STANDARD FORM OF CONTRACTS: A NECESSARY EVIL OR EXAGGERATED MEDIUM

Written by ***Srinidhi Muralidharan***

2nd Year BA LLB Student, School of Law, CHRIST (Deemed to be University)

'Standard Form Contracts' or 'Boiler-Plate' Contracts are considered as privately made laws which regulate our day-to-day activities. From purchasing biscuits to insurance, numerous contracts of this kind are made by individuals. With the evolving market structures and business cycles, the structure of the aforementioned contracts is becoming complex leading towards the exploitation of the parties to the contract. As one of the parties is responsible for making the contract, the other party is stuck in a position where they either have to either 'take or leave' the contract. This showcases the unequal bargaining power present between both the parties, and must be regulated. The primary contention of this Article is to analyse the regulation of aforementioned contracts in India. This Article therefore considers the essence of Standard Form Contracts in today's era. It attempts to bring about the stance of the American and British jurisprudence in this regard. This is to gain an international perspective towards the construction of Standard Form Contracts as a whole. It is understood that the American and British laws operative distinctively. This Article analyzes the workings and interactions of different frameworks under the Law of Contract. It further aims to study the Indian take on Standard Form Contracts. This will be dealt with, taking into consideration the judgments given by the Indian Supreme Court. With the evolution of technology and mankind, it is highly imperative for the law to dynamic. This Article brings about the importance of 'Standardization' of contracts, and the need to regulate Standard Form Contracts. It tries to achieve the same by the means of highlighting the very nature of the Contract Law governing India.

INTRODUCTION:

Standard form Contracts are contracts where one party is solemnly responsible for making the contract. These are accepted to be privately made laws which adhere to the general rule of public policy. The future of contractual stigmatization is in the form of standard form contracts. They are widely used in today's world of globalization and technological advancement. The law governing contracts have always been structure specific. It merely regulates the structure that is to be followed by contracts. The courts in this regard have realized certain structural impediments relating to standard form contracts, rather than de-structuring the law governing these contracts. The primary question of concern arises with the attribution of consent that is to be provided by both the parties. standard form contracts are formed by one of the parties. The contracting party can either 'take' or 'leave' the contract. There is absolutely no room for negotiation in this area. This is also one of the fundamental differences between general and standard form contracts. The rule of interpretation that is to be applied by the courts will also vary. Several attributes of the contract will be put into question. The contracting party's consent in this regard is pretty much restricted. The Indian Contract Act of 1872 under Section 24 prescribes for consent being obtained freely.

"13. 'Consent' defined —Two or more persons are said to consent when they agree upon the same thing in the same sense."

The consent of the individuals must be attained if they mean the same thing in the same sense of it. In case of standard form contracts this becomes difficult. The contracting parties may intend to contract towards different aspects of the same matter. Consent can neither be attained in the same sense between both the parties. It becomes crucial to establish or even identify the prevalence of demarcation between the said laws. The Indian Contracts Act in this regard doesn't recognize the divergent nature of such contracts. The effectiveness of a written contract mutually agreed upon by both the parties. With the ascertainment of the consent that's given by the parties, the validity of the said contracts is put into question.

The quintessential problem with standard form contracts is that, there is no equal bargaining powers attributed to the parties. The party in charge of drafting the contract has the ability to mold the nature of the contract. With lengthy and bulky contracts, usually the parties are not

aware of what they are signing up for. However, courts assume that the parties have given their free and informed consent resulting in enforcement of such contracts. Therefore, it is to be understood that standard form contracts are viewed distinctly due to the very imbroglio that exists.[1] Contract Law, legislation wise, has evolved to an extent that it covers the application of standard form contracts. This is pertaining to the 'nature of the document' and not the nature of the contract that exists. Several guidelines had been laid down in order to cover the scope of these contracts when they exist in conflict with other laws such as the Consumer law, Insurance law, etc. These guidelines formulate the standards to evaluate standard form contracts.

The essence of contract law being will of the parties cannot be destroyed by law-makers or courts mandating a fixed format for standard form contracts. It is to be understood that these contracts are privately made, in order to regulate the flow of privately made bargains in everyday life.[2] Now, with the establishment of two different stand points pertaining to the same issue of the validity of the said contracts, it becomes highly imperative to address one certain dispute of law. This is the conflict between contract law and other laws. The applicability of standard form contract itself must be viewed differently when it evolves into a consumer or insurance transaction. The Courts are then required to decide the prevalence of one law over the other. The principles adopted to decide these cases vary from court to court, bench to bench, and even judge to judge. Contract laws of India, when compared to other democracies do not provide for codified regulation of standard form contracts. These contracts are adjudged on the basis of guidelines proposed in various judgments.

