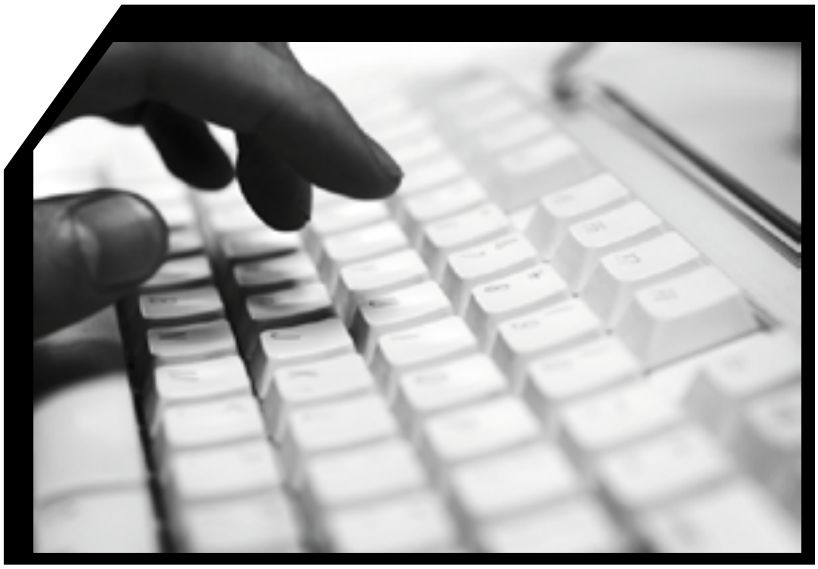

# Doing Business Online:
## Travails and Conflicts (Ts&Cs) in Online Agreements

by: Nicole Jumper & Kelly Frey

If you have a client that has a website, then you have got a problem. You have probably counseled your client to include a "Terms of Use" hypertext link on the website that, at a minimum, alerts the user of the website that accessing or using the website is an affirmative action that indicates the user's consent to those terms of use. If your client is conducting commerce at the website, you may even have counseled your client to include a "click through agreement" as part of the sales process (where the customer is presented with the terms of the transaction and forced to affirmatively click an "I Agree" icon on the webpage in order to complete the transaction).

The problem is that recent court opinions have called some terms of these online agreements into question. As a result of these recent decisions, your client's ability to conduct business, and contractually bind its customers via industry standard online agreements, may be in jeopardy.

Historically, most businesses have attached certain terms and conditions to each of their commercial transactions. Such "Ts and Cs" may be in the form of a negotiated, executed agreement between the parties. However, more frequently in commercial settings such Ts and Cs are set out as attachments to invoices, additional documentation to purchaser orders, or a host of other non-obvious mechanisms in what has become known as "the battle of the forms."

Commercial websites have attempted to mimic this process. Customers are "admitted" into the virtual confines of the website based upon an explicit terms of use agreement that is posted on the first page of the website (typically referred to as a "browse wrap agreement").[1] These browse wrap agreements usually state that a user's continued use of the website is an affirmative act indicating the user's assent to the terms of the browse wrap agreement. Similarly, prior to engaging in a commercial transaction in the online commerce environment, most online retailers alert the website customer that the transaction will be governed by certain Ts and Cs and require that a potential online customer affirmatively assent to these Ts and Cs before he/she can complete an online transaction (such agreements are typically referred to as a "click wrap agreement").[2] In either situation, the expressed intent of the online retailer is to create explicit legal documentation that sets out what a user may, and may not, do at the website and under what terms the online retailer is willing to do business with the online customer.

It has taken over a decade for courts to concur that online agreements can be enforced against website users. However recent cases have begun to erode the extent to which such online contracts will be enforced, especially where courts determine that specific terms within such online agreements disproportionately favor the website owner over the consumer.

