

Chapter 10

An Analysis on the Terms and Conditions of the Clickwrap Agreement and the Benefits of Maintaining the Click Wrap Agreement in Cloud Computing

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ABSTRACT

One of the most unique forms of contracting is apparent in cloud computing. Cloud computing, unlike other conventional methods, has adopted a different approach in the formation of binding contract that will be used for the governance of the cloud. This method is namely the clickwrap agreement. Click wrap agreement follows a take it or leave it basis in which the end users are provided with limited to no option in terms of having a say on the contract that binds them during the use of cloud services. The terms found in the contract are often cloud service provider friendly and will be less favourable to the end user. In this article, the authors examine the terms that are often found in the cloud computing agreement as well as study the benefit that is entailed in adopting this contracting method. This chapter has undertaken a qualitative study that comprises interviews of cloud service providers in Malaysia. Hence, this study is a novel approach that also provides insight in terms of the cloud service provider perspective regarding the click wrap agreement.

INTRODUCTION

Non-negotiability is the key characteristics of this type of contract. However, it is seen that there has been greater negotiability in the recent to allow the end users to communicate their interest to the providers (Alistair Maughan, Christopher D. Ford, and Scott W. Stevenson, 2014). Nonetheless, it is also mentioned in the same scholarly article that if one demands for negotiability in the contract to ensure their interest

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and wants are heard, the cloud is not the infrastructure for such demands (Alistair Maughan, Christopher D. Ford, and Scott W. Stevenson, 2014). Hence, it can be seen despite the increase in the negotiability, the general mind set is practicing a non-negotiability practice in the cloud agreement and condoning the concept of relinquishing negotiation power that an end user might have in a regular contract. Before undertaking the study on the terms and condition and legal issues underlying it, this article will look at the process of the whole contract and how this contract is communicated to the end users. Furthermore, this study will also include the study on local providers that will deepen the analysis of this agreement as well as assist us in the understanding of the reason behind adopting the clickwrap agreement. This rule can also be applied in the smart contracts found in Blockchain system. It is said that an application of smart contracts running on a permissioned distributed ledger (essentially a private blockchain where only credentialed participants are allowed to read and write) to managing tenant and service accounts in a cloud computing data center. (Sambit Nayak, Nanjangud C Narendra, Anshu Shukla, 2018)

BACKGROUND: NATURE OF THE CLOUD CONTRACT

An ordinary contract in the ordinary world often a written and the contract is passed from the offeror to offeree. Upon the concluding the contract, neither part could withdraw their offer nor acceptance as the contract has already been formed. The contract is concluded upon the signature of the offeree which expresses acceptance of the offer. A contract can also be verbally concluded without being in a written form. However, the standard form contract is different from a conventional contract despite have a face-to-face meeting. One would come across such contracts in many circumstances that involves sale and purchase. Nonetheless, it is also noted that in such contract, the consumers are presented a take it or leave it basis contract (*similar to the clickwrap agreement as mentioned before*) and this contract are rarely understood by the consumers. Hence, despite having a face-to-face meeting, it is said that terms and condition are left unread. This is because consumers consistently fail to read their standard terms. This failure undermines market pressure to provide mutually beneficial terms (Robert a. Hillman & Jeffrey j. Rachins, 2002).

The failure to obtain mutually benefitting terms is due to various factors. Some of the factors are as the following. Firstly, this contract often entails terms and condition that is not understandable to the consumer. These terms are also, at most of the time, communicate in small bold print which reduces the consumers interest in perusing the contract that they are binding by. Moreover, the consumers also rarely look at the contract as a major deciding factor in their purchase because in most circumstance the consumer/buyer would have made up their mind on their purchase before being handed the contract. The deciding factor often relies on the reasonableness of the price, quality as well weighing whether the purchase is indeed worth the money paid. Thus, majority of the consumer are more inclined to ensure that they have received a good bargain rather than focusing on the small bold prints present during the purchase. The contracts are also often lastly placed thus leaving behind a risk of unconscionable terms being present in the signed contract. The consumer also underestimates the adverse risk that maybe present in the contract. The question therefore lies on how the courts decide on the enforceability of such contracts. The current legal approach adopts a similar approach to what was illustrated by Karl Llewellyn's (Professor Karl Llewellyn, 1994) vision that the law should create a presumption of assent which was referred to as a blanket assent recognized that businesses generally compete to offer reasonable goods and services to consumers, and assumed that businesses, better than judges, could determine

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