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Standard Form of Contracts in E-Commerce: Position at USA, EU and India

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ABSTRACT

A Standard form of Contract (SFC) is a contract between two parties which doesn't allow a scope for the parties to negotiate the terms of the contract concerned.The Article Tries to Compare the Standard Form of E contracts Of US and UK along with the Present Indian Scenario, the Approaches which led to the formation of Standard forms of Contract, the subsequent issues which arise when SFC are taken into the internet. The author also gives an insight on the new E-commerce rules released by the Department of Consumer Affairs and the impact it would have on E-commerce players.

Keywords: *E-Commerce Directive, Consumer, UETA, UCITA, unconscionable terms of contract*

I. INTRODUCTION

In India, most Contract Agreements are governed through Standard Terms which are incorporated in Standard Form Contracting (SFC). It is likely that SFC will continue to dominate the market given that advancements in technology and new developments in the field are adding improved practices in the market. For example, online contracting has been reaching new heights and its scope is increasing vastly.[2]

II. SCHOOLS OF THOUGHT

According to the basic principles of Contract Law, the formation of any contract is preceded by the process of negotiation by parties to the contract who exercise the liberty to enter into a contractual agreement. SFCs operate differently, in the sense that there is no room for negotiation and the other party can either accept the contract or leave it. The terms of an SFC are pre-determined, generally by the party that has more power in terms of bargaining

SFCs are rarely altered since consumers do not deal with contracts on a daily basis, unlike

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[2] 2004, total online consumer spending in the US rose by 26%, from $93.2 billion (in 2003) to $117.4 billion. See eMarketer.com, Online Consumer Spending Up in 2004, Jan.12, 2022, http://www.emarketer.com/Article.aspx?1003212. Consumer online spending in 2005 rose constantly, amounting to $143.2 billion. See Jack Loechner, Consumer SpendingOut of the Gate Fast in 2006, Feb. 8, 2006, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&artaid=39442. Total consumer online spending continued to increase in 2006. See, e.g., Metrics 2.0, http://www.metrics2.com/blog/2006/10/26/online consumerspending__to -hit 170 billion in 200.html (Oct. 26, 2021).

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businessmen who are deal in this area frequently.[3]

Law and Economics Perspective

According to this view both contracting parties use their ability that maximize efficient contracts accept assuming that SFCs substantially reduce transaction costs by eliminating negotiations over contractual terms. [4] Another benefit of SDCs is that it helps vendors in eliminating the need for training their agents/employees thereby cutting costs. It also improves business efficiency and serves as a check on the agents of the business who might provide various offers to the end consumer which are unfavourable to the business. SFCs also help in ensuring equality amongst all consumers as they are presented with the same contract (provided the business does not practice discrimination in terms of various contracts).[5]

Another benefit that accrues from is that any legal intervention in SFCs is considered an act of State Paternalism resulting in encroachment on the autonomy of the parties to contract. Some scholars state that businesses are in a better position to ascertain the content of SFCs since they engage in such business activities repeatedly[6]

III. THE NON-INTERVENTION APPROACH

The advocates of this approach agree to the fact that the terms of SFCs are not generally read by the consumers before entering into an agreement through purchase, sale, etc. However, the proponents of this approach believe that some consumers do read the provisions of the contract and do look for better alternatives and hence it should counter the disadvantaged position of the consumers. This logic prevents businesses from applying unfavourable terms in their SFCs due to the risk of losing such savvy consumers to market competitors that offer better contractual offers. Businesses generally respond to a segment of consumers and offer products and services according to their preferences, hence firms in competitive sectors are likely to avoid exploitation of consumers by adding self-serving provisions in SFCs[7]. By using this approach as the prevailing situation, policymakers should just

[3] Lucian A. Bebchuk & Richard A. Posner, One-Sided Contracts in Competitive
Consumer Markets, 104 MICH. L. REV. 827, 827 (2006) (stating, as a starting point, that "[tihe usual assumption in economic analysis of law is that in a competitive market without informational asymmetries, the terms of contracts between sellers and buyers will be
optimal").

[4] Since SFCs are utilized to minimize negotiation costs, individual exchanges are not a sufficient reason to reopen the bargaining terms, which were drafted in advance. Still, forms
typically, do leave blank spaces for salient and regularly variable aspects of bargains such as quantity, price, method of payment, and day of delivery. Such salient terms are not central to our analysis.

[5] ex ante discrimination, i.e., the sellers' ability to offer different contracts to different consumers. If the seller can identify sophisticated consumers and offer them better contracts, its incentive to draft fair contracts to all consumers diminishes. Vendors might engage in ex post discrimination as well, which implies that sophisticated or assertive consumers will obtain relief after a dispute arises whereas lay consumers will not. Assertive and sophisticated consumers-knowing the likelihood of relief later on-will not be motivated to read (let alone negotiate the alteration of) contract terms at time of contracting)

[6] Robert A. Hillman, *Rolling Contracts,* 71 FORDHAM L. REV. 743, 751 (2002).

[7] Alan Schwartz, Unconscionability and Imperfect Information: A Research
Agenda, 19 CAN. Bus. L.J. 437 (1991).

mandate the use of contracts that are shorter and written in layman terms thereby helping consumers to have an idea about the fairness of the terms of an SFC.

IV. TAKING SFC'S ONLINE

The agreements which are faced by consumers while availing services online are drafted by just one party i.e., the operator of the website. SFCs are generally not open for negotiation. Additionally, the major issue faced by consumers in online SFCs is the lack of a grievance mechanism. Unlike offline contracts where consumers can express their discontent with the agents, there are no such options available in the case of the automated system of online operators[8].

SFCs are required to provide a balanced allocation of risks and obligations for both parties and is also expected in online contracts. The fear of loss of savvy consumers in the competitive online markets is a powerful disincentive that prevents businesses from creating SFCs that are unfavourable to consumers. The Non-Interventionist approach also augments the ideals of the Internet Policy Doctrine, the proponents of which have supported the idea of the internet to be free and unregulated. Many scholars hold the view that the regulation of the internet will result in a lack of innovation as technology often outpaces regulations[9].

Savvy consumers can also know about the consequences of various SFCs through blogs, consumer forums, social media etc. Since the users of these forums are consumers, the information provided by them is devoid of legal language and is provided in simple terms so that it reaches fellow consumers[10].

