

Legal Position of Click Wrap Agreement

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Abstract. Technological advancement in the communication industry over the last decade has given rise to consumers and parties to arrange their own business or contractual relations via the Internet. The foot mark of such technology can be seen in the new form of contract which is called “click wrap agreement”. Since the concept of click wrap contract is still vague, this paper is aimed at clarifying the relevant concept and main elements which are necessary to be exist in each form of contract such as free consent, coercion, and undue influence in click wrap agreement in Malaysia and the United States of America.

Keywords: click wrap agreement, contract, and electronic contract.

1. Introduction

Recently, the form of contract in ordinary life has been changed gradually by combining its old version with the new technology and advanced version in different types of contract. One of these new contracts is “click wrap agreement”.

The Internet is the largest and most diverse information reserve in the world. People access information on topics ranging from desired television shows to important legal and social issues. Therefore, the users of the Internet are able to have access to the goods and services that are available on the Internet and make a contract through cyber space. The position and situations of a person who is sitting and signing a contract via the Internet is not equal and similar to a person who is doing a contract through face to face transaction. Hence finding out the situation of main elements of a contract in the electronic contracts seems important.

2. Click Wrap

A click wrap agreement (also known as a "click through" agreement or click wrap license) is a common type of agreement which is mostly used in connection with software license. This agreement generally uses or found via the Internet, as part of the installation process of many software packages, or in other circumstances where agreement is sought using electronic media. For making an agreement successfully and also legally bound, the end user must click on the “I accept “or “I agree” button for showing his consent with the terms or obligations which has been written already.

In this situation the end user has the choice of “take it or leave it. Therefore, to download or install the software the user must enter into an agreement by clicking on the button which is in contrast with face to face

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or paper form contracts where there is no force to sign the agreement. This situation gives rise to the issue of void or voidable contract.

3. Malaysia

3.1 Consent in click wrap agreement

A contract is defined by Malaysian Contract Act 1950 as follows:

Section 10 what agreements are contracts;

- (1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void;
- (2) Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.
- (3) According to the general principles, the parties to a contract are bound when a legally enforceable agreement is concluded. But the main question is whether all of the contracts are acceptable and enforceable Consistent with the section 10 of the Contract Act 1950. The “free consent” is one of the important components of a valid contract. Consent means that the parties must have agreed upon the same sense in doing or not doing something. For a valid contract it is necessary that the consent of parties to the contract must be free. According to section 14, consent is free when it is not obtained by coercion, undue influence, fraud, misappropriation or mistake. ‘Free’ in this situation means that there should not be any force or coercion to make the contract.

Freedom of contract entails at least three related concepts of freedom. Firstly is a positive conception involving the liberty of individuals to make their own choices, in contract, this is the freedom to identify a possible exchange, to bargain for terms, and to enter an agreement based on mutual assent. The second is a negative concept, consisting of freedom from governmental constraints or interference while engaging in these acts. Finally, freedom of contract entails the ability of individuals to access the power of government to enforce their agreements. In each of these aspects, freedom of contract has always embodied fictions. In the electronic context, consent can be given in many different ways. Currently there are many circumstances in which there is neither freedom nor equality in matters of contracting. People are forced to make certain contracts in their lives, such as the compulsory insurance or software agreement (click wrap) for the installation on their Personal Computer (PC) it is unrealistic to suppose that the consumer can renegotiate the terms of such a contract.

Some authors believe that in this type of contract nothing is changed. What is different is the method by which those contracts are formed. They said that while buyer is doing a communication with seller only his place is changed and instead in he goes to shopping and selects his goods he is sitting at his place and is doing all that procedures by internet and technology. Consequently, the process of contract formation is not as straightforward as in the physical world. Regarding this, it is possible for legal systems or countries in the face of problems try to solve it by distributing the old acts and regulations to the new situations.

Unfortunately the Contracts Act 1950 of Malaysia does not make any provision for the online environment. With the introduction of Electronic Commerce Act 2006 (ECA). Online contract is recognized as all electronic transactions and shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form.

3.2 Coercion and Duress

Central to the legal concept of contract is the idea of consent parties who are legally bound to enter into contract by a free consent which has been given to them freely. In the absence of the free consent, the deal would be void or voidable. Nevertheless the party who is coerced or is under pressure or is forced to make such contract can seek relief. Depending on the different circumstances under which the consent was

improperly obtained, parties are entitled to relief on the grounds of duress, undue influence or unconscionability.

As in section 14 of Malaysian Contract Act 1950 it is stated that a contract is voidable by coercion. Consent is said to not have been given in the existence of coercion, undue influence, fraud, misrepresentation or mistake. A contract is said to have been made under duress when a party is entered into contract by another party's coercion or forces as he could never reject or ignore it. In fact the nature and concept of pressure and duress would be meaning full while there is a violence or threat of violence to the person.

Duress is part of coercive behavior, either physical compulsion/confinement or a threat of the same, which induces the victim to agree to enter into a contract. Under the theory of contract law, where there has been duress, there has been no actual assent to the contract, since the victim has been forced to become a "mere mechanical instrument" of the stronger party.

