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The incorporation of terms into commercial contracts: a reassessment in the digital age

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***J.B.L. 87** Is the doctrine of the incorporation of terms required to be reassessed?

Contractual terms define the parties' rights and liabilities in contracts. In commercial contracts, terms and conditions should be constructed in a way that clearly reflects on the contracting parties' intention after contract negotiations. A poorly drafted contract often increases the risk of misunderstanding, which may lead to payment and performance delays and other disputes. In consumer contracts, additional consideration may be required in order to incorporate terms validly, fairly and reasonably, because most consumers do not understand their baseline legal rights even if the terms are written clearly.¹ Moreover, as raised in the old-fashioned ticket cases, "[n]o customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat".²

Similarly, in modern society, consumers would lose the fun of shopping if they had to read the fine print of terms and conditions every time. In the digital age, both B2B and B2C contracts concluded by electronic means may be further challenged not only because of the requirements of assessing reasonableness and fairness in context but also because of the need to examine the appropriate technical measures to give sufficient notice and consent for the incorporation. In other words, the assessment of the doctrine of the incorporation of terms in the digital age consists of three elements (the availability of terms, the provision of unambiguous consent and the content of terms) as opposed to the traditional twofold assessment (methods of incorporation and protection against unfair terms). The reassessment, thus, needs to reflect on these three elements, that is:

1. relating to the formality as to the availability of terms and reasonable awareness (i.e. the conspicuous availability of terms);
2. involving informed consent (i.e. methods of incorporation such as by signature);
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3. concerning the content of terms as to the fairness and reasonableness.

It is debatable whether there are uniform rules concerning the methods and requirements of "making contractual terms and conditions available" and "incorporating terms and conditions into the contract" in the international legal instruments such as the CISG and *UNIDROIT Principles*.³ Although it is suggested that "using the CISG and *UNIDROIT Principles* together makes it possible to create a complex regulation of contractual relationships in the international sale of goods",⁴ neither instrument provides a specific provision regarding "the availability of contractual terms and conditions". It is arguable that the CISG (art.8) provides a relevant provision regulating the manner of negotiating and incorporating terms and condition⁵ that statements made by a party and/or other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been

unaware what that intent was. Some other relevant provisions can also be found in the CISG and *UNIDROIT Principles* applying to "the incorporation of terms and conditions", though they are geared towards matters concerning the incorporation of standard terms and battle of forms. Moreover, the CISG provides a gap-filling procedure in art.7 so that it is possible that the substantive issues regarding the availability and incorporation of terms and conditions are governed by national laws where applicable.

For example, in the EU, Directives governing internet-related issues provide related provisions on the availability of contractual terms such as the [EC Directive on Electronic Commerce 2000](#) and [EC Directive on Consumer Rights 2011](#),⁶ though there is no substantive provision in those directives regulating the incorporation of contractual terms. In contrast, the recent Proposal for a Regulation on a Common European Sales Law 2011, known as the Proposed Common European Sales Law, suggested specific provisions such as "Pre-contractual information" (Ch.2) for the availability of contractual terms and "Unfair contract terms" (Ch.8) for the unfairness test for the incorporation of contractual terms.⁷ The Proposed Common European Sales Law takes into consideration the new technology used in contracting and includes additional requirements of providing "appropriate, effective and accessible technical means" for distance contracts.⁸

In the UK, there are no specified rules in traditional English contract law on making contractual terms available, though there are UK Regulations that implement the EC Directives concerning such matters, for instance, the [Electronic Commerce \(EC Directive\) Regulations 2002](#) and the **J.B.L. 89 Consumer Contracts Regulations 2013*.⁹ The [Consumer Contract Regulations](#) supersede two previous sets of regulations, including the [Consumer Protection \(Distance Selling\) Regulations 2000](#).¹⁰ The interconnected rules on incorporating terms in English contract law are at common law, while specific rules on incorporating unfair terms in consumer contracts are also supplemented by the [Unfair Contract Terms Act \(UCTA\) 1977](#) and [Unfair Terms in Consumer Contracts Regulations \(UTCCR\) 1999](#).¹¹ UCTA applies a test of "reasonableness" to both B2B and B2C contracts determining whether the term is fair and reasonable "having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made",¹² whereas UTCCR employs a test of "fairness" based on a *non-negotiated* term that causes a *significant imbalance of the parties' rights and obligations of the parties* in B2C contracts.¹³ Although there are different approaches taken by the two tests, there is something in common in that both tests display the necessity of drawing contracting parties' attention to unusual and significant terms affecting the proposed relationship, especially where there is an onerous clause in the standard contract. The integrated doctrine, known as "the reasonableness and fairness test", can be employed systematically to determine whether a contractual term is fair and valid in contract law. Currently, the UK Consumer Rights Bill seeks to streamline these two separate pieces of legislation into one place, which applies "both to contracts and to notices and to both negotiated and non-negotiated terms".¹⁴ In parallel, the [Consumer Protection \(Amendment\) Regulations 2014](#) (also known as the [Consumer Protection from Unfair Trading \(Amendment\) Regulations 2014](#)) have been further developed to better prevent misleading and aggressive practices. **J.B.L. 90*¹⁵

In the US, references can be found under the Uniform Commercial Code (UCC), in relevant provisions provided by the Federal Trade Commission (FTC),¹⁶ and through the common law doctrines of unfair surprise and reasonable expectations. Section 2-302(1) of the UCC also requires the notification of clauses at the time it was made, providing that:

"If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." ¹⁷

The "unconscionableness" test is similar to the "reasonableness and fairness" test in the UK in that it acknowledges the necessity of drawing contracting parties' attention to terms affecting their rights and obligations at the time the contract was made.

In China, the Contract Law of the People's Republic of China 1999 provides explicit requirements for the valid form of incorporating contractual terms in particular standard terms,¹⁸ while the Law of the People's Republic of China on Protection of Consumer Rights and Interests 1993 further prohibits business operators "through standard form contracts, notices, announcements and entrance hall Bulletins" from imposing unfair or unreasonable rules on consumers, and reducing or escaping civil liability for their infringement of the legitimate rights and interests of consumers.¹⁹ On October 25, 2013 the Law of the People's Republic of China on the Protection of Consumer Rights and Interests

(China Consumer Protection Law) was amended for the second time in accordance with the *Decision on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests adopted at the 5th Session of the Standing Committee of the Twelfth National People's Congress*. Its art.26 amends the old art.24, inserting an additional requirement that business operators should draw consumers' attention to significant terms in the standard contract, which may affect the significant relationship in the parties' rights and obligation, by conspicuous means.²⁰ This amendment brings a standard for the protection of unfair terms in consumer contracts consistent with that in the EU, UK and US. The advancement of this provision lies in the requirement of specific notification standard—"by conspicuous means", which has been employed to determine the validity of terms in common law cases.²¹ This is similar to Lord Denning's "red hand" rule in the UK and the requirement for disclaimers of certain implied warranties to be ***J.B.L. 91** "conspicuous" under the UCC in the US.²² Most recently the Ministry of Commerce also adopted the Regulations of Online Signing Process of Electronic Contract which promotes the integrity and unchanged reproduction of an electronic contract.²³

In the information society, there are a variety of electronic means which enable terms and conditions to be notified and incorporated into a contract, though their legal effects are debatable. For example, terms and conditions may be displayed on a smartphone screen when users click on a digital product such as e-books, games or networking software, and deemed to be incorporated when users click the "install" or "download" button. With the recent invention of Google Glass technology embedded with Google Wallet, a device can be worn by an individual and used to make transactions.²⁴ With the possible future civilian use of so-called "beaming" technology, a robot can physically represent an individual or legal entity to negotiate and conclude contracts with other parties in another place or country.²⁵ The possibility of employing the intelligent and adaptive system of service-oriented computing could also provide intelligence and reasoning capabilities to give automated support to the incorporation of terms and conditions in automated transactions without direct human intervention. In other words, the deployment of service-oriented computing in automated transaction systems would allow contracting parties to form real-time contracts without any human interaction. Ever-changing technology and its impact on the commercial practice, today more than ever before, prompts us to consider the need to adopt consistent and fair international standards of "making terms and conditions available online" and "incorporating them into the electronic agreement", taking into account the features of electronic communications and the nature and frequency of cross-border transactions. A set of mature and effective international legislation, regional and national instruments, or consistent judicial interpretation may help to fill a gap among traditional international instruments,²⁶ and cope with the increasing challenges that new technologies pose to the assessment of the fairness and reasonableness of the availability and incorporation of contractual terms. In other words, the reasonableness and fairness test in the information age extends to the assessment of the electronic availability of terms in a digital form and the examination of incorporation by electronic means. The assessment of protection against unfair terms under the reasonableness and fairness test remains the same in electronic transactions as that in paper-based transactions in substance, though further interpretation is required, taking into account the appropriateness of the technical measures for the incorporation.

This article first considers the characteristics of electronic presentation of terms and provides a general assessment of contract law and obligations concerning the incorporation of terms and their relation to legal and technical measures for making ***J.B.L. 92** terms available before and after the conclusion of the contract. It then evaluates the implementation of the "reasonableness and fairness" test in context, and examines the appropriate means to give sufficient notice for the incorporation of terms into commercial contracts in electronic communications. It seeks to suggest solutions to promote harmonisation of the regulatory standard for the availability and incorporation of terms at the international level in the digital age with reference to the legal theories and practice in the EU, UK, US and China.

Electronic presentation of terms

In a face-to-face transaction, it is most common that the mutual assent to terms presented is by signature. In an automation transaction, new forms of technology not only enable terms to be presented through different channels but also offer contracting parties various means to give their consent to the presented terms. A wide range of emerging technologies in the information society enables contracts concluded by new forms of electronic communications.

Justification of methods

Globally there are four common methods in which commercial contracts can be made by electronic means.

