Al-Misbah, **Vol. 2 No. 3**(2022), 8-25
https://reinci.com/ojs3308/index.php/almisbah/index

MODERN APPROACH TOWARDS "STANDARD FORM" CONTRACTS: A LEGAL PERSPECTIVE

* Dr Mufti Muhammad Anas Rizwan

Abstract

In "Standard Form" contracts, one party drafts the terms and conditions and the other party is invited to accept it or leave it. Only option for the invited party is either adhere to all the terms and conditions or leave it altogether. Standard forms are commonly used in the contemporary complex world of mass corporations, mass production of goods and services among others. The use of standard terms and condition is not only limited to contracts in commercial transactions but also in contracts with public authorities, multinational organizations and giant corporations, banking, insurance and transportations etc.

These contracts are termed and named differently in different jurisdictions. Sometimes it is referred to as standard-form contract or boilerplate agreements. The Standard Form contracts s are used abundantly in every field. Examples include insurance contacts, employment contracts, banking contracts, transportation, online websites and software among others.

This study aim to discuss the origin and historical evolution of the standard form contracts including its characteristics and features. This study will also provide a comparison between the standard contracts and the conventional contractual Paradigm. Additionally, the principle of freedom of contract and initial judicial response to the contracts of adhesion has also been discussed in this study. Finally, the application of strict contract theory and modern approach towards standard form contracts, doctrine of Unconscionability has been discussed from legal prospective. This study will help to understand the rights of weaker parties and to protect them in any unjust situation arises from any such contract.

Keywords: Standard Form, Contracts, Adhesion, weaker party, protection.

* Assistant Professor, Faculty of Shariah and Law, International Islamic University, Islamabad

ISSN-Online: 2790-8828
ISSN-Print: 2790-881X

1.1 Introduction

In this Paper we will discuss the "Standard form" contracts, emergence of the concept, historical evolution and its today modern practices from legal perspective.

The form of contract is the manifestation of the development of the market in the world. This legal instrument indicates the need of human life that is primitive in nature and is used since ancient time. From oral to written and from written to typed and from typed to online, it has gone the long way and now it has come to the standardized Contract forms. We engage in countless contracts in our everyday life and it is an indispensable part of our lives. From buying property to hiring services, everything is accomplished through contracts. Business activities would cease to exist if there are no contracts. With the advancement of science and technology, trade has gone to the global level at unprecedented mass scale. It has transformed the way contracts were made. To make the commerce swifter and more efficient, standard form contracts were introduced. It is a kind of template where all the terms and conditions are already prepared by one party. The other party has to just adhere to it without having the option of negotiating any term. It has not only changed the form of contract but it is also a challenge for the traditional law of contract too. It has ignited a serious debate among jurists and lawyers. Therefore, in order to better understand the concept of adhesion, we must analyze it in the perspective of conventional contractual regime as construed in law and as the jurists understand it. Thus, we may be able to understand the concept of adhesion that how far it fits in the conventional contractual framework and comprehend the jurisprudential problems and their solutions. Therefore, prior to the discussion of Standard Form contracts s in its different aspects, it will be appropriate first to review briefly the contract, its ingredients and principles.

1.2 Definition of Contract

There is no formal definition of a contract in English Law. It is obvious in absence of the code. The reason is the peculiar nature of the law of contract evolved in English land. It developed around the action of assumpsit[1] instead of some theory or concept of contract. Nonetheless, Contract is defined by the text book authors in their books. But these definitions serve the purpose of illustration and can't be declared comprehensive one[2].

According to Treitel: " A contract may be defined as an agreement which is either enforced by law or recognized by law as affecting the legal rights and duties of the parties."[3]

Cheesman presented his definitions in following words. : "A contract is an agreement that is enforceable by a court of law or equity."[4]

On the other hand, American Law Institute encapsulated the doctrine of contract as: "A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty."[5]

While Pakistan's law of Contract defines contract by virtue of Section 2 (h): "An agreement enforceable by law is a contact."[6]

Aforementioned definitions elucidate that the valid contract is the one that is enforceable by law. It means that there are few conditions that are needed to be fulfilled in order to be contract a valid contract. These are enlisted below:

1. An agreement must take place between the parties[7]. It means that there should be a valid offer from one party and the second party accept it and adheres to that offer completely. The party that extends the offer may be called promisor and the other party that accepts that contract is promisee.
2. By this exercise of offer and acceptance, both parties intend to create legal relations with each other. The creation of the legal relations means that both of the parties fully understand that these offer and acceptance will create obligations for both of the parties. And they fully understand and are ready to be legally bound by that contract[8].
3. The parties must be sane, major and allowed by law to enter into the contract. Their legal capacity must make them eligible to enter into a contract[9]. It will not amount to a valid contract if any side of the parties are legally restricted from making any contract. Legal capacity of the parties is discussed in Section 11 and Section 12 of the Contract Act, 1872.

   Section 11 of the Act states: "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject"[10].

   Section 12 of the same Act then explicates the sound mind and says : "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind"[11].
4. Offer and acceptance must be obtained by free will and consent of both parties. There should be no vitiating factors that nullifies the intentions of the both parties. Parties should arrive at agreement genuinely. Section 13 explains the consent in following words: "Two or more persons are said to consent when they agree upon the same thing in the same sense"[12]. These should be arrived without any coercion, undue influence, fraud, misrepresentation and mistake. Section 14 to 22 discuss these terms in sufficient clarity.
5. The consideration on the part of the both parties must be lawful. It means that the object or service which promisor is offering must be lawful and not illegal and the compensation offered by other party must not be illegal. Section 23 enshrines the factors that makes the considerations illegal. It states that : "The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions

of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void"[13].

