

CLICKWRAP, BROWSEWRAP, AND SHRINKWRAP AGREEMENTS IN INDIA

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INTRODUCTION

Browsing on social media, we come across websites that seem to fascinate us but also come along with technical terms and conditions that are to be accepted to have full access to the respective website. Without giving a second thought, we carelessly and recklessly give in our acceptance to the terms and conditions stated. We have no sense of security about which authority is receiving access to our private data and to what extent. These details are embodied within the hosts of these agreements, having higher bargaining power as compared to us, the clients.

CLICKWRAP AGREEMENTS

Clickwrap or Clickthrough Agreement/License is a form of electronic agreement that is used for software licensing, websites, application downloads, and other electronic media such as, downloading or installing software, purchasing an airline/railway/bus ticket, registration of an account on social media platforms, etc. These kinds of agreements are “take it” or “leave it” kinds of agreements. The bargaining power is limited and is not widely available. If the customer/client wants to avail of the service, he shall click on “I accept” or “I agree” or “Ok”. Similarly, if he wants to reject the service then he can simply click “Cancel” or close the window directly. Once dismissed, the customer/client cannot utilize the administration or item. “A clickwrap agreement is an online exchange in which a client must consent to terms and conditions before utilizing the item or administration. The terms and conditions of service or license might not be always visible on the same webpage or window, but they are always accessible before the client gives his acceptance or rejection.” Clickwrap agreements allow online organizations to set up contracts with various clients without arranging exclusively and personally with them. Clickwraps help organizations to spare electronic marks and implement extra provisions that are not presently available in India’s digital laws.

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Some companies, such as banking sites or apps, place the agreement that the customer/client has to sign on the page itself. This makes sure that the customer/client reads and understands before accepting the Terms of Services, thus reducing the situations of dispute. Other companies require the customers/clients to offer affirmative assent like check a box, or leave initials at different places in the contract to call notice to certain essential clauses and affirm assent to them both individually, as well as assent to the entire agreement. This is common in leasing/renting agreements. Most social networking sites or apps layout multiple agreements that are accepted simultaneously through a single assent. These popular checkboxes generally have links to the agreement in reference, which is hosted on another page entirely.

Clickwrap Agreements facilitate transactions and are praised for their ease of utilization, enforceability, and validity. Few considerations should be followed:

1. ***Affirmative consent of the user*** – When a buyer or client taps a box to validate rather than withdraw his permission, this is known as active consent. The accept box is often pre-ticked and consented by the host, and the recipient must uncheck the box if he wants to refuse the agreement. Pre-ticking boxes are not only unethical and risky, but it is also illegal in certain nations.
2. ***Reasonable and Prominent notice of the Terms of Service*** – The terms of operation (ToS) must be displayed. Until pressing "I accept," customers/clients have an inherent right to familiarise themselves with the terms and conditions. Customers/clients are considered to have constructive experience in cases when they have offered their legal permission but have not read the TOS. The advantage of presenting the ToS in this way is that every rational individual may view and interpret it.
3. ***Easily understandable to the public*** – Terms of service and other online legal documents should be written in a way that a layperson or anyone without legal experience can interpret, grasp, appreciate, and commit to.
4. ***Bargaining Power*** – Clients/Customers have few choices other than agreeing on the terms of the agreement by clicking "I approve," or quitting the web by exiting or closing the tab. A clickwrap arrangement may be declared unenforceable due to abuse of authority. Contracts of adhesion or unfair purchasing authority are frowned upon under contract law. Due to a lack of negotiating power, eCommerce TOS are only

enforceable if they list the site's conditions simply and specifically. To access the web, eCommerce agreements do not require the customer to give away too much.

These electronic agreements are getting mainstream both domestically and internationally, requiring the clients/customers to be aware of the contents, agendas, terms, and conditions, etc. of the agreement to prevent heavy losses in terms of money and time fighting a case. The most basic precaution is to read and understand the contents and the terms of the agreement. The client/customer should give a cursory glance to be aware of what and how much data will be shared with the host party. Contracts of a higher priority, such as opening an online bank account or ordering costly products and services online, must be carefully read before approval. If a contract does not have certain terms and conditions, the contract may be challenged in a court of law. Most Clickwrap Agreements contain a provision for arbitration or settlement, which is normally held in the host's country or where the host lives. Such words can be emphasized when arguing that the deal is overly discriminatory because it offers the host an unfair benefit in terms of saving money on travel and other expenditures. The faction with fewer negotiating influences requires insufficient resources to fly to a foreign nation and observe court hearings.

BROWSEWRAP AGREEMENTS

A browsewrap agreement is a type of license agreement that governs access to and usage of materials on a website or in a downloadable product. A browse-wrap agreement does not enable you to demonstrate your agreement to the terms and conditions by checking a box that says "I accept." Rather, a website consumer consents merely by utilizing the product, such as by visiting a certain website page or installing apps. Browse-wrap deals conceal the provisions of the contract such that they are not visible before the commodity is bought.

