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Chapter 9 - Incorporation of Terms

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CHAPTER 9 INCORPORATION OF TERMS

INTRODUCTION

[9.1] The central theme of this chapter is the adaptation of contract formation principles pertaining to the incorporation of terms. The existing methods of incorporation must be mapped onto an environment without tickets, counters, walls, paper and reverse sides of attached notes. This chapter assumes that it is impossible to directly apply these principles in an environment missing the very elements they were built around. It does not attempt to create their functional equivalents but focuses on using web-technologies to achieve that same purpose as traditional methods of incorporating terms.

The previous chapter dealt with the broad implications of HTML for ascertaining the source and scope of contractual statements. It focused on the additional factors to be taken into account when distinguishing between terms and representations as well as on the existence of writing and documents. Even if websites are regarded as “documents” and “writing,” such functional equivalents do not facilitate the application of contract formation principles. The latter developed in a three-dimensional world, predominantly around the concept of paper. This chapter attempts to map various methods of incorporating terms onto the two-dimensional environment of websites.

The previous chapter asked what representations were made? This chapter asks whether those representations were made in a manner warranting their inclusion in the contract. It focuses on how contractual terms are presented. Most importantly, it examines how users are notified about the existence of terms in an environment that is not always obviously transactional and how terms are made available. Emphasizing the procedural aspects of determining which terms have become part of the contract, the various methods of incorporating terms are referred to as “incorporation procedures.”

The incorporation of terms in on-line contracts has not been the subject of much academic debate in Australia. Despite the absence of clear guidelines, e-commerce developed numerous “click-through” patterns, or transacting interfaces, which can be regarded as practical implementations of the traditional principles. With all doubts concerning the validity and enforceability of on-line transactions removed, web-merchants want to contract on their terms. Accordingly, there are many practical examples of how web-merchants adapted incorporation procedures to the on-line environment. As demonstrated by recent case law, not all of those “adaptations” are successful.¹

¹ eBay International AG v Creative Festival Entertainment Pty Limited [2006] FCA 1768

Nowhere does the relationship between contract law and technology become as prominent as in this chapter. The incorporation of terms, and sometimes the very existence of the contract, hinges on the design of the web-interface, or – to be more precise – the contracting sequence.² Throughout the discussion it must be remembered that the subject of analysis are not lengthy negotiations where parties gradually reach agreement, be it face-to-face or by correspondence, but sequences of clicks occurring in response to dialog-boxes, pop-up windows and interactive screens. The aim of the analysis, however, is the same as in contracts formed by traditional means: ascertaining the intention of the contracting parties. What terms have been proposed by the web-merchant? What terms did the user assent to?

The starting point is the assumption that a valid and enforceable contract has been formed. The question is: what are its terms? The problem is usually approached in a post factum manner: have the terms become incorporated? Theoretically, a forward-looking question could be asked: how to incorporate terms in on-line contracts? This chapter acknowledges the need to look-backward when determining the effectiveness of any incorporation procedure and avoids sounding like “how-to” guide, but also suggests possible solutions. While these solutions must be grounded in legal principle, not technology, the latter can be put to good use to preserve or reinforce the principle. As stated by one author: the Internet can be used for good and for ill.³

The question whether terms have become incorporated is strictly related to the moment of formation. The difficulties in determining which act constituted acceptance and when it became effective must constantly be borne in mind. An acceptance can only occur in response to an offer. This leads back to the necessity to differentiate between offers and invitations to treat. Chapter 5 discussed websites in search for distinguishing factors between offers and invitations; this chapter narrows down the analysis and focuses on the manner of presenting contractual terms. This chapter analyses the web-merchant’s side, especially with regards to the adequacy of notice and availability of terms, while the next chapter, on electronic assent, discusses the user’s side, the “click.” The next chapter asks is there a contract? It focuses more on the method of acceptance than on the contents of the offer. Each element of the contract formation process is interrelated and all separations are, by definition, artificial. Such “separations” are, however, necessary as different technologies create different problems; different sides of the transaction raise different questions.

Roadmap

[9.2] To place the discussion into context, the chapter commences with an explanation of the importance of terms in the on-line environment and continues with a note on the impact of consumer protection regulations. Next, it presents the general principles of incorporating terms, including a brief discussion of recent developments in US cases pertaining to this subject. Without attempting to present a comparative analysis of incorporation procedures, it aims to establish the extent, if any, to which guidance can be obtained from US approaches.

The chapter proceeds to describe a number of Internet-specific factors, which must be taken into account when adapting incorporation procedures to the on-line environment. The discussion centres on the intricate relationships between user dependence and technical manipulations of the web-merchant, between e-commerce business models and the limited space available to present information. It aims to present the complexity of the novel transacting environment and the need to steer clear from oversimplifications.

² see e.g. *Register.com Inc v Verio Inc* 356 F3d 393 (2nd Cir 2004)

³ J Braucher, *Replacing Paper Writings with Electronic records in Consumer Transactions: Purposes, Pitfalls and Principles* (2003) 7 NCBKNI 29

The chapter revisits the traditional principles in light of the Internet-specific factors discussed above. The question is not whether these principles hold true in the novel transacting environment but how to apply them. The question is also not one of constructing suitable analogies or modifying the offer and acceptance model for on-line transactions. The discussion centres on how to use web-technologies to fulfil the purposes of incorporation procedures.

The importance of terms

[9.3] Incorporation procedures can only be discussed as part of the transactional landscape of e-commerce. Four general observations must be made.

First, the importance of terms in on-line transactions must be emphasized. This may sound confusing: why should terms be more important on-line than in the real world? As indicated throughout this thesis, on-line contracting creates many uncertainties, regarding both the manner the contract is formed as well as the contractual subject matter. In the former case, terms may provide default rules filling out the "grey areas," such as when acceptance becomes effective. This type of provisions resembles the communication rules found in EDI trading partner agreements,⁴ which prescribe the form and legal effects of the parties' interactions.

Regarding the contractual subject matter, the latter may consist in traditional goods or services or take the form of virtual goods, i.e. information. The legal status of such virtual subject matter is unclear.⁵ The same information has a different value depending on what rights are granted to the transferee. To use a popular example: the difference between a single user license and a 1000 person network license lies solely in the terms accompanying the code.⁶ The contractual subject matter is shaped by the terms of the contract. Absent default rules governing transactions in information terms gain importance by defining the rights of the parties. Furthermore, even traditional goods and services often come with a set of standard terms that co-define their value. Without going into a detailed discussion of the "contract-as-product" theory,⁷ it must be assumed that buyers have the right to know the product they are acquiring and the terms accompanying the product.⁸

Second, on-line contracts are often subject to two sets of terms: one governing the use of the website ("terms of use"), the other - the specific transaction ("terms of transaction"). The former may contain a number of Internet-specific provisions, such as the exclusion of liability for website errors⁹ (i.e. the malfunctioning of the electronic agent deployed by the web-merchant) as well as communication rules prescribing that, for example, by staying on the site the user accepts all its terms.¹⁰ The terms of the transaction resemble those governing the same type of transaction in the real world, possibly with the addition of provisions regulating distance contracts. The division disappears whenever the website itself constitutes the subject matter of the contract. The communication rules contained in the terms of use may also prescribe the manner the main transaction is entered into, creating an intersection between the two sets.

