

Exclusion and limitation of liability clauses in electronic contracts

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Abstract:

Contract law is the basis of any economic system. Any sale of goods or services as well as the transfer of property is based on the contracts. The Contract law, which is traditionally linked to the agreements in written form and personally signed by contracting parties, is brought before a new challenge of introduction of use of hardware and software assets in contracting processes. In this area, it is particularly visible the legality of a continuous development and changes in standard electronic business complexity and severity. The electronic contracting becomes specific because of the media in which the electronic contract is manifested. Consequently they developed the specific exclusion and limitation of liability clauses, which provides adequate protection for the bidder of the specific risks that may occur in the electronic contracts. This clauses are in widespread use in electronic contracting.

The exclusion and limitation of liability clauses are contractual manner restrictions which allowed the bidder limited responsibility for events that can occur without guilt and responsibility of the bidder. The clause that should produce the effects, must be the result from negotiations between contracting parties rather than be imposed from the exploitation of the dominant position of one of the parties. These rules are generally accepted and being applied in

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situations of conclusion of electronic contracts.

Except the usual contractual exclusion and limitation of liability clauses, in the e-commerce, the specific clauses appears exclusion and limitation of liability clauses for damages caused by:

- Attacks of computer viruses, worms, trojan horses and other destructive programs;
- Interception of received messages;
- Change the conditions on the website or the content of web pages;
- Changes in specifications of goods made on the site.

In this paper we will give the review and analysis of each of these clauses especially because they are specific only for bidding and concluding electronic contracts.

The basic hypothesis of this paper is that this situation does not require a change in the existing rules on contract law and consumer protection laws but only the adjustment of the existing rules to new business techniques. The hypothesis will be proved through the analysis of the legislation related to e-business, contract law, legislation of the consumer protection and the analysis of comparative law solutions pertaining to the electronic contract law and consumer protection law by means of following methods: comparative-law, historical, normative and analytical method.

Key words: Exclusion of liability clauses, Limitation of liability clauses, Contract law, Electronic contracts.

Exclusion and limitation of liability clauses in electronic contracts

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1. Introduction

Contract law is the basis of any economic system. Any sale of goods or services as well as the transfer of property is based on the contracts. The Contract law, which is traditionally linked to the agreements in written form and personally signed by contracting parties, is brought before a new challenge, the challenge of introduction and use of hardware and software assets in contracting processes.

The contract is the result of an agreement of parties that communicate their assent. Conditions that must be fulfilled: the party, building contracts, the basis for which the job creates, and procedures to achieve the consent of the regulated national contract law, or in the case of international treaties relevant sources of general rules of contractual rights. In this area, it is particularly visible the legality of a continuous development and changes in standard electronic business complexity and severity. The electronic contracting becomes specific because of the media in which the electronic contract is manifested. A complete examination of the legal challenges to be faced and overcome is beyond the scope of this paper, but there are aspects of e-contracting that can be examined in bite-sized pieces, in particular - one that appears to be ignored by the builders of the electronic commerce “exclusion and limitation of liability clauses”.

Exclusion and limitation of liability clauses are used by all of us in one form or another, primarily because they are necessary. Without them, selling or buying any goods or services

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would be prohibitively expensive. Some activities would be impossible if the full and complete risks had to be included in the price. Consequently they developed the specific exclusion and limitation of liability clauses, which provides adequate protection for the bidder of the specific risks that may occur in the electronic contracts. These clauses are in widespread use in electronic contracting. If public and private business is to be affordable, some exclusion of liability is useful - even absolutely necessary - but the age-old question is how far can you go in limiting and excluding potential liability?

2. Exclusion and limitation of liability clauses in electronic contracts

The exclusion and limitation of liability clauses are contractual manner restrictions which allowed the bidder limited responsibility for events that can occur without guilt and responsibility of the bidder. The clause that should produce the effects, must be the result from negotiations between contracting parties rather than be imposed from the exploitation of the dominant position of one of the parties. These rules are generally accepted and being applied in situations of conclusion of electronic contracts⁷.