The recent federal district court decision in *Hines v. Overstock.com*[3] illustrates the paternalistic stance courts have adopted towards online consumers. In the *Hines* case, the website user complained that Overstock.com did not disclose a $30 restocking fee for returned goods. In its defense, Overstock maintained that its website's terms and conditions explicitly set out the $30 returned-goods fee and moved to dismiss or stay the action (citing to a mandatory arbitration provision in its online terms and conditions). Despite the explicit text of Overstock.com's terms and conditions, the judge found the provision within the terms and conditions with respect to arbitration unenforceable due to "lack of notice" to the consumer. The court reasoned that the plaintiff lacked actual and constructive notice because the link to the terms and conditions was not sufficiently prominent and because the website failed to prompt the user to review the terms and conditions (noting that a user was never forced during the sales process to review the terms and conditions applicable to Overstock.com online sales).[4]

Other opinions seem to apply a slightly different judicial analysis in cases involving commercial parties. In a recent district court ruling in Illinois involving two corporations the court held that a limitation of liability clause in the website owner's online terms and conditions (which were hyperlinked and referenced during the final ordering process) was not unconscionable and could be enforced as written.[5] In rationalizing its decision, the Illinois district court pointed out that both parties were of equal bargaining power.[6] However, arguably in this Illinois case the website owner provided the same level of notice to its customers as Overstock.com. The conclusion may be that in Illinois the sophistication of the parties to the controversy, rather than the explicit wording of the online agreement, will be determinative as to enforceability of at least some provisions of any online agreement.

Similarly, in an Illinois state court case, *Hubbert v. Dell Corp.*,[7] the court held that the arbitration clause of a browse wrap agreement ***was*** enforceable against consumers. The two major factual distinctions between the Overstock.com case and *Hubbert* seem to be (1) the nature of the plaintiffs' claim (an action based on consumer protection and fraud, not on an explicit return policy in the terms and conditions) and (2) the nature of the plaintiffs themselves (the class of customers purchasing computers online). In determining whether the plaintiffs in Hubbert had notice of the arbitration clause in the online terms and conditions agreement, the court noted that three of the five pages of the ordering process advised the consumer that all purchases were subject to the online retailer's terms and conditions and that numerous web pages throughout the ordering process contained a blue hypertext link to the text of the terms and conditions. The court stated, "[c]ommon sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink."[8]

So, in Illinois at least, the nature of the product being purchased online seems to inform the court with respect to the level of sophistication of the consumer (and therefore, the enforceability of online agreements).[9]

Tennessee courts have not dealt extensively with the issue of enforcing online agreements. One Tennessee case, *Woodruff v. Anastasia International, Inc.*[10], touches on the enforceability of forum selection clauses in online agreements. The plaintiff in this Tennessee case utilized Anastasia's online dating services designed to introduce American men to Eastern European women. He accepted Anastasia's terms of service for its online services via a click through agreement. Dissatisfied with the Anastasia services, he filed a complaint against the company. The company moved to dismiss the complaint based upon the explicit terms of the forum selection clause of the click through agreement. The Tennessee Court of Appeals ruled that the forum selection clause of the click through agreement was enforceable, suggesting that it was reasonable for online companies with customers in many states to limit their exposure to multiple forums through the explicit terms of their online agreements.[11]

Unfortunately, there is no bright line test for determining when any specific court will enforce any specific provision of a hypertext linked terms of use or a click through agreement. Most courts consider "providing sufficient notice" as a threshold element to enforcement. The rationale for this element is that notice is a necessary requirement for any affirmative assent by the website user (regardless of how such assent is displayed, whether through continued use of the website after notice or via an affirmative click through on an "I Accept" icon). Secondly, we know that most courts are going to be more critical

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of one-sided terms where the website user is a consumer rather than a business entity. However, even between merchants (or others of equal bargaining power) some provisions of website agreements appear to be problematic from the perspective of judicial enforcement.

So, in the meantime, what practical measures can you take to try to avoid litigation over an online agreement, and if litigation arises, have your client's terms and conditions enforced?

First, try to avoid clauses in online agreements (and business practices online) that give the appearance of "being unfair." Keep return/restocking fees to the approximate costs involved, provide reasonable return/refund policies and timelines, and advise your clients to treat their online customers the same as they would customers at their retail locations. Also, be aware that courts tend to be hypercritical of clauses in online agreements that limit remedies available to a consumer such as mandatory arbitration, forum selection, etc.

Second, provide reasonable notice to website users of any terms of use or terms and conditions with respect to a commercial transaction. By reasonable, think "hit the website user over the head" with such notices. Prominently display the terms and conditions link by putting it in contrasting font/font size and color and place the link so that for a typical screen size it appears on the first page of the website (instead of forcing the user to scroll down below the first visible screen). Make sure that the link appears on every web page (not just the home page) and consider using parenthetical language next to the link like "'Terms and Conditions' (these Terms and Conditions are contractually binding upon use of these website services)." Make sure that the user can access the terms and conditions from any point of the website and can easily print the terms and conditions for future reference.

