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Types of E-Contracts and their Legal Compliance: Guiding Netizens towards Fair and Transparent Internet Usage

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ABSTRACT

In the digital era when everything is made available to us at the click of a button, we unknowingly enter into an invisible contract with every such click. Although there are legislations in place to protect the consumer from any loss that may arise from one such contract, they are largely insufficient as usually, the principle of standard contracts are followed. This article discusses the legal provisions in place with respect to electronic contracts and their enforceability. The two major types of electronic contracts entered into by users or customers in the digital medium are discussed. The article goes on to point out the challenges that come from these one-sided contracts drafted by a party in a position of superior bargaining power. It is aimed at educating netizens on the reality of the agreements and encourages them to have thorough knowledge of the terms and conditions they give their assent to.

Keywords: E-Contracts, Clickwrap, Browsewrap.

I. INTRODUCTION

With the advent of internet, there has been a massive change in our understanding of what constitutes a contract. A contract is no longer limited to a formal, documented sheet signed by both parties in a contract. Now, the ambit of a contract has widened to include communication over electronic means. This may include an e-mail, a message sent through social media or agreeing to allow cookies on a website. The Information Technology Act (2000) gives legal recognition to contracts made on electronic medium. Section 10A of the Act, affirms the validity of a contract in which the communication, acceptance and revocation of proposal is made through electronic means, provided it complies with the essentials of a contract as stated under Section 10 of the Indian Contract Act. In addition, the Indian Evidence Act, 1872 has been appropriately amended to include e-contracts.

While much has been said about e-contracts made between two commercial parties or private

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individuals, the types of contracts entered into by a common Internet user and services he avails has not received enough attention. In our daily activities, we may intentionally or unintentionally give our assent to numerous agreements. This may occur while visiting a website, signing into a new device with our account or even when we install an app or software. Mass e-contracts can be interpreted as forms of standards contracts as the terms of the contracts are not negotiated and sometimes not even read or known about[2]. Ignorant users are likely to fall into the web of e-agreements entered into in the cyberspace.

II. TYPES OF E-CONTRACTS

In this context, it is important to understand the types of E-contracts and how they are different from each other. An E-contract is a contract entered between two parties through the electronic medium. It is modeled, specified, executed and deployed by a software system. It is similar to a paper based commercial contract.

Browse-wrap contracts and Click-wrap contracts are the two major types of E-contracts that exist purely in the digital space. The main point of distinction between the two lies in whether they require explicit assent and affirmative action to the terms and conditions by the user or not.[3]

(A) Browse-wrap contract

A browse-wrap contract is a small hyperlink at the end of the page that redirects the user to a legal page-Privacy Policy or Terms and Conditions. Hence, it is only a link to the legal agreement and does not draw the user's attention to the actual agreement. A browse-wrap contract may also be presented in a manner that may indeed encourage the user to go through the legal terms and conditions. Some websites tell the users that they should go through the terms and conditions before proceeding to be bound by a contract with the company. Other websites may explicitly state that by using their services, an user is by default bound by the terms of the legal agreement. When an app is installed, a browse-wrap contract is given under the 'Settings' or 'Help' options.

In all these cases however, there is no explicit assent obtained by the user when he is browsing through a website, using their services or downloading a software.

In *Specht v. Netscape*[4] the plaintiffs installed the Smart Download plugin from Netscape's website. They later brought a suit against the defendant saying that it violated their privacy.

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[2] Ruth Orpwood, *Electronic Contracts: Where We've Come From, Where We Are, and Where We Should Be Going,* IICJ Vol. 1, No. 3, 455-466 (2008)
[3] Deborah Davis Boykin, *Survey of E-Contracting Cases: Browsewrap, Clickwrap, and Modified Clickwrap Agreements*, TBL, Vol. 68, No. 1*,* 257-262 (2012)
[4] F.3d 17 (2d Cir. 2002).

The court reviewed and found that while using Netscape, if the user scrolled down the page in the next screen, he would be able to see an invite to the Terms and Conditions in the form of a hyperlink. It was held by the Second Circuit Court of Appeals that the simple act of downloading the plugin would not bind the user in any contractual obligation as consent was not explicitly obtained.

In another case of *Hubbert v. Dell Corp*[5] the court held that since the users of Dell products were repeatedly showed over a series of pages that the sale was subject to the Terms and Conditions of Dell and also presented a hyperlink to the same, the repeated visual exposure is deemed to put a reasonable person on notice of the Terms and Conditions.

(B) Click-wrap contract

A Click-wrap agreement is an explicit presentation of the Terms and Conditions, Privacy Policy, Copyright policies that require the user's assent in order to avail the services of the website or app. It is famously presented through the 'I Agree' checkbox.

While installing an app or software, the checkbox with the detailed legal provisions are given before the installation process takes place. In case of websites, they are also shown through pop-ups. The user has to accept them in order to move on to the subsequent steps.

In *Feldman v. Google*[6] the plaintiff claimed that he was a victim of click fraud in his contract with Google's AdWords. He alleged that he never saw, signed or negotiated the terms of the agreement. In reviewing the facts of the case, the court saw that in the contract with AdWord, it was displayed in bold at the top of the page that users should carefully read the terms and indicate their assent. Then the terms were displayed in a box. Without having to scroll down, the user was required to check the checkbox at the bottom of the page and then proceed to the next steps. The court concluded that Feldman had reasonable notice of the Terms and Conditions of the agreement because he had taken an affirmative action in agreeing to the terms.