There are different views as to the purpose of exclusions clauses. On the one hand it could be argued that exclusion clauses are merely a device for defining the exact obligations of the promissory, however on the other hand it could be argued that they are used as a defense mechanism against any breach of contract. In law, it has always been possible to consent to something that would otherwise attract legal liability. The legal principle involved *volenti non fit injuria* (he who consents can not receive an injury), is alive and well in electronic contracting. In practice, the legal issues which can arise from waiving one's legal rights by consent range from whether the person knowingly waived their rights, to the limits to which this legal principle can be allowed, to apply.

Exclusion and limitation liability clauses are a common feature of professionally drafted contracts for usage on the Internet. Except the usual contractual exclusion and limitation of

⁷ See Simmons&Simmons, “ *Communication Practice E-Commerce Law: Doing Business Online*“, Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, “*E-Commerce Law: Issues for Business*“, South Western College Publishing (2002)

liability clauses, in the electronic contract the specific additional clauses appear⁸. Such clauses partially seek to exclude or limit their liability under the specifics of e-contract and include, exclusion and limitation of liability clauses for:

- Attacks of computer viruses, worms, trojan horses and other destructive programs;
- Interception of received messages;
- Change the conditions on the website or the content of web pages;
- Changes in specifications of goods made on the site.

Further in this paper we will give the review and analysis of each of these clauses especially because they are specific only for bidding and concluding electronic contracts.

Internet as a medium in which is usually conducted electronic business is based on computers and Internet network. Thus there is a danger that the computers of clients accessing the web site of the bidder due to vulnerabilities of the bidder to be attacked any viruses were other destructive programs⁹. Therefore Bidders on there web site set up the exclusion clause on the risk of attacks of computer viruses, worms, trojan horses and other destructive programs. Its common formulation is: "The user assumes full responsibility for the protection of there computer and the computer system including hardware and software, protection of databases in there system as well as the protection of hardware and software of third persons who have access to the user's system." The user also assumes responsibility for damages incurred because recorded or otherwise received documents from the web site bidder which may contain viruses or other destructive programs.

Disclosure of business over the Internet can result in interception of messages or the availability of clients' data to an unauthorized person in some other way¹⁰. Therefore bidder on its website as a common rule sets a clause of exclusion of liability for damages resulting from unauthorized acts listed by third parties. One of the standardized version of this clause reads: "The company

⁸ See Simmons&Simmons, " *Communication Practice E-Commerce Law: Doing Business Online*", Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, " *E-Commerce Law: Issues for Business*", South Western College Publishing (2002)

⁹ David B. Canton, John E., " *Legal Landmines in E-Commerce*", McGraw-Hill Education,(2002).Str.7-9.

¹⁰ See David B. Canton, John E., " *Legal Landmines in E-Commerce*", McGraw-Hill Education,(2002).Str.7-9.

will take reasonable measures to prevent the possibility that the electronic messages that are received via the web site will be available to any unauthorized third party. The user accepts the risk that the company sent messages, can be intercept prior to receipt by the company and that his message was received from the company may be used by unauthorized third persons. The Company does not assume responsibility for the provision of messages from the unauthorized actions of third persons. "

Due to dynamic of electronic business as well as the specifics of the media in which it occurs, it is necessary to constantly change the content of the website. This can occur some typographical errors or content nature suitable to bring the user mystifying. In order to prevent its responsibility for such omissions of bidder on its web site sets a clause of exclusion of liability for damages made by changes to the conditions on the page or the content of web pages¹¹. One of the standardized versions of this clause reads: "The information contained on the web site may contain certain technical inaccuracies or typographical errors. Information may be changed or updated without prior notification. All information that is available on the web site is provided for the purpose of information and does not contain any guarantee for their accuracy. "

Due to the large number of clients which electronic bid is sent there is a real possibility that the seller can not accept all contract of those who have sent acceptance. If for the goods there is some substitute goods, bidders often put to their web site listings clause which provide the right to execute the contract with delivering of substitute goods. As a standard may be implemented following clause: "All goods are sold by the specification, which is located on the site. The Company reserves the right to modifications of the specifications of any product if it is not able to buy that product, the right of the delivered his substitute product if its material properties responsible for the use of which is designed according to the quality of the same or better than the specifications made on the website » . These clause have deliberating effect only in respect of items obligations. They do not relieve the bidder duties to perform its obligations in a timely and orderly.

