LIBRARY COPYRIGHT ALLIANCE RESPONSE TO ISRAEL MINISTRY OF JUSTICE REQUEST FOR COMMENTS REGARDING THE BARRIERS COPYRIGHT LAW PLACES ON LIBRARIES, ARCHIVES, AND MUSEUMS IN THE DIGITAL AGE

The Library Copyright Alliance ("LCA") consists of two major U.S. library associations: the American Library Association and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. These two associations cooperate in LCA to address copyright issues that affect libraries and their users.

LCA welcomes the opportunity to respond to the Ministry of Justice's January 26, 2025, request for comments on the barriers copyright places in libraries, archives and museum in the digital age. Israel's copyright law already is among the more progressive copyright laws in the world for libraries, archives, and museums because it includes a fair use right in section 19; an exception for the benefit of people with disabilities in section 28A; and clear exception for libraries and archives in section 30. Furthermore, the National Library Law permits the National Library to make additional copies for preservation beyond the conditions set forth in section 30 of the Copyright Act.

However, as the request for comments recognizes, contracts can change the balance established in the copyright law between the interests of the rightsholder and the public. In these comments, LCA advocates for adoption of an explicit provision nullifying contract terms that purport to prohibit activities by libraries, archives, and museums otherwise permitted under the Copyright Act.

INTRODUCTION

Copyright laws around the world provide exceptions that limit the exclusive rights granted to copyright owners.[1] However, the shift towards the digital distribution of content has

[1] Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives* (Nov. 4, 2008), *available at* SSRN: https://ssrn.com/abstract=1415012 or http://dx.doi.org/10.2139/ssrn.1415012. These exceptions can be viewed as rights or privileges that the legislature has granted users and other beneficiaries, just as the legislatures have bestowed exclusive rights of exploitation upon copyright owners. For the sake of clarity, this article refers to the privileges or rights granted to libraries as "exceptions."

led to publishers distributing this content under license.[2] And these licenses frequently contain terms that seek to "override" the exceptions provided under the copyright statutes.

For thirty years, the EU directives relating to copyright have required the nullification of license terms that override specific exceptions mandated by those directives. The EU recognized that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by contract. Two of these directives—the Marrakesh Treaty Directive and the Copyright in the Digital Single Market Directive—require Member States to render unenforceable contractual provisions contrary to the exceptions mandated under those Directives for libraries and other cultural heritage institutions.

All EU Member States must implement these protections against contract override in their law. Moreover, some Member States have adopted more extensive contact override prevention ("COP") clauses than those required by EU directives. The copyright laws of Germany, Ireland, Portugal, and Belgium prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions, including the specific exceptions for libraries. Likewise, prior to Brexit, the UK adopted COP clauses more extensive that those required by the EU directives.

Some countries outside of Europe recently have adopted COP clauses. The Cook Islands, Kuwait, Nigeria, and Singapore have adopted provisions that apply to a broad range of exceptions, including the library exceptions. Singapore appears to have the most complex provision; among other factors, it takes into consideration the bargaining power of the parties.

The U.S. Copyright Act does not include a COP clause, although the Library of Congress promulgated a regulation that, in effect, nullifies license terms that purport to override copyright exceptions.

The Israel Copyright Act also does not include a COP clause. The Ministry of Justice has issued an opinion that under the Standard Contracts Law, a clause that prohibits a permitted use under the Copyright Act is not enforceable. But if the agreement is not a standard contract, i.e., if the agreement is negotiated, the principle of freedom of contract prevails and the contract would be enforced. We recommend that Israel adopt a COP clause that would apply to both negotiated and non-negotiated contracts entered into by libraries, archives, and museums. This is necessary to ensure that libraries, archives, and museums in Israel can continue to perform their historic mission of preserving and providing access to cultural heritage as it is increasingly distributed in digital format.

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[2] The challenges posed to libraries by this migration to digital distribution is explicated in Guy Rub, *Reimagining Digital Libraries* (February 19, 2024), 113 GEORGETOWN L. J. 191 (2024); and Margaret Chon, *Protecting Progress: Copyright's Common Law and Libraries,* __ J. Cop'y Soc. __ (2025).