In general, the courts of USA and Canada upheld the validity of the latter kind of agreements over the former. In *Kanitz v. Rogers Cable Inc*[7]. the users of Rogers telecommunication company had to agree to a click wrap agreement where one of the clauses stated that the company could unilaterally change or amend the agreement, provided that it was posted on Rogers' official website. Subsequently, a change was made in the agreement, whereby it was notified that any dispute would be settled through arbitration. The plea of Kanitz was dismissed as it was held that the change was made in accordance with the terms of the agreement.

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[5] *359 Ill. App. 3d 976*
[6] *513 F. Supp. 2d 229*
[7] [2002] O.J. No. 655

According to the court, the subscriber's continued use of the services after posting about the amendment implied an implicit consent of the users.

Subsequently in 2005, a similar case, but involving browse wrap contract was given a dissenting judgement. The homepage of Paysystems Corporation in Aspencer1.com Inc. v. Paysystems Corporation had a statement that read, *"Your continued use of MyPaysystems Services is subject to the current version of the MyPaysystems Agreement. This Agreement was last updated December 18 2003. Please click here to review".* According to the court, the plaintiffs continued use of the services could not be interpreted as consenting to the Terms and Conditions.

A comparative analysis of contemporary cases in different jurisdictions shows that Click-wrap contracts have better compliance with legal requirements.

a) In click-wrap contract, the user is provided notice. He is clearly told that only by accepting the terms and conditions, he can avail the services of the website, app or software.

b) In click-wrap contracts, the user gives consent. Only if he agrees to the terms, he is allowed to use the electronic medium. Unlike this, in browse-wrap agreements, it is implied that by using the digital platform, the user's has consented to the terms. Consent, which is one of the essentials of a valid contract is expressly provided in a click-wrap contract.

c) A click-wrap contract has fair enforcement. If an user feels that the terms may be detrimental to his interest, he may refuse to accept the conditions and therefore withdraw himself from moving on to the further steps of using the platform. However, in a browse-wrap contract, the terms may contain such clauses or provisions which can put an innocent third party at a vulnerable position. His rights may be violated just because he failed to read through complex documents. Hence, it is an unjust way of enforcing a contract.

III. LEGAL ENFORCEABILITY AND CHALLENGES

As discussed earlier, e-contracts can also be considered standard contracts of adhesion. These contracts are generally of a 'take it or leave it' nature, imposed by a superior bargaining party[8]. These one sided contracts pose the risk of fairness of contract as the weaker party can be taken advantage of by the obscure, unequivocal and long terms. In fact, even though it is believed

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[8] Batya Goodman, *Note, Honey, IShrink-Wrappedthe Consumer: TheShrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 at 324 (199)

among experts that click-wrap contracts have a fairer compliance, browse-wrap contracts are often favoured by customers because they are user friendly and provide ease of access without bombarding the user with legal data. However, the concern remains in the fact that the terms and conditions go unread in this kind of a contract even if they are made visible[9]. Even in cases of clickwrap contracts, users hardly care to go through the notice before clicking 'I Agree'. The leading international statute governing e-contracts is the UN Convention on the Use of Electronic Communications in International Contracts and UNCITRAL Model Law on Electronic Commerce. None of them deny the validity of e-contracts simply because of the novel mode of formation. While in an ideal world the standard contracts would be beneficial to both parties, it is not quite the case today[10]. Consumers look forward to speed, time and efficiency and reading through long paragraphs of legal terms is definitely an impediment.

The most widespread problem with e-contracts lies in the fact that consumers are often not aware that they have entered into a contract in the first place. Even in places where explicit consent is needed, the consent is simply given through a click of a button without any knowledge of what consent is required. Clear language and unequivocal notice via dropboxes or hyperlinks are construed as viable agreements, more so when the website states that they will strictly follow their policies in matters of dispute. Therefore, tangible consent is not mandated but presumed by both, the courts and the parties[11].

E-contracts are almost never built on the principles of fairness and equity. They are always made in the interests of the dominating party and can cause serious financial losses to the unexpecting consumer. Although courts of justice have in certain cases upheld the practical and logical interpretation of the purpose of contracts, companies continue to draft terms that are highly inconvenient for common users and can be unilaterally modified.

IV. CONCLUSION

Although there exists potential checks and balances in the Indian Contract Act, 1872 against unfair standard contract terms, the truth still remains that the legislation acts as a limited solution to real assent when it comes to e-contracts. Apart from the consumer's assent before availing the services from an e-commerce website, installing softwares of accepting cookies, there lies a huge responsibility on the part of the dominant party as well to draft reasomable

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[9] Srishti Aishwarya Shrivastava, *The Enforceability of Electronic Click Wrap and Browse Wrap Agreements*, 77 NLIU LR (2017)

[10] Bhanu Srivastava, Balendu Bhushan, *Legal Issues Involved in E-Contracts*, ACADEMIKE (Jan 30, 2015), http://www.lawctopus.com/academike/legal-issues-involved-e-contracts/.

[11] Nancy Kim, *Clicking and Cringing: Making Sense of Clickwrap, Browsewrap and Shrinkwrap Licenses*, online http://law.stanford.edu/wpcontent/uploads/sites/default/files/event/266730/media/slspublic/Kim_clicking_and_cringing.pdf

terms that would favour non-reading consumers as well. This is more important in India, where presently justice is delayed and long litigations lead to lost time and huge costs.

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