⁴ see Chapter 1 [1.10]

⁵ see generally: Nimmer & Towle para 5.02[2]

⁶ R Nimmer, Article 2B: Proposals for Bringing Commercial Law into the Information Age (1999) 14 JCL at 7; R Nimmer, Through the Looking Glass: What Courts and UCITA Say about the Scope of Contract Law in the Information Age (2000) 38 Duq L Rev 255

⁷ F H Easterbrook, Cyberspace and the Law of the Horse (1996) U Chi Legal F 207 at 214

⁸ M J Radin, Online Standardization and the Integration of Text and Machine (2002) 70 Fordham L Rev 1125 at 1139

⁹ M Chissick, G Vesey, The Perils of On-Line Contracting (2000) 6 (5) CTLR 121-122

¹⁰ See generally: S K Sandeen, The Sense and Nonsense of Web Site Terms of Use Agreements (2003) 26 HMLR 499

Third, as mass-market e-commerce leaves little room for individually negotiated transactions, most terms encountered in web-based transactions are standardized.¹¹ Standard terms are less likely in consumer-to-consumer transactions, where parties negotiate via email. Standard terms are often discussed in relation to what conditions are unfair (content control) and what requirements standard terms must meet to become incorporated (inclusion control).¹² Assuming that issues pertaining to the fairness of standard terms are not Internet-specific, this chapter focuses on the mechanics of incorporation.¹³ The reasons for employing standard terms remain the same, on-line and in the real-world.¹⁴ The ability to negotiate is not a prerequisite of a valid agreement, neither is the existence of actual choice. Care must be taken not to suggest that certain problems are created by the Internet. Generally, web-merchants impose their terms and limit the manner the other party can assent to them. The problem is not that standard terms cannot be negotiated but that they are encountered in an unfamiliar environment.

Fourth, historically most of the information on the Internet was available for free and without any restrictions. People generally do not expect that any terms govern the browsing of websites, not to mention that their behaviour may result in the formation of a contract.¹⁵ While most of the information remains available free of charge, the absence of payment does not mean that there is no contract. The user's consideration may consist in the permission to study his or her browsing behaviour.¹⁶ Surprisingly, incorporation procedures lie at the heart of many fraudulent on-line practices, such as spyware.¹⁷ To illustrate: users are presented with sequences of screens or pop-up windows but quickly click-through to close them, not realising that some of those pop-ups contain a provision stipulating that further progression within the site constitutes an acceptance of the terms which are provided behind a hyperlink at the bottom at the page and that – in consideration for the ability to use the website – the user agrees for the merchant to study his or her browsing behaviour. Users can also be presented with scroll-through windows containing license agreements for free software. Users click the "I agree" button without realizing the existence of a provision that allows the provider to install additional software on the user's computer and collect personal information. In both situations, users are unaware of the consequences of their actions and of the product they are acquiring. In both situations, however, it can be claimed that a contract was formed and that the terms became incorporated. After all, the objective approach requires appearances of intention. Websites can be designed to take advantage of the objective theory of contract, without actually informing the other party of the terms. One can speak of an abuse of the procedural aspects of incorporation and the objective approach to evaluating contractual intention. The minimal legal requirements have been met because, theoretically, the terms were presented and the user "clicked" in agreement. The web-merchant could always claim that had the user paid more attention to what is displayed on his or her screen, he or she would have noticed the link to the terms or the text on the pop-up window.

Consumer aspect

[9.4] Business-to-consumer e-commerce constitutes a large part of on-line transactions. While consumer protection regulations are not directly relevant to the principles of contract formation, it must be appreciated that they have been the fastest to respond to the changed transacting environment.

¹¹ Nimmer & Towle para 5.03[4][b]

¹² Nimmer & Towle para 5.07[2] discussing procedural and substantive unconscionability.

¹³ The fairness of a particular provision can impact on the effectiveness of incorporation or the enforceability of a specific provision. It may be easier to declare a particular term unincorporated than unfair or unreasonable.

¹⁴ One Internet-specific reason for using standard terms is the deployment of electronic agents. Standard terms are easier to process by a machine, see: M J Radin, *Humans, Computers and Binding Commitment* (2000) 75 Ind LJ 1125 at 1150; see also *ProCD, Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) at 1451

¹⁵ A Joint, *Regulating the Message* (2002) 20 ITL 11.1

¹⁶ J K Winn, *Contracting Spyware by Contract* (2005) 20 Berkeley Tech L J 1345 at 1349, 1354

¹⁷ J M Blake, "Robust Notice" and "Informed Consent:" the Keys to Successful Spyware Legislation (2006) 7 Colum Sci & Tech L Rev 2

Accordingly, they provide examples of protective mechanisms tailored to its idiosyncrasies. Different regulatory bodies focus on different aspects of on-line transactions. They all explicitly recognize the dangers of on-line contracting, particularly regarding its perceptive deficiencies and the information asymmetry between the parties.¹⁸ The OECD stresses the necessity to ensure that on-line consumers are informed about their rights and obligations,¹⁹ the FTC focuses on the practical aspects of presenting information in a hyper-linked environment,²⁰ Australian regulations not only require that web-merchants provide the terms of the transaction, but also that such terms be clearly distinguishable from advertising material;²¹ the European Directive on E-commerce prescribes that web-merchants clearly explain the steps necessary to conclude a contract,²² amongst others. Consequently, there is an informational and a procedural aspect to consumer protection. Consumer protection regimes may also require that web-merchants disclose specific terms, such as the minimal length of the contract, or display them in a specific manner, such as on the same screen where the contractual subject matter is presented.²³ All regulations aim at enabling consumers to make informed choices – both regarding the contractual subject matter and the fact of entering into a contract. The distance between the parties is compensated with more and better information.²⁴

Consumer protection rules may override or supplement contract formation principles in individual circumstances. Care must be taken, however, not to assume that certain on-line procedures reflect contract law principles and construct arguments on that basis. Contract law is antecedent to consumer protection regulations and remains unchanged – irrespective of who are the parties of the transaction. At the same time, courts adopt a less liberal approach to incorporation procedures whenever the other party is a consumer thereby indirectly counterbalancing the negative effects of standardization or the unfairness of specific terms. A more liberal approach, often labelled as “facilitating” e-commerce, favours web-merchants, as it is them who impose terms on the other party. Broader policy implications of incorporation procedures are beyond the scope of this thesis.

“Distortions” by consumer protection rules notwithstanding, incorporation procedures are nothing but an application of the offer and acceptance model. Despite their inevitable overlap, contract formation principles are separate from consumer protection issues. This chapter is about adapting incorporation procedures to the on-line environment, not about consumer protection in e-commerce.

¹⁸ See generally: C Coteanu, *Cyber Consumer Law and Unfair Trading Practices*, Aldershot 2005

¹⁹ Guidelines for Consumer Protection in the Context of Electronic Commerce, approved on 9 December 1999 by the OECD Council C (99)184/FINAL

²⁰ See: Federal Trade Commission, *Facts for Businesses: Big Print. Little Print. What’s the Deal? How to disclose Details*; available at www.ftc.gov/bcp/online/pubs/buspubs/bigprint.htm, which requires that information affecting the cost of an offer be disclosed on the same page and next to the price, not via hyperlink; see also *Dot.Com Disclosures*, available at www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html

²¹ Australian Guidelines for Electronic Commerce, Commonwealth of Australia 2006, paras 29 & 30, available at www.treasury.gov.au

²² Directive 2000/31/EC on Certain Legal Aspects of Information Services, in particular Electronic Commerce in the Internal Market, Art 10 (a); See also: Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts, Art 4 & Art 5

²³ for a detailed discussion see Nimmer & Towle paras 5.04, 5.05

²⁴ K Alboukrek, *Adapting to a New World of E-Commerce: The Need For Uniform Consumer Protection in the International Electronic Marketplace* (2003) 35 *Geo Wash Int’l L Rev* 425 at 435, 436

GENERAL PRINCIPLES

[9.5] The adaptation of incorporation procedures to the on-line environment must commence with a discussion of basic principles. The aim is not to recite textbooks or re-open old discussions but to distil the main premises of effective incorporation. The key principle of determining whether a term has been effectively incorporated is whether a positive answer would be given to the question:

Would a reasonable person, in the position of the party who denies that the term has become incorporated, understand that the other person intends to contract exclusively on the basis that the term is part of the contract?