I. EUROPEAN UNION

A. COP Clauses Consistent With Directives

The first two EU Directives with COP clauses did not specifically concern libraries or archives.[3] The Software Directive, adopted in 1991, mandated that Member States adopt exceptions permitting the making of backup copies, and the copies incidental to reverse engineering. Furthermore, Article 9(1) of the Directive provides that "any contractual provisions contrary" to these exceptions "shall be null and void."[4] Because software publishers typically distributed their products subject to a license, EU decision members recognized that the Directive's exceptions would have no effect if they could be overridden by license terms. Similarly, the 1996 Database Directive required exceptions for acts necessary for the purpose of access to and normal use of the contents of a database, as well as the extraction and reutilization of insubstantial parts of a database.[5] Article 15 of the Directive then provided that any contractual provision contrary to these exceptions would shall be null and void. A COP clause was needed to preserve the Directive's exceptions because software, like databases often were distributed subject to licenses.

Article 5(2)(c) of the Information Society Directive, adopted in 2001, permitted Member States to enact exceptions allowing "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage."[6] The Directive did not prohibit the overriding of this exception by contract, presumably because the exception was not mandatory.

In contrast, under the 2017 Marrakesh Directive, adoption of exceptions implementing the Marrakesh Treaty was mandatory. The Marrakesh Directive required Member States to enact exceptions permitting "authorised entities" to make accessible format copies of works and distribute them to people with print disabilities.[7] Authorised entities include public and non-

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[3] For a more detailed discussion of the theoretical underpinnings of COP clauses preserving mandatory provisions in the EU, *see* Lucie Guibault, *Copyright Limitations and Contracts – An Analysis of the Contractual Overridability of Limitations on Copyright* (2002).

[4] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, 2009 O.J. (L 111) 16.

[5] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77).

[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10.

[7] Directive (EU) 2017/1564 of the European Parliament and the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and

profit institutions that provide education, training, or adaptive reading access to people with print disabilities, and thus are understood to include libraries. Significantly, Article 3(5) provides that "Member States shall ensure that the exception" required by the Directive "cannot be overridden by contract."

Likewise, the 2019 Copyright in the Single Digital Market Directive[8] contained mandatory exceptions for cultural heritage institutions to engage in text and data mining[9] and the preservation of the works in their collections.[10] Article 2(3) of the Directive defines cultural heritage institutions as "publicly accessible library or museum, an archive or film or audio heritage institution." Article 7(1) provides that "any contractual provision contrary to the exceptions" for text and data mining and preservation "shall be unenforceable."

All 27 EU Member States are required to implement these protections in their domestic law.[11] Significantly, the COP clauses mandated by the EU directives apply to all contracts, not just standard (non-negotiated) contracts.

B. COP Clauses that Exceed Directives

Several EU Member States have enacted provisions protecting most if not all of their copyright exceptions from being overridden by contracts. In particular, these jurisdictions invalidate contract terms that purport to limit the specific exceptions enjoyed by libraries and archives, regardless of whether the contract was negotiated on non-negotiated.

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related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, O.J. (L 242) 6.

[8] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, O.J. (L 130) 92.

[9] Article 2(2) defines text and data mining as "any automated analytical technique aimed at analyzing text and data in digital form on order to generate information which includes but is not limited to patterns, trends, and correlations." The exception is in Article 3.

[10] Article 6 states the Member States shall provide for an exception "in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter to the extent necessary for such preservation."

[11] The following EU Member States have adopted COP clauses limited to those mandated by the Directives: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Sweden.

- Article XI. 193 of the Belgian Code de Droit Economique renders void contract terms contrary to the exceptions for document supply,[12] public institutions,[13] lending,[14] and orphan works,[15] as well as preservation[16] and Marrakesh Treaty implementation.[17]
- Under Article 60 g(1) of the German copyright law, "the rightholder may not invoke agreements which restrict or prohibit uses permitted in accordance" with the exceptions for non-commercial media collections,[18] libraries,[19] and archives and museums.[20]
- Section 2(10) of the Irish Copyright and Related Rights Act broadly provides that "where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act." Thus, a contractual restriction on any activity by a library permitted under the copyright law is unenforceable.[21]
- Similarly, Article 75(5) of the Portuguese Code of Copyrights and Related Rights provides that "any contractual clause that seeks to eliminate or prevent the normal exercise by the beneficiaries" of uses permitted by specified exceptions "is null and void," including preservation and internal uses by libraries, archives, and museums; and dedicated terminals in libraries.[22]

II. OTHER JURISDICTIONS

Several countries outside the EU have also adopted contract override prevention clauses. In most cases, they apply to all or virtually all copyright exceptions, including exceptions for library and archives; and they apply regardless of whether the contract was negotiated or not.

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[12] [Code of Economic Law] Title 5, Art. XI.190(13) (Belgium).

[13] [Code of Economic Law] Title 5, Art. XI.190(17) (Belgium).

[14] [Code of Economic Law] Title 5, Art. XI.192(1) (Belgium).

[15] [Code of Economic Law] Title 5, Art. XI.192/1 (Belgium).

