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Cyberlaw & Security Policy

Lecture 2

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Cyberlaw in e-commerce

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Topics covered:

- E-commerce – electronic / online contracts
- Challenges & possible solutions
- Basic requirements for a contract
- Software licensing agreements
- Click-wrap vs. browse-wrap

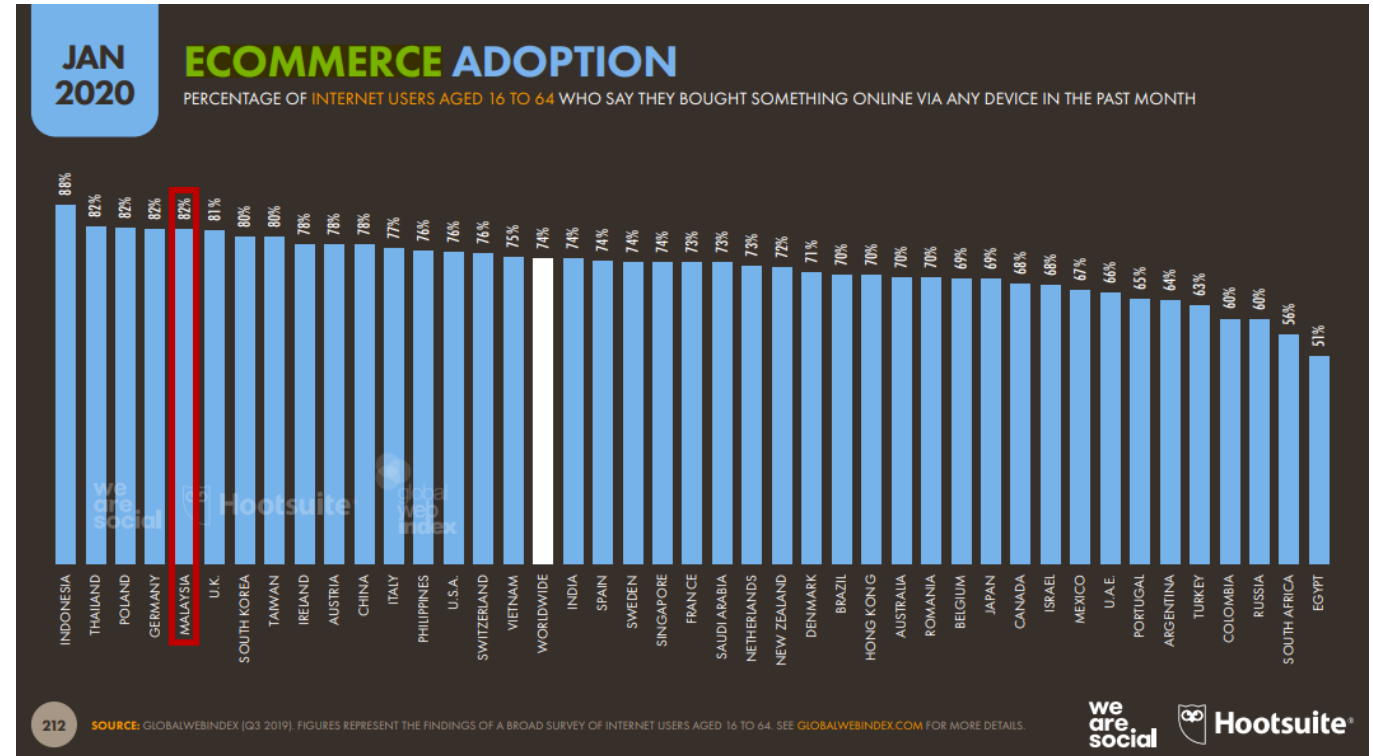
E-commerce

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- E-commerce is the process of buying, selling or exchanging products, services and information via computer networks, mostly the Internet and Intranets. E-commerce can be done by anyone with a partner, across the boundary of time and location.
- E-Commerce can be business-to-business (B2B) or Business-to-Consumer (B2C) but is currently heavily dominated by B2B in terms of revenue split.
- B2B e-Commerce can be open to all interested parties, including commodity exchange, or limited to specific qualified participants, such as private electronic markets or e-markets. B2C e-Commerce, on the other hand, is conducted by establishments, such as Amazon.com, with any individual.