With the evolution of technology, the system of contract formation has also effectively changed. The principles of interpretation towards these contracts have evolved with the due course of time. SFCs, are interpreted differently from general contracts. General contracts are formulated by parties having equal bargaining power, after entering into negotiations.[3] The rule of interpretation applied by many countries is 'Contra Proferentum'. When the contract or the

[1] Mallika Abidi and Shreya Aren, Standard Form Contracts, in Sairam Bhat (ed), Law of Business Contracts in India (SAGE Publications India Pvt. Ltd, 2009)
[2] W. David Slawson, 'Standard Form Contracts and Democratic Control of Law making Power' (1971) 84 Harv L Rev 529 <https://heinonline.org/HOL/P?h=hein.journals/hlr84&i=555> accessed on 17 May 2018
[3] Mallika Abidi and Shreya Aren, Standard Form Contracts, in Sairam Bhat (ed), Law of Business Contracts in India (SAGE Publications India Pvt. Ltd, 2009)

elements of a contract is ambiguous, it must be viewed in a manner that opposes the interest of the parties who provided the wording for the contract.[4] There is a stricter review for SFCs as the unconscionability of the agreement is primarily questioned rather than the enforceability.[5]

ECONOMICS OF SFCs:

Contracts is made up of a chain of supplies and demands. A seller would go forward and produce products, for which he would expect a valid return by selling it. Th price of the product will be attributed towards the intersection of the supply and demand for the product. In this case, when there is mass production of goods due to equivalent demand for the goods, numerous standard form contracts are made. This need not necessarily be product specific. Services provided by people will also be taken in account. These standard form contracts if not effectively regulated, would spoil the market structure of the economy. It is to be understood that the seller cannot invest and maintain a standardized contract for every single item that s being sold by him. It becomes highly improbable due to the raging costs and insufficient returns. When this system is turned the other way around, the Government would be held accountable for standardizing contracts, and ensure that the seller doesn't exploit the buyer. This would inherently become the transaction cost borne by the Government. It is highly imperative for one to note that the Government would equalize its costs by taxing the product for its services. The buyer will have to eventually bear these costs. In addition to this, differing from the non-standard forms, the buyer will have no say towards the contract. There is absolutely no scope for negotiation. The buyer is therefore stuck with the existing contract put forth by the seller. The aspects of competition and commercial pressure also play a crucial role.[6]

---

[4] *Laura A. Foggen, 'Is Judicial Treatment of Contra-Proferentum Outcome-Determinative in Insurance Disputes' (1992) 5(1) Envtl Cl J 43 <https://heinonline.org/HOL/P?h=hein.journals/envcl5&i=49> accessed on 15 September 2018*

[5] Edith R. Warkentine, 'Beyond Unconscionability: The Case for Using "Knowing Assent" as the basis for Analyzing Unbargained-for Terms in Standard Form Contracts' (2008) 31(3) Seattle U L Rev 469 <https://heinonline.org/HOL/P?h=hein.journals/sealr31&i=477> accessed on 15 September 2018

[6] W. David Slawson, 'Standard Form Contracts and Democratic Control of Law making Power' (1971) 84 Harv L Rev 529 <https://heinonline.org/HOL/P?h=hein.journals/hlr84&i=555> accessed on 17 May 2018

Consider the two different market conditions: Perfect and Imperfect Competition. In a market with perfect competition, the Government will have to play a very minimal or no role at all towards the standardizing of contracts. There would be multiple players selling identical products, with the goal of attaining maximum returns. Here, the consumer's preference and taste will be given utmost importance. Therefore, standard form contracts in this scenario would be justifiable in all regards. However, perfectly competitive market is an ideal vision of the economy. In reality, there exists imperfect markets only. The will of the consumers is given least preference as there are only few market players to begin with. The intention of players would be profit making as the demand is inelastic in nature. Therefore law-makers will have to set up standards to ensure that there is no exploitation that takes place. The extent of standardization is what the Government has to look into. It is noted that standard form of contracts, although varied deal with the fundamental working of human life, are impersonal in nature. The electronic contracts in this regard makes it even impersonal. One of the de-merits of standard form contracts is the fact that people do not take the time to read it. It's either the bulkiness of it, or the mere tendency to not look into it. The law-makers have to take-in these facets into consideration while setting standards for such contracts, or while making decisions pertaining to such contracts.

