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## **CLICKWRAP AGREEMENTS IN INDIA AND USA: ENFORCEABILITY AND LEGAL CHALLENGES**

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### **ABSTRACT**

Clickwrap agreements have emerged as a crucial element in digital transactions, particularly in the context of e-commerce, mobile applications, and online services. These agreements enable users to accept contractual terms by simply clicking an "I Agree" button or similar option, thus facilitating contract formation in the digital space. This paper reviews the legal framework that governs clickwrap agreements in India, emphasizing key legislation such as the Indian Contract Act, the Information Technology Act, and the Consumer Protection Act. It also evaluates pertinent judicial rulings and contrasts India's stance with that of the United States, where electronic contracts are afforded clearer legal recognition under legislation like the ESIGN Act and UETA. The study further investigates challenges related to enforceability, including issues around informed consent, unilateral changes, and consumer protection. In conclusion, it provides suggestions for enhancing the fairness and legal robustness of clickwrap agreements, aiming for a balanced relationship between business objectives and consumer rights.

**Keywords:** Clickwrap Agreements, Electronic Contracts, Contract Law, E-commerce Regulations, Legal Enforceability, Terms and Conditions Online Agreements.

## 1. Introduction

The digital economy in India has witnessed exponential growth, with millions of users engaging in online transactions daily<sup>1</sup>. In today's digital landscape, contracts are not just confined to conventional paper documents that require signatures with a pen. The expansion of e-commerce, mobile apps, and online platforms has created new ways to establish agreements, with clickwrap agreements standing out as a significant option. A "click-wrap agreement" is a type of contract created entirely in an online setting, like the Internet. This agreement details the rights and responsibilities of the parties involved. The name "click-wrap" is derived from the action of clicking an on-screen button or icon to indicate acceptance of the agreement's terms.<sup>2</sup> Clickwrap agreements are a form of contract where a user expresses their consent by clicking a button, often presented as "I Agree" or "Accept Terms" checkboxes on websites and apps. Click-wrap agreements are intended to take the place of direct negotiations between parties in an online environment and can be utilized in a variety of contexts. Negotiating with each visitor to a website would be impractical, if not impossible, for a website owner or online service provider (OSP). Instead, the website owner can present a click-wrap agreement that visitors must accept before accessing the site, downloading software, or making purchases. For example, a click-wrap agreement may: (1) notify users that the content on the website and any associated software is protected; (2) set restrictions on the usage of the site and the downloaded software; and (3) make it easier for the OSP to act against users for any violations. Moreover, click-wrap agreements can serve to limit the liability of the OSP. By using these agreements, an OSP can seek to relieve itself of responsibility for the content available on its website, including any losses incurred from using that content and any issues related to software downloads or products/services bought through the site.<sup>3</sup> This article investigates the legal framework regulating clickwrap agreements in India, examines relevant judicial precedents, compares India's approach with the U.S., further outlines the challenges related to enforceability, and suggests necessary reforms.

## 2. Legal Framework in India

In India, the legal recognition of clickwrap agreements is shaped by several laws that create a

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<sup>1</sup> "Future Ready: India's Digital Economy to Contribute One-Fifth of National Income by 2029-30," (2025) PIB Delhi < <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2097125> > accessed on 23 February 2025

<sup>2</sup> Buono, Francis M. and Friedman, Jonathan A., "Maximizing the Enforceability of Click-Wrap Agreements," (1999) Vol. 4: Issue. 3, Journal of Technology Law & Policy < <https://scholarship.law.ufl.edu/jtlp/vol4/iss3/4> > accessed on 23 February 2025

<sup>3</sup> *Ibid*

framework for electronic contracts and digital signatures. The key statutes to this area are:

### **2.1. Indian Contract Act, 1872.**

The Indian Contract Act<sup>4</sup> outlines the fundamental principles of contract law in India, which include the necessary elements for valid contracts such as offer, acceptance, consideration, and the intention to create legal obligations. Section 10 of the Act<sup>5</sup> stipulates that a contract must be formed with the free consent of parties who are competent to contract and that it is for a lawful purpose. When these conditions are fulfilled, the contract is legally enforceable. In a clickwrap agreement, users express their acceptance of the terms by clicking a designated button. These agreements are considered valid as long as they comply with the requirements set by the Indian Contract Act. It is essential for the agreement to meet all legal criteria and principles established by the Act to ensure adequate protection for both parties under the law.

### **2.2. Information Technology Act, 2000 (IT Act)**

Section 10A of the Act states that “Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose”<sup>6</sup> The section mentioned above clearly states that contracts formed electronically are considered valid and enforceable. This means that a contract cannot be regarded as unenforceable simply because it was created online. As a result, electronic contracts such as clickwrap agreements are effectively validated in India.

