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CLICKWRAP AGREEMENTS: VALIDITY, ENFORCEABILITY AND CHALLENGES

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ABSTRACT

As digital transactions increase in the modern e-commerce and technology-driven world, clickwrap agreements emerge as a cornerstone for facilitating seamless online interactions, thus standardising service-providing processes across the sector, like software licensing, digital service subscription and e-commerce. These agreements require assent from the users, where the user is facilitated with the services by clicking the "I Agree" button. This research article will explore the legal validity and enforceability associated with these types of agreements. It will also examine the role of the courts in interpreting user consent in such digital environments and how they differentiate it from other types of agreement. The word "Consent" has been and continues to be a paramount essential of the contract subject, and it is inculcated under these agreements through the "I Agree" button. This research article will explain and highlight the issues arising from the consent given by users after being fatigued by those lengthy terms, which later result in companies' mismanagement of privacy and data. The companies also did not provide their users with the purpose of those consents and the location of the metadata they gather through those agreements, thus causing significant breaches for the user. The research article will delve into these areas of concern with some instances revolving around it, compare analysis with global standings, and, in the end, attempt to provide specific possible solutions for the same. This research article aims to critically assess these horizons while ensuring a compatible ground for both the users and service providers.

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Keywords: *Digital, E-commerce, Agreement, Privacy, Data, Clickwrap, Service.*

1. INTRODUCTION

In recent times, E-contracts have revolutionized the formation of contracts and execution, offering unparalleled convenience and efficiency, making it highly reliable for online businesses. These agreements streamlined traditional contracting processes by eliminating the need for physical documentation and signatures. Further classifications in these e-contracts give rise to specific types of e-contracts like shrink wrap, browse-wrap, and clickwrap as their major division. These types are associated with different forms of taking assent from the user and how they further redirect them with specific results. Narrowing the aspect further, this paper will focus on the clickwrap agreements and their implications.

Clickwrap (also known as click-accept, click-to-sign, or clickthrough) agreement is an online agreement that users agree to by clicking a button or checking a box that says "I agree". The act of signing via an electronic signature is replaced with the act of clicking[1]. These agreements are widely used in software installations and e-commerce platforms during the checkout processes, as well as subscription-based services like music and streaming platforms, social media platforms, cloud services and financial applications. Among all types of e-contract methods, with the advent of technological advancement, clickwrap agreements are the fastest-growing category in the agreement space, projected to grow at a CAGR(Compound Annual Growth Rate) of 26.8% from 2024 to 2030.[2] Certain essentials for a contract also apply to the clickwrap agreement, i.e., those discussed under Section 10 of the Indian Contract Act, requiring free consent, competent parties, lawful consideration, and lawful object, and those should not be declared void.[3] Though all these circumstances are fulfilled in the case of the clickwrap, the competent parties and the non-negotiable terms for using the service always remain the area of discussion. In the context of India, these agreements are recognised under sec 10 of the IT Act, 2008, stating, "*Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed*

1 Ironclad, What Is a Clickwrap Agreement?, IRONCLAD (Apr 12, 2025), https://ironcladapp.com/journal/contract-management/what-is-a-clickwrap-agreement/.

2 Certinal, *Understanding Clickwrap Agreement,* CERTINAL (April 12, 2025), https://www.certinal.com/blog/understanding-clickwrap-agreement.

3 The Indian Contract Act, No. 9 of 1872, § 10, India Code (1872).

to be unenforceable solely on the ground that such electronic form or means was used for that purpose".[4] The IT Act in India also recognises electronic signatures as a valid and legally binding alternative of physical signatures, thus validating the clickwrap agreement as a form of e-contract. In a global context, such legislation as the ESIGN (Electronic Signature Act) and UETA (Uniform Electronic Transactions Act) govern the e-contract and its enforceability in agreement.

The terms and conditions in these agreements are made unilaterally and duly served to the users when they wish to access the desired services. These agreements fall under the standard form of adhesion contract, which are those that are offered to the buyers on a take it or leave it basis, typically by the party having superior bargaining power. These agreements lack mutual bargaining power and thus raise significant questions about their enforceability. The same was subjected to the challenge and scrutinised in the case of Capgemini Business Services (India) Ltd. V. CIT[5], where the court laid principles and enlisted circumstances where the enforceability of the "I Agree" button becomes highly questionable. Even though these fundamentals have been questioned and analysed by courts in different circumstances, both in the Indian and Global contexts, still, the validity and enforceability of these agreements remained hinged and firm as a form of e-contract.

