Web Contracting And Standardization Of Standard Form Contracts In The Electronic Age

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Abstract: Advancements in technology has led to rapid changes in the quality of life among people. Internet medium has paved way to make web contracting and it always assume that there exists assent to contractual terms on the part of the other contracting party in the online environment with business/service provider. Web contracting in the digital age purely uses standard forms and in majority situations consumers do not have any idea as to what terms and conditions which may bind them and the legal consequences arising there to. Service providers providing mass market licences do not disclose the full list of terms at the time of contracting. This leads to high level of exploitation and some of the common clauses in the standard form contract like dispute resolution clauses which are unfair leads to consumers susceptible. This article looks into the challenges faced by consumers due to web contracting and DRCs and the recent developments in India on consumer protection which has brought ecommerce platforms and online businesses into the purview of the law.

Keywords: web contracting, dispute resolution, consumer protection, standard form contracting

1 INTRODUCTION
Web contracts are highly beneficial to businesses and consumers. Electronic commerce sector has made consumers susceptible to SFCs and the online consumers are left at stake due to contractual terms designed by businesses to safeguard their own interests since majority fail to read the terms before the completion of the contract which affects consumer interests (Robert A. Hillman, 2017). Technology have paved way for expanding online businesses rapidly where consumers in no time can buy products online by comparing prices and product specifications. The research article focusses on the issues surrounding standardization of standard form contracts and consumer protection. Section 2 looks into the concept of web contracting and the effects of clauses in the SFCs, Section 3 describes the legislative approaches in India and the United States in dealing with SFCs. Section 4 describes problems and challenges on the dispute resolution clauses, Section 5 highlights the consumer protection afforded by Indian laws to protect online consumers and Section 6 concludes the article.

2 STANDARD FORM CONTRACTING IN THE DIGITAL ENVIRONMENT AND ITS EFFECTS
Standard form contracts in the cyber environment has lots of concerns on the part of consumers in the business to consumer transactions. Some of them are reduced choice and non-disclosure of complete terms. To be specific, online business/service providers offer really very minimum legally enforceable rights relating to products defects/deficiencies in services.

Now-a-days majority of e-commerce agreements are designed to make-it or leave-it or take-it standard form contracts and the use of browse wrap agreements especially in the software products (licensing of software) as Terms of use agreements or End user licence agreements. In the case of mass market licences, companies offering services do not disclose the terms either at the time of contracting or before contracting but after the contract is concluded. In other words, commentators and consumer advocates expressed their concerns that browse wrap agreements lacks direct notice of the terms and browse wraps differ from the usual type of click wrap that it will be in the form of hyperlinks to various web pages and has less or little notice on the part of consumers, whereas other mode of contract formation is Pay now Terms Later (PNTL) contracts. In the case of browse wrap transactions, consumer will have access to a set of terms upon searching for the hyperlink and clicking on it to know the terms. In a majority of situations, consumers without taking initiatives to know what the terms and conditions are will simply complete the contracts without knowing the legal consequences. Web business/service providers argue that the customer has given assent to the terms displayed, irrespective of whether they have read or not. When it comes to enforceability of electronic contracts, courts insist on actual or constructive notice of the terms and that protects sellers/website owners. In a decided case in United States, Berkson v Gogo LLC (2015), the court looked at three general principles to determine the standard of terms whether it was reasonably communicated to the online user and whether an ordinary, reasonable and prudent user has a notice of the term. The three general principles are: “First, the website must be designed such that a “reasonably prudent user” will be placed on “inquiry notice” of the terms of using the website. Second, the design and content of the website must encourage the user to examine the terms “clearly available through hyperlinkage. Third, agreements will not be enforced where the link to the agreement is “buried at the bottom of a webpage or tucked away in obscure corners of the website.” The court concluded that the defendants’ presentation of the arbitration clause did not adhere to these requirements.
3 LEGISLATIVE PROVISIONS IN INDIA AND IN UNITED STATES DEALING WITH STANDARISED CONTRACTUAL TERMS

3.1 Position in India
The electronic commerce market in India has grown dramatically and the country doesn’t have comprehensive set of rules or exclusive legislative enactment dealing with consumer issues in terms of acceptance of the electronic standardized/regulated terms. Indian Contract Act, 1872 is still relied upon for the formation of a contract which includes acceptance of terms etc. The practice and application of this law in the modern digital environment has not been satisfactory as this can be applicable to certain cases provided the affected contracting party proves that there was fraud, or unlawful conduct on the part of the other contracting party which is highly difficult in web/online contracting. Though the contract law has provisions dealing with unfair contractual terms or unconscionable conduct on the part of contracting party, applying the same to ecommerce environment is difficult. The issue of web consumers failing to read and understand the electronic standard terms and less opportunity provided to know the terms which may bind them is still prevalent.