### **2.3. Indian Evidence Act, 1872**

Section 65B of the Indian Evidence Act, 1872 states that “any information in an electronic record printed on a paper or stored or recorded or copied in optical or magnetic media produced by a computer shall be deemed by a document. It further states that such a document can be admissible as evidence in any proceedings without additional proof of the original”<sup>7</sup> Section

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<sup>4</sup> Indian Contract Act 1872

<sup>5</sup> Indian Contract Act 1872, Section 10

<sup>6</sup> The Information Technology ACT, 2000, Section 10A

<sup>7</sup> Indian Evidence Act, 1872, Section 65 B

65 (B) addresses the validity of electronic evidence in Indian courts, making evidence in electronic form valid, and also validating electronic contracts, such as clickwrap agreements.

## **2.4.Consumer Protection Act (CPA), 2019**

The Consumer Protection Act of 2019 aims to safeguard consumers' rights in India, including those involved in online and digital transactions. This Act covers e-commerce transactions and addresses issues such as unfair trade practices, defective goods, and service deficiencies. The relationship between Clickwrap Agreements and the Consumer Protection Act lies in the necessity for the terms and conditions of these agreements to be fair, transparent, and not misleading or exploitative to consumers. Clickwrap Agreements must comply with the principles of fairness, transparency, and consumer protection outlined in the Consumer Protection Act, 2019. This ensures that consumers are not subjected to unfair terms and have access to appropriate mechanisms for redress when issues arise.

## **3. Legal Validity of Clickwrap Agreements**

For a contract to be legally valid, whether it is a paper-based contract or an electronic contract, it must possess certain essential elements that are considered *sine qua non*, or prerequisites. These elements include:

### **3.1. Offer and Acceptance**

Section 2(a) of The Indian Contract Act speaks of the offer. “When one person signifies his willingness to do or to abstain from doing anything to obtain the assent of that other to such act or abstinence, he is said to make a proposal.”<sup>8</sup> All communications such as offers, invitations to offer, and counteroffers occur electronically in an e-contract. Under Indian law, a contract is considered valid only when there is an offer and an acceptance of that offer. In the context of a clickwrap agreement, the website or app owner presents the terms and conditions to the user as a form of making an offer. Under Indian law, an offer must be accepted to form an agreement.<sup>9</sup> Section 2(b) of The Indian Contract Act speaks of the Acceptance “When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise”<sup>10</sup> In the case of a clickwrap

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<sup>8</sup> Indian contract act 1872, section 2(a)

<sup>9</sup> Indian contract act 1872, section 2(b)

<sup>10</sup> *Ibid*

agreement, the user's action of clicking "I Agree" constitutes acceptance of the offer.

### **3.2.Consideration**

Consideration is an important aspect of contract law. The rule of consideration states that it is essential to have consideration for a valid contract. Section 2 (d) of the Indian Contract Act, defines the consideration. "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."<sup>11</sup> Consideration must be something that the law recognizes as having value,<sup>12</sup> so the question arises: what constitutes consideration in clickwrap agreements? The answer is in a clickwrap agreement, consideration generally involves the service or product provided by the website or platform in exchange for the user's agreement to the terms. For example, when a user agrees to the terms of a software license, the consideration is the permission to use the software in return for accepting those terms and conditions. The Indian Contract Act stipulates that consideration in a contract does not have to be of equal value,<sup>13</sup> just that it must be present. As a result, digital contracts like clickwrap agreements are legally enforceable as long as there is some form of consideration involved.

### **3.3. Intention to Create Legal Relations**

The term "intention to create a legal relationship" in contract law denotes the mutual understanding and intention of both parties to form an agreement that is enforceable by law. This indicates that if one party does not meet the obligations of the contract, the other party is entitled to pursue legal action in court to uphold the contract. This intention is an essential factor that distinguishes a legally enforceable contract from a simple social arrangement.<sup>14</sup> In clickwrap agreements, the user's intention to enter into a transaction or agreement for using a service or product indicates a desire to create legal relations.

### **3.4. Competence of Parties**

According to Section 11 of the Indian Contract Act, individuals entering a contract must be

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<sup>11</sup> Indian Contract Act 1872, Section 2 (d)

<sup>12</sup> Chidambara Iyer v P.S. Renga Iyer, (1966) AIR 193, (1966) (1) 168

<sup>13</sup> Indian Contract Act 1872, Section 25 (Explanation 2)

<sup>14</sup> Balfour v Balfour [1919] 2 K.B. 571 (25 June 1919)

competent. This entails having a sound mind, not facing legal disqualifications, and being at least 18 years old<sup>15</sup>. In the context of clickwrap agreements, a user's competence is typically presumed if they can access the digital platform and make choices. Nevertheless, the validity of these agreements may be challenged if the parties are minors or are unable to comprehend the terms.

