

FAIR GO! Are jurisdiction clauses in online consumer contracts unfair?



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Unlike most purchases made in person, online purchases usually require consumers to enter into a written contract with the vendor. The majority of online contracts are standard form contracts on the vendor's terms. To minimise the jurisdictional risk to the vendor posed by the global reach of the internet, online contracts will often contain a jurisdiction clause that stipulates the forum in which disputes are to be heard.

This article considers whether jurisdiction clauses in online consumer contracts may be found to be unfair under the unfair contract terms provisions in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the Australian Consumer Law).

WHAT ARE JURISDICTION CLAUSES?

A 'jurisdiction clause' is a contractual term that stipulates where the parties to a contract may commence proceedings regarding contractual disputes. Such clauses are also known as 'choice of forum' or 'forum selection' clauses.

Jurisdiction clauses may be exclusive, by purporting to prohibit the parties from commencing proceedings regarding the contract in any other forum, or non-exclusive, where the parties submit to the stated jurisdiction but are not precluded from commencing proceedings regarding the

contract elsewhere.

The global reach of the internet means that an online vendor could be selling goods and services to purchasers anywhere in the world. Online vendors will usually include an exclusive jurisdiction clause in their contracts to reduce their risk of being sued in a foreign court. While a jurisdiction clause may be challenged, a court will consider a jurisdiction clause to be an important factor when determining whether it has authority to hear a contract dispute.¹

FORMING CONTRACTS ONLINE

Online contracts are usually formed as either clickwrap contracts or browsewrap contracts. A 'clickwrap contract' requires a website-user to view and physically signify their acceptance of the contract terms by clicking on an 'I agree' or 'I accept' button before proceeding.²



A 'browsewrap contract' consists of terms that are available online for online consumers to view, usually via a hyperlink. However, the website-user is not required to signify their acceptance of those terms and conditions before proceeding. Accordingly, courts are generally more reluctant to uphold browsewrap contracts.³

UNFAIR CONTRACT TERMS LEGISLATION

On 1 July 2010, the unfair contract terms provisions (Unfair Terms Regime) of the Australian Consumer Law (ACL) came into force, initially under the *Trade Practices Act 1974* (Cth) but, from 1 January 2011, the Unfair Terms Regime is in Schedule 2 of the *Competition and Consumer Act*. The ACL will also be implemented by complementary legislation in each Australian state and territory.⁴ Section 23(1) ACL provides that a term of a consumer contract is void if that term is unfair and is contained in a standard form contract.

In the European Union, corresponding legislation is contained in *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts* (Directive), which must be implemented by each member state in national legislation so that unfair contract terms are not binding on consumers.⁵ The Directive applies to consumer contracts where the vendor/defendant is domiciled in a state outside the European Union.⁶

Standard form consumer contract

The Unfair Terms Regime applies only to standard form consumer contracts. Under the ACL, a 'consumer contract' is a contract for the sale of goods or services or for the sale or grant of an interest in land, where the person who is acquiring the goods, services or interest is acquiring them primarily for personal, household or domestic use or consumption (that is, a consumer) (s23(3) ACL).

'Standard form contract' is not defined. However, s27(1) ACL provides that a contract alleged to be a standard form contract is presumed to be one unless the other party proves to the contrary.

In deciding if a contract is a standard form contract, a court may consider:

1. whether one of the parties has all or most of the bargaining power relating to the transaction;
2. whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
3. whether another party was required to accept or reject the terms of the contract in the form in which they were provided;
4. whether another party was given an effective

While they may be challenged, jurisdiction clauses are regarded as important factors by courts when determining their authority to hear contract disputes.

opportunity to negotiate the terms of the contract other than terms concerning the main subject matter of the contract, price or terms required by law (excluded terms);

5. whether the terms of the contract (other than the excluded terms) take into account the specific characteristics of another party or the particular transaction; and
6. other matters prescribed by regulation from time to time.⁷

Consumers are generally regarded as having weaker bargaining power than vendors. Online contracts are usually prepared by the vendor without discussion with the consumer, and the consumer must either accept or reject the terms of such contracts in the form provided.

There will generally be no opportunity for the consumer to negotiate those terms, and the vendor will not intend to negotiate for reasons of cost and administrative efficiency.⁸ As the parties will not usually communicate before entering into an online contract, the contract terms will not take into account specific characteristics of the consumer, such as the consumer's language and literacy skills or product knowledge. Accordingly, online contracts are likely to be standard form contracts for the purposes of the ACL, and will be subject to the Unfair Terms Regime.

Unfair terms

A term is 'unfair' under s24(1) ACL if:

1. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
2. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
3. it would cause detriment (financial or otherwise) to a party if it were to be applied or relied on.

There is a rebuttable presumption under s24(4) ACL that a term is deemed not to be reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term unless that party proves otherwise.⁹

When determining whether or not a term of a standard form consumer contract is unfair, a court may have regard to whatever matters it considers relevant; however, in doing so, the court must take into account the extent to which the term is transparent, and the contract as a whole.¹⁰ Section 24(3) ACL provides that a term is transparent if:

1. it is expressed reasonably in plain language;
2. it is legible;
3. it is presented clearly; and
4. it is readily available to any party affected by the term.