In applying this principle, the courts focus on the basis on which the term is alleged to be incorporated. Just like in the case of differentiating between offers and invitations to treat, the courts have developed a number of methods of analysing the effectiveness of incorporation procedures in typical transacting scenarios. Although incorporation procedures can be roughly divided into those with a signature and those without a signature,²⁵ a more detailed division is presented for analytical purposes. Accordingly, terms may become part of the contract:

- (a) by signature on a contractual document;
- (b) by reasonable notice;
- (c) under the principles established in the ticket cases;
- (d) by sufficient course of dealing; or
- (e) by reference.²⁶

As this thesis examines first time transactions between strangers, arguments assuming the existence of previous dealings are excluded. In light of the relative novelty of on-line contracting it is also difficult to speak of general usages of trade or reasonable expectations. Moreover, in the predominant number of situations the question is not whether a set of terms has become part of the contract, but whether a particular term has been incorporated, such as an exclusion clause or a choice-of-law provision. Although the incorporation of terms is traditionally discussed under the heading “express terms,” some procedures are more correctly referred to as incorporation by implication because the terms are not always expressly spelled out in the contractual document, if any.

Incorporation by signature

[9.6] If a document is signed, then “in the absence of fraud, misrepresentation or a plea of non est factum,”²⁷ the signatory is bound, regardless whether he or she has read the document or has knowledge of the terms contained therein.²⁸ A misrepresentation of the effect or the contents of the document may prevent incorporation.²⁹ The most important qualification is that the document be contractual in character: “[j]ust as not all contracts are embodied in documents, so also not all documents signed at the conclusion of negotiations are contractual in character.”³⁰

The legal character of the document and therefore the effectiveness of a signature as a method of incorporation depend on the knowledge (actual or assumed) of the person being presented with the

²⁵ Law of Contract paras 3.9, 3.10

²⁶ Carter on Contract [10-140]

²⁷ Law of Contract para 3.9

²⁸ Carter on Contract [10-150]; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Parker v South Eastern Railway Co* (1877) 2 CPD 416

²⁹ *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805

³⁰ Carter on Contract [10-150]; see also: *Joseph Grogan v Robin Meredith Plant Hire and Triact Civil Engineering Ltd* (1996) 15 Tr LR 317

document. This knowledge usually derives from the circumstances, such as when parties interact in a commercial setting.³¹ The situation is less clear when the context is not *prima facie* transactional and the party being handed the document is not required to provide payment.³² The title of the document is not decisive. The party relying on a signed document need not bring the contractual character of such document or its terms to the attention of the signatory – unless it contains unusually onerous provisions. In principle, however, “signature” and “notice” are separate and notice is generally not required when terms become incorporated by signature.³³ Terms may not become incorporated when a document is signed only after the parties have orally agreed on the terms or after the contract has been performed.³⁴

It is irrelevant that the signatory did not read, understand or expressly agree to the terms.³⁵ From an objective perspective, the only two relevant questions are: was the document contractual and was it signed. The signature binds its maker almost absolutely.³⁶ Being regarded as evidence of assent,³⁷ it constitutes a representation of willingness to be bound by the contents of the document. Despite the broad understanding of the term “signature,” its many functions and possible manifestations, it must be noted that the “classic” cases relating to incorporation by signature dealt with handwritten signatures on documents that were evidently contractual.

Incorporation by notice

[9.7] Another incorporation procedure consists in giving the other party notice of the terms. Notice must be reasonable in light of the accompanying circumstances or likely to bring the terms to the other party’s attention.³⁸ More notice is required in the case of particularly onerous or unusual provisions.³⁹ Accordingly, the degree of notice depends on the contents of the provision to be incorporated.⁴⁰ To cite a famous statement:

Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing it before the notice could be held to be sufficient.⁴¹

The sufficiency of notice is evaluated objectively, with the reasonable addressee in mind. Individual characteristics of the addressee, such as illiteracy, are irrelevant⁴² unless the person making the notice should have known of them.⁴³ Notice need only relate to the term’s existence, not their contents.⁴⁴ It is also assumed that people must know that certain contracts are generally governed by terms.⁴⁵ Even in case of signed documents, which are not obviously contractual in character, the terms contained in the

³¹ *L’Estrange v F Graucob Ltd* [1934] 2 KB 394; *Roe v Naylor (No1)* [1917] 1 KB 712 at 716 per Lord Atkin; *Toll (FGTC) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52

³² *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661

³³ see: E Peden, J W Carter, *Incorporation of Terms by Signature: L’Estrange Rules!* (2005) 21 JCL 1 at 15

³⁴ *D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749, Full Ct; *Eggleston v Marley Engineers Pty Ltd* (1979) 21 SASR 51

³⁵ For an opposing view see: J R Spencer, *Signature, Consent, and the Rule in L’Estrange v Graucob* (1973) 32 CLJ 104

³⁶ J R Spencer, above at 36 at 117; *McCutcheon v MacBrayne* [1964] 1 WLR 125 at 134 per Lord Devlin

³⁷ E Peden, J W Carter, above at note 34 at 13

³⁸ *Chapelton v Barry Urban District Council* [1940] 1 KB 532; *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379;

³⁹ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163; [1971] All ER 686, CA; *Richardson Spence & Co v Rowntree* [1894] AC 217; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433

⁴⁰ M Clarke, *Notice of Contractual Terms* (1976) 35 CLJ 69

⁴¹ *Spurling Ltd v Bradshaw* [1956] 1 WLR 461 at 466

⁴² *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41

⁴³ *Geier v Kujawa Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd’s Rep 364

⁴⁴ Law of Contract para 3.13

⁴⁵ See generally: M Clarke, above at note 40 pp 51-81; *Cockerton v Naviera Aznar, SA* [1960] 2 Lloyd’s Rep 450

document will not be incorporated absent sufficient notice.⁴⁶ Needless to say, notice must be given before or at the time of contract formation.⁴⁷

The ticket cases

[9.8] A large body of case law has developed around so-called “ticket cases.” The latter refer to situations where one party offers to contract on the terms contained in or referred to in a document given to the other party during the contract formation process. Such document may take the form of a simple ticket.⁴⁸ The retention of the ticket indicates assent to the terms of the contract. While the ticket is usually regarded as a written offer containing or referring to contractual terms,⁴⁹ it may also be provided in execution of an existing agreement.⁵⁰ Its legal effect depends on the moment of delivery and the manner the party providing the ticket has structured his or her contracting procedure.⁵¹ As courts often engage in hair-splitting analyses regarding the exact moment the ticket was handed over, it can be assumed that the time of delivery may be decisive for successful incorporation. Tickets delivered after formation are irrelevant for the contents of the contract.⁵²

The effectiveness of incorporation also depends on whether the recipient knows or should know that there is writing on the ticket.⁵³ The recipient is deemed to know that the writing refers to terms if the circumstances so indicate or if it was reasonable to assume so. Incorporation by means of tickets depends on whether there was sufficient notice that the ticket contained or referred to terms or, again, the nature of the document was obvious.⁵⁴ In principle, a non-contractual document will not incorporate terms.⁵⁵

Incorporation by reference

[9.9] Space constraints often prevent the inclusion of the full text of the terms in the contractual document. The contracting parties may record “the bare essentials”⁵⁶ of the agreement and refer to another document containing terms. Usually reference is made to the standard terms of one of the parties or a particular industry.⁵⁷ The party seeking to incorporate terms must specifically refer to the document containing such or to the place where it can be found. Successful incorporation may depend on the specific wording of the reference⁵⁸ and/or the construction of the incorporating document.⁵⁹ The courts have tolerated references to terms available in remote locations, such as references on tickets made to terms in offices.⁶⁰ A mere reference may not, however, constitute sufficient notice.⁶¹

⁴⁶ Carter on Contract [10-150]

⁴⁷ Olley v Marlborough Court Ltd [1949] 1 KB 532

⁴⁸ Carter on Contract [10-170]

⁴⁹ MacRobertson Miller Airline Services v Comr of State Taxation (WA) (1975) 133 CLR 125

