

South African Law perspective on

ELECTRONIC RESOURCE LICENSES

OVERVIEW

- ⦿ What is a contract – the very, very short version
- ⦿ The anatomy of a license agreement
- ⦿ South African challenges



Contracts - a very short introduction

- ◎ Basic building blocks of civilization
 - Contracts govern everything from shopping to watching your favorite series on ShowMax; travelling to property ownership.
 - The very idea of civilization and government are based on a so-called *social contract*



Contracts - a very short introduction

Ancient Sumerian Codes of Ur-Nammu
c. 2100 – 2050 BCE

*“If the man had slept with the widow without there having been any **marriage contract**, he need not pay any silver”*



Contracts - a very short introduction

- In *theory*, a contract is simply an agreement between parties with more or less equal bargaining power – i.e. a *horizontal* relationship

“Only free men can negotiate. A Prisoner cannot enter into a contract”

- Nelson Mandela



Contracts - a very short introduction

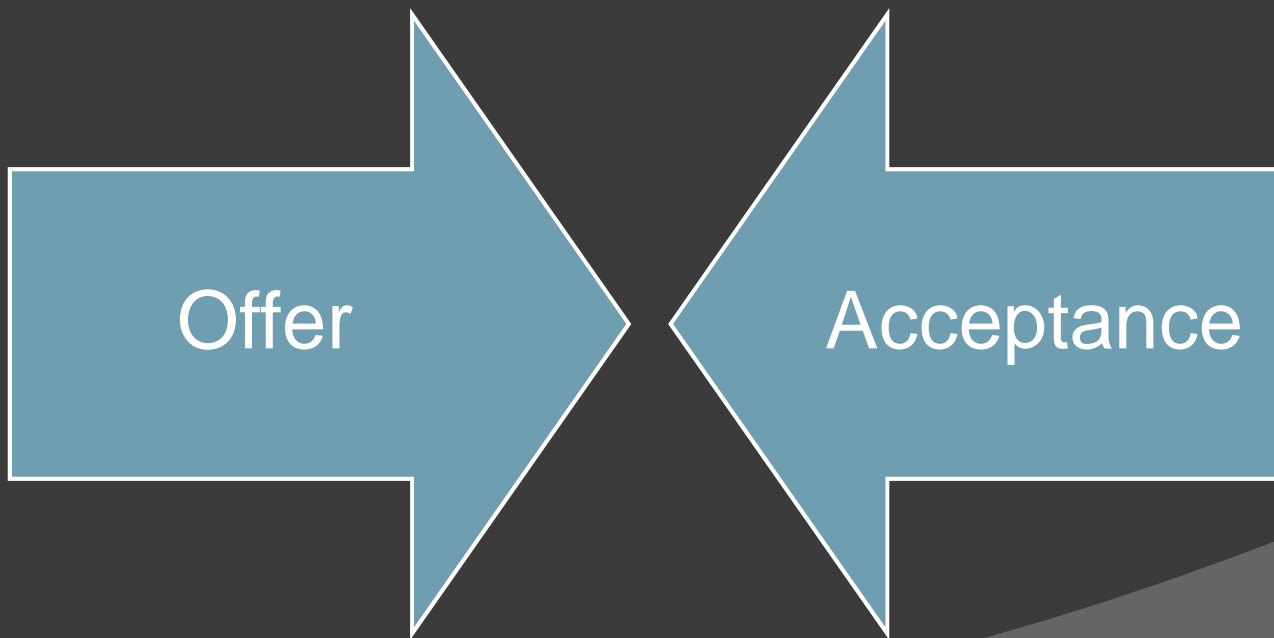
- In *practice* parties are often in unequal positions, which leads to clauses like this:

“We may amend this agreement at any time, and if we do so, we will notify you and the changes will become immediately effective, and your continued use of the service will indicate your acceptance of such changes.”



Contracts - a very short introduction

- Only 2 basic legal requirements for a valid contract:



Why contracts should be in writing, even if not legally required

- Legal certainty
- Protects both parties if things go wrong
- Minimizes opportunities for disputes
- Regulate how disputes will be resolved, which can save time and money
- Compliance issues / record keeping



Timing

- ⦿ Don't be hasty – sign *before* you proceed
- ⦿ Without a written agreement, your order is at the mercy of the service provider and you have almost *no* rights other than common law or legislation, which you will have to fight in court to prove at great expense
- ⦿ In complex arrangements, such as consortia, not signing in advance stymies the logistics of the entire system



The anatomy of a license agreement

A lease by any other name...

