any requirement for a signature (s8)
• Electronic records satisfy any requirement for document retention (subject to certain qualifications) (s9)
Legality of E-contracts

ETA exclusions (s4(1))

- Wills
- Negotiable instruments
- Indentures, declarations of trust or powers of attorney
- Contracts involving immovable property
- Documents of title
Legality of E-contracts

Other ETA provisions

• Formation and validity of contracts (s11)
• Effectiveness between parties (s12)
• Attribution (s13)
• Acknowledgement of receipt (s14)
• Time and place of despatch and receipt (s15)
• Presumptions regarding secure electronic records (ss 18 & 21)
Legality of E-contracts

Singapore caselaw

Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2

“It is common ground that the principles governing the formation of written or oral contracts apply also to contracts concluded through the Internet.”
Legality of E-contracts

Formation of standard term on-line contracts

Key methods of imposing standard terms on-line:

- Click-wrap (or click-through)
- Browse-wrap
Legality of E-contracts

Click-wrap

• User is asked to read or is referred to terms and conditions and asked to agree by clicking a button or hyperlink marked "I agree"

Browse-wrap Agreements

• Terms purport to bind user by his/her continued use of the site, i.e. without any other explicit manifestation of affirmative assent on the part of the user
Legality of E-contracts

Issues with click-wrap & browse-wrap

• Reality: people don’t read the terms

• Traditional contract law: emphasizes informed mutual consent

• E-contracts push the boundaries: will purported “acceptance” of terms that are known not to have been read be classified as deemed acceptance?
Legality of E-contracts

Caselaw developments (US) - “click-wrap”

- Specht v Netscape (2001)
- Williams v AOL (2001)
- Bruce v Verizon (2002)
- DeJohn v The .TV Corp (2003)
- Trieber & Straub Inc v UPS (2007)
- cf Feldman v UPS (2008)
Legality of E-contracts

Caselaw developments (US) - “browse-wrap”

- Ticketmaster Corp v Tickets.com (2000)
- Mary Defontes v Dell (2004)
- Dewayne Hubbert v Dell (2006)
- Affinity Internet v Consolidated Credit (2006)
- Druyan v Jagger (2007)
Legality of E-contracts

Other issues affecting on-line contracts

• Offer or invitation to treat?
  - Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2
  - cf Eastman Kodak case (Fin Times, Feb. 11, 2002)

• Battle of the forms : “Clickwrap-trap”
Legality of E-contracts

Other issues affecting on-line contracts

• Incomplete incorporation of terms by reference
  - AV v iParadigms (2008)
  - cf Greer v 1-800-flowers.com (2007)

• Post-agreement modification of terms & conditions
  - Sample
Legality of E-contracts

Summary on formation

• Current state of the market

• Relevance of user characteristics?

• “Doctrine of reasonable expectations”?

• Possible absurdity?
Legality of E-contracts

Suggestions for enhancing effectiveness

- Terms should be conspicuous and easily accessible
- Users should be required to take affirmative action to accept the terms
- User should be expressly told that they will be bound by the terms
- Users should only be allowed to proceed with the transaction after they have confirmed their consent
- Terms should include representation that the user is duly authorized to enter into the contract
Legality of E-contracts

Suggestions for enhancing effectiveness

• Care must be taken to ensure terms make clear reference to all related/ancillary documents that are intended to form part of the contract (eg privacy policies) and to state that they do form part of the contract

• Cross-links to any related/ancillary documents forming part of the contract should be available and conspicuously located

• Terms should be presented in different languages (eg as appropriate to customer base)

• Users should be allowed to print out and/or review the terms at their leisure
Legality of E-contracts

Suggestions for enhancing effectiveness

• If intention is merely to invite bids, terms should clearly state so and that the provider reserves the right to accept or reject any offer made, without giving any reasons
• Automated confirmations should equally only reflect a confirmation of receipt and not confirmation of the offer itself
• Reasonable steps should be taken to highlight subsequent amendments to the terms of use to users
• Users should be given an opportunity to react to and/or reject subsequent proposed amendments (eg by terminating their account), without prejudicing their position
Enforceability of on-line terms

General considerations:

• Prohibited/restricted trades
• Public policy considerations
• Conflicts of laws
• Import/export regulations
• Competition law issues
• Privacy laws issues
• Consumer protection issues
• Tax issues
Enforceability of on-line terms

Concern with provision of digitized content/services:

- Dealing with licences (not sale of goods)
- Allows vendors/suppliers broad discretion to dictate terms under umbrella of the licence
- Open to abuse
  - Contracts of adhesion
  - “As is” disclaimer
Enforceability of on-line terms

“As is” disclaimer:

YOU AGREE THAT [SOFTWARE/SERVICE PROVIDER] HAS MADE NO EXPRESS WARRANTIES, ORAL OR WRITTEN, TO YOU REGARDING THE [SOFTWARE/SERVICES] AND THAT THE [SOFTWARE/SERVICES] ARE BEING PROVIDED TO YOU "AS IS" WITHOUT WARRANTY OF ANY KIND.