V. THE ISSUE OF THE FREE RIDER

This issue pertains to the mindset of the average consumer who believes that SFCs of products of competing businesses are nearly identical and the exercise in reading and analysis of different contracts is futile.

VI. VENDOR'S MISPERCEPTION

A number of B2C websites provide a consumer feedback mechanism allowing the feedback to reach the concerned authorities. The competitors in the e-commerce marketplace have a number of incentives to provide structured access to consumers for providing feedback.

VII. DRAWBACKS OF NIA ONLINE

(A) Information Overload

It is said that the benefit of access to myriad information about the contract involved in

[8] In the US, courts frequently apply the doctrine of unconscionability in this context.
Other doctrines include, inter alia, unfair surprise, the duty to contract in good faith, the reasonable expectation doctrine, and the like. See, e.g., Robert A. Hillman & Jeffery J.
Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. REv. 429, 456
(2002).

[9] See John Perry Barlow, A Declaration of the Independence of Cyberspace, Feb. 8,
1996, http://homes.eff.org/-barlow/Declaration-Final.htm. For a discussion of this issue, see
JACK GOLDSMITH & TIMOTHY WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS
WORLD 20-22 (2006

[10] Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 938 (2006)
(noting that "legal terms [of SFCs] matter only when something goes wrong").

different kinds of transactions[11] is nullified by the presence of a huge number of online contracts that are present which leads to cognitive pressures on the consumers due to information overload[12]. The resultant effect of this is that the consumers scrutinize only the key terms in a contract and fail to analyse the contract holistically[13]. The other possibility is that due to the overwhelming amount of information, the consumer might end up ignoring the exercise of analysing the contract entirely.

(B) Solution

The types of forums discussed above allow consumers to rate their transactions with different businesses. Some forums combine the ratings given by different consumers provided on different factors into a single rating[14]. This is also supplemented by the elaborate accounts of interactions provided by the consumers. In this way, the problem of information overload can be overcome by taking the help of an aggregate rating.

(C) Considerations for Courts Intervention

The factors that courts should consider while analysing unfair provisions in SFCs are the particular transaction and dynamics of that market. It's irrelevant to consider whether the consumer has reviewed the consequences and information arising before and after signing the contract since businesses act on the overall consumer preferences and trends and not on a specific consumer.

Another factor that can assist the courts in arriving at a finding is the ease of finding information flows in the website of the business[15].

Circumstances that mandatorily require Intervention

a) **Recent or Frequent Modifications in the SFC**: Such amendments make the flow of information difficult as the consumer feedback and information on an amended SFC is rendered useless for the ex-ante consumers (as the consumer information on an older SFC is based on a different legal premise).

b) **Discrimination in Contractual Terms[16]:** Discrimination in terms of contracts

[11] For example, the ability to browse easily through the contract using various search functions.

[12] however, that according to some recent surveys, users are not overwhelmed when engaging in searches for information regarding commerce online. PEW INTERNET & AMERICAN LIFE PROJECT,

[13] Russell Korobkin, Bounded Rationality Standard Form Contracts, and Unconscionability, 70 U. CHI. L. REV. 1203, 1220 (2003).

[14] For a feedback system composed of four rated factors aggregated into an overall numeric rating of the vendor, see Epinions, http://www.epinions.com. These factors then aggregate into one overall rating to account for all consumers. The consumer can also post a written review of the vendor. We thank Eric Goldman for this information

[15] For instance, courts can examine whether relevant message boards and other points of virtual congregation are "visible" (as both sponsored and non-sponsored links) on relevant search pages, when keywords related to the vendor are submitted. However, such an inquiry must also take into account the forms of routes used by consumers to the vendors' website (i.e., how many consumers indeed pass-through search engines to get to the website, and in that way encounter these alternative sources).

[16] the sellers' ability to offer different contracts to different consumers. If the seller can identify sophisticated consumers and offer them better contracts, its incentive to draft fair contracts to all consumers diminishes. Vendors might engage in ex post discrimination as well, which implies that sophisticated or assertive consumers will obtain relief after a dispute arises whereas lay consumers will not.

leads to manipulation of the market dynamic which ensures that a sizable segment of consumers is able to benefit from the efforts of a small group of activist consumers or an organization. If contractual discrimination is practised by firms, then it puts most consumers in a disadvantageous position.

c) **Vendor's Attempts to Tamper with Data Flows:** Nowadays most businesses use various blogs, social media websites and forums to promote their products and services. However, differentiating between a legitimate forum and one which has been created as a façade to trick consumers through fake positive reviews is a big problem. These fake forums hinder the ex-post ex-ante flow of information thereby the SFCs of such businesses should be scrutinized more carefully [17].

d) **Difficulties in Reviewing the SFC** The phenomenon of ex-post ex-ante information flow depends majorly on the ability of the ex-post consumers to scrutinize the particular SFC as per their convenience. Prevention of such scrutinization by the business through various means stops the flow of ex-post ex-ante information. This is another scenario that mandates careful scrutiny.

e) "**Buried Provisions**" When the vendors apply certain provisions which are used sparingly or towards certain consumers then the ex-post-ex-ante flow of information will not happen[18]. In such cases reliance on savvy consumers pointing out such information is useless for providing an effective deterrence on the businesses from including self-serving terms.

VIII. POSITION IN US AND EU

Two jurisdictions namely the European Union (EU) and the United States of America (US) have different approaches to the creation of online contracts. Under the laws of the European Union. Under the EU laws, the focal points are Consumer Protection and Market Harmonisation. Under the US laws emphasis is on self-regulation and economics.

Overview of the US and EU approaches

In the US, two different statutes were enacted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), namely the Uniform Computer Information Transaction Act

Assertive and sophisticated consumers-knowing the likelihood of relief later on-will not be motivated to read (let alone negotiate the alteration of) contract terms at time of contracting.

[17] Several troubling instances indicate otherwise. According to news reports, one recent case took place in the folksonomy Digg.com. See Dan Mitchell, What's Online-Stuffing the Electronic Ballot Box, N.Y. TIMEs, Dec. 23, 2006, available at http://www.nytimes.com/2006/12/23/technology/23online.html. With regard to the proactive role law might be required to take regarding these matters, see Tal Z. Zarsky, Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows, FORDHAM INTEL. PROP. MEDIA & ENT. L.J., 741, 781 (2008) (indicating that such steps are already seriously contemplated in the UK, such as anti-sock puppet legislation).

