A STUDY OF CONSUMER AWARENESS REGARDING THEIR RIGHTS COVERED WITH REFERENCE TO STANDARD FORM OF CONTRACTS

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INTRODUCTION

Standard form contract in its widest sense is no more than a "document in a common form" which contains the terms on which a certain type of transaction shall, once and for all, be conducted. It may be defined as a contract entered into totally or partially according to pre-drafted terms and conditions and intended to be applied similarly in a large number of individual cases irrespective of individual differences. As the majority of standard form contracts are generally drawn up unilaterally by only one of the parties to the contract, they thus tend to develop into a contract of adhesion. Thus, in U.S.A., the standard form contracts are called contracts of "Adhesion". Some writers use the terms, 'standard form contract' and 'contract of adhesion' interchangeably. The term 'contract of adhesion' was invented by Saleilles in 1901. According to him, in such contract, conditions are fixed by one of the parties in advance. The contract, which frequently contain many conditions, may either be accepted or rejected in toto but its conditions are not open to bargain. Prof. Ehrenz defines contract of adhesion as "agreements in which one party's participation consists in his more adherence, unwilling and often unknowing, to a document drafted unilaterally and insisted upon usually by a powerful enterprise.

In the words of Hon'ble Mr. Justice C.H. Bright[1], "the boundaries of an appropriate definition of the term 'contract of adhesion' are marked by the two factors that one party has fixed unalterable conditions in advance and the other party either in ignorance or out of necessity submits to them. Those conditions may be fair or unfair. They may be all the conditions of the contract or some of them for it would not affect the mischief if the supplier will negotiate on some conditions whilst leaving other in the category of "Non-negotiable".

[1] Justice Bright C.J. in contract of Adhesion and Exemption Clauses (1967) 41 Aust. L.J. 261 at 262 States, The phrase 'Standard' or 'Standard form Contract' is often used as synonymous for 'contract of adhesion.

There are a number of reasons why such terms might be accepted:

1. Standard form contracts are rarely read

Lengthy boilerplate terms are often in fine print and written in complicated legal language which often seems irrelevant. The prospect of a buyer finding any useful information from reading such terms is correspondingly low. Even if such information is discovered, the consumer is in no position to bargain as the contract is presented on a "take it or leave it" basis. Coupled with the often large amount of time needed to read the terms, the expected payoff from reading the contract is low and few people would be expected to read it.

2. Access to the full terms may be difficult or impossible before acceptance

Often the document being signed is not the full contract; the purchaser is told that the rest of the terms are in another location. This reduces the likelihood of the terms being read and in some situations, such as software license agreements, can only be read after they have been notionally accepted by purchasing the good and opening the box. These contracts are typically not enforced, since common law dictates that *all* terms of a contract must be disclosed *before* the contract is executed.

3. Boilerplate terms are not salient

The most important terms to purchasers of a good are generally the price and the quality, which are generally understood before the contract of adhesion is signed. Terms relating to events which have very small probabilities of occurring or which refer to particular statutes or legal rules do not seem important to the purchaser. This further lowers the chance of such terms being read and also means they are likely to be ignored even if they are read.

4. There may be social pressure to sign

Standard form contracts are signed at a point when the main details of the transaction have either been negotiated or explained. Social pressure to conclude the bargain at that point may come from a number of sources. The salesperson may imply that the purchaser is being unreasonable if they read or question the terms, saying that they are "just something the lawyers want us to do" or that they are wasting their time reading them. If the purchaser is at the front of a queue (for example at an airport car rental desk) there is additional pressure to sign quickly. Finally, if there has been negotiation over price or particular details, then concessions given by the salesperson may be seen as a gift which socially obliges the purchaser to respond by being co-operative and concluding the transaction.

5. Standard form contracts may exploit unequal power relations

If the good which is being sold using a contract of adhesion is one which is essential or very important for the purchaser to buy (such as a rental property or a needed medical item) then the purchaser might feel they have no choice but to accept the terms. This problem may be mitigated if there are many suppliers of the good who can potentially offer different terms (see below), although even this is not always possible (for instance, a college freshman may be required to sign a standard-form dormitory rental agreement and accept its terms, because the college will not allow a freshman to live off-campus).

