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TECHNOLOGY MARATHON

**Best Practices for Terms of Service
When Launching in a New Market**

Anastasia Dergacheva, Emily R. Lowe, & Catherine North
Hounfodji

May 4, 2023 | 11:00-12:00 pm ET

Presenters



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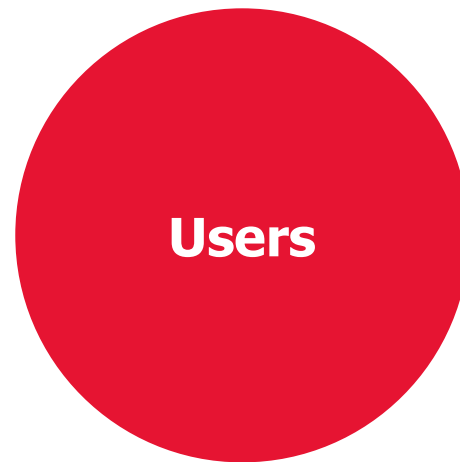
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Agenda

- Preparing the Terms of Service
 - Structure and Electronic Contracting
 - Users, Data and Privacy
 - Governing Law, Arbitration and Limitation of Liability
- Keeping Track of Cultural and Legal Differences
 - Top Ten Issues to Look for in a New Jurisdiction
- Navigating Regulatory Requirements
 - Regulated areas, industries and jurisdictions
- Questions?

Launching in a new market... What do you mean?

New...





What to Ask the Business?

- What have been the **primary challenges** in current markets?
- Will the **same products/services** be offered in the new market(s)?
- Will the business target the **same audience** in the new market?
- Is it **strategic market** or **add-on market**?
- What **obstacles or challenges** does the business foresee in expanding?
- What is the **risk of litigation** generally? Class actions? Large judgments?

Preparing the Terms



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What To Include

Absolute Must-Have's:

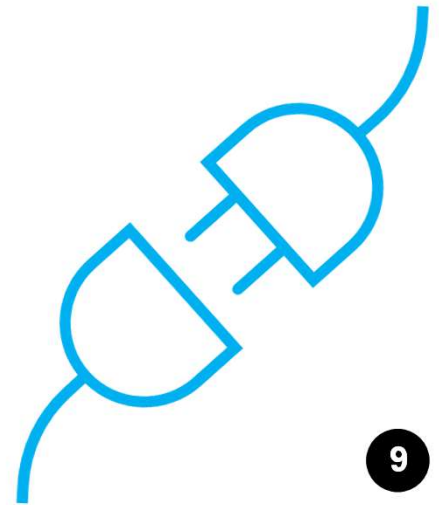
- Acceptance, modification, & enforceability
- Product/service description (incl. regulatory disclaimers!)
- Users (incl. personal data and privacy)
- Term & termination
- Limitation of Liability
- Governing law and dispute resolution
- Severability provision

Other Provisions You May Need:

- Warranties and indemnification
- Marketing and use of text messages
- Delivery terms
- Return and refund policies
- Pricing and payment information
- Restrictions on use of product/site/service
- IP protections

Structuring the Terms

- Start with ONE primary Terms of Service document
- Use addenda or riders to address differences among markets
- Terms of Service must be:
 - Conspicuous
 - Accessible: Language + Website Accessibility
 - Clear and Understandable
 - Reasonable
- Notice up front of an arbitration provision



Electronic Contracting: Browse Wrap Agreements

- No “I Accept” – Enforceability Issues
- Need to demonstrate party knew purchase/use was subject to agreement terms and terms were readily available to review
 - *Specht v. Netscape* (S.D.N.Y. 2001) (aff’d. 2d.Cir. 2002) (“Download” click; terms hidden; arbitration provision unenforceable)

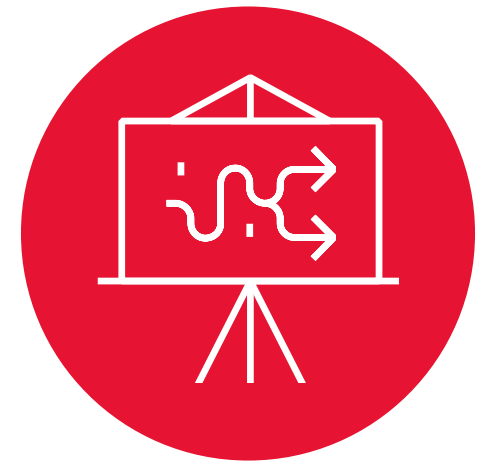
Electronic Contracting: Click-Wrap Agreements

