THE ENFORCEABILITY OF ELECTRONIC CLICK WRAP AND BROWSE WRAP AGREEMENTS

Srishti Aishwarya Shrivastava[*]

Abstract

The paper discusses the enforceability of the browse 'wrap'/'clickwrap' agreement in light of balance of bargaining power and the principle of the contract of adhesion. The author argues that e-contracts as contract of adhesion are generally interpreted as binding in nature if adequate notice of the terms has been provided. In case of business to customer dealing, however, courts are more solicitous when interpreting such contracts and strike down the validity their validity in favour of equity. Electronic contracts irrespective of their nature are required to call for the adequate notice of the terms for the enforcement of the contract. The author concludes that enforceability is a matter contingent on the terms of an agreement and the treatment provided to it.

[*]Srishti Aishwarya Shrivastava is a postgraduate student at National University of Singapore. The author may be reached at srishti@nujs.edu.

I. INTRODUCTION

The standard terms and conditions administering the transactions online are often in the form of electronic contracts. Electronic contracts as stated in UNCITRAL Model Law on Electronic Commerce indicates "an offer and the acceptance of an offer … by means of data messages"[1] and entails the contracting system where one or both parties act through machines.[2]

The electronic contracts habitually are in nature of browse wrap or click wrap agreement. [3] In case of click wrap agreement, the party generally clicks on "I agree" or similar icon to evince acceptance. While in web wrap agreement, the website typically has its "terms of use". This paper discusses the enforceability of electronic contracts: specifically the browse wrap agreement's set of terms and conditions.

Such agreements are more often than not the standard contract of adhesion, available on a take - it or leave - it basis. The standard electronic contract transaction involves certain system dependant and transaction specific uncertainty. The system dependant precariousness encompasses technical problems entailing the legal norms. The actual formation of contract in electronic medium is one major issue in this respect. On the other hand, the transaction specific problems result from asymmetry of information between the parties. The party agreeing to such standard contract of adhesion may not have information about the terms of use. Further, the choices of the user are rather limited owing to the 'as is' nature of the contract. Further

[1]UNCITRAL Model Law on Electronic Commerce, 1996, c 3, a 11, https://www.uncitral.org/pdf/english/ texts/electcom/05-89450_Ebook.pdf.
[2]ICC Guide for E-Contracting, B4, http://www.iccwbo.org/products-and-services/trade-facilitation/tools-for-e-business/.
[3]Electronic commerce has various models including business to business, customer to customer, peer to peer and business to customer. This paper while talking about e- commerce, focuses on the e- commerce aspect in relation to business to customer dealings. *See* Corritore.

concerns exist in relation to willingness and the ability of the parties to perform the contract.[4]

The paper discusses the balance of bargaining power and the principle of adhesion. E-contracts as contracts of adhesion are generally interpreted as binding in nature if adequate notice of the terms has been provided.[5] In case of business to customer dealing, however, courts are more solicitous while interpreting such contracts and would strike down the validity of such contract in favor of equity.[6] Electronic, a 'browse-wrap' standard agreement or otherwise, are required to abide by contractual norms and call for the adequate notice of the terms and lack of unconscionability, for the enforcement of the contract. In the event, the terms of such contract are unconscionable it can be brought to question.[7] The enforceability is therefore a matter contingent on the terms of an agreement and the treatment provided to it.[8]

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[4]Sonja Grabner-Kraeuter, *The Role of Consumers' Trust in Online-Shopping*, 39 EBEN 43 (2002).

[5]Francis J. Mootz III, *After the Battle of the Forms: Commercial Contracting in the Electronic Age*, SCHOLARLY WORKS 27 (2008), http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1026&context=facpub [hereinafter Mootz]; *See also* Burcham v. Expedia, Inc., W.L. 586513 (E.D.Mo. 2009); Major v. McCallister, 302 S.W.3d 227 (Mo.Ct.App. 2009); Scherillo v. Dun & Bradstreet, Inc., 684 F. Supp. 2d 313, 316 (E.D.N.Y. 2010); Tradecomet.com LLC v. Google, Inc., 693 F. Supp. 2d 370 (S.D.N.Y. 2010).

[6]Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006-2007), at 476 [hereinafter Lemley].

[7]Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005); Aval v. Earthlink, Inc., 36 Cal. Rptr.3d 229 (2005).

[8]PAMELA TEPPER, THE LAW OF CONTRACTS AND THE UNIFORM COMMERCIAL CODE 470 (3d ed., Delmar Cengage Learning: United States, 2014).