THE US AND UK STANDPOINT:

American law has introduced legislations in order to regulate SFCs. Uniform Commercial Code under Section 2-302 provides for unfair terms in contracts.

"(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

Section 211 of the Restatement (Second) of Contracts addresses the assent of the parties that is provided to a contract and how it is dealt with. This Section particularly deals with standardized agreements.

"(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."

American Courts have identified the Contracts of Adhesion by the medium of 'Adhesion Analysis'. This was introduced in the case of *Steven V. Fidelity & Casulaty. Co.*[7] The Contract pertaining to airplane insurance, the insurer was held liable for the not providing the 'non-coverage' clause. It was held that the contract was prepared by parties with unequal bargaining powers. Therefore, it instituted an adhesion-based contract. It was said that judicial scrutiny was required towards evaluating such type of contracts which are in standardized forms. With the introduction of the above given statues effective 'standards' have been implemented to regulate these contracts. The case of *Pro CD, Inc. V. Zeidenberg*[8], a landmark United States for the Seventh Circuit judgment on Standardized agreements, it was held that the plaintiff had the time to go through the software license agreement. The said software was supposed to be used for non-commercial purposes only, and this was one of the terms of the agreement. The defendant re-sold the software. The court although recognized the fact that the license came within the packaging and not outside it, the shrink-wrap agreement was held to be valid. The purchaser had the time to go through the license, inspected the package, tried out the software and had learnt about the license. The contention that the license was unfair on the ground that

[7] 58 CAL 2D 862
[8] 86 F.3d 1447 (7th Cir. 1996)

the terms of the said license makes it worth less than the sale price was rejected. It is to be noted that in the above given case, Section 2-302 can also be adopted, it was specified in the given license regarding the usage for non-commercial purposes. When dealing with the above given case one might question the judgment this rationale with the succeeding judgment given the case of *Klocek V. Gateway*[9], Inc, given by the U.S District Court. In this case, the defendant contended that the plaintiff had agreed to the terms and conditions of the agreement inclusive of the arbitration clause, by the act of purchasing a box which contained the agreement. The act of purchasing the computer along with the agreement in the given box and keeping it for five days was acceptance of the terms. This was contended by the defendant. The court held that the American Uniform Commercial Code applies to this particular case as it deals with the sale of goods. The defendant was held liable for damages due to the unfair nature of the agreement. It was stated that there was essentially no consent given towards the arbitration clause of the agreement. The plaintiff had to expressly agree to the additional terms for it to become a part of the contract. The above given judgments appear to offer dissenting views towards shrink-wrap agreements,[10] and towards standardized agreements as a whole. It is to be understood that the reasoning adopted by the courts are similar. The courts looked into the nature of the agreements, and the nature of the assent that was provided for the said agreements. In the first case, the defendant had the opportunity to learn about the license and its clause. This wasn't present in the second case. One can observe the pattern of 'Standardized Contracts' turning into a 'Contract of Adhesion' from the first case to the second. In addition to this, the core contention of bargaining power that is prescribed to both the parties was looked into. This was present in the first case, and not in the second one. Therefore, it becomes highly imperative to look into both the judgments not as individual cases, but as a combined system of uniform reasoning, according to the above given statutory provisions.

The United Kingdom has put forward The Unfair Contract Terms Act, 1977. This was enacted in order to ensure fairness in terms of contract formulation. The Section 3 of the Act provides for 'liability arising from the contract'.

[9] 104 F. Supp. 2d 1332 (D. Kan. 2000)

[10] Mallika Abidi and Shreya Aren, Standard Form Contracts, in Sairam Bhat (ed), Law of Business Contracts in India (SAGE Publications India Pvt. Ltd, 2009)

*"**F1**(1) This section applies as between contracting parties where one of them deals F1... on the other's written standard terms of business.*

(2) As against that party, the other cannot by reference to any contract term—

(a)when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b)claim to be entitled—

(i)to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii)in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

One of the common problems that arises from a standardized contract is the notion, that the contract could be molded in a way favoring the party forming the contract. This particular legislation identifies the facets of unfair terms in contractual agreement and prohibits such terms to be listed in the contract. The primary contention behind the formulation of the UTCA was an extension towards the "Doctrine of Fundamental Breach".[11] This was given in the case of *Photo Production Ltd V Securior Transport Ltd*.[12] In this case, the defendant's claim that the exclusion clause present in the contract to not hold them liable for any action committed by their employee 'under any ordinary circumstance' was not accepted. The Doctrine of Fundamental Breach was applied and the contract was invalidated. In this regard Section 3 of the Act becomes pertinent. The Act also provides for certain guidelines[13] for the protection of the weaker parties i.e, parties with lesser or no bargaining power in the contract. Section 2, 4,6,7 and 11 give the conditions where exclusion of liability is strictly barred. This legislation analyzes the provisions of the contract in particular. When read with The Unfair Terms in Consumer Contracts Regulation 1999, it provides for the stipulation of consumer contracts. This Act is yet to deal with the situation of the 'Battle of Forms'[14]. This is rarely discussed in