¹¹ See Simmons&Simmons, " *Communication Practice E-Commerce Law: Doing Business Online*", Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, " *E-Commerce Law: Issues for Business*", South Western College Publishing (2002)

Exclusion and limitation liability clauses is found as part of standard business conditions and are almost always incorporated into the contract and thus must be clearly visible in the offer. There are often imposed by one side and there are not the result of bargaining, they are under the control-related to Unfair Contract Terms, so, if the courts prove that the conditions from the clause may be unfair to take it away by legal action¹². That's why one of the fundamental issues when considering these clauses is control under the Unfair Contract Terms which subjects exclusion clauses to the reasonableness test. The reasonableness test requires an exclusion or limitation of liability clause in a contract either on standard terms or excluding negligence to be:

*"... a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."*¹³

If the test is not satisfied, the clause is not enforceable.

Contract terms are unfair where in the event that, at the time the contract was formed, the term would not have been considered to be fair and reasonable¹⁴, having regard to the circumstances which were known or should have been known to the parties¹⁵.

In some situations where a contract has been called into question¹⁶, court may take into account, amongst other factors:

1. the strength of the bargaining positions of the parties relative to each other
2. whether an inducement was offered to the customer

¹² See Simmons&Simmons, "Communication Practice E-Commerce Law: Doing Business Online", Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, "E-Commerce Law: Issues for Business", South Western College Publishing (2002)

¹³ "Briefing Note - Unfair Terms in B2B & B2C Terms of Business Contracts"
<http://www.gillhams.com/articles/179.cfm>

¹⁴ SJ Berwin LLP "Exclusion clauses: reasonableness revisited?", <http://www.legal500.com/developments/3983>, 20.08.2009

¹⁵ See Simmons&Simmons, "Communication Practice E-Commerce Law: Doing Business Online", Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, "E-Commerce Law: Issues for Business", South Western College Publishing (2002)

¹⁶ Robert C Worthington " The power of consent",
http://findarticles.com/p/articles/mi_qa3993/is_200206/ai_n9094964/ , 20.08.2009.

3. the opportunity for the customer to obtain similar goods or services with other persons, without having to accept the term of contract in question, and
4. whether the term was brought to the party's notice.

The test of reasonableness also imports an element of good faith into the contract¹⁷.

“Good faith” requires that contract parties are dealt with fairly and openly. When standard terms are drafted to protect commercial objectives, those standard terms may not go further than necessary to protect those legitimate commercial interests. The terms must be expressed in plain and intelligible language¹⁸.

Also, one of the mischiefs lay where the customer was forced into a "take it or leave it" position and that, even where the supplier supplied a set of standard terms at the outset, if the parties genuinely negotiated the terms, they ceased to be "standard". This should not have been a problem in itself because what constitutes a 'take it or leave it' negotiation seems simplistic; its view of what is a 'reasonable' exclusion is much more subtle. Various factors have to be taken into account, such as the parties' strength of bargaining position, any inducement the customer received to agree to the term and (where a limit of liability is concerned) the availability of supplier's insurance.

Exclusion and limitation of liability clauses are often a part of the standard terms and condition of business. There are three acceptable ways to present them on the offer page:

- hyperlinks displayed on the bottom of the page, through which a simple click on it comes up to the standard conditions of the offer.
- hyperlinks in the sentence that would look: clicking on the accept button you confirm that you are familiar with and accept the conditions of the offer.
- part of the offer, which must first read to get the possibility to click on the button to accept and thus find agreement.

