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**COMMISSION ON GENETIC RESOURCES FOR FOOD AND  
AGRICULTURE  
ACTING AS  
INTERIM COMMITTEE FOR THE INTERNATIONAL TREATY  
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE**

**METHODS OF EXPRESSING ACCEPTANCE  
OF THE TERMS AND CONDITIONS OF MTAs:  
SHRINK-WRAP AND CLICK-WRAP AGREEMENTS**

by

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This document was prepared at the request of the Secretariat of the Commission on Genetic Resources for Food and Agriculture acting as Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture, in order to provide background information on shrink-wrap and click-wrap agreements to the Contact Group for the Drafting of the Standard Material Transfer Agreement, which was established by the Interim Committee at its Second Meeting.

The content of this document is entirely the responsibility of the authors, and does not necessarily represent the views of the FAO, or its Members.

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**METHODS OF EXPRESSING ACCEPTANCE  
OF THE TERMS AND CONDITIONS OF MTAs:  
SHRINK-WRAP AND CLICK-WRAP AGREEMENTS**

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**EXECUTIVE SUMMARY**

1. The traditional method of expressing acceptance of the terms of a contract is by means of a written signature. However, written signatures are not a legal necessity for a contract to be binding. Indeed many contracts are concluded in everyday life without any written contract at all. Because of the difficulties of requiring written signatures and the delays that would be inherent in such a requirement, new ways of expressing acceptance of contract terms have been developed, in particular by the information technology industry. Examples are so-called “shrink-wrap” and “click-wrap” contracts. For similar reasons, the CG Centres have been using the “shrink-wrap” contract form for their Material Transfer Agreements. This is consistent with the requirements of the International Treaty that access to plant genetic resources for food and agriculture under the Multilateral System should be accorded expeditiously. So far the experience with such contracts has been positive. However, it must be admitted that the validation of such contract forms in national systems of law is still in its early stages. The enforceability of both shrink-wrap and click-wrap contracts can be enhanced by ensuring that wide publicity in the trade is given to the terms of material transfer agreements, and the Standard Material Transfer Agreement (SMTA) in particular. In general click-wrap agreements may be easier to enforce in national law, given that one can point to an express acceptance of the terms of the material transfer agreement by the recipient of the plant genetic resources for food and agriculture.

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**CHAPTER 1: INTRODUCTION**

2. The Expert Group on the Terms of the Standard Material Transfer Agreement identified three options for the terms to be included to ensure that recipients are bound by the SMTA on acceptance of the material from the Multilateral System. The first was a provision based on the concept of a “shrink-wrap” contract<sup>3</sup>, the second a signed contract, and the third a dual purpose contract, that may be signed or not, according to the decision of the recipient. The present document reviews some of the considerations relevant to the choice among these options, with particular reference to the enforceability of shrink-wrap agreements under different national legal systems.

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<sup>3</sup> This term is used for a contract included in a sealed package with the product to which it refers, or printed on that package, where the act of opening the package constitutes agreement to the contract.

## **CHAPTER 2: GENERAL CONSIDERATIONS**

3. The classical way of expressing consent to be bound by a legal agreement is signature by a duly authorized person. Requiring such a signature has the advantages of clarifying the following points:

1. that the terms of the agreement have been expressly agreed to by the recipient; and
2. that the person who signs is duly authorized to sign and thus bind the recipient to the terms of the agreement.

4. Signature of the agreement by a duly authorized person is undoubtedly the most effective way of ensuring that a recipient is legally bound by the terms of the agreement. It is also a way that is recognized in all systems of law.

5. Signature of a written agreement, though legally desirable, is of course not essential to the formation of a legally binding contract between two parties. Most, if not all, systems of law recognize unwritten contracts where it is clear that it is the intention of the parties to enter into legally binding and enforceable contracts. Sales of products in the retail market are one example of such unwritten contracts.

6. Even where the terms of a contract are themselves written, the additional requirement of a written signature may itself cause unacceptable delays in concluding a legally binding agreement and in handing over the subject matter of the agreement, even where the existence of a legally binding agreement is to be a pre-condition for the transfer of the material in question. It is for this reason that the information technology industry in particular has been using new forms of contract, such as the so-called “shrink-wrap” and “click-wrap” contracts, which avoid the need for written signatures.

