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CLICK WRAP AGREEMENT – A ROAD TOWARDS DEVELOPMENT OR A ROAD TOWARDS PROBLEMS

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Abstract

In the present day world there has been a fast paced development in the field of technology and this development has spread its wings in every corner of the globe. With this development there has also been a development in the field of software and internet technology. Software companies and companies which are using internet as place of business have gone global and are now serving millions of users at a same time. Examples can be taken of Microsoft, Google, Facebook etc. Companies or organizations like them are now having millions of people as their users or customers and these organizations do not have enough time to negotiate their terms of contract with each of their customers specifically, so in order to resolve this problem these software companies use a form of standard contract called Click Wrap Agreement. In this form of contract the user or customer has to either agree with the contract in order to use the software of the said company or has to simply decline the contract and thus not being able to use or install the software. Click wrap agreements have become very common method used by the companies to deal with their customers and it can be commonly seen when any app is installed on our smartphones. However there are thousands of users who are suffering from problems such as losing private or confidential data and not getting any relief for their loss in the form of damages as they already accepted the terms and conditions of the contract. Thus there has been a need for a specific legislation to be made for Click Wrap Agreements and other type of contracts like it so that the users have some legal remedies.

Keywords – Click Wrap Agreement, Contract, Technology, Company, Public Policy

Introduction

With the fast pace changes constantly occurring in the field of software and internet technology the numbers of users also increased as software and internet become within reach of more and more people and thereby making it difficult for companies to negotiate with each of their users personally. Therefore these software and Internet companies opted for using such form of contract in which they already fixed their terms and conditions and left the only option for the user of their software or their services to either accept the agreement or to deny it and not being able to use the said software or services. Example can be taken of

the 'Terms & Conditions' which a person is required to accept when he/she creates a Gmail Account or Facebook Account etc. This has made work of these Companies quite easy as now they are not required to cater to the specific needs of their customers because now users will either simply accept or deny their terms & conditions as all the users or customers do not have enough time to go through all the clauses of the agreement. Also this has put these Companies in a dominating position since there are millions of users and not all of them will go through the entire agreement thus Companies use this to put themselves at advantage and leaving a very narrow scope of

any remedy for the user. The aim of this article is to explain meaning of Click wrap agreements, standard form of contracts and what laws would be applicable on Click Wrap Agreements in India, how Click Wrap Agreements have been dealt by the Supreme Court Of India and other courts internationally.

Meaning of Standard Form of Contract, E-Contracts and Click Wrap Agreements

Standard Form of Contract

Standard Form of contract is a contract in which the party to which it is presented have no space or chance for negotiating the terms of the contract. The party to which it is presented is bound to either accept it or leave it. The terms of the contract are same for every person or party to whom this contract is presented. However this type of contract is not having any specific definition under Indian Contract Act 1872 but still it has been recognised as a valid contract until and unless the terms and conditions of such contract is in violation of public policy. Also this contract is quite common in businesses which generally have large number of transactions.

E-Contracts

E-Contracts are just like any ordinary contract involving offer, acceptance, consideration and a lawful objective. But the difference between an E-Contract and an ordinary contract is that E-Contracts are made electronically and are also communicated between the parties electronically through the use of internet. This contract mainly involves a check box by clicking which the other party shows its acceptance of the contract. In various cases parties also use their Electronic signature for giving their acceptance in such contracts. It is recognised as a valid contract under the Indian Contract Act, 1872. One of the benefits of this form of contract is that it has helped the domestic businesses to enter into a contract with businesses from other countries without involving much cost as it removes the requirement of travelling to the other country or

any other place for signing of the contract and it can also be delivered to other party in an instant through the use of internet. Hence, making contracting much easier than before.

Click Wrap Agreement

Click Wrap Agreements can be easily understood as a combination of Standard Form of Contract and E-Contracts. This is because Click Wrap Agreements are already drafted and thus they contain no room for any form of customization by the other parties and they usually appear in a form of Pop Up window which generally comes up in cases when installing any app or software or filling up any registration form on any website or signing up for any social media account. Now they provide the users with two options which are generally mentioned as follows "I agree" or "I disagree" except these two there is a link for getting access to the full agreement. Till now Click Wrap Agreement have been recognised as a valid form of contract under the Indian Contract Act, 1872. Since it is also an E-Contract it might become void if the terms of a Click Wrap Agreement are unconscionable or violates any public policy.

Laws applicable in India in case of Click Wrap Agreement

Indian Contract Act, 1872

Although every such provision which are applicable to any ordinary contract under Indian Contract Act will be applicable to Click Wrap Agreements since it is a form of E-Contract which is like any ordinary contract in electronic form. Here are some of the important sections which will be applicable upon Click Wrap Agreements :-

²⁴**Section 10** – According to this section all those agreements are valid which made with the free consent of the parties who are competent to contract and for a lawful consideration along with a lawful objective. If anyone of these things is not present within a contract or agreement

²⁴ Indian Contract Act, 1872, § 10

then such contract or agreement will be declared as void.