II. STANDARD CONTRACT OF ADHESION

An adhesion contract is a standard form contract that is offered to buyers on a take it or leave it basis, typically by a party with superior bargaining power.[9] Prof. Todd Rakoff listed seven elements of standard form contract: (a) a contract with myriad terms, (b) drafted and proposed by one party to the transaction, usually the one with higher bargaining power that is the business corporation, (c) such business entity carries out similar dealings on regular basis, (d) the contract is provided on take-it-or-leave- it basis, (e) consumer usually agree to such standard form contract, (f) in comparison to the business entity, the consumer engages in such transaction infrequently and (g) typically the principal responsibility of the consumer is to provide payment.[10]

Contracts of adhesion are acknowledged to be an integral and imperative component of economy.[11] In the wider market, agreements cannot be individually negotiated; therefore, standard agreements are used.[12] Standard contracts have been around before the advent of electronic age and for instance one can look at banking and insurance[13] transaction and in tenders for contracting.

With the advent of internet, transactions are experiencing a gradual shift from physical format to the electronic one.[14] The move from

[9]Batya Goodman, *Note, Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 (1999), at 324.
[10]Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96:6 HARV. L. REV. 1174 (1983), at 1177.
[11]Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577 (2007), at ¶57.
[12]Dan Streeter, *Into Contract's Undiscovered Country: A Defense of Browse-Wrap Licenses*, 39 SAN DIEGO L. REV. 1363 (2002), at 1368 [hereinafter Streeter].
[13]*See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 MINN L REV 1263 (2010).
[14]*See* Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677 (2004), at 712-14 [hereinafter Friedman].

"bricks-and-mortar retailer" to the online sphere retains essential contractual obligations. The customer's action of clicking to put things in shopping cart to buy is web paradigm of conventional buying option. Contractual obligation in an e- contract can possibly follow two paradigms. In the **first**, the website can offer the good at a charge, consumer selects it and the sale is consummated. The **second** option is further supplements the conditions of sale with return policies, warranties et cetera and is prone to be boilerplate in nature.[15]

The websites by and large have its own boilerplate terms and conditions for usage typically in form of the browsewrap agreement or clickwrap agreement.[16] A clickwrap agreement is the one where the consumer clicks on an "I accept" icon or click-check an unchecked box for validating the agreement.[17] The icon can be placed before the consumer completes the transaction.[18] Browsewrap or Web wrap agreements on the other hand are mostly inconspicuous. The terms and conditions are listed on a link accessible from the website.[19] The electronic and paper standard contract of adhesion is characteristically similar in many ways. Consumers by and large agree to the terms and conditions without reading them given they lack bargaining power and the understanding of the legal terms.[20]

However, it leads to concern over fairness of contract. It is argued that websites can draft one sided contracts and put them in the website in an obscure and equivocal fashion, so that customers continue to shop

[15]Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail* Contracting, 108:4 COLUM L. REV. 984 (2008), at 986, 988.
[16]*Id*. at 1011.
[17]Ryan J. Casamiquela, *Contractual Assent and Enforceability: Cyberspace*, 17:1 BTLJ 475 (2002), at 475, 476.
[18]*See* Download Java For Windows, http://java.com/en/download/chrome.jsp.
[19]Jennifer Femminella, *Online Terms and Conditions Agreements: Bound by the Web*, 17 ST. JOHN'S J. LEGAL COMMENT 87 (2003).
[20]Kunz, *supra* note 18, at 290.

at their website unhindered and unaware.[21] However, barring internet contracting owing to its click and browse nature can have "untold effects on the future of contracting in the digital arena".[22]

III. NATURE OF BROWSE WRAP AGREEMENT

Terms of use on a website has both legal and commercial tangent. The myriad functions it serves including governing the usage of a website and transactions carried out on the website often leads to its validity being questioned. Answers to such question are contingent on the presence and quality of contractual intention[23] and presentation of such terms.[24]

The term browse wrap was coined in the case of *Pollstar v. Gigmania Ltd*.[25] The terms of the agreement were written "in small grey print on a grey background on the home page" without underlining as is the general practice to show a hyperlink. Court acknowledged that such terms may not be visible. However, the court did not pronounce the agreement to be unenforceable.[26]

Though click wrap agreements are more explicit and pose lesser enforceability concerns,[27] web based businesses frequently favor browse wrap agreement. Almost all the websites have terms and conditions of use; however, the users are rarely required to expressly provide consent to it via clickwrap agreement. Browse wrap

