

UNDERSTANDING & ANALYSING THE LEGALITY OF E- CONTRACTS

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INTRODUCTION

Nowadays, online transactions are a hit in the market. Since the last decade, almost all of our transactions from buying of daily goods, to more sophisticated purchases like software etc., are done through the Internet. The Internet is like the new Walmart store, supplying everything from elephant to a pin.

But, there is one aspect of online transactions which most of us don't consider to be of much value, that is the contract that these online retailers ask us to oblige with & when there is any disagreement in the contracts, these retailers invoke the contract, which most of the time favours these retailers and moreover they are not read by the customers. These contracts most of the time limit the liability of these online companies to an extent that they most of the time are not even liable for even serious affairs of business. These contracts are known as standard form of contracts or adhesion contract and under which comes e-contracts which include shrink-wrap, click-wrap & browse-wrap contracts which are formed through online transactions. Although India doesn't have any cases or laws as such to govern the e-contracts & standard form of contracts, but certain guidelines were given by Supreme Court and Law Commission reports which were based on the US courts.

First, we shall discuss about the understanding & legality of the standard form of contracts and their connection with Indian scenario & then we shall analyse the aspects of e-contracts and their validity.

STANDARD FORM OF CONTRACT

The Rise of the Concept

The term, "*Faute de Mieux*" or "Adhesion contract" was coined by famous French civilist, Raymond Saleilles, in his discussion of party autonomy as defined by the recently promulgated German Civil Code. He explained the term as a contract in which offeror's will is predominant & the conditions are dictated to a large number of parties, not to an individual acceptance. Although Unfair Terms Act, 1977 recognises the existence of "written standard form of contract", but there is no statutory provision which defines the

standard form of contract. It's usually taken into consideration that this types of contracts are *take it-or leave-it* contracts where terms & conditions of the contract are predetermined and party has no control either to change or to negotiate it, since these terms & conditions are made on a large scale basis for large number of customers, & not to be changed as per the wish of a single customer, so party has no power except either to accept the terms & use the product or to reject & leave the product. These types of contract gained popularity for certain kind of products in market which have the following features¹:-

- a. Widespread demand for the goods or service rendered.
- b. Monopolistic position or economic power of the offeror.
- c. The continuing & general nature of offer

It's such a contract which is entered between two unequal bargaining powers, like parking lot tickets, airline tickets, and debit cards receipts. In Black's Law Dictionary², it's defined as. "A standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms. Also termed contract of adhesion, adhesory contract; adhesory contract; take it or leave it contract; leonire contract". This form of contract directly contradicts the "will theory" of a contract, which states that the will of both parties shall be taken into consideration while drafting of a contract, but here the will of seller has an upper hand than the buyer.

It was held in the of Schroeder Music Publishing case³, that there are two types of standards form of contract. The first one, which has a very ancient origin, is those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Here the clauses in the contract have been settled over the years through negotiation by representatives of commercial interest and have been widely accepted, as it facilitates trade. Example, police of insurance, contracts of sale in commodities markets. The second one has a more modern origin, where the terms of the contract have not been the subject of negotiation between the parties neither has it been approved by organisation representing interest of weaker parties⁴. Now the question arises whether this form of contract can be considered as a contract in a classical sense? In order to answer this, we have to analyse standard form of contract within the framework of definition of classical contract-

¹ Vera Bolgar, 'The Contract of Adhesion - A Comparison of Theory and Practice' (1972) 20 The American Journal of Comparative Law 53.

² Black's Law Dictionary – 7th Ed., p. 38.

³ Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 1308

⁴ Standard Form of Contract (Law Explorer, 28 November 2015) <https://lawexplores.com/14-standard-form-contracts/> accessed on 3 March 2018.

- a. Freedom of party to enter into contract on whatever terms it may consider advantageous to its interest or choose not to enter into a contract.
- b. Another element is *consensus ad idem*, i.e. meeting of minds.

Now, as we have discussed the elements of standard form of contract that it can't be negotiated by the buyer, as the terms are pre-planned & the pen of the individual signing along the dotted line doesn't represent the will & consensus ad idem of the individual, though it creates the illusion that individual has accepted the terms of the contract. Since, neither of the two qualities is met, so it can be said that standard form of contract is not a contract in the classical sense. Even though, there are drawbacks of standard form of contract, but they are still used in large forms as it reflects today's underlying economic realities and economic necessity.

