

Corporate Department

# Click-wrap: Are Online Contracts Enforceable?

## Click-wrap: Are Online Contracts enforceable?

Almost all of us have encountered 'click-wrap' online standard form contracts. Perhaps most of us would admit to habitually "accepting" online contracts by clicking a button without reading the underlying contractual terms. The horse, along with certain rights, will thus have bolted.

The concept of the 'click-wrap' contract has recently been affirmed by various courts, whether or not the 'clicker' (acceptor) has read the contractual terms. Leaving aside the issues of unfair contractual terms, consumer protection and other legislative attempts to retroactively corral the said horse, we will now look briefly at this emerging legal concept.

### A Question of Law:

A recent judgment of the Court of Justice of the European Union to address 'click-wrap' contracts was the case of *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, (C332/14) (21 May, 2015).

This case involved a request for a preliminary ruling concerning the interpretation of Article 23(2) of Council Regulation (EC) No 44/2001 of 22 December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **Brussels I Regulation**).

The question asked by the referring German court was whether 'click-wrapping' fulfilled the requirements relating to a communication by electronic means within the meaning of Article 23(2) of the Brussels I Regulation.

### The Ruling:

The ruling sought was in relation to the validity of a jurisdiction clause contained in a contract for the sale of goods which was entered into by the buyer clicking a link on the seller's website.

The buyer (a car dealer based in Cologne, Germany) contracted to acquire an electric car from the seller (whose registered office was in Amberg, Germany). Before the buyer received delivery of the car, the seller cancelled the contract, claiming that it had noticed that the car had been damaged prior to shipment to the buyer.

The buyer disputed this reason and alleged that the true reason for the cancellation of the sale was that the buyer had purchased the car for a very good price and that the seller had since realised that and no longer wished to sell. The buyer then issued proceedings before a German court.

The seller asserted that the German courts had no jurisdiction to hear the dispute as the contract stated that the courts of Belgium were to have jurisdiction in the event of a dispute. The buyer challenged the validity of the jurisdictional clause, maintaining that it was not "in writing", as required under Article 23(1)(a) of the Brussels I Regulation.

*This document is intended to provide a general overview and guidance on a particular topic. It is provided wholly without any liability or responsibility on the part of Eugene F. Collins and does not replace the necessity to obtain specific legal advice. © Eugene F. Collins, 2015*

Article 23(1)(a) of the Brussels I Regulation requires that a contractual agreement conferring jurisdiction on the court(s) of a member state (which jurisdiction shall be exclusive unless the parties agree otherwise but which jurisdiction is subject to certain exceptions) must be in writing or be evidenced in writing.

### **Clicking the Box:**

Article 23(2) provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to “writing.”

The buyer submitted that the webpage containing the general terms and conditions of sale of the seller did not open automatically upon registration and upon every individual sale. Instead, the buyer said, a box with the indication ‘click here to open the conditions of delivery and payment in a new window’ must be clicked on (‘click-wrapping’). The buyer also contended that the provisions of Article 23(2) are met only if the window containing those general terms and conditions opens automatically.

### **The Judgment:**

The answer given by the Court of Justice of the European Union was that, in the instant case, the ‘click-wrapping’ tool made it ‘possible’ to save and print the relevant general terms and conditions before concluding the contract and therefore, in this case, the method of accepting the general terms and conditions of a contract for sale by ‘click-wrapping’, concluded by electronic means, which contains an agreement conferring jurisdiction, constituted a communication by electronic means which provided a durable record of the agreement.

While the Brussels I Regulation has been recast, the jurisdiction requirements remain the same in the recast regulation and the decision (which reflected the reasoning of the referring court) is still relevant.

### **Evidenced in writing – an Irish Case:**

Article 23 and the concept of a contract being *evidenced in writing* were considered by Judge Peart in the case of Muireann Gaffney trading as Art of Fitness v Life Fitness (UK) Limited, [2015] IEHC 123. In that case, there was a dispute between the parties over the alleged unlawful termination of a distribution agreement (by reason of insufficient notice) in a situation where a renewal contract had only been executed by the plaintiff but both parties had continued to perform under its terms. The learned judge thus found that the High Court did not have jurisdiction given the jurisdiction clause contained in the original and the renewal agreements.

The global legal system continues to evolve to deal with the circumstances presented to it and this is particularly true in the case of the world wide web and the concepts of online trading and dissemination of information that it ushered in. People and companies engaged in online activities must continually bear this in mind.

For further information on this topic please contact Gavin Doherty, Senior Associate, Corporate Department, E: [gdoherly@efc.ie](mailto:gdoherly@efc.ie), or any member of our Corporate team.