- E-Marketplace is also known as a virtual market where buyers and suppliers meet to exchange information about product and service offerings, and to negotiate and execute business transactions.
- Recent studies foresee a massive growth of e-commerce in the Southeast Asian region especially in Malaysia, Indonesia, Thailand.



<https://wearesocial.com/sg/blog/2021/01/digital-2021-the-latest-insights-into-the-state-of-digital>

The need for E-commerce related laws

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- Governments and regulatory bodies throughout Asia have recognized the prospects of e-commerce and policies have been designed to amend the existing laws to deal with the emerging legal issues post by e-commerce transactions.
- To attract new online business opportunities and increase the competency of e-commerce in the Asian region, it is extremely crucial for international businessmen, entrepreneurs and their legal advisors to be familiar with the e-commerce laws, policies and regulations throughout Asia.

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Challenges in e-commerce

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Among the challenges faced in e-commerce include:

- Product originality
- False claimed prices
- Cheated images
- Fraud transaction and delivery
- Security and privacy
- Warranty



When u order something online vs. when it arrives



Among the possible solutions include:

1. Electronic transactions law

- Electronic Commerce Act 2006. It is improved by the Electronic Government Activities Act 2007, which concerns similar rules to the government sector. The Electronic Commerce Act 2006 is not a new act, it is almost similar to the United Nations Electronic Communications Conventions.
- The Digital Signature Act 1997 has enacted to protect digital signatures. The content of the current act was strengthened to support upcoming use, as the result of the Digital Signature (Amendment) Act 2011. Furthermore, the Electronic Commerce Act 2006 emphasizes broad (technology-neutral) necessities on electronic signatures.

2. Consumer protection

- The Consumer Protection Act is also known as Malaysia's general consumer legislation guarantees consumers right against a variety of repression practices and implements minimum product standards. Alterations have been made to the Act – in 2007 to widen its scope to shield e-commerce transactions and in 2010 to introduce a new approach on standard safety condition for services and the security to consumers from one-sided terms in a regular form contract.
- Consumer Protection (Electronic Trade Transactions) Regulations 2012 has also been introduced. In order to build consumer's confidence to shop and do online transaction, guidelines contained have detailed out certain requirements on online merchants and online marketplace operators, which will give positive impact to the growth of e-commerce in the country.

3. Privacy and data protection

- The Personal Data Protection Act 2010 covers the private sector only – government agencies are exempt.
- The Personal Data Protection Act 2010 closely mirrors the principles in the European Union directive, with some variations that appear to adopt parts of the APEC Privacy Framework. However, the Act does not contain any European Union style registration requirements.

4. Online content regulation

- The Communications and Multimedia Act 1998 established the Malaysian Communications and Multimedia Commission (MCMC), which is empowered to regulate the information technology and communications industries.
- The Act empowers the Commission with broad authority to regulate online speech, providing that “no content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person”. Publishers of media content in violation of this provision may face criminal penalties.

5. Cybercrime and cybersecurity

- The Computer Crimes Act 1997 prohibits 4 categories of activities related to unauthorized entry into computer systems, which are:
 - Section 3: acts committed with intent to secure unauthorized access to programs or data stored in any computer;
 - Section 4: acts committed with intent to secure unauthorized access to programs or data stored in any computer in order to commit an offence involving fraud or dishonesty;
 - Section 5: acts committed with the knowledge that the act will cause unauthorized modification of the contents of any computer;
 - Section 6: wrongful communication of any password, code or means of access to a computer to any person who is not authorized to receive the same.