[18] It is understood that applying this rule in practice would prove difficult, as the party arguing for the existence of rarely applied contractual provisions (the consumer) will have limited or no resources to prove its existence. One way to overcome this difficulty is to adopt a procedural rule, according to which courts encountering a provision they find suspiciously imbalanced will shift the burden regarding this matter to the respondent (the vendor). In other words, the vendor must meet the burden of proving that the provision at stake is enforced in other instances (information it should have no problem obtaining).

(UCITA)[19] and the Uniform Electronic Transaction Act (UETA)[20]. UCITA deals with contracts and business transactions done on the medium of 'computer information'[21]. Any contract which involves the usage of computer information may be formed electronically, in person or by any other means. UCITA is, however, not the sole authority on electronic contracts. UETA, another act with an even greater ambit includes all types of transactions done on an electronic medium.

A law related to electronic signatures was passed by the US Congress in the year 2000, the act is known as Electronic Signatures in Global and National Commerce Act (E-sign). It adopted the important provisions of UETA. If a US state has not yet adopted UETA in an unrevised form, then the E-Sign law automatically applies to it. If the state has adopted UETA, then it will be the law governing a contract between two parties, whether they are from the same state or from two different states.

Both laws provide that if by law a record is required to be in writing or its original form then such a requirement can be satisfied by an electronic record. Also, both statutes state that if the record requires a signature, then an electronic signature will suffice. The states are not prohibited by the E-Sign law to amend the abovementioned rules. However, such an amendment must be based on the principles of UETA and the exception is not opposed to the scope of UETA which is inconsistent with E-Sign.

The EU

The EU law on electronic contracts is derived from the following:

1) Electronic Commerce Directive (E-Commerce Directive) [22]
2) Distance Contracts Directive[23]

[19] Uniform Computer Information Transaction Act (2002) *available at* http://www.law.upenn.edu/bll/ulc/ucita/2002final.pdf (last visited Aug. 30, 2019).

[20] Uniform Electronic Transaction Act (1999) *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.pdf

[21] Comment 2 to UCITA Section 103. The scope of this Act turns initially on the definition of computer information transaction. Section 102(11). Computer information transactions are agreements that deal with the creation, modification, access to, license, or distribution of computer information. Section 102(a)(11). Computer information is information in a form directly capable of being processed by, or obtained from, a computer and any copy, associated documentation, or packaging. Section 102(a)(10). As stated in subsections (b) and (c), if a transaction is a computer information transaction but also involves other subject matter, this Act ordinarily applies only to the aspects of the transaction that involve computer information.

[22] Council Directive 2000/31, Directive on Electronic Commerce (hereinafter "E-Commerce Directive"), 2000 O.J. (L 178) (EC) *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML (last visited Aug. 30, 2016).

[23] "Distance Contracts Directives" refers to the following Directives: European Parliament and Council Directive 2005/29, Directive Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and the Council of Regulation (EC No. 2006/2004 of the European Parliament and the Council ("Unfair Commercial Practices Directive") 2005 O.J. (L 149) (EC) *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:HTML (last visited Aug. 30, 2006);Council Directive 2002/65,

3) Unfair Terms in Consumer Contracts Directive (Unfair Contract Terms Directive) [24]

4) Community Framework for Electronic Signatures[25]

Additionally, there are multiple horizontal directives mainly Privacy[26] and Intellectual Property Rights in Cyberspace[27]. A horizontal directive is enacted to cover roughly all sectors. Although it does not cover all the specific requirements of a particular sector, its main objective is to supplant the more focussed vertical directives.

The e-commerce directive was enacted to regulate the electronic commerce sector[28]. Articles 9, 10 and 11 of the Directive regulate the electronic contracts used in transactions in the B2C sector. The e-commerce directive obligates a business/vendor in the market to make all the necessary arrangements so that the consumers are able to completely understand that they are a party to an electronic client[29]. Article 2(b) of the directive defines a service provider as "*any natural or legal person providing an information service*". In the EU signed electronic contracts are equally enforceable as the traditional contract[30]. Article 9 of the directive obligates the members of the EU to provide a framework to ensure that electronic contracts are legal and actionable and remove the possible prohibitions

Concerning the Distance Marketing of Consumer Financial Services and Amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (hereinafter "Distance Marketing Contracts Directive"), 2002 O.J. (L 271) (EC) *available at* http://europa.eu.int/eurlex/pri/en/oj/dat/2002/l_271/l_27120021009en00160024.pdf (last visited Aug. 30, 2016); Council Directive 97/7, Directive on the Protection of Consumers in Respect of Distance Contracts (hereinafter "Distance Contracts Directive"), 97 O.J.(L 144) (EC) *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML (last visited Aug. 30, 2006).

[24] Council Directive 93/13, Unfair Terms in Consumer Contracts (hereinafter "Unfair Contract Terms Directive"), 93 O.J. (L 095) (EEC) *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML (last visited Aug. 30, 2019

[25]Council Directive 93/13, Unfair Terms in Consumer Contracts (hereinafter "Unfair Contract Terms Directive"), 93 O.J. (L 095) (EEC) *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML (last visited Aug. 30, 2019).

[26] Council Directive 99/93, Directive on a Community Frameworkfor Electronic Signatures (hereinafter "E Signature Directive"), 99 O.J. (L 013) (EC) *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:EN:HTML (last visited Jan. 30, 2018).

[27] European Parliament and Council Directive 2002/58, Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (hereinafter "Privacy Directive"), 02 O.J. (L 201) (EC) *available at* http://europa.eu.int/eurlex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf(last visited Aug. 10, 2020).

[28] E-Commerce Directive, 2000/31, art. 1.

[29] *Id.* art. 10 ("Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: (a) the different technical steps to follow to conclude the contract.").

[30] *Id.* art. 9 (" Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.").

on the usage of electronic contracts, with permissible exceptions.