In Browse Wrap agreements, a hyperlink is mentioned on the website which contains the terms and conditions regarding the usage of the website. These terms and conditions generally claim that by the usage of the website, the person has voluntarily consented to be bound by the terms and conditions mentioned. For example, e-commerce websites such as Amazon, Flipkart, Myntra, Snapdeal, etc, display a hyperlink on their websites under the tab of "Terms and conditions" or "Terms of Use". By clicking the hyperlink, it directs the client/customer to a page displaying the terms and conditions in detail. These terms and

conditions contain a precise statement, stating that by accessing, browsing, or using the website, the client/customer indicates his consent to all the terms and conditions of the website.

SHRINKWRAP AGREEMENTS

The Shrink Wrap Agreement is similar to the Click Wrap Agreement except that it is a physical document. The terms and conditions are included in the purchased kit. Shrink Wrap contracts are those agreements that contain the terms and conditions of the usage of the product. They are usually present on the manuals or the outer plastic layer of the software products that the client/customer purchases. “For example, a CD- ROM. As soon as when the buyer opens the pack or unveils the CD, the contract is said to be concluded.”

These are “take-it-or-leave-it” contracts wherein the terms and conditions of the contract are set up by the host party while the client/customer cannot negotiate more favorable terms. The acceptance of the terms and conditions on the part of the client is implied when he opens the package or the bundle accompanying the product. “As digital distribution grows, shrink-wrap licenses are on the decline. To be the most effective, the box visible through the shrink-wrap should state that the software is copyrighted and the end-user shall be subject to the official terms and conditions of the agreement within the box. Finally, within the shrink-wrapped box, the full terms of the license are printed.” The major disadvantage concerning the enforceability and validity of such an agreement is the fact that while the customers' consent might be implied from the opening of the plastic packaging, there is no informed consent in the said matter per se, which results in the ambiguity about the validity and enforceability of the said agreement.

LAWS GOVERNING DIFFERENT TYPES OF E-AGREEMENTS

Presently in India, there aren't any precise and clear laws, provisions, and principles to deal with online contracts. However, these e-contracts are dealt with similarly to the traditional contract laws i.e., “Section 10 of Indian Contract Act, 1872. Information Technology Act, 2000 has been framed by the Indian Parliament to include within its ambit such online contracts. This act is based on UNCITRAL's Model Law on Electronic Commerce, 1996 (applicable in the United States) to deal with online contracts. The IT Act, 2000 mentions the

provision related to e-commerce, electronic contracts, and digital signature in India. It provides the legal structure for e-commerce by recognizing electronic records and e-signatures.” The legal validity of electronic contracts in India is stated in Section 10A of the IT Act, 2000. The contracts in India performed either electronically or digitally are considered legally valid, void, or voidable based on the provisions of various statutes such as:

1. Indian Evidence Act, 1872,
2. Indian Penal Code, 1860,
3. Reserve Bank of India Act, 1934,
4. Bankers Books Evidence Act, 1891

CASE LAWS

1. **LIC India vs. Consumer Education and Research Centre** - According to the Supreme Court, the contracting sides have unfair negotiating control. The Court determined that an Adhesion Contract exists where one side has more jurisdiction and an undue benefit over the other. Furthermore, the Supreme Court ruled that where the parties to a contract do not have equitable negotiating power, it shall strike down an unequal or unjust contract in accordance with Article 14 of the Indian Constitution, which guarantees equal protection of the law to its people.
2. **Trimex International FZE vs. Vedanta Aluminium Limited, India 2010** - In this situation, the Supreme Court decided that the contract provisions were discussed by email and that those communications constituted a binding contract that could be enforced. And if electronic contracts were unsigned and unregistered online, the Supreme Court affirmed their legality.
3. **Bhagwandas Goverdhandas Kedia vs. Girdharilal Parshottamdas** - It was decided that an oral contract is just as legitimate as a written contract if both meet the requirements of a valid contract. In this situation, it was determined that the ordinary approval of an offer and intimation is what makes a contract binding and that this intimation must be made by some outward manifestation. As a result, the

enforceability of e-contracts cannot be questioned in the absence of any relevant regulations.

4. **Interglobe Aviation Ltd. vs. N. Satichidanand** – In this situation, it was maintained that a user's failure to read the words would not excuse them from following the guidelines. The conditions of the Indigo Carriage were not considered by the High Court since citizens are not allowed to read the terms while purchasing a fare. The Supreme Court overturned this logic. In the case of shrink wraps, the consumer is forced to interpret the words.
5. **Infotech Software Dealers Association vs. Union of India** – The copyright of applications that depended on the Shrinkwrap software packaging was decided by the Madras High Court. It demonstrated how a DVD/CD produced can be included with more than one hardware and how time-consuming and complex it is to distribute physical copies of licenses to various places where clients are located.

CONCLUSION

The advent of increasing online agreements but limited statutory laws governing the legality of the same is a major concern today. A fair contract often demands that all sides have an equitable bargain for consideration and that all parties agree freely, although most online contracts are not voluntary so consent is determined by three factors: deception, misrepresentation, and error. Today, due to the Covid crisis, the world is going digital and people are adapting new and unconventional modes of getting into legally binding contracts which brings along a lot of skepticism. Be it a clickwrap, a browsewrap, or a Shrinkwrap agreement it is prudent for the client to be aware and informed to prevent indulging in fraudulent contracts. In India, the Cyber Law is not mature, stringent, and requires a lot of checks and amendments.

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