3.2 Position in U.S.
In the United States, for a longer period of time, there were various legislative enactments dealing with Standard form contracts rectifying the gaps and defects.
- Restatement (Second) of Contracts
- Uniform Commercial Code (UCC)

These legislative enactments provide substantive information with respect to basic principles of formation of contracts and sales contracts. Apart from these, principles of unconscionability is looked into and applied in the contractual cases brought for enforcement. The determination of unconscionability is based on the material contents of the contractual document, ie clauses/terms and the way how these are incorporated into the contract. The approach in the United States regarding the electronic standard terms in the online platforms for software contracts provided by ALI (American Law Institute) principles attempts to cure the defects in the process of obtaining the assent from contracting parties. The objective of the ALI principles is that it provides early disclosure of standardized terms as a best practice, where vendors/sellers should disclose their terms of contract well in advance in their website which will provide an opportunity for online users to familiarize themselves with the terms and this would like to effective enforcement on the part of vendors.

The disclosure of terms strategy as implemented by ALI principles are as follows:
Source

### Fig 1: ALI Principles: Sections 2.02(b) & (c) standard-Form transfers of Generally Available software

4 ANALYSIS OF THE DISPUTE RESOLUTION CLAUSES IN SFC’s AND ITS CHALLENGES
Even though there are a list of clauses/terms in the ecommerce agreements in the form of SFC, some of the common clauses really affect the consumers interest and rights absolutely. They are:
- Warranties
- Limitation of liability clauses
- Merger
- Indemnity
- Dispute resolution clauses

The issues and problems which may originate on the part of consumers against online sellers can be addressed for appropriate redressal through dispute resolution clause in the contractual document. If the dispute resolution clause is unfair in the standard form prescribed by the online business/service provider, the consumers are left at stake and they have to approach the court challenging the validity of the clause. The objective and the purpose of DRC (Dispute Resolution Clauses) is to have clear information as to how contractual disputes can be resolved without having any issues with respect to jurisdiction in the case of cross border transactions, etc. The clauses may have forum selection or venue, choice of law so as to determine which court has the jurisdiction to deal with the case and the law to be used while dealing with the case. I have gone through a good number of terms of use agreements, end user licence agreements and ecommerce agreements and noted that majority of the online businesses have included DRCs and majority sellers in the online transactional documents has forum selection/arbitration clause, choice of law. It gives clear information now a days how a dispute may have to be resolved and it can even include ADR mechanism to get the matter resolved. The use of ADR will help to resolve the dispute which may arise between the parties in a speedier way rather using the court system which is
complicated, expensive and time consuming and ADR has various other advantages as well. Some examples of DRCs in some of the well-known online businesses are given below:

![Sample Dispute Resolution Clauses](image)

5 **PROTECTION FOR ONLINE CONSUMERS UNDER THE NEW LAW IN INDIA**

Consumer law in India has undergone a rapid change in the digital era and also included protection provisions satisfying long awaited consumer expectations. The new law which came into force very recently after obtaining Presidential assent in the Indian Parliament in August 2019 has a lot of key changes brought to the older law which was in place since 1984. Some of the key highlights of the new law are as follows:

- Coverage of E-commerce transactions
- Revised Pecuniary jurisdictions
- Electronic filing of Complaints
- Product related defects and Penal liability
- Unfair trade practices
- Misleading advertisements and its penalties
- Provision for ADR mechanisms to resolve consumer disputes

### E-Commerce Transactions:

- New law has provided a wider definition of ‘consumer’.
- Includes any person who buys any goods, whether through offline or online transactions, electronic means, teleshopping, direct selling or multi-level marketing.
- No specific mention of e-commerce transactions in the previous law.

### Electronic filing of complaints:

- The new law allows flexibility on the part of affected consumer to file complaints with the consumer forum located at the place of residence or work of the consumer.
- The new law has ruled out the current practice of filing it at the place of purchase or where the seller has its registered office address.
- It contains enabling provisions for consumers to file complaints electronically and for hearing and/or examining parties through video-conferencing.
- The purpose and objective were to benefit the affected consumer with less procedure for initiating the claim.

### Liability for Product defects:

- New law has introduced the concept of product liability
- Includes the product manufacturer, product service provider and product seller, with regard to any claim for compensation.
- E-commerce platform is well brought under the term ‘product seller’ defined to include - person who is involved in placing the product for a commercial purpose.
- No defense that e-commerce platforms can escape from liability claiming they act as platforms.

### ADR Mechanism for dispute resolution:

- New law provides for mediation as an Alternate Dispute Resolution mechanism, where the process is much quiker and simple.
- The objective is to reduce cases brought to consumer courts for adjudication.

### 6 CONCLUSION

The growth of electronic commerce due to technological advancements and the internet medium in the last few decades has been amazing, and this will grow at the rapid rate in the forth-coming years. Cyber environment has led...
to development of new ways of creating contracts. The concept of SFC is an older phenomenon but it is in absolute practice in the electronic age where technology has enabled people to execute transactions across great distances. It is evident that standard forms used creating commercial relationship has no specific regulations except self-regulation. SFCs in United States are enforceable as a rule but in India there is no specific legislation which governs SFCs which leads to challenges on the part of online consumers as the existing contract law is not adequate to protect them absolutely. The recent enactment consumer protection law tried to fill gaps in the previous law widening the scope of protection including the online market environment but there may be shortcomings which may be noticeable upon administering the law.

REFERENCES