⁵⁰ Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1991) 22 NSWLR 1; MacRobertson Miller Airline Services v Comr of State Taxation (WA) (1975) 133 CLR 125 at 136; Hollingworth v Southern Ferries Ltd., (“The Eagle”) [1977] 2 Lloyd’s Rep 70; Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197

⁵¹ eBay International AG v Creative Festival Entertainment Pty Limited [2006] FCA 1768

⁵² Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 at 169

⁵³ Parker v South Eastern Railway Co (1877) 2 CPD 416

⁵⁴ Hood v Anchor Line (Henderson Bros) Ltd [1918] AC 837; Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163; see also: Atiyah p 186

⁵⁵ Law of Contract para 3.15

⁵⁶ Carter on Contract [10-190]

⁵⁷ see, e.g. ABA Digital Signature Guidelines, par. 1.15 and comment 1.15.2 relating to the incorporation of certification practice statements

⁵⁸ OK Petroleum AB v Vitol Energy SA [1995] 2 Lloyd’s Rep 160; see generally: P Todd, Incorporation of Arbitration Clauses into Bills of Lading (1997) JBL 331-349

⁵⁹ Hong Kong Borneo Services Co Ltd v Pilcher [1992] 2 Lloyd’s Rep 593

⁶⁰ Hollingworth v Southern Ferries Ltd (“The Eagle”) [1977] 2 Lloyd’s Rep 70

⁶¹ Hollingworth v Southern Ferries Ltd (“The Eagle”) [1977] 2 Lloyd’s Rep 70 at 78

General observations

[9.10] In attempting to distil the premises of successful incorporation a number of observations can be made:

First, despite the above divisions, incorporation procedures often combine multiple methods: tickets may contain references, references may constitute notices, notices may refer to the location where the terms can be found. "Notice" may be regarded as common to all methods, except for incorporation by signature. Even then, however, it may be required with regards to specific terms or in relation to the character of the document. The notice may constitute the term itself, such as when the relevant provisions are directly presented on the ticket or poster.

Second, the subjective knowledge of the other party (i.e. the party not seeking to include terms) is irrelevant. The other party need not know, understand or read the terms. Once the existence of terms is brought to his or her attention, the party is expected to make inquiries regarding their actual content. As their existence most likely derives from the transactional context, the minimal requirement appears to be that the other party must be aware that he or she is about to enter into a contract.

Third, some manipulations on the part of the person seeking to incorporate terms are implicitly permitted: terms may be presented in small black print on brown paper⁶² or cross-referenced between multiple documents and locations.⁶³ As the other party bound by appearances, persons seeking to incorporate terms can reduce the likelihood of their actual review by providing minimal yet sufficient notice or making it cumbersome to obtain them.⁶⁴

Fourth, terms must be available - a requirement that is usually lost in discussions regarding the reasonableness of notice.⁶⁵ Such availability may be purely theoretical, as in the case of references to remote locations. In ticket cases, the contract is regarded as complete only after the recipient had a chance to examine its contents and acquaint him/herself with the terms.⁶⁶ Both in *L'Estrange*⁶⁷ and in *Toll*,⁶⁸ the signature was placed on a document, which contained the full text of the terms. The signatories were given an opportunity to read them but took the chance of being bound by terms they did not know. Even if the opportunity to read is rarely availed of⁶⁹ it must be assumed that the terms must be available to become incorporated.

The purpose of the notice must be remembered: to inform the other party that terms exist and, in combination with availability, enable a decision whether to enter into a particular transaction or not. The party seeking to incorporate terms must actively bring them to the attention of the other party, then it is the other party who actively inquires about their contents.

⁶² *L'Estrange v F Graucob Ltd* [1934] 2 KB 394

⁶³ *McCutcheon v David MacBrayne, Ltd* (1964) WL 19517 (HL)

⁶⁴ See: Atiyah p 188 who stresses that notice, which is sufficient in law, may in fact be fictitious; see also: *Toll (FGTC) Pty Limited v Alphapharm Pty Limited* [2003] NSWCA 75 at 112 by Young CJ: "In a system where contractual intentions are judged objectively, doing what was reasonably sufficient is enough."

⁶⁵ *M Clarke*, above at note 40 at 72

⁶⁶ *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1 at 159.

⁶⁷ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394

⁶⁸ *Toll (FGTC) Pty Limited v Alphapharm Pty Limited* [2003] NSWCA 75

⁶⁹ *MacRobertson Miller Airline Services v Comr of State Taxation (WA)* (1975) 133 CLR 125 at 137

A US Perspective

[9.11] A number of observations must be made with regards to recent developments in the US. These broadly relate to issues of terminology and to the availability of terms. It is not intended to engage in a comparative analysis but to establish the “usability” of those solutions for Australian on-line transactions.

Terminology

[9.12] US cases and literature discusses incorporation procedures in terms of enforceability.⁷⁰ The question is not whether or what terms have become incorporated but whether terms, or a particular term, are enforceable. As only terms that have been incorporated can be enforced, this difference in terminology can be disregarded for all practical purposes. Both analyses, (i.e. whether a term is incorporated or enforceable) aim at establishing whether a term became part of the contract. It must further be noted, that incorporation procedures are often discussed in relation to the “manifestation of assent.”⁷¹ The relationship between “manifestation of assent” and “incorporation” is examined in the following chapter.

US cases and literature also speak of “notice,” “reason to know” and “opportunity to review.” These concepts easily translate into the common law concepts, whereby the “opportunity to review” can be equated with availability and the “reason to know” with the assumption that in certain circumstances users are deemed to know that terms exist – be it due to adequate notice or the clearly transactional context.

Availability

[9.13] A relatively recent phenomenon is the concept of “rolling,” “layered” or “terms later” contracting.⁷² Without engaging into a historical analysis, it can be pointed out that it developed in parallel to the concept of “shrink-wrap” licenses. Leaving aside issues pertaining to the general enforceability of shrink-wrap licenses or the correctness of these approaches in light of the UCC,⁷³ the most prominent decision in this area must be briefly mentioned.

*ProCD v Zeidenberg*⁷⁴ (“ProCD”) concerned the purchase of off-the shelf software. The software was accompanied by a license the terms of which were displayed only once the purchaser started using it. The license provided that the purchaser may return the software within a prescribed period if he or she did not agree with its terms. The retention of the software beyond this period indicated their acceptance. In its famous ruling, Judge Easterbrook held that the contract did not occur when the software was purchased in the shop but only after the user had a chance to read the terms and failed to return the software. Relying on the practicalities of mass-market standard contracting, he argued that the licensor, being the master of the offer can prescribe acceptance in any manner and that intention can be expressed in any manner.⁷⁵ The

⁷⁰ see e.g. *Moore v Microsoft Corp* 293 AD 2d 587 (2nd Dep’t 2002); *Register.com Inc v Verio Inc* 126 F Supp 2d 238 (SDNY 2000); *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000),

⁷¹ *Nimmer & Towle* para 5.03

⁷² *Nimmer & Towle* para 5.03[4][a]; W H Lawrence, *Rolling Contracts Rolling Over Contract Law* (2004) 41 *San Diego L Rev* 1099; R A Hillman, *Rolling Contracts* (2002) 71 *Fordham L Rev* 743

⁷³ for a detailed critique see: R C Bern, “Terms Later” Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, *Judge Easterbrook Notwithstanding* (2004) 12 *J L & Pol’y* 641; J Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice* (2002) 46 *Wayne L Rev* 1805; see also the dissenting judgement of Sanders, *J in MA Mortenson Company Inc v Timberline Software Corp* 970 P2d 803 (Wash 2000)

⁷⁴ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996)

⁷⁵ *ProCD, Inc v Zeidenberg*, 86 F 3d 1447 at 1452

notice of the term's existence was not in question. The ProCD reasoning was followed in numerous cases.⁷⁶

Although ProCD was technically a case about contract formation, not incorporation, it concerned the enforceability of terms disclosed after an event that would commonly be regarded as the moment of formation: the exchange of money and goods.⁷⁷ Three points arise regarding the applicability of the ProCD reasoning in Australia:

First, the provision of terms after formation, or, alternatively, the artificial extension of the contract formation process by deferring the act of acceptance is inadmissible. The end of the contract formation process is marked by acceptance - not by the provision of terms. Theoretically, any incorporation procedure could be manipulated to enable the claim that the contract was formed only after the terms became available.