²⁵Section 23 – According to this section any agreement or contract will become invalid or void if the consideration or object of such an agreement or contract is regarded by the court of law as immoral or against any public policy, if such agreement is forbidden or prohibited by any law, if such agreement will violate the provisions of any law if it is permitted, if the object or consideration of an agreement causes injury to person or property of another.

Indian Evidence Act, 1872

Recently Indian Evidence Act have been amended and through this amendment it has made to include any electronic record to be used or to be admissible as an evidence.

²⁶Section 65B(1) – This section states that any electronic record containing any information which was printed on paper, stored, recorded, or produced on any magnetic or an optical media produced by a computer will be taken as an original document and will be admissible as an evidence in the court of law.

Information Technology Act, 2000

Information Technology Act, 2000 was amended and section 10A was inserted for deciding and maintaining the validity of the contracts formed through electronic means.

²⁷Section 10A – It is stated under this section that if there is a communication of proposal or acceptance in electronic format for the purpose of contract formation or if there is any communication of revocation of such proposal or acceptance in an electronic form or through any electronic means than such form of communication in case of a contract is valid and the contract made through such electronic form or electronic means is enforceable in the eyes of law and will not be considered as

unenforceable only because electronic means was used.

Cases Laws related to Click Wrap Agreements

Cases in India

Here are a few cases on Click Wrap Agreements which were decided by Supreme Court of India. These cases are mentioned as follows :-

LIC India v. Consumer Education and Research Center

In this case it was held that Supreme Court in a case where a contract which is a standard form contract but is made in such a manner that it curtails the equal bargaining powers of any of the party to the contract then Supreme Court under the ambit of Article 14 of Constitution of India can strike down such contract or agreement. In this case Supreme Court also said that there is power in the hands of the courts to make an intrusion into such contract where the parties to the contract are not in equal position i.e, one of the party to the contract are is not having equal bargaining or negotiation powers in comparison to other party of the contract.

Trimex International Fze Ltd., Dubai vs Vedanta Aluminium Limited, India

In this case both the parties to the contract were residing in different countries so they decided the terms of contract or agreement through the exchange of e-mails between each other. However due to some circumstances the parties came into a disagreement between them and a case was filed that whether the terms of the contract which they decided over e-mail would be treated as a valid contract in India. The Supreme Court India gave an affirmative decision in this case by deciding that such a contract would be a valid contract.

Cases in Abroad

Specht v. Netscape Commc'ns Corp.

In this case court gave a decision that websites entices users by offering free software for

²⁵ Indian Contract Act, 1872, § 23

²⁶ Indian Evidence Act, 1872, § 65 B

²⁷ Information Technology Act, 2000, § 10 A

download however it is necessary to clearly mention the license terms in such a place on the website that the user can note of them and then decide whether to accept that Click Wrap agreement or not. But Netscape placed the terms of its Click Wrap Agreement in an inconspicuous place so that users might not take note of the terms and then simply agree to the agreement. So it was decided that the Click Wrap Agreement of Netscape is deemed to be not enforceable.

Hotmail Corporation v. Van Money Pie

The question which was raised in this case was that whether after clicking the button or check box which contains the words “I Agree” or “I Accept”, the Click Wrap Contract will become enforceable in the eyes of law. The court answered this question by deciding that after clicking the button “I Agree” the Click Wrap Contract will become duly enforceable .

Conclusion

Click Wrap Agreements can be viewed as an evolution in the field of contracts as now businesses can do their business with masses in their home country and also can deal with the global customer base in an easy manner. However every coin has two sides and the is other side of Click Wrap Agreement is that companies use these form of contract to mention unconscionable terms by filing up the contract with a long list of clauses mentioned in a complex language thus making it difficult for general public to understand the terms and because of this many people just tend to the button “I Agree”. However there are laws protecting the public if the terms of such contract goes against the public policy and there also decisions taken by Supreme Court of India and courts of other countries which showcases that if terms of such contracts become unreasonable than these contact will also be struck down but there is still many companies which still use such contracts to put themselves in a dominating position. Thus it is recommended that a separate legislation

should be made for governing contracts like Click Wrap Agreement. Also general public should be made aware about going through the terms of such contract before accepting them. Also the companies should be ordered to mention their terms in such language and manner that a layman can easily understand the terms of such contract before accepting it. Therefore there is much room left for making improvements in governing Click Wrap Agreements nationally and internationally.

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