In the US, the exemptions provided under the UETA statute have a wider ambit than the EU's e-commerce directive. For example, UETA has an exemption for laws that govern wills, codicils and testamentary trusts from being under the ambit of UETA. If the transactions in the US are governed by the Uniform Civil Code, then they are exempted from the ambit of UETA. E-Sign is similar to UETA. The act gives validation to the majority of the electronic contracts and electronic transactions if such contracts have a digital format of records, signatures, notices related to them. There is one difference between E-Sign and UETA which is their treatment of consumer transactions. E-Sign provides significant protection to consumer transactions compared to UETA which does not exempt consumer notices. UETA only requires the parties to conduct business through an electronic medium without any details about the procedure to obtain consent, whereas under E-Sign requires a specific process for obtaining consent electronically before such a contract can replace the traditional written contract.

The rule providing the procedure to take consent under E-Sign is provided in Section 101(c). It states that the consumer's consent has to be obtained electronically. Their expression of the consent form should reasonably demonstrate that the consumer has access to the electronic form which makes him/her aware of a situation requiring consent. If there are some modifications in the hardware and/or software requirements that are needed to get access to or for the retention of electronic records, or if such modification creates a risk for the consumer's ability to use access or hold on to the electronic record which was the subject of the consent, then in such cases the consent of the consumer must be taken again.

IX. PRIOR INFORMATION REQUIREMENTS

'Prior information requirements' is a concept that obligates the service providers to provide certain information before the customer places an order for any service given by the service provider[31]. This rule is generally applied to B2C and B2B transactions, however, the rule does allow an exemption for B2B transactions[32]. There are various areas on which the service provider must provide information namely:

1) The technical steps are required to be followed by the customer for the conclusion of a contract.
2) Information as to who will file the contract, the service provider, a third entity etc, and whether it will be open for access.
3) The procedure to ascertain and rectify input errors before the order is placed.
4) The languages in which the contract can be concluded. [33]

The service provider must provide a mechanism that will accord the consumer to store and reproduce the contracts and/or the general

[31] Council Directive 2000/31 art. 10(1).
[32] Ibid
[33] Ibid

conditions[34]. The terms of the contract must be made visible on the screen of the consumer before he/she makes a purchase. Under the e-commerce directive,[35] the service provider is also obligated to conform with the information requirements provided under the community law, which are contained in the Distance Contracts Directives[36], sectoral directives like those on insurance[37], travel packages[38] , etc. The Distance Contracts Directive[39] provides the rules regarding when and what kind of information should be provided to the consumer prior to concluding the distance contract[40]. The prior information requirements of this directive supplant the requirements of the E-commerce directive[41] mandating the service provider to give relevant information on the contract regardless of the formation of a contract or not. Under the e-commerce directive, there is an exemption to give prior information requirements under Article 10[42] for contracts that are concluded through email or similar modes of individual communication, the reason for this is that obtaining necessary information is relatively easier in the case of individual consumers.

Unlike the E-commerce Directive, UETA does not mandate information to be provided before contracts can be concluded. The reason behind this is that UETA aims to eliminate the barriers to the formation of contracts through electronic records and not affect the legal rules and requirements at the same time[43].

In cases where one of the requirements regarding contracts is to give a notice, the law under UETA requires to be ascertained whether the electronic record is similar to the record in writing. If information is to be provided in writing, then there must be some framework that allows the electronic record of that information to be retained by the person who sends that information[44]. The e-commerce directive of the

[34] Council Directive 2000/31 art. 10(3).
[35] Council Directive 2000/31 art. 10(1).
[36] Directive 97/7/EC on the protection of consumers in respect of distance contracts
[37] Article 36 of the Directive 2002/83/EC (Life Directive) and Article 31 of Directive 92/49/EEC
[38] Council Directive 90/314.
[39] Directive 97/7/EC on the protection of consumers in respect of
distance contracts
[40] Council Directive 97/7 art. 4. A *distance contract* is defined as
"any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more
means of distance communication up to and including the time at which the contract is concluded." *Id.* § 2(1). Section 2(a) of Council Directive 2002/65 adds "any contract concerning financial services" to this definition.
[41] The following compose the prior information requirements in the Distance Contracting Directives: (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs, where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of withdrawal . . . (g) the cost of using the means of distance communication . . . (h) the period for which
the offer or the price remains valid; (i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed
permanently or recurrently. See Council Directive 97/7, art. 4.
[42] art. 10(4). The requirement that contract terms and general conditions be provided to the recipient in a manner that allows him to store and reproduce them still applies
[43] UETA Prefatory Note at *1.
[44] UETA section 8(a) "is satisfied if information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt."

EU, on the other hand, requires that the contractual terms and conditions must be provided in a format that lets a consumer store as well as produces it[45].

This particular provision forces a relook at click-wrap agreements. In click-wrap agreements, the contractual agreement is displayed on a separate webpage which does not allow the option of download and/or printing. The reason for obligating prior information requirements is to ensure that there is mutual trust between firms and consumers in all types of markets in e-commerce. Prior to the directive the information displayed differed between different member states resulting in ambiguity regarding the conditions of the contract and the credentials of the sellers. By enacting this directive, the EU aims to do away with the different laws of the member states and create uniform guidelines to help the consumer to ascertain the quality of the product and offer prior to the conclusion of the contract. It was important to bring this to remove any apprehensions in the minds of the consumers and bring the security in e-commerce on par with traditional markets and one of the important steps to achieve that was by ensuring uniform protection for all consumers in their home state and other member states across EU. This way the directive also augments the principles of free movement of services and ease of establishment of businesses across the EU.

The stance of US laws is different as it supports self-regulation and economic rationality instead of creating a regulatory environment for e-commerce activities. For instance, the E-Sign Act does not provide any technology protocol for validating instruments like e-signatures and certificates. It allows freedom to the consumers to choose from various e-signatures. Whereas the EU has specific requirements for e-signatures namely:

1. They must be based on a qualified certificate.
2. They must be created by a signature-creation scheme.
3. The legal requirements that apply to handwritten signatures for paper-based data must be similarly adhered to by the e-signature for data in electronic format.
4. They must be admissible in legal proceedings.

X. VALIDITY OF UNFAIR CONTRACTS TERMS IN B2C CONTRACTS

The Unfair Contract Terms Directive[46] passed by the EU lists out a detailed set of rules and an annexure containing a comprehensive list of seventeen contract terms that are likely to be considered unfair. These terms have the potential to revise the original status of the contracts by either absolving the business from any legal liabilities against the consumer or providing the business with certain rights which are not accessible in the ordinary course of business. This directive is applicable to consumer contracts in the domain of both e-commerce and traditional contracts. In the US, UCITA covers the subject

UETA § 8(a) (emphasis added).