The first common method is through the exchange of electronic mail (email). Email can be used to make an offer and communicate an acceptance of that offer. The email containing the offer or acceptance can be sent through the offeror's (or offeree's) outbox, the digital equivalent of a postbox to a server, the internet service provider (ISP) and then forwarded to the offeree's (offeror's) inbox/mailbox. There seems to be a clear consensus about the validity of email communications at the international level. For example, in the US, in the case of *Rosenfeld v Zerneck*, the Supreme Court of New York recognised that email was a valid form of communications accepting an offer, although the court dismissed the plaintiffs' claim owing to the failure of the incorporation of the essential terms in the email.²⁷ In the UK, in the case of *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)*, an email was found to be a valid form to communicate the acceptance regardless of being treated as a spam mail by the system.²⁸ In Singapore, in the case of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*, the Singapore High Court found that there was a concluded lease agreement between the parties by an exchange of email correspondences.²⁹ In South Africa, in the case of *Jafta v Ezemvelo KZN Wildlife*, the Labour Court of South Africa further concluded that "an SMS is as effective a mode of communication as an email or a written document". ***J.B.L. 93**³⁰

The second common method of forming an online contract is using the World Wide Web, known as a webwrap or clickwrap agreement. Normally, the vendor would provide a display of products on his website and indicate the cost of such products. A customer can scroll through the website previewing the items or products on offer, click on the item for further information and if interested in the purchase, can place an order by filling in an order form and clicking "Submit", "I Accept" or something similar.³¹ Forming a webwrap agreement is like taking the goods to the cashier in a shop, except that the cashier will be an electronic agent (such as computers or other electronic devices) instead of a person. Contracts or agreements displayed on a website requiring a user to click a button to show acceptance are generally non-negotiable, though the buyers may be offered an opportunity to read, view and download them in their entirety before being accepted. This circumstance can raise the issue of what manner of displaying terms and conditions can continue an informed consent to the buyer and whether there is truly mutual assent by the parties to the terms of the agreement. In practice, most of the online retailers, such as Amazon, introduce tailor-made procedures to enhance the legal certainty, such as sending an email notification after a clickwrap action to validate a clickwrap agreement. For example, when a customer chooses a product, inputs the quantity, selects a delivery method, clicks a hyperlink to "Conditions of Use/Conditions of Sale" and finally clicks the "Place the Order" button to make payment to purchase a product at Amazon's online platform, Amazon will send the customer an email confirming receipt of his/her order and containing the details of his/her order (the "Order Confirmation E-mail"). The Order Confirmation E-mail, which specifies the selected products, price, delivery address and estimated delivery date with terms and conditions, is acknowledgement that Amazon has received the customer's order, and does not confirm acceptance of the customer's offer to buy the product(s) ordered. Amazon will later send the consumer another email called the "Dispatch Confirmation E-mail" which confirms acceptance of the customer's offer, and notifies the dispatch of the ordered product with an estimated delivery date. It then concludes the contract of sale for a product ordered by the customer.³² The deployment of such procedures helps ensure that customers are given an opportunity to review and revise their orders and print a hard copy of terms and conditions or download them as a PDF file.

The third common method of forming an electronic contract is by consenting to a "browsewrap" agreement. Browsewrap agreements refer to terms for which the provider/seller purports to obtain implicit assent through the customer's opportunity to view the terms while browsing the site.³³ It is most debatable whether assent could be validly obtained through this method. It is suggested that the quality of assent may depend on how the terms and conditions are arranged and displayed on the website.³⁴ It is also possible that the terms and conditions in browsewrap agreements may be accepted by conduct.³⁵ In order to enhance the certainty, website ***J.B.L. 94** operators may wish to collect users' consent to the terms of service when users enter the website for the first time.

The fourth common method of forming an electronic contract is by consenting to a "shrinkwrap" agreement. A shrinkwrap agreement usually refers to a contract for a software product. It is commonly used in a software licence agreement. The terms and conditions in a shrinkwrap agreement are usually not visible until users start to install the software on smartphones, smart TVs

and computers. In other words, the terms and conditions of the contract will be only available for review after the purchaser pays the product. Currently, there are no consistent judicial opinions in the world on whether the terms and conditions of a shrinkwrap agreement that are not available before the conclusion of the contract of sales should be valid and enforceable,³⁶ though it appears that courts have been more inclined towards the recognition of shrinkwrap terms without prior disclosure, such as in the leading case of *ProCD Inc v Zeidenberg*.³⁷ However, legislation seems to take a stricter approach. For example, in the US, the Uniform Computer Information Transactions Act (UCITA) 1999 states that if the purchaser does not have an opportunity to review the terms before he/she pays, the product can be returned to the merchant.³⁸ However, the UCITA is not widely adopted in the US. In the EU, there is also a tendency for the requirement of disclosing terms and conditions prior to the conclusion of any agreement with consumers according to the [EC Directive on Electronic Commerce](#), the [EC Distance Selling Directive](#) (replaced by the [EC Directive on Consumer Rights](#) in 2014) and the [Unfair Commercial Practices Directive](#).³⁹ In e-commerce practice, it is advisable that the seller of software products shall make the terms and conditions available for the purchaser to review prior to the placing of the order by displaying them in a PDF file on the website or providing a hyperlink to the terms that can be downloaded onto a durable medium or saved as a PDF document for later reference.

New tech challenges to common methods

New technologies continue to emerge for electronic contracting, which may pose a challenge to meeting the existing legal requirement of contracting such as "in a durable medium" and "for later reference". For example, it is debatable whether the terms are incorporated into the agreement when the agreement is concluded without human interaction in the service-oriented computing system; and whether it is feasible that such system-generated agreement is stored in a durable medium and reproduced without changes in such system for subsequent reference.

Trust, therefore, becomes the basic element to foster transactions in the new tech environment. When a certain level of trust is established, it will build up users' **J.B.L. 95* confidence in concluding electronic contracts in an automated system. It is noteworthy that a form of "trustmark" for contracts can be introduced, so that a provider can have their contracts approved by an independent third party who can then certify that sufficient protection for the customer (and provider) is in place. However, there are two significant limitations to this approach. First, it places a high barrier of entry to individuals wishing to provide services, since they would need to formulate an appropriate contract and have it validated. A potential solution to this would be to use a broker or proxy service that has template contracts that can be adopted (analogous to sellers adopting the privacy statement and practices and the buying and selling policies of sites such as eBay, which in turn are certified by organisations such as TRUSTe), but it is unlikely that such template contracts can be made sufficiently broad to be practical and yet detailed enough to provide appropriate protection. Secondly, and more importantly, such contracts will be inflexible, requiring approval by the independent third party, and are impossible to be updated rapidly in response to circumstances at run-time.⁴⁰ This will jeopardise the advantage of flexibility that new technologies offer, such as service-oriented computing, because in the service-oriented computing system, contractual terms for services can be selected and configured at run-time according to user preferences and the current situation.

Legal recognition of electronic means

Efforts to remove legal uncertainty in online contracting have been made at the international, regional and national level. At the international level, both the UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts employ the "functional equivalent approach" with a view to determining how the purposes or functions of paper-based documents could be fulfilled through electronic commerce techniques.⁴¹ The UNCITRAL Model Law on Electronic Commerce states that

"an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."⁴²

In the EU, the [EC Directive on Electronic Commerce](#) contains three provisions⁴³ on electronic contracts, the most important of which being the obligation on Member States to ensure that their legal system allows for contracts to be concluded electronically. It can be found in [art.9\(1\)](#), which in

effect requires Member States to screen their national legislation to eliminate provisions that might hinder the electronic conclusion of contracts. Most of the Member States have introduced into their legislation a horizontal provision stipulating that contracts concluded by **J.B.L. 96* electronic means have the same legal validity as contracts concluded by more traditional means. In particular, as regards requirements in national law according to which contracts have to be concluded "in writing", Member States' transposition legislation clearly states that electronic contracts fulfil such a requirement.⁴⁴ In the US, the legal effect of electronic records and signatures is recognised by the Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act.⁴⁵ In China, the China Contract Law recognises various valid means for the formation of the contract.⁴⁶ According to the China Contract Law, writings include agreement, letters, telegram, telex, fax, electronic data information and electronic mail.⁴⁷ Moreover, the China Electronic Signatures Law 2004 and China Consumer Protection Law (2013 amendment) explicitly recognise the validity of electronic communications.⁴⁸

To determine the effectiveness of an online contract, attention should be drawn upon the relationship of the intertwined legal issues, such as the formation of online contract (offer and acceptance), the availability of terms and conditions, the incorporation of terms and conditions, and the battle of forms. Making terms available is at the heart of the process of an automated transaction. Terms should be accessible and obtainable before, during and after the contract is made. This would enable the contracting parties to give informed consent to the terms and have terms recorded for later reference.

The appropriateness of making terms available in a digital form

The appropriateness of making terms available is of great importance prior to and after the conclusion of a contract to ensure the fairness of contracting between two parties, in particular in the context of the usage of standard terms.

The deployment of appropriate methods of making terms available is to justify that the terms are brought to the contracting parties' attention; and the contracting parties are given an opportunity to review terms and conditions so that the consent which the parties may give can constitute an informed consent to incorporating those terms into the agreement. In the old days, terms were usually made available in writing or first discussed in a meeting before being reduced to writing. In modern commercial practice, the terms and conditions are often presented on a website, via a hyperlink address, through an adjacent scroll box, in a downloadable PDF file or Word document, or in an email. New technology is deemed to assist in increasing the efficiency of contracting: once the "accept" button to terms and conditions is clicked, those terms and conditions immediately become effective and binding unless parties can prove that there are vitiating factors such as unconscionable and unfair terms, mistakes and misrepresentation. **J.B.L. 97*

This requires general assessment measures on whether new technologies make contractual terms available appropriately, fairly and reasonably, as new technologies may place practical and technical impediments that hamper the validity of an online agreement under certain circumstances, for example, if after clicking the "I agree" or "submit" button or ticking a checkbox the terms and conditions disappear and it is not possible to get back to them afterwards. Even if it is possible to access them or reproduce them afterwards, where standard terms are inalterable or terms are not individually negotiated, parties who are asked to give consent to the terms online would have no easy alternatives other than to submit.⁴⁹ Thus, there is a need for a reassessment of what would be the acceptable forms of communications (technologies) for contractual terms that meet the requirement of bringing to the parties' attention in particular unusual or onerous terms.

Challenges to reasonable notification—is hyperlinking valid?

With regard to the amendment of or update to the contracts, it would require interpretation on whether the parties were reasonably informed or notified. It is a common practice that internet service providers may need to revise or amend the terms and conditions for the use of online services in order to be in line with updated or new services resulting from technological innovation. Under these circumstances, users should normally be informed about changes of terms and provided with a copy of the revised terms and conditions. However, concerns may arise over in what manner the revised terms and conditions should be displayed; what would constitute sufficient notice to users; and how users give their informed consent.

Although customers may not read terms and conditions properly before they give their consent, it is

the manufacturers' or sellers' responsibility to inform customers of changes in an appropriate, effective, fair and reasonable manner, in particular where there is an unusual term included. For example, in China, in the case of *Ying Mao Co v Tian Yuan Co (Metarnet Technologies Co Ltd)*,⁵⁰ Ying Mao Co registered a free 50 GB storage email account with Tian Yuan Co but in 2001 Tian Yuan informed all users that the free storage would be temporarily reduced from 50GB to 5GB. Ying Mao Co claimed that Tian Yuan Co breached the agreement of the email service and requested Tian Yuan to restore the original capacity of the email account. Both People's Court for Haidian District Beijing and the Court of Appeal in the Beijing No.1 Intermediate Court held that Tian Yuan Co did not breach the service contract by adjusting the capacity of the email account as Tian Yuan had announced this decision on its website to all users, which fulfilled the obligation of informing users (the "duty to call attention") about the changes of service terms according to the email service agreement. Thus, Tian Yuan's amendment to the email service agreement did not infringe the provisions concerning standard terms in China Contract Law (arts 39, 40, 41, 52 and 53).

It is most debatable whether it is valid to have the amendment of terms and conditions displayed on a website via a hyperlink without providing the possibility **J.B.L. 98* of printing or downloading those terms. There is a growing concern over whether the duty to inform is fulfilled in such a way; and whether the terms displayed in such way are valid. It is noteworthy that the primary nature of a hyperlink is a clickable link with the destination address, while the primary function of a hyperlink is to help users to go to the information page. A hyperlink acts as an indexed tool which is identical to indexes in a library or bookstore. According to the primary nature and function of a hyperlink, the provision of hyperlinking (either surface linking or deep linking) should be deemed as the provision of a tool that provides a location address and access to information in principle. From a legitimacy perspective, a hyperlink address may be used as: (1) another form of citation or quotation for published and copyrighted work in particular in scientific work for educational purposes; or (2) another format for providing additional information/reference for business. Correspondingly, hyperlinking itself may not immediately infringe others' rights or generate invalid agreements. In other words, the action of hyperlinking should not be treated as a sole/direct indicator, measurement or benchmark for determining illegal activities and unlawful procedure. For example, in the EU, in the recent ECJ case regarding distance selling, *Content Services Ltd v Bundesarbeitskammer*, it appeared that a hyperlink itself did not determine the validity of the terms and conditions,⁵¹ though the court was concerned whether the terms and conditions were made available via a hyperlink would affect the effectiveness of the availability for the incorporation of terms and conditions.