Indian Scenario

Before discussing the Indian scenario, it should be kept in mind that this type of contract includes wide discretionary clauses favouring to the large enterprises. The clauses are introduced not always with the ideas of imposing harsh terms to the buyers but for the following reasons:

- a. To escape the legal implications arising out of the contracts.
- b. To specify the liquidated damages to be paid as & when arises.
- c. Desire to avoid court proceedings.
- d. As every other enterprise in the markets are using this form of contract.

So when every other organisation are using this form of contract, individuals don't have choice to go elsewhere & he has to accept the terms of the contract, this gives the organisations chances to exploit the helplessness of the individual. Following are some cases which will illustrate on the matter. In the case of *Madhurima Chaudhury*⁵, Calcutta HC has to deal with case of a passenger travelling through Indian Airlines. The plane crashed causing the death of the passenger & his widow sued for damage. The air ticket exempted the carrier from liability on account of negligence of the carrier from liability on account of negligence of the carrier or of the pilot or of other staff. There was evidence that the conditions exempting the carrier were duly brought to the notice of the passenger & that he had every opportunity to know them. It was held by HC that : the Privy Council held that the obligation imposed by law on common carriers in India is not founded upon contract, but on the exercise of public employment for reward, that is by common law of England governing rights & liabilities of such common carriers. It is not affected by the Indian Contract Act, 1872. Therefore, no question of testing the validity of the exemption

⁵ *Indian Airlines Corporation v Sm. Madhuri Chowdhuri and Ors.* AIR 1965 Cal 252

clause with reference to section 23⁶ at all arises. It is a case where the carrier said that he was prepared to take by air provided the passenger exempted him from liability due to negligence. The exemption clause in the contract was good & was a complete bar to the plaintiff's claim. The Indian Carriage by Air Act, 1934, was not made applicable because the requisite notification applying the act had not been issued. Another famous case dealing with this aspect is the case of Lilly White v R. Munuswami⁷. In this case the facts are that on a 13-5-1963, plaintiff gave a new sari (6 yards in length), to the firm for dry cleaning. The firm undertook to dry-clean the article and to deliver on 18-5-1963. Admittedly, the sari was never delivered, and it must be held that the garment has disappeared, though only negligence is alleged against the firm in this respect. The plaintiff, in essence, claimed the market value of the entrusted article. The firm took the defence that on the reverse side of the bill there is a clause that the customer was entitled to claim only 50 per cent of the market price or value of the articles, in case of loss. It was held that condition relating to restriction of the claim to 50 per cent to the market price, "is not enforceable on public grounds. If this condition is enforced, then, any laundry owner will try to misappropriate new clothes". It further held that terms which are opposed to public policy & to the fundamental principles of the law, cannot be enforced by the court merely because it was printed on the reverse side of the bill. Another famous English case on same lines is that the case of Henderson v Stevenson⁸, where the plaintiff brought a streamer ticket. On the back side of the ticket it was written that defendant won't be liable for the loss, injury or delay to the passenger or his luggage. Plaintiff has not seen the back side of the ticket as there was no indication or any sign denoting that something is written on the backside. Plaintiff's luggage was lost & he sought compensation. It was held that plaintiff is bound to recover the loss in spite of the exemption clause as no indication or sign was printed like "for conditions see back" was printed to draw the attention on the exemption clause. From analysing the above cases, it can be said that court form all around the world have started to give guidelines to restrict the arbitrariness of exemption clauses in the standard form of contract. Now exemption clauses will depend upon these 5 grounds⁹-

- a. Reasonable notice
- b. Opposed to public policy
- c. Notice should be contemporaneous to the contract.
- d. Unreasonable terms
- e. Fundamental breach of "core" contract.

⁶ Indian Contract Act 1872, s 26.

⁷ Lilly White v R. Munuswami AIR 1966 Mad 13; (1965) 1 MLJ 7.

⁸ Henderson v. Stevenson L. R. 2 H. L. Sc. 470.

⁹ Avtar Singh, *Contracts & Specific Acts* (10th edn, Eastern Book Company 2008)

The above rules are followed in all types of standard form of contract & E-contracts are also one type of standard form of contracts where no negotiation scope is there & thus are binding the minute the product is used. In E-contracts also, the above restrictions hold good and some of the provisions are governed by it. Following sections shall discuss the concept, types and legality of e-contract in India.