[45] Council Directive 2000/31 Art. 10(3).

[46] Council Directive 93/13/EEC.

of unfair contracts under Section 111. This provision states that if a court adjudges the terms of a contract to be unfair or not in the interest of the consumer then it can either render that particular term as non-actionable or declare the entire contract to be invalid. Unlike the EU directive, the provisions of UCITA do not list out the terms which are considered unfair. The provision gives the courts the power to adjudicate the tenability of the contract or its terms, it does so by adopting the unconscionability doctrine of the Uniform Commercial Code (§ 2-302). The fundamental test that is applied to ascertain the fairness of a contract is to view the nature of the terms of the contract in light of the prevailing business conditions of the particular sector in which the contract is made. The court needs to check whether the terms of the contract are too one-sided or stringent for one party at the time of the formation of the contract[47]. UCITA only deals with a certain class of contracts; hence other contracts are regulated by Section 2-303 of the Uniform Civil Code to the extent when it deals with electronic contracts for the sale of goods or for where the general defence of unconscionability is to be applied for contracts of services. The basic standard of the test applied by all laws is to check whether the terms of a contract are too one-sided to be enforceable under law.

Both UETA and the E-Commerce Directive of the EU requires the penalties to be determined for non-compliance in providing the information required. The e-commerce directive under Article 20 delegates this duty to member states to determine the sanctions for non-compliance of national laws created pursuant to the directive. UETA does the same thing by creating an obligation on state laws to determine the sanctions when the business/vendor fails to comply with information requirements.

XI. FORMATION OF ELECTRONIC CONTRACT

Unlike the traditional principles of contract law, where the presence of 'intent' is key, the E-Commerce Directive does not contain any requirement of 'intention to enter into a contract' for e-commerce contracts/transactions. The requirement of intent is satisfied by mandating the vendor to provide information that helps the consumer to form the requisite intent. When the consumer proceeds with the technical steps that are necessary to conclude the contract, he/she indirectly forms an intent to enter into the contract[48]. The UETA addresses this issue differently by requiring the consumer to give direct proof of intent. Section 7(d) of the law states that "*if a law requires a signature, an electronic signature satisfies the law.*" Electronic

[47] UCITA § 111 cmt. 2. See also Restatement (Second) of Contracts § 208 (1981). Traditionally, a bargain was said to be unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406 (1889), quoting *Earl of Chesterfield v. Janssen*, 2 Ves.Sen. 125, 155, 28 Eng.Rep. 82, 100 (Ch. 1750). Today, courts generally look for both substantive and procedural unconscionability. The former generally involves oppressive terms of a contract resulting in a gross imbalance in consideration. Procedural unconscionability involves a lack of meaningful choice or an unfair process by which a contract was concluded.

[48] Council Directive 2000/31 art. 10(1)(a).

signature is defined as "*an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.*

According to the E-commerce directive, there is another step involved in contract formation i.e., confirmation of the contract. Article 11 of the Contract states that "in cases where the recipient of the service places his order through technological means, the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means". In simple words, it means contracts in B2C transactions when the customer has been provided with the receipt of his/her by the service provider. Article 11 is not applicable where the customer makes the offer to contract first.

There are multiple benefits that accrue from the 'requirement of receipt', namely:

1. The customer gets another chance to review whether he/she has made the correct purchase.
2. It allows the vendor to ascertain the stock of the particular product and check the price at which the product was sold.

This provision of confirmation, however, runs contrary to Article 10(1) of the directive, which requires the service provider to provide a framework to the consumers for the detection of errors. There is also no particular format in the statute for a receipt. The provisions under the directive are likely to be more effective if it provides the consumer with the right to review the contract before concluding it.

UCITA, on the other hand, requires an offer and acceptance: "*A contract may be formed in any manner sufficient to show an agreement including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract*."[49] "*An offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances".*[50]

XII. TREATMENT OF MISTAKES

The E-Commerce Directive takes on the issue of errors in contracts by obligating the service providers to establish a mechanism for error-rectification. Article 11(2) of this directive states that: "*Member States shall ensure that, except where otherwise decided by non-consumer groups, the service provider makes available to the purchaser of the service appropriate, effective and usable technical means enabling it to detect and correct input errors prior to ordering.*" Despite its usefulness, this provision is not effective for consumers who realize the presence of an error even after getting the error rectified. The directive does not address the basic issues that are come from concluding contracts, it leaves such issues to be dealt with by national laws of the members of the EU. However, in the US, both UETA and UCITA deal with the issue of errors in a contract after it is concluded. In purchases that are automated, the consumer is absolved from any responsibility if the error is due to a technical glitch or malfunction. UCITA

[49] UCITA § 202(a).

[50] UCITA § 203(1).

defines a technical error as "*an error in an electronic message created by a consumer using an information processing system if a reasonable method to detect and correct or avoid the error was not provided*" [51]. Both the laws have a mechanism to address an electronic error, it requires the consumer to tell the vendor/supplier about the particular error by following the instructions laid down by the vendor/supplier for such an issue. The user is also required to reimburse any reward received due to an incorrect electronic record. [52]

Position in India

India has been spearheading the growth and expansion of the e-commerce sector. The vast market allows for big opportunities in retail which is the prime sector of opportunity for e-commerce as it can facilitate a transition from the traditional brick and mortar shops thereby cutting the cost of operation.

Social media has been one of the key factors in the development of e-commerce as it had helped in bringing brands and consumers on one platform for a better connection. Social media is also one of the most used resources of internet users in India. A study conducted by the Internet and Mobile Association of India reported that, in June 2014, India had 243 million internet users which made it the second-largest internet base in the world, only behind China. This study was supported by data provided by Facebook Inc. which reported that India had 82 million active users in June 2013.

The Indian government has also been enacting projects to improve broadband connectivity in local and village level government departments. The government is focused on improving internet access in rural India for allowing outreach of internet services like e-commerce, e-entertainment, e-education, e-government, e-health etc. so that individuals and businesses can make use of it

E-commerce refers to a mechanism on the internet where many different companies, individuals conduct business. Although e-commerce is not defined anywhere, it generally refers to business activities taking place on the internet instead of the traditional means. E-commerce has created a plethora of business models in all sectors which have led to more convenience for consumers and businesses alike.

