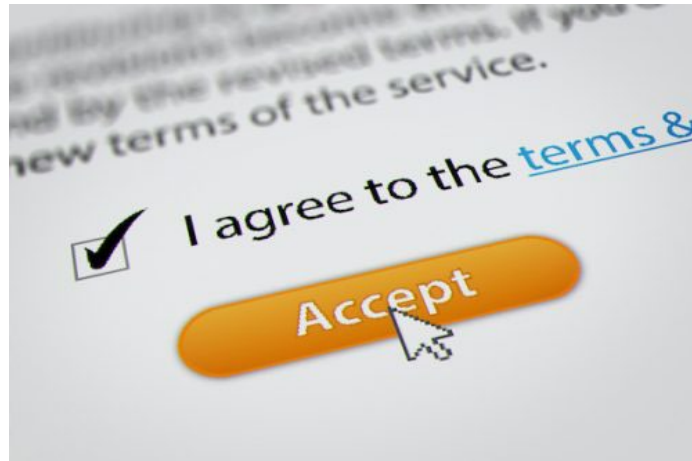


## Modern Wrap Contracts: Agreements & their enforceability



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In wake of the covid-19 pandemic, the number of retailers offering products and services online has dramatically increased. With this comes a variety of new websites and methods of purchase and taking delivery, but what about the fine print when signing up to access these products and services?

### Modern contract forms

Many of us are familiar with the “shrink wrap agreement”, whereby a product is purchased and the legal document containing specific terms and conditions such as warranties, rights of use, limitations and licenses of the product are contained within and are inaccessible until the product is purchased. These contracts were drafted so that removal of the shrink-wrap or use of the product was deemed to be acceptance of the contract terms. These forms of agreements have remained to be a controversial topic among Courts for many years. The following agreements have all been derived from the shrink wrap agreement.

With the ever increasing push for online purchases, sales, subscriptions and basic access to websites we are seeing an increase in digital contracts. So what are these contracts and how do they stack up?

**Click-wrap Agreements** – known by a variety of names, generally, these contracts require a user to click a check box or click an accept button to verify their consent to the terms and conditions. Often these agreements do not allow a user to progress unless the acceptance is made. In some instances, the user must scroll through the contract before being able to accept the terms. By clicking the button or checkbox, the user is giving clear consent.

**Browse-wrap agreements** – the terms and conditions of use or other legal policies will not be flaunted in front of users like in many other agreements. There will usually be hyperlinks at the bottom of the homepage (in some instances every page) where a user can view the documents. These usually state that by entering the website, users agree to be bound by those terms – accessing the site is considered to be passive acceptance of the website owner’s T&C’s. These policies are not necessarily viewed by the user, they are often not enforceable as they can not show the user has assented to the contract. These agreements rely on assumed or implied consent, and are often seen as banners or ‘pop-ups’ such as cookie authorization screens.

**Sign-in wrap agreements** – these agreements are a mix of the above two whereby the user grants acceptance of the contract through performance of another action – such as signing up or logging in (that is, the user will click a button to both sign in and accept terms). Generally, the enforceability of a sign-in wrap is less certain than a clickwrap agreement, but often more agreeable than a browse-wrap agreement.

**Web wrap agreements** – a further form of agreement whereby a user agrees to the user licence agreement by downloading and installing the program/app. Generally, web wrap agreements do not provide users with the opportunity to separately acknowledge and accept the terms, and this is done by way of proceeding to download the file.

### **Enforceability**

For an agreement to be enforceable, the agreement must have been consented to by both parties. This consent may be either express or implied.

In addition to consent, fairness of contract must also be taken into account. An unconscionable contract is a contract that no reasonably informed person would otherwise agree to. Inequality of bargaining power also plays a role in fairness of contract. For a user to prove that an agreement is unfair or unconscionable can be a difficult task.

### **Outlook**

At this time, the enforceability of modern wrap agreements is still widely unknown. While we know that click-wrap agreements are enforceable to a degree, however in a situation where a person fails to read or is otherwise unaware of the contents of the agreement they click “I agree” to, it is unclear what position the Courts will take.

In all circumstances, it is strongly recommended that consumers take the time to carefully read and understand the effect of every legal instrument they encounter online.

*The contents of this article are general in nature. For advice specific to your circumstances, please contact your legal practitioner.*



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