

# Click-wrap contracts

## How purchase agreements have changed in the digital age

INTERVIEWED BY ROGER VOZAR

It used to be that buyers would send out purchase orders with standard terms and conditions, and sellers would ship the product with invoices containing their own conditions. Now that more business is conducted online, conditions are agreed to by click-wrap — clicking a box to accept the terms of the website.

That causes problems when employees wind up agreeing to terms that greatly benefit the seller or supplier to the detriment of the purchaser, says Todd C. Baumgartner, a partner at Brouse McDowell.

“For whatever reason — it might be psychological — there is a lot less negotiation with terms and conditions on websites. It’s important to know what you’re agreeing to, and negotiate if you need to protect your interests,” Baumgartner says.

*Smart Business* spoke with Baumgartner about how to handle click-wrap agreements and potential problems when they’re agreed to without proper review.

### How are differences resolved when buyers and sellers have different terms?


The Uniform Commercial Code has standard rules to follow when that happens. But what’s occurring now is that, General Electric, for example, uses a website instead of putting terms and conditions on the back of invoices. There is no paper going back and forth. GE has the clout to pull that off — companies will just accept the terms in order to be GE’s supplier. But you can negotiate terms and conditions on websites.

A 2002 case, *ILan Systems Inc. v. Netscout Service Level Corp.*, demonstrates what can happen with these click-wrap contracts. The buyer, *ILan Systems*, negotiated an extensive software license agreement with all sorts of protections.

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However, whenever there was an update to the software, it was downloaded from a website by the IT department. Every time that happened, they downloaded a new license agreement that voided the prior one. The new agreements were skewed in favor of the software company, stating that it was not responsible if the software crashed the computer system. When that happened, there was fairly extensive damage, but the court ruled the software company was only liable for the original purchase price.

It’s critical that companies understand every time an IT employee clicks these buttons, they’re getting a new software licensing agreement whether they realize it or not.

### What’s the best way to deal with click-wrap agreements?

Don’t just click boxes. Have the head of the IT department review everything, and set up a policy in-house with appropriate procedures so these matters are presented to the right decision-makers.

If there’s something in the agreement that’s not acceptable, depending on your leverage, you can tell the software company you’re not doing click-wrap updates or negotiate an agreement covering the updates.

Click-wrap agreements are not necessarily a bad thing for the buyer or seller, but it’s important that it’s mentioned in bold at the

bottom of your invoice or purchase order that the terms are on the website. The seller also needs to keep track of the terms and conditions it had. Then, if a company comes back later and claims it didn’t understand the terms, or didn’t know what was agreed to, sellers can produce what was on the website two years ago.

### What sort of problems can arise years later?

Many times disputes are about specifications that the product was supposed to meet, and if it didn’t meet those specifications, what damages might be involved. As a supplier, you want to limit your consequential damages to replacing the product. A buyer will argue that it lost revenue as a result of the defective product. If the agreement doesn’t have the proper damage limitation, it’s going to be a problem for the supplier.

### Are purchase agreements done differently online?

Essentially they’re set up the same way; it’s just that people are less likely to negotiate something that’s on their computer screen. Companies will still ask for changes to terms and conditions on a website, but the number of requests for changes drops substantially. Everyone’s classically conditioned to review a contract in Microsoft Word line-by-line; as businesspeople we’re still catching up with the fact that websites can be changed. ●