### **CHAPTER 3: SHRINK-WRAP AND CLICK-WRAP AGREEMENTS**

7. **“Shrink-wrap” agreements** have been used in the software industry for at least 20 years. The contractual terms are supplied with the software packaging. Typically, there is a notice on the packaging which states that acceptance on the part of the user of the terms of the agreement is indicated by opening the shrink-wrap packaging of the software, by use of the software, or by some other specified procedure. The user does not sign the agreement. The term “shrink-wrap” derives from the fact that these agreements are often included on the outside of the packaging and are visible through the clear plastic shrink wrap with which the package is sealed. While there may continue to be doubts about the enforceability of shrink-wrap agreements in some jurisdictions, the lack of viable alternatives to such agreements has ensured their continued and wide-spread use.

8. Under **“click-wrap”** agreements, a contracting party consents to be bound by electronically displayed terms (usually online) after being given an opportunity to read those terms. The contracting party demonstrates his or her consent by either typing and submitting words indicating his/her acceptance (“Type and Click”) or clicking on a specified icon (“Icon Clicking”). Click-wrap agreements are very common in internet electronic sales, as well as in sales of software, where the acceptance of the conditions of sale is required before the first installation and use of the software.

#### **CHAPTER 4: THE USE OF SHRINK-WRAP AND CLICK-WRAP AGREEMENTS IN THE TRANSFER OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE**

9. At present most of the transfers of plant genetic resources for food and agriculture that take place in the world are from the Network of *Ex Situ* Collections under the auspices of FAO. These include the collections held by the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR) system (the “CG Centres”). The Material Transfer Agreements used reflect the standard terms set out in the “in trust” Agreements with FAO of 1994.

10. The CG Centres have been using “shrink-wrap” contracts for the transfer of material from their collections for almost ten years.

11. Initially the CG Centres required the signature of a written MTA before acceding to a request for germplasm. This requirement led to delays in transferring germplasm. At the request of users of germplasm, particularly in developing countries, the CGIAR Centres then turned to a simplified form of MTA, based on the so-called “shrink-wrap” form of contract. Under such contracts, the opening of the sealed package of germplasm and acceptance of the germplasm itself are deemed to constitute legal acceptance of the terms of the MTA. The CGIAR reported to the Expert Group that the “shrink-wrap” approach greatly speeds up the process, and that between 700,000 and 1,000,000 samples have been shipped since the in-trust agreement with FAO came into force. No recipient has to date questioned the legality of the MTA on the basis of its form.

12. So far, little use has been made by the CG Centres of “click-wrap” agreements. Click-wrap agreements are predicated on the use of computers for placing orders. Up until now, it has been considered that to respond only to electronic requests for germplasm would be to place farmers and breeders in developing countries at a serious disadvantage.

13. In the case of transfers of plant genetic resources for food and agriculture under the Multilateral System established by the International Treaty, it is a legal requirement that access be accorded expeditiously, without the need to track individual accessions. The use of simplified forms of MTA, including the shrink-wrap form of MTA, certainly makes it easier for Parties to the Treaty and CG Centres to meet their obligations under the Treaty in this respect.

14. However, the simplicity of the approach must be balanced by considerations of the enforceability or otherwise of such an approach. The remainder of this paper therefore deals with the question of the enforceability of shrink-wrap contracts in different legal systems, as well as giving a brief overview of the enforceability of click-wrap agreements.

15. Before embarking on the review, it is perhaps wise to inject a note of caution in the way the information presented should be evaluated. Both shrink-wrap and click-wrap contracts are a fact of everyday life in most jurisdictions. But they are a new form of contract, and it will take some time for them to be fully accepted, and enforced, by the courts of all countries. In the meantime, the experience of national legal systems with both forms of contract, and in particular with shrink-wrap contracts, is somewhat mixed. In this review we will deal first with shrink-wrap agreements and then with click-wrap agreements.