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[21]*Id.*
[22]Streeter, *supra* note 12, at 1377.
[23]Lemley, *supra* note 6.
[24]*See* Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the 'Reasonably Communicated' Test,* 77 WASH. L. REV. 481 (2002), at 498-99.
[25]Pollstar v. Gigmania Ltd., 170 F.Supp. 2d (E.D.Cal. 2000).
[26]*Id*. at 977, 981.
[27]Mootz, *supra* note 5.

agreement are perceived as user friendly, providing ease of access to the consumers without bombarding them with legalese.[28]

IV. VALIDITY AND ENFORCEABILITY OF BROWSEWRAP AGREEMENTS

For greater clarity, we shall analyse real contractual terms. Zalora, a Singapore based online shopping website provides in its contract that:

> *6.2 (a): "the information set out in the Terms and Conditions and the details contained on 'Zalora' do not constitute an offer for sale but rather an invitation to treat. No Contract in respect of any Products shall exist between you and us until we have shipped the Products to your address."*[29]
>
> *6.2(c): "An order is only considered accepted by us upon your order being shipped to the delivery address provided by you".*[30]

The Zalora Terms and Conditions of Use, negates formation of contract until the shipping of the product. Would a condition of this sort be valid? This section of the paper discusses the validity of electronic contracts- under the statutory and judicial paradigm with the help of legislations and case laws under certain jurisdictions in this regard.

A. Electronic Contracting: The Statutory Stance

[28]Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36:1 CAMPBELL L. REV. 31. (2014).
[29]Zalora Terms of Use, http://www.zalora.sg/terms-of-use/.
[30]*Id.*

Various countries and international organizations, taking note of the radical shift towards electronic contracting, 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")**.

1. <u>Formation of Electronic Contract</u>

"The process of formation of contract is a process of communication."[31] The UN Convention defines electronic communication as "any communication that the parties make by means of data messages."[32] A proposal to contract via electronic medium not specifically addressed, but accessible generally to parties making use of such electronic system would not constitute an offer but an invitation to make offer, unless stated otherwise.[33] Given the wide array of products that online businesses sell, it is only prudent to provide for the acceptance of the offer in accordance with their terms and conditions.

Usually, in the case of e-contracts, the contract comes into existence when the offeror acknowledges the acceptance of the offer by "means of a direct response on the website or by a subsequent email, which is called the 'information duty".[34] Once the offer has been accepted, a contract is formed and it's no longer in realm of invitation to treat. When an offer is accepted leading to formation of contract is in realm

[31]Wolfgang Hahnkamper, *Acceptance of an Offer in Light of Electronic Communications*, 25 JOURNAL OF LAW AND COMMERCE 147 (2005-2006), at 147.
[32]U.N. Conventions on the Use of Electronic Communications in International Contracts, 2005, c II, a 4(b) [hereinafter Conventions on the Use of Electronic Communications].
[33]*Id.* at c III, a14; Singapore Electronic Transactions Act, 2010, c 88, § 14.
[34]Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China*, ROUTLEDGE RESEARCH IN IT AND E-COMMERCE LAW: UNITED STATES (2011), at 42.

of the terms and conditions drafted by the business entity. For instance, Clause 6.2 of Zalora denies formation of contract until the product has been shipped to the consumer's address.[35] Zalora responds to the order by mechanism of e-mailing the consumer, the receipt of the order, followed by another e-mail when the order is shipped. The contract would thus come in place when the consumer receives the e-mail acknowledging shipment of the ordered good. Such formation of contract is irrespective of when the payment is made- that is before the delivery or on delivery.

The question that seeks an answer now is whether such terms and conditions as stipulated by Zalora valid. It can be averred that when a person buys a product on a website, it evinces her consent to the terms and conditions of the website, and the receipt of the acceptance of the offer, denotes formation of a contract. The actual formation of the contract, however, is contingent on the notice or knowledge of the existence of such terms and conditions provided to the user, as elucidated later.

2. *Validity of Electronic Contracts*

(a) International Conventions:

UNCITRAL Model Law affirming the validity of the e-contracts state that in the event "data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose".[36] UN Convention recognizing e- contracts state that a contract cannot be "denied validity or enforceability on the sole ground that it is in the

[35]*Supra* note 36.
[36]UNCITRAL Model Law on Electronic Commerce, 1996, c 3, a 11.

form of an electronic communication."[37] Likewise as is stated in UN Convention, and UNCITRAL Model Law, EU Directives categorically provide that a contract cannot be denied effectiveness and validity owing to the fact that its concluded using electronic means.[38] None of these laws, deny validity to variants of electronic contract, on the basis of their form, but provide a general dictate that electronic contracts per se are valid. The legitimacy of the browsewrap agreements ought to be therefore weighed on the scale of conventional contractual paradigm and the laws hereunder.

