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Whitepaper

The effectiveness of clickwrap for legally enforceable agreements.

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The use of clickwrap technology has experienced explosive growth as a convenient and effective way to enter into an agreement with both consumer and commercial customers. The term "clickwrap" is commonly used to designate a particular process for entering into a contract online, wherein the company offering its products or services displays agreement terms which the prospective customer accepts by clicking a button and/or by checking a box (e.g., "I Agree").[1] Even when a company chooses to use a clickwrap process in online transactions, as discussed in more detail below, the essential elements of contract formation (i.e., notice, opportunity to review, meaningful and mutual assent) are still required in order to have a binding and enforceable agreement.[2]

There is a long line of cases dating back to the 1800's supporting a flexible concept of what may constitute assent to an agreement, with the first reported decision explicitly supporting the enforceability of clickwrap agreements in 2002;[3] however, the courts are now applying more exacting standards when evaluating the effectiveness and fairness of online contracting.[4] The judicial analysis may turn on a particular website's design, how the button is labeled (e.g., "continue" or "next" versus "I Agree"), use of "all caps," use of colors or formatting that encourage or dissuade action, font size, important terms being visually obscured by advertisements, or even what the "reasonable internet user" would conclude were the terms of the agreement.[5]

This White Paper discusses (i) the laws that support clickwrap agreements, (ii) certain general principles of contract formation that are applicable regardless of the medium, (iii) strategies for designing an electronic presentation platform or process to ensure a binding, enforceable and admissible clickwrap agreement, and (iv) other considerations when contracting in an electronic environment.[6]

Clickwrap under US law.

As noted above, the principles of contract law have supported the enforceability of clickwrap agreements in United States since the mid-1990s.[7] Since 1999 and 2000, respectively, additional statutory support for the enforceability of clickwrap agreements has been provided by the Uniform Electronic Transactions Act ("UETA")[8] and the Electronic Signatures in Global and National Commerce Act ("ESIGN")[9], and clickwrap agreements have also been supported under international law.[10] Thus, as a legal base line, the US and most foreign jurisdictions recognise many electronic contracts[11] as legally enforceable to the same extent as their pen-and-ink counterparts.

In the US, for any transaction covered by ESIGN or the UETA, if other law requires the transaction to be in "writing" or have a "signature," electronic records and signatures may be used instead of paper and ink. ESIGN and UETA define an "electronic signature" as "an electronic sound, symbol or process that is attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Examples of different types of electronic signatures under US law would include an "I agree" button, a check box, a typed name, biometric measurements, and digital signatures created using PKI digital certificate encryption technology. However, in many cases, a formal signature is not required by law to form a valid and enforceable contract.[12] By way of example, and not limitation, the following contracts generally do not require a signature by law in most US jurisdictions:

- The sale of goods less than $500 and leases with payments totaling less than $1,000
- Software licenses
- Procurement contracts
- Contracts for services performable within one year

Even if a signature is not required, it remains in a relying party's interest to document the agreement of the parties for future reference. ESIGN and UETA allow parties to use electronic records and any of the technology methods noted above to indicate their intent to be bound or otherwise manifest their assent to an online agreement. In all cases, in order to ensure enforceability, platforms should be designed to capture a party's intent to be bound to the agreement, and otherwise meet any other required elements of contract formation.[13]

Clickwrap under the EU and other jurisdictions.

Many foreign jurisdictions also recognise the legal effect and admissibility of electronic records. But while the foundational US laws do not establish preferences between different types of electronic signatures,[14] other jurisdictions around the world typically do. Electronic Identification, Authentication and Trust Services ("eIDAS") is a European Union regulation establishing a set of standards for conducting electronic transactions in the European Single Market.[15] eIDAS defines an "electronic signature" as "any data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign" (sometimes referred to as a "simple signature"). eIDAS further establishes two types of electronic signatures which receive preferential treatment under the regulation – "advanced" and "qualified." An advanced electronic signature must be: (i) uniquely linked to the signer, (ii) capable of identifying the signer, (iii) created using signature creation data under the signer's sole control, and (iv) linked to the signed data in such a way that any subsequent change to the data is detectable. An example of an advanced electronic signature would be an individual's signature applied using a PKI digital certificate issued to that individual. Qualified electronic signatures are advanced electronic

History of clickwrap agreement.

1800's
First flexible concepts of what may constitue assent to an agreement.

1990's
Enforceability of clickwrap agreements in United States.

1999-2000
The Uniform Electronic Transaction Act adds statutory support for clickwrap agreements.