- ⦿ A owns a thing, B wants to use it
- ⦿ A recognizes there is value in letting B use it
- ⦿ A lets B use it in return for value
- ⦿ B does not become the owner, simply has *right of use*



The anatomy of an *electronic resource* license agreement

But, unlike a standard lease...

- ⦿ The “thing” is usually *intangible*
- ⦿ It can be used by millions of people simultaneously
- ⦿ The Licensee is not necessarily the end user



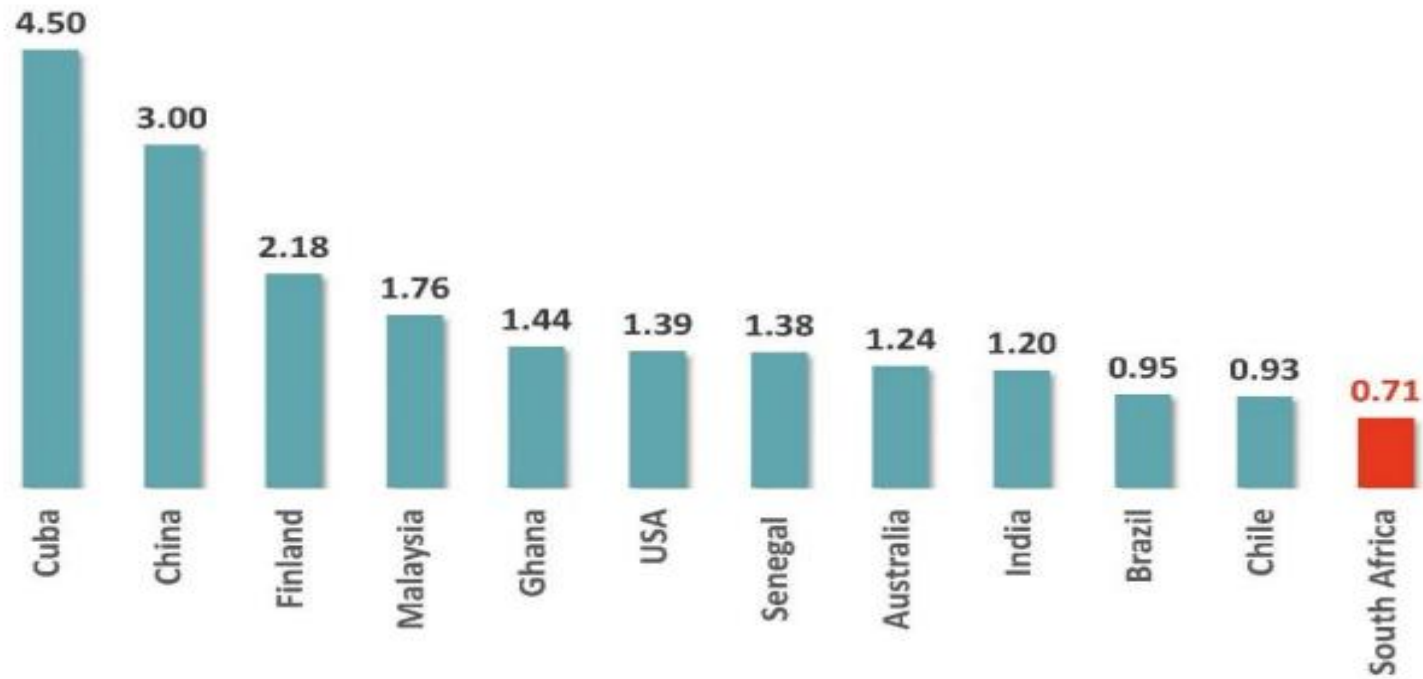
The anatomy of an *electronic resource* license agreement

- Definitions clause
- Fees
- License period and renewals
- Authorised use / access requirements
- Parties' rights and obligations
- Jurisdiction and dispute resolution



South African challenges

Expenditure on higher education as % of GDP, 2012



Compiled by Charles Sheppard
Source: OECD (2016), Public spending on education (indicator), doi: 10.1787/899b45d0-ee (Accessed on 12 May 2016)



South African challenges



South African challenges

- ⦿ Contractual challenges include:
 - Affordability uncertain over multi-year periods
 - Budgets determined at very late stage
 - Contracts and renewals need to be negotiated well in advance
 - Publisher fee increases



Addressing challenges

- Opt-out clause

- Institution may cancel on notice if funds not available to continue with next year period
- This needs to be balanced by institutions finalizing their budgets on time and notifying Publishers prior to next renewal period, or to pay for actual use if notice is too late



Is the problem more fundamental?

- Subscription-based services no longer cost effective
- Movement towards alternative, open models – e.g. Open Access, SPARC
- License agreements nevertheless remain relevant – e.g. GNU General Public License



Thank you

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