¹⁷ “*Exclusion Clauses and Limitations of Liability in Business*”, <http://www.gillhams.com/articles/400.cfm>

¹⁸ See “*Briefing Note - Unfair Terms in B2B & B2C Terms of Business Contracts*”
<http://www.gillhams.com/articles/179.cfm>

Click wrap and other electronic contracts are in widespread use in markets for computer software and for many online services¹⁹. When confronted by a lengthy and incomprehensible contract, the response of many, if not most, consumers is to click “yes” – without reading the exclusion and limitation liability clauses or giving it careful consideration. Exclusion and limitation liability clauses are presented to the user electronically, and the user agrees to the terms of the exclusion and limitation liability clauses by clicking on a button or ticking a box labeled ‘I agree’ or by some other electronic action.

The most recent evolution of the electronic contract is the ‘browse wrap’ contract, where the operator of a website purports to make all use of that website subject to a ‘terms and conditions’ agreement, where the terms of that agreement and exclusion and limitation liability clauses are never actually presented to the website user, and the user is said to assent by merely using the website²⁰. A further issue is whether the terms of the browse wrap contract and exclusion and limitation liability clauses have been adequately brought to the attention of the user.²¹ Typically, the exclusion and limitation liability clauses of the browse wrap contract will not be incorporated into the areas of the website that the user actually accesses, instead there will be a small hyperlink to a separate “Terms & Conditions” page, in the small print at the bottom of the website, along with other seldom-read links to things such as the website’s privacy policy, contact information and accessibility information²².

The courts are also paying attention to the way in which the waiver is brought to the attention of the person waiving liability²³. The court will still most often enforce such clauses when they are signed after the opportunity to be read was provided but, if such a clause is carefully and simply worded, printed large and highly prominent to the average user's eye, it can be more effective to

¹⁹ See Dale Clapperton and Stephen Corones “*Unfair terms in ‘Clickwrap’ and other electronic contracts*” in of the *Australian Business Law Review* volume 35 June 2007.

²⁰ See Dale Clapperton and Stephen Corones “*Unfair terms in ‘Clickwrap’ and other electronic contracts*” in of the *Australian Business Law Review* volume 35 June 2007.

²¹ See “*Exclusion Clauses and Limitations of Liability in Business*”, <http://www.gillhams.com/articles/400.cfm>

²² See Dale Clapperton and Stephen Corones “*Unfair terms in ‘Clickwrap’ and other electronic contracts*” in of the *Australian Business Law Review* volume 35 June 2007.

²³ Robert C Worthington ” *The power of consent*”, http://findarticles.com/p/articles/mi_qa3993/is_200206/ai_n9094964/ , 20.08.2009.

limit or waive liability.²⁴ In a recent court cases, even the size of print on the computer screen, the colours and the design of the notice borders were all considered by the court to have increased the enforceability of the clause.

Consent to no legally (exclusion) or limited liability through a carefully worded clause, even if agreed to by the user, may not be effective in all circumstances.²⁵ The courts can declare the exclusion clause or waiver to be void.²⁶ It is rare for the courts to do so in signed contracts, unless the cost of avoiding the harm was small in comparison to the severity of the harm, the clause was hidden or deceptively worded, or special circumstances exist (e.g., consumer purchase, agency or partner relationship), but it has occurred.²⁷

Given that the clauses on limitations or exclusions of liability often agree in the regime of form typed contracts, and there are often in part of the standard terms and condition of business. Because of this, we will briefly expose general conditions of contract which is directly related to them.