When the user engages in online commerce transactions, do not allow the user to complete the transaction unless they are presented with the terms and conditions of the transaction and affirmatively click "I Agree."[12] In addition to the standard "I Agree" click through agreement process, include a verifying email to the online customer that the terms and conditions displayed online apply to the sale or include a printed copy of the terms and conditions with the order when it is shipped. Make sure that the click through agreement is presented to the user during every online session and for every transaction (i.e., it is not a "one time and never again" process for the user). Be careful that you don't have conflicting clauses as between your terms of use, your privacy policy, and your terms and conditions (or an integration clause that might create issues as between the various online agreements at the client's website).

Third, remember that "sugar does a better job of catching flies than vinegar." As lawyers, we are accustomed to writing heavy-handed, one-sided agreements that favor our clients. But where such agreements will not be negotiable (as in the online commerce environment), we need to remember that (1) the way we phrase a term may influence whether a court will enforce the term and (2) once a court begins to opine about the enforceability of one section of an online agreement, it typically feels free to review all other sections of the online agreement for "unconscionability." Specific clauses that require careful drafting include disproportionate fees for shipping/restocking, mandatory arbitration without providing for interim escalation of disputes within the online retailer, and other terms that would cause a typical juror to make the comment "the parties couldn't have intended to contract under those terms." When in doubt, include references within the online agreement to objective standards of commercial behavior, such as Uniform Commercial Code provisions.

As lawyers, we have a responsibility to accommodate our clients' business needs despite uncertainties in the state of the law. Until the law on the enforceability of online agreements becomes settled, we must anticipate what issues may arise and resort to practical and creative measures that encourage enforcement of the explicit terms of a client's online agreements by the courts. This is not just a matter of creative legal drafting, but of accommodating the sophistication level of online shoppers and the nature of online transactions. When in doubt, think of what a consumer's expectations might be for a particular transaction; then, address those expectations in both the language of the agreement governing the transaction and in the mechanisms by which the agreement is presented to the consumer. And, always advise your clients about the practical enforcement

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issues that currently exist with respect to online agreements and online transactions. ■

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**(Footnotes)**

[1] Usually, a "browse wrap agreement" is implemented on a website by using a hypertext link at the bottom of the homepage of the website that directs the user to the text of the applicable terms of use. Typically the terms of use for a website include general provisions against a user misappropriating the website's proprietary materials, refraining from illegal or inappropriate conduct at the website, and providing notices to the user with respect to how any information gathered at the website will be used.

[2] Usually, a "click wrap agreement" is implemented on the website by creating a "pop up" window or directing a user to a specific page of the website and requiring the user to use their mouse to click on an "I Agree" icon (or an "I Do Not Agree" icon that terminates the proposed transaction). Best practice in the industry is to make the terms of such click through agreements available to all users of the website at all times (not just during a transaction) and allow the user to print the click through agreement at any time during their online experience.

[3] No. 09 CV 991(SJ), 2009 WL 2876667 (E.D. N.Y. Sept. 4, 2009).

[4] *See id.* *2-3.

[5] *PDC Lab., Inc. v. Hach Co.*, No. 09-1110, 2009 WL 2605270 2009 (C.D. Ill. Aug. 25, 2009).

[6] *Id.* at *6.

[7] 835 N.E.2d 113 (Ill. App. Ct. 2005).

[8] *Id.* at 121.

[9] Perhaps if the plaintiff in *Overstock.com* had purchased a computer instead of a vacuum, the court would have found that she had constructive notice of the agreement given that Overstock.com had substantially the same type of hypertext links of its terms and conditions as in the *Hubbert* case.

[10] No. E2007-00874-COA-R3-CV, 2007 WL 4439677 (Tenn. Ct. App. Dec. 19, 2007).

[11] *Woodruff*, 2007 WL 4439677.

[12] Simply having the icons and text of the terms and conditions of sale is insufficient – the website owner has to assure that no online commerce transaction can occur without affirmatively viewing the terms and conditions and clicking on the "I Agree" icon (and assuring that clicking on "I Do Not Agree" sends the website user back to the homepage or an alternative webpage that explains that the commercial transaction cannot be completed without the user's explicit consent to the terms and conditions).