(b) United States on Electronic Contracts:

U.S. developed Uniform Electronic Transaction Act ("**UETA**") to aid transaction using electronic records.[39] Section 14 lists that a contract is formed owing to interaction between electronic agent and individual when the individual deliberately takes action that completes the transaction or causes performance.[40] The individual consequently, if aware of the terms and conditions of a browsewrap agreement, acquiesce to it, carries on with the transaction, that individual would be subject to such agreement.

United States further formulated Uniform Computer Information Transactions Act ("**UCITA**") to deal with the e- contracts using computer systems, and provides for provisions similar to UETA. UCITA focuses on consensus as the basis of contract, and emphasizes that "a contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties

[37]Conventions on the Use of Electronic Communications, *supra* note 32, c 3, § 8(1), *see also* c 3, a 12: A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.
[38]Electronic Commerce Directive, Directive 2000/31/EC, s 3, a 9(1).
[39]Uniform Electronic Transactions Act, 1999, § 6 [hereinafter UETA].
[40]*Id.* at § 14(2).

or operation of electronic agents which recognizes the existence of a contract."[41] When parties on both sides are represented by electronic agents, a contract is formed when their interaction leads to process that signifies acceptance of an offer.[42] If the communication is between electronic agent and individual, "a contract is formed if the individual takes an action or makes a statement that the individual can refuse to take or say and that the individual has reason to know will 'indicate acceptance'".[43]

A party acquiesces to the standard term of contact by "manifesting assent". Such terms thereafter become part of the contract, irrespective of whether the party agreeing to such terms has knowledge or understanding of such terms.[44] The assent in this regard is manifested, if the person or electronic agent having the knowledge or the opportunity of such terms, indicate assent to it through conduct or statements which denotes consent.[45]

Thus, according to UCITA, party in case of electronic standard contract, if holds the knowledge of such terms and conditions or is aware of existence of such conditions, would be held to the contract, if acted in accordance with what would constitute a contract as per such terms and conditions.

(c) Singapore on Electronic Contracts:

Singapore has the Electronic Transaction Act ("**ETA**") for regulating electronic transactions. Drawing from the UN Convention, Section 11 states that a contract cannot be "denied validity or enforceability" on

[41]Uniform Computer Information Transactions Act, 2002, § 202(a) [hereinafter UCITA].
[42]*Id.* at § 206(a).
[43]*Id.* at § 206(b).
[44]*Id.* at § 208.
[45]*Id.* at § 112.

the ground that electronic means were used for the same.[46] With regard to agreement, ETA states that the "consent may be inferred from the conduct of the parties".[47]

The UCITA and ETA therefore effectively validates the browsewrap agreements, if the user is manifesting assent to it[48] after knowing or reviewing the terms and conditions, through conduct or statement.[49]

B. *Electronic Contracting: Judicial Stance*

Courts generally do uphold the validity of the e- contracts. "The quintessential approach of the law is to preserve rather than to undermine contracts."[50] In *Chew Kin Keong v. Digilandmall.com Pte. Ltd.*,[51] Singapore High Court held that, while deciding a case, it considers the need to "observe the principle of upholding rather than destroying contracts, facilitate the transacting of electronic commerce, and reach commercially sensible solutions while respecting traditional principles '….'"[52] U.S. courts today, in various circumstances have validated the document business provides in name of contract in form of click wrap, browse wrap or web wrap agreement or as Lemley puts it as "Terms of Use".[53] For instance, in *Hotmail Corp. v. Van Money Pie, Inc.*,[54] the court held that the defendants were bound to the Terms of Service posted on the website when they clicked "I accept."