[16] [Code of Economic Law] Title 5, Art. XI.190(12) (Belgium).

[17] [Code of Economic Law] Title 5, Art. XI.190(15) (Belgium).

[18] Copyright Act, Art. 60b (Germany).

[19] Copyright Act, Art. 60e (Germany).

[20] Copyright Act, Art. 60f (Germany).

[21] Copyright and Related Rights Act (2000), Sec. 50 (fair dealing) and Secs. 59-70 (libraries and archives) (Ireland).

[22] Code of Copyright and Related Rights (2017), Art. 75(5) (Portugal).

- Section 11(5) of the Copyright Act of the Cook Islands provides that "any contractual provision contained in an agreement for the assignment or licensing of a work that is contrary to any of the exceptions to copyright infringement set out in sections 14 to 25 has no lawful effect."[23] This provision applies to the exceptions for libraries, archives, museums, and galleries in section 20.
- Article 32 of the Kuwait Copyright Law states that "any agreement contrary to the limitations and exceptions set forth in this chapter shall be null and void," including library exceptions for replacing damaged copies, preservation; and completing works.[24]
- Article 31(4) of the Moldova Law on Copyright and Related Rights provides that "any clauses in a copyright contract that are contrary to the provisions of this Law shall be deemed null and void, and the conditions set out in this Law shall apply in place thereof."[25] This applies to Article 21 concerning libraries.
- Article 45 of the Montenegro Law on Copyright and Related Rights (2011) asserts that "limitations to copyright … may not be waived," and that "the provisions of a contract or other legal act stipulating the user's waiver of the permitted limitations ... shall be null and void."[26] This provision applies to Article 52 and 60, concerning library copying and dedicated terminals.
- Recent amendments to the Nigeria Copyright Act added Section 20(3), declaring that "any contractual term which purports to restrict or prevent the doing of any act permitted under thus Bill shall be void." This COP clause covers the exception for libraries[27] and archives and the fair dealing provision based on 17 U.S.C. § 107.[28]
- The library exceptions in the UK Copyright, Designs, and Patents Act for supply of copies to other libraries,[29] replacement copies,[30] and copies to users[31] contain language stating that "to the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable."

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[23] Copyright Act, Sec. 11(5) (Cook Islands).

[24] Copyright Law (2019), Art. 32 (Kuwait)

[25] Law on Copyright and Related Rights, Art. 31(4) (Moldova). Moldova is a candidate for joining the EU.

[26] Law on Copyright and Related Rights, Art. 45 (Montenegro). Like Moldova, Montenegro is a candidate for joining the EU.

[27] Copyright Act, Sec. 20(1)(m) and Sec. 25 (Nigeria).

[28] Copyright Act, Sec. 20(1) (Nigeria).

[29] Copyright, Designs, and Patent Act, Sec. 41(5) (UK).

[30] Copyright, Designs, and Patent Act, Sec. 42(7) (UK).

[31] Copyright, Designs, and Patent Act, Sec. 42A (UK).

In contrast to the simple, typically one-sentence COP clauses in the EU and the other jurisdictions discussed above, Singapore has adopted a more complex and nuanced approach.[32] Under section 186 of the Singapore Copyright Act (2021), a rights owner can restrict application of a permitted use only through an individually negotiated contract.[33] In other words, restrictions on exceptions asserted through adhesion contracts such as subscription agreements are not enforceable. Even if the contract is individually negotiated, its terms are enforceable only if they are fair and reasonable under a set of criteria set forth in the statute.[34] These criteria include the relative bargaining positions of the parties.[35]

Section 187 further restricts enforcement of individually negotiated contracts to the extent they purport to limit uses permitted by public collections such as galleries, libraries, archives and museums under sections 221 through 236.[36] Thus, library exceptions prevail over individually negotiated contracts to the contrary. The only exclusion to this COP clause is section 234, which permits a library to make a copy of a work for inclusion in the collection of another library or supply to an individual. Accordingly, a prohibition in a negotiated contract on a library making a copy of a work for another library or an individual would be enforceable, if the prohibition were fair and reasonable under section 186. All other restrictions on the exercise of library exceptions would not be valid.

Finally, section 188 anticipates efforts to circumvent the COP clauses through choice of law provisions. Section 188, entitled "Evasion through choice of law clause to be void," invalidates a term that purports to apply the law of a country other than Singapore if "the application of that law has the effect of excluding or restricting the operation of any permitted use;"[37] and "the term is imposed wholly or mainly for the purpose of evading the operation of any permitted use."[38]

III. UNITED STATES

In contradistinction to the countries discuss above, the U.S. Copyright Act does not include a provision directly preventing the exceptions granted libraries from being overridden by contract. To the contrary, section 108, which sets for exceptions for libraries and archives, states that

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[32] For the reader's convenience, Singapore's COP clauses are set forth in the appendix.

