

Digitalization of Transactions and Consumer Protection in Wrap contracting

Ayyappan Palanissamy, R. Kesavamoorthy



Abstract: E-commerce today gives opportunities for businesses in the online environment to expand their businesses rapidly and provide services to larger group of online consumers. Although the online medium is a comfortable platform for carrying out commercial/consumer transaction, the purchasers are disadvantaged due to various major reasons like lack of adequate information about the products and services, acceptance of the standard form contracts (SFC) which binds parties to the terms and conditions prescribed by the e-commerce business providers based on their convenience which includes dealing with defects, redressal mechanisms included, etc. This leave no option/feedback for online purchasers before or at the time of making their transaction. One of several defences which can be claimed by the online purchasers is unconscionability in contract clauses. The difficulty on the part of consumers is to prove unfairness which can be either substantive or procedural. To deal with SFCs, courts have concerned that online users consenting to these agreements leads to absolute exploitation on the part of businesses without considering the mutual benefits of either party which is the essence of the contract. The article focusses on the concept of wrap contracting, the legality and enforceability of standard forms used in digital transactions and existing legal regimes in various jurisdictions and also steps to be taken to regulate web-based business/service providers in dealing with modernized electronic contracting. The article reveals that the existing legal mechanisms and the role of law dealing with SFCs is not adequate protecting online consumers and there is an urgent need to amend or formulate regulations leading to absolute consumer protection.

Keywords: consumer protection, e-commerce, unfair practices, wrap contracting

I. INTRODUCTION

The internet and technology have paved way for various businesses in the online environment and trading activities online have expanded rapidly where consumers have access to goods and services at attractive prices and users can compare the prices and specifications of the products they have intended to buy being at a place and can place an order by completing a sale transaction. According to Organization for Economic Cooperation and Development (OECD, 2017), it has been stated that online consumer often complains about the complexity and the uncertainties in online contracts.

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The report has identified that there are various consumer concerns surrounding the online shoppers like dispute resolution, misleading or fraudulent business practices, jurisdictional issues in cross border e-commerce, etc. Apart from that comes other issues like misuse or disclosure of personal data collected by the business from the online shoppers during the process of completing the online transactions.

The research article is organised as follows: Section 2 looks into the concept of wrap contracting taking into consideration the legality and enforceability, Section 3 highlights the literature on consumer protection in digital transactions and the problems and difficulties confronted on the part of online consumers, Section 4 describes some of the common clauses used in SFCs and its legal effect which exploit individual consumers and Section 5 provides the legislative approaches in various jurisdictions in dealing with SFCs and Section 6 concludes the article.

II. CONCEPT OF WRAP CONTRACTING

Business to consumer (B2C) transactions executed online are usually categorised as Click wrap, Browse wrap and Shrink wrap contracts.



Fig 1: Types of Wrap Agreements

Some of the key features of these Wrap contracts are:

Click Wrap:

- Actual notice to online consumer about the terms of the transaction.
- Conditions and warranties displayed on the screen.
- Requirement to click- Icon clicking to proceed further to complete the transaction.

Browse Wrap:

- No direct or actual notice
- Terms and warranties applicable to the transaction displayed somewhere on the website or screen page. (hyperlinks provided in the webpage where the consumer can be routed to know the terms before completing the transaction)

Shrink Wrap:

- Actual or constructive notice of terms/conditions
- Applicable usually for software products/licensing agreements
- Licence terms will be displayed for user agreement at the time of installing or downloading the product.

The issue with regard to enforceability of wrap contracts is that the courts are highly reluctant to see what type of agreement is executed online but they ensure that a reasonable notice of terms had been served to the online consumer before or at the time of execution or conclusion of the transaction. Online business/service providers use standard forms creating a legal binding agreement with the web users when they deal with selling/buying products or providing services. These standard form contracts (SFCs) are not subjected to the process of negotiation on the part of online consumers and majority of online consumers when they deal with websites buying products or availing services do not read the forms as they think and treat it as just formality. Those who intend to read the terms prescribed by the website owners do not understand the majority terms/clauses which are long, full of legal terminology used to explain the clauses and are one sided. In terms of protecting online consumers from the clutches of web based business/service providers, notice of terms should be mandatory failing which the contract should be treated as void to protect the interests and rights of consumers.



Source: <https://marketoonist.com/2018/03/terms.html>

III. REVIEW OF LITERATURE

An extensive literature review is conducted looking into various research studies carried out on the subject with regard to consumer protection in e-commerce. Nicoleta (2016) stated that the negative side of online shoppers is their inability to try their products before they buy. An opportunity of testing or examining the product is the main issue which leads to misleading practices which affects online consumers directly. Valarezo A. (2018) studied the drivers and barriers for the individual adoption of cross-border e-commerce. He stressed on a point based on the survey analysis that many consumers may not know exactly from where the website operator or the center for displaying the products is located. Gowri A. (2015) observed that the consumers, in difficult situations are left with no remedy since because of jurisdictional issues in the cyber environment. The study has indicated that legal framework existing on consumer protection lacks in terms of addressing e-commerce consumer needs. The research has analyzed the changing nature of the users in the electronic transactions and has highlighted some of the new legal issues raised by