## **CHAPTER 5: THE ENFORCEABILITY OF SHRINK-WRAP AGREEMENTS**

16. The legal principles governing the enforceability of non-signed agreements vary from jurisdiction to jurisdiction. Generally speaking, problems in enforcing such agreements in normal commercial practice stem from:

- (i) the lack of explicit consent by one of the parties to be bound by the terms of the agreement;
- (ii) consumer protection laws (which generally apply where a party contracts in the course of business with consumers on standard terms); and
- (iii) the fact that the terms are often brought to the attention of one of the parties after the contractual transaction is concluded.

17. Although shrink-wrap licences are common in most jurisdictions, there have been very few judicial decisions worldwide concerning their enforceability. In order for a contract to come into existence, the laws of most jurisdictions require that the parties reach an agreement (usually consisting of an offer by one party and an acceptance of that offer by the other party) and intend to be legally bound. As no written or verbal assent is given by one of the parties to a shrink-wrap agreement, the enforceability of these agreements may be problematic in some jurisdictions.

### **5.1 Consumer Protection Legislation**

18. As shrink-wrap agreements are not individually negotiated, national consumer protection legislation may restrict the enforcement of some or all of the terms. Generally speaking the consumer protection legislation applies where one of the parties is acting on standard terms in the course of business and the other party is acting as a consumer (i.e. not in the course of the business). The main *raison d'être* of consumer protection legislation is of course to protect consumers, and the paradigm case where such protection is required is where a large corporation is dictating the terms of sale of its product, usually for profit. The situation of a standard Material Transfer Agreement, adopted by the Governing Body of the Treaty at the behest of sovereign countries parties to the Treaty and in the public interest, has some similarities with this paradigm case, in that the recipient will be required to accept or reject, but not modify, a standard agreement. On the other hand, the fact that the standard Material Transfer Agreement is being drawn up by the Governing Body of a Treaty to which many sovereign states have become party, and the fact that the standard Material Transfer Agreement is being drawn up to meet the public interest, set it somewhat apart from that paradigm case. Whether or not an agreement between a Provider of plant genetic resources for food and agriculture and a Recipient will be caught by consumer protection legislation will of course depend on national law. However, whatever the outcome, it would be good practice to comply with the general principles of fairness underpinning consumer protection law in general.

19. Thus the Recipient might not be bound by conditions with which he/she had no real opportunity of becoming acquainted with before the conclusion of the contract and with terms considered unduly onerous or unfair.<sup>4</sup> If the Governing Body wishes to pursue the option of the shrink-wrap contract approach, then it will be important to ensure that the terms of the SMTA are widely known in the trade.

20. A choice of jurisdiction clause (including an arbitration clause) may also be struck out under consumer protection legislation, where it is deemed unduly onerous on the consumer. The choice of international arbitration would appear not to be subject to criticism as being unduly onerous.

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<sup>4</sup> See for example the EC Council Directive 93/13/EEC of 5<sup>th</sup> April on Unfair Terms in Consumer Contracts.

## 5.2 Authority

21. Where the Recipient is a company, and a shrink-wrap contract form is used, the enforceability of the contract may more often be subject to the defence that the person who has indicated acceptance to the terms of the MTA by accepting the material, may not have not have authority to bind its company. However it should be noted that the use of the material for a breeding programme may itself be a clear indication of the acceptance of the terms.

## **CHAPTER 6: OVERVIEW OF ENFORCEABILITY OF SHRINK-WRAP AGREEMENTS IN A FEW JURISDICTIONS<sup>5</sup>**

### **6.1 US**

22. The US Federal Courts have taken the most lenient and pragmatic approach to shrink-wrap and click-wrap agreements.

23. The Seventh Circuit has found shrink-wrap licences enforceable where (1) the packaging indicated to the purchaser that software was subject to a licence; (2) the purchaser had ample opportunity to read the licence; and (3) the purchaser had an opportunity to reject the licence by returning software for a refund.<sup>6</sup>

### **6.2 England**

24. There are no decisions concerning the validity and enforceability of shrink-wrap agreements under English law. There is, however, a decision of the Scottish Court of Session<sup>7</sup> in which a shrink-wrap licence was held to be enforceable.

25. One of the main issues which may be determinant for English courts is the stage at which the contract is deemed to have been concluded between the Recipient and the Provider of the plant genetic resources for food and agriculture, and whether the recipient had notice of the terms and conditions before the contract is legally concluded.