### **3.5. Free Consent**

A fundamental requirement of Indian contract law is that the consent of all parties involved must be given freely and willingly. This means that consent should not be obtained through any form of coercion, undue influence, fraud, or misrepresentation. Coercion refers to the use of force or intimidation to compel someone to act against their will, while undue influence involves taking advantage of a position of power over another party. Fraud occurs when false information is intentionally provided to deceive another party into entering a contract, and misrepresentation involves providing misleading or inaccurate information, whether intentionally or unintentionally. Ensuring that consent is truly free from these detrimental influences is crucial for the validity and enforceability of a contract under Indian law. Clickwrap agreements are typically viewed as having free consent; however, there are concerns regarding "unilateral" or "take-it-or-leave-it" contracts. In these situations, users might not be fully aware of the terms or may not have the chance to negotiate them. As a result, courts may examine whether the user's consent was genuinely informed.

## **4. Judicial Precedents related to clickwrap agreements.**

The Indian judiciary has not explicitly tackled numerous cases related to clickwrap agreements; however, many cases consider the validity of electronic contracts.

### **4.1. Trimex International FZE Ltd Dubai v. Vendanta Aluminium Ltd<sup>16</sup>**

The court examined whether the parties had a valid contract, focusing on their email exchanges. It concluded that the offer presented in the emails was valid, which indicates that a contract was formed. This ruling confirms that emails can indeed create binding contracts when there is clear acceptance of an offer. This case recognizes the validity of electronic contracts.

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<sup>15</sup> Indian Contract Act 1872, Section 11

<sup>16</sup> S.C.R. 2010 1 820

#### 4.2. Tamil Nadu Organic Private Ltd. v. State Bank of India<sup>17</sup>

The legal matter in this situation revolves around the legitimacy of e-auctions. The court affirmed that e-auctions are valid, noting that using electronic methods improves both efficiency and transparency. Additionally, the court highlighted that Section 10A of the IT Act 2000 legitimizes contracts created via electronic means, thus reinforcing the legality of e-auctions.

### 5. Comparative Analysis with U.S.

Clickwrap agreements are common digital contracts used in many places around the world. However, their legal acceptance varies by country, especially regarding consent, clarity, and consumer protection. This section compares how clickwrap agreements are viewed in India and the United States. It will highlight the important similarities and differences in how these two countries handle electronic contracts.

#### 5.1. Legal Framework in the U.S.

The Restatement (Second) of Contracts<sup>18</sup> serves as a comprehensive legal framework that outlines the principles and doctrines governing contract law in the United States, the Electronic Signatures in Global and National Commerce (E-Sign) Act<sup>19</sup> along with the Uniform Electronic Transactions Act (UETA)<sup>20</sup> establish a strong legal basis for the validation of electronic agreements, including clickwrap contracts. These statutes affirm that electronic signatures and records are legally equivalent to conventional paper documents, provided that all parties agree to utilize electronic records.<sup>21</sup>

#### 5.2. Restatement (Second) of Contracts

Restatement (Second) of Contracts is the law that governs the principles of contract law in the USA. Both India and the USA recognize the fundamental principles of a valid contract. These

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<sup>17</sup>AIR 2014 Mad 103 <<https://cyberblogindia.in/tamil-nadu-organic-private-ltd-v-state-bank-of-india/>> accessed on 23 February 2025

<sup>18</sup> The Restatement (Second) of Contracts, 1981

<sup>19</sup> Electronic Signatures in Global and National Commerce (E-Sign) Act 2000

<sup>20</sup> Uniform Electronic Transactions Act (UETA) 1999

<sup>21</sup>R.Thirushya, "Electronic contracts: legal frameworks and challenges in the digital age" (2024) Manupatra <<https://articles.manupatra.com/article-details/Topic-ELECTRONIC-CONTRACTS-LEGAL-FRAMEWORKS-AND-CHALLENGES-IN-THE-DIGITAL-AGE>> accessed on 23 February 2025

principles include making an offer<sup>22</sup>, accepting it, and demonstrating a “meeting of the minds” or mutual agreement. Mutual agreement means both parties intend to enter into a contract and be legally bound by its terms. Once this is established, each party is bound by the offer that was accepted through clear actions or words. Assent, or agreement, doesn’t always have to use spoken or written words; it can also be shown through the actions and behaviour of the person accepting the offer. However, the situation must clearly show that they intended to be bound by the contract for it to be valid.