There are various types of business models in e-commerce namely:

a) B2B: Business to Business (B2B) means the online commercial transactions between different businesses which helps in creating new relationships and improvement of online business models. Examples of B2B e-commerce are transactions between manufacturer and wholesaler, transactions between a retailer and wholesaler.
b) B2C: B2C is a model where the businesses directly engage with end consumers online providing them various products/services. This model is

[51] UCITA § 213(a).
[52] UETA § 10(2)(A); UCITA § 213(b). The Commentary states that the defense does not apply if the electronic system with which the consumer is working provides a reasonable means to correct or avoid errors

the most ubiquitous of all and is one of the biggest e-commerce models. Examples are Amazon, Flipkart, Alibaba, online services like Netflix, Hotstar, etc.

c) C2C: C2C means Consumer to Consumer. This is a relatively newer model of e-commerce which provides a framework for commercial deals between end consumers. Examples of this model are online shopping for used products viz. Quickr, OLX, websites that allow residential property rental, matrimonial services etc.

d) C2B: Consumer to Business, is a model which creates a framework that provides for the flow of products and services from Consumers to various businesses.

e) B2B2C: B2B2C is a subset of the B2C model which is becoming quite popular these days. Since most businesses are interdependent on each other for maximizing success, the same phenomenon is found in online businesses as well. The biggest example of this is the targeted advertisements on websites like Google search, social media sites like Facebook, Instagram, Twitter, etc. The advertisement services act as a promotional tool for businesses offering an end product or service for consumers. One business leads to another business which ultimately caters to the consumer.

E-commerce might seem hassle-free and less regulated at first, which business models find lucrative. However, there are many compliances and regulatory aspects of conducting business through e-commerce that businesses must be aware of before they delve into starting an online business model.

XIII. LEGAL VALIDITY OF ELECTRONIC TRANSACTIONS IN INDIA

Formation and validity of electronic transactions entail issues of online contracting and enforcement:

(A) Formation of an E-Contract:

E-contracts usually comprise click-wrap, browse-wrap and shrink-wrap contracts. These contracts are different from the standard paper-based contracts due to the difference in the presentation of terms and conditions, for example, in click-wrap contracts, the customer's consent is recorded when he/she clicks on the 'I-accept' tab on the dialogue box which lists out the various terms and conditions for the customer.

In browse-wrap contracts, just browsing the website or usage the features creates a binding agreement between the website and the user.

In shrink-wrap contracts, the terms of the contract are explicitly displayed in a box or container which contains the product. In such agreements, the opening of the box and the usage of the product creates a binding agreement between both parties.

(B) Online Contracts Validity:

E-contracts in India are governed by the Indian Contract Act, 1872 which has many preconditions for the validity of a contract,

namely lawful consent and lawful consideration. So how do the principles of Indian Contract apply to e-contracts? Apart from the Indian Contract Act, the Information Technology Act, of 2000 also governs e-contracts in India.

The Indian Contract Act, 1872 lists out various conditions for a contract to be deemed valid, which are:

- The consent of the parties to the contract must be obtained without any coercion, undue influence i.e., it must be free.
- The consideration for a contract must be within the law.
- All parties must be competent to contract as per law.
- The contract must be made in the pursuance of a lawful objective.

The most important aspect in making sure that e-commerce transactions are lawful as per the Indian Contract Act are the terms and conditions that govern those transactions. Click-wrap agreements are usually the preferred form of contracts on websites and are generally enforceable if they are in consonance with principles of the Indian Contract Act, 1872

The physical signing of contracts is not a requirement under the Indian Contract Act, though some specific laws do insist on having signed documents and contracts. E-commerce is one such domain where the requirement of signature must be made mandatory due to its open accessibility. For example, nowadays even minors have access to e-commerce websites, however, it's not possible for the websites to determine the age of the user, which could lead to enforceability issues if a minor makes a purchase and implicitly comes into a contract with a supplier. It will become a problem because as per the Indian Contract Act, a person should be a major to enter into a contract.

Documents and instruments that create rights in favour of one party are required to be stamped by the state authorities. The procedure and specifics of stamping of different contracts are governed by different stamp duty legislation in India.

(C) Standard Form of Online Contracts are Unconscionable

Unlike the framework of the US and the EU, Indian laws do not talk about the tenability of Standard Form Contracts. Indian judiciary has addressed the issue of standard form contracts which were concluded between parties of unequal stature or bargaining power. The Indian Contract Act only deems those contracts as invalid where the consideration is illegal or the object of those contracts is against public policy.

In such cases, the courts can ask the superior party in a contract to disprove the assumption of unequal bargaining power between the parties to the contract.

In the case of "*LIC India Vs. Consumer Education & Research Center*,[53]" the Supreme Court gave an explanation with respect to dotted line contracts. The court held that in such contracts where terms are already set without any room for negotiation, the weaker party cannot have any bargaining power. The only options in

[53] 1995 AIR 1811

front of such a party are to either the unfair conditions or to abstain from entering into such a contract.

Contracts in e-commerce must be carefully drafted with detailed terms and conditions which helps the consumer in forming a well-formed decision. The various issues that need to be taken care of in such contracts include but are not limited to taxation, security, consumer protection, intellectual property, content regulation, intermediary liability, jurisdiction etc.

To sum up the present Indian Scenario

The development of E-Commerce in India has created a new trend and consumer behaviour in respect of purchasing and selling. It has also revealed the legal and regulatory issues that plague this industry which need to be resolved to unleash its potential. The legal system needs more changes like the revolutionary IT Act to be capable of addressing the issues arising from this ever-evolving domain. This would require a detailed understanding of the legal issues of the e-commerce industry and creating efficient mechanisms to deal with possible uncertainties that can emanate out of the working of the industry.

XIV. CONSUMER PROTECTION E-COMMERCE RULES 2019

In 2019 the Ministry of Consumer Affairs tabled the draft Consumer Protection (E-Commerce) Rules, 2019[54] for the regulation of e-commerce businesses in India. It was an initial draft published to invite comments and objections of various stakeholders before notifying them under the Consumer Protection Act, 2019[55]. The objective of the draft rules is to control the manipulation of price and ensure quality by making it the responsibility of the e-commerce businesses and mandating adherence to a set of rules which helps consumers to be diligent about their purchases, prevents fraud on e-commerce websites and abates unfair or deceptive trade practices.