6. Online Dispute Resolution And Domain-Name Regulation

- Three sections have been incorporated into Malaysia's Communication and Multimedia Act to deal with the regulation of domain names.
- Section 179 of the Act specifies that the MCMC is responsible for the planning, control and administration of electronic addresses (i.e., domain names). Section 180 gives the MCMC the power to develop a numbering and electronic addressing plan, which among other things sets out the rules for assigning and transferring electronic addresses.
- The functions contained in sections 179–181 appear to be delegated to MYNIC, the registrar of Malaysia's country code top-level domain (ccTLD). In addition to acting as registrar, MYNIC is the registry and administrator of the .my domain.

Challenges and solutions in e-market place

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Challenges	Solutions
<ul style="list-style-type: none"> • Product originality • Warranty 	Consumer Protection Act 2007.
<ul style="list-style-type: none"> • Cheated images • Falsed claimed prices 	Communications and Multimedia Act 1998
<ul style="list-style-type: none"> • Fraud transaction and delivery 	Electronic Commerce Act 2006
<ul style="list-style-type: none"> • Privacy and security 	Personal Data Protection Act 2010

- The rise of the internet and e-commerce has made online contracts very common. They are used every day.
- People enter into a contract when buying goods through online retailers, such as Lazada.com.my or shopee.com.my. They enter into auction contracts on carsome.my or lelong.my.
- A person agrees to terms-of-use contracts when using free wireless internet at a local coffee shop. In many instances, you might not even be aware that you are entering into valid, enforceable contracts.
- Online contracts are contracts that are entered into over the internet or through a technological medium. There is nothing particularly special about these contracts other than the medium used to form the contract. The underlying transactions are the same for online contracts and traditional contracts.

Basic Requirements for a Contract

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- Section 7 of the Electronic Commerce Act 2006 (ECA) stipulates that contracts for commercial transactions (matters relating to the supply or exchange of goods or services) *can be formed electronically*.
- The same legal principles applying to the formation of contracts apply to contracts formed online or electronically, that is:
 - There must an *offer*
 - Clear and unequivocal *acceptance* of the offer
 - *Consideration* and the intention to create legal relations

Software licensing agreements












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1. Software licenses can generally be fit into the following categories: proprietary licenses, free software license, open source licenses. The features that distinguish them are significant in terms of the effect they have on the end-user's rights.
 - a) Proprietary software is computer software which is the legal property of one party. The terms of use for other parties is defined by contracts or licensing agreements. These terms may include various privileges to share, alter, disassemble, and use the software and its code.

Software licensing agreements (cont...)

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- b) Free software is computer software distributed under terms that allow users to run the software for any purpose as well as to study, change, and distribute it and any adapted versions. Free software is a matter of liberty, not price: all users are legally **free to do what they want with their copies of a free software** (including profiting from them) regardless of how much is paid to obtain the program. Computer programs are deemed "free" if they give end-users (not just the developer) ultimate control over the software and, subsequently, over their devices. And unlike freeware, free software may be distributed for a fee.
- c) Open source software is a type of computer software in which source code is released under a license in which the copyright holder grants users the rights to use, study, change, and distribute the software to anyone and for any purpose. Open-source software may be developed in a **collaborative public manner**. Open-source software is a prominent example of open collaboration.

	 Free software	 Open-source software	 Freeware	 Public-domain software
Definition	"FREE" is a matter of liberty, not price	"OPEN" doesn't just mean access to the source code	"FREE" refers to price, while freedom of the use is restricted by creator	"PUBLIC DOMAIN" belongs to the public as a whole
Ground philosophy	Social movement	Development methodology	Marketing goals	Copyright disclamation
Ground rules	Four Freedoms https://www.gnu.org/philosophy/free-sw.html	Open Software initiative https://opensource.org/osd		Creative Common Organization https://creativecommons.org
Free of charge	Not necessary	Not necessary	✓ YES	✓ YES
Covered by copyright law	✓ YES	✓ YES	✓ YES	✗ NO
Examples	   		 	

