

CLICKWRAP AGREEMENTS IN INDIA: THE LEGAL STANCE?

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ABSTRACT

With Globalization and increased technological advancements, e-contracts have become an essential instrument for all businesses and commercial transactions. This article explores the essence of the legality and validity of e-contracts specifically pertaining to clickwrap agreements. The nature, essentials, legal framework in India, and the stance of the judiciary with respect to enforceability of clickwrap agreements are analyzed in the article. The case-to-case basis approach of the Indian judiciary as compared to the liberal approach of American courts in determining the validity of these agreements and the subsequent implications are examined through various case studies and legal framework of both the nations.

Introduction:

Since the beginning of the internet age, there has been an expansion in e-commerce globally. In order to regulate this ever-expanding business of e-commerce, E-contracts have become an important instrument. E-contracts have evolved to become a more efficient and convenient alternative to traditional contracts. There are various types of e-contracts- clickwrap e-contracts, browse-wrap e-contracts, Shrink wrap e-contracts. Clickwrap e-contracts are one of the most prevalent types of e-contracts that we deal with in our day-to-day transactions. These agreements are used mostly for software licensing, websites, online purchases, etc. Clickwrap agreements are electronic contracts between parties, which requires the party to give explicit assent to the website's Terms which by default apply to any subsequent transactions. Contrary to other e-contracts an 'I agree' or 'I understand' dialogue box appears and only on accepting the same can the user proceed to view the website. Due to the consideration given to the clear consent of the user, it is seen that clickwrap contracts are more prevalent. However, the question of enforceability of these contracts is still debated over and the limits of legal protection and recognition awarded to these is what this article explores.

Laws Governing E-contracts in India:

In India there are no explicit laws to govern e-contracts, however, these contracts are governed by the Indian Contract Act 1872 and Information and Technology Act 2000. While the Indian Contract Act does not address the enforceability of clickwrap or e-contracts in general the essentials prescribed by the legislation for valid contracts are prerequisites for these as well. Hence to the extent that the general validity of these contracts is beyond the aspect of consent other essentials as stipulated in section 10 are imperative.

Sec 10 of the Indian Contract Act states that a contract is said to be a valid contract if it is made with the free consent of parties, who are competent to contract. Additionally, these contracts should have a legal object and lawful consideration and should not be expressly declared as void by the law in force. The Preamble of IT Act which came into force in 2000 affirms that one of the critical purposes of the act is to provide legal recognition to e-commerce transactions. With the growth of e-commerce transactions and the disputes arising thereon regarding the legality of e-contracts, an amendment was made to IT Act in 2009 and sec 10A was inserted thereupon.

Sec 10A clarifies the validity of contracts formed by electronic means and section 5 provides legal recognition to Electronic Signatures.¹

Enforceability in India:

The enforceability of E-contracts is governed under sec 10A of IT Act, which provides that when in a contract, electronic means are used to communicate a proposal or offer or to accept an offer or for the purpose of revocation of the offer, then the enforceability of such a contract will not be questioned solely on the ground that such a contract is an e-contract and not a physical contract.²

For many Websites, Clickwrap agreements are often the obvious choice because of how they expressly demand/procure the user's consent which protects the website from any subsequent claims regarding the agreement being invalid. There is no agreement or acceptance on the user's part by default, instead, they are afforded an opportunity to understand the terms and conditions of use and then make a well-informed choice about whether or not to proceed. This, to an extent, reduces any scope of disputes regarding free consent of the user. In addition to this, they are generally perceived as being more flexible, concise, and economical as compared to the other e-contracts.

Despite this, various complexities arise in enforcing these contracts in a court of law. ³'Sneaking of onerous terms', imbalance in bargaining power, unjust terms waiving the consumer rights of users, and other such one-sided terms.

The imbalance of bargaining power that exists in click-wrap agreements may sometimes be unfair to the customers or users of websites, or there might be cases where users may agree to most of the terms and conditions but may not consent to one or two of them. In these one-sided agreements the user has no or very less bargaining power and are denied the option to opt out certain conditions

¹ <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-elecsig-e.pdf>

² Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent by Christina L. Kunz, Maureen Del Duca, Heather Thayer, Jennifer Debrow :: SSRN

³ Davis, Nathan J. "Presumed Assent: The Judicial Acceptance of Clickwrap." Berkeley Technology Law Journal, vol. 22, no. 1, 2007, pp. 588.

that suit them. In such cases the court views such agreement with vigilance, if the court finds it to be unfair or biased, then such agreements are held unenforceable.⁴

Courts in India and abroad have given due consideration to the feature of clickwrap agreements which require express consent and there is little regard for claims involving negligence on the part of the user such as failing to read the terms and ignorance of the legal effect of ‘Agreeing’ or the general binding nature of these e-contracts. However there still remains due regard that is given to the principles of public policy, Doctrine of Unconscionability, legally guaranteed Consumer and commercial rights.