Apart from the aforementioned rules, e-commerce businesses must comply with various other laws namely:

1) They must be registered under specific Indian Laws.
2) They should always maintain compliance with the current and upcoming rules.
3) An e-commerce business must not be managed or owned by a convicted person, who has been convicted for an offence carrying a punishment of five years or more.
4) The business needs to comply with the provisions of IT (Intermediary Guidelines) Rules, 2011[56].
5) The business must comply with the Reserve Bank of India's guidelines on payment

[54] Consumer Protection (e-Commerce) Rules , 2019 ; Available at https://consumeraffairs.nic.in/en/theconsumerprotection/consumer-protection-e-commerce-rules-2020 last viewed on March 06, 2022

[55] CPA 2019 available at http://egazette.nic.in/WriteReadData/2019/210422.pdf last viewed on July 19,2020

[56] Information Technology (Intermediaries guidelines) Rules, 2011 available at https://www.wipo.int/edocs/lexdocs/laws/en/in/in099

facilities[57].

These businesses must also create a level-playing field for other entities and should avoid price manipulation for similar goods and services offered on their websites. This law aims to achieve equality between e-commerce businesses and traditional brick and mortar shops, by regulating predatory pricing and unreasonable discounting.

E-commerce businesses must also refrain from unfair trade practices that wrongly influence consumer choices, through malpractices like rigged consumer reviews, features of products. etc.

The various sellers that operate on an e-commerce website must have a proper description which includes their legal names, main address, contact details, website name, the products that it sells, etc.

Furthermore, the sellers must describe the terms and conditions of the contract with the e-commerce platform which include but are not limited to return, refund, delivery, mode of payment, grievance mechanism, warranties and guarantees, etc. that help a consumer to make better decisions

The e-commerce businesses have to make sure that the advertisements of the products are genuine and there are no misleading elements present. Additionally, the businesses need to provide information related to the safety of the product, its shelf life, break up of all charges, methods of payment, and protection of personal data of consumers as per Indian Laws.

The e-commerce entity is also liable to replace or refund the goods or services that are defective or are not provided within a reasonable time. The entities must also regularly check for counterfeit products and take them down immediately. Entities must also set up a grievance mechanism for students and provide a redressal time of 1 month.

For strengthening the e-commerce platforms further, the sellers on the e-commerce websites must comply with certain regulations on them, namely:

- Sellers and entities must be in a contract with each other before they can begin selling;
- The legal requirements relating to taxes, legal metrology rules, delivery charges are pre-determined;
- The delivery terms must be fair and reasonable;
- The responsibility for a warrant of the products sold by the seller must be listed out

The Confederation of All India Traders (CAIT) has welcomed the draft consumer protection rules for e-commerce by describing the steps taken as helpful in curbing malpractices by Indian e-commerce players. CAIT secretary, Praveen Khandelwal, described the e-commerce entities as habitual offenders[58] and said that the

en.pdf last viewed on July 19,2020

[57] Guidelines on Regulation of Payment Aggregators and Payment Gateways available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0 last viewed on July 19,2020

[58] CAIT welcomes 'The Consumer Protection (e

new rules would lead to more transparency, fairness and accountability for the customers. He also said that the Consumer Affairs Ministry has to double down on its new move as the present regulations are also not that effective and are frequently violated by e-commerce entities, he quoted the violation of FDI rules as an instance and called for serious repercussions for the entities in cases of violations.

The e-commerce policy also talks about the interdisciplinary nature of e-commerce

Regulatory challenges related to e-commerce are constantly evolving due to technological advancement. Hence the current laws need to change as well taking into account the increased usage of technological services like the Internet of Things, different modes of deliveries, data protection, emerging online marketplaces. The related government departments are expected to be cognizant of these developments and ensure that the policy formulation with respect to these things are dynamic in nature and leave no room for loopholes. The inter-disciplinary nature of e-commerce gives rise to the need for addressing the different issues related to IT Act, Competition Act, Consumer Protection Act, etc. To solve this a Standing Group of Secretaries on e-commerce has been created (SGoS) will play the role of providing recommendations and overlooking the e-commerce policy to address the emerging policy challenges and keeping up with the evolving digital space. Some specific recommendations to address these issues are:

- Regulatory must be figured out in the existing text of the statute whenever possible instead of bringing frequent amendments.
- The ministries that are deal with the issues in e-commerce must do consistent assessments of the workings of the sector. Some ministries have already started to bring measures to adapt to the changes that have come with e-commerce.
- The inputs of the nodal agencies and concerned ministries must be taken whenever some new development has an effect on its domain.

The Department for Promotion of Industry and Internal Trade needs to oversee the needs of the sector, ensuring that the regulations are positive in nature and improve the e-commerce ecosystem instead of creating hindrances to ease of doing business in that sector. However, there are some aspects that need to be reconsidered to make sure this sector can reap maximum economic progress. Some aspects of e-commerce are regulated by State Governments in India which are constitutionally provided to them. We need to acknowledge that e-commerce comes under the subject of Inter-state trade and commerce and thus has been under Schedule VII of the constitution. So, it becomes the responsibility of the central government to ensure that there are no roadblocks in its operation.

commerce) Rules 2019 available https://knnindia.co.in/news/newsdetails/sectors/cait-welcomes-the-consumer-protection-e-commerce-rules-2019 last viewed on July 19, 2020

XV. CONCLUSION

Terms in a contract comprise expressly written terms such as in SFCs and implied terms which can be construed from the circumstances surrounding the contract. For example, terms that are incorporated in a contract by a reference to other documents, advertisements that impliedly constitute an offer, terms incorporated via the laws related to consumer protection.