- “I Accept” clicked – terms enforceable
 - *i.Lan v. Netscout* (D. Mass. 2002) (enforcement for distributor that installed / clicked)
 - *Feldman v. Google* (E.D. Pa 2007) and *Novak v. Overture* (E.D. NY 2004) (Google terms enforceable including arbitration)
 - *A.V. v. iParadigms* (E.D. Va. 2009) (liability limit enforceable)

Electronic Contracting: Unconscionable Terms

- Unconscionable terms unenforceable
 - *Comb v. PayPal* (Cal. 2002) (ability to withhold disputed payments; unilaterally change terms)
 - *Douglas v. U.S.* (9th Cir. 2007) (AOL browse wrap terms for unilateral changes including new service charges; arbitration; waive class action)

Note: Everything we're talking about here is subject in some way to a reasonableness standard.

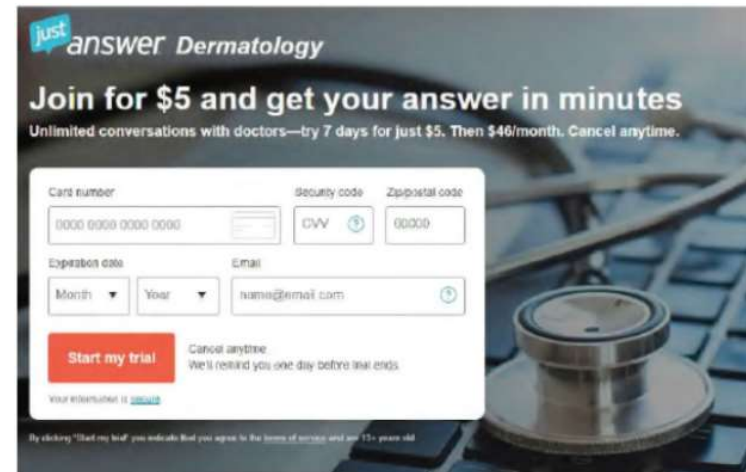


Electronic Contracting: User & User Actions

- User and User actions impact enforceability
 - *Nguyen v. Barnes & Noble* (9th Cir. 2014) (terms unenforceable against consumers enforceable against businesses)
 - *Register.com v. Vario* (2d Cir. 2004); *Southwest v. BroadFirst* (N.D. Tex. 2007) (repeated access to site)
 - *Doe v. Roblox* (Cal. 2022) (inadequate disclosure of terms against minor)

Electronic Contracting: Web Design

- Web Design
 - *Berman v. Freedom Financial Network* (9th Cir. 2022) (“continue” button did not unambiguously manifest assent)
 - *Sarchi v. Uber* (ME 2022) (hyperlinks were insufficient to constitute notice)
 - *Sellers v. JustAnswer LLC* (Cal. 2021) (“start my trial” button not sufficiently conspicuous to bind customer)
- Web design matters:
 - Font size, capitalization, color of font compared to color of background
 - Obviousness of hyperlink
 - Proximity of text to button
 - Screen clutter
 - Scrollwrap if pop up window



Electronic Contracting: Potential Future Issues

- Terms Updates
 - *Sifuentes v. Dropbox, Inc.* (Cal. Jun. 2022) (email re: update to terms not sufficient notice)
- Pop Up Window
 - *Good v. Uber* (Mass. 2022) (accepting pop up window insufficient; scrollwrap necessary)

Electronic Contracting: Drafting Issues

- Terms readily available before Assent
- Assent Before Access To Website/Product
- Clear disclosure of terms - Notice of consequences of assent or reject
- Clear method of assent (“I Accept”)
 - Record of assent
- Customary agreement terms
- Notice and acceptance of updates

Good hygiene: new pop-up window + I accept

Identifying and Addressing Different Users

- Who are the primary consumers?
 - Children and minors (under/over 13)
 - General population vs. segmented/technical subset (e.g. medical or financial professionals)
 - B2B
- Why does it matter?
 - Contract enforceability
 - Privacy requirements will vary (think COPPA, US state consumer privacy laws, UK/GDPR)
 - Barriers to use or access
 - Information disclosure standards

Personal Data & Privacy Concerns

Addressing Privacy Practices

- Keep Privacy Policy separate from Terms of Service
 - But incorporate links & rights to use the data into the Terms
- Ensure Privacy Policy is updated
 - Does it account for any new services or practices, e.g. new data being collected?
 - Are there different requirements in the new market(s) that need to be addressed?
 - Will different categories of consumers be impacted?

