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CLIENT UPDATE



If You Thought Terms of Use Didn't Matter!

March 20, 2021

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Background

Israel's Supreme Court, in a decision issued in February, 2022 in **Google LLC. (formerly known as Google Inc.) v. Eshel et al.**, addressed the question of what law would govern the dispute, given a Governing Law Clause in Google's online terms of use (“**Google**” and “**Terms of Use**” respectively). The specific question was whether the governing law should be that of California or Israel. The Supreme Court decided in favor of Israeli law due to the lack of clarity of the way the Governing Law Clause was drafted.

Google's Terms of Use state that in certain cases, a dispute between Google and its users arising from the use of its services will be adjudicated in the courts of California (the “**Jurisdiction Clause**”) and under the laws of California (the “**Governing Law Clause**”). In other cases (the parties disagreed on what those cases are), the jurisdiction will be the courts of the user’s residence, and the governing law will also be the country of the user’s residence.

In a previous ruling of the Israeli Supreme Court, it was held with respect to a comparable foreign Jurisdiction Clause, that such a clause was "onerous" in a standard form contract (a contract of adhesion) and should be invalidated. Following that ruling, Google accepted that the applicable jurisdiction should be Israeli courts and not California courts. Accordingly, this decision focused only on the Governing Law

Clause, i.e., on the question of which law should apply to the dispute under Google's Terms of Use.

The Parties' Arguments

Google claimed that the language of its Terms of Use unequivocally provided that California's laws govern the dispute. Furthermore, Google argued that, as it is a corporation with extensive operations worldwide, the Governing Law Clause above aimed to apply the law of a single jurisdiction to its relationships with its users. According to Google, if Israeli law were to apply to this dispute (and the law of other countries in disputes with users in those countries), this will result in the complete opposite outcome, where laws of dozens of countries will apply to the relationships between Google and its users, according to the residence of each user.

On the other hand, Eshel (the respondents) claimed that the language of the Governing Law Clause was clear and speaks for itself, stating that if the California law does not apply within the jurisdiction, then local law should apply. Therefore, in this case, the governing law should be Israel since, of course, Israeli law applies in Israel. Moreover, according to the respondents, even if the language of the clause is not clear, Israeli law should apply for the following reasons. First, when a contract is unclear and subject to different interpretations, and one of the parties has drafted those unclear terms, the contract should be interpreted against the interests of that drafting party. Applying that rule to this case, the contract should be interpreted against Google, the drafting party. Second, this case refers to a standard form contract, and given two interpretations of such a contract, the interpretation that is not onerous to users should be preferred. Third, where a contract refers to foreign governing law, if the drafting party wishes to deny the right to Israeli litigants to litigate under Israeli law, it must state so clearly.

The Supreme Court Decision

In its decision, the Supreme Court held that the fundamental principle in interpreting the meaning of a contract is to examine its specific language. According to the Court, the intuitive meaning of the language of Google's Terms of Use is that when California law does not apply, *"because California law does not apply in Israeli courts but rather Israeli law"*,^[1] the law of the user's country of residence should apply. Therefore, the Court decided that Israeli law should apply to this dispute with respect to the Terms of Use.

However, the Court explained that even if the language of the clause might be interpreted differently, the application of the principles of contractual interpretation also leads to the conclusion that the Israeli law should apply. The Terms of Use constitute a standard form contract. The language was set unilaterally by a single party, serving its interest in its relationships with numerous unspecified users. The standard form contract should be interpreted objectively and in line with a reasonable user's interpretation. Thus, the court held that a reasonable user would conclude from the language of the Governing Law Clause that in the event of a dispute between the user and Google, Israeli law should apply.

Furthermore, the court held that the Terms of Use are signed *"between a user, who is not proficient in reading commercial contracts, and a global commercial corporation with vast financial resources and legal teams. Such power gaps require imposing on Google the responsibility to draft the Terms of Use as clearly as possible, using relatively plain language without unnecessary restrictions. All the more so, when at issue is a Governing Law Clause, encompassing major implications, pertaining to the way a user is entitled to exercise his legal rights in the event of a dispute; and as far as*

a clause, which in certain cases may even have a chilling effect on the exercise of a party's right of access to justice".[2]

Therefore, if the language of the clause is vague, an interpretation against the interest of the drafting party should be preferred, so that Israeli law should govern the Terms of Use.

Recommendations

In view of the foregoing, it is essential to draft clearly and unambiguously the terms of use and, in particular, the governing law clause on websites, apps and other platforms, in order to avoid different and conflicting interpretations. It is recommended that a service provider in Israel take extra care in precisely formulating the Terms of Use, in order to reduce the risks of ambiguity, where a court will interpret the Terms of Use against the service provider's interest.

[1] The Decision, Section 12.

[2] The Decision, Section 14.

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