2. VALIDITY AND ENFORCEABILITY

2.1 In the Indian Context

The validity and enforceability of clickwrap agreements follow the same genus as those for other e-contracts in India; certain major acts like the Contract Act, BSA (Bhartiya Sakshya Adhiniyam) and IT Act certify the same, though there is no special provision for governing the clickwrap agreement. The court had also recognised these forms as enforceable, rather than that the authorisation should be freely and wilfully given.

Section 63 of the BSA adds the legitimacy of electronic contracts. It defines a document as any information in an electronic record printed on paper or stored, recorded, or copied on optical or magnetic media made by a computer.[6] Section 65B further specifies that such a document can be used as evidence in any process without additional verification of the original.

4 The Information Technology Act, No. 21 of 2000, § 10, Acts of Parliament, 2000 (India).

5 Capgemini Bus. Servs. (India) Ltd. v. Comm'r of Income Tax, MANU/IU/0200/2016 (India)

6 Bhartiya Sakshya Adhiniyam, 2023, § 63 Act of Parliament, 2023 (India).

The ICA, through Section 10, laid specific fundamental prerequisites for contracts. The same applies in these clickwrap agreements, thus making it enforceable under section 2(h) of the Contract Act. In addition, the IT Act validates electronic signatures, thus validating contracts made through e-means and clickwrap agreements.

Indian courts have also upheld the validity and enforceability of clickwrap agreements, although there is no specific legislation; their validity will be decided on a case-by-case basis. In several cases, the court defined how these clickwrap agreements should and shouldn't be made, as in the case of Ddit (It)3(1), Mumbai V. Gujarat Pipavav Port Ltd.[7]The court ruled that

the agreements created through the method are valid and enforceable in court. Still, their validity is based on the authorisation made freely and actively provided by the users. Throughout its decision, the court highlighted the parties' role and bargaining power while coming into the agreement. Further, it highlighted that the parties should be on equal footing while making such an agreement. Even though the court had held these as valid but the non-bargaining power, lack of prudence from the user, and the fatigue consent remain the main issues from the user's perspective.

2.2 In Global Context

The clickwrap agreements have been globally governing with the same general governance principles as the electronic contracts. *Various countries and international organisations, taking note of the radical shift in the e-contract, formulated laws to deal with the same; prominent amongst them being the - EU E-Commerce Directives ("EU Directives"), UN Convention on the Use of Electronic Communications in International Contracts ("UN Convention") and UNCITRAL Model Law on Electronic Commerce ("UNCITRAL Model Law").*[8]

The enforceability in countries like the USA has been firmly upheld with cases like Feldman v. Google, Inc.[9], where the court emphasised the importance of providing reasonable notice of terms and manifested assent of the contract, the same type of agreements was also discussed in Hotmail Corp. V. Van$ Money Pie Inc[10], where the court recognised the

7 Comm'r of Income Tax v. Gujarat Pipavav Port Ltd., 2017 SCC OnLine ITAT 2058 (India)

8 Shashank Shekhar, Note, *The Enforceability of Electronic Click Wrap and Browse Wrap Agreements,* 6.1 NLIU L. REV. 77 (2017).

9 Feldman v. Google, Inc., 513 F. Supp. 2d 229 (E.D. Pa. 2007)

10 Hotmail Corp. v. Van$ Money Pie, Inc., No. C-98-20064 JW, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998)

binding nature and enforceability of the clickwrap agreements, validating assent through a click as a valid acceptance. Further in the development, the UNICTRAL model remains a pioneer in recognising these types of contracts and providing the foundational principle for the e-contract. It provides that a contract shall not be denied validity solely based on electronic form if the same follows the foundational principle of the contract. *UCIT(Uniform Computer Information Transactions Act), from the National conference of Commissioners on uniform State Laws (NCCUSL) also makes clear that click-wrap agreements that allow a user to convey his or her assent through an on-screen "click" are legally binding as long as the user had an opportunity to review the terms before assenting*.[11]

Even though these laws, acts, and cases validate the same, there still remains an area for scrutiny where information overload, consent fatigue, and uneven bargaining power continue to raise concern, thus making it a subject to judicial interpretation.

