

**MEMORANDUM**  
**(Website Terms of Use)**

**Subject:** Research Brief- Review of e-Commerce Platforms' Terms of Use

**Date:** May 2020

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**1. Introduction**

Student was instructed by Company to conduct research to aid their drafting of the website terms of use (“ToU”) and privacy statement. The scope of this memorandum will be limited to terms relating website use, liability and intellectual property but **not** terms relating to substantive commercial arrangements such as payment, delivery and refunds. The following is the first piece of research reviewing common ToU elements in e-Commerce platforms that will act as the foundation of Student’ proposal of requisite terms catering to Company’s business and legal needs.

ToU agreements are legal contracts that visitors to a website must agree and conform to in order to use the site’s services. It is submitted that a well-drafted TOS statement on Company could serve three main purposes- *limiting liability* for the content of the website, defining the *permitted conduct* on the site and incorporating a *dispute resolution clause*.

**2. Executive Summary**

Though ToU statements are not required under Hong Kong law, they are important to protect the business. ToU can either be incorporated as “browsewrap” or “clickwrap” agreements, the latter of which actively gathers consent from its user and is more likely to be enforceable. The common ToU elements listed in §4 include an introduction, eligibility of users, acceptable use policy, intellectual property rights, right to modification and termination, user warranties, jurisdiction, dispute resolution and limitation of liability clauses.

**3. Manner of Incorporation**

As a website that offers goods for sale, terms and conditions of sale must be brought properly to the attention of the buyer and incorporated in to the contract.<sup>1</sup> Similar, the manner of incorporating a TOS on the website is a decisive factor in whether a TOS is binding and

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<sup>1</sup> *Butler Machine Tool Co v Ex-Cell-O Corporation* [1979] 1 All ER 965 at 968.

enforceable contract against users. TOS agreements can be roughly divided to “browse-wrap” agreements and “click-wrap” agreements.

3.1.1. “**Browse-wrap**” is a term that describes license agreements which do not compel website visitors to actively agree to enter into the agreement, such as clicking on a box saying “I agree”. Browse-wrap agreements are sometimes displayed in full directly on the initial page of the website or sometimes contained in a hyperlink on the site. Company’s TOS fall under the latter case since they are contained within a hyperlink at the bottom of the website and do not require any action to be taken by the user.

3.1.2. “**Click-wrap**” agreements, on the other hand, require a “click” or other actions by the user as acknowledge and acceptance of the terms. Full license terms may be displayed as “pop-ups” in front of the user for review or contained within a hyperlink.

3.1.3. In Hong Kong, Section 17(1) of Electronic Transactions Ordinance (Cap. 553) has the effect of binding a party to an electronic contract such as a TOS upon acceptance. There are legal opinions that the act of clicking a button can be an effective acceptance of the terms of an offer and Section 17(1) is broad enough to give effect to the conclusion of “click-wrap” contracts.<sup>2</sup> However, there is considerable doubt as to whether an automated form of acceptance generated by a computer is sufficient to conclude a contract, such as a “browse-wrap” agreement or TOS that is agreed to or clicked on by default. There is currently no Hong Kong case law deciding on the issue of whether “browse-wrap” agreements are enforceable, but United States has an extensive body of case law providing guidance on how to ensure TOS enforceability.

3.1.4. Company’s current incorporation of TOS is most analogous to the “browse-wrap” agreement in United States District Court case *In Re Zappos, Inc.*<sup>3</sup>. In this case, Zappos’ Terms of Use hyperlink could be found on the footer section of

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<sup>2</sup> Cameron McCullough, “An Overview of the New Regime Created by the Electronic Transactions Bill,” (Jan 2000) *Hong Kong Lawyer*

<sup>3</sup> *In re Zappos, Inc.*, 893 F. Supp. 2d 1058, 2012 U.S. Dist. LEXIS 141803, 95 A.L.R.6th 721, 2012 WL 4466660 (D. Nev. September 27, 2012)

every webpage and is stylized with the size, font and color as other non-significant links. The Court held that no reasonable user would have reason to click on the TOS and there is no acceptance by the user, no meeting of minds and no contract under Nevada law. In addition, there is a line of authority supporting the contention that “browse-wrap” agreements are generally unenforceable.<sup>4</sup> Company’s current TOS may be held unenforceable since no action was required from the user to express acceptance and is placed on the website in a manner similar to Zappos.com.