Occasionally, there may be a conflict between written agreements and online agreements (displayed on a webpage or via a hyperlink) regarding the same transaction. For example, in the US, in the case of *Fadal Machining Centers LLC v Compumachine Inc*, the terms and conditions on Fadal's website provided that within six months after any act or omission in controversy, claims or disputes "arising out of or related to this agreement, or the breach thereof" shall exclusively be submitted to arbitration in Los Angeles, California under the Commercial Arbitration Rules of the American Arbitration Association (AAA).⁵² However, the distributorship agreement in writing had a contradictory clause designating the US District Court for the Central District of California as the forum to resolve disputes. In this case, the Ninth Circuit (US Court of Appeals) upheld a district court's enforcement of an arbitration clause included in a manufacturer's online terms and conditions regardless of a conflicting distributorship agreement, as the written agreement provided that Fadal would unilaterally establish "the terms of sale ... from time to time".⁵³

It is, therefore, important to promote a harmonised standard of "the availability of terms and conditions" in electronic communications. In response to the matters concerned, some regional or domestic laws provide relevant provisions as to the manner of making terms available. It is a common requirement that the terms and conditions should be available (in a more durable medium) for later reference, which aims to enhance legal certainty, transparency and predictability in international transactions concluded by electronic means, though some may not **J.B.L. 99* cover the issue regarding the consequences of the failure to comply with the requirements of making terms available electronically.

Legal measures for accessibility and unchanged reproducibility—"in a durable medium" and "for later reference"

Legal measures for making terms available, accessible and reproducible "for later or subsequent reference" are provided in national, regional and international legislation.

In the EU, the [EC Directive on Electronic Commerce \(art.10\(1\)\(b\)\)](#) requires that the concluded contract should be filed by the service providers, and it must be accessible.⁵⁴ Furthermore, it stipulates that "contract terms and general conditions provided to the recipient must be made available in a way that allows him to *store and reproduce* them".⁵⁵ However, the [EC Directive on Electronic Commerce](#) does not provide the solution for determining the consequences of a failure to provide the stipulated information.

In addition to the requirement of accessibility, storage and unchanged reproducibility under the [EC Directive on Electronic Commerce](#), the [EC Distance Selling Directive](#) (replaced by the [EC Directive on Consumer Rights](#) in 2014) further provides relevant provisions in order to enhance consumer protection.⁵⁶ The [EC Distance Selling Directive \(art.4\(20\)\)](#), replaced by [art.6\(1\) of the EC Directive on Consumer Rights](#) in 2014) specifies that information in relation to the sale of goods or provision of service shall be provided to consumers "in a *clear and comprehensible* manner in any way *appropriate* to the means of distance communication used" to enable them to give informed consent.⁵⁷ Moreover, the [EC Distance Selling Directive \(art.5\(1\)\)](#), replaced by [art.8\(1\) of the EC Directive on Consumer Rights](#) in 2014) requires that "the consumer must receive written confirmation or confirmation in another *durable medium available and accessible* to him of the information" prior to the conclusion of the contract, during the performance of the contract and at the latest at the time of delivery.⁵⁸ In the recent Proposed European Common Sales Law 2011, art.24(4) also proposes that

"the trader must ensure that the contract terms ... are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form."⁵⁹

The form of a durable medium is interpreted in the case of [Content Services v Bundesarbeitskammer](#)⁶⁰ that a website should not be regarded as "a durable medium". ***J.B.L. 100**

In the UK, the [Consumer Contracts Regulations 2013](#) further strengthens the requirement of making terms available in the [UK E-commerce Regulations 2002](#),⁶¹ and asserts the reasonable expectation principle, explaining that "something is made available to a consumer only if the consumer can reasonably be expected to know how to access it".⁶² The [Consumer Contracts Regulations](#) also implements the [EC Directive on Consumer Rights](#). It further provides a systematic and constructive explanation of the meaning of "durable medium".⁶³ It defines "durable medium" as

"paper or email, or any other medium that (a) allows information to be addressed personally to the recipient; (b) enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information; and (c) allows the unchanged reproduction of the information stored."⁶⁴

This is a well-blended definition, which takes into account the current practice in other countries and promotes a harmonised standard.

In the US, the Uniform Electronic Transactions Act (UETA s.8(a) and (c)) indicates that "an electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to *print or store* the electronic record", which may result in an electronic record being "not enforceable against the recipient".⁶⁵ It also specifies that the otherwise applicable substantive law will not be overridden by this Act and it is subject to other law that requires a record to be posted or displayed in a certain manner.⁶⁶ This is to ensure the consistency with other law, the fairness of an agreement and the availability of information for later reference. It was explained under the comment note of the UETA (s.8) that "the policies underlying laws requiring the provision of information in writing warrant the imposition of an additional burden on the sender to make the information available in a manner which will *permit subsequent reference*".⁶⁷

Similar to the UETA, in China, the China Electronic Signatures Law (arts 4, 5(1) and 6(1)) also consider the purpose of "*for reference*" in that "a data message, which can give *visible and effective expression* to the contents carried and can readily be picked up *for reference*, shall be deemed to be the written form which conforms to the requirements of laws and regulations".⁶⁸ The China Consumer Protection Law (2013 Amendment art.26) also specifies that information in relation to the sale of goods or provision of serviced shall be provided to consumers "in conspicuous means". ***J.B.L. 101**⁶⁹

At the international level, the United Nations Convention on Contracts for the International Sale of Goods (CISG) does not explicitly require making terms available; however, arts 8 and 14 impliedly set the requirements for the awareness of the contract or sale agreement.⁷⁰ The UNCITRAL Model Law

on Electronic Commerce (art.6) also recognises the significance of information available "for subsequent reference", providing that "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable *for subsequent reference*".⁷¹ The UN Convention on the Use of Electronic Communications in International Contracts (the UN Convention) also emphasises such importance, providing that

"where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is *accessible* so as to be usable *for subsequent reference*."⁷²

The UN Convention further establishes two benchmarks for a communication or a contract to be validly "made available or retained in its original form", namely, the "integrity of information" and the capability of "being displayed".⁷³

The weight of this element can be further evidenced by another two provisions—arts 4 and 13 of the UN Convention; in particular art.13 proposes a specific title, "Availability of Contract Terms". That is, the UN Convention (in art.4(b)) stipulates that

"where the law requires that a communication or a contract should be made available or retained in its original form, that information is *capable of being displayed* to the person to whom it is to be made *available* [emphasis added]."

The specific provision of "Availability of Contract Terms" in its art.13 particularly clarifies that

"nothing in this Convention affects *the application of any rule of law* that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to *make available* to the other party those electronic communications which contain the contractual terms *in a particular manner*, or relieves a party from the *legal consequences of its failure* to do so."⁷⁴

However, the UN Convention does not intend to use the specific provision of "Availability of Contract Terms" to harmonise the international standard of best practices; instead it serves as

"a reminder for parties that the facilitative rules on the Convention did not relieve them from any obligation they may have to comply with domestic legal requirements that may impose a duty to make contract terms available. *J.B.L. 102 "⁷⁵

That is, the UN Convention does not impose any requirement for contracting parties to make contractual terms available in any particular manner as well as any consequence for failure to perform the duty.

Moreover, the UN Convention preserves the application of domestic law, which means that the substantive issues of the availability of contract terms will be still subject to relevant national laws in particular consumer protection regulations.⁷⁶ Although it recognises that creating "specific obligations seems to be an interest in enhancing legal certainty, transparency and predictability in international transactions concluded by electronic means",⁷⁷ it is asserted that introducing a duty to make contract terms available would "result in imposing rules that did not exist in the context of paper-based transactions".⁷⁸ Subsequently, no formulation is provided for an appropriate set of possible consequences for failure to comply with a requirement to make contract terms available in the UN Convention.⁷⁹ It is notable that, subject to domestic laws, there may be a wide variety of consequences for failure to make terms available such as an administrative offence, a fine or condition on the effectiveness of contract, or a court order of enforcement.⁸⁰

The way forward—a harmonised standard for making terms available as a prerequisite for incorporation of terms

Although the conditions of "for later or subsequent reference" and "in a durable medium" for making terms available are set in most of the international, regional and national legislation, the doctrine of making terms available as a prerequisite for incorporation of terms needs further establishment. Special consideration may be required for such establishment owing to the implications of electronic communications. There are at least three elements for consideration in order to bring about a harmonised international standard in countries.

First, it is necessary to establish a principle that meeting the requirements of the availability of contract terms is the prerequisite to fulfil the requirements of the awareness of the contract or sale

agreement. The CISG advisory council supports this view according to the leading German case of *Machinery*,⁸¹ where the Federal Supreme Court of Germany considers the requirements for the incorporation by reference of standard terms into sales contract under arts 8 and 14 of the CISG.⁸² In *Machinery*, the court stated that

"the recipient of an offer must be given a reasonable chance of considering the standard conditions, if these conditions are to become part of the offer. This requires that the recipient is made aware of the offeror's intention to **J.B.L. 103* include the standard terms. Moreover, it also requires that the offeree is sent the standard conditions or otherwise given the opportunity to read them."⁸³

This rule is also applicable to B2C contracts according to national consumer protection laws.

Secondly, as to in what particular manners the terms should be deemed as being validly made available, a harmonised standard of technical measures is also of great importance to ensure fairness for the conclusion and performance of a contract. It is sensible to introduce technology-neutral means without jeopardising technological innovation. Any means of communication for terms and conditions should be valid, provided the terms can be recorded, downloaded or printed in a way that allows for safe storage and unchanged reproduction, in the sense that integrity and authenticity can be maintained. Most recently, UNCITRAL has proposed the Provisions on Electronic Transferable Records which specifically recognise the legal effect of electronic transferrable records when authoritative copies are readily identifiable and cannot be reproduced.⁸⁴ Similarly, if a term is made available online by a reliable method that ensures that the authoritative copy of such term is identifiable and can be recorded in a durable medium for later reference, such means should be valid. In current practice, common means include displaying on the website with the function for printing, downloading a PDF file or encrypted Word document from the network, providing a digital copy in the users' online account for later access, sending an encrypted confirmation email or offering a requesting form for hard copies from merchants.

Last but not least, it is debatable how to implement fair, reasonable and appropriate legal measures and sanctions for non-compliance in international legislation. It does not seem to be necessary to have a specific provision proposing a specific figure of fine or other specific penalties, as such issues should be subject to substantive laws in different countries. For example, the recent legislative development in the UK—the [Consumer Contracts Regulations 2013](#)—provides measures for breach of information requirement by extending the consumer contract cancellation period.⁸⁵

Nevertheless, it would be helpful to promote a harmonised standard of legal measures for making terms and conditions available in a digital form. This would increase the legal certainty of the effectiveness and appropriateness of the availability of terms and conditions as a prerequisite to the effect of the incorporation of terms and conditions by electronic communications.