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[46]Singapore Electronic Transactions Act, 2010, c 88, § 11(2) [hereinafter SETA].
[47]*Id.* at c 88, § 5.
[48]UCITA, *supra* note 41, § 208.
[49]*Id.* at § 112; SETA, *supra* note 46, c 88, § 5.
[50]Chew Kin Keong v. Digilandmall.com Pte. Ltd. [2004] 2 S.L.R. (R).
[51]*Id.*
[52]Chew Kin Keong v. Digilandmall.com Pte. Ltd. [2004] S.G.H.C. 71, ¶103.
[53]Lemley, *supra* note 6; *See also* Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005); Recursion Software, Inc. v. Interactive Intelligence, 425 F.Supp.2d 756 (2006); Salco Distributors v. iCode, Inc., 2006, M.D. FLA.No. 8:05-CV-642-T-27TGW; Mortgage Plus Inc. v. DocMagic Inc., 2004 US Dist. LEXIS 2014; I-Systems Inc. v. Softwares, Inc., D. Minn No. Civ. 02-1951(JRT/FLN) (2004).
[54]Hotmail Corp. v. Van Money Pie, Inc., W.L. 388389 (N.D.Cal.: 1998).

1. <u>*Legitimacy of Browsewrap Agreement: Notice of the Terms of the Agreement*</u>

Courts have held the party accountable to browse wraps agreement if it's established via facts that the concerned party knew about the terms of use and has frequently used the website.[55]

Christina L. Kunz et. al. have put forth fulfillment of the following four components for the validity and enforceability of browsewrap agreements:

> *"(i) The user is provided with adequate notice of the existence of the proposed terms, (ii) The user has a meaningful opportunity to review the terms, (iii) The user is provided with adequate notice that taking a specified action manifests assent to the terms, (iv) The user takes the action specified in the latter notice."*[56]

In *Dell Computer Corp. v. Union des Consommateurs,*[57] the Supreme Court of Canada held that adhesion contracts are binding irrespective of explicit assent to the terms of contract from the consumer if the terms of contract are presented for review.[58]

In the event, the consumer is oblivious to the fact that browsewrap agreement exists; it cannot possibly review it or know that her particular action constitutes consent to the agreement.[59] Section 113 of UCITA in this regard provides that "a person has an opportunity to

[55]Cairo Inc. v. Crossmedia Services Inc., W.L. 756610, (N.D. Cal.: 2005), at 4.
[56]Kunz, *supra* note 18, at 281.
[57]Dell Computer Corp. v. Union des Consommateurs, (2007) S.C.C. 34 (Can. LII), at 100-101.
[58]*See* Philippa Lawson, *Browse-Wrap Contracts and Unfair Terms: What the Supreme Court Missed in Dell Computer Corporation v. Union des consommateurs et Dumoulin,* 37 REV. GEN. 445 (2007).
[59]Kunz, *supra* note 18.

review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review".

Clear language and unequivocal notice of the terms of contract via hyperlink or otherwise is more likely to be construed as a binding contract. If the hyperlink for the terms and conditions categorically state that browsing the website constitute consent to its policy[60] will probably be seen as more informative and taken seriously than a mere hyperlink stating "terms of use".[61]

In *Effron v. Sun Line Cruises, Inc.*,[62] the terms and conditions stated on the back of the cruise ship ticket were in question. Court held that the ticket very well communicated the terms with regard to dispute forum selection and was binding. Given that the warning, "Important Notice- Read before Accepting" was written in bold and in medium sized font on the ticket. However, if the notice is not brought to the terms and conditions or if it is written in a discreet inconspicuous manner, it cannot be said to be reasonably communicated and would not be enforceable. Court refuses to give effect to the agreement where prints of terms and conditions are too fine and illegible.[63]

In browse wrap agreement, the user is provided sufficient notice of the agreement, the actual review of the notice to evince consent is not required, given that the usage per se in most of these online businesses constitute consent.[64] It is deemed to be the responsibility

[60]Zara.com, http://www.zara.com/; Mango.com, http://shop.mango.com/preHome.faces;jsessionid= 6E4D71C9B535B635FA4759FA561F768B. The homepage of these website states in a clearly visible box that browsing the website constitutes assent to its cookies policy.
[61]Kunz, *supra* note 18.
[62]Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (1995), at 9.
[63]Kunz, *supra* note 18, at 292; *See* Yates v. Chicago National League Ball Club, Inc., 595 N.E.2d 570 (1992), at 581.
[64]Korobkin, *supra* note 18.

of the user consenting to the standard terms, to read and understand the terms of the agreement.[65] Though, given the nature of the agreement, the user consenting to the terms would be bound by it even if she has not read the terms and conditions.[66] The actual intention of the parties in a contract is irrelevant. A person's outward actions are assessed for the purpose of contract. A contract comes into existence "when there is, to all outward appearances, a contract. The intention is to be found in the apparent expression[67] accessed objectively by reviewing the exchanges between the parties.[68]