JUDICIAL STANCE ON CLICKWRAP AGREEMENTS:

United States-

The general stance of the courts in the United States, towards clickwrap Agreements can be said to be favourable.⁵ Where it was proved by the defendants/website/proprietor that the user had actually ‘clicked’ or accepted the terms upon indication by the dialogue box, the courts have famously ruled in their favor. The Hotmail Corporation vs Van Money Pie Inc.⁶ case was one of the First cases that decided the enforceability of click wrap agreement. In this case the defendant had entered into a click-wrap agreement with Hotmail by clicking on the “I agree” button. The defendant used to send spam emails advertising pornographic and obscene material and created several hotmail account for the same. The plaintiff claimed that this had violated the agreement as one of the conditions of the agreement prohibits circulation of unsolicited material using Hotmail. The court held the click wrap agreement to be legally enforceable and gave judgment in favor of the Plaintiff.

In the case of Specht v. Netscape Communications Corporation,⁷ the court held that for a clickwrap agreement to be legally enforceable the essentials of contract laws will be applicable. The court was of the view that click wrap agreement will not be enforceable if there lies no manifestation between the parties. In this case the defendant was given the option of downloading the software,

⁵ “Update on Shrinkwrap/Clickwrap/Browsewrap Contracts.” Berkeley Technology Law Journal, vol. 21, no. 1, 2006, pp. 553

⁶ Hotmail Corporation vs. Van\$ Money Pie Inc.(Cal. April 20, 1989)

⁷ Specht vs Netscape Comms. Corp https://cyber.harvard.edu/stjohns/Specht_v_Netscape.pdf

the agreement had a clause stating that downloading of the software will be considered as accepting the terms of agreement. However, this condition wasn't mentioned near the download option, therefore the court held the agreement to be unenforceable on the ground that defendant failed to give reasonable notice of contractual obligation to plaintiff.

In *Sgouros VS Trans Union Corp*,⁸ the court held that clicking on “i agree” button will amount to consent as long as the language of the website gives sufficient notice that by doing so the user will enter into a contractual relationship.

⁹In some cases even where the defense could not submit concrete evidence of the user's acceptance, the courts have relied on arguments that the user would have been unable to use the website or proceed with the act in question without accepting the terms.

India-

In India there is no stringent rule to determine enforceability of e-contracts, it rather is decided on a case to case basis. In *LIC India V. Consumer Education and Research Center*¹⁰ the court held that courts have power to intervene in disputes arising out of contracts between the parties if the contract formed is an adhesion Contract.

In *Ddit(ltd) Mumbai v. Gujarat Pipavav Port ltd*¹¹ case the court held mass contracts like click wrap are enforceable if they meet all the prerequisites of a valid contract. However if these contracts have unreasonable bargaining power then they will be unenforceable. Thus, enforceability depends on the factor if consent was freely taken or not. The court also retreated the position of enforceability of online contracts in *Trimex International FZE vs. Vedanta Aluminum Limited, India*,¹² where online contracts were held to be valid and legally enforceable. From the above judgements it's clear that the courts in India have stated that generally click wrap agreements are valid and enforceable in nature. However it depends on a case to case basis.

⁸ <https://www.lexisnexis.com/community/casebrief/p/casebrief-sgouros-v-transunion-corp>

⁹ *Eslworldwide.com, Inc. v. Interland, Inc.*, No. 06 CV 2503 (LBS), 2006 WL 17168

¹⁰ *LIC India vs. Consumer Education and Research Centre* <https://india.lawi.asia/l-i-c-of-india-and-anr-v-consumer-education-and-research-centre-and-ors-4/>

¹¹ *Ddit(ltd) Mumbai v. Gujarat Pipavav Port ltd.* (2017-LL-0210-119)

¹² *Trimex International FZE vs Vedanta Aluminum Limited, India*, 2010 (1) SCALE 574

Conclusion:

Although there is no specific legislation or any extensive legal provisions dealing with the enforceability and essentials of an e-contract, there is adequate legal and judicial backing for clickwrap agreements. While the IT Act, of 2000 provides legal validity and recognition to them, the requisites prescribed under the Indian Contract Act, 1872 act as guiding provisions in the test of its validity/legality. In this era of globalization, modernization, and the flourishing e-commerce industry, courts have also begun to adapt and apply the existing standard for contracts to electronic contracts. In the US, while we have seen that even historically clickwrap agreements have been considerably favoured, in India the enforcement is largely on a case-to-case basis. The prevalent hazard of ‘rushing through’ negligently or failing to read the terms and conditions closely has been ruled out as a contention by most courts. In both countries, while the ‘assent’ feature is taken into account and given substantial weightage, enforcement is only subject to the general principles of contract law which pertain to justice, fairness, and being conscionable. Where there is an evident imbalance in negotiation power, which is arguably inherent in clickwrap agreements, courts look into the terms or disputed clauses of a contract carefully to detect any fraudulent, unjust, or manipulative conduct on the part of the defendant. Where the requisites under the Contract act i.e offer, acceptance, capacity to contract, free consent, legal consideration among others are not present then also Indian courts have determined such contracts to not be enforceable. Hence if one were to summarize the legal position of clickwrap agreements in India it would be twofold; firstly courts take a general progressive stance in consideration of technological advancement and promoting economic development via legalizing speedy, convenient electronic contracts; secondly, these liberal interpretations are yet subject to legal principles applying to contract law and commercial transactions in general.