The implementation of the doctrine of incorporation of terms in the digital age

It is notable that the substantial issues concerning the incorporation of terms and conditions are usually subject to domestic contract law. In common law there are three main recognised methods of incorporation of contract terms: by signature, **J.B.L. 104* by notice/reference and by course of dealing. Such methods are applicable to both B2B and B2C contracts, though unconscionable and unfair terms in consumer protection may be further enhanced by relevant statutes, regulations and judicial interpretation.

Moreover, informed consent to terms is regarded as a condition for terms to be validly incorporated into the contract. National laws require business or merchants to obtain users' consent to the terms and conditions before they become effective. It is notable that the modification of the terms and conditions should also be notified and accepted by counterparties in order to become part of the contract in most countries. With regard to the issue concerning when knowledge of the terms and conditions shall be gained or consent should be given, there are two major arguments: (1) the majority of countries require prior knowledge before the conclusion of a contract by explicitly expressing consent or knowledge at least at the time of contract conclusion⁸⁶; and (2) the other view is that an e-market participant shall in principle be bound by the terms and conditions if, at the time of agreement, he was aware or should have been aware of such terms using ordinary care (i.e. implied consent).⁸⁷

National legislation may specifically require express consent to terms under certain circumstances. For example, the [Consumer Contracts Regulations 2013](#) require that a seller should not supply digital

content which is not on a tangible medium before the end of the cancellation period except if the consumer has given express consent acknowledging that the right to cancel the contract will be lost by the supply.⁸⁸

As shown above, the incorporation of terms and conditions in a digital form challenges the traditional rules of determining the validity of methods of incorporation, because it requires the further interpretation of informed consent and unfair terms in electronic communications, in addition to meeting the requirement of making terms available.

Incorporation by signature

The easiest (and most certain) method of incorporating terms and conditions is through signature. In the paper-based environment, the power of giving a signature to a document physically presented is that the terms might become binding when signed even if the contracting parties did not read or understand the terms in a B2B contract. A typical example can be found in the leading English B2B contract case of *L'Estrange v F Graucob Ltd*,⁸⁹ which was about a café owner who bought a cigarette vending machine and signed a sales agreement which she did not read. A term of this agreement, which was "in regrettably small but quite legible" form, said that the machine did not need to work and that all statutory implied terms were not to apply. The machine did not work. The café owner sued to get her money back, claiming that [s.14\(2\) of the Sale of Goods Act](#) had been breached. The court held that the café owner failed, even though [s.14\(2\) of the Sale of Goods Act](#) had clearly been breached. The defendant brought the claimant's attention to the agreement, and the claimant had signed the agreement. Thus, the claimant was bound by it. The ruling of this case has been subject to criticism as to whether it meets the requirements of fairness and justice.⁹⁰ The justification is as follows:

Reasonably sufficient notice (reasonable steps)

It is noteworthy that there are cases in particular for B2C contracts where an unusual or onerous term requires reasonably sufficient notification. This can be evidenced in traditional ticket cases—if reasonable steps were brought to the contracting parties' attention which amounts to reasonable notice, the signature would be effective regardless whether the parties actually read or understand those terms.⁹¹ The same requirement of reasonable notice also applies to the insertion of additional terms to an existing contract, for example, another leading English case, *Grogan v Robin Meredith Plant Hire*, states that it is unlikely that "a mere signature on a document which contains or incorporates by reference contractual terms has the effect of incorporating those terms into a contract", which means that additional terms and conditions in a time sheet signed cannot be regarded as validly incorporating additional terms and conditions into the existing contract.⁹² This is because the term was not notified reasonably and sufficiently to the signer. It shows that informed consent is a key factor to the effectiveness for the incorporation of terms by signature, which reflects on the underlined element in the "reasonableness" test in the [UCTA](#) in the UK; the "unconscionableness" test in the UCC in the US; and the "conspicuous means" test in China.

The fairness and reasonableness test against unfair terms

Even if reasonable steps have been found, where a term is not individually negotiated (which refers to a standard contract) and causes a "significant imbalance" in the parties' rights and obligations between the sellers and consumers arising under the contract, such a term will not be enforceable when signed. This is known as the "fairness" test under the [EC Directive on Unfair Terms in Consumer Contracts 1993](#) (and the [UK Unfair Terms in Consumer Contracts Regulations 1999](#) implements it into its domestic law). This is similar to the underlined element in the "reasonableness" test in the [UCTA](#) in the UK and the "unconscionableness" test in the UCC in the US. It is commonly understood that the fairness test consists of three elements: "1) a significant imbalance in parties' rights and obligations; 2) to the detriment of the consumer; and 3) contrary to good faith".⁹³

The European Court of Justice (CJEU) recently interpreted these criteria in the case of *Mohamed Azi*, asserting that **J.B.L. 106*

"in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in

that regard."⁹⁴

Furthermore, if a term is unilaterally amended without justification, such amendment should be considered as unfair, and thus, not enforceable.⁹⁵

Most recently, the UK Consumer Rights Bill explains the "fairness" test in its s.62 as follows:

"(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. (5) Whether a term is fair is to be determined (a) taking into account the nature of the subject matter of the contract, and (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."⁹⁶

It adds three more items to the indicative and non-exhaustive list of terms which may be considered as unfair (known as the Grey List).⁹⁷ They are: high sum compensation in early termination clauses; price alteration after the conclusion of the contract; and the determination of the characteristics of subject-matter after the conclusion of the contract.⁹⁸ A term may be excluded from the fairness assessment only if it is transparent and prominent.⁹⁹ The condition of being "transparent" means that "it is expressed in plain and intelligible language and (in the case of a written term) is legible",¹⁰⁰ while the condition of being "prominent" means that "it is brought to the consumer's attention in such a way that an average consumer would be aware of the term".¹⁰¹ It is expected that the UK Consumer Rights Bill may remove anomalies in different regulations and increase the legal certainty of the assessment for fairness. ***J.B.L. 107**

It is noteworthy that the assessment of the fairness and reasonableness as to the content of terms is equally applicable to terms that are incorporated by other means.

Incorporation by electronic signature

In the information society, electronic signatures have been deemed to have the equivalent effect to written signatures. Inserting a name in an encrypted email message or clicking the "I agree" button on a website may constitute a valid form of signature and thus validly incorporate terms into a contract. For example, in the American case of *Moore v Microsoft Corp*, it was held that clicking an "I agree" button was sufficient for terms and conditions to be incorporated.¹⁰² Similarly, in the case of *Caspi v Microsoft Corp*, it was held that an exclusive jurisdiction clause contained in an online subscriber agreement of Microsoft was valid and enforceable, because the user was required to click the "I accept" button with regard to MSN's membership agreement appearing on the computer screen in a scrollable window next to blocks before subscribing to Microsoft's online service.¹⁰³ Scrolling the terms and conditions before giving consent should be considered as plaintiffs having had adequate notice of the forum selection clause.

The incorporation of terms by electronic signature is often intertwined with other methods of incorporation, in particular by notice/reference. When terms are displayed on the website (a scrollable box) and in a PDF file, scanned copy or picture, this can be considered as an act of "notice/reference". When users click the "accept" button, this can be considered as an act of "signature" in response to the notice/reference to the terms. The interaction can also be analysed in an email environment. Where terms are sent as an attachment in an email and if the attached terms are conspicuously notified, the other party cannot simply ignore such terms. This is considered as "a commercially reasonable approach".¹⁰⁴ For example, in the US case of the *Golden Valley Grape Juice*, the dispute concerned an international B2B agreement for a sale of goods between Australia and the US where the offer (the terms of the sales quote) was sent as an attachment to an email. The concern arose out of the validity of the other three attachments in the same email including the warranty, the General Conditions (standard terms) and bank information.¹⁰⁵ It was argued that the mere receipt of the General Conditions was not enough to accept the conditions. The court held that:

"The General Conditions were attached, contemporaneously, with the sales quote and with other sale information, such as warranty information and banking information, which were included in the e-mail ... the General Conditions were not sought to be imposed after the contract had been formed. The General Conditions were part of the offer. ***J.B.L. 108**"¹⁰⁶

That is, the General Conditions were not attached to just any correspondence but were provided contemporaneously with the sales quotes and thus, were part of the contract. Thus, the forum selection clause included in the General Conditions was part of the parties' agreement, although it

was broadly worded.

This case indicates that if there were a number of attachments, including the offer and the General Conditions (standard terms) in the same email, it would be the offeror's intention to have all of the attachments included in the agreement by notice/reference. If the offeree accepted the offer (the terms of the sales quote) by email as a form of signing it, he accepted the other attachments (i.e. the General Conditions). Thus, it is possible to validly incorporate terms into the agreement by email attachments.

Incorporation by notice/reference

The second main method of incorporating terms and conditions into a contract is incorporation by notice or by reference. Parties can be bound by in circumstances where they were given reasonable notice of terms. There are three factors that have to be satisfied in order to validly incorporate terms by notice: (1) within good time; (2) in a contractual document; (3) reasonable steps have to be taken to bring the contractual terms to the notice of the other party. The assessment for electronic notice can be justified follows:

Classic interpretation in ticket cases

In a leading English case, [Thornton v Shoe Lane Parking Ltd](#), an exclusive term on the ticket was not validly incorporated into the contract as the parking agreement was already concluded when the ticket came out of an automated machine.¹⁰⁷ The decision also affirms that there is need for the better notice of the more onerous clauses in particular to consumers. Similarly, in the case of [Olley v Marlborough Court Ltd](#), terms and conditions excluding liability to loss or damage to property which appeared on the back of a hotel door were held not to be incorporated.¹⁰⁸ As the contract for a room had been agreed at the hotel front desk, the terms—which were not highlighted until the customer reached their bedroom—could not be said to have been incorporated.¹⁰⁹ That is, the awareness of the terms is essential to the effectiveness of the incorporation of contract terms. Similarly in another traditional English case, [Chapelton v Barry Urban DC](#), the Court of Appeal held that terms and conditions for the hire of deckchairs, which were printed on the back of the ticket and which the owners of the deckchairs attempted to rely upon, were not enforceable as the ticket was simply a receipt for the money paid for the hire of the chair.¹¹⁰ It is clear that the offeree's actual awareness of contract terms is the prerequisite before those terms can be validly and effectively incorporated into the contract. In the Scottish case of [University of Edinburgh v Onifade](#), the terms of the notice in the car park was clearly displayed, which was found valid, and thus parking charges issued to be lawful. *J.B.L. 109¹¹¹

These classic ticket cases maintain their place in the common law of contract; however, the artificiality of this interpretation has been discussed in modern contract law in the information society.