The fact that a term is transparent does not of itself overcome any underlying unfairness in that term.¹¹

Section 25(1) of the ACL gives specific examples of terms that may, but will not necessarily, be regarded as unfair for the purposes of the Unfair Terms Regime.¹²

ARE JURISDICTION CLAUSES UNFAIR?

Jurisdiction clauses are not specifically mentioned as an example of a potentially unfair term in s25 ACL. However, s25 ACL does not limit the types of contract terms that can be regarded as unfair. Section 25(1)(k) lists as an example a term that limits, or has the effect of limiting, one party's right to sue another party. This example does not specifically refer to jurisdiction clauses. However, the European courts have found that a similar example in s1(q) of the Annex to the Directive, which refers to terms 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy', includes jurisdiction clauses.¹³ Accordingly, jurisdiction clauses may be regarded as falling within the example in s25(1)(k) ACL.

A jurisdiction clause in a standard form consumer contract that satisfies the elements of an unfair term in s24(1) ACL will be void under the Unfair Terms Regime. Each element of s24(1) ACL is considered below in respect of jurisdiction clauses in online consumer contracts.

Significant imbalance in rights and obligations

The first element of an unfair term is that 'it would cause a significant imbalance in the parties' rights and obligations arising under the contract'.¹⁴ Matters relevant to this element include whether or not a contractual right given to the vendor is also given to the consumer, and whether burdens placed on the consumer are balanced by other terms in favour of the consumer.¹⁵

A jurisdiction clause that may cause a significant imbalance in the rights and obligations of the parties under the contract is a clause stipulating that disputes must be heard in a jurisdiction that does not provide the same statutory protection to consumers as the consumer's home jurisdiction.¹⁶ For example, see *Law v MCI Technologies Pty Ltd*¹⁷ and *Oubani v MCI Technologies Pty Ltd*,¹⁸ where courts in Victoria and New South Wales respectively refused to enforce an exclusive Queensland jurisdiction clause in a software licence agreement because the rights conferred by consumer protection legislation in each of those states 'would be eroded if consumers were compelled to take any legal action arising from the supply of goods to them in an interstate court or tribunal'.¹⁹

Not reasonably necessary to protect legitimate interests

The second element of an unfair term is that 'it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'.²⁰ The party advantaged by a term in an online consumer contract will usually be the vendor. In considering this element, courts may have regard to whether there are other, less onerous ways of protecting the vendor's legitimate interests and current market practice.²¹

Because of the global reach of the internet, a vendor trading online may have a legitimate interest in ensuring that legal proceedings regarding its online contracts are heard in the vendor's home jurisdiction rather than a foreign

country.²² However, a vivid example of when a jurisdiction clause is likely to be found not to be reasonably necessary to protect a vendor's interests is the US case of *Bragg v Linden Research, Inc.*²³ In that case, Bragg, a Pennsylvanian resident, accepted Linden's clickwrap terms of service agreement (TOS) to enter the Second Life virtual world. The TOS arbitration clause required disputes to be arbitrated by a minimum of three arbitrators in California, where Linden was based.

When Bragg commenced proceedings against Linden in a Pennsylvanian court, contrary to the arbitration clause in the TOS, the court refused Linden's motion to uphold the arbitration clause on the basis that the clause was unconscionable. The court found that the arbitration process in the TOS was costly to implement when compared with the amounts usually involved in Second Life transactions and the comparatively lower cost of commencing court proceedings. Because the arbitration clause was so one-sided in Linden's favour, the court held that Linden '[appeared] to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices'.²⁴

Since the *Bragg* decision, Linden has amended its TOS by, among other things, giving users with less than \$10,000 in dispute an option to participate in a binding, non-appearance based arbitration to be conducted online or by telephone. This caps the arbitration expenses of such users >>

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at approximately \$200, and allows users to avoid the costs that they may otherwise incur to make an appearance.²⁵ By these amendments, Linden has attempted to avoid the arbitration clause in its TOS being found unconscionable, while protecting itself from being hauled into court in a foreign jurisdiction. Whether Linden has succeeded in doing so remains untested.

Cause detriment if applied or relied on

The final element of an unfair term is that 'it would cause detriment (financial or otherwise) to a party if it were to be applied or relied on'. Because this provision refers to future detriment, a consumer may prove that a term is unfair without breaching it and incurring the potential negative consequences.²⁶ With respect to a jurisdiction clause, this provision permits a consumer to challenge that clause before incurring detriment by commencing proceedings in the vendor's chosen jurisdiction.²⁷

A series of cases has been referred to the European Court of Justice (ECJ) for a preliminary ruling requesting details of the factors that national courts must take into account when determining if a jurisdiction clause is unfair for the purposes of the Directive. These cases are instructive as to the circumstances when a jurisdiction clause may be found to cause detriment to a party, if it were relied upon for the purposes of s24(1) ACL.