### 5.3. ESIGN

The Electronic Signatures in Global and National Commerce Act (ESIGN) makes electronic signatures and contracts legally valid. Key points include: 1. Electronic records can meet legal writing requirements. 2. Electronic signatures can substitute for traditional signatures 3. Consent can be provided and confirmed electronically. ESIGN applies to transactions involving interstate commerce and allows state laws to limit its scope. For ESIGN to be applicable, participants must agree to use electronic records, and consumers should receive information about the necessary hardware and software. While consent is important, a court may not invalidate a contract solely for lacking consent. Best practice is to obtain this consent beforehand. ESIGN also sets record retention requirements, stating that electronic records must be accurate and accessible to authorized individuals<sup>23</sup>.

### 5.4. UCITA

To create a contract under UCITA, both parties need to agree. This agreement can happen in different ways. It can be through an offer and acceptance, actions taken by both parties, or through electronic agents that recognize the contract. An offer invites someone to accept it in a reasonable way. When someone sends an electronic message as an offer, a contract forms once the acceptance is received. If you respond by starting a task, completing a task, or providing access to information, the contract is established when the action is received or access is granted, and the necessary resources are available. A confirmation that repeats what the parties have agreed to does not have any legal weight under U.S. law. In the U.S., users

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<sup>22</sup>Restatement (Second) of Contracts, § 2-206

<sup>23</sup>A.J. Zottola, Christopher Kim, Allison Laubach, Stephanie Molyneauxa11 “ONLINE CONTRACT FORMATION” 2018 J. Internet L



must have clear notice of the terms and conditions before they agree.<sup>24</sup> For clickwrap agreements to be enforceable, users must have a reasonable opportunity to read the terms, and their acceptance must be clear (e.g., by clicking a button labelled "I Agree").

### **5.5. Case law: *Specht v. Netscape Communications Corp.* (2002)<sup>25</sup>**

This case is recognized as the first significant clickwrap case, dating back to 2002. The court confirmed that the key elements of contract law still apply to online agreements. It stated that “a transaction, in order to be a contract, requires a clear agreement between the parties.” The court made several important points: “A consumer’s click on a download button does not show agreement to the terms if the offer does not make it clear that clicking the button means agreeing to those terms.” “An offeree is not bound by unclear contract terms that they do not know about if those terms are in a document that doesn’t obviously appear to be a contract.” “Simply mentioning the existence of license terms on a hidden screen does not adequately inform consumers about those terms.” Over the past twenty years, many cases have cited these points, evaluating clickwrap agreements based on these basic principles.<sup>26</sup>

### **5.6. *Feldman v. Google, Inc*<sup>27</sup>**

To be enforceable, a clickwrap agreement must provide users with reasonable notice of the terms and require their clear agreement to those terms. In this case, the plaintiff claimed that he did not agree to any contract with Google. However, the courts determined that he could not have completed the advertisement purchase without checking a box to accept the terms and conditions. As a result, the court upheld the enforceability of Google's clickwrap terms.

## **6. Comparison with India**

India and the U.S. share comparable principles when it comes to recognizing electronic contracts. In India, the Information Technology Act of 2000 (IT Act) corresponds with U.S. laws by legitimizing electronic agreements and accepting electronic signatures. However, the U.S. legal system, especially the E-SIGN Act, offers a more extensive and unified standard for

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<sup>24</sup>Sylvia Kierkegaard “E-Contract Formation: U.S. And EU Perspectives” (2008) ResearchGate <[https://www.researchgate.net/publication/228199208\\_E-Contract\\_Formation\\_US\\_And\\_EU\\_Perspectives](https://www.researchgate.net/publication/228199208_E-Contract_Formation_US_And_EU_Perspectives)> accessed on 23 February 2025

<sup>25</sup> *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002)

<sup>26</sup> “6 Precedent-Setting Clickwrap Legal Cases” Ironclad Journal <<https://ironcladapp.com/journal/legal-operations/clickwrap-legal-cases/>> accessed on 23 February 2025

<sup>27</sup> 513 F. Supp. 2d 229 [E.D. Pa 2007]

digital contracts. Conversely, India is still in the process of enhancing its consumer protection regulations in the online realm. Moreover, Indian courts have been slow to tackle certain details, such as the clarity of terms in clickwrap agreements, which have been examined more thoroughly in U.S. judicial decisions.