3. OTHER E-CONTRACTS

Other than the clickwrap contracts, different types of e-contracts, like browse wrap, shrink wrap, and other agreements, have also been prevalent today. These have also been used when parties do not meet each other.

3.1 Browse Wrap

The agreement will be binding upon the contracting party using the website. These include the user policies and terms of service of websites such as Flipkart or eBay and are in the form of a "terms of use", a "user agreement" or "terms of service", which can be found at the corner or bottom of the website.[12]Courts have often questioned their validity and, in certain circumstances, refused to enforce such terms due to insufficient visibility. Unlike clickwrap, the user is not required to agree actively- the mere use of the website is considered acceptance.

3.2 Shrink Wrap

These agreements are used initially in software purchases and are enclosed within product packaging. They aim to create an enforceable electronic agreement by requiring users

11 Francis M. Buono & Jonathan A. Friedman, Maximising the Enforceability of Click-Wrap Agreements, 4 J. TECH. L. & POL'Y 1 (1999), https://scholarship.law.ufl.edu/jtlp/vol4/iss3/4.

12 Ujwala Bendale & Rashmi Dubey, Electronic Form of Contract, SSRN (Aug. 7, 2022), https://ssrn.com/abstract=4001851.

of websites and other electronic media to accept the website's terms of use.[13] These are also accepted in many jurisdictions, especially when the user can return the product after reviewing the terms.

Other than these two, there are also e-contracts done in the form of e-mail, smart contracts, sign-in wrap, phone calls, messages, and others. The only requisites that remain the same throughout them all are the contracts' fundamentals, which need to be followed for a valid contract.

4. KEY CLAUSES IN CLICKWRAP AGREEMENTS

Clickwrap agreements, although enforceable, have implications that largely depend upon the content and the clarity embedded within them. Specific key clauses carry inevitable legally significant consequences, shaping users' and service providers' rights and obligations. There is a need to include these key clauses in any such kind of e-contract.

4.1 Jurisdiction and Governing Laws

This clause determines which country's law will apply to the agreement and which court will have jurisdiction in case of disputes. This clause is very critical in the case of cross-border digital transactions. However, in certain circumstances, the court invalidated the term of the clause if the same was deemed unfair and placed an unreasonable burden on the consumers. In the case of SpiceJet Ltd V. Ranju Aery[14], the court held that the jurisdiction lies where the consumer resides and where part of the cause of action arises, affirming that rigid territorial limits should not undermine the consumer's convenience.

4.2 Liability Clause

This clause limits the service provider's liability in case of damages resulting from using their platform or services. It excludes liability arising from indirect or consequential damages. Though these terms were intended to help protect businesses from extensive claims, they can be struck down if they exclude the liability for gross negligence or misconduct. Reaffirming the liability clause, the court in the case of Seth Thawardas Pherumal v. Union of India

13 Practical Law, What Is a Clickwrap Agreement?, Thomson Reuters (Apr 15 2025), https://uk.practicallaw.thomsonreuters.com/w-031-4220

14 SpiceJet Ltd. v. Ranju Aery, CaseMine (Feb. 7, 2017), https://www.casemine.com/commentary/in/deficiency-in-air-transport-service%3A-establishing-consumer-protection-rights-in-spicejet-ltd.-v.-ranju-aery/view.

(1955)[15] upheld the validity of an exclusion clause where the public works department was exempted from liability for certain damages. The court recognised the freedom of parties to exclude liability contractually and held such clauses enforceable.

4.3 Dispute Resolution Clause

Most e-contracts now include ADR resolutions or ODR to resolve disputes. This clause thus reduces litigation costs and speeds up the resolution of matters. They generally cover the how and through what form the conflict will be resolved. However, they also face criticism for limiting access to the traditional court and their bias towards cooperation, in the case of Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.[16]The court recognised the validity of an arbitration clause and agreement formed through electronic communications, provided the parties intended to be bound by such terms.