3.1.5. In summary, to ensure the enforceability of TOS agreements, Company should observe the following requirements:

**I) Provide ample notice and opportunity to review terms**

- Providing scroll box of agreement before completing a transaction may suffice<sup>5</sup>
- Recurrent display of statements such as “All transactions are subject to our Terms and Conditions”, provided with obvious hyperlink to full terms in a noticeable location<sup>6</sup>
- Give clear and noticeable notice to updates of terms in TOS or Privacy Agreement

**II) Seek consent from the user**

- “Clickwrap” agreements have better enforceability, can be created by gathering express consent through “I agree” checkboxes or giving notice to TOS agreement before allowing access to website functions<sup>7</sup>
- Seeking consent to updates of terms using similar techniques above

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<sup>4</sup> *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 2002 U.S. App. LEXIS 20714, 48 U.C.C. Rep. Serv. 2d (Callaghan) 761 (2d Cir. N.Y. October 1, 2002); *Alan Ross Mach. Corp. v. Machinio Corp.*, 2018 U.S. Dist. LEXIS 113012, 2018 WL 3344364 (N.D. Ill. July 9, 2018)

<sup>5</sup> *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1010 (D.C. Cir. 2002)

<sup>6</sup> *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005)

<sup>7</sup> *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 4553, 54 U.S.P.Q.2D (BNA) 1344, Copy. L. Rep. (CCH) P28,059 (C.D. Cal. March 27, 2000)

## **4. Common Terms of Use Elements**

### **4.1. Introduction / Deemed Acceptance of Terms**

Firstly, this section defines the parties to the agreement, which is the user and the website service provider. It may include the company name, place of incorporation, address, contact details and a brief outline of services provided on the website. Secondly, the section will stipulate that by using the website or a specified scope of services, the user is agreeing to abide by the full terms and conditions; refusal of which may deny the user from certain services. Thirdly, the section will emphasize that ToU constitute a binding legal agreement with users.

### **4.2. Eligibility of Users**

Company may limit who is eligible to its services provided in this section. The most obvious example is being of legal age in one's jurisdiction of access due to content related to alcoholic beverages. Further limitations to services may be stipulated, such as only having access to certain parts of the site if the user is a registered member.

### **4.3. Acceptable Use Policy**

This section defines the acceptable and prohibited uses of the website. Some websites such as WineBourse may have a detailed and comprehensive policy that is drafted in a separate document and linked to the ToU page.<sup>8</sup>

Prohibited use of Company's website may include any commercial use, any illegal or fraudulent purpose, any conduct that interferes with the website's cybersecurity, transmission of malware and computer viruses. On the other hand, Company may grant the user limited, nonexclusive and revocable rights such as personal viewing, creating hyperlinks to Company's websites.

### **4.4. Company's Rights and Ownership**

This section will detail that Company own all intellectual property rights to content on the website, including but not limited to trademarks, products, graphics, videos, images,

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<sup>8</sup> Available at <http://www.winebourse.com/staticpage/acceptableuse>

text, data and coding. If Company allows the publication of user-generated content, the rights and ownership in such content should also be addressed in this section.

Company may include a copyright or trademark notice providing with registration information of its material that is protected under intellectual property law, and a notice expressing that trademarks (such as wine labels) not owned by Company are properties of their respective owners. A section may also be dedicated to providing contact information in the unlikely event that other intellectual property right owner may complain of infringement on the website to Company.

Company may prohibit visitors to the site to replicate its content or trademarks, use content or trademarks in connection to foreign products or services, use content or trademark in any manner that may disparage Company or in any manner that may cause confusion to customers.

#### **4.5. Modifications and Termination**

Company may reserve the right to modify, add to or terminate parts of the site in this section. It may also reserve the right to modify any terms in the ToU and documents referenced within the ToU. In this section, most websites stipulate that by accessing or using the website after a notice of ToU changes have been posted, users are deemed to have accepted the changes.

Further, this section may reserve the right for Company to terminate the access of any visitor at any time without notice and at its discretion.

#### **4.6. User's Warranties**

Since Company allows the registration of user accounts and may allow user-generated content such as record of one's wine inventory, this section will detail that the user is warranting the truth and accuracy of data provided and is responsible for their own account information. This section may further detail user warranties such as the lawfulness of their use of the website and legal authority to act in transactions.

#### **4.7. Disclaimers**

Company may use disclaimers to limit its liability and they should be clearly outlined in this section. Generally, websites attempt to opt out of promises contained in the information on the site that the company did not offer or intend to offer. Liability in tort may arise where website operator providing “advice” may owe a duty of care to the website’s users because they are equipped with special knowledge, and is aware that the user may access the advice for a certain purpose and reasonably rely on the advice for that purpose. Apart from information from the site, such a disclaimer should also opt out of liability for negligent misstatement in user generated content as well as interactive services (e.g. customer service chatbox) since “negligent speech” is widely construed by courts.<sup>9</sup> Company may wish to avoid such liability by incorporating appropriate disclaimers or statements to limit the website users’ expectations.