6. Common law status

As a general rule, the common law treats standard form contracts like any other contract. Signature or some other objective manifestation of intent to be legally bound will bind the signor to the contract whether or not they read or understood the terms. The reality of standard form contracting, however, means that many common law jurisdictions have developed special rules with respect to them. In general, in the event of an ambiguity, the courts will interpret standard form contracts *contra proferentem* against the party that drafted the contract, as that party (and only that party) had the ability to draft the contract to remove ambiguity.

United States: Standard form contracts are generally enforceable in the United States. The Uniform Commercial Code which is followed in most American states has specific provisions relating to standard form contracts for the sale or lease of goods. Furthermore, standard form contracts will be subject to special scrutiny if they are found to be contracts of adhesion.

Canada: In Canada, exclusion clauses in a standard form contract cannot be relied on where a seller knows or has reason to know a purchaser is mistaken as to its terms (*Tilden Rent-A-Car Co. v. Clendenning*[2]).

Australia: Standard form contracts have generally received little special treatment under Australian common law. A 2003 New South Wales Court of Appeal case (*Toll (FGCT) Pty Limited v Alphapharm Pty Limited*[3]) gave some support for the position that notice of exceptional terms is required for them to be incorporated. However the defendant successfully

[2] (1978), 83 DLR (3d) 400
[3] [2004] HCA 52; 219 CLR 165; 79 ALJR 129; 211 ALR 342

appealed to the High Court so currently there is no special treatment of standard form contracts in Australia.

Legislation: In recognition of the consumer protection issues which may arise, many governments have passed specific laws relating to standard form contracts. These are generally enacted on a state level as part of general consumer protection legislation and typically allow consumers to avoid clauses which are found to be unreasonable, though the specific provisions vary greatly. Some laws require notice to be given for these clauses to be effective, others prohibit unfair clauses altogether (e.g. Victorian Fair Trading Act 1999).

United Kingdom: Section 3 of the Unfair Contract Terms Act 1977 limits the ability of the drafter of consumer or standard form contracts to draft clauses which would allow him to perform in a substantially or totally different manner than would be reasonably expected.

Exclusion or Limitation of Liability by One Party

In ***D.C.M. Ltd. v. Assistant Engineer (HMT Sub-Division), Rajasthan State Electricity Board, Kota***[4] where the division bench had to consider the question whether the Rajasthan State Electricity Board functioning under the Electricity Act of 1910 and the Electricity (Supply) Act, 1948 could in exercise of its powers under Section 49 of the Supply Act require the consumer-appellant before them to pay by way of minimum charges at nearly three times the normal rate charged from other consumers being heavy industries consuming heavy demand of 25 MW. Even though the appellant before them, D.C.M. Ltd., had entered into such an agreement with the Board it was held that the said term in the agreement was unreasonable and consequently the demand of such excessive minimum consumption charges was not justified and could not be countenanced on the touchstone of Article 14 of the Constitution of India as the Electricity Board was an instrumentality of the State.

Problem

1. There should be contractual document
2. There should be no misrepresentation
3. There should be a reasonable notice of the contractual terms
4. Notice should be contemporaneous with the contract
5. The terms of the contract should be reasonable
6. Strict interpretation of the exemption clause

[4] AIR 1988 Raj 64, 1987 (2) WLN 538

7. Fundamental breach of contract

8. Non-contractual liability

9. Liability towards third parties

10. Statutory Protection

Position in India

Unlike England, there is no specific legislation in India concerning the question of exclusion of contractual liability. There is a possibility of striking down unconscionable bargains either under Section 16 of the Indian Contract Act on the ground of undue influence, or under Section 23 of that Act, as being opposed to the public policy.

