

In the heart of the Silicon Valley, legal doctrine is emerging that will determine the course of civil rights and technological innovation for decades to come. The Center for Internet and Society (CIS), housed at Stanford Law School and a part of the Law, Science and Technology Program, is at the apex of this evolving area of law.

Stay up to date with CIS: [f](#) [t](#) [You Tube](#) [flickr](#)

People &  
Blogs

Events

Consumer  
Privacy Project

Fair Use  
Project

Academics

About *Omer Tene*



Associate Professor, College of  
Management School of Law, Israel

[View full user profile](#)

Our Issues

cybercrime Fair Use Project  
free speech infrastructure  
intellectual property  
privacy  
anti-circumvention copyright  
copyright law  
Creative Commons DMCA  
donottrack Fair Use  
first amendment  
Fourth Amendment  
Future of Ideas Google  
Hearsay Culture  
internet libel IP reform  
journalism libel network neutrality  
Open Source Privacy robotics  
robots surveillance tcblog  
Testimony trademarks

## Israeli court says no to forum selection clause in clickwrap agreement

by **Omer Tene**, posted on September 19, 2011 - 2:55pm

In a highly important decision, the Tel Aviv District Court annulled this week a forum selection clause in a clickwrap contract, holding the user was not sufficiently aware of the choice of foreign forum nor of the fact he was contracting with a foreign company; and has not clearly consented to such choice.

In Civ. (Tel Aviv) 1963-05-11 Malka v. Ava Financial, defendants moved for summary judgment against the plaintiff, user of their foreign exchange trading platform, on the basis of an English forum selection clause in a clickwrap contract. Plaintiff sued defendants for conflicts of interest and multiple violations of Israel's financial trading regulations. Defendants, most of whom are Israeli residents, argued that the plaintiff entered into a contract with a British Virgin Islands company choosing English law and venue for any future litigation.

Plaintiff argued that the forum selection clause was "hidden" in an online contract whose terms he never read. In addition, he argued that such choice constitutes an "unfair term" in a contract of adhesion under the Standard Form Contract Act, 1982. Israeli Courts have broad powers to uphold, strike out, or amend unfair clauses in standard contracts ("blue pencil rule"). The Standard Form Contract Act enumerates a list of contractual provisions which are presumptively unfair, including unreasonable or unilateral forum selection (but not choice of law).

The court rejected the defendants' reliance on the forum selection clause, effectively establishing Israeli jurisdiction over the case. An important factual holding of the court is that plaintiff did not personally set up his online account on the defendants' platform, but rather had it set up by an agent of the defendants. Consequently, plaintiff's assertion of lack of knowledge of or consent to the forum selection clause held sway.

Regardless of the fact-specific holding, certain statements of the court are extremely important for non-Israeli companies entering into clickwrap or browsewrap agreements with Israeli customers. The court (Judge Ruth Ronen) stated that while "non est factum" arguments with respect to signed agreements must be interpreted restrictively, a party relying on a contract must produce a signed document evidencing the counterparty's agreement. In an online setting, a party's intent to enter into a contract can be established by showing that such party was informed of (i.e., read) the terms of the agreement and actively expressed his consent to be bound by them.

The court held that clickwrap agreements better evidence a consumer's consent than browsewrap agreements. If clicking on a link is required to view the terms of the contract, such link must be featured prominently for consumers to see. (The court even states that in the online environment, viewing additional linked documents is easier than in the offline world).

The court held that a foreign forum selection clause is acceptable only where one of the parties to the agreement is non-Israeli (i.e., a contract between strictly Israeli parties should not point to a foreign forum). In this case, the court held (based on its factual holding above), that the plaintiff was not informed of and did not intend to agree to selection of a foreign forum. The court added that had the plaintiff agreed to such selection, defendants would still need to cross the hurdle of the Standard Contract Act; yet given the English choice of law clause, they would have been able to try to prove that under English law, a mechanism similar to Israel's Standard Contract Act did not exist. Reading between the lines, it is evident that the court is readier to heed a foreign choice of law clause (the court assumes it would be enforceable in the present case) than a foreign forum selection provision.

This is an interesting case – another in a long line of jurisprudence, in Israel and abroad, discussing the enforceability of clickwrap contracts generally, and foreign choice of law and forum selection clauses in particular.

[permalink](#) | [Omer Tene's blog](#) [RSS](#) [Google](#) [StumbleUpon](#) [Dribbble](#) [Twitter](#) [Facebook](#)

Substantive Tags: intellectual property, privacy  
Free tags: choice of law, e-commerce, forum selection, israel, online contracts

#### comentario

Comment by **Pablo Palazzi** (not verified), posted September 20, 2011 - 7:28am

Omer

Nice case and comment!

I assume the result would be the same in Argentina.

Pablo

**reply**

#### "The court held that a

Comment by **Zohar** (not verified), posted September 21, 2011 - 4:16am

"The court held that a foreign forum selection clause is acceptable only where one of the parties to the agreement is non-Israeli (i.e., a contract between strictly Israeli parties should not point to a foreign forum)."

Does this apply only to standard form contracts or to contracts in general?

**reply**

## Post new comment

**Your name: \***

Vijayashankar (Naavi)

**E-mail: \***

naavi9@gmail.com

*The content of this field is kept private and will not be shown publicly.*

**Homepage:**

<http://www.naavi.org>

**Subject:**

**Comment: \***

Input format

CAPTCHA

*This question is for testing whether you are a human visitor and to prevent automated spam submissions.*

What is the first word in the phrase "gomaxa iqosu wufufoz pofaqox saf"?: \*

**Preview**

[Home](#) » [Blogs](#) » [Omer Tene's blog](#)

[privacy policy](#) | [forums](#) | [about CIS](#) | [sitemap](#) | [subscribe](#) | [contact](#) | [Login](#) |

Creative Commons | Powered by Drupal  
Drupal Design and Development by pingVision.