<https://blog.usejournal.com/understanding-open-source-and-free-software-licensing-c0fa600106c9>
<https://www.digitalocean.com/community/tutorials/free-vs-open-source-software>
<https://www.auroralinux.net/open-source-vs-free-software-whats-difference-matter/>

End User License Agreement (EULA) or Terms of Use Agreements

- Alternative names for clickwrap or browse-wrap agreements.
- May be considered counteroffers or proposals for additional terms.
- Attempts to regulate user behavior. They state how a consumer can and cannot use certain products or services. They tend to severely limit a consumer's rights and give the owner or vendor of the product or service many rights.
- If a consumer fails to follow the terms of these agreements, an owner can try to sue for breach of contract. If a consumer follows the terms of these contracts, then he or she is regulating his or her behavior in a manner that is most likely advantageous to the owner or vendor of the product or service.

NOTE

A 2010 study reported that more than half of the study's participants spent only 8 seconds reviewing EULAs.²⁷ A 2017 study found that 97 percent of people ages 18 to 34 agree to terms of service contracts without reading them at all.²⁸

Ref [5] in Teaching Plan

EULAs and Terms of Use Agreements

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- Consumers need to take the time to read these types of agreements. They are not all created equal. It would be a mistake to think that these agreements simply govern the intellectual property rights of the owners of a product or service.
- Although many EULAs and terms of service do this, some also have unexpected terms. For example, some of these terms include language that would **allow the vendor to install additional software** onto a consumer's computer system. The additional software could be **used to learn the consumer's internet habits** in order to supply targeted advertisements.
- These types of contracts also can have terms about **additional licensing fees** or **deeply buried upgrade, support, or maintenance fees**. For applications used on mobile computing devices, such as smartphones, these types of contracts also **might grant the application access to other types of personal user data** stored on the device. Reading the EULA or terms of service agreement is the only way for a consumer to know what rights he or she is giving up.

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Ref [5] in Teaching Plan

Common Clauses in EULAs

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- Warranties
- Limitation of liability
- Arbitration
- Indemnity
- Severability
- Merger
- Choice of law/forum selection
- License granting
- Restrictions on use
- Infringement information
- Termination of licensing

Common Clauses in EULAs

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License Agreements

End User License Agreement

 [Print](#)
 [Email](#)

This End User License Agreement ("EULA") is between the individual consumer or business entity that will use the Software ("You") and the applicable entity identified in the "Licensor Table" located at www.dell.com/swlicensortable ("Licensor").

This EULA governs Your use of: (a) the object code version of Dell branded software that is preinstalled on Dell hardware or otherwise provided to You pursuant to a purchase contract, quote, order form, invoice or online procurement process (each, an "Order"); (b) associated software license keys, if any ("License Keys"); (c) updates to such software ("Updates"); (d) the documentation for such software; and (e) all copies of the foregoing (collectively, "Software"). If You accept this EULA, or if You install or use the Software, then You agree to this EULA unless You already have a signed agreement with Dell Marketing L.P. or one of its affiliates ("Dell") that includes licensing terms that govern Your use of the Software ("Pre-Existing Agreement"). If You accept this EULA or install or use the Software on behalf of a business entity, then You represent that You have authority to take those actions, and this EULA will be binding on that business entity unless the entity already has a Pre-Existing Agreement. If You do not agree to this EULA, do not install or use the Software.