The agreements that cater to a huge number of end-users have rapidly adopted the concept of 'terms of use'. Many scholars and experts have commented on this new form of contract and its resultant impact on the class of population for which it was designed i.e., the consumers. However, it has been said that SFCs will significantly impact businesses instead of consumers in the long run[59]. Policymakers and courts have tried to mitigate the impact of SFCs on consumers, mostly through non-enforcement of browse-wrap licenses[60]. However, some courts have allowed the usage of browse wrap-license in cases where both parties are commercial entities and in competition with each other[61]. Courts have allowed shrink-wrap and click-wrap licenses to be used but they have protected consumers from those e-contracts which are unfair to the consumers[62]. The different factors that make the usage of 'terms of use' a big problem is the tendency of the courts to disregard the presence of consent in forms that resemble actual contracts and the advancement in technology that has made creating contracts easier. Not all contracts can indicate a rigorous negotiation process prior to its conclusion. However, the more we move towards lessening the importance of explicit consent, the more problems of contract analysis will arise as the principles of contract law will fit less with the

[59] Mark A Lemley, 'Terms of Use', Minnesota Law Review, Vol. 91, 2006, p. 462. Available at SSRN: <http://ssm.com/abstract=917926>

[60] *Campbell* v *Gen. Dynamics Gov't Sys. Corp,* 407 F.3d 546, 556-57 (1st Cir. 2005) (noting that an employer could not make a policy a provision of an employment agreement merely by posting it on the employee intranet); *Waters v Earthlink, Inc.,* 91 F.App'x 697, 698 (1st Cir. 2003) (refusing to enforce an arbitration clause posted on a Web site in the absence of proof the consumer had seen the clause); *Specht* v*Netscape Commc'ns Corp.,* 306 F.3d 17,35-38 (2d Cir. 2002) (refusing to enforce browse-wrap against consumers). One partial exception to this statement is *Dyer v Northwest Airlines,* 334 F Supp. 2d 1196, 1199-1200 (DND. 2004), which held that a privacy policy posted on a Web site was not enforceable as a contract against the posting company. It is worth noting that in *Dyer* the plaintiffs brought a consumer class action suit and could not demonstrate even that their members had accessed the site in question Cited in Mark A Lemley, 'Terms o f Use', *ibid. 95 Register.com, Inc. v Verio, Inc.,* 356 F.3d 393, 428-30 (2d Cir. 2004); *Cairo, Inc. v Crossmedia Servs, Inc.,* No. C04-04825JW, 2005 WL 756610, (ND. Cal Apr. 1, 2005); *Ticketmaster Corp v Tickets com, Inc.,* No CV997654HLHVBKX, 2003 WL 21406289, (C.D. Cal. Mar 7, 2003), *Pollstarv Gigmama, L td ,* 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (refusing to rule that browsewraps were unenforceable ca a motion to dismiss). Cited m Mark A Lemley, 'Terms of Use',

[61] *Register.com, Inc. v Verio, Inc.,* 356 F.3d 393, 428-30 (2d Cir. 2004); *Cairo, Inc. v Crossmedia Servs, Inc.,* No. C04-04825JW, 2005 WL 756610, (ND. Cal Apr. 1, 2005); *Ticketmaster Corp v Tickets com, Inc.,* No CV997654HLHVBKX, 2003 WL 21406289, (C.D. Cal. Mar 7, 2003), *Pollstarv Gigmama, L td ,* 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (refusing to rule that browsewraps were unenforceable ca a motion to dismiss).

[62] For example, courts have been unwilling to enforce onerous arbitration and choice of forum clauses against consumers, even when the consumer agreed to a standard form imposing such requirements And the Uniform Computer Information Transactions Act (UCITA) forbids the use of electronic selfhelp in mass market transactions, even if the parties agree otherwise UNIF COMPUTER INFO TRANSACTIONS ACT º 816 (2001)

things that are considered contracts in general parlance. E-contracts have brought tremendous changes in contracting in general. The shift from paper-based contracts to electronic contracts is both a blessing and a curse for the courts and policymakers who have a number of concerns with SFCs[63]. The genesis of e-contracts has brought up a new process of forming and concluding contracts which resultantly has changed the way for courts to ascertain the enforceability and fairness of e-contracts. But overall, the new changes have helped consumers to form a robust opinion on different alternatives in the market that works in their best interest.

Simultaneously this has also led to the creation of new methods by businesses to use SFCs to take advantage of consumers. Most factors suggest that the courts and policymakers need to be vigilant in ascertaining disputes of e-contracts as they were before for traditional contracts[64].

The courts must also be cognizant of the fact that consumers are likely to remain unaware and non-vigilant with respect to contracts that are unfair and not mutually beneficial. This is regardless of the fact that the advancement of technology has helped in the proliferation of knowledge and collective awareness.

For policymakers, the problem of enforceability of SFCs is likely to remain due to the fact the consumers are likely to take advantage of the improved time and knowledge given by the electronic environment to deliberate upon and measure the impact of SFCs on their interests. Consumers will mostly use the resources to compare prices, seller's reliability and quality but not for reviewing the terms and conditions of the contracts[65].

Electronic contracts are more or less similar to the traditional ones and the fundamental principles of contract law does not require drastic amendments to address the new changes. Therefore, SFCs can be tackled through the current principles of contract law which were created to augment freedom of trade in society.[66] Regardless the policymakers and courts do need to upgrade their viewpoints to take into consideration the new avenues in e-commerce for consumers and businesses alike.

The basic principles of the electronic and traditional world are more or less similar as in both domains the businesses use certain boilerplate clauses that are designed to be exploitative or benefit both parties[67]. Businesses will have more domain knowledge than consumers regardless of the playing field, they will have more knowledge about contractual risks and hence will always be in a position that is advantageous to them. Consumers can offset this position in all fields by making logical

[63] Hillman, Robert A & Rachhnski , Jeffrey J., 'Standard-Form Contracting in the Electronic Age', Available at SSRN: hltp://ssm.com/abstract=287819 (accessed: 27 May 2012).
[64] Ibid
[65] Ibid
[66] James J. White, 'Contracting Under Amended' 2-20T 2004 *Wis L Rev.* 723 (2004). 'Perhaps we would have a more just society if relations between consumer and merchants appeared more honest, even if there is no change in consumer behaviour or consumer transactions " William C. Whitford, 'The Functions of Disclosure Regulation m Consumer Transactions', 1973 Wis L. Rev. 400, 404, 439.
[67] Supra Note 64

decisions as per the methods that have been discussed in this paper.

E-commerce has created opportunities and protection measures for consumers and businesses alike but the basic premise of doing business remains the same. Courts should remain vigilant about contracts in both fields when it comes to enforcing standard terms in SFCs. The balance between judicial overreach in routinely interfering with contracts and concerns relating to fairness must be adopted for contracts in the electronic world in toto.

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