[33] Copyright Act, Sec. 186(2)(a) (Singapore).

[34] Copyright Act, Sec. 186(2)(b) (Singapore).

[35] Copyright Act, Sec. 186(3)(a) (Singapore).

[36] Copyright Act, Sec. 187(1)(a) (Singapore).

[37] Copyright Act, Sec. 188(1)(a) (Singapore).

[38] Copyright Act, Sec. 188(1)(b)(i) (Singapore).

"nothing in this section … in any way affects … any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections."[39]

On its face, this provision appears to ensure that the section 108 exceptions yield to conflicting contract terms. However, the House Report explaining this provision arguably narrows its intent: "This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced."[40] In such a situation, the right of reproduction granted be section 108 would not override any contractual arrangements assumed by the library when it obtained the work for its collection. Arguably, Congress did not intend for this clause to reach the more typical circumstance of a library obtaining a published work on the open market.

Moreover, the existence of this provision in section 108 creates a negative pregnant with respect to other exceptions relied upon by libraries, such as fair use in section 107 and the Marrakesh Treaty implementation provisions in sections 121 and 121A. In other words, Congress's assertion that section 108 does not affect contractual obligations prohibiting copying indicates that sections 107, 121, and 121A may affect such obligations; that is, that sections 107, 121, and 121A supersede conflicting contract limitations. In effect, section 108(f)(4) could be read as indicating that other copyright exceptions do have preemptive effect on the enforcement of inconsistent contract terms under state law, either by operation of the express preemption provision in 17 U.S.C. § 301(a) or conflict preemption under the Supremacy Clause of the U.S. Constitution.[41]

Nonetheless, in the absence of clear case law on either express or conflict preemption of contract terms inconsistent with the Copyright Act's exceptions, the Library of Congress promulgated a regulation that in effect creates a COP clause with respect to any license it joins. 36 C.F.R. § 701.7(e) provides that the following clause "is deemed incorporated in each license agreement to which the Library of Congress is a party:"

> The Library of Congress does not agree to any limitations on its rights (e.g., fair use, reproduction, interlibrary loan, and archiving) under the copyright laws of the United States (17 U.S.C. 101 et seq.), and related intellectual property rights

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[39] 17 U.S.C. § 108(f)(4).

[40] H.R. Rep. No. 94-1476 at 77 (1976).

[41] Preemption of inconsistent contract terms is a complex issue beyond the scope of these comments. For a more detailed discussion of preemption in the United States, *see, e.g.*, Guy Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1141 (2017). For a discussion of other contract law theories which could be used to challenge license terms limiting exceptions, *see* Jonathan Band and Krista Cox, *The Enforceability of License Restrictions on Ingestion for Artificial Intelligence Training Purposes*, *available at* arl.org (April 2024).

under foreign law, international law, treaties, conventions, and other international agreements.[42]

The Library of Congress is in a unique position among U.S. libraries in that it can promulgate legally binding regulations to protect itself. To be sure, a publisher could in theory refuse to license its digital works to the Library in order to avoid this clause, but there is no reported instance of a publisher doing so. Other libraries can attempt through negotiations to limit publishers' demands for contractual restrictions on exceptions, but typically they do not have the bargaining power to succeed.

IV. RECOMMENDATION

As noted above, the Ministry of Justice has issued an opinion that under the Standard Contracts Law, a clause in a standard contract that prohibits a permitted use under the Copyright Act is not enforceable. But if the agreement is not a standard contract, *i.e.*, if the agreement is negotiated, the principle of freedom of contract prevails and the contract would be enforced. Many of the license agreements libraries, archives, and museums enter into have a degree of negotiation and thus likely would not be considered standard contracts under the Standard Contracts Law.[43] In other words, rightsholders could enforce contractual limitations on library uses permitted by statute.

Accordingly, the Israel Copyright Act should be amended to include a COP clause that would apply to both negotiated and non-negotiated contracts entered into by libraries, archives, and museums, similar to COP clauses in Europe, Singapore, and elsewhere. This is necessary to ensure that libraries, archives, and museums in Israel can continue to perform their historic mission of preserving and providing access to cultural heritage as it is increasingly distributed in digital format. Otherwise, rightsholders could unilaterally erase the exceptions and limitations adopted by the Knesset. The existence of COP clauses for cultural heritage institutions in copyright laws throughout Europe, including in countries with major publishing industries, indicates that such clauses would not prejudice the interests of copyright owners.[44] The COP clause could have the granularity of Singapore's, applying differently to different library

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[42] This provision does not apply to software licenses.