If You are a business entity and You purchase Software from a third party ("Reseller") who sublicenses the Software to You under the terms of an agreement between You and such Reseller (a "Sublicense Agreement"), then the terms of Your Sublicense Agreement with the Reseller shall govern Your use of the Software and not this EULA. Resellers may only grant rights, and must pass through conditions, consistent with this EULA. Thus, even though Your Sublicense Agreement is between you and the Reseller, by installing or using the Software, You acknowledge and agree that: (a) any license rights in the Sublicense Agreement that are greater than the license rights in this EULA shall not apply; (b) any license conditions in this EULA that are not contained in the Sublicense Agreement apply to You; (c) the limitations of liability set forth in this EULA will apply in favor of Licensor, its affiliates and suppliers despite the existence of a Sublicense Agreement; and (d) Licensor is a third-party beneficiary of the Sublicense Agreement and is entitled to exercise and enforce all of the Reseller's rights and benefits under that Sublicense Agreement.

If You purchase Software as an individual consumer, nothing in this EULA affects your statutory rights if the laws of your state or country do not permit it to do so.

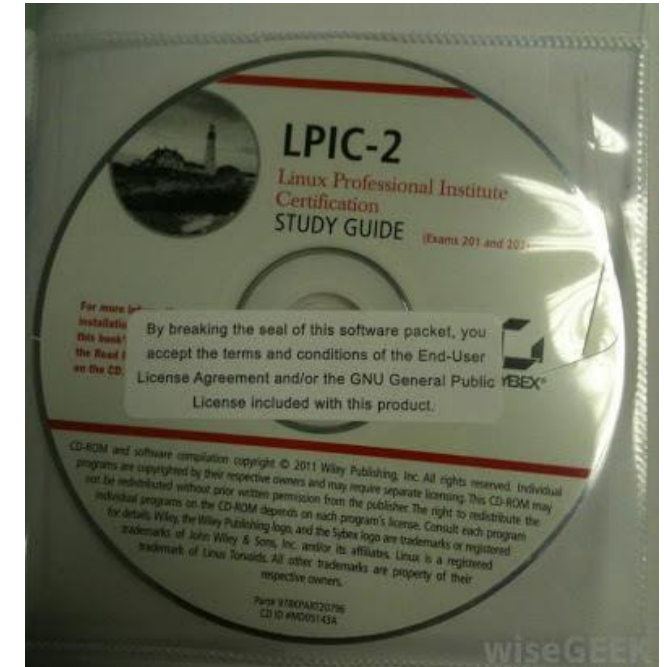
1. License Grant.

1.1. Right to Use. Subject to and in consideration of your full compliance with the terms and conditions of this EULA, Licensor grants to You a personal, non-exclusive license to use the Software during the period stated in the applicable Order (if no period is specified, You may use the Software perpetually). If You are an individual consumer, this license grant allows You to use the Software in connection with Your own personal use. If You are a business entity, this license grant allows You to use the Software in connection with the internal business

Shrink-wrap and Click-wrap Agreements

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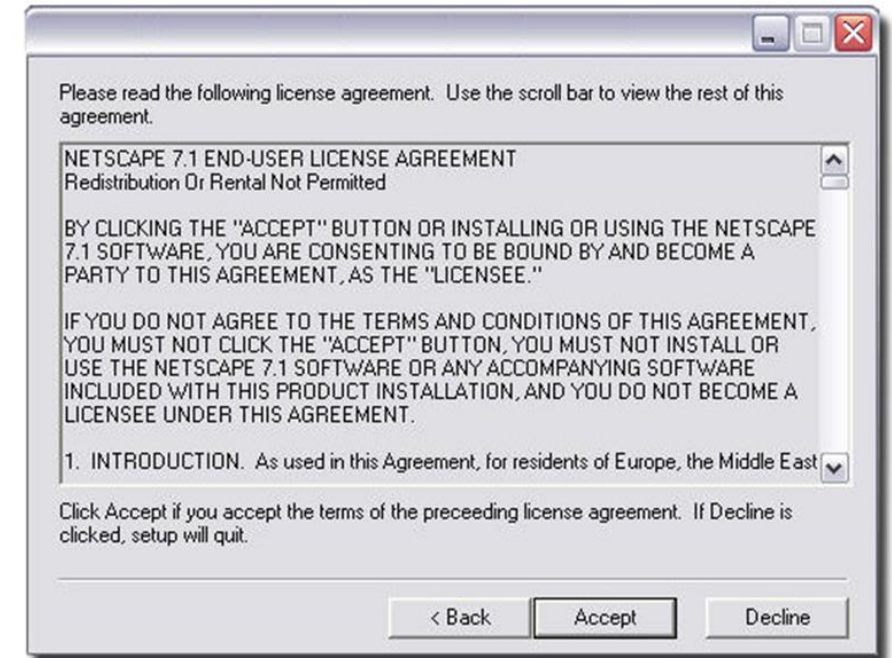
1. A "shrink-wrap" agreement gets its name from the fact that many retail software packages are covered in plastic or cellophane "shrink-wrap."
2. Many vendors provide (in language on the box or package or sometimes on the wrap itself) that customers accept the various agreements that pertain to such software by simply tearing the wrapping from the package. In many instances, customers are given the option of returning the item if they do not wish to be bound by the terms of the shrink-wrap agreement.
3. The term "click-wrap" is derivative of the term "shrink-wrap," and it is a natural result of the fact that the computer industry began using one, and then the other, form of agreement in rapid succession.