E-CONTRACTS

Nature of E-Contract

E-Contracts are the type of contracts in which contractual obligation arises between the parties through usage of electronic means, rather than using the traditional, means of post. These types of contracts are governed by both Indian Contract Act & Information technology Act (IT Act). It's a contract modelled, executed & enacted by a software system, in the sense that they are not concluded by face to face communication, i.e. buyer & seller don't meet in person to negotiate the terms of the contract, and so these are a type of *standard form of contract*. Computer programs are used to automate business process that governs e-contracts. In these types of contract, the document is signed & drafted in an electronic form. An electronic contract can also be formed by clicking on "I agree" button on the page containing terms & conditions of the license agreements. Since a traditional ink signature isn't possible in electronic contract, people use different ways to indicate their acceptance, like typing the signer's name into the signature area, pasting in a scanned version of the signer's signature or clicking an "I Accept" button. It's must be kept in mind that E-Contract by itself won't be voids because of using the electronic form of communication ion formation of contract. The same has been incorporated in sec 10(a) of IT act¹⁰. Even the SC in the case of Trimex International¹¹ upheld the position that & has said that that the contract between the parties was unconditionally accepted through e-mails and was a valid contract which satisfied the requirements of the Indian Contract Act.

Jurisdiction of Courts in E-Contracts

Jurisdiction of courts in the matter in dispute in contract is dependent on the mode through which contract was executed. There are two modes of communication through contracts are executed-

- a. **Non- Instantaneous Communication:** These include forming of contract through post, fax etc. In this form of communication, the conclusion of contract takes place, where the offeree accepts the proposal given by offeror and the court of that place has the jurisdiction in disputes of contract as per sec 4 of Indian Contract Act. This rule is

¹⁰ Information Technology Act 2000, s 10(a).

¹¹ Trimex International FZE Limited, Dubai v. Vendata Aluminium Ltd. (2010) 3 SCC 1.

- called postal rule & was developed from the English case of Adam v Lindsell¹² where it was held that conclusion of contract takes place where acceptance of the offer is done by offeree, as at that place consensus ad idem is there between both the parties.
- b. **Instantaneous Communication**- These include communication through telephone, where there is no third party between offeror & offeree as against the case of non-instantaneous one, where postal service act as the third party between the offeror & offeree. There is as such no provision in Indian Contract Act, regarding this type of communication, but in the case of Bhagwandas Govardhandas¹³ where through majority it was decided that in instantaneous case, since there is no third party between offeror & offeree, the conclusion of contract will take place when the acceptance by the offeree shall be communicated to the offeror & thus at that place conclusion of contract would take place & there court will have jurisdiction.

However, since e-contracts are not physically signed/executed, and are concluded in a virtual space, simply imposing the traditional principles of jurisdiction, applicable to physical contracts, to such transactions can prove to be challenging. So to overcome the problem, jurisdiction section was included in IT act. As per the section 13 of IT Act, it provides provision relating to time and place of dispatch and receipt of an electronic record, and addresses the issue of deemed jurisdiction in electronic contracts. Sec 13 says,

“(1) Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:-

- a) *if the addressee has designated a computer resource for the purpose of receiving electronic records,-*
 - i. *receipt occurs at the time when the electronic record enters the designated computer resource; or*
 - ii. *if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;*

¹² Adam v Lindsell (1818) 1 B & Ald 681

¹³ Bhagwandas Govardhandas Kedia v. M/S. Girdharilal Parshottamdas 1966 AIR 543; 1966 SCR (1) 656

b) *If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.*

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be despatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.”

So in essence it lays down four rules for deciding the time & place of dispatch & receipt of electronic record¹⁴:-

- a. The dispatch of electronic record occurs when it enters a computer resource outside the control of the originator.
- b. The time of receipt of electronic record occurs at the time when the electronic record enters the designated computer resource of the addressee.
- c. If the electronic record is sent to computer resource of the addressee that is not designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee.
- d. If the addressee has not designated computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

Development

With the advent of internet, different companies have started to sell their software online which not only enhanced the productivity but was also time saver for buyers as well. But with increase in online selling of software, the problem of pirating & illegal copyright also increased, it's because as per copyright law, the Doctrine of First Sale¹⁵ states that once the copy of the work is sold, the new owner can do with it as they please, including copying for private use. Therefore, a software producer could conceivably sell only a few copies of his or her work before free copies are available through alternative sources. So to reduce the problem of pirating software providers began to include terms & conditions in their packaging & thus classifying the transaction as “License” rather than use, so that not only overall ownership of the software still remains with the software providers but also restricting on how software can be used. These gave rise to different types of agreements, which can be broadly classified under 3 main agreements

¹⁴ Suman Lata Chaudhary, “Concept and Provision” (2013) PL November 70.