26. In the Scottish decision referred to above, the court found that a contract for the sale of packaged software was not completed until the purchaser had read and accepted the terms of the shrink-wrap conditions. An English court could take the same approach. Indeed there have been a number of cases under English law where terms that were brought to the notice of the customer only after the transaction had ostensibly been conducted were deemed, nonetheless, to have been incorporated in the contract.<sup>8</sup> However, another possible analysis would be that the contract is concluded at the time the customer pays for the product, and terms brought to its attention after this time are not incorporated in the contract.<sup>9</sup> In the case of plant genetic resources for food and agriculture accessed from the Multilateral System, there is of course no question of payment being made for the material accessed. If it is made clear in the SMTA that the plant genetic resources for food and agriculture accessed can be returned to the Provider if the terms of the MTA are not agreed to, then there would seem to be more likelihood of the shrink-wrap form of MTA being declared enforceable in English law.

### **6.3 France**

27. Again, there do not appear to be any decisions concerning the enforceability of shrink wrap agreements in France. However, the existence of the enforceability of shrink-wrap agreements appears more doubtful than in England.

28. Under French law, a contract is only concluded when a clear, precise offer is accepted without any reservations. This offer and acceptance threshold may not be met in the case of a shrink-wrap

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<sup>5</sup> The information in this section, other than that on the UK and USA, is drawn mainly from internet sources, and thus gives only a partial view of the situation in each jurisdiction.

<sup>6</sup> See for example *ProCDInc v Zeidenberg*, 86 F.3d 1447 (7<sup>th</sup> Cir. 1996) and *Hill v Gateway* 105 F.3d 1147 (7<sup>th</sup> Cir. 1997).

<sup>7</sup> *Beta Computers (Europe) Limited v. Adboe Systems (Europe) Limited* (1995).

<sup>8</sup> For example, exclusion clauses on railway tickets (*Parker v E.E. Railway Co* (1877) 2 CPD 416).

<sup>9</sup> See for example, Lord Denning's judgment in *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686.

transaction where the buyer is only confronted with the terms of the shrink-wrap agreement after the transaction. However again under French law, as under English law, the fact that the terms of the SMTA may be widely known in the trade before any transfer is requested or made will also be relevant to any court decision on enforceability.

#### 6.4 Germany

29. Again, there do not appear to be any decisions concerning the enforceability of shrink wrap agreements in Germany. German law requires that parties to a contract explicitly consent to its terms. This means that a buyer must be provided with the opportunity to review (and subsequently reject or accept) the terms of a shrink-wrap agreement before accepting the plant genetic resources for food and agriculture. Again the fact that such terms may be widely known in the trade and that no charge is to be made for the transfer of plant genetic resources for food and agriculture will be relevant to any decision on enforceability.

#### 6.5 The Netherlands

30. When the customer is unable to review the terms of the shrink-wrap agreement, for example, because the terms are in the box or envelope containing the software, the agreement is unlikely to be enforceable.

#### 6.6 Singapore<sup>10</sup>

31. There do not appear to be any definitive decisions concerning enforceability of shrink-wrap agreements in Singapore. Under Singapore law if a party wants terms incorporated into an agreement, then they must be sufficiently brought to the attention of the other party *before* the contract is formed. The more onerous the terms are, the more effort must be taken to bring them to the customer's attention.

#### 6.7 Hong Kong<sup>11</sup>

32. Hong Kong contract law has been derived from English law. There is no Hong Kong law relating specifically to formation of online contracts or to the validity of shrink wrap agreements. In light of this, it is likely that the enforceability of shrink and click-wrap agreements will be similar to that in English law.

#### 6.8 Canada<sup>12</sup>

33. Under Canadian common law, three elements are required in order for any contract to be valid and enforceable. There must be an offer, an acceptance and the existence of consideration.

34. Several provincial statutes require that certain forms of contracts be in writing or accompanied by a signature in order to be valid.<sup>13</sup> Subsection 19(1) of the Ontario Consumer Protection Act, R.S.O. c.

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<sup>10</sup> E-Com Legal Guide. Singapore. <http://www.apectelwg.org/apecdata/telwg/e-com/singapec.html>.

<sup>11</sup> E-Com Legal Guide. Hong Kong. <http://www.apectelwg.org/apecdata/telwg/e-com/hongkong.html>.