Key Privacy Policy Considerations

- What kind of data do you collect? From whom?
 - Do you need a cross-border transfer provision?
- What privacy laws are you subject to / will you be subject to in the new market(s)?
 - COPPA
 - HIPAA
 - GLBA
 - US state consumer privacy laws (California, Colorado, Connecticut, Indiana, Iowa, Utah, and Virginia – possibly Montana, Tennessee, and others)
 - UK/GDPR
 - China
 - Other local laws

Limitation of Liability

- Are these strategies viable?
 - Disclaimer of any warranties: 'as is, where is' basis
 - Disclaimer of indirect and consequential damages
 - Cumulative cap on damages
- What is "market"?



Governing Law

- Who is contracting on your side?
 - Main operating entity
 - Regional holding
 - Local entity
- Is it B2B or B2C?
- What kind of disputes you expect, where these will be resolved and where you will be enforcing decisions?



Dispute Resolution

Consider whether an arbitration provision would be appropriate

- Weigh the pros and cons and consider the scope
- Notice must be prominent at the top of the Terms
- Provision must be: conspicuous, mutual, consumer-friendly, and detailed (as to arbitration provider, filing info, costs, location, delegation)
- Consider exception for small claims
- Will there be an opt-out provision?

Is a class action waiver desirable?

- Must be included in arbitration provision

Will the award be enforceable in this jurisdiction against this user?

Arbitration

- Arbitration - State Variances

The validity of arbitration clauses has been an issue for years, as evidenced by these cases.

- *AOL v. Booker* (Fla.2001) (enforce VA choice of law)
- *Williams v. AOL* (Mass.2001) (no enforcement of VA choice of law)
- *Brower v. Gateway 2000* (NY 1998) (enforce arbitration provision)
- *Klocek v. Gateway* (Kansas 2000) (no enforcement of arbitration provision)
- *Calderon v. Sixt* (Fla. 2021) (enforce arbitration provision)
- *Wollen v. Gulf Stream* (NJ 2021) (no enforcement of arbitration provision)

These cases show the concept isn't new, but courts have flip-flopped a lot over time.

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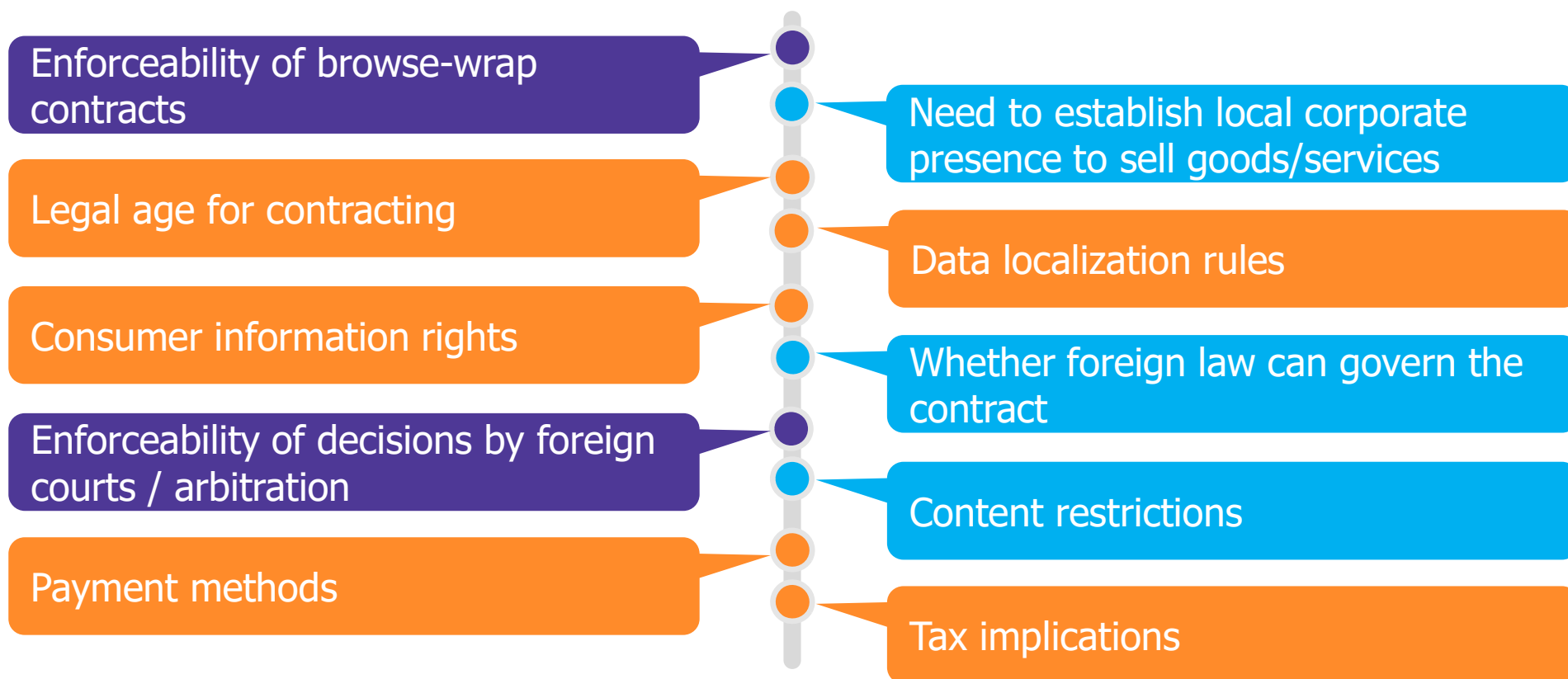
Cultural and Legal Differences