4.4 Privacy and Data Protection Clause

This is one of the most critical clauses. It outlines how user data will be collected, used, stored, and shared. Any non-compliance with the data law and their sharing or outsourcing can render the agreement between the user and service providers, thus giving the user an edge to seek scrutiny or penalties over the service provider. For citing the example in this clause, there could not be a better case than Justice K.S. Puttaswamy (Retd.) V. UOI[17], which held the right to privacy as a fundamental right protected under Article 21.

These clauses need to be inculcated under the e-contract or mainly in the clickwrap, though they are not enough. Other clauses like indemnity, termination, modification, and other clauses also form the essential part of the agreement.

5. CONCERNS & CHALLENGES

5.1 Consent fatigue

One of the significant challenges in the clickwrap agreement that the user faced was the fatigue caused by the multiple forms and their listed documents, which resulted in the user giving their consent to them with frustration, without reading them all, out of sheer necessity of “getting it over with”. These consents result from constant fatigue, or one

15 Seth Thawardas Pherumal v. Union of India, AIR 1955 SC 468 (India).

16 Trimex Int’l FZE Ltd., Dubai v. Vedanta Aluminium Ltd., (2010) 3 SCC 1 (India).

17 Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).

must undergo a lengthy process to provide consent.[18] This fatigue causes concern to the user when they approach the service providers for any redress. Though these consents are treated as the implied consent, the unfair terms and onerous act could only shift the liability from the user to the service provider in case of inadequate information on the user's side.

5.2 Non- Clarity of terms

Clickwrap terms should be presented in clear language, without any ambiguities and should explain the reasons for agreeing and what they are assenting to.[19] Making the terms unclear and using complex language makes them less perceivable for the user and could later result in making such agreements voidable.

5.3 Lack of evidence and Proof of consent

This issue is often faced by both parties in case of any legal disputes, and there is no proof or evidence to the user of what terms have been presented to them while agreeing, as no copy of the terms or agreement is provided to them. This could further help the other party and could later weaken the case on one side.

5.4 Jurisdictional Issues

It is one of the significant concerns in times of breach or default in the contract. The chaos in geographical jurisdiction often results in the filing of legal matters before courts of different jurisdictions. In significant cases, it provides an edge to the service provider as they can induce a jurisdictional term of their choice, and the user is not in a position to negotiate but either has to accept or deny it.[20]

5.5 Data privacy and Users' Rights

The marking of the digital age has also brought some issues related to one's privacy. The consent taken at the time of agreement often gives the service provider the right to access the private data. They further do not even explain the purpose for those assents taken. Recently, certain companies have been charged or made liable for selling data to other private entities, hampering users' right to privacy and raising concerns over the misuse of

18 *Consent Fatigue and Clickwrap Agreements: Is Current Data Consent Law in India Fit for This Purpose?,* SCC Online Blog (June 12, 2024), https://www.scconline.com/blog/post/2024/06/12/consent-fatigue-and-clickwrap-agreements-is-current-data-consent-law-in-india-fit-for-this-purpose/.

19 Iubenda, *Clickwrap Agreements: Top 5 Things You Need to Know,* Iubenda (Apr. 19,2025), https://www.iubenda.com/en/help/111125-clickwrap-agreements-top-5-things-you-need-to-know.

20 Mitul Soni, Legal Issues and Jurisdiction Involved in E-Contracts: An Analysis (Aug. 2, 2023), http://dx.doi.org/10.2139/ssrn.4528990

users' data. One of the most recent incidents is related to a data breach caused by one of the most influential social media networks, Facebook, and other platforms. The recent breach of February exposed millions of two-factor authentications (2fa) that they used, resulting in data loss and a rise in privacy concerns.[21]

5.6 Incapacity of giving consent

This scenario could have been seen in the case of clicking on the "I Agree" button by a minor or an unsound person, who has no idea about the essence of such consent, thus invalidating the purpose of the agreement. This consent often poses a risk of an unenforceable contract and potential exploitation of both the user and the service provider in case of any concern or data mismanagement.