The first case is *Oceano Grupo Editorial SA v Salvat Editores SA*,²⁸ which concerned an action by the vendor to recover monies payable under a standard form contract for the sale of encyclopaedias. The contract included a jurisdiction clause conferring exclusive jurisdiction on the courts of Barcelona, Spain, where the plaintiff vendor was domiciled, but not any of the defendants. The ECJ found that:

'A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence.'²⁹

Accordingly, the ECJ ruled that where such a term has been included in a contract without being individually negotiated, it must be regarded as unfair under Article 3 of the Directive, if the remaining elements of an unfair term are also fulfilled.³⁰

The subsequent Hungarian case of *Pannon GSM v Gyorfi*³¹ concerned a dispute between a vendor and a consumer about a standard form mobile phone contract, which required proceedings regarding the contract to be brought in the place where the vendor had its principal place of business. The defendant received an invalidity benefit and lived 275km from the vendor's principal place of business. Further, transport to the nominated jurisdiction from the defendant's home was limited because of the lack of

a direct train or bus service. The national court referred the matter to the ECJ for a preliminary ruling, as it had doubts regarding the possible unfairness of the jurisdiction clause. The ECJ noted that, while the decision in *Oceano Grupo* interpreted the general criteria applicable under the Directive to define the concept of unfair terms, the ECJ cannot rule on the application of those general criteria to a particular jurisdiction clause. Rather, each clause must be considered by the national court in light of the particular circumstances of the case.³²

CONCLUSION

A jurisdiction clause in an online consumer contract may be unfair for the purposes of the Unfair Terms Regime. However, each jurisdiction clause must be considered individually in light of the elements of an unfair term in s24(1) ACL, having regard to the contract as a whole and the relevant circumstances of the case. ■

Notes: **1** B Fitzgerald et al, *Internet and E-Commerce Law – Technology, Law and Policy*, Lawbook Co, Pymont, 2007 at [2.320]. **2** For examples of clickwrap contracts upheld in Australia, see *Smythe v Thomas* (2007) 71 NSWLR 537; [2007] NSWSC 844 and *eBay International v Creative Festival Entertainment* [2006] FCA 1768. **3** For example, see *Comb v Paypal, Inc* 218 F Supp 2d 1165 (ND Cal 2002) and *Specht v Netscape Communications* 306 F 3d 17 (2nd Cir 2002). **4** Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law* (2 July 2009): http://www.consumerlaw.gov.au/content/the_acl/downloads/acl_liga.pdf. **5** Article 6(1) *Council Directive 93/13/EEC*. **6** B Terradas, 'Restrictions on Jurisdiction Clauses in Consumer Contracts within the European Union' (2003) *Oxford University Comparative Law Forum* 1 at <http://ouclif.iuscomp.org>, text after note 264. **7** Section 27(2) ACL. **8** J Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness As A Ground for Review of Standard Form Consumer Contracts', 33 *Melbourne University Law Review* 934 at pp939-40. **9** Commonwealth of Australia, *Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, [5.27]. **10** Section 24(2) ACL. **11** Commonwealth of Australia, note 9, [5.39]. **12** *Ibid* at [5.44]. **13** For example, see *Oceano Grupo Editorial SA v Salvat Editores SA* [2000] ECR I-4941 at [22]. **14** Section 24(1)(a) ACL. **15** J Paterson, note 8 at pp943-4. **16** K Harris, 'The Globalisation of the Consumer – How Is the Law Responding?' 26th *International Trade Law Conference* (23 September 2004): <http://tinyurl.com/4zqucf7>, citing *Green v Australian Industrial Investment Corporation* (1989) 90 ALR 500 and *Francis Travel Marketing v Virgin Atlantic Airways* (1996) 39 NSWLR 160. **17** [2006] VCAT 415 (22 March 2006). **18** [2004] NSWSC 733 (17 August 2004). **19** *Law v MCI Technologies Pty Ltd* [2006] VCAT 415 at [48]. **20** Section 24(1)(b) ACL. **21** J Paterson, note 8 at p945. **22** M Roth, 'International Contract and Competition Law in Internet Matters' [2004] 9 *International Trade and Business Law Review* 95 at p116. **23** 487 F Supp 2d 593 (ED Pa 2007). **24** The court was citing *Comb v PayPal, Inc* 218 F Supp 2d 1165. **25** P Riley, 'Litigating Second Life Land Disputes: A Consumer Protection Approach' 19 *Fordham Intellectual Property, Media and Entertainment Law Journal* 877 at p901. **26** J Paterson, note 8 at p945. **27** B Terradas, note 6, text after note 264. **28** [2000] ECR I-4941. **29** [2000] ECR I-4941 at [22]. **30** [2000] ECR I-4941 at [24]. **31** [2009] c-243/08. **32** [2009] c-243/08 at [42]. See also *Asturcom Telecomunicaciones SL v Nogueira* [2009] c-40/08.

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