Second, the case separates notice of the terms' existence from their availability. Such separation is concomitant with providing the terms after contract formation and goes against the basic idea that parties must agree on all the terms of the contract. To repeat the obvious: one cannot agree to terms provided after acceptance.⁷⁸ Assent cannot be manifested if there is no reasonable opportunity to review the terms. Especially when the terms co-define the product. The right to return the software after reading the terms does not change anything in this regard. From the perspective of the reasonable addressee, the contract was formed in the shop.

Third, the offeror's power as the master of the offer does not extend to prescribing acceptance by silence, an involuntary act or by rejecting the purchased goods. An additional complication in ProCD was that the licensor was not a party to the sales transaction. A non-party cannot impose terms on the purchaser and prescribe in those very terms how acceptance is to take place. A party should know from the beginning of the contract formation process, which of his or her acts will constitute acceptance or how to express acceptance.

In light of the foregoing, the approach to US case law must be cautious and selective. In Australia, the general rule remains that the offeree can only accept what was offered and that terms must be available before acceptance. The introduction of any terms after acceptance is a proposal for the modification of the original contract. Simply continuing with the agreement does necessarily imply acceptance of such proposal. Furthermore, the offeror cannot prescribe acceptance by an act of rejecting the goods.⁷⁹ The practical application of the offer and acceptance model is difficult enough to warrant any further distortions.

⁷⁶ *Hill v Gateway 2000 Inc* 105 F 3d 1147 (7th Cir 1997); *Bower v Gateway 2000 Inc* 676 NYS 2d 569 (NYAD 1998); *I.Lan Systems Inc v Netscout Serv Level Corp* 183 F Supp 2d 328 (D Mass 2002)

⁷⁷ Earlier shrink-wrap cases precluded the enforcement of terms, which were disclosed after the purchaser obtained the software, see: *Step-Saver Data Systems Inc v Wyse Technology* 939 F 2d 91 (3d Cir 1991); *Arizona Retail Systems, Inc v Software Link Inc* 831 F Supp 759 (D Ariz 1993)

⁷⁸ In the words of R C Bern: such practice is a "deceptive strategy under the guise of efficiency to bind customers to adverse terms concealed from them until after they have made the purchase decision and parted with their money;" above at note 73 at 696

⁷⁹ *Carter & Harland* [229]

INTERNET-SPECIFIC FACTORS

[9.14] The following sections describe the main differences between the real-world and the on-line transacting environment. The adaptation of incorporation procedures must occur with a number of Internet-specific factors in mind. Their implications for contract law may not be apparent at first glance. Chapter 5 emphasized that the on-line environment changes the manner contractual intention is presented; Chapter 8 drew attention to the difficulties in objectively evaluating the web-merchant's intention from the perspective of the addressee. Incorporation procedures require an even more fine-grained evaluation of both sides of the transaction.

User Dependence

[9.15] The focus is traditionally placed on users of websites, the addressees of the web-merchants' manifestations of intention. A common theme is that web-merchants should use the available technologies to effectively communicate their terms. While this view is correct, the difficulties encountered by the web-merchant must also be appreciated. It is also correct to assume that the web-merchant's manifestation of intention must be objectively evaluated from the side of the addressee. A balance must be struck, however, between objectivity and the reasonableness of the addressee. The problems are reminiscent of those discussed in Chapter 7, which dealt with the allocation of risks for terminating devices and the degree to which senders should allow for the idiosyncrasies of the addressees' network environment. In evaluating the addressee's reasonableness, the differences in how people use specific technologies come into play again. These differences pertain to the IT literacy of the user: his or her selection of the browser type, his or her ability (or willingness) to upgrade or customize the browser.

Web-merchants design websites with certain assumptions regarding how they will be viewed. They expect a popular browser type, a reasonably recent browser version and default settings. In evaluating the web-merchant's manifestations of intention and the effectiveness of incorporation procedures a number of additional factors must be allowed for. All of those factors are beyond the web-merchant's control. Throughout the discussion it must be remembered that incorporation procedures should aim at communicating terms. This translates into the provision of reasonable notice and the availability of terms. The fulfilment of these basic requirements encounters numerous "technical problems."

Display size and scrolling

[9.16] The "amount" of content presented on a website depends on the size of the computer display. The whole web-page may not fit onto the screen – even when the browser window is maximized. Users may be required to scroll horizontally or vertically to see all of its text and graphical elements. Courts often emphasize that scrolling reduces the likelihood of viewing the remainder of the page.⁸⁰ Even in the case of large displays users may keep several windows open simultaneously, none of them "maximized." Consequently, only a small amount of a web-page is visible by default, generally the upper left area. The latter must convey all the important information, both legal and promotional. The displayed content is even more limited when websites are viewed on so-called alternative browsing agents, such as mobile phones or PDAs. In one of the most prominent cases on on-line contracting, *Specht v Netscape Communications*,⁸¹ the visibility of the hyperlink depended exclusively on the size of the display and on the necessity to scroll down to the bottom of the page. The hyperlink constituted notice of the terms and provided the terms upon activation. In another case, however, the court did not perceive the necessity of scrolling through the terms as a factor preventing their effective incorporation.⁸²

⁸⁰ *Specht v Netscape Communications*, 306 F 3d 17 at 23, 24

⁸¹ *Specht v Netscape Communications* 306 F 3d 17 at 23

⁸² *Novak v Overture Services Inc* 309 F Supp 2d 446 (EDNY 2004) at 452

Browser version, type and customization

[9.17] As indicated earlier, the same website renders differently (i.e. displays different content or a different arrangement of the same content) depending on the browser type and version. It is an oversimplification to assume that web-merchants bear all risks resulting from the users' browser version or type. The problem must be looked at from both sides - the web-merchant's and the user's.

From the side of the web-merchant, the question is: which browser type should web-pages be designed for? It appears reasonable to code websites in accordance with applicable standards, the web-development specifications published by the W3C. At the same time it is common knowledge that the most popular browser, Microsoft's Internet Explorer ("IE"), does not adhere to W3C standards. Web-merchants face a difficult choice: design web-pages for display on Internet Explorer or follow the W3C. The choice of browser type has a direct bearing on the functionality of the site and the manner its contents are displayed. The implications of this problem for contract law are surprising: effective incorporation often hinges on the reasonableness of notice. This reasonableness generally translates into the visibility or conspicuousness of the notice. Colours and fonts may not survive a specific browser type.⁸³ The visibility of a notice or the positioning of a hyperlink providing the terms may depend on the specific browser type or version. A notice may not be displayed because the addressee's browser does not support the required technology, terms may not be available because the relevant link is not visible.

Looking at the problem from the addressee's side: is it reasonable to use a browser other than IE? IE is the most popular, not the best browser. It is common knowledge that some other browsers are more advanced than IE. An additional factor is security. As IE is notorious for being prone to security breaches, it is reasonable to use a different browser – especially if a user stores sensitive data on his or her computer. Users of such different browsers, however, may not see all of the contents that would have been visible on IE. Have the terms been incorporated if the notice or terms were not displayed? Or: who should bear the risk of "invisible notices"? Chapter 7 comes to mind. It posed the question which party should bear the risk of failed receipt or illegible messages in the event of incompatible mail-applications. Leaving aside issues of outdated versions and failure to upgrade, it may be impossible to state whether the use of a particular browser is reasonable. Persons who are sufficiently IT literate to use a browser other than IE will most likely be able to explain such choice by technical considerations. In sum, not using the browser which most websites have been designed for cannot be regarded as unreasonable. The more IT literate the user, the higher the likelihood that he or she will use the Mozilla, Opera or Safari browsers. An additional consideration is that IE does not exist for Mac computers. Is it unreasonable to use Mac computers? The latter are generally regarded as superior to mainstream PCs. Yet, the differences between how Safari (the native Mac-browser) and IE display the same content can be quite dramatic.