2002
First reported decision supporting enforceablility of clickwrap agreements.

signatures that also must be "created by a qualified signature creation device and which is based on a qualified certificate for electronic signatures."[16] While a clickwrap process is not an advanced or qualified electronic signature under eIDAS, a clickwrap solution could be deemed sufficient as a simple signature – if the process is properly designed, the parties agree to its use, and its use is permitted by the applicable EU member state for the type of document at hand.[17]

Clickwrap and basic contract law.

As noted, in addition to meeting the requirements for creating an enforceable electronic record, the company utilising a clickwrap agreement must also comply with basic contract law to establish an enforceable contract.[18] The customer must have effective notice of the contract terms. This requires the company to carefully design the process for presenting the contract terms, including for example, font size and readability, especially as clickwrap is most often employed with contracts of adhesion – "take-it-or-leave-it" contracts which are not negotiable by the customer. When evaluating such contracts, courts are particularly focused on the presentation of those contract terms which change the relationship between the company and the customer, such as arbitration clauses, forum selection clauses and limitations of liability and warranty.[19] Thus, an effective clickwrap process should give the party a clear opportunity to review the contract terms and manifest acceptance. The customer also should have a meaningful opportunity to retain a copy of the contract terms, or otherwise be provided with ongoing access to the contract terms online.

After the contract terms are accepted, the relying party must be able to provide evidence in the event of any later dispute concerning the customer's assent and the agreed-upon contract terms. The relying party should retain documentary evidence of the process (e.g., representative screen shots and process flows), the identifying characteristics of the customer, the date and time of the customer's access to the site, the version of the contract terms presented to the customer, and the customer's acceptance of such terms. Even if the company constructs an effective and efficient clickwrap process which obtains valid, binding and admissible agreements, the value in such a process is realised only if sufficient evidence of such agreements is created and remains available as proof in any resulting legal proceedings.[20]

Suggested practices for clickwrap agreements.

Regardless of the type of transaction or agreement, an effective clickwrap process should address the following:

"Non-porous"
There should be no alternative way to obtain the product/service without clicking the button or checking the box or taking other affirmative action.

Clear call to action
The button or box to be clicked should be displayed such that acceptance or denial is unambiguous. A statement could be included informing the customer that the click signifies agreement to the contract terms, and that the click is required before the assenting party may proceed with the transaction/activity. The button or box and the statement should be clearly displayed.

User certification
Ideally the informative statement with the call to action should also state that the click signifies the assenting party has read and agrees to the contract terms. A company may alternatively require a second button or box to click for this purpose.

Highly visible terms
The contract terms should be presented on the screen in close proximity to (typically adjacent to or just above), the call to action, with no other distractions.

Available terms
The customer should be allowed to view the contract terms in their entirety. If using a hyperlink to display the terms, the hyperlink should be properly labeled, that is it is clear what is being presented via hyperlink.[21] Companies wishing for an additional layer of compliance may cause their clickwrap process to require the customer to scroll through the entire terms, or click the hyperlink, before making the acceptance/decline buttons or boxes active. Additionally, the customer should be able to print or download the terms for review prior to acceptance.

Enforceable terms
The company should draft their contract terms to ensure that they provide all information required by law, in the format required by law, while being reasonably brief and easy to read. If the terms include provisions such as an arbitration clause, forum selection clause or limitations of liability and warranty, the company should consider adding, either with or adjacent to the call to action, a notice to the customer that the contract terms include such provisions.[22]

Retained terms
Whether the company allows the customer to download or print the contract terms prior to or after acceptance, the customer should be informed of their ability to do so. Alternatively, the company can inform the customer, prior to and after acceptance, that the terms will be either stored in the company's online system or application for the customer's future reference or emailed to the customer for their records.

Compatible and consistent
The entire clickwrap process should be checked against a customer's use of commonly available operating systems, devices and platforms (e.g., mobile, tablet and laptop), to ensure the same process will be employed regardless of the OS, device or platform used by the customer.

Customer authentication
Processes should be included to establish the identity of the customer entering the clickwrap process and, if applicable, the authority of the individual to act on behalf of the customer.[23] Such processes may include contacting the customer using an established email address or providing a verified customer representative with unique credentials to access the assent platform.

Evidence of agreement
As discussed above, the company must retain evidence of the entire process, as well as the agreed terms, for use in the event of a later dispute. The clickwrap solution should record customer identification information and activity, including the provision of clickwrap consents, as well as the form or version of the contract terms to which the customer agreed. Additionally, records must be kept of the steps of the process at the time the customer's consent was given, as processes are often modified over time.