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Do Your Homework

- Take the time necessary – especially for expanding into new countries
- Rely on the business development team on the ground, especially for cultural awareness
- Learn the legal framework, consider engaging local counsel
- Evaluate whether the products/services offered in the new jurisdiction require any changes in your practices or procedures
- And . . . come back to this slide deck to remember our Top Ten List!

Top Ten Issues to Look for in the New Jurisdiction

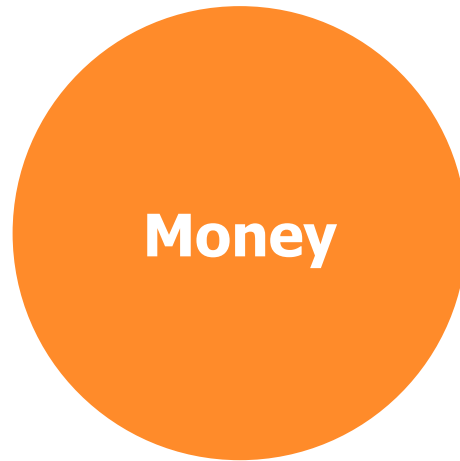


Navigating Regulatory Requirements



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Regulated Areas



Regulated Industries

- Regulated Industries:
 - Financial Services
 - Communication
 - Transportation (incl. autonomous vehicles)
 - Critical Infrastructure
 - Healthcare & Life Sciences
 - Education
 - Retail (not truly regulated, but let's discuss why this is important)

Jurisdictions

- California (and copycat states) vs. the rest of USA
- UK vs EU: watch out for Retained EU Law Bill
- China



Questions?

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Upcoming Webinars

The Growing Complexities of Regulating Digital Healthcare Products

May 8, 2023 | 1:00 – 2:00 PM ET

Speakers: W. Reece Hirsch, Sydney Reed Swanson

AI and Data Privacy: US and European Privacy Laws

May 18, 2023 | 11:00 – 12:00 PM ET

Speakers: Ezra D. Church, Paulina Whitaker, Ksenia Andreeva

China's Privacy and Cybersecurity Regime: What Tech Companies Need to Know

May 22, 2023 | 9:00 – 10:00 AM ET

Speakers: Todd Liao, Sylvia Hu, Barton W.S. Bassett, Daniel F. Carmody

Privacy in the Middle East

May 31, 2023 | 11:00 – 12:00 PM ET

Speakers: Privacy in the Middle East

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Biography



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Anastasia Dergacheva counsels major international companies in the telecommunications, media and entertainment, and technology industries. Anastasia's practice focuses on mergers and acquisitions and technology transfer transactions, as well as licensing, outsourcing, and professional services deals. Anastasia also advises clients on various regulatory aspects of telecommunications, IT business, and ecommerce, as well as data transfers.

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Emily R. Lowe represents clients in commercial transactions, with a focus on the acquisition, use, protection, development, and commercialization of technology and biotechnology. Emily helps domestic and international companies commercialize their products through various commercial vehicles, including manufacturing and supply agreements and distribution strategies, and development and licensing agreements.

Additionally, Emily assists clients in marketing their products and services online and through joint marketing agreements, sales representative agreements, and distribution agreements. She focuses on the software, specialized manufacturing, consumer products and retail industries. Emily also has experience in licensing software and providing services to sports teams and sports leagues.

Emily is on the Board of Directors of Ronald McDonald House Charities of Pittsburgh.