[43] Because of the uniqueness of the titles offered by rightsholders, libraries often have little leverage in their negotiations with them.

[44] Three of the five largest trade publishers are based in Europe. Penguin Random House is owned by the German publisher Bertelsmann; Hachette is French; Macmillan is owned by the German publisher Holtzbrinck. Similarly, three of the four largest scientific, technical, and medical (STM) publishers have European headquarters. Elsevier is a Dutch company owned by a British holding company; Springer Nature is owned by the German publisher Holtzbrinck; and Taylor & Francis is British. Pearson, the world's largest textbook publisher, is British.

privileges, and anticipating choice of law clauses attempting to evade the effectiveness of the COP clause.[45]

We recognize that the United States has not yet enacted a COP clause.[46] But the Library of Congress has adopted a regulation voiding license terms that attempt to limit its rights under copyright law. And most countries in Europe likewise protect libraries from the forced waiver of statutory limitations adopted by the national legislature.

We welcome any questions the Ministry may have.

Respectfully submitted,

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[45] The clause should clearly void terms that prohibit the use of materials in the public domain as well uses permitted by fair use, the other statutory exceptions, and the National Library Act.

[46] Although the United States has a strong tradition of freedom of contract, Congress routinely prohibits wavier of statutory protections in situations with unequal bargaining position. *See, e.g.*, 5 U.S.C. § 8479(a) (duties of fiduciaries); 7 U.S.C. § 7a-2(c)(5)(C)(ii) (commodity exchanges); 10 U.S.C. § 987(d)(2)(B) (consumer lending); and 11 U.S.C. § 522(e) (bankruptcy).

Appendix

Singapore

Copyright Act (2021)

Permitted uses may be excluded or restricted by reasonable contract term

186.—(1) Subject to this section and section 187, a rights owner may, by contract with a person, exclude or restrict the application of a permitted use to that person.

(2) A contract term between the rights owner and another person (called in this section the counterparty) is valid for the purposes of subsection (1) only if —
(a) the contract is individually negotiated; and
(b) the term is fair and reasonable, having regard to the circumstances that are, or ought reasonably to be, known to or in the contemplation of the parties when the contract is made.

(3) For the purposes of subsection (2)(b), relevant matters in deciding whether a term of a contract is fair and reasonable include —

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the counterparty's requirements could have been met;
(b) whether the counterparty received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the counterparty knows or ought reasonably to know of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and
(d) whether at the time of the contract it is reasonable to expect that the contract is workable without the term.

(4) Subject to any contrary intention in the contract, where a contract term between a rights owner and a person excludes or restricts the application of a permitted use to that person, the benefit of that term passes to the rights owner's successors in title.

(5) This section applies to any contract made before, on or after 21 November 2021.

Permitted uses that may not be excluded or restricted

187.—(1) Any contract term is void to the extent that it purports, directly or indirectly, to exclude or restrict any permitted use under any provision in —
(a) Division 6 (public collections), but not section 234 (supplying copies of published literary, dramatic or musical works or articles between libraries and archives);
(b) Division 7 (computer programs);
(c) Division 8 (computational data analysis); or
(d) Division 17 (judicial proceedings and legal advice).

(2) Without limiting subsection (1), a contract term is void to the extent that it purports, directly or indirectly, to prevent or restrict the doing of any of the following acts in circumstances that constitute a permitted use under the provisions mentioned in subsection (1):
(a) making a copy of a work or a recording of a protected performance;
(b) supplying (whether by communication or otherwise) a copy of a work or a recording of a performance;
(c) performing a work or a recording of a protected performance.

(3) This section applies to any contract made before, on or after 21 November 2021.

Evasion through choice of law clause to be void

188.—(1) A contract term that purports to apply the law of a country other than Singapore is void if —
(a) the application of that law has the effect of excluding or restricting the operation of any permitted use; and
(b) either —

(i) the term is imposed wholly or mainly for the purpose of evading the operation of any permitted use; or

(ii) in the making of the contract one of the parties dealt as consumer, and he or she was then a Singapore resident, and the essential steps for the making of the contract were taken in Singapore (whether by him or her or by others on his or her behalf).

(2) For the purposes of subsection (1)(b) —
(a) the interpretation of section 27(2)(b) of the Unfair Contract Terms Act 1977 must be considered; and
(b) if a person claims that a party does not deal as a consumer, the burden is on the person to prove this.

(3) This section applies to any contract made before, on or after 21 November 2021.