Other considerations for clickwrap agreements.

Deciding what type of electronic assent process to implement should be dictated by the complexity of the use case and agreement terms as well as whether a signature is required by law. Electronic records are generally permitted as evidence of agreements by both US and international laws, if proper contract formation requirements are met. Care should be taken with respect to those transactions expressly excluded from ESIGN or UETA (e.g., a will) or expressly restricted by other law from being signed or assented to electronically. Also an e-signature process with more extensive features and workflow options may be more appropriate for documents involving multiple signatories, representing a large dollar value or a higher likelihood of fraud, requiring unique consideration (e.g., restrictive covenants)[24] governmental approval, or compliance with specific electronic standards, formats or other requirements in certain jurisdictions (e.g., tax forms and reports, drug clinical trials, securities or commodities trade regulatory documents, business or entity formation and organisational documents). However, these exclusions are limited and do not impact various use cases for clickwrap agreements, including those described above in this white paper. For the right use case, an appropriately configured clickwrap solution can result in a valid, binding, admissible and enforceable agreement.

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Margo H.K. Tank and David Whitaker focus their practice on Digital Transformation Strategy as part of DLA Piper LLP's (US) Intellectual Property and Technology Practice. Margo also serves as the US Co-Chair of the DLA Financial Services Sector and Co-Chair of the Blockchain group. Together they have over four decades of experience advising commercial enterprises, including financial service providers, FinTech companies, and technology service providers on the full spectrum of regulatory compliance matters related to the use of electronic signatures, electronic records, identity management, virtual currency and other digital assets to enable fully digital transactions. Margo and David were ranked by Chambers Fintech in 2019.

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Notes

1 Clickwrap agreements can be distinguished from "browsewrap" agreements. A browsewrap agreement process does not require any affirmative action by the party to be bound to evidence assent. Typically, the terms are made available on a website and the party to be bound may or may not actually view the terms. Courts have upheld browsewrap agreements in the past based on very specific facts and circumstances. See, International Star Registry of Illinois v. Omnipoint Marketing, LLC, 510 F.Supp.2d 1015 (S.D. Fla 2007) (court upheld browsewrap terms incorporated into billing invoices); Internet Archive v. Shell, 505 F.Supp.2d 755 (D. Colo. 2007) (motion to dismiss denied as defendant raised factual issues concerning the website owner's placement and accessibility of the browsewrap terms of use).

2 It should be noted that a clickwrap process can be used to satisfy a signature when it is required by law, such as the case for statute of frauds purposes and it can be used to manifest assent to be bound to an agreement even when a signature is not required.

3 I. Lan Systems, Inc. v. Netscout Serv. Level Corp., 183 F.Supp.2d 328 (D. Mass. 2002). See also, e.g., the following earlier cases implicitly validating "click-through" agreements: Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (online registration agreement in which the user typed "agree" before registering for an online service); Hotmail Corp. v. Van$ Money Pie, Inc., 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998); Groff v. America Online, Inc., No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998) (subscriber could not have enrolled without clicking the "I agree" button next to the "read now" button or the "I agree" button next to the "I disagree" button at the end of the Agreement); Caspi v. Microsoft Network, LLC, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) (network subscribers could click box saying "I Agree" or "I Don't Agree" at any time while scrolling through the terms of the membership agreement); In re Real Networks, Inc., Privacy Litigation, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000) (user had to agree to online license agreement before installing software). Compare, Williams v. America Online, Inc., No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001) (agreement terms were accessible only by twice overriding the default choice of "I Agree" and clicking "Read Now" twice. A user who clicked "I Agree" was bound by an Agreement that had never been seen).

4 See Berkson v. GoGo LLC, 97 F.Supp.3d 359 (E.D.N.Y. 2015) (establishing general principles for enforceability of internet agreements - (1) the evidence must show that the user had notice of the agreement, (2) the link to the terms is located where users are likely to see it, and (3) a "user is encouraged by the design and content of the website and the agreement's webpage to examine the terms clearly available through hyperlinkage").

5 See id. (Requiring that "the offeror must show that a reasonable person in the position of the consumer would have known what he was assenting to." The court distinguished the noticeably smaller hyperlink for the contract terms from the large, colored "Sign In" button.).

6 This Whitepaper was prepared at the request of DocuSign, Inc. and is for information purposes only. The content should not be construed as legal advice on any matter contained herein.