In *Central India Water Transport Corp. Ltd. v. Brojo Nath*[5], the Supreme Court struck down a clause in a service agreement whereby the service of a permanent employee could be terminated by giving him a 3 months' notice or 3 months' salary. It was held that such a clause was unreasonable and against public policy and void under Section 23 of the Indian Contract Act. Similarly, if a dry cleaner tried to limit his liability to 50% of the price of the saree lost on the basis of a term printed on the reverse of the receipt, the clause limiting the liability was held to be against public policy, and therefore, void.The Law Commission of India in its 103rd Report (May, 1984), on unfair terms in contract, has recommended the insertion of a new Chapter IV-'A', consisting of Section 67A in the Indian Contract Act. According to this recommendation, where the court, on the terms of the contract or evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable. A contract, according to this provision, is considered to be unconscionable if it exempts any party thereto from either the liability from willful breach of contract, or the consequences of negligence. However, the same has not been implemented until today.

Contractual Liability Exclusion

If you looked at Bodily Injury and Property Damage Liability Coverage in your liability policy, you would probably think that it did not cover contractual liability. This is because Coverage A contains a contractual liability exclusion. This exclusion applies to bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. Note that contractual liability applies only to bodily injury or

[5] 1986 AIR 1571, 1986 SCR (2) 278

property damage. If you assume liability under a contract on behalf of someone else for claims that allege personal and advertising injury, the claims will not be covered under your liability policy. Contractual liability is specifically excluded under personal and advertising injury liability coverage (Coverage B).

LITERATURE REVIEW

Prof. M.A. Eisenberg quotes Prof. Arthur Leff from the latter's article "unconscionability of the code" published in (196) 115 U. Pen Law Review 485 and 494 state that :

"The purpose of contract Law is not simply to create conditions of liability, but also to respond to the social process of promising."[6]

He stated that since the law does not enforce, a promise as such, a legal analysis of bargain of promise must start with a question whether such promise is legally enforceable at all. He further quoted Arthur Leff analyzing the distinction between procedural and substantive unconscionability is fault or unfairness in the bargaining process and substantive unconscionability is fault or unfairness in the bargaining outcome – i.e. unfairness of terms.

In *V. Ragunath Rao v. State of Andhra Pradesh*,[7] the Andhra Pradesh High Court Considered the constitutionality of clauses 11, 29, 59, 62B and 73 the A.P. standard specification on the anvil of the articles 14, 19(1). The contract was entered by petitioners therein under 298 and AP High Court declared clauses 73 that was an arbitration clause of reference to officers who had already dealt with the contract as arbitrary and ultra vires the constitution.

In *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and another*[8]**,** Supreme Court of India refused to interfere in adhesion contract on the ground that it was not unconscionable so as to "shock the conscience of the court".

In *Ratanchand v. Askar*[9] the Andhra Pradesh High Court has suggested that the courts may create new heads of public policy to meet the changing social values and concepts in the progressive modern society.

[6] Eisenberg, MA, "The Bargain Principle and its Limits", (1982) 95 Har. L.R. 441
[7] (1989) Andhra Law Times 461
[8] AIR 2005, 1993 SCR (3) 199
[9] A.I.R. 1976 AP 112; N.V.P. Pandian v. MM Roy, A.I.R. 1979 Mad. 42.

In *Lily White v. Manuswami*[10] the Madras High Court refused to enforce an agreement limiting the liability of one of the parties, on the ground that such an agreement was unconscionable and opposed to public policy. In this case the plaintiff gave a new saree to the defendants, a firm of launderers and dry-cleaners, for dry cleaning. The saree was lost. In an action by the plaintiff the defendants relied on a condition printed on the reverse of the receipt according to which the customer was entitled to claim only 50% of the market value of the saree lost.

In *Grandhi Pitchaish Venkatoraju & Co. v. Pulukuri Jagannadham and Co. Calcutta*[11], a bill was prepared by Calcutta's firm addressed to petitioner of Rajahmundry. It contained description of the pulses supplied, the weight and the rate and the total payable. It further contained the top words "subject to Calcutta jurisdiction" and same was underlined in print. The question to be decided was whether the words "subject to Calcutta jurisdiction" operate to exclude the jurisdiction of Rajahmundry Sub court where part of the cause of action in respect of the claim in this suit had arisen. It was held that the bill containing the words at the top "subject to Calcutta jurisdiction" do not amount to a contract between the parties which confers exclusive jurisdiction on the Calcutta courts to the exclusion of any other court that may have jurisdiction by reason of section 21 of the CPC. Hence jurisdiction of Rajahmundry courts is not excluded.