[SOFTWARE/SERVICE PROVIDER] DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESSED, IMPLIED, OR STATUTORY, INCLUDING, BUT WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF NONINFRINGEMENT OF THIRD PARTY RIGHTS, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
Enforceability of on-line terms

“As is” disclaimer (cont’d):

TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAWS, THE [SOFTWARE/SERVICE PROVIDER] SHALL NOT BE LIABLE FOR ANY LOSS, INJURY, CLAIMS, LIABILITY OR DAMAGE OF ANY KIND RESULTING IN ANY WAY, WHETHER BY NEGLIGENCE OR OTHERWISE, AND INCLUDING WITHOUT LIMITATION FROM (A) ANY ERRORS OF OMISSIONS IN THE [SOFTWARE/SERVICE]; (B) THE UNAVAILABILITY OR INTERRUPTION OF THE [SOFTWARE/SERVICES] OR ANY FEATURES THEREOF; (C) YOUR USE OF THE [SOFTWARE/SERVICES]; (D) THE LOSS OF ANY DATA OR EQUIPMENT IN CONNECTION WITH THE USE OF THE [SOFTWARE/SERVICES]; OR (E) THE CONTENT, ACCURACY OR COMPLETENESS OF THE [SOFTWARE/SERVICES].
Enforceability of on-line terms

“As is” disclaimer (cont’d):

YOU MUST ASSUME THE ENTIRE RISK OF USING THE PROGRAM. IN NO EVENT SHALL [SOFTWARE/SERVICE PROVIDER] BE LIABLE TO YOU FOR ANY DAMAGES, INCLUDING ANY LOST PROFITS, LOST SAVINGS, OR OTHER INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF THE USE OF THE [SOFTWARE/SERVICE] EVEN IF [SOFTWARE/SERVICE PROVIDER] HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
Enforceability of on-line terms

“As is” disclaimer (cont’d):

IN NO EVENT WILL THE [SOFTWARE/SERVICE PROVIDER’S] LIABILITY FOR ANY CLAIM, WHETHER IN CONTRACT, TORT, OR ANY OTHER THEORY OF LIABILITY, EXCEED THE LICENSE FEE PAID BY YOU, PROVIDED, HOWEVER, IF THE RELEVANT SOFTWARE WAS PROVIDED TO YOU AT NO CHARGE YOU AGREE [SOFTWARE PROVIDER] SHALL NOT BE LIABLE TO YOU FOR ANY DAMAGES. THIS LIMITATION SHALL APPLY TO CLAIMS OF PERSONAL INJURY TO THE EXTENT PERMITTED BY LAW."
Enforceability of on-line terms

Concern with provision of digitized content/services:

- Query: to what extent are on-line licence terms for the provision of software, digitized content and/or services regulated by local laws?

- Review of Singapore laws
Enforceability of on-line terms

Sale of Goods Act, Cap 393 (SOGA)

- Imposes implied terms as to title, where there is a sale by description, about quality or fitness for purpose and where there is a sale by sample
- However, only applies to contracts for the “sale of goods”
- Also, subject to the Unfair Contract Terms Act, may be negatived or varied by express agreement or by course of dealing (s55)
- Clearly does not apply to licensing of digitized information or the provision of on-line services
Enforceability of on-line terms

Unfair Contract Terms Act, Cap 396 (UCTA)

• Limits or restricts a party’s right to exclude or limit its liability under a contract

• However, 1st Schedule, UCTA, expressly excludes a contract “so far as it relates to the creation or transfer of a right or interest in any … copyright or … other intellectual property, or relates to the termination of any such right or interest.”

• May apply to on-line contracts for the provision of software/services where there are separate/ancillary obligations aside from underlying IPR licence?
Enforceability of on-line terms

Consumer Protection (Fair Trading) Act, Cap 52A (CPFTA)

- Protects consumers against “unfair practices” (s4)
- Consumer: “an individual who receives goods or services otherwise than exclusively in the course of business”
- Goods: “any personal property, whether tangible or intangible”
- Act applies where (a) either supplier or consumer is resident in Singapore; or (b) offer or acceptance is made in or sent from Singapore (s3)
Enforceability of on-line terms

Unfair practices (s4 CPFTA)

Includes:

• Doing or omitting to do anything which might reasonably mislead the consumer
• Making false claims
• Taking advantage of a consumer where the supplier knows or ought to know consumer (a) is not in a position to protect his own interests; or (b) is not reasonably able to understand the character, nature, language or effect of the transaction
• Doing anything specified in the 2nd Schedule
Enforceability of on-line terms

2\textsuperscript{nd} Schedule, CPFTA

- List of 20 specific items deemed unfair
- Representing goods/services have qualities they do not have
- Representing transaction involves rights it does not have
- Taking advantage of “consumers” by including terms that are harsh, oppressive or excessively one-sided so as to be unconscionable
- Using small print to conceal material facts from consumers
Enforceability of on-line terms

Other relevant provisions (CPFTA)

- Cannot contract out (s13)
- Parol evidence rule abolished (s17)
- Burden on supplier to show compliance (s18A)
- 2 year limitation period from occurrence of breach or knowledge of the unfair practice (s12)
Enforceability of on-line terms

Remedies (CPFTA)

• Consumer can sue if claim/value of subject matter is no more than S$30k (but can abandon excess portion)
• Court can order restitution, award damages, order specific performance, order repairs and/or vary the contract terms
• Court can apportion use between business and non-business if deemed just (even if goods or services are indivisible)
Enforceability of on-line terms

Comparison with US laws

- **Uniform Commercial Code (Article 2-302)**
  - The unconscionability defence is concerned with the fairness of both the process of contract formation and the substantive terms of the contract. When the terms of a contract are oppressive or when the bargaining process or resulting terms shock the conscience of the court, the court may strike down the contract as unconscionable.

  - (Prefatory note) The UCITA follows Article 2 in providing a standard of unconscionability for courts to employ in policing contract terms. UCITA goes beyond Article 2 in authorizing courts to strike down over-reaching language that conflicts with fundamental public policy…"
Enforceability of on-line terms

Way forward?

• Caveat emptor, subject to test of unconscionability?
• Recognition of “unconscionability” as a defence under common law
  - Chitty Vol 1, para 7-126
  - Chitty Vol 1, para 7-129
• Recognition under ETA (s13(4))
• Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2
The End …

Thank You!