Justification of interpretation in an online environment

In an online environment, how to ensure that the offeree is aware of electronic contract terms before terms are concluded is also the focal point to the effectiveness of incorporating electronic contract terms by notice or reference. In *Specht*, the court addressed the traditional principle of prior knowledge of the terms before terms can become binding, deploying it to contracts formed over the Internet as follows:

"These principles 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!'"¹¹²

However, challenges still arise regarding the interpretation, in particular regarding browsewrap agreements. The rationale is identical to the situation of selling tickets to consumers as discussed earlier, namely: what are the practical implications for ticket sellers and how are they to take account of their customers' expectations and community expectations? How can ticket sellers ensure that consumer purchasers are aware of terms, particularly exclusion clauses, contained in tickets? How can they ensure their contracts will not be questioned as containing unfair contract terms?¹¹³

It is suggested that there are generally two approaches in response to the incorporation of standard

terms: one is that "the terms enter the contract automatically unless the other party promptly objects to their inclusion" and the other is that "something more than failure to object is necessary for the inclusion of the standard terms".¹¹⁴ In electronic communications, there is something more required to measure the valid incorporation of standard terms by notice or reference. Ensuring the awareness of the standard terms for browsewrap agreements is particularly challenging. In browsewrap agreements, customers will not be given a chance to consent to the terms and conditions through clicking the "I agree" button before a transaction takes place. The acceptance to the terms and conditions in browsewrap agreements is by conduct. For example, in the case of [Ryanair v Billigfluege.de](#), it was held that the terms were clearly visible to all visitors to and users of their website; and the defendants were making use of the website for their own commercial advantage in carrying out the screen-scraping activity, and as such that use constitutes an unambiguous manifestation of assent to its terms.¹¹⁵ Conduct and action could constitute consent to the use of website under its terms and conditions if the user was drawn attention to such terms and conditions, and as such it is arguable that the location of a notification of terms and conditions is ***J.B.L. 110** important that it should be placed somewhere where a reasonable person could obviously see it.¹¹⁶ The conclusion was that:

"The exclusive jurisdiction clause contained in the plaintiff's website's Terms of Use was binding on the defendants in circumstances where those Terms were at all times available for inspection by the defendants as users of or visitors to the website, the plaintiff having taken appropriate steps to ensure that the Terms were brought to the user's attention through their inclusion on the website via a clearly visible *Hyperlink* [emphasis added]." ¹¹⁷

Correspondingly, using bold colours or easily noticeable fonts could be deemed to be a way to draw the users' attention to the terms on the website. Such requirement is in line with the traditional "red hand" rule in [J Spurling v Bradshaw](#), to the effect that some clauses "would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient".¹¹⁸

Subsequently, if there was no reasonable notice to and awareness of terms in particular uncommon terms, those terms might not be incorporated into the agreement and thus may be non-binding between parties. For example, in a leading Australian case, *eBay International AG v Creative Festival Entertainment Pty Ltd*, terms and conditions of tickets were not drawn to the attention of purchasers when they placed the order online in some instances.¹¹⁹ Thus, the case concerned whether the condition of no resale for profit through online market or auction sites was incorporated into the contract where tickets to "Big Day Out" festivals were offered by eBay's members to others who wished to purchase them on the eBay website.¹²⁰ Creative Festival Entertainment Party Ltd sold concert tickets via the Big Day Out website, the Ticketmaster website, and over the counter at Ticketmaster and other retail outlets. It was clear that the Big Day Out website enabled buyers to click on a box next to the words "I have read and agreed to the following terms and conditions" and a green tick appeared in the box before placing an order,¹²¹ which could be considered as the incorporation of terms such as "the prohibition of resale for profit" by signature in a clickwrap agreement.

In contrast, on the website of another agent, Ticketmaster, a purchaser "could not access any information which set out any conditions at all on the ticket or on the Big Day Out website".¹²² Nor was the potential purchaser given any opportunity to review or see the sale conditions.¹²³ Ticketmaster also did not disclose terms and conditions embedded on the ticket in advance by notice or reference on ***J.B.L. 111** Ticketmaster's webpages.¹²⁴ Tickets were only dispatched over six weeks later. Thus, the new condition 6 on the Big Day Out website, together with all the other provisions on the ticket, was not communicated to the potential purchaser in the Ticketmaster online transaction. There was no incorporation by reference of provisions on the ticket,¹²⁵ and anything on the ticket such as the prohibition of resale for profit could not, in those circumstances, constitute a term of the contract. As a result, the sale and purchase of those concert tickets on eBay should be allowed.

The *eBay* case shows that it is more difficult to prove sufficiency to draw the terms to a user's attention and thus be enforceable by reference on a webpage. It was suggested that businesses and consumers' confidence in conducting online business could be ensured by legislation adapting with particular reference to online terms and conditions.¹²⁶ If the amendment of the existing legislation is to be contemplated, the core issue should lie in the realistic assessment of the reasonableness and fairness of bringing the awareness/attention to terms and conditions by notice and reference via electronic communications.

The realistic assessment of the reasonableness and fairness for the notice of terms online should be based on two principal elements, namely, reasonably conspicuous notice and manifested unambiguous consent, as illustrated in *Specht v Netscape*.¹²⁷ *Specht* was concerned with whether the arbitration clause was incorporated in the SmartDownload licence terms that the user plaintiffs had reasonable notice of, and so were able to manifest assent to the SmartDownload License Agreement.¹²⁸ The court emphasised that:

"Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."¹²⁹

Subsequently there were various concerns over informed consent: (1) there was no clear expression in a visible place indicating "Please review and agree to the terms of the Netscape SmartDownload software license agreement", but an invitation to click a hyperlink for more information; (2) licence terms on the "SmartDownload Communicator" webpage was located in text that "would have become visible to plaintiffs only if they had scrolled down to the next screen"; and (3) a website operated by ZDNet offered only a hypertext link to "more information" about SmartDownload without a clear reference to the licence agreement. It was concluded that Netscape's webpage, unlike typical examples of clickwrap, neither adequately alerted users to the existence of SmartDownload's licence terms nor required users unambiguously to manifest assent to those terms as a condition of downloading the product. Thus, the court affirmed that the user plaintiffs had not entered into the SmartDownload licence agreement.¹³⁰ This case asserts that the terms in question must be *readily identifiable or sufficiently visible* *J.B.L. 112 to the users of the website and should be placed in a position on the webpage that a user could not miss them for any clickwrap, shrinkwrap or browsewrap agreements.

Moreover, the realistic assessment of the reasonableness and fairness for the notice of terms online would relate to the third element concerning the content of the term, namely, better notice of unusual or onerous terms, in particular to consumers. This is traditionally known as the "red hand rule", which basically requires that more be done to draw the contracting parties' attention to unusual terms in order to meet the standard of "reasonably sufficient notice". That is, parties can only escape being bound if they can show they were not afforded a reasonable opportunity to read the term in question before entering into the contract. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, it was held that where a condition is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.¹³¹

The cornerstone of these three elements would be the actual awareness of the terms where the conditions of "reasonably conspicuous notice", "manifested unambiguous consent" and "better notice of unusual terms" are all interconnected.

The determination of the actual awareness of information provided is particularly challenging in the information society where new technologies keep appearing, from scrolling boxes to pop-up screens; and from service-oriented computing to cloud computing. This challenges the determination of how appropriate and feasible terms are brought to the contracting party's attention and when exactly terms are incorporated into the contract. Judicial interpretation has been provided to employ traditional legal principles to determine the term generated by current technologies as follows.

An online PDF file containing terms and conditions which are displayed on a website may amount to actual awareness of information for users, whereas information or a statement on a website may not be sufficient to be treated as a term. For example, the English case of *Patchett v Swimming Pool and Allied Trades Association Ltd (SPATA)*, concerns the validity of details of installers from a dropdown list on SPATA's website to build a swimming pool in their garden.¹³² The SPATA website stated that members were fully vetted (with checks on their financial record and experience and an inspection of their work) and that they benefited from a bond and warranty scheme known as SPATASHIELD. Also SPATA's website included a reference to, and encouraged people to obtain, a copy of an information pack. It turned out that the chosen builder in the dropdown list on the website was not a full member and therefore had not been vetted and did not benefit from the SPATASHIELD scheme. The claimant claimed that he relied on the statements on the website as he did not check the information pack. The Court of Appeal held that it was reasonable that a customer would be expected to look at the website as a whole and obtain the relevant information pack; therefore SPATA was not liable for the error on the website as all information was correctly recorded in an information pack confirming the terms of cover.¹³³ In other words, *J.B.L. 113 SPATA had performed duties to inform as "the website should not be taken as inviting reliance without further enquiry, that is without applying for and reading the

information pack referred to in paragraph 8 of the website",¹³⁴ whereas "the appellants had been grossly negligent in failing to make enquiries as to the availability of SPATASHIELD insurance".¹³⁵ This is identical to a situation when customers purchase travel insurance on a website. It is sensible that customers are reasonably expected to download the PDF files of "the fact sheet" and "terms and conditions" and read them before they complete the purchase of insurance.

As analysed earlier, terms may also be incorporated into a contract by reference via email communications and their attachments. This is intertwined with incorporation by electronic signature as discussed earlier. According to the previous analysis concerning the US case of *Golden Valley v Centrisys*, the offer was made by email providing the sale quotes, which was an adequate offer pursuant to the CISG. Displaying three other attachments in the same email would meet the criteria of "reasonably sufficient notice" to additional terms. Thus, the General Conditions were not attached to just any correspondence but were provided *contemporaneously* with the sales quotes and thus, were part of the contract.¹³⁶

It is also advisable that a notice/reference on a website must be *reasonable* and *adequate* for the terms to be effectively incorporated. For instance, in the US, in the case of *Manasher v NECC Telecom*, the court held that an arbitration clause found in the defendant's online terms and conditions was not incorporated into the contract terms by reference, because an arbitration clause added in an amended terms and conditions was unconscionable—the online terms were placed and referenced in the fifth statement of the second page of the defendant's invoice and in ambiguous language.¹³⁷ In contrast, in the case of *Paola Briceño v Sprint Spectrum LP*, it was confirmed that:

"Sprint printed a 'Notice of Changes' on the front of the June 16, 2003 invoice that it mailed to Briceño. This notice informed her that amendments to the original Terms and Conditions were posted on Sprint's website. Briceño stated that she never read any of the original or amended Terms and Conditions, either on the internet or in hard-copy, because it was 'not important' to her. She also stated that she saw the 'Terms and Conditions of Service' internet link, but did not care to click it."¹³⁸

The court held that a customer would be bound to the amended terms and conditions if a customer was properly informed of them, though the customer did not read them. In particular there was no evidence that Sprint concealed or attempted to conceal the aforementioned original or amended terms and conditions.¹³⁹ Thus, proper notice of the modified terms is so important that it is required for consent to be effective. ***J.B.L. 114**¹⁴⁰

In order to further protect consumers' rights online, the consumer must receive written confirmation or confirmation in another durable medium available. In the EU, the judge in the recent ECJ case of *Content Services* provided an interpretation on whether information (such as terms and conditions) that is available via a hyperlink on a website should be effective and enforceable.¹⁴¹ This is in sharp contrast to the recognition of the effectiveness of clicking a hyperlink to terms as implied in *Ryanair v Billigfluege.de*¹⁴² and *Specht v Netscape*.¹⁴³ On July 5, 2012, in the *Content Services* case, the European Court of Justice ruled that:

"Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (now the EC Directive on Consumer Rights to be implemented in 2014, Articles 2(10), 7 and 8¹⁴⁴) must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither 'given' by that undertaking nor 'received' by the consumer, within the meaning of that provision, and a website such as that at issue in the main proceedings cannot be regarded as a 'durable medium' within the meaning of Article 5(1)."¹⁴⁵

It is noteworthy that the definition of "durable medium" is now given by art.2(10) of the new EC Directive on Consumer Rights (to be implemented in 2014), in that "durable medium" means: "any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored".¹⁴⁶

It was evidenced that a hyperlink itself did not determine the validity of the terms and conditions, but the problem was that a website itself referred by a hyperlink could not be deemed as a "durable medium". This is because information on a website (i.e. the content of a webpage) can be altered constantly. If a hyperlink leads to a PDF document which can be stored, accessed and reproduced, such a PDF document/file can be transferred to a "durable medium" and thus should meet the

requirements.¹⁴⁷ Or if the technology is developed for a website to ensure that information can be stored, accessed and reproduced on that website by the consumer during an adequate period, this can then meet the requirements of "a durable medium".¹⁴⁸

In response to the emergence of new technologies in the future, it is important to develop a set of technological-neutral principles/rules for the determination of how appropriate and feasible terms were brought to the contracting party's attention ***J.B.L. 115** and when exactly terms were incorporated into the contract. According to the observations provided above, principles to be considered include "the parties' intention", "contemporaneous inclusion", "reasonable and adequate notice" and "accessible in a durable medium for future reference".