the increased advancements in the internet and technology. A study conducted by IIM, Ahmedabad (2016) has stressed on a need for a separate law for e-commerce for the purpose of protecting rights of online consumers in India. The study stressed on a need for a separate law for e-commerce as other countries have. Professor Akhileshwar (2015) stated that there are various problems faced by consumers in e-commerce. All these problems arise because both the seller and buyer being at a distance. The buyer was not given an opportunity to inspect the goods. Gheorghe H. (2015) has analyzed the degree of consumer protection in digital content markets, in particular various aspects concerning consumer protection in e-commerce. Digital shoppers undergo a lot of challenges than purchasers in any other market. Their interests are high which is equivalent to challenges they face in online consumers.

IV. ANALYSIS OF THE LEGAL EFFECT OF TERMS/CLAUSES IN SFC'S

Various terms and conditions agreed between seller and buyer in an electronic wrap contracts includes warranties, limitation of liability, choice of law or Applicable law, forum selection clause, indemnity clause, entire agreement or integration clause, arbitration clause, severance or separability clause, etc.

In all these clauses, a detailed description or information has been provided so as to say that if anything goes wrong between the parties concerned the company or the website owner will deal with the matter as spelled out in the agreement. The entire contractual terms are one sided which originate from the business provider, designed and prescribed by the company purely at their own interests and not at any point of time thought at the interests of consumers.

Thomas Gamarello (2015) has observed in his study about the end user licence agreements that these contracts executed between parties is highly unconscionable. These agreements are better described as take it or leave it contracts or mass market licences where there exist no alternatives to the end user either to negotiate or dictate new terms.

Forum Selection clause: The clause used by the online business to designate a place or venue to deal with any dispute or controversy which may arise between contracting parties. Online business providers like Amazon, eBay, airline companies, hotel booking intermediaries, etc. has listed in their website terms one sided jurisdictional clauses which is likely to affect the ultimate rights of consumers dealing with them.

In the case of *Tricome v eBay* (2009), the transaction executed between eBay and internet user had agreed on a clause which states that "ALL DISPUTES BETWEEN THE USER AND EBAY MUST BE BROUGHT TO COURT IN SANTA CLARA COUNTY, CALIFORNIA."

The plaintiff consumer brought the case before the federal court in Pennsylvania against eBay challenging the clause as unconscionable. The court found the clause not unconscionable taking into account the material facts produced by eBay to say that there was no pressure tactics employed by eBay to get the plaintiff sign the user agreement.

This decision shows that there is no certainty in terms of enforcement of clauses and the courts across have decided cases by giving different reasoning on different cases. Consumers or end users also has the difficulty in proving that the clause is arbitrary, unfair or unreasonable because the burden is on the part of plaintiff to prove the case.

Arbitration clause: In the place of forum selection or venue clause, to overcome the difficulties confronted, companies nowadays choose arbitration as a mechanism to resolve disputes which may arise in future and to that effect include a clause with clear description that the subject matter of the dispute will be arbitrated and the decision arrived at will be final and binding on parties.

As an example, in the case of *Omstead v. Dell, Inc*, 594 F.3d 1081 (9th Cir. 2010) the plaintiff consumer who purchased a notebook computer online returned the product for its defects seeking refund of money paid. The arbitration clause in the SFC agreement is as follows:

13 BINDING ARBITRATION: Any claim, dispute, or controversy between customer and dell shall be resolved exclusively and finally by binding arbitration administered by the national arbitration forum(NAF) neither customer nor dell shall be entitled to join or consolidate claims by or against other customers or arbitrate any claim as a representative or class action. (Clause 13 of the Agreement).

The legal challenge on the part of consumer is that the arbitration clause in the agreement executed is highly unreasonable and it is not economically feasible for the consumer to arbitrate individually before a national authority as envisaged in the contractual clause. The Californian court rendered the contract unconscionable taking into consideration the consumers rights and interests.

Limitation of Liability clause: Business/Service providers while drafting SFCs always include warranties and limitation of liability clause as one of the terms of the contract. The rationale of this clause is that businesses do not want to take unlimited risk/liability in case if anything goes wrong between parties in the future. To that effect companies draft a detailed clause describing the extent of liability and also include a pecuniary damage or compensation to which the company will take responsibility irrespective of the real damage incurred on the part of the other contracting party. An example clause is as follows:

DISCLAIMER OF WARRANTIES AND LIMITATION OF LIABILITY

THE AMAZON SERVICES AND ALL INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) AND OTHER SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE AMAZON SERVICES ARE PROVIDED BY AMAZON ON AN "AS IS" AND "AS AVAILABLE" BASIS, UNLESS OTHERWISE SPECIFIED IN WRITING. AMAZON MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE AMAZON SERVICES, OR THE INFORMATION, CONTENT, MATERIALS, PRODUCTS (INCLUDING SOFTWARE) OR OTHER SERVICES INCLUDED ON OR OTHERWISE MADE AVAILABLE TO YOU THROUGH THE AMAZON SERVICES, UNLESS OTHERWISE SPECIFIED IN WRITING. YOU EXPRESSLY AGREE THAT YOUR USE OF THE AMAZON SERVICES IS AT YOUR SOLE RISK.