¹⁵ Jennifer Femminella, ‘Online Terms and Conditions Agreements: Bound by the Web’ (2003) 17 St. John's J. Legal Comment 87.

- a. Shrink-wrap agreement
- b. Click-wrap agreement
- c. Browse-wrap or web-wrap agreement

Shrink-Wrap Agreement

Shrink-Wrap Agreement got their name from the usual cellophane wrap that is used in packaging retail software. So by putting notice of license agreement outside of the package, the vendor can make buyer bind to the terms of the agreement once the purchaser simply open the box. So in these types of license agreements, T&C can only be read after opening of the product, but before tearing, a notice is given outside the cover, making buyer aware that by breaking the product they will be bound by the contract. & once the product is opened it's deemed that buyer has agreed with the terms & conditions & thus contract is taken to be binding. This is done to protect the manufacturers, where the consumer cannot reproduce, copy or sell the product. Legal status regarding shrink-wrap agreement is not clear, since no particular law or cases is there to regulate it. But, it was not until the famous US case of **ProCD**¹⁶, which served as certain guidance in regulating this type of contract. In the case, ProCD involved a compilation of telephone directories offered on a computer database. For nonretail buyers, ProCD offered this information as a way to avoid calling long-distance information. The general public could get this information at a low price, while retailers, manufacturers and others using the information for business uses had to pay a higher price. To assure that this price discrimination practice was enforced, ProCD used a shrink-wrap license. The defendant, Matthew Zeidenberg, purchased the product and then made the information available over the Internet for a price cheaper than ProCD was charging in direct violation of the terms of the shrink-wrap¹⁷. The court found that "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. Consistent with contract law, Zeidenberg had the ability to reject the contract by sending back the product after having read the terms. Zeidenberg's failure to send the product back after reading the terms indicated his acceptance to the court and bound him to the terms of the agreement. This case also discussed that terms & condition offered by contract reflect private ordering & a decision on behalf of consumer & seller as to what are the most important & essential terms.

In another case of US case of **Vault Corporation**¹⁸ case, the district court said that shrink-wrap license at issue was a contract of adhesion which could only be enforceable only if the provision in Louisiana statute made it enforceable.

¹⁶ ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)

¹⁷ Femminella (n 15).

¹⁸ Vault Corporation v Quaid Software Ltd. 847 F.2d 255 (5th Cir. 1988).

Click-Wrap Contract

Click-wrap contracts are the contracts, which are mostly found as a part of installation process of software packages. These contracts come to the effect when the buyer presses the button “**I Agree**” button on the software agreement, which clearly shows that there was meeting of minds between both the buyer & seller. Till the time buyer doesn't press the “**I Agree**” button, till that time he won't be able to use the product the product. It's only after clicking that buyer will be able to run the software or be able to download the software. Click-wrap agreements can of two types¹⁹-

- a. **Type & Click-** the buyer must type the consenting words like “I Agree” or “I Accept” and thereby submit, by clicking the button “Submit”.
- b. **Icon Clicking-** in here, the buyer has to only click on the “I Agree” button and the installation or downloading of the software would start on its own.

These are also the examples of standard form of contract, where the terms & conditions offered on the webpage are not for negotiation & buyer has either to buy it or to refuse it. There is no ground for negotiation for individual. Again in the very famous US case of **Hotmail Corporation**²⁰, here the defendant after accepting the terms and conditions of the Hotmail e-mail service, started to use the service to send spam which advertised pornographic material. Defendants altered the return addresses of this e-mail to falsely indicate that it was sent from a Hotmail account. This was accomplished by using plaintiff's mark in the e-mail's reply address. Numerous recipients of defendants' spam responded with complaints, which were sent to accounts defendants had set up at Hotmail for the receipt of e-mail. This utilized much of the finite capacity of plaintiff's computer network. The court held that the court the defendants were bound to the Terms of Service posted on the website when they clicked "I accept". In another case of **Caspi v Microsoft case**²¹, which upheld the enforceability of an online subscriber agreement requiring members to expressly assent to its terms and conditions by clicking "I agree" or "I don't agree". It's not important nor taken into consideration that buyer had actually read the terms & condition of the document, mere clicking on the “I Agree” button would indicate the consensus ad idem.

Browse-Wrap/Web-Wrap Agreement

¹⁹Shodhganga. 'E-Contract-An Overview'

http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/9/09_chapter%202.pdf accessed on 5 March 2018.

²⁰ Hotmail Corp. v. Van Money Pie, Inc. 1998 WL 388389, 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998)

²¹ Caspi v. Microsoft Network, LLC, 732 A.2d 528 (N.J. App.Div. 1999).