Other than these significant concerns in the area of e-contract or specifically the clickwrap agreement, non-bargaining power, changes in terms, cross-border legal challenges, and accessibility issues are also some of the additional challenges that come into play while enforcing these agreements.

6. POSSIBLE SOLUTIONS

There could not be a one-to-one solution that can be provided in the area of such agreements. Still, specific changes could be made to make it more effective and worthwhile, like in privacy, legal disputes or consent fatigue.

a. One of the significant challenges in case of any disputes is the lack of agreement proof; this can be resolved by the end of the service provider by duly serving the agreement in an electronic form to the email or the number after getting assent to the terms by the user. Screenshots of the terms by the user while agreeing can also act as proof of the agreement between the parties. [22]

b. Consent fatigue is why parties assent to these agreements without referring to all the clauses, which later become more hectic for the user. The service to solve such a problem could provide clauses in two terms, like those that are more requisite, and reading should be compulsory, and others where it is not as mandatory to be followed. They could only obtain consent in areas with a chance

21 Violeta Lyskoi, Facebook Data Breaches: A Detailed Look at the Most Prominent Data Leaks, NordVPN Blog (July 16, 2024), https://nordvpn.com/blog/facebook-data-breach/ (accessed Apr. 19, 2025).

22 Morae, *Clickwrap Agreements: Everything You Need to Know,* Morae (April 19, 2025), https://www.morae.com/insights/clickwrap-agreements/

of any possible lapse risk.[23] The voice simulation provides significant agreement terms to the user and can also be used to avoid such fatigue.

c. The service provider should specify the purpose for which they are taking consent, making the user more aware of the appropriateness of the consent taken through such agreement. Under the new DPDP (Digital Personal Data Protection) Act, 2023, the government has taken steps regarding the use of data and collection of metadata in the country itself, thus making the service provider more responsible for the user's data and holding the data from any misuse or selling. Though this act has not been implemented, it will be key in securing and managing the user's privacy and rights.

d. In the case of consent made by any minor or unsound person, the company could use Aadhar verification before serving any service or terms of agreement, thus making it more reliable. It will continue to uphold the purpose of such a contract and safeguard it from voidability.

e. The clickwrap agreement lacks bargaining power, thus becoming more oppressive or unconscionable. This could be reduced by making specific selections in clauses; thus, depending on the user's wish to access any particular thing, they have to agree to such a term or deny if they wish not to avail any service related to such a clause. This, though not wholly, will remove the supremacy but dilute the power from the service provider to the user, thus improving the overall trust.

f. In the end, using concise plain English and serving the terms in the regional language could make such an agreement more receptive, thus reducing fatigue and making it more generalised for the user.

7. CONCLUSION

Clickwrap agreements are a crucial facilitator in e-commerce, software licensing, and digital subscriptions. The efficiency and convenience for parties are what make clickwrap contracts appealing. While validated as a form of electronic agreement in India, based on both the Information Technology Act, 2000 and other international frameworks such as the ESIGN Act and UNCITRAL Model Law, these agreements exhibit their characteristics of a contract, however, they continue to receive scrutiny from not only the courts in India but

23 Angelique Carson, How to Avoid Consent Fatigue, IAPP (April 19, 2025), https://iapp.org/news/a/how-to-avoid-consent-fatigue.

also government policy makers, academics and the representatives of consumers worldwide. Arguments against the enforcement of clickwrap agreements include consent fatigue, vague wording or conditions, issues of bargaining equality, and concerns with the privacy of data. Even the judicial interpretation of clickwrap agreements, such as Capgemini Business Services (India) Ltd. v. CIT or Feldman v. Google, Inc., has suggested that clear notice of use and true assent from the user can prevent enforcement. Some of the possible ways to mitigate issues in clickwrap agreements come with clearer terms, enhanced transparency of provisions in the ability to review and assess the terms, a better understanding of eligibility verification through Aadhar, and, in more remote contexts, a blockchain approach to agility in accessing agreements as permanent records. Addressing clarity of terms, accessibility of agreements, and collection and use of data, clickwrap agreements can become a predominant form of e-contract, singularly representing service delivery needs of both the users and the digital commerce service providers, in not only India but on an international stage.