## **7. Challenges to the Legal Validity of Clickwrap Agreements**

Even with the recognized framework supporting the validity of clickwrap agreements, there are still several ongoing challenges:

### **7.1. Informed Consent Issues**

One of the most difficult aspects is obtaining informed consent. Numerous users neglect to read or fully understand the terms and conditions, leading to concerns about the authenticity of their consent. A significant challenge in securing informed consent is making sure that users genuinely comprehend the presented terms and conditions. Frequently, people skim or disregard these documents altogether, often due to their length, complexity, or legal terminology. This lack of engagement with the content raises important questions about the validity of their consent. If individuals do not fully understand the consequences of their agreements, it brings into question whether their consent can actually be considered informed. Thus, it is essential to present these terms in a straightforward and accessible way and to offer users the chance to ask questions and obtain clarification, which promotes a more transparent and reliable process.

### **7.2. Unilateral Modifications**

Many platforms can change their terms of service without warning. This practice raises concerns about fairness. Users may face new rules without understanding or agreeing to them. When these changes happen without clear communication, users might feel confused and lose trust. They may not realize how these updates affect their rights, responsibilities, or how the platform works. These actions undermine user agreements and show the need for clearer and fairer ways to communicate policy changes.

### **7.3. Competency**

The Indian Contract Act restricts and renders minors, individuals with mental illness, and those

of unsound mind incapable of forming contracts. A significant challenge with online transactions is that one party's ability to enter into a contract is frequently unknown to the other. The intricate nature of electronic contracts makes it difficult for one party to ascertain whether the other party on the other side of the screen is competent to enter into a contract. The physical distance between the contracting parties and the total lack of face-to-face interaction render it nearly impossible to determine the other's competency (or the absence of it). Internet transactions, particularly those involving consumers and parties without any prior relationship, raise concerns about an individual's identity regarding their capacity, authority, and legality to engage in a contract. While digital signatures are one method used to verify an individual's identity, they are not yet widely adopted.<sup>28</sup>

#### **7.4. Consumer Protection Concerns**

There is increasing concern regarding the significant power imbalance inherent in clickwrap agreements. These are online contracts that users usually must accept when they sign up for services. Users often have no choice but to agree to the terms as they cannot negotiate. This happens because the agreements are long and complicated, and users may not fully understand what they are agreeing to. As a result, they might give up rights or take on responsibilities they didn't realize. This situation raises important issues about fairness and transparency in online agreements. It highlights the need for clearer information and fairer practices to protect consumers.

### **8. Recommendations**

To improve the enforceability of a click-wrap agreement and ensure it aligns with conventional contract principles, consider the following recommendations:<sup>29</sup>

- A. Display the terms prior to any actions by the user, such as making payments, downloading, accessing content, signing up, or installing software.
- B. Require users to take a clear affirmative step (for instance, ticking a box that isn't pre-selected or scrolling through the entire agreement before allowing the "I accept" button to

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<sup>28</sup> Govind L. Vekariya and Dr. Mayursinh J. Jadeja, "Recent Legal Issues and Challenges of E-Commerce Contract in India" 2023 8(5) Vidhyayana < <https://j.vidhyayanaejournal.org/index.php/journal/article/view/1530/1645> > accessed on 3 March 2025

<sup>29</sup> A.J. Zottola, Christopher Kim, Allison Laubach, Stephanie Molyneaux, "ONLINE CONTRACT FORMATION" 2018 J. Internet L

be clicked).

- C. Whenever possible, offer a “decline” option.
- D. Show the terms (or provide a hyperlink to them) on the same screen and near the “accept” button.
- E. Make sure that users can easily read and navigate all terms, utilizing clear and enforceable language.
- F. Emphasize particularly significant provisions in the agreement to bring extra attention to users (for example, using bold text or capital letters for disclaimers and limitations on liability).
- G. Include a noticeable link to the terms on every page of the website, even after the user has accepted them.
- H. Clearly label any links to the terms with simple, understandable titles, such as “Terms of Use.”

## **9. Conclusion**

Clickwrap agreements are essential in the digital economy as they enable smooth and effective contract creation. Although Indian law offers a basic legal structure for these agreements, challenges persist in achieving informed consent, ensuring fairness, and maintaining enforceability. A comparative evaluation with the U.S. legal framework highlights the necessity for clearer judicial guidelines and enhanced consumer protections in India. To improve the dependability of clickwrap agreements, businesses should implement best practices such as clearly presenting terms, utilizing affirmative consent methods, and establishing protections against unfair changes. Enhancing regulatory oversight and judicial examination can help ensure that these agreements conform to principles of fairness, transparency, and legal validity. By tackling these issues, clickwrap agreements can remain a strong tool for digital transactions while safeguarding users' rights.