<sup>12</sup> E-Com Legal Guide. Canada. <http://www.apectelwg.org/apecdata/telwg/e-com/canadaapec.html>.

<sup>13</sup> For example, Statute of Frauds, (Ontario) R.S.O.1990, c. S-19, imposes a written requirement for contracts of guarantee and contracts for sale of land or any interest in land, among others.

C-31 (“OCA”) requires that all executory contracts<sup>14</sup> contain specified information and be in writing. Subsection 19(2) of the OCA requires that such contracts be signed and that each party receive a duplicate original of the contract.

35. It would appear that the requirement of a written contract in certain scenarios presents an obstacle to online contracting in Canada. However, the federal and provincial governments have recognized the value and growth in electronic commerce and may legislate to address the apparent inconsistencies between current laws and emerging business needs.

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<sup>14</sup> Executory contracts are those contracts in which the contracting parties do not receive the product or associated payment simultaneously.

## **CHAPTER 7: SUGGESTIONS FOR INCREASING THE ENFORCEABILITY OF SHRINK-WRAP MTAs**

36. The above review is perhaps more indicative of the nascent state of the law on the enforceability of shrink-wrap agreement, rather than providing a clear indication that such agreements will not be enforceable. However, the review does point out the importance that the courts will place great emphasis on whether or not the terms of the agreement were known to the recipient before the contract is concluded, and whether he or she can be deemed to have accepted those terms.

37. If the conditions and mode of execution of the MTAs are widely known, it will be more difficult for the Recipient to argue that he/she did not agree to be bound by those conditions. Therefore, publicity relating to the MTAs (for example, through newsletters, internet sites and other media), should increase the enforceability of the shrink-wrap MTAs. In the case of the standard MTA, the fact that the standard MTA will have been adopted under the International Treaty by the Governing Body in the international public interest will also be a factor that would militate in favour of the enforceability of shrink-wrap MTAs, if indeed this were to be the approach adopted by the Governing Body.

38. In order to decrease the chances of the MTA being found unenforceable under national consumer legislation, the terms should be, insofar as possible, clear and fair.

39. The dispute resolution clauses should not specify a forum or language of proceedings that is unfairly burdensome on the Recipient.

40. In the case of shrink-wrap MTAs, the language on the box should specifically state that the sale is subject to the terms and conditions inside.

41. The Recipient should be given as much opportunity as possible to review the terms of the MTA before indicating his/her acceptance of them. In the case of plant genetic resources for food and agriculture accessed from the Multilateral System, there is by definition no point in time at which the recipient is required to pay for the material. There is thus no automatic cut off point for the conclusion of the contract. To have the best chance of being found enforceable, the Standard MTA should allow a reasonable period of time in which the Recipient is given an opportunity to review terms and return the germplasm. The acceptance of the Recipient to the terms of the MTA could thus be said to be indicated by not returning the germplasm within this period. The process for returning the germplasm should be made as easy as possible.

42. If acceptance is to be indicated by opening the box in which the germplasm is delivered and there is no provision for the return of the germplasm once opened, then the terms of the agreement should be presented in such a way that they can be fully read before opening the box. The Recipient should be allowed to return the unopened container if she or he disagrees with the terms.

## **CHAPTER 8: CHOICE OF LAW**

43. Most jurisdictions will allow the parties to a contract to choose which law should apply to that contract, at least where there is an international dimension to the contract. Greater flexibility may be allowed in contracts which provide for arbitration as a means of dispute settlement, where, for example, general principles of law recognized in the trade may be chosen as the applicable law. Reference to general principles of law recognized in the trade is likely to favour the enforceability of shrink-wrap contracts in view of the existing practice of using such contracts for the transfer of germplasm, at least where CG Centres are involved.

44. However, a choice of law clause may not necessarily be determinant on the fundamental question of whether the Recipient is deemed to have actually entered into a contract with the centre releasing the plant genetic resources. In other words a court could well find that the form of an agreement is insufficient to demonstrate the agreement of both parties to the establishment of a legally binding contract between them. In such a case, the reference to arbitration contained in the failed contract would have no legal effect.