Therefore tangible consent is not mandated but is presumed. Assent is for that reason interpreted as acquiescence and not as an agreement per se.[69] Court would usually enforce the terms of such agreement subject to certain limitations including unconscionability as discussed later. The notion of consent is an imperative component of contracts, granting it the required legitimacy.[70]

2. *<u>In favor of Browsewrap Agreement, Reading the Unread: Are Webwrap Agreements/ Terms of Use Actually Read?</u>*

Terms and conditions of a browsewrap or similar agreement are often left unread even if they are available and made visible. The existence of browse-wrap agreement at the bottom of most of websites is undeniable. Such conditions are mostly visible, depending on size of

[65]Upton v. Tribilcock, 91 U.S. 45 (1875) [hereinafter Upton].
[66]Kunz, *supra* note 18, at 296.
[67]Storer v. Manchester City Council, [1974] 3 All. E.R. 824, at 828. *See* Elizabeth Macdonald, *When is a contract formed by the browse-wrap process?* 19 INT'L J.L. & INFO. TECH. 285 (2011).
[68]Shogun Finance v. Hudson, [2003] U.K.H.L. 62, ¶ 123.
[69]*See* Nancy Kim, *Clicking and Cringing: Making Sense Of Clickwrap, Browsewrap And Shrinkwrap Licenses*, http://law.stanford.edu/wpcontent/uploads/sites/default/files/event/266730/media/slspublic/Kim_clicking_and_cringing.pdf.
[70]Lemley, *supra* note 6, at 465.

the screen. Therefore, it is not easy to assert ignorance of such terms and conditions forming the browsewrap agreement.[71]

The fine prints are often ignored with the thought that the understanding of the terms and conditions of such agreement would not be consequently required.[72] Restatement (Second) of Contracts in comments to **§** 211 lucidly avers that, "a party who makes regular use of standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. Customers do not in fact ordinarily understand or even read the standard terms".[73]

It is therefore averred that "judges, regulators and operators may have to resign themselves to the fact that irrespective of the technology used and irrespective of the amount of information provided users will not read it".[74] Given that most consumers provide consent to the conditions without appraising the terms and conditions of the agreement, the requirement of overt consent for online contracting cannot be assigned much importance. [75] Though, it's not necessary that such terms and conditions will be legally binding in nature, their existence or knowledge, it is argued, cannot be subject to pretence of ignorance.[76]

3. *The Unbinding of the Browsewrap: When is the agreement not valid?*

[71]Lemley, *supra* note 6.
[72]Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990), at 598.
[73]Restatement (Second) Of Contracts, 1979, § 211.
[74]Eliza Mik, *Terms of Use: Reflection on a Theme*, Asian Law Institute 11th Conference, 28-30 May 2014, Kuala Lumpur, (2014), http://ink.library.smu.edu.sg/sol_research/1299/.
[75]37 RevGen citing STEPHEN M. WADDAMS, THE LAW OF CONTRACTS 313-314 (5th ed., Toronto, Canada Law Book) (2005), ¶ 441.
[76]Lemley, *supra* note 6.

(a) Lack of notice of the terms and conditions constituting agreement:

The contractual law applies to the contract of adhesion as well, be it an electronic or paper one, irrespective of the lack of bargaining power and standard nature of the contract.[77] In *Fteja v. Facebook* court held that,

> *"while new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."*[78]

One pertinent problem with regard to the browsewrap agreements arises when the notice of the terms is not given clearly to the user, thus undermining the consent user is generally deemed to provide via conduct. Courts would quash consent to adhesion contract if they are unfair, invalid under consumer laws, not brought to sufficient notice of the consumer and unacceptable under common law doctrine of unconscionability.[79] Under United States' UCITA, Section 206 states that in the event transaction occurred owing to fraud, electronic mistake etc., the court can grant apposite relief.[80]

The standard boilerplate contracts of adhesion are construed in the favor of weaker bargaining party.[81] In *AEB & Assocs. Design Group, Inc. v. Tonka Corp*., court held that an adhesion contract "will not be enforced against the weaker party when it is (1) not within that

[77]Kunz, *supra* note 18.
[78]Fteja v. Facebook, Inc., 2012 W.L. 183896 (S.D.N.Y. Jan. 24, 2012).
[79]Upton, *supra* note 65, citing STEPHEN M. WADDAMS, THE LAW OF CONTRACTS (5th ed., Canada Law Book: Toronto, 2005), ¶ 441.
[80]UCITA, *supra* note 41, § 206(a).
[81]Leon E. Trakman, *The Boundaries of Contract Law In Cyberspace*, 38 PUB. CONT. L.J. 187 (2008-2009).