The position of coerce or duress in click wrap agreement is vague according to the Malaysian Contract Act 1950, however, a general view or circumstances which coercion will happen under that, is clarified in Ss 14, 15. In fact the end user wants to have a software which for having that, has to accept the terms and conditions. By and large, a person who enters to a contract via the Internet and makes a click wrap contract, is not under any kind of duress, coerce or force according to the Contract Act Ss14, 15 .consequence, this type of contract is enforceable according to the Contract Act of Malaysia 1950 due to there is no factor to make it void or voidable under the coercion or duress.

3.2.1 The United States Of America

A. Uniform Commercial Code (UCC)

The Uniform Commercial Code (UCC) is the main body of law that governs transactions involving goods. According to the UCC's definition:

Section 1-201.b.3 Agreement, as distinguished from "contract", means the bargain of parties in fact, as found in their language or inferred from other circumstances, Including course of performance, course of dealing, or usage of trade as provided in Section 1-303.

A contract is a promise between at least two persons involving exchange of some goods or services.

B. Uniform Computer Information Transactions Act (UCITA)

A new act relating to E-commerce is Uniform Computer Information Transactions Act (UCITA). This Act applies to computer-information transactions, defining them as "an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information." UCITA further defines computer information as "information in electronic form that is obtained from or through the use of a computer or that is in digital or equivalent form capable of being processed by a computer." This definition includes a copy of information in that form and any documentation or packaging associated with the copy. UCITA whose application depends on a voluntary decision by each State to amend UCC with a new article 2B has accepted this contract as a valid one and also has announced that the consent is available in the click wrap or shrink wrap agreements. The legislators in section 209 of UCITA have recognized the validity of mass market licenses like click-wrap and shrink-wrap whose proof is the proposed Article 2B of the Universal which, seems to approve and adopt such model as a general model for exchanging content.

I. Consent

The provisions of UCITA that have effect in validating most shrink-wrap licenses and the analogous web contracts involve creation of a new category called "mass-market" transactions. Mass-market transactions are defined as factor which is directed to the general public under substantially for the same conditions and information. Manifestation of assent can include breaking the shrink-wrap, clicking on a link, or commencing to use information. It certainly seems that UCITA's definition of manifestation of assent stretches the ordinary concept of consent (contested as it was). That stretching starts with the substitution of

the word "assent" for the word "consent." Consent is one of the meanings of assent. Nevertheless, assent has connotations of acquiescence, of mere failure to remove oneself from a process; consent, on the other hand, seems surrounded with more connotations of voluntary involvement of oneself in a process. Section 2B-112 of UCC provides that a contract is not enforceable unless the consumer agrees or manifests assent. According to the UCITA section 209 and 112, UCITA maintains that shrink-wrap and click-wrap agreements are generally enforceable, as long as the agreements meet basic requirements regarding the user's opportunity to review the terms and conditions and manifest their assent to be bound. The United States District Court for the District of Massachusetts has now provided an answer to the validity and existing of consent in sort of wrap contract. In *I.LAN v. Netscout Serv. Level Corp.* Civ. The court held that the click wrap agreement was an enforceable and binding contract. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even wilful inaction, as long as it is unequivocally referable to the promise, may create a contract. Subsequently, in respect to the UCITA sections which are stated above in a Click-wrap license if a person reads the terms and clicks "I agree" he asserts to the same, and it shows that he has got will and free consent to deal by way of Ss. 209 & 112 of UCITA this matter can be seen in case *Hotmail Corporation v. Van Money Pie Inc., et al.*[20] in which, court found out that contract is enforceable because the party had opportunity to review the terms and conditions before clicking. Consequence, click wrap contract carries the parties assent and consent and it is binding and enforceable under the UCC and UCITA and also by American judges for parties.

II. Coercion

For the formation of a contract it is necessary to show there was an intention to create legal relations, consideration and that a valid offer and acceptance. In a situation like click wrap there will exist both an intention to create legal relations and consideration. Accordingly a binding contract will have been created when the end user clicks on the "agree" button. UCITA specifically deals with these types of supply transactions in sections 201 to 207 which are concerned with the formation of a contract and which allow the terms of the contractual licence to be incorporated into the supply contract. This legalisation of post-payment disclosure of terms has been the subject of much criticism in the USA but legal safeguards are provided in the legislation since The US courts have already held that such contracts are enforceable regarding to the s 209.

4. Conclusion

The paper has discussed that in the United States of America any kind of electronic contract is acceptable as the same as the face to face one. The click wrap agreement is accepted under UCITA and UCC, too, and courts know click wrap contracts enforceable due to there is no coerce or duress while the end user enters into it and he is aware of the situation and terms and also has enough opportunity to read conditions and accept them. Therefore, there is no relief or break of contract for parties. In Malaysia, according to the Malaysian Contract Act 1950 click wrap agreement would be acceptable and enforceable however there is no specific article about this. Although the contract act can be applicable but it is not sufficient for end user who are crating this contract via the Internet since all the processes are happening in the cyber space. Consequence, Now it is a time for Malaysia that has a revision on the Contract Act to make the users much more positive and clear about their position in click wrap agreements.

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