## **CHAPTER 9: CLICK-WRAP CONTRACTS**

45. As in the case of shrink-wrap agreements, there is a paucity of judgments concerning the enforceability of click-wrap agreements. Click-wrap agreements should, however, be easier to enforce than shrink-wrap agreements. This is because: (1) the Recipient has an opportunity to review the terms before purchasing the plant genetic resources for food and agriculture; and (2) the acceptance of the contractual terms is indicated by way of an action rather than an omission. Problems may occur where the laws governing the formalities on contract formation prohibit the conclusion of contracts by electronic means.<sup>15</sup> Thus click-wrap agreements have been found enforceable in **US** Federal Courts<sup>16</sup>. Although, there has been no decision concerning the enforceability of click-wrap licences under **English** law, a click-wrap licence of the type envisaged in section 6.3 below, should be enforceable under general principles of English contract law. Further, in December 2001, the Law Commission, when reviewing formal requirements in commercial transactions, concluded that clicking on a website button can demonstrate consent to the terms of an agreement.<sup>17</sup> Click-wrap agreements are also, at least in theory, likely to be enforceable in **France, Germany, the Netherlands, and Singapore**.

46. As with shrink-wrap contracts, measures can be taken to increase the likelihood of their enforceability.

47. The Recipient's acceptance of the terms should be indicated by as positive an act as possible. Ideally a Type and Click type mechanism for indicating consent should be used, or the Recipient should have to scroll through the terms and click an "I agree" button before proceeding with the order. The Recipient should not be able to process the order without first agreeing to the terms. The Recipient should also be given an opportunity to reject the terms either by clicking or typing "I disagree" or words to that effect. If the terms are rejected, then the Recipient should be linked back to an earlier page (such as the home page). The Recipient should have an opportunity to print out and/or save the terms before agreeing to them. Active buttons should be provided to enable the Recipient to do this.<sup>18</sup> Receipt of the order should also be acknowledged, and a record of the date and time of the Recipient acceptance made and maintained for evidential purposes.

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<sup>15</sup> Cf the EU E – Commerce Directive (00/31/EC) which requires member states to ensure their legal system allows contracts to be concluded by electronic means (subject to limited possible derogations by the Member State).

<sup>16</sup> *Hotmail v Money Pie, Inc* (47 U.S.P.Q. 2d (BNA) 1020 (N.D. Cal 1998)); *Hughes v AOL Inc*, USDC, District of Massachusetts, summary judgment, civil action no. 2001.

<sup>17</sup> <http://www.lawcom.gov.uk/files/e-commerce.pdf> Pages 18-19.

<sup>18</sup> Required by the US Electronic Signatures in Global and National Commerce Act.

## **CHAPTER 10: CONCLUSIONS AND RECOMMENDATIONS**

48. This background note on methods of expressing acceptance of the terms and conditions of MTAs, with particular reference to the enforceability of shrink-wrap agreements, is submitted for the information of the Contact Group. In summary conclusion the following conclusions can be drawn:

1. The normal method of expressing consent to formal contracts is through signature of those agreements. Such contracts are likely to be enforceable in all jurisdictions.
2. There is a growing practice for the use of shrink-wrap and click wrap forms of contract, due to the pressure of the industry and their convenience.
3. The law relating to the enforceability of shrink-wrap and click-wrap agreements has not yet fully developed: in many jurisdictions there are still likely to be difficulties in enforcing such contracts.
4. The decisions of courts on the enforceability of shrink-wrap agreements are likely to be determined on the facts of the particular case, and in particular whether or not the recipient knew and accepted the terms of the agreement, or can be deemed to have known.
5. Much could be done to increase the possibilities of enforceability, e.g. by giving wide publicity to the terms of a standard MTA.
6. The fact that a standard MTA has been drawn up by the Governing Body of a Treaty in the public interest, will certainly greatly increase the chances of it being found enforceable.
7. Click-wrap agreements may well be more immediately enforceable, and could therefore also be used, wherever possible, in standard MTA transfers.
8. It may also be possible to offer a choice of concluding the SMTA by means of a shrink-wrap, click-wrap or written signature form depending on the enforceability of such forms in particular jurisdictions. This would however require the drawing up of a list of jurisdiction in which the various forms of contract would be enforceable, a task which itself may not be easy in light of the nascent state of the law in this area.