[11] Alfred W. Meyer, 'Contracts of Adhesion and the Doctrine of Fundamental Breach' (1964) 50 (7) Va L Rev 1178 <https://heinonline.org/HOL/P?h=hein.journals/valr50&i=1206> accessed on 15 September 2018

[12] [1980] AC 827

[13] 11 2 UTCA

[14] Edward J. Jacobs, 'The Battle of the Forms: Standard Term Contracts in Comparative Perspective' (1985) 34(2)) Int'l &Comp LQ 297 <https://heinonline.org/HOL/P?h=hein.journals/incolq34&i=315> accessed on 15 September 2018

the area of Contract Law. It focuses on the question that what is to happen to the parties when they enter into a standard form contract, and there is a conflict with the parties' standard terms.[15] This could be seen in the judgments of Specialist Insulation Ltd V. Pro-Duct (Fife) Ltd.[16] and Butler Machine Tools Co Ltd v Ex-Cell-O Corp (England Ltd).[17]

To summarize, with the introduction of standard form contracts, the American Law has made a clear distinction between standard form contracts and contracts of adhesion. In common parlance, both the terms mean the same. However, SFCs are regulated and valid in the United States where as Contracts of Adhesion aren't. By the means of the above given statutes, it is to be understood that a privately made law in the form of a standard form contract must be constructed in a way that it does not formulate a contract of adhesion. The introduction of the said statutory provisions establishes the standards that is to be followed when such contracts are made. The United Kingdom has come up with legislation effectively regulating standard form contracts. This is based on the foundation of the 'exclusion of liability' clause. It can be understood that the legislation itself focusses on the above given aspect of unfair terms, and evolves towards the conditions assimilating around the areas of assent and bargaining powers. It should be noted that the scope of the Act must be limited towards exclusion clause. However, the culmination of the legislative efforts showcases the regulation of standard form contracts in both the countries. A codified law pertaining to the regulation of standard form contracts provides for the mitigation of any conflict that could arise with multiple aspects of law itself.

THE INDIAN CASE STUDY:

The Indian Contract law is governed by the Indian Contract Act of 1872. This Act gives provides for the regulation of contracts in the countries. It lags behind when it comes to the regulation of standard form contracts. Although there are facilitative provisions with in the Indian Contract Act of 1872 i.e, Section 16 which deals with undue influence, and section 23 which talks about lawful consideration. These provisions are however not effective. In the case

[15] All Answers ltd, 'Battle of the forms' (Lawteacher.net, September 2018) <https://www.lawteacher.net/free-law-essays/contract-law/battle-of-the-forms-law-essay.php?vref=1> accessed 15 September 2018
[16] [2012] CSOH 79
[17] 1 WLR 401

of *Sheikh Mohd. Ravuther V. B.I.S.N. Co*[18], the court rejected the application of Section 23 of the Act. In the judgment of *Union of India & Anr v M/S Indus Bank Ltd. & Anr*[19] , Hon'ble Justice R.Nariman stated that before one has to evaluate the validity of the Indian Contract Act of 1872, before structuralizing of standard form contracts. He pointed out that the Indian legislature should divert itself towards the views of public policy and economic disparities before formulating laws. This however isn't applicable to the Indian Contract Act itself. It is to be noted that Indian judges have to take into consideration multiple facets of society, and not only the law when cases relating to Contracts law or standard form contracts for that matter. The judges have to ensure commercial interest as well as public policy is taken into consideration.

In this regard, one can observe a pattern of guidelines that has been put forth by various judges in relation to SFCs. Indian Courts have looked towards the interpretation as well as the evaluation of the terms of standard form contracts. In the case of *H.M. Kamaluddin Ansari and Co. and Ors. vs. Union of India and Ors.*[20] , it was contended if the Government of India can withhold the amount from a different contract, in case of non-payment of claims from one contract. The question arose in front of the Supreme Court towards the interpretation of clause 18 of the Contract. The Court applied the golden rule of interpretation[21], and dwelled into the fundamental nature of the contract. It examined the words prescribed in the contract, and provided for a different interpretation to the same clause. This showcased the willingness of the Court to look into the clause and interpret it keeping mind the commercial interest of the parties. With the presence of no effective law to regulate standard form contracts, it becomes the duty of the Courts to give about the standards.