Designing for IE can be considered reasonable for the web-merchant, avoiding IE may be reasonable for the user. The only practical solution is to design multiple versions of the same web-site for different browsers or, as is often the practice, specifically indicate which browser type and version the website is designed for. In the latter scenario the risk is clearly placed on the user/addressee – unless a certain browser type is not available for a specific platform.

To inject further complexity into the discussion, browsers can be customized. User settings override default settings. Users can adjust the size and colour of fonts, they may turn off basic functionality, such as image display, JavaScript, or Java and ActiveX support. It is an oversimplification to state that users customize their browsers at their own risk because they change the manner a website was intended to display. Again, security aspects enter the discussion. Chapter 7 indicated that addressee's have the right to reject messages carrying potentially dangerous content. In the case of browsers, it may be reasonable to deploy high security settings and permit unrestricted content solely from trusted sites. While such customization cannot be regarded as unreasonable it may prevent the

⁸³ Nimmer & Towle para 5.05[5]

display of certain elements of a website, including notices. These problems will not disappear anytime soon. A general trends in browser design is endowing the user with more options – and therefore more choice – regarding the display of contents. Consequently, the risk of invisible notices will remain difficult to apportion. Courts will face increasingly difficult decisions involving not just a legal analysis of the reasonableness of notice, but a technical analysis of the reasonableness of browser choice and settings.

Connection type

[9.18] Depending on the type of connection, users may chose not to load graphics and thus will not see links embedded in imagemaps.⁸⁴ Users with dial-up modems are less likely to view complex graphic elements, pictures and flash animations than users connected via broadband. The type of connection may impact on the manner the site is displayed. It must be borne in mind that broadband penetration in industrialized countries has only now passed the 50% mark.

Sequence of presentation and points of access

[9.19] Websites are a pull medium - it is the user who requests the contents and decides on the sequence in which to view them. As HTML “destroys” the linearity of print,⁸⁵ pages may be viewed non-sequentially,⁸⁶ there being no logical order determined by the physical constraints of a book or real-world shop. Websites are non-linear, the user’s navigational patterns are unpredictable, web-pages may be accessed out of context. As each web-page has multiple points of access,⁸⁷ users may bypass the homepage and “enter” the transactional part of the website directly. This has little precedent in the real world, where shops have one entry point and a number of fixed or unavoidable elements, such as doors and counters. This very problem arose in *Specht v Netscape Communications*⁸⁸ where one of the plaintiffs accessed the page where the product could be obtained not from the homepage but through a shareware site that deep-linked straight into the transactional part.⁸⁹ Accordingly, he was not able to see the hyperlink indicating the existence of terms.

Web-merchant manipulations

[9.20] While web-merchants have little control over the manner users view and navigate their websites, they also have novel ways of manipulating user behaviour:

“[E]-businesses ... have more avenues for tinkering with the presentation format of their electronic boilerplate. Businesses can collect information as to which presentation formats induce customers to visit the link to the ‘terms and conditions’ of their agreements, and which deter them from doing so. This information could allow businesses to experiment with different ways of presenting the boilerplate and to relay on those designs that reduce the number of consumers who read them. Just as businesses utilize fine print and hidden terms in the paper world to increase the costs of finding and reading terms, certain methods of presentation of the terms ... can also discourage e-consumers from reading the boilerplate.”⁹⁰

⁸⁴ P Lynch, S Horton, *Web Style Guide*, 2nd ed, available at www.webstyleguid.com, Chapter 3 p 26

⁸⁵ J W Delapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law* (1999-2000) 88 Ky J 809 at 872

⁸⁶ P Lynch, J Horton, above at note 84 p 2

⁸⁷ W A Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code* (1997) 34 San Diego L Rev 1263 at 1290, 1291

⁸⁸ *Specht v Netscape Communications* 306 F 3d 17 at 24

⁸⁹ See also Chapter 8 [8.10]

⁹⁰ R A Hillman, J J Rachlinski, *Standard Form Contracting in the Electronic Age* (2002) 77 NYULR 429 at 479

Manipulative merchants need only provide a theoretical possibility to learn about the terms' existence,⁹¹ while applying techniques, which minimize the likelihood of review. The problems are similar to those in the real world, where terms are often contained in small print. The difference to the real world lies in the fact that both courts and customers are used to standard terms and disclaimers in small-print, know that they exist and where to expect them, whereas on-line such expectations may not exist – usually due to the lack of obvious transactional context. Furthermore, web-merchants act in a familiar, "self-designed" environment, while users must adapt their cognitive abilities to the web-interface.

Internet Advertising

[9.21] Websites are designed primarily from a marketing perspective.⁹² Business models are largely based on the sale of advertising space and on the number of times the site is accessed per day (so called "hits" or "eyeballs"). Websites are designed to attract and retain attention. Immediate graphic impact takes precedence over the logical organization of information. Pop-up windows, floating adds and banner advertisements of various shapes and sizes distract from the main flow of information and often interfere with the displayed contents. The battle for the user's attention is compounded by the pressure to complete the transaction in as few clicks as possible.⁹³ The reasonableness of notice must always be evaluated against multiple distracting factors: notice often "competes" with a multitude of graphical and textual elements presented on computer screen.

What is new about that? After all, the layout of products in supermarkets and the arrangement of advertisements in magazines are also directed at attracting attention and ultimately selling a product. The problem lies in the unfamiliarity of the environment, in the compounded effect of hypertext, dynamic and active content, the spatial confinement of the screen and the unpredictability of where terms might be found. In the real world, many situations are perceived as contractual and terms are expected – even if they are not read. In the real world, people are also generally aware of the traditional "manipulations" because over the last century they have remained relatively constant.

ADAPTATION OF INCORPORATION PROCEDURES

[9.22] Incorporation procedures assume a three-dimensional environment where the person seeking to incorporate terms controls the manner they are presented. Principles from the world of paper transactions "apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to "Download Now."⁹⁴ Traditional incorporation procedures must be mapped onto an environment lacking those very elements that form their basis in the real world. The following sections examine the possibility of using web-technologies to achieve the main purpose of incorporation procedures: creating actual or constructive knowledge of the terms, so that acceptance or any act of assent can encompass them.

Adaptation or Modification?

[9.23] The point of departure is the assumption that no new methods need be developed or new elements introduced into the contract formation process. Full account must, however, be taken of the novelty of the environment and the resulting impossibility of a direct application of the principles pertaining to the

⁹¹ see: J R Maxeiner, *Standard-terms Contracting in the Global Electronic Age: European Alternatives* (2003) Yale J Int'l L 109 at 115, 119; see also: R A Hillman, J J Rachlinski, above at note 90 at 494

⁹² S Jones, *Forming Electronic Contract in the United Kingdom* (2000) 11 ICCLR 301 at 301

⁹³ W Effros, above at note 87 at 1284

⁹⁴ *Specht v Netscape Communications* 306 F 3d 17 at 31, see also: *In re RealNetworks Inc* No 00 C 1366, 2000 WL 631341 (ND Ill May 8, 2000)

incorporation of terms. “What was a valid application of the principles in Parker’s⁹⁵ day and in Hood’s⁹⁶ day may not be a valid application today.”⁹⁷ A slight modification in the application of those principles must therefore be proposed. The suggested solutions do not constitute a modification of the principles themselves. They can be regarded as a shift in emphasis or an adaptation of the analysis regarding the effectiveness of incorporation. The only principle that must be unconditionally followed is that acceptance occurs in response to an offer and can only encompass the terms of the offer. The principle is too obvious to be repeated: parties must know what they are agreeing to. Combined with the objective evaluation of intention, the premises of all effective incorporation procedures can be reduced to notice, availability and/or signature.