party's reasonable expectations; or (2) is unduly oppressive, unconscionable or against public policy."[82]

Such restrictions keep a check on repressive, unfair and unconscionable terms and conditions of the contract. Courts construe agreements of that sort restrictively or repudiate them "on grounds that the dominant party misled the subservient party."[83]

As a general rule, parties to the contract are bound by it even though they may have made a mistake in entering into the contract.[84] Principles underlying a conventional oral or written contract apply to e- contracts as well.[85] As court held in *Specht v Netscape Communication Corporation*, "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."[86]

Thus, providing the notice of terms and conditions is integral for the manifestation of mutual consent, which would in turn decide the validity of the contract. In *Ticketmaster Corps v. Ticket.com,*[87] while dealing with web wrap agreement, court held that "it cannot be said that merely putting terms and conditions 'on the website' creates a contract with anyone using the website."[88]

In *Specht v. Netscape Communications Corp*.,[89] Netscape tried to pursue arbitration as per the terms of the web wrap agreement

[82]AEB & Associates Design Group, Inc. v. Tonka Corp., 853 F. Supp. 724 (S.D.N.Y. 1994).
[83]*Supra* note 93.
[84]Chwee Kin Keong v. Digilandmall.com Pte Ltd, S.G.C.A. 2 (2005), ¶30-31.
[85]*Id*. at ¶ 29.
[86]Specht v. Netscape, 306 F.3d 17 (2d Cir. 2002), at 28 [hereinafter Specht].
[87]Ticketmaster Corp. v. Tickets.com, Inc., 2000 U.S. Dist. LEXIS 4553 [hereinafter Ticketmaster].
[88]*Id.*; *See also* Tara Zynda, Ticketmaster Corp. v. Tickets.com, Inc. - Preserving Minimum Requirements of Contract on the Internet, 19:1 495 (2004).
[89]Specht, *supra* note 86, at 596.

provided on the home page of website. United States Court of Appeal for the Second Circuit held 'The terms and conditions are not visible to the user for them to even agree upon them and by any means it cannot be said that user agreed to such terms and conditions as there is no requirement of affirmative consent'.[90]

In *Re Zappos.com, Inc*.,[91] the Terms of Use of Zappo was held to be a browsewrap agreement where "a website owner seeks to bind website users to terms and conditions by posting the terms somewhere on the website, usually accessible through a hyperlink located somewhere on the website".[92] The United States Nevada District Court held that "a party cannot assent to terms of which it has no knowledge or constructive notice, and a highly inconspicuous hyperlink buried among a sea of links does not provide such notice".[93] The notice of the terms is therefore important for the validity of the browsewrap agreement.

(b) Unconscionability of the terms of the agreement:

For a valid contract all the components required for it should be fulfilled, including consensus ad idem in form of mutual consent, consideration and last but not the least, lack of unconscionability.[94] The contract would not be valid if the terms of the contract are

[90]*Id.*
[91]In Re Zappos.Com, Inc., Customer Data Security Breach Litigation, 2012, 3:12-cv-00325-RCJ-VPC,
http://www.americanbar.org/content/dam/aba/publications/litigation_news/zappos-data-security-breach.authcheckdam.pdf.
[92]*Id.*; *See also* Van Tassell v. United Marketing Group, 795 F.Supp.2d 770. 792: a user only encounters the Conditions of Use after scrolling to the bottom of the home page and clicking the 'Customer Service' link, and then scrolling to the bottom of the Customer Service page or clicking the 'conditions of Use, Notices & Disclaimers' link located near the end of a list of links on the page.
[93]*Id.*
[94]Kunz, *supra* note 18.

unconscionable.[95] The unconscionability doctrine authorizes the court to deny validity to the unconscionable clause or the whole contract encompassing such clause.[96] "Equity relieves party of unconscionable bargain".[97]

Unconscionability is branched into substantial and procedural one.[98] Under contractual law jurisprudence, a term can come under the scanner of procedural unconscionability if it's inconspicuously placed on the website in a manner that complying party is not made aware of it.[99] Procedural unconscionability concerns the freedom to acquiesce. For instance, exploiting the lack of explicit consent of the consumer by providing inconsiderate terms and conditions that is obscurely put up somewhere on the website, would fall in the ambit of procedural unconscionability.[100] The consumer is required to be given reasonable notice of the terms of the agreement[101], for the consumer to abide by it, in absence of which, the contract would be unconscionable and unenforceable.[102] Substantive unconscionability concerns the flesh of the contract.[103] A clause can be said to be suffering from substantive unconscionability if it's unduly harsh, unfavorable or shocks the conscience.[104]