Biography



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Catherine North Hounfodji regularly counsels and defends clients in matters relating to privacy, cybersecurity, class actions, state consumer privacy laws such as the California Consumer Privacy Act, consumer protection laws, retail operations, loyalty and gift card programs, unclaimed property, and commercial disputes.

Catherine led a multi-team, multi-year effort for a major retail client to track and analyze COVID-19 restrictions across the United States. Catherine has more than a decade of experience litigating commercial disputes and defending against wage and hour, healthcare, and tort claims.

Catherine also maintains an active pro bono practice, which includes assisting immigrant clients with Violence Against Women Act (VAWA) and residency applications, election-related litigation, and expungements.

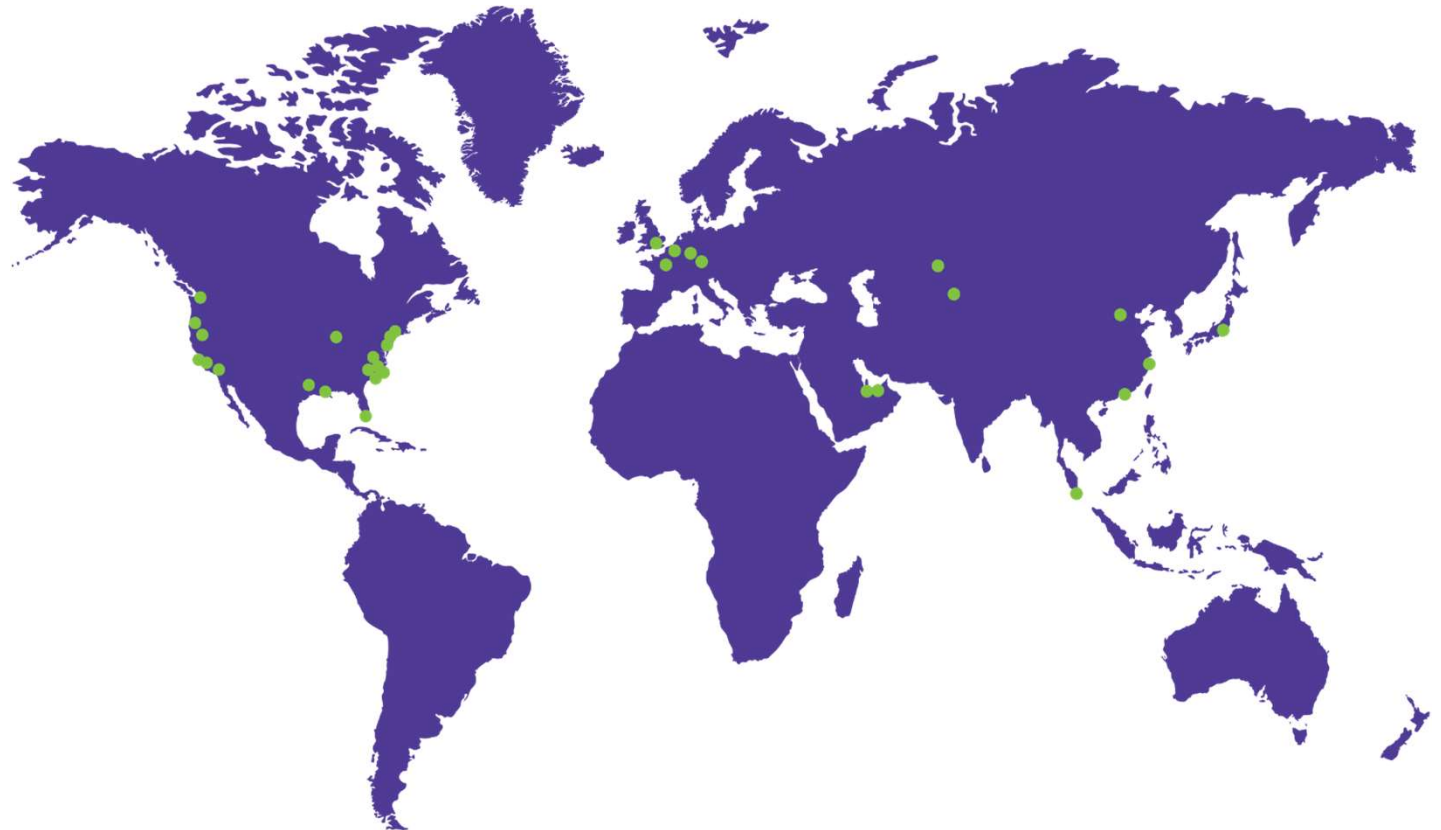
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