Shrink-wrap and Click-wrap Agreements (cont...)

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1. Unlike shrink-wrap agreements, where a customer learns the terms of the agreement after buying the product, the terms of a click-wrap agreement are typically provided to a user online, during a visit to a Web site.
2. Under a typical arrangement, terms and conditions are provided when purchased software is installed or downloaded, or when a site is accessed, or service is requested on the Internet.
3. Terms are usually presented in a separate frame on the same screen with an “accept” button or in a new window with an “accept” button contained therein. Terms may also be presented as a hyperlink next to an “accept” button.
4. Terms and conditions are presented on a “take it or leave it” basis; no bargaining between the parties with respect to the terms of the agreement.
5. Acceptance of the terms is typically manifested by clicking on an onscreen icon or button.



Browse-wrap Agreements

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1. Placement of a link to the terms of use on a webpage, but requiring no affirmative action to manifest acceptance by a user.
2. Assent to the terms is shown by using the website or service after notice of the existence of the terms of use, no other action is required.
3. Terms and conditions are presented on a “take it or leave it” basis; no bargaining between the parties with respect to the terms of the agreement.
4. Accepted by courts, but with more restrictions than click-wrap agreements.
5. Courts seem more willing to enforce browse-wrap agreements against businesses than against individual consumers. This may be a result of the facts which courts have faced in the cases that have been brought rather than a signal of judicial preference.



click-wrap vs. browse-wrap agreements

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Clickwrap agreements: Electronic version of shrink-wrap license.

- Computer user agrees by pointing the cursor to a particular location on screen and clicking “I Agree”
- Common with software downloaded from the Internet or for software installed on a CD-ROM

Browse-wrap agreement: website **terms and conditions of service or use** are posted on the website typically as a hyperlink at the bottom of the screen.

- Agreement allows user to view terms of agreement, but does not require the user to take any affirmative action
- Users do not need to “click” to accept website terms

Best Practices for Enforceable Click-wrap Agreements

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- Conspicuous presentation of the terms prior to any payment, download, access or installation of software or other goods and services.
- Require the checking of a box, clicking of a radio button, or scrolling the entire agreement to affirm acceptance before clicking “accept,” and, if possible, offer a “decline” button as well.
- Place the terms, or a hyperlink to the terms, on the same screen and near the “accept” button.
- Allow the user to easily read and navigate all of the terms.
- Consider highlighting especially important terms in a different color or font size to increase the likelihood of a user viewing them.
- Provide an opportunity to print and/or save a copy of the terms.
- Offer the user the option to decline as prominently and by the same method as the option to agree.

Best Practices for Enforceable Click-wrap Agreements (cont...)