In *Delhi Transport Corporation v. DTC Mazdoor Congress*[12] it has been held that the courts would relieve the weaker party to a contract from unconscionable, oppressive, unfair, unjust and unconstitutional obligations in standard form contract.

In *Tata Chemicals v. Skypak Couriers*[13] the National Consumer Disputes Redressal Commission after referring to copious case law, refused to enforce an onerous clause in a printed form contract and accordingly relieved a consumer from the terms found thereon.

IMPORTANCE AND RELEVANCE OF THE STUDY:

In the changing economic conditions, the trade and commerce has increased tremendously worldwide which has given rise a "large scale and wide spread practice of concluding contracts in standardized forms. This standard form contract has become the universal necessity in the

[10] A.I.R. 1966 AP 112; N.V.P. Pandian v. MM. Roy, A.I.R. 1979 Mad. 42.
[11] A.I.R. 1975 AP 32.
[12] 1991 Supp (1) SCC 600.
[13] OP No. 66 of Fri. Sep. 18, 1992.

modern world of trade and commerce. For example LIC of India has to issue thousands of insurance covers every day. Similarly, the railway administration of India has to make innumerable contracts for carriage. It would be difficult for such large scale organizations to draw up a separate contract with every individual. So, standard form contract becomes necessary for them. Such standardized contracts contain a large number of terms and conditions in fine print which restrict and often exclude liability under the contract.

In such type of contracts, terms are drafted by are party at its own choice and the other party can hardly bargain with such massive organizations and therefore, his function is to accept the offer whether he likes its terms or not. The other party has no choice to negotiate but only has to accept to or go without it. The term standard form contract is less favourable to the party who is at the receiving end. The offerer has several advantages over the weaker party due to huge financial resources, legal advice and expert draftsmanship. In addition to this, stronger party feels that the other party has no option rather to accept the services on the given terms. This gives a unique opportunity to the giant company to exploit the weakness of the other party or individual by imposing terms which may go to the extent of exempting the company from all liability under the contract. The classical doctrine of freedom of contract is greatly affected in such type of contracts. The weaker party has no freedom in such contracts. Our day to day dealing are also affected by them. For example we have to enter into a standard form contract while traveling by bus, train or air even the launderer washes the cloths subject to the printed contract terms. Our employment is also regulated by standard form contract. In these circumstances, courts have found it very difficult to come to rescue of the weaker party; particularly where he has signed the documents. In such cases the courts have been constrained to hold that he will be bound by the documents even if he never acquainted himself with its terms. For example in case of DHL Worldurdi express v. Bharthi Knitting company, the Apex consumer court held that by signing on the consignment note at the time of handing over the packet to the courier the consumer had agreed to the term and conditions that limited the liability of the courier in case of loss or damage to the consignment, to 100 dollars. The consumer court therefore could not award any damages over and above this amount. This was upheld by the Supreme Court.

NEED FOR LEGISLATIVE AND JUDICIAL CONTROL OVER STANDARD FORM CONTRACTS

In order to protect weaker parties, particularly consumers against such one sided contracts and agreements, we need to have a specific law or regulations that prohibits unfair terms in contracts. In India, there is no specific law which protects the interests of the consumers. The Indian Contract Act, 1872 represents the same principles and philosophy which was there in 1872 and no much amendments have been made to make it upto date. The Indian Contract Act, 1872 has its root in the judge made English law of contract and at that time standard form contracts had not created that problems which they are creating in the modern time. However, the English law of contract, which is still a judge made law has been greatly modified by various enactments. In England, such protection is given through the unfair contract terms Act, 1977 which together with sale of goods makes some forms of exclusion clauses null and void, in all circumstances. For example see:

i) The misrepresentation Act, 1967;

ii) The unfair contract terms Act, 1977

In addition, there is unfair terms in consumer contracts regulations which apply to standard contract terms used with consumers. Under these regulations a consumer is not bound by a standard term in contract with a seller or a supplier if that term is unfair this also provides powers to the office of fair trading and other qualifying bodies such as the utility regulations and consumers association, to stop the use of unfair standard terms by businesses. In the absence of a specific law there is a possibility of controlling these standard contracts either under section 16 of the Indian contract Act, 1872, on the ground of undue influence or under section 23 of this Act, as being opposed public policy. The courts in India, however, try to provide relief to the weaker party by using the above sections of the Act. The Act provides that where one party is in a position to dominate the will of other and the transaction appears on the face of it or on the basis of evidences produced to be unconscionable, a presumption of under influence would arise there. The party who is in a dominating position has to prove that he did not exercise under influence in that case.[14]