Justice RV Raveendran, in the case of *M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.*[22] stated that, there was a clear demarcation between 'Standard Form Contract' and 'Standard Form of Terms and Conditions' which needs to be identified. He also stated that the arbitration clause present in the Standard form of Terms and Conditions shall be deemed to be incorporated by reference to strengthen its enforceability. The inclusion of an arbitration

[18] [1908] ILR 32 M 95
[19] MANU/SC/1016/2016
[20] 1983 SCR (3) 607
[21] 1983 SCR (3) 607
[22] (2009) 7 SCC 696

clause by a mere allusion to the main contract, will not be held as a contractual clause. In the recent Supreme Court judgment of *M/S. Inox Wind Ltd. vs M/S. Thermocables Ltd*,[23] aforementioned contention of the provisional application of the arbitration clause was contended. The existence of an arbitration clause in the Standard Terms and Conditions of the agreement made it enforceable. The Court looked into he findings of both the parties, and concluded that the said clause is expressly written in the agreement and is to be considered valid. The Courts have also looked into the terms of the contract, and have made inferences towards it being fair to the contract.

In the Competition Commission case of *Jyoti Swaroop Arora V. Tulip Infratech Ltd. and Ors.*, [24] The contention put forth by one of the parties reflected upon the terms given in contested Standard form contract. The Commission took into consideration this contention and examined the document. It pointed out that the terms of the contract weren't necessarily unfair. However, this case was directed towards further investigation by the Commission.

The Indian Contract Law in this regard, is not sufficient to meet the changing business requirements.[25]

CONCLUSION:

With the evolution of technology, changing business systems it becomes necessary to realize the fact the law must be dynamic. The emergence of e-commerce market and Artificial Intelligence has led to the construction of 'click-wrap', 'shrink-wrap' and 'browse-wrap' agreements. The Indian law does not dwell into the nature of such agreements. With the law neither being stringent nor flexible, the judiciary has taken it into consideration that it distinguishes between standard terms and standard form contracts. It has been seen that the enforceability of these contracts is more case-to-case basis rather than it following a statutory code of conduct. The distinction towards a clause being unfair o not also depends on which court is it being brought to. A civil court may rule in the favor of the contract per se, but a

[23]AIR 2018 SC 349

[24] 2015 Comp LR 109 (CCI)

[25] Mallika Abidi and Shreya Aren, Standard Form Contracts, in Sairam Bhat (ed), Law of Business Contracts in India (SAGE Publications India Pvt. Ltd, 2009)

consumer forum would adopt an alternative approach. This is also where one can notice the 'clash of laws' that takes place. Several cases note the prevalence of consumer laws over that of contract or vice versa. It is to be noted that the Law of Contract must harmonize with the existing laws without losing its validity.

In order for the nation to adhere to a prescribed set of standards, all the contracts must be regularized. This is not possible as it takes away the commercial freedom of the parties involved. However, it should be realized that privately made laws cannot be let alone as it leads to exploitation. As mentioned earlier, the law must be dynamic. A statute or an amendment to the existing Contract law is required. Concentration must be given towards the attainment of assent of the parties. The contract must be regulated on the basis of the bargaining power attributed to both the parties. With this being taken into consideration, the judicial interpretation of standard form contracts, will provide for effective stimulation rather than regularization.

The general principles of the existing contract law are not vocal about the evolving e-commerce markets. When compared to the US and UK models, India falls far behind in this particular issue. The American Law demarcates between the contracts of adhesion and standard form contracts. The Uniform Commercial Code of the United States regulates standard form contracts on the grounds of bargaining power and the assent provided by the parties. However, the British legislation deals with the exclusion clause and dwells on it. The Indian laws merely acknowledge the presence of standard form contracts, but there are no clear standards set so far to regulate these contracts. The judiciary of India, has realized these shortcomings, and is making effective contributions by deciding the cases as individual entities. As observed in the above given cases, the courts have gone ahead and looked into the nature of these contracts before giving a decision. The Indian Contract Act in itself is not sufficient to regulate standard form contracts. The Indian Legislature should work on the eradication of these short-comings. A separate code should be enacted keeping in view the American model of construction on contracts. The role of bargaining powers and assent attribution must be seen towards the formulation of such legislation. This would be both wider and not limited to the parties drafting the contracts.

It must be realized that standard form contracts play a vital role in people's lives, and must be aligned with standards in order to regulate the economy as a whole.