Standard terms and condition of business of contract and the clauses on limitations or responsibilities are all the terms of the contract pre-formulated for the increasing number of contracts which a contracting party (scheduler) places the other party at the conclusion of the agreement, whether contained in the contract document, whether to call them in the contract. Standard terms and condition of business of contract are special supplement hits established between the parties and as a rule require like this. In case of disagreement of general conditions and special Conditions apply special hits. Standard terms and condition of business of contract and also the clauses on limitations or exclusions of liability are becoming an integral part of a contract only if the scheduler during the conclusion of the agreement:

²⁴ See Dale Clapperton and Stephen Corones “*Unfair terms in ‘Clickwrap’ and other electronic contracts*” in of the *Australian Business Law Review* volume 35 June 2007.

²⁵ See “*Exclusion Clauses and Limitations of Liability in Business*”, <http://www.gillhams.com/articles/400.cfm>

²⁶ See Simmons&Simmons, “*Communication Practice E-Commerce Law: Doing Business Online*“, Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, “*E-Commerce Law: Issues for Business*“, South Western College Publishing (2002)

²⁷ See “*Exclusion Clauses and Limitations of Liability in Business*”, <http://www.gillhams.com/articles/400.cfm>

- other Party expressly referred to or, if explicit instruction because of the way of concluding the contract is possible only with disproportionate difficulties, visible advertising on the place of conclusion of the agreement referred to them;
- provide the possibility of the other party that the acceptable way to know their contents, and
- if the other contracting party is in accordance with their application.

The contracting party may for a certain type of legal issues in advance to agree the validity of certain standard term and condition of business of the form typed contract, in addition to the above requirements²⁸.

Exclusion and limitation of liability clauses in the standard terms and condition of business of contract which according to circumstances, and especially by the external appearance of the contract, are so unusual that a contractual partner with the scheduler does not have to count, do not become an integral part of the contract²⁹. There are also not valid if they produce to the contracting partner scheduler significant damage, contrary to the principles of honesty, and good business practices. It is considered that significant damage existed if there is some clause about limitations or responsibilities of the contracting partner scheduler:

- leads to significantly unequal position with respect to the rights and obligations, or
- placed in a situation that significant deviating from its legitimate expectations, or
- thus, limits the essential rights and obligations which derive from the nature of the contract that affects the achievement of the purpose of the contract.

In standard terms and condition of business of form typed contracts are not valid provisions scheduler:

- reserve the right to inappropriate long or insufficiently specific deadlines to accept or reject any bid or to conduct a performance;
- derogation from the law, reserves the right to bad debt or insufficiently provided for an additional period of performance which is required;
- they plan to themselves without really justified in the contract this reason exempted from the

²⁸ Robert C Worthington ” *The power of consent*”,
http://findarticles.com/p/articles/mi_qa3993/is_200206/ai_n9094964/, 20.08.2009.

²⁹ See Simmons&Simmons, “ *Communication Practice E-Commerce Law: Doing Business Online*“, Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, “*E-Commerce Law: Issues for Business*“, South Western College Publishing (2002)

obligations of execution;

- he promised that performance can change or deviate from it only by taking into account their interest;
- identifies that the statement of the contracting partner scheduler with missing or taking certain actions is valid as that of the data or that data did not, except if the contracting partner is granted an appropriate deadline for providing explicit statements, and if the scheduler commits to contractual partners at the beginning of period instructions on the importance of the predicted behavior;
- predicts the scheduler that the statement of special importance applies as if it was the other contracting party received;
- can inappropriate to require a high fee for the use or the use of some things or some law or made for performance or inappropriate to require a high compensation for expenses in the event that the other contracting party to withdraw from the contract or cancel the contract;
- reserves the right to be free to fulfill the obligations of the contract with the inability to use performance, without the obligation to immediately inform the contracting partners of the disposition and the inability to make up contract action from contracting partners without delay;
- an increase in pay for the goods or performance that are expected to be delivered or completed within four months after the conclusion of the contract;
- excludes or limits the right to refuse performance or lien, which the contracting partner scheduler belongs by the rules of the simultaneous fulfillment of obligations;
- take away the contracting partner the authority to make out with unlimited time, or established legal demand;
- frees itself of legal obligations that other Party or warnings that the deadline for the fulfillment of performance;
- negotiated lump sum compensation or compensation less the value, if the lump sum exceeds the damage that is prescribed in cases and under the normal course of things can be expected or exceed the impairment that typically occurs, or other party precludes evidence that damage or impairment in general are not incurred or that are significantly lower than rates;
- in the case of guilty violation of contractual obligations scheduler excludes or limits the right of the other contracting party to terminate the contract or to require compensation for failure to fulfill the contract;