[14] Section 16 (3), The Indian Contract Act, 1872

CONCLUSIONS & SCOPE OF THE STUDY:

Scope The law of contract in recent years has to face a problem which is new and wide dimensional. The problem has arisen out of the large scale practice of concluding contracts in standardized form. In standard form contract; contracting parties are not in equal bargaining position. In such type of contracts, one party drafts the terms and conditions of the contract which generally favour to that party and the other party has to sign on dotted lines without any choice to negotiate. The terms of contract, so drafted are less favourable to the party who is at the receiving end and much favourable to the drafting party. In some cases, this may go to the extent of exempting themselves from all liabilities in case of any loss or damages.

In India, there is no specific law to protect the interest of the weaker party. Provisions to regulate standard form contracts are mainly scattered in different statutes. However, Indian courts have evolved same modes of protection. The object and scope of this study is to make analysis of various aspects of standard form contracts and exclusion of contractual liability. An attempt has also been made to suggest improvements in the existing laws with a view to eliminate the problems created by the standard form contracts.

BIBLIOGRAPHY

BOOKS

Anson's Law of Contract Ed. by A.G. Guest, 25th Edn. 1979

Bangia, R.K., Law of Contract-1 and Specific Relief Act, Edn. 2009

Cheshire and Fifoot, The Law of Contract, 8th Edn. 1972

Davison, J.P., Contract, 1982

Iiyer, T.S.V., Law of Contract, Vol. 1, 1984.

Patna, A.C., Indian Contract Act, 1965

Ponnuswami K. and Puri, K.K., Cases and Materials on contracts, 1974

Ramachandran, V.G., The Indian Contract Act, Vol. 1, 1983

Singh Avtar, Law of Contract and Specific Relief Act, 9th Edn. 2005

Sutherland, D., Indian Contract Act and Specific Relief Act, 1990.

Tritil, G., An outline of law of contract, 1984

Willston on Contracts, 3rd Edn. 1979.

ARTICLES

Allen E., Adhesion Contracts (1953) 53 Col. L.R. 1072.

Bright, C.M., Contract of Adhesion and Exemption Clauses (1967) 41 Aust.

Clam, M., Contractual Limitation of Liability for Negligence (1915) 28 Mar.

Clark, P.H., Unequal Bargaining Power in the Law of Contract (1975) 49

Denning, The Road of Justice (1955) JBL 526.

Ellinghaus, in Defence of Unconscienability (1969) 78 Yale LJ 75.

Guest, A.G., Fundamental Breach of Contract (1961) 77 LQR 98.

Issacs, The Standardizing Contact (1917) 27 Yale LJ 34.

Kerr, A.J., Imposed Terms in Standard Form Contracts (1981) 98 SALJ 15.

Linhoff, A., Contract of Adhesion and Freedom of Contract (1961-62) 36

Maitrose, L.J., Some Problems about Fundamental Terms (1964) Camb. L.J.

Nicholas, S.W., Freedom of Contract and Adhesion Contract (1965) 14CLQ

Patel, G.C., Law of Contract (1966) ASIL 217.

ACTS

The Indian Contract Act, 1872.

The (Indian) Sales of Goods Act, 1930.

The (Indian) Specific Relief Act, 1963.

The (Indian) Consumer Protection Act, 1986.

The (English) Unfair Contract Terms Act, 1977.

The (English) Occupier's Liability Act, 1957.

The (English) Micro presentation Act, 1967.

The (English) Sale of Goods Act, 1979.

The (English) Consumer's Safety Act, 1978.

The (English) Supply of Goods (Implied Terms) Act, 1973.

The (English) Unfair Terms in Consumer Contracts Regulation, 1979.