Incorporation by course of dealing

The third common method of the incorporation of contract terms is based on a course of dealing. In general, there are two main tests for the incorporation of terms into contracts based on prior dealings. In the information society, further interpretation may be required taking into account the features of electronic communications.

Two tests for incorporation by course of dealing

There are two tests for incorporation by course of dealing. The first test is the "regular and consistent" test, which is also known as "the reasonable objective expectation test". In the traditional English case of *McCutcheon v David MacBrayne Ltd*, the "regular and consistent" test was employed in that the corporation of contract terms by course of dealing would only be possible when a course of dealing was regular and consistent.¹⁴⁹ It displays the logical reasoning: if standard terms are regularly and consistently used between contracting parties, it will be unreasonable to deny the awareness of those sets of standard terms. In the recent Western Australia Court of Appeal decision of *La Rosa v Nudrill Pty Ltd*, a similar approach was taken that an exemption clause in documents from the parties' previous dealings would only be incorporated into subsequent contracts if such a course of dealings referred in general to "the existence of a prior consistent history of comparable transactions between the parties when the relevant transaction was undertaken".¹⁵⁰ That is, the consistency and regularity test requires justification in terms of the nature and content of the terms based on a course of dealing. Compared with the UK and Australia, the "regular and consistent" test in the US may also rely on the number of prior transactions that contain the term,¹⁵¹ as well as the language in the contract.¹⁵²

The second test is the "awareness" test, which is known as the "reasonably sufficient notice" test or the "ticket cases" test. That is, the party seeking to rely on the term is required to give reasonably sufficient notice to the other contracting party regarding the term. However, actual knowledge of the content of the relevant term is not essential. It is suggested that ***J.B.L. 116**

"since in the previous contracts a party may have bound himself by terms which he has not read and of which therefore he has no actual knowledge, these terms can surely be incorporated without actual knowledge into a subsequent contract by course of dealing."¹⁵³

In other words, if a term is reasonably brought to the other party's attention, it satisfies the awareness test regardless of whether the other party reads the term as evidenced in traditional ticket cases, though "reasonable notice" is particularly required for cases involving an automated ticket machine.¹⁵⁴ For example, the recent English case of *Allen Fabrications Ltd v ASD Ltd* concerned contractual documents that did not make reference to either party's standard terms.¹⁵⁵ In the *Allen* case, there had been over 250 transactions between the parties, which, in each case, involved the sending to the plaintiff of an advice note and an invoice; but both parties had their own set of standard terms.¹⁵⁶ The reasoning in the judgment of the *Allen* case relied on the "reasonably sufficient notice" test established in the automated ticket machine case *Thornton*.¹⁵⁷ It was suggested that the assessment of fairness and reasonableness should consist of four elements when the case or situation was fact-sensitive: "(a) the nature of the clause (b) what actual steps were taken to draw it to the other party's attention (c) the character of the parties and (d) their particular dealings".¹⁵⁸ Subsequently, it was held that the exclusion clause was incorporated by express acceptance (under the credit facility application) or by a course of dealing and the seller only needed to satisfy the normal "notice" test for incorporation as the clause was found to be reasonable.¹⁵⁹

Moreover, the implementation of the "awareness" test may also be intertwined with the "oh, of course" test or the "officious bystander" test,¹⁶⁰ in particular for the incorporation of terms implied in fact or by

trade custom. In a traditional English case of [Southern Foundries \(1926\) Ltd v Shirlaw](#), it was suggested that

"prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'" ¹⁶¹

In the US, there are cases where they require additional evidence in terms of awareness in order for unusual terms (i.e. terms may cause significant disadvantages to the other party) to be incorporated into the contract, and thus they cannot be solely based on the number of the transactions.¹⁶² It was suggested that ***J.B.L. 117**

"by permitting evidence of trade custom and past dealings, future courts will be able to more consistently effectuate the intent and expectation of the parties and construe their agreements in accordance with commercial realities." ¹⁶³

That is, evidence is required in order to justify parties' awareness in the course of dealing, in particular for the incorporation of unusual or unreasonable terms.

Consistent and regular modes of electronic communications

Equally, the above two tests should also be applicable to determine the effectiveness of the incorporation of terms by electronic means by course of dealing, though these tests may require further interpretation taking into consideration the features of electronic communications. In a digital environment, the interpretation of the "consistency and regularity" test may require special consideration for the consistent and regular modes of electronic communications in addition to those traditional factors discussed above, whereas the interpretation of the "awareness" test may need to employ the requirement of making terms available conspicuously and effectively in a durable medium for later reference as a prerequisite for the incorporation of terms (which is also required for the incorporation by signature and by notice). For example, the case of [University of Plymouth v European Language Centre Ltd](#) concerned whether information exchanged by email communications could constitute an agreement by course of dealing.¹⁶⁴ In this case, the European Language Centre used accommodation at the University of Plymouth for their summer language classes. The number of beds available was reduced to 100 at the end, though it was estimated through emails and over the telephone during the period of inquiry that about 200 beds would be available. The language centre sued the university, arguing that a contract was in existence for 200 beds, as per the earlier email and telephone communication. The Court of Appeal held that incorporation by a course of dealing was not applicable and a contract had not been entered into because: (1) the parties had merely been negotiating prior to formalising the arrangement into a contract after the court looked at the record of the entire communication between the parties; and (2) in previous years the final arrangement would be reduced into writing and concluded in a detailed contractual document.¹⁶⁵ That is, the contract could not be formed by mere exchange of email communications as it was not consistent with making a detailed contract in the previous course of dealing. Thus, a course of dealing must be regular and consistent in terms of modes of communications for contractual terms, and "onerous or unusual terms should be brought specifically to the buyer's attention",¹⁶⁶ otherwise they will not form part of the course of dealing.

The "consistency and regularity" test and the "awareness" test for the incorporation of terms by course of dealing can be employed in modern contract law, though they need to be further interpreted in light of the new factors such as ***J.B.L. 118** the consistent and regular mode of electronic communications and the appropriateness of making terms available in a digital form.

Conclusion and recommendation

In the age of the internet and globalisation, more flexible means can be used to construct a contract as a result of ever-changing technology in modern commercial practice. The employment of electronic means for contracting may increase the efficiency of the contracting process and promote cross-border commercial transactions. However, the legal uncertainty about the effectiveness of the incorporation of terms in a digital form may hamper the growth of electronic commercial transactions. There is need for a reassessment of legal and technical measures to ensure that terms can be effectively incorporated by electronic means.

As analysed above, the doctrine of the incorporation of terms in both B2B and B2C electronic transactions consists of three elements: the availability of terms; the provision of unambiguous consent and the content of terms. The first element—making terms available—is fundamentally important and should be considered as a prerequisite for the incorporation of a term. It is noteworthy that the effectiveness of giving unambiguous consent relies on two elements: the appropriateness of the availability of terms, and the conspicuous means of electronic communications that enables users to give informed consent. As to the content of the terms, the more unusual a term is, the greater notice is required to draw the other party's attention to it for both B2B and B2C contracts.

Among the three traditional tests ("awareness", "consistency and regularity" and "fairness and reasonableness") that are employed to determine the effectiveness and validity of the incorporation of terms, it is clear that the cornerstone element for the incorporation of terms (by signature, by notice and by course of dealing) is the awareness test, namely, "reasonably sufficient/conspicuous notice" and "manifested unambiguous consent".¹⁶⁷ That is, the party should draw the other party's attention to the existence of contract terms at the time the contract is made; and the other party should give unambiguous manifestation of assent to those terms before the contract becomes binding. Furthermore, in order to keep up with the development of new technologies, the traditional "consistency and regularity" test should be extended to assess the consistent and regular modes of electronic communications, while the traditional "reasonableness and fairness" test for unfair terms in contracts should also be further interpreted to evaluate the appropriateness of the technical means of electronic communications.

In recent years, countries, regions and international organisations have made efforts to amend existing legislation and launch new legislation for e-commerce. It appears that the common legal principles concerning the incorporation of terms in the EU, US and China require making terms available effectively by appropriate/conspicuous means and ensuring the accessibility, storage and unchanged reproducibility of the terms for later reference.¹⁶⁸ In the EU and UK, there is a further requirement that terms must be made available and accessible in ***J.B.L. 119** a durable medium.¹⁶⁹ After all, the common criteria around the globe for making terms available in a digital form can be summarised as: accessibility for later/subsequent/future reference; integrity of the information; capability of being displayed; capability of being printed, stored and reproduced; notice in a clear and comprehensible manner or by conspicuous means; and records in a durable medium.

However, there is no established single provision for the incorporation of terms in national, regional and international legislation. The future success of the facilitation of electronic communications in international contracts depends on consistency in interpreting and implementing the doctrine of the incorporation of terms. It would be helpful to establish an internationally harmonised approach to remove the obstacles to the determination of the appropriateness of making terms available and the effectiveness of incorporating them into the contract by electronic means. Legal and technical measures adopted in such approach should be technological-neutral in order to avoid jeopardising technological innovation and market development. In the author's view, the key elements for legislative consideration should include:

- ensuring that the terms are brought to the parties' attention by conspicuous means at the time the contract is made;
- implementing legal and technical measures to enhance the availability, accessibility and unchanged reproducibility of terms; and enabling such terms to be informed, accessed and stored in a durable medium for later reference;
- establishing appropriate, effective and user-friendly means for users to give their conscious consent to terms before they are incorporated into the contract;
-

providing a consistent interpretation of the reasonableness and fairness test for unfair terms to both B2B and B2C contracts, taking into consideration the features of electronic communications.

The above recommendations may help in promoting the harmonisation of regulatory standards for the availability and incorporation of terms at the international level, and as a result, increasing users' trust in electronic commercial transactions and stimulating the healthy growth of the digital economy around the globe in the coming years.

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1. L.L. Fuller and M.A. Eisenberg, *Basic Contract Law, 7th edn* (St Paul, Minnesota: West Publishing, 2001), p.641.

2. [Thornton v Shoe Lane Parking Ltd \[1971\] 2 Q.B. 163 CA \(Civ Div\)](#).

3. See the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) and *UNIDROIT Principles of International Commercial Contracts 2010* (UNIDROIT Principles).