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[95]UCITA, *supra* note 41, § 209.
[96]United States Uniform Commercial Code, 2002, a 2, § 302; UCITA, *supra* note 41, § 111.
[97]Singapore Commercial Law, c. 8, § 8.11.10., http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8.
[98]Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967), at 488.
[99]Streeter, *supra* note 12, at 1377.
[100]Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002), at 456-457 [hereinafter Hillman].
[101]Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F2d 11 (2d Cir 1968).
[102]Specht, *supra* note 86; Ticketmaste, *supra* note 87.
[103]Hillman, *supra* note 113, at 457. *See also* Wayne R. Barnes, *Toward A Fairer Model Of Consumer Assent To Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH L. REV. 227 (2007).
[104]Korobkin, *supra* note 18.

The principle behind unconscionability doctrine is to not strike down the contract owing to its standard, non-negotiable nature but "prevention of oppression and unfair surprise".[105] It is important to note that usage of unconscionability for striking down the contract, is nevertheless used strictly, "reserved for harshest and severest terms".[106]

(c) Principles of Fairness and Equity:

The browsewrap agreement is further supposed to be weighed on the scale of equity[107] and fairness of the terms.[108] Equity owing to its dynamic nature allows the courts to meet the end of justice.[109] The contract ought not to be fraudulent or misrepresentative for it to be effective. Further, the contract would be invalidated if it is caused by coercion, mistake or duress.[110]

Singapore Court of Appeal in *Chwee Kin Keong v. Digilandmall.com Pte Ltd* held that "the court would, in the exercise of its equitable jurisdiction, be entitled to intervene and grant relief when it is unconscionable for the non-mistaken party to insist that the contract be performed".[111]

[105]UCITA, *supra* note 41, § 111. Comment 2: Basic Policy and Effect; *See* Intel Corp. v. Integraph, 195 F.3d 1346 (Fed. Cir. 1999).
[106]*See* Wayne R. Barnes, *Toward A Fairer Model Of Consumer Assent to Standard Form Contracts: In Defense Of Restatement Subsection 211(3)*, 82 WASH L. REV 227 (2007).
[107]Chwee Kin Keong v. Digilandmall.com Pte Ltd., S.G.C.A. 2 (2005) [hereinafter Chwee Kin]. Equity ought to intervene to set aside the purchases [….] 'constituting' sharp practices.
[108]Singapore Commercial Law, c. 8, § 11, http://www.singaporelaw.sg/sglaw/laws-ofsingapore/commercial-law/chapter-8.
[109]Chwee Kin, *supra* note 107, ¶ 528-529.
[110]UCITA, *supra* note 41, § 116.
[111]Chwee Kin, *supra* note 107.

V. CONCLUSION

It is imperative to let the user be made aware that the transaction on the website is governed by the terms of use. If the terms and conditions provided on a website are fairly visible to the consumer, the consensus ad idem required for formation of contract would be deemed as existent. The consumer cannot later on claim that her conduct to shop from such website does not constitute consent, if that's what the consent connotes in accordance with the website's terms and conditions. The online website has the sanction to cancel the order until the point of delivery, as is the case with Zalora, if that is what its terms and conditions provide, and user with the notice of such terms, acted on it.

To ensure effectiveness of browsewrap agreement, as a matter of principle, it must be mandated to use technology effectively to make the users aware of such conditions.[112] The ball nevertheless remains in the court of the buyer, if the terms are conscionable or such terms are discretely placed in some dubious corner of the website, not visible to the consumer. The courts are generally more solicitous towards the consumer[113] and would decide in favor of the consumer if the terms are found to be unfair and unconscionable.[114] Further, the consumer always has the option and freedom to decide whether she wants to get into a contract of adhesion or not.[115] In sum and substance, consumers can take cover under the fairness of contracting terms- an important paradigm of any contractual arrangement. Reliance can be placed on unconscionability of the contract for striking down along with the consumer protection laws. Adhesion contract should therefore not be undermined if they are fair and efficient.

[112]Lemley, *supra* note 6.
[113]*Id.*
[114]Comb v. PayPal, Inc., 218 F Supp. 2d 1165 (N.D. Cal. 2002), at 1172.
[115]Kunz, *supra* note 18.