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Fig 3: Sample Clause (Source: www.disclaimertemplate.net)

V. ANALYSIS OF THE ROLE OF LAW DEALING WITH SFC's ACROSS JURISDICTIONS

Standard Form Contracts are subjected to enforceability in various jurisdictions so as to protect and benefit consumers especially in the case of business to consumer transactions. It is well evident that SFCs doesn't create much problems provided the other transacting party read the terms of the contract and understand the legal consequences of the terms which binds them. In majority countries, terms or clauses are not effective unless a clear and reasonable notice is given to consumers. The legislative position in various developed and developing jurisdictions dealing with SFCs is as follows:

United States: SFCs are dealt with under Uniform Commercial Code – Section 2.302 – Court as a matter of law may refuse to enforce the contract if the contract or a clause in the contractual agreement found to be unconscionable.

Singapore: Unfair Contract Terms Act, 1994 – provides provisions dealing with SFCs with an objective of protecting consumers absolutely.

Australia: Competition and Consumer Act, 2010 which is well described as Australian Consumer Law – a framework for consumer protection in transactions provides provisions which deals with SFCs. Unfair clauses are void if it appears in SFCs and all persons are strictly prohibited engaging in unconscionable conduct during the course of trade or commerce.

Canada: Exclusionary terms or exemption clauses in SFCs are invalid and not enforceable if there is no proper or clear notice provided to consumers and unconscionable conduct is categorized as an offence under the law Unconscionable Transactions Relief Act.

United Kingdom: Unfair Contract Terms Act- the primary objective of the law is to protect consumers who are prejudiced due to their weaker position in terms of bargaining in consumer transactions.

India: Indian Contract Act, 1872 has provisions which speaks about unconscionable bargains. The protection is inadequate for consumers to get their rights and interests protected. As in other jurisdictions like UK, there is no specific legislative enactment which spells out unconscionable conduct making business providers responsible and liable. The New consumer protection bill passed in the lower house of the Indian Parliament in 2018 has provisions with respect to unfair contract terms used in SFCs on the part of businesses but the scope of the provisions spelled out in the draft law is limited.

Robert Hillman (2017) has suggested in his study that the law should mandate some protective terms which are utmost important on the part of consumers. He has also suggested another strategy to be used to overcome the difficulty of reasonable notice that consumers should be required to click 'Agree' icon which appear next to each and every contentious term which would lead to little reading rather doing speed clicking once to complete the process. But still this will not be a solution to deal with unconscionable terms which originate from businesses.

VI. CONCLUSION

As discussed above, the subject of unfair contract terms or unconscionable clauses in the SFCs has gained immense importance for the twenty-first century consumer taking into consideration the rapid growth and expansion of businesses in the cyber environment. Some of the governments across the world has taken appropriate steps recently to amend their existing laws/ legislative enactments in order to protect consumers. But this will not protect online consumers in wrap contracts absolutely. Consumers will still face problems before the adjudicatory authorities to challenge the unfair contractual terms which leads to inadequacy of law in terms of protection afforded. Governments should take initiatives to regulate online businesses with regard to SFCs that some of the contentious clauses should be standardized and dictated to avoid exploitation of consumers. This will create confidence on the part of consumers dealing in the ecommerce environment. The protection afforded to individual consumers still remains as a challenge with no absolute protection in the consumer protection laws in practice. The legal rules cannot be static. As society changes based on advancements in technology, law also need to be changed from time to time so as to accommodate the societal expectations and needs.

REFERENCES:

1. Akhileshwar Pathak, E-Retailing and the Consumer Protection Bill, 2015: Drawing from the European Union Consumer Directives W.P. No. 2015-10-02 October 2015
2. Ángel Valarezo, Drivers and barriers to cross-border e-commerce: Evidence from Spanish individual behavior Telecommunications Policy Volume 42, Issue 6, July 2018, pp. 464-473.
3. Gamarello Thomas, "The Evolving Doctrine of Unconscionability in Modern Electronic Contracting" (2015), Law School Student scholarship, Paper 647.
4. Gowri Nair. A & K.M. Aiswarya, Emerging Trends of E-Commerce & Challenges to the Consumer Protection Act, 1986/2015 School of Legal Studies, CUSAT <https://www.lawctopus.com/academike>
5. Nicoleta Andreea, Consumer protection in electronic commerce, Bulletin of the Transylvania University of Braşov • Series V • Vol. 9 (58) No. 1 – 2016.
6. Omstead v. Dell, Inc, 594 F.3d 1081 (9th Cir. 2010).
7. Popescu, Gheorghe H, E-Commerce Effects on Social Sustainability, (2015) Economics, Management and Financial Markets, Vol.10, No.1.
8. Robert A. Hillman, Consumer Internet Standard Form Contracts in India: A Proposal (2017) 29 NLSI Rev. pp. 71-85.
9. Tricome v. eBay, Inc., 2009 WL 3365873 (E.D. Pa. October 19, 2009).

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