7 See, supra note 3.

8 As approved and recommended by the National Conference of Commissioners on Uniform State laws in July 1999. Final draft made available at www.uniformlaws.org/viewdocument/final-act-with-comments-29?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034&tab=librarydocuments. Each state and territory of the US has its own variable version of UETA. Three states have not adopted UETA, but have adopted similar laws or are subject to ESIGN (Illinois, New York and Washington). States having adopted a version of UETA that does not conform to the requirements of ESIGN (e.g., California) are also subject to ESIGN.

9 15 USC 7001 et seq. ESIGN operates at the federal level.

10 See, e.g., Moretti v. Hertz Corp., No. 113-2972, 2014 WL 1410432 (N.D. Cal. Apr. 11, 2014) (customer had to click to accept hyperlinked terms of use to proceed with transaction); Sherman v. AT&T Inc., No 11-C-5857, 2012 WL 1021823 (N.C. Ill. Mar. 26, 2012) (online process included checkbox confirmation that customer read and agreed to terms of service). See also, Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH, Case No. C-322/14, May 21, 2015, European Court of Justice (interpreting clickwrap agreement in light of Article 23(2) of Council Regulation (EC) No 44/2001 of 22 December 2000).

11 Certain types of agreements may be excluded from ESIGN or the UETA. Before proceeding with the use or acceptance of electronic signatures generally, companies should consult with legal counsel.

12 While certain agreements may not require a signature, they still may be required by law to be in writing and therefore still benefit from provisions of ESIGN and the UETA.

13 US laws include additional requirements for enforceability that are not expressly addressed in this 10 whitepaper. When choosing to implement an electronic assent process – whether via clickwrap or a more extensive signature service – consultation with counsel is recommended to ensure the selected process results in valid, admissible and enforceable contracts that can be relied upon.

14 Certain state statutes do exhibit such preferences (e.g., Washington, Utah), however such statutes would be preempted by ESIGN.

15 eIDAS was established in EU Regulation 910/2014 of 23 July 2014 on electronic identification and repeals directive 1999/93/EC from 13 December 1999.

16 The qualified certificate should be issued by a trust service provider which verifies the identity of the signer and vouches for the authenticity of the resulting signature. The trust service provider must be on the EU Trusted List and certified by an EU member state. Additionally the qualified signature creation device must ensure (i) the confidentiality of the electronic signature creation data, (ii) the electronic signature creation data used for electronic signature creation can practically only occur once, (iii) the electronic signature creation data used for signature creation cannot be derived and the signature is protected against forgery using current available technology, and (iv) the electronic signature creation data used for signature creation can be reliably protected by the legitimate signatory against use by others.

17 A company must check each EU member state's laws to determine whether clickwrap may be used with respect to certain documents so as to be admissible and enforceable in the courts of the EU member state.

18 Companies should also evaluate their authentication practices to ensure that the individual performing the clickwrap process and agreeing to the contract terms is the customer the company intended to contract with.

19 See, infra notes 20 and 22.

20 See Vandehey v. Asset Recovery Solutions, LLC, 2018 WL 6804806 (USDC E.D. Wisc. 2018) (Acquirer of clickwrap loan agreements denied arbitration due to insufficient evidence of clickwrap process and of identifying plaintiffs as having agreed to the loans).

21 Hyperlinks are traditionally indicated visually by the use of underlining and blue font.

22 See, Applebaum v. Lyft, 2017 WL 2774153 (S.D. N.Y. 2017) at *3 (Displayed contract terms began, "PLEASE BE ADVISED: ... THESE PROVISIONS WILL... REQUIRE YOU TO SUBMIT CLAIMS YOU HAVE AGAINST LYFT TO BINDING AND FINAL ARBITRATION...."); Berkson, 97 F.Supp.3d at 403 (The court noted that Gogo did not "make an effort to draw [the consumer's] attention to its 'terms of use'", by failing to (i) inform the consumer that the terms were a contract, (ii) use all caps, (iii) refer to the terms of use as "important" and (iv) ask the consumer to "please read" the terms).

23 See, e.g., Jim Schumacher, LLC v. Spireon, Inc., No. 3:12-CV-625, 2015 WL 3949349 (summary judgment denied due to lack of evidence of credentials used by authorized company representative).

24 See, TopstepTrader v. OneUp Trader No. 17 C 4412 (N.D. Ill. 2018) (holding a covenant not to compete in a clickwrap agreement unenforceable for lack of consideration).

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