In browse-wrap agreement, the T&C of the contract are posted either in the homepage or at the end of the page in a hyperlink. Unlike click-wrap, where buyer has to click on the “I Agree” button, here buyer doesn’t have to give any manifestation of sort like this. Here buyer can just download the product or install the software from the website without even viewing the terms & condition of the product & providers can invoke the contract, even if the buyer hasn’t read the contract. The argument given by seller is that by visiting the website he/she gives his assent to the T&C, doesn’t matter if he has read the terms or not.

Web-wrap agreements are of two types-

- a. **Web link**: - where there is hyperlink in the website, where by clicking on it, it will lead to a new website containing T&C.
- b. **Browse-wrap Agreement**: - in this type, the T&C are there in the end of the web-page and the customer has to scroll down to read those terms.

Here the main contention comes whether the reasonable notice of the T&C where given to the buyer or not. In both the cases, the contract shall not be binding on the customer as in the first case, if the buyer can download the software without clicking on the hyperlink, then it shall be considered that meeting of minds where not there & thus contract will be void. Again, if buyer has to scroll down, then reasonable notice of the T&C was not given & the agreement will be void. Or if the situation arises that by clicking on the hyperlink the downloading of the software starts, then also in that case, the contract will be taken as a void one. To make the web-wrap agreement valid, the underlying conditions is whether the reasonable notice to the license agreement is brought to the user or not. Following cases shall describe the matter in detail.

In the case of *Pollstar*²², the plaintiff provided current concert information on its website pursuant to the conditions of a license agreement. The license agreement was characterized as a web-wrap agreement because the terms were only viewable by clicking on a link from the homepage. However, beyond making this distinction and labelling the license, the court refrained from determining the enforceability of web-wrap agreements.

Further in the case of *Ticketmaster Corp. v. Tickets.com, Inc.*²³. The defendant in this case, Tickets.com, operated a website which sold tickets to certain events. However, for events that Tickets.com did not sell tickets, it provided direct links to Ticketmaster.com so users could purchase the tickets through the alternative website Ticketmaster.com's website, however, subjected its users to a web-wrap agreement that was only viewable by scrolling down to the bottom of the homepage. Ticketmaster claimed that by using the information provided for commercial uses, Tickets.com violated the agreement. Without

²² *Polistar v. Gigmania* 170 F.Supp.2d 974 (E.D. Cal. 2000).

²³ *Ticketmaster Corp. v. Tickets.com, Inc.* 2000 U.S. Dist. LEXIS 4553,

clarifying or labelling the agreement at issue, the court held that this was not a typical shrink-wrap. The court stated that shrink-wrap agreements are usually "open and obvious" and hard to miss, which not the case here because the home page could be, and was, bypassed by Tickets.com users and was not immediately apparent to a user upon entering the website. Additionally, the court discussed the absence of an "accept" button as additional evidence that this was not an enforceable contract, stating that "it cannot be said that merely putting terms and conditions in this fashion creates a contract with anyone using the website. The most recent case to explore the enforceability of the web-wrap agreement is the *Specht v Netscape Communications*²⁴. This case involved Netscape's Smart Download and the proper forum for disputes concerning the software. Pursuant to the terms of a web-wrap agreement on its homepage, the defendant, Netscape Communications, moved to compel arbitration in its disputes concerning Smart Download. After evaluating the various types of licensing agreements, the court held that the agreement at issue was a web-wrap agreement because it could only be viewed by scrolling down the homepage of the website and there was no affirmative consent necessary to download the product.

CONCLUSION

After analysing all the aspects of standard form of contract & e-contracts and its various types, it can be said that these contracts are formed so that seller have upper hand in case any dispute arises. These contracts are made without any negotiation with the buyer & buyer doesn't have any remedy when any wrong has been done to him. Indian contract act doesn't provide any provision as such to regulate such type of contract, so in 103rd Law Commission report, it was recommended creation of a separate chapter-IVA and inserting section 67A, where the court shall have the power to refuse the enforcement of the contract or any part of it that holds to unconscionable. Now it has over 30 years since the recommendation have been placed before the government, still no action has been taken. Now with increasing use of the internet, there has been increasing use of online transaction *& thereby it's now more important than ever that the interest of the buyer in this regard be safeguarded or else theses big companies will continue to harass the customers on the terms & conditions for which they never signed up for in the first place.

²⁴ *Specht v Netscape Communications*, 150 F.Supp.2d 585, 587 (S.D.N.Y. 2001)