For instance, in *Gary Patchett and another v Swimming Pool & Allied Trades Association Ltd* [2009] EWCA Civ 717, a negligent misstatement claim, the court found that there was no duty of care owed by the website owner to the claimants where the website users (potential customers) were advised to obtain additional information from specialists before engaging a contractor. Thus, express statements that content on the website is for information purposes only and that the user should seek professional/specialist advice before carrying out any action in reliance of the website may limit Company’ liability for negligent misstatement.

A further liability concern is from hyperlinking to a linked site with obscene, defamatory or otherwise unlawful content, and becoming a party to legal action.<sup>10</sup> It is advisable to do due diligence on the legality of the third party site before providing a link. Disclaimers may also seek to limit liability in this area.

Exemption clauses used to avoid liability are governed by the Control of Exemption Clauses Ordinance (Cap. 71) and common law principles in Hong Kong. Clauses which seek to exclude liability for death and injury are usually not effective. As for liability for financial loss or property damage, the exemption clause’s validity is subject to a "reasonableness" test under Schedule 2 of Cap. 71. Common law principles also require

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<sup>9</sup> See *Domicrest Ltd v Swiss Bank Corporation* [1999] QB 548, where the court draws no distinction between written document, oral or other forms of instantaneous communication

<sup>10</sup> *McGrath and another v Dawkins and others* [2012] EWHC B3 (QB); *Caine v Advertiser And Times Ltd & others* [2019] EWHC 2278 (QB)

reasonable steps to be taken by the party that seek to rely on the clause to bring it to the other party's attention, disclaimers are thus often bolded and typed out in capital letters in ToU agreements.

#### **4.8. Jurisdiction and Governing Law**

The interpretation and application of the terms and conditions may vary greatly depending on governing law. The legal forum where disputes arising from the ToU agreement is settled i.e. the "jurisdiction", is also a significant issue to consider. Company may make informed decisions based on private international law, commercial law, contract law and legal cost considerations after seeking professional legal advice.

This section expresses Company's choice as to which countries' courts should have the right to hear disputes under this agreement, and what the governing law should be.

#### **4.9. Dispute Resolution Clause (Optional)**

If Company decide that legal disputes under this agreement should be referred to mediation and/or arbitration, it may decide to incorporate a dispute resolution clause. Mediation is a voluntary process in which an impartial mediator helps disputing parties to reach a settlement and arbitration is a dispute resolution process that employs a panel of adjudicators to hand down a legally binding award to resolve a dispute.

Company may seek legal advice in considering the pros and cons of alternative dispute resolution and incorporate [model clauses](#) suggested by the Hong Kong International Arbitration Centre in this agreement.<sup>11</sup>

### **5. Implied Terms**

The laws of Hong Kong has yet to establish internet specific consumer protection legislation but the common law principles and pre-existing laws governing consumer contracts will be applicable if the governing law of the consumer contract is Hong Kong law.<sup>12</sup> The following Ordinances will need to be considered:

- Sale of Goods Ordinance (Cap. 26)
- Control of Exemption Clauses Ordinance (Cap. 71)

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<sup>11</sup> Available at <https://www.hkiac.org/arbitration/model-clauses>

<sup>12</sup> Paul Stephenson & Alisa Kwan, *Cyberlaw in Hong Kong* (Hong Kong: LexisNexis, 2014), p 600.

- Unconscionable Contracts Ordinance (Cap. 458)
- Trade Descriptions Ordinance (Cap. 362)
- Mock Auctions Ordinance (Cap. 255)

### **5.1. Statutorily Imposed Terms in Sale of Goods Ordinance (Cap. 26)<sup>13</sup>**

- i) Fitness for the purpose for which goods are sold
- ii) Mercantile quality
- iii) Warranty that description is accurate
- iv) Warranty that the purported owner does have legal right to sell

## **6. Cookies/ Web Beacons Policy**

Lastly, if Company's website uses cookies, a section that discloses how they are used to store information should be included. Guidance for users on how to decline cookies or web beacons through browser settings should also be included. Cookies & other web beacon technologies will be regulated data privacy regulations, which will be further elaborated on in the second memorandum.

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<sup>13</sup> See n12, p 601.