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- Ensure that the terms are easy to locate online after the user agrees.
- Consider offering an easy to read and understand summary of the terms, especially key terms like forum selection and arbitration clauses.

Best Practices for Enforceable Browse-wrap Agreements

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- Place links to the terms of use or sale in prominent positions on every page of a website in a position visible upon initial loading of the page.
- Clearly name the link to the terms of service agreement as leading to the terms and conditions of sale or use.
- The link to terms of service should lead directly to the terms, not a separate landing page that requires further investigation.
- The terms of service should be written in easy to read font and language. This is especially true for those terms most likely to be challenged, such as arbitration and forum selection clauses.
- Highlight especially important terms in a different color or font size to increase the likelihood of a user viewing such terms.
- During checkout or at the time of a sale, make links to the terms of use or sale conspicuous by changing font size or position of the links.

Best Practices for Enforceable Browse-wrap Agreements (cont...)

- Do not require a user to scroll a page to find the terms, especially on a page where any transaction will take place.
- Provide the user with an opportunity to print and/or save a copy of the terms.
- Ensure that the terms are easy to locate online for future reference after the user agrees.
- Place a disclaimer on all pages near the link stating that continued use of the page or service binds the user to the terms contained behind the link.
- Offer an easy-to-read and understandable summary of the terms, especially key terms like forum selection and arbitration clauses.

Enforceability of click-wrap, browser-wrap and shrink-wrap contracts in Malaysia

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- To date, there is no Malaysian case law that has expressly discussed the enforceability of click-wraps, browse-wraps and shrink-wrap contracts.
- The fundamental legal issue surrounding such contracts is whether there is a clear and unequivocal acceptance of the terms and conditions attached to the contracts.
- As a purchaser is typically prompted to accept or reject a retailer's terms and conditions (therefore a clear acceptance of the terms) under the click-wrap contract, the risk of such category of contract being unenforceable is low.

Enforceability of click-wrap, browser-wrap and shrink-wrap contracts in Malaysia (cont..)

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- *Browse-wrap contracts* (where terms of use for the website bind the user by virtue of browsing the website) and *shrink-wrap contracts* (where terms only come to notice of the user when the product is received) on the other hand, are generally more controversial as they give rise to whether the:
 - Customer had notice of the terms and conditions.
 - Terms and conditions had been accepted.

Relevant regulations for doing business online in Malaysia

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- Electronic Commerce Act 2006 (ECA), which recognizes the validity of electronic contracts and signatures.
- Personal Data Protection Act 2010 (PDPA), which governs the use of personal data (including the personal data of website users).
- Consumer Protection Act 1999(CPA), which applies to all goods and services offered to consumers in trade (including any trade transactions conducted through electronic means) where goods/services are primarily purchased, used or consumed for personal, domestic or household purposes.
- Consumer Protection (Electronic Trade Transactions) Regulations 2012 (ETT Regulations) which regulate operators that supply goods or services through a website or online marketplace.

Relevant regulations for doing business online in Malaysia (cont..)

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- Trade Descriptions Act 2011 (TDA), which prohibits false trade descriptions and false or misleading statements, conduct and practices in relation to the supply of goods or services (including through electronic means).
- Sales and Goods Act 1957 (SGA), which governs contracts for the sale of goods in Malaysia.
- Communications and Multimedia Act 1998 (CMA), which regulates the multimedia and communications industry in Malaysia, including content applications service provider (such as website operators).

Limitations in relation to e-contracts and e-signatures

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- The application of the ECA is expressly excluded in certain transactions.
- Agreements in relation to these transactions cannot therefore be formed electronically.
- These include, among others, the creation of wills and codicils (add-ons), the creation of trusts and negotiable instruments, such as:
 - bills of exchange - a written order to a person requiring them to make a specified payment to the signatory or to a named payee)
 - promissory notes - written promise by one party (the note's issuer or maker) to pay another party (the note's payee) a definite sum of money, either on demand or at a specified future date.

Thank You



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