The divisions of incorporation procedures into “by signature,” “by notice” etc., need not and cannot be maintained. Maintaining such divisions would necessitate the creation of functional equivalents of, for example, tickets. The creation of such equivalents was described as futile, failing to enable a direct application of those contract formation principles that require tangible embodiments of writing.⁹⁸ To continue the ticket example: rather than replicating the contracting sequence involving the provision of tickets on-line, the focus should be placed on achieving the purpose of the ticket – informing the other party of the existence of terms and, possibly, indicating the location of the full text.⁹⁹ The main function of tickets, namely being a “voucher or receipt for the money that has been paid”¹⁰⁰ can still be fulfilled. In on-line purchases of airline and concert tickets the “electronic ticket” is generally provided after the contract formation process is completed: it is sent to the purchaser’s email address, displayed in a printable window, alternatively the “real” paper ticket is delivered by mail. In these instances, the ticket is provided too late to introduce terms and cannot be considered a written offer¹⁰¹ or affect the terms of the antecedent contract.¹⁰² Accordingly, it cannot serve incorporation purposes.¹⁰³

A Perfect Information Environment?

[9.24] The web appears to be the perfect information environment, where any imaginable piece of information is readily available. In the words of one author: “Could the cyber consumer argue the lack of information within the context of an environment, which by definition is synonymous with ‘wealth of information?’”¹⁰⁴ Despite the abundance of information, there are still no widely accepted standards of presenting and organizing the content of websites. While some conventions are slowly emerging, each shopping experience may be a new experience, each interface differs, the contents of every website may be arranged differently. On-line contracting remains in a transitional period, where trade usages, user expectations and business models are still being formed. It is difficult to state when and where users should expect terms. It is not a question of being or buying on-line for the first time but visiting a specific web-site for the first time. Consequently, users still face disorientation and difficulties in finding the

⁹⁵ Parker v South Eastern Railway Co (1877) 2 CPD 416

⁹⁶ Hood v Anchor Line (Henderson Bros) Ltd [1918] AC 837

⁹⁷ Hollingworth v Southern Ferries Ltd (“The Eagle”) [1977] 2 Lloyd’s Rep 70 at 78

⁹⁸ see Chapter 8 [8.22]

⁹⁹ See R Abeyratne, Electronic Ticketing – Current Legal Issues (2005) 70 J Air L & Com 141 who discusses the implications of electronic ticketing for the airline industry and points to the inability to provide terms in the inner jacket of tickets; J M Moringiello, “Paper World” Analogies to Web Site Terms and Conditions: Travel Tickets and Other Similar Forms, available at: www.abanet.org/buslaw/newsletter/0014/materials/paperworld.pdf, who discusses the requirement that tickets “reasonably communicate” the terms of the contract.

¹⁰⁰ Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 at 169; see also Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197 at 228

¹⁰¹ eBay International AG v Creative Festival Entertainment Pty Limited [2006] FCA 1768

¹⁰² Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197 at 227; eBay International AG v Creative Festival Entertainment Pty Limited [2006] FCA 1768 at 45, 53

¹⁰³ S Y Chow, Contracting in Cyberspace: The Triumph of Forms? (1997) 41-Jun BBJ 16 at 27

¹⁰⁴ C Coteanu, above at note 18 p 17

required information.¹⁰⁵ These problems are mirrored on the side of web-merchants: how to effectively communicate with users, i.e. how to bring specific contents to their attention?

Web-technologies can be used both to facilitate on-line contracting and to make it more difficult; they can create informed consent but they can also create underinformed and overwhelmed users.¹⁰⁶ Although users have the possibility to transact in the comfort of their own homes and read the terms at their leisure,¹⁰⁷ they often display a sense of urgency and haste, impatiently clicking through numerous screens. None of the transacting parties seems to take full advantage of the available technologies of communicating information: web-merchants are more interested in selling advertising space and counting “eyeballs” than communicating the terms of the contract; web-users, on the other hand, seem more interested in quickly clicking through numerous screens rather than studying the content of specific web-pages. If something does not retain their attention, they “click-away.”

Some technologies appear tailor-made for incorporation purposes, with regards to both notice and availability. Their deployment, however, turns out to carry risks. Push technologies, which could serve to provide terms or notices, are perceived as intrusive and distracting. User’s often install pop-up blockers to prevent their display. Similarly, there are methods to create the “red hand pointing to words printed in red ink.” Users may, however, disable active content thereby preventing the execution of scripts – the very technology required to display the moving hand. Consequently, technologies that could provide better notice and availability than the traditional methods of displaying terms and notices, cannot be relied on.

Incorporation “by Hyperlink”

[9.25] The only technology that generally “survives” browser types, versions and user-settings are hyperlinks. While it must be acknowledged that not all hyperlinks are displayed by every browser, they can be regarded as the best available technology for incorporation purposes.¹⁰⁸ There is always a trade off between the effectiveness of a given method and the practical possibilities of its deployment: pop-up windows can be blocked, scroll-bars can be ignored and hyperlinks require minimal user activity.

Terms must be made available.¹⁰⁹ Theoretically, taking into account the non-linear character of websites and the different access paths to the transactional parts, the text of the terms should be placed on every page of a website. This, however, would require scrolling – a technique not always perceived favourably by the courts. The only acceptable solution appears to be the provision of terms behind hyperlinks.¹¹⁰

¹⁰⁵ M Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?* (2000) 16 Ga St U L Rev 741 at 775, 780

¹⁰⁶ J Braucher, *Rent-Seeking in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online* (2001) Wis L Rev 527 at 531, 539

¹⁰⁷ *Novak v Overture Services Inc* 309 F Supp 2d 446 (EDNY 2004), where the court stressed that the plaintiff had an opportunity to read the terms and conditions with no time limitation, at 452; see also: *Real Networks, Inc Privacy Litigation* No 00 C 1366, 2000 WL 63 1341 (ND Ill May 8, 2000)

¹⁰⁸ V Gautrais, *The Colour of E-consent* (2003-2004) 1 UOTTL T J 189 at 199

¹⁰⁹ See also CUECIC Art 13

¹¹⁰ See, e.g. MLEC Art 5bis, “Incorporation by reference”: Information shall not be denied legal effect, validity and enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message. A D Murray, *Entering into Contracts Electronically: The Real WWW*, in L Edwards, C Waelde, ed, *Law & the Internet*, Oxford 2000, p 30

Despite claims to the contrary,¹¹¹ terms need not be unavoidable. Minimal user activity seems admissible:¹¹² users can be expected to activate a hyperlink in order to view terms. There is no justification, however, to make users search for terms or revert to a different communication method. The temporal or spatial separation of notice from availability, justifiable in the real world on practical grounds, can be compared to placing the text of terms behind multiple clicks. There is no justification for such separation on-line. While the actual place of the text of the terms is irrelevant, they should be no more than a click away.¹¹³

Hyperlinks are ideally suited to combine notice with immediate availability.¹¹⁴ They also combine two incorporation methods: by notice and by reference. The first concerns the visibility of the link; the second, like in the real-world, focuses on the wording of the link or the incorporating document, i.e. the context in which it is placed. It must be assumed that the "incorporating" link should be clear and conspicuous, or – as prominent as possible under the given circumstances. Cases abound with practical guidelines about the positioning and colour of links.¹¹⁵ Bearing in mind their importance as a method of providing notice of the terms and the terms themselves, there is little choice in positioning: to ensure universal visibility it must be placed on every page of a website in the upper left area. At the same time, a convention is emerging to provide a "legal link" on the bottom of every page, together with copyright notices and links to privacy policies. Despite the fact that the Specht court specifically stated that the presence of a scrollbar does not imply the need or create the obligation to actually scroll down the page,¹¹⁶ it is becoming increasingly difficult to claim ignorance of those links as they are present on practically all e-commerce websites.