4. J. Kotrusz, "Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts" (2009) 26 *Uniform Law Review* 119, 145; and see also the 45th Session UNCITRAL (New York, June 25 to July 6, 2012), which endorsed the 2010 edition of the *UNIDROIT Principles*.

5. F. Lautenschlager, "Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG—The Reasonable Third Person, Language Problems and Standard Terms and Conditions" (2007) 11 *Vindobona Journal of International Commercial Law & Arbitration* 259.

6. See [EC Directive on Electronic Commerce 2000 art.10](#); and the [EC Distance Selling Directive 1997](#) (replaced by the [EC Directive on Consumer Rights \(2011/83\)](#) on June 13, 2014) [art.5](#).

7. "Proposal for a Regulation on a Common European Sales Law (Proposed Common European Sales Law 2011)" COM/2011/0635 final—2011/0284 (COD), Brussels, October 11, 2011.

8. Proposed Common European Sales Law 2011 arts 10, 13, 23 and 24; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>. On February 26, 2014 the European Parliament adopted a legislative resolution on the Proposal for a Common European Sales Law, <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1339866&t=e&l=en> [Both accessed December 23, 2014].

9. The [Electronic Commerce \(EC Directive\) Regulations 2002](#), http://www.legislation.gov.uk/ukxi/2002/2013/pdfs/ukxi_20022013_en.pdf; the [Unfair Terms in Consumer Contracts Regulations 1999](#), http://www.legislation.gov.uk/ukxi/1999/2083/pdfs/ukxi_19992083_en.pdf; and the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265898/consumer-contracts-information-cancellation-and-additional-charges-regulations-2013.pdf [All accessed December 23, 2014].

10. *Law Society, The Practice Note for Consumer Contracts Regulations 2013* (May 15, 2014), available at <http://www.lawsociety.org.uk/advice/practice-notes/> [Accessed December 23, 2014]. See also [Consumer Contracts Regulations 2013 reg.2](#)

11. See also [Unfair Terms in Consumer Contracts Regulations 1999](#) and [Consumer Protection \(Distance Selling\) Regulations 2000](#) (to be replaced by the [EC Directive on Consumer Rights 2011](#) in 2014).

12. The [Electronic Commerce \(EC Directive\) Regulations 2002 s.11](#) and [Sch.2. Schedule 2](#) sets out guidelines for the application of the reasonableness test that: "(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met; (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term; (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; (e) whether the goods were manufactured, processed or adapted to the special order of the customer."

13. The [Unfair Terms in Consumer Contracts Regulations \(UTCCR\) 1999 ss.5 and 6](#). The [UTCCR \(s.5\(1\)\)](#) defines unfair terms as follows: "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". See also [Directive 93/13 on unfair terms in consumer contracts \[1993\] OJ L95/29 art.3](#).
14. "*The Consumer Rights Bill: Statement on Policy Reform and Responses to Pre-Legislative Scrutiny*" (January 2014), Annex H: *Unfair Terms*, p.59, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274912/bis-14-566-consumer-rights-bill-statement-on-policy-reform [Accessed December 23, 2014].
15. The [Consumer Protection \(Amendment\) Regulations 2014](#), <http://www.legislation.gov.uk/uksi/2014/870/made> (last accessed 20 May 2014); see also "*Misleading and aggressive commercial practices—The Draft Consumer Protection from Unfair Trading (Amendment) Regulations 2013*" (August 2013), <https://www.gov.uk/government/publications/misleading-and-aggressive-commercial-practices-the-draft-consumer-protection-from-unfair-trading> [Both accessed December 23, 2014].
16. Uniform Commercial Code (UCC) s.2-207.
17. UCC s.2-302(1).
18. Contract Law of the People's Republic of China (adopted by the National People's Congress on March 15, 1999, and promulgated by the Presidential Order No.15) (China Contract Law) 1999: see arts 36–41. Article 39 of the China Contract Law provides a provision on "standard terms" as follows:
"Where a contract is concluded by way of standard terms, the party supplying the standard terms shall abide by the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other party's attention to the provision(s) whereby such party's liabilities are excluded or limited, and shall explain such provision(s) upon request by the other party."
19. Law of the People's Republic of China on Protection of Consumer Rights and Interests 1993 art.24.
20. Law of the People's Republic of China on Protection of Consumer Rights and Interests (2013 amendment) art.24.
21. See for example *Specht v Netscape Communications Corp* 306 F. 3d 17 (2d Cir. 2002) at [20].
22. See [J Spurling Ltd v Bradshaw \[1956\] 1 W.L.R. 461 CA](#); as Lord Denning explained, "the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient"; and see UCC s.2-316(2).
23. The Regulations of Online Signing Process of Electronic Contract (came into force December 1, 2013), MOFCOM Announcement of No.41 of 2013 by Ministry of Commerce of the People's Republic of China, arts 5.1(5) and 8.
24. "*Google Wallet is said to be landing on Google Glass*" (May 6, 2014), *Cnet*, <http://www.cnet.com/uk/news/google-is-said-to-be-tacking-google-wallet-onto-google-glass/> [Accessed December 23, 2014].
25. "*Robot avatar beaming put to the test*" (May 10, 2012), *BBC News*, <http://www.bbc.co.uk/news/technology-18017745> [Accessed December 23, 2014].
26. See United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 art.7.
27. *Rosenfeld v Zerneck* 4 Misc. 3d 193, 776 N.Y.S. 2d 458 (Sup. Ct. Kings Co., NY, May 4, 2004).
28. [Bernuth Lines Ltd v High Seas Shipping Ltd \(The Eastern Navigator\) \[2005\] EWHC 3020 \(Comm\); \[2006\] 1 All E.R. \(Comm\) 359](#).
29. *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58; see also *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2.
30. *Jafta v Ezemvelo KZN Wildlife (D204/07)* [2008] ZALC 84; [2008] 10 B.L.L.R. 954 (LC); (2009) 30 I.L.J. 131 (LC) (July 1, 2008). In England, the case of [North Range Shipping Ltd v Seatrans Shipping Corp \[2002\] 1 W.L.R. 2397 CA \(Civ Div\)](#) concerned a similar issue concerning the malfunction (fault) of an email, in that an email was sent but did not enter the recipient's mailbox; however, the case was resolved without having to respond to that issue.
31. R. Ong, "Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hongkong" (2004) 12 International Journal of Law & Information Technology 101, 103.
32. "*Amazon Conditions of Use & Sale*", <https://www.amazon.co.uk/gp/help/customer/display.html?ie=UTF8&nodeId=1040616&pop-up=1#> [Accessed December 23, 2014].
33. R. Mann and J. Winn, *Electronic Commerce, 2nd edn* (New York: Aspen Publishing, 2005), p.275.

34. *Specht v Netscape* 306 F. 3d 17 (2d Cir. 2002).
35. [Ryanair v Billigfluege.de \[2010\] IEHC 47.](#)
36. *Klocek v Gateway, Inc* 2000 U.S. Dist. Lexis 9896, 104 F. Supp. 3d 1332 (D. Kan., June 16, 2000)—the courts hold that the shrinkwrap terms and conditions do not create a binding contract. See *Brower v Gateway 2000, Inc* 676 N.Y.S. 2d 569 (New York Supreme Ct. App. Div. [Aug.] 1998)—a shrinkwrap agreement was validly formed.
37. *ProCD Inc v Zeidenberg* 86 F. 3d 1447 (7th Cir. 1996). See also the EU position in the Commission Notice "Guidelines on Vertical Restraints", which states that "this may take the form of a 'shrink wrap' licence, i.e. a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package": Brussels, SEC(2010) 411, http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf [Accessed December 23, 2014].
38. Uniform Computer Information Transactions Act (UCITA) 1999 s.209.
39. [EC Directive on Electronic Commerce 2000 art.10](#); [EC Distance Selling Directive 1997 art.5](#) (to be replaced by the [EC Directive on Consumer Rights 2011 art.8](#)); and [EU Directive on Unfair Commercial Practices 2005](#), in general.
40. F. Wang and N. Griffiths, "Protecting Privacy in Automated Transaction Systems: A Legal and Technological Perspective in the EU" (2010) 24 International Review of Law, Computers and Technology 153, 159.
41. UN Convention on the Use of Electronic Communications in International Contracts (the UN Convention) 2005 arts 8 and 9.
42. UNCITRAL Model Law on Electronic Commerce 1996 art.11.
43. [Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market \(Directive on Electronic Commerce\) \[2000\] OJ L178/1 art.9](#) (Treatment of contracts); [art.10](#) (Information to be provided); [art.11](#) (Placing of the order).
44. *Commission, First Report on the application of Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) COM/2003/0702 final.*
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51. [Content Services Ltd v Bundesarbeitskammer \(C-49/11\) EU:C:2012:419; \[2012\] 3 C.M.L.R. 34.](#)
52. Memorandum for: *Fadal Machining Centers LLC v Compumachine, Inc No.10-55719 (9th Cir. December 15, 2011).*
53. Memorandum for: *Fadal Machining Centers No.10-55719 (9th Cir. December 15, 2011)*, p.3.
54. [Directive on Electronic Commerce 2000 art.10\(1\)\(b\).](#)
55. [Directive on Electronic Commerce 2000 art.10\(3\)](#) (emphasis added).
56. [Directive 2011/83 on consumer rights, amending Directive 93/13 and Directive 1999/44 and repealing Directive 85/577 and Directive 97/7: Text with EEA relevance \[2011\] OJ L304/64–88](#) (EC Directive on Consumer Rights).
57. [Directive 97/7 on the protection of consumers in respect of distance contracts,\[1997\] OJ L144/19–27 \(EC Distance Selling Directive\) art.4\(20\)](#) (emphasis added); and see also [EC Directive on Consumer Rights 2011 art.6\(1\)](#).
58. [EC Distance Selling Directive 1997 art.5\(1\)](#); and see also [EC Directive on Consumer Rights 2011 art.8\(1\)](#) (emphasis added).
59. Proposed European Common Sales Law 2011 art.24(4).

60. [Content Services ECLI:EU:C:2012:419; \[2012\] 3 C.M.L.R. 34.](#)
61. The [UK E-Commerce \(EC Directive\) Regulations 2002 art.9\(3\).](#)
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63. [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 s.5.](#)
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66. UETA 1999 s.8(b).
67. UETA 1999 s.8—Comment, para.3 (emphasis added), http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf [Accessed December 23, 2014].
68. China Electronic Signatures Law 2004 arts 4, 5(1) and 6(1) (emphasis added).
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74. UN Convention 2005 art.13 (emphasis added).
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87. *Sweeny v Mulcahy [1993] ILRM 289.*
88. [Consumer Contracts Regulations 2013 reg.37.](#)
89. *L'Estrange v F Graucob Ltd [1934] 2 K.B. 394 KBD.*
90. S. Kapnoulas and B. Clarke, "Incorporation of Unusual or Unreasonable Terms into Contracts: The Red Hand Rule and Signed Documents" (2006) 11 Deakin Law Review 95, 112.