- it eliminates the right to the other contracting party to require compensation for failure to fulfill the entire contract or to terminate the entire contract, if in part fulfillment of the contract for it does not represent any interest, in case the scheduler is in part responsible for the breach of contractual obligations;
- when the contract on deliveries of new produced things performance and its responsibility for defects in whole or in part, excludes or limits the previous reference to the rights to third persons (manufacturers of parts) is earned through the court;
- limits claims against themselves only to the subsequent fulfillment - shortcomings, if the agreement is not otherwise expressly provided;
- excludes or limits the obligations scheduler to bear the necessary expenses to cure - removal of defects;
- conditional later fulfillment - repairing defects preceding the full payment of the agreed price or the greater part not proportional defects;
- shorten the deadline for placing the complaint because of the lack of things or the right to break the contract or reduction of duties for a period shorter than one year;
- in a contractual relationship, which is subject to regular delivery of goods or the performance of regular service or production performance of the scheduler, determines that the contract binds the other side for more than two years;
- at the expense of the other contracting party determined by canceling term longer than three months prior to the expiration or earlier agreed time, extended period of the contract;
- stipulates that a third of scheduler can assume the rights and obligations under the sales agreement or contract for work, unless that provision in the third listed by name, or
- the other party does not recognize the right to terminate the contract;
- what scheduler dealer other contracting party to impose itself on its own responsibility or obligation to download a consequence, without further explicit statement that it is directed, or in the case of representation without authorization impose accountability over the responsibility prescribed by this Act for such a case;
- changing the obligation of proving to the other contracting party, in particular so that: the responsibility to impose conditions which by law scheduler match, imposes the assumption that the other contracting party confirmed the existence of certain facts, and without its explicit statement;

- stipulate that the statements that have given scheduler, or one third related to the strict form of written or prescribed by law for special cases.

It is important to emphasize that if the standard terms and condition of business and also the exclusions or limitations of liability clauses are not fully or partially become an integral part of the contract or there are not legally binding, in the remainder of the contract remains valid part.³⁰ It is forbidden to some reduction of not legally binding terms of general conditions to its remaining permitted content.

3. Conclusion

Contracting in principle is an expression of will between the contracting parties. From this stems the fundamental issues in the business application and contracting with the use of the IT-communications technologies, or through the website (the Internet), to provide legally valid and relevant statements by the will in the process of contracting, how to perform identification of the signatory, what is the content of the contract, that fulfill their responsibilities and how, in the event of a dispute, to confirm the authenticity of the signed electronic records.

Unlike classical contracting procedures, electronic contracting is primarily based on the conclusion of the contract through form typed contract, now exception became the rule! Because of this, negotiations are in principle not possible. Contracts may conclude automated (e.g., double clicking on the question on the web page provided accepts the offer).

Except the usual exclusion and limitation of liability clauses in the e-commerce through Web pages appear exclusion and limitation of liability clauses for damages incurred due: attacks of destructive programs (computers viruses, worms, etc), interception of messages received, changes in conditions on the website or the content of web sites, changes in specifications of goods made on the web page, etc.

³⁰ See Simmons&Simmons, “ *Communication Practice E-Commerce Law: Doing Business Online*“, Copenhagen Business School Press, (2003).str. 33-44. kao i John Bagby, “*E-Commerce Law: Issues for Business*“, South Western College Publishing (2002)

Classical solutions of the exclusion and limitation of liability have endured the demands of new technologies, but in an age of electronic business has received a completely new Standardized content.