Last but not least, the permanent positioning of the incorporating hyperlink in one of the above areas on every page of the website solves problems of timing and enables the preservation of the classic contracting sequence, which assumes the provision of terms before acceptance. This "permanent availability" ensures that terms are available throughout the contract formation process and counterbalances the difficulties in establishing which act constituted an offer and which can be regarded as acceptance.

Incorporation by Electronic Signature

[9.26] While the on-line environment appears to accommodate incorporation by notice and by reference, more problems arise with incorporation by signature. This method of incorporation hinges on the existence of a "signature" and a contractual document. As described in Chapter 8, both the server- and the client-side of a website can be regarded as documents. So can screens. Leaving aside the distributed character of their contents and whether they constitute writing, the more urgent question is what makes them contractual? Is it the mere fact of placing terms thereon? Is it the fact of signing? It is easy to succumb to circular reasoning: because something is signed it must be contractual, therefore it incorporates terms.¹¹⁷

¹¹¹ see: Federal Commission, Proposed Statement Regarding E-Commerce, 63 Fed. Reg. 24996-01 (1998); see also: L J Wilhelmi, Ensuring Enforceability: How Online Businesses Can Best Protect Themselves From Consumer Litigation (2002) 86 Marq L Rev 181 at 200

¹¹² Kilgallen v Netowrk Solutions Inc 99 F Supp 2d 125 (D Mass 2000)

¹¹³ see: CompUSA Agrees to Discontinue Practice of Placing Disclosures behind Several Links (2001) Electronic Com & L Rpt (BNA) 562

¹¹⁴ V Gautrais, above at note 108 at 210

¹¹⁵ Pollstar v Gigmania Ltd 170 F Supp 2d 974 (ED Cal 2000); Caspi v Microsoft Network LLC 723 A 2d 528 (N J Super CAD 1999)

¹¹⁶ Specht v Netscape Communications 306 F 3d 17

¹¹⁷ see, e.g. "If the document is signed it will normally be impossible or at least difficult, to deny its contractual character, and evidence of notice, actual or constructive, is irrelevant." in Cheshire, Fifoot & Furmston p 179

Or, because a document contains terms, it must be contractual. Obviously, terms must be contained or referred to in the document if the signature is to incorporate them. Their existence, however, cannot be regarded as *prima facie* evidence of the contractual character of the document.

It is difficult to find the correct sequence of argumentation. What comes first: the contractual character of the document or the signature? Although the two requirements appear difficult to separate, the first question regards the existence of a signature. It was never posed in the context of cases like *L'Estrange*¹¹⁸ or *Toll*¹¹⁹ as the character of the handwritten name seemed beyond doubt. The legal effect in the form of incorporation could follow.

In the on-line environment, one can only speak of functional equivalents of signatures. Model regulations generally state that where the law requires a signature, that requirement is met if a method is used to identify the person and to indicate a persons approval of the information contained in a message.¹²⁰ As no technology is prescribed, practically any method of interacting with the web-interface can constitute a signature.¹²¹ Although functional equivalents of signatures pertain first and foremost to formal requirements, it is also accepted that they cannot be discriminated against on the sole basis that they are electronic. The "side-effect" of such approach is that a simple "click" can constitute a signature or produce the legal effects of a signature. Consequently, it could be assumed that any click that meets the requirements of the model laws regarding the functional equivalent of a signature, can also incorporate terms. This assumption must, however, be approached with caution.

The general validity and enforceability of electronically signed on-line contracts does not imply that electronic signatures produce the same range of legal effects as handwritten signatures. The latter are not only more expressive psychologically but also generally perceived as a sign of intention. The signature binds the person to the contents of the contract, regardless of whether it was read, because the person knows that he or she is signing a contract. Furthermore, in the real world, the legal effects of a handwritten signature depend on the intention of the signatory. Such intention is evaluated on the basis of the context or circumstances in which the signature occurred.¹²²

The legal character, or effect, of a click can only derive from the context: it is the content and construction of the website that distinguishes a click for navigational purposes from a click, which can be regarded as a signature. The signature has an incorporating effect if the document is contractual, at the same time, the signature itself seems to be a product of the contractual context.¹²³ After all, model laws and enabling legislation deal with the form of electronic acts, not with their legal effect.

Mapping the "incorporation by signature" method onto the on-line environment requires the existence of a clear contractual context. In the real world, the contractual nature of the situation is usually beyond doubt. Not so in the on-line environment. Due to the ease of transition between websites, the changeover between a commercial and non-commercial environment may not be apparent. This problem is unprecedented in the off-line world: people are rarely kidnapped from a library and "teleported" into a bookstore. If users do not perceive the environment as transactional, they will not anticipate terms. If the website is not of contractual character the electronic signature cannot incorporate terms because it appears questionable whether it constitutes a signature or whether it is performed with the requisite

¹¹⁸ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394

¹¹⁹ *Toll (FGTC) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52

¹²⁰ MLEC Art. 7, see also: ETA Section 10 (1) (a); CUECIC Art 9 .3 (a)

¹²¹ See also Chapter 10 [10.8]

¹²² *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661 at 99 666-667 per Tagdell JA; It is also argued that if the signing party has reasonable grounds to believing that the document is not contractual, it should not be bound by its contents, see: D W Greig & JLR Davis, *The Law of Contract*, Sydney 1987, p 611

¹²³ See: MLEC Guide to Enactment para 53: The function of an electronic signature depends on the nature of the signed document.

contractual intention.¹²⁴ In sum, an electronic act cannot constitute a signature if it does not occur in a context that is objectively contractual. Analyses of the incorporation of terms by means of electronic signatures must therefore, first and foremost, focus on the existence of the contractual context. The latter may only be obvious due to the existence of a prominent notice about the terms.

Conclusion

[9.27] The characteristics of the novel transacting environment leave no room for a liberal approach to incorporation procedures. Quite the opposite: the potential information overload combined with the restrictions of the web-interface requires a strict adherence to the basic principles of contract law. Bearing in mind the cognitive difficulties created by the web environment, the propensity for disorientation and the potential lack of contractual context, it appears necessary to introduce the requirement of enhanced notice: a notice that not only informs about the existence of terms, but creates the contractual context. Enhanced notice requirements need not necessarily be perceived as a modification of incorporation procedures. After all, the reasonableness or sufficiency of notice must be tailored to all the circumstances and the situation of the parties.¹²⁵

It is unnecessary to maintain the traditional methods of analysing incorporation procedures, such as “by notice” or “by signature.” Ultimately, the incorporation of terms in on-line contracts hinges on making the website user aware of their existence, i.e. providing notice, and enabling the user to familiarize him- or herself with their contents, i.e. ensuring availability.

As hyperlinks enable the combination of notice with availability, on-line contracting can provide a more compact contract formation process: parties need not run around parking lots or ferry stations to find the text of the terms. Web-technologies provide all the tools required to provide both notice and availability. While hyperlinks constitute the main source of problems in establishing the contents of on-line contracts, they also provide a perfect method to ensure that terms are communicated.

A number of design considerations force web-merchants to provide hyperlinks in specific places. Achieving the purpose of incorporation procedures can therefore be said to have direct implications for the design of websites, leaving web-merchants little flexibility over how to design their contracting procedure. There is also a number of additional factors to be taken into account when evaluating the reasonableness of notice, the most important being the differences in how a website may be displayed by the user’s browser application. As long as there are discrepancies between browsers, courts will face the technical question whether the risk of “invisible notices” should be apportioned to the web-merchant who designed the website for Internet Explorer or to the user who - due to security concerns - opted for a different browser type.

¹²⁴ For more detailed discussion see Chapter 10 [10.8]

¹²⁵ Hood v Anchor Line [1918] AC 837 at 844