91. See [Parker v South Eastern Railway \[1877\] 2 C.P.D. 416 CA](#); and [Thompson v London, Midland and Scottish Railway Co Ltd \[1930\] 1 K.B. 41 CA](#).
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94. [Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa \(Catalunyacaixa\) \(C-415/11\) EU:C:2013:164; \[2013\] 3 C.M.L.R. 5](#) at [68].
95. [Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt \(C-472/10\) EU:C:2012:242; \[2012\] 3 C.M.L.R. 1](#). The CJEU ruled at [31] that
 "it is for the national court, ruling on an action for an injunction, brought in the public interest and on behalf of consumers by a body appointed by national law, to assess, with regard to [Article 3\(1\)](#) and [\(3\) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts](#), the unfair nature of a term included in the general business conditions of consumer contracts by which a seller or supplier provides for a unilateral amendment of fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for that amendment. As part of this assessment, the national court must determine, inter alia, whether, in light of all the terms appearing in the general business conditions of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the general business conditions at issue, the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract."
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99. Consumer Rights Bill (Version 14.03.2014) s.64(2).
100. Consumer Rights Bill (Version 14.03.2014) s.64(3).
101. Consumer Rights Bill (Version 14.03.2014) s.64(4). Section 64(5) further explains that "In subsection (4) 'average consumer' means a consumer who is reasonably well-informed, observant and circumspect".
102. [Moore v Microsoft Corp N.Y. Sup. Ct App. Div. 2d Dept \(April 15, 2002\)](#).
103. [Caspi v Microsoft Corp 323 N.J. Super. 118, 732 A. 2d 528 \(1999\)](#).
104. CISG-AC Opinion No.13, "Inclusion of Standard Terms under the CISG" (January 20, 2013), <http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html> [Accessed December 23, 2014].
105. [Golden Valley Grape Juice and Wine LLC v Centrisys Corp, Federal District Court, California \(January 21, 2010\)](#), <http://cisgw3.law.pace.edu/cases/100121u1.html> [Accessed December 23, 2014].
106. [Golden Valley v Centrisys, Federal District Court, California \(January 21, 2010\)](#), <http://cisgw3.law.pace.edu/cases/100121u1.html> [Accessed December 23, 2014].
107. [Thornton v Shoe Lane Parking \[1971\] 2 Q.B. 163](#).
108. [Olley v Marlborough Court Ltd \[1949\] 1 K.B. 532 CA](#).
109. [Olley v Marlborough Court \[1949\] 1 K.B. 532](#).
110. [Chapelton v Barry Urban DC \[1940\] 1 K.B. 532 CA](#).
111. [University of Edinburgh v Onifade 2005 S.L.T. \(Sh Ct\) 63](#).
112. [Specht Corp 306 F. 3d 17 \(2d Cir. 2002\)](#), p.22, http://cyber.law.harvard.edu/stjohns/Specht_v_Netscape.pdf [Accessed December 23, 2014].
113. A. Freilich and E. Webb, "The Incorporation of Contractual Terms in Unsigned Documents—Is it Time for a Realistic, Consumer-Friendly Approach?" (2008–09) 34 University of Western Australia Law Review 261, 272.

114. L.A. DiMatteo, "Critical issues in the formation of contracts under the CISG" (2011) 59 *Belgrade Law Review* 67, 78.
115. [Ryanair v Billigfluege.de \[2010\] IEHC 47.](#)
116. E. Macdonald, "When is a Contract formed by the Browse-wrap Process?" (2011) 19 *International Journal of Law and Information Technology* 285, 291.
117. [Ryanair v Billigfluege.de \[2010\] IEHC 47.](#)
118. [J Spurling v Bradshaw \[1956\] 1 W.L.R. 461.](#)
119. *eBay International AG v Creative Festival Entertainment Pty Ltd (ACN 098 183 281) [2006] FCA 1768.*
120. *eBay v Creative Festival Entertainment [2006] FCA 1768* at [4], [6] and [12]. On the back of the ticket sold by eBay, it said: "6. Should this ticket be re-sold for profit it will be cancelled and the holder will be refused entry. This condition specifically prohibits ticket re-sale through online market or auction sites." This is different from the notice of terms on other sale agents, which provided the old condition, to the effect that: "6. Should this ticket be re-sold or transferred for profit or commercial gain it will become voidable and the holder may be refused entry to, or ejected from the venue."
121. *eBay v Creative Festival Entertainment [2006] FCA 1768* at [23].
122. *eBay v Creative Festival Entertainment [2006] FCA 1768* at [45].
123. *eBay v Creative Festival Entertainment [2006] FCA 1768* at [45].
124. *eBay v Creative Festival Entertainment [2006] FCA 1768* at [53].
125. *eBay v Creative Festival Entertainment [2006] FCA 1768* at [55].
126. *New South Wales Young Lawyers Civil Litigation Committee and Business Law Committee, "Australian Government Review of Australian Contract Law" (July 2012), p. 12.*
127. *Specht 306 F. 3d 17 (2d Cir. 2002).*
128. *Specht 306 F. 3d 17 (2002).*
129. *Specht 306 F. 3d 17 (2002)* at [20].
130. *Specht v Netscape Communications 150 F. Supp. 2d 585, 595-596 (S.D.N.Y. 2001).*
131. [Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd \[1989\] Q.B. 433 CA \(Civ Div\)](#) at 439.
132. [Patchett v Swimming Pool and Allied Trades Association Ltd \(SPATA\) \[2009\] EWCA Civ 717; \[2010\] 2 All E.R. \(Comm\) 138.](#)
133. [Patchett v SPATA \[2009\] EWCA Civ 717.](#)
134. [Patchett v SPATA \[2009\] EWCA Civ 717](#) at [51].
135. [Patchett v SPATA \[2009\] EWCA Civ 717](#) at [58].
136. *Golden Valley v Centrisys, Federal District Court, California (January 21, 2010),* <http://cisgw3.law.pace.edu/cases/100121u1.html> [Accessed December 23, 2014].
137. *Manasher v NECC Telecom No.06-10749, 2007 WL 2713845 (E.D. Mich. 2007).*
138. *Paola Briceño v Sprint Spectrum LP 911 So. 2d 176, 177-80 (Fla. Ct App. 2005),* in the District Court of Appeal of Florida, Third District.
139. *Sprint Spectrum 911 So. 2d 176, 177-180 (Fla. Ct. App. 2005)* at p.8.
140. B. Casady, "Electronic Pitfalls: The Online Modification of Ongoing Consumer Service Agreements" (2009) 5 *Shidler Journal of Law, Commerce and Technology* 12.
141. [Content Services \(C-49/11\) EU:C:2012:419; \[2012\] 3 C.M.L.R. 34.](#)
142. [Ryanair v Billigfluege.de \[2010\] IEHC 47.](#)
143. *Specht v Netscape 306 F. 3d 17 (2d Cir. 2002).*
144. [Directive 2011/83 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44 repealing Directive 85/577 and Directive 97/7, Text with EEA relevance \[2011\] OJ L304/64-88.](#)

145. [Content Services EU:C:2012:419; \[2012\] 3 C.M.L.R. 34](#) at [51] (emphasis added).
146. [EC Directive on Consumer Rights 2011 art.2\(10\)](#) (emphasis added).
147. F. Wang, "Hyperlinking: Debate on Contract, IP and Database Regulation" (2013) 93 Intellectual Property Forum 85 (a quarterly journal published by the Intellectual Property Society of Australia and New Zealand Inc).
148. [Content Services EU:C:2012:419; \[2012\] 3 C.M.L.R. 34](#) at [48]. See also the [Consumer Contracts Regulations 2013 reg.5](#).
149. [McCutcheon v David MacBrayne Ltd \[1964\] 1 W.L.R. 125](#).
150. *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18 at [63].
151. *Schulze and Burch Biscuit Co v Tree Top, Inc* 831 F. 2d 704, 715 (7th Cir. 1987). In this case, the parties had nine prior transactions with identical terms including the arbitration provision. The court held that the 10th transaction with identical terms including the arbitration provision was not a material alteration; see also UCC s.2-207. Please note that in other cases there was also debate over the underlying public policy on arbitration that parties are not compelled to resort to arbitration unless there is a clear and unambiguous consent each time (i.e. *Schubtex, Inc v Allen Snyder, Inc* 49 N.Y. 2d 1, 399 N.E. 2d 1154, 424 N.Y.S. 2d 133 (1979)).
152. *Borden Chem., In. v Jahn Foundry Corp* 834 N.E.2d 1227, 1230 (Mass. App. Ct 2005). "In this case, the summary judgment record established that, for the resin shipments involved in the claims arising from the 1999 explosion, Jahn's 1998 and 1999 purchase orders contained new terms respecting warranties and remedies in connection with Borden's product that were inconsistent with an agreement to indemnify Borden."
153. M. Evans, "Incorporation of Exemption Clauses in a Contract—Course of Dealing" (1964) 27 Modern Law Review 354, 356.
154. [Thornton v Shoe Lane \[1971\] 2 Q.B. 163](#). In *Thornton* case, Sir Gordon Willmer considered the nature of the case taking into account particular conditions, and asserted that "at least it seems to me that any attempt to introduce conditions after the irrevocable step has been taken of causing the machine to operate must be doomed to failure".
155. [Allen Fabrications Ltd v ASD Ltd \[2012\] EWHC 2213 \(TCC\)](#) at [17].
156. [Allen Fabrications \[2012\] EWHC 2213 \(TCC\)](#) at [13].
157. [Thornton v Shoe Lane \[1971\] 2 Q.B. 163](#); and see also [Allen Fabrications \[2012\] EWHC 2213 \(TCC\)](#).
158. [Allen Fabrications \[2012\] EWHC 2213 \(TCC\)](#) at [61].
159. [Allen Fabrications \[2012\] EWHC 2213 \(TCC\)](#) at [13], [30], [64] and [66].
160. [Southern Foundries \(1926\) Ltd v Shirlaw \[1939\] 2 K.B. 206 CA](#) at 227.
161. [Southern Foundries \(1926\) Ltd v Shirlaw \[1939\] 2 K.B. 206](#) at 227.
162. See *Schubtex Inc v Allen Snyder, Inc* 49 N.Y. 2d 1, 399 N.E. 2d 1154, 424 N.Y.S. 2d 133 (1979), in contrast to *Schulze and Burch Biscuit Co v Tree Top Inc* 831 F. 2d 704, 715 (7th Cir. 1987).
163. J. Ebetino, "N.Y.U.C.C. § 2-207: Existence of Agreement to Arbitrate May Be Implied from Evidence of Prior Course of Dealing or Trade Usage" (1980) 54 St John's Law Review 821, 827; see also D. Collins, "Arbitration and the Uniform Commercial Code" (1966) 41 New York University Law Review 736, 740.
164. [University of Plymouth v European Language Centre Ltd \[2009\] EWCA Civ 794; \(2009\) 153 S.J.L.B. 27](#).
165. [University of Plymouth \[2009\] EWCA Civ 794; \(2009\) 153 S.J.L.B. 27](#).
166. [Allen Fabrications \[2012\] EWHC 2213 \(TCC\)](#) at [54].
167. See *Specht* 306 F. 3d 17 (2d Cir. 2002).
168. See [EC Directive on Electronic Commerce 2000](#); UETA 1999; and China Electronic Signatures Law 2004.
169. See [EC Directive on Consumer Rights 2011 art.8\(1\)](#); the [Consumer Contracts Regulations \(UK\) 2013 reg.5](#); and see also [Content Services Ltd \(C-49/11\) EU:C:2012:419; \[2012\] 3 C.M.L.R. 34](#).