6. The contract in order to be enforceable by law must not be amongst the list classes of contract that are expressly barred by the law. Section 25 to 30 elucidates such classes.
7. In addition to above mentioned conditions. Contract must not be in contravention of any other law of the land.

An agreement will be deemed as an enforceable contract if above mentioned conditions are fulfilled.

1.2.1 Historical Evolution and Development of Contract Law in Common Law

The law of contract has developed over the centuries and has gone through various reforms and transformations in order to keep pace with emerging political, social, economic and technological developments. Especially is has gone through major transformation after the industrial revolution in England in nineteenth century.

Modern law of contract has its origin in the simple and unsophisticated English markets around two centuries ago[14] and it is based upon laissez-faire principle that calls for freedom of contract.

However, law of contract is much older than two centuries and it can be traced back to the Middle Ages when Common Law was just starting off[15]. Ownership of land and protection of rights in relation to it was the main concern of the society at that time. For this, the law of contract was mainly in relation to the property right and the law developed at quite quick pace in this regard. Enforceability of rights depended upon the formal agreements and informal ones. The template of formal agreement constitutes its rendering in writing and authentication by 'sealing'. This mode of contract was adopted for transfer of land and formed the basis of deed.

During twelfth century two main types of formal agreement developed that needed a seal on it in order to be enforceable. One of them was known as a 'covenant' which entailed a promise to perform a certain action for instance building a house. In case of breach, the remedy that got developed over the course of time was 'specific performance'. Second kind of formal agreement was a formal 'debt'. It would constitute an 'obligation' and was actionable under that heading and thus the remedy that got developed during the course of the time was payment of the debt.

Nonetheless the informal agreements too gradually were recognized by the law and were called 'parol' agreements that meant 'by words of honor'. The main obstacle with regard to the enforceability of these types of contracts were the proof. It was hard to prove the existence of such types of contracts and terms and conditions decided thereof. Two particular actions were formed for such informal contracts.

The remedy was the price of the goods when the informal oral agreement was made for the sale of goods. This was known as an action for debt. Second action was 'Detinue' which was about the chattel. For instance, demand for handing over horse or other livestock. During fourteenth century the law of 'assumpsit' was developed and became the basis of modern law. It was an undertaking to fulfil the promise. During the course of time, as the law evolved, the notion of 'consideration' originated. It was based on the proposition that none does anything for nothing.[16]

1.3 Standard Form contracts

As mentioned earlier, the adhesion is the new form of contract which is unfamiliar to the conventional contractual law and theories. In following lines, we will discuss Standard Form contracts s, its definition, characteristics, nature, historical evolution and development, and conceptual, jurisprudential and judicial problems in these contracts.

1.3.1 Definition of Standard Form contracts

Black's law dictionary defines Standard Form contracts as:

> A standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice or no choice about the terms. Also termed Contract of adhesion; adhesive contract; adhesory contract; take it or leave it contract; leonire contract.[17]

Standard Form contracts is thus a standard contract whereby one party drafts the terms and conditions and the other party is invited on the take it or leave it basis. Only option for the invited party is either adhere to all the terms and conditions or leave it altogether. Thus, that party is only adhering instead of negotiating the terms. Because of this "adherence", this contract is called "Standard Form contracts".

Standard form or Standard Form contracts s are commonly used in the contemporary complex world of mass corporations, mass production of goods and services etc. The use of standard terms and condition is not only limited to contracts in commercial transactions but also in contracts with public authorities, multinational organizations and giant corporations, banking, insurance and transportations etc.

These contracts are termed and named differently in different jurisdictions. Sometimes it is referred to as standard-form contract or boilerplate agreements. Both terms i.e. standard contracts and contracts of adhesions are used interchangeably and denote to the contracts that are formulated by one of the party in advance although there is technical difference in both. Standard form contract are the model contracts which are used by the businessmen and are subject to alteration and amendment contrary to the Standard Form contracts s which are not subject to alteration etc. and the weaker party has to adhere to it as it is. Therefore, it is not necessary that all standard contracts are adhesive one but all Standard Form contracts s are for sure standard ones[18].

The Standard Form contracts s are used abundantly in every field. Examples include insurance contacts, employment contracts, banking contracts, transportation, online websites and software etc.

1.3.2 Origin and Historical Evolution of the Standard Form contracts s

The adhesion and standard-form contracts are the result of the scientific development that took place in nineteenth and twentieth century which further paved the way for industrial revolution. As a result of massive industrialization, advancement in the methods of production, marketing and distribution a new contractual paradigm emerged. The mass production and distribution of goods and services gave rise to this new form of contracts as the traditional contracts which were formed on equal bargaining and negotiation were considered inadequate. The use of these standardized contracts was inevitable in the emerging economic situation.[19]

However, the concept of standardized contract form was not drastically introduced at a certain time in history. Rather, it had been practiced since long time in one way or the other. Variants of these informal standard contracts led to the current refined form. In the primitive market, transfer of property or shift of proprietary rights was established in front of the priest as these contracts were considered sacred. With the passage of time, these sacred words, spoken in front of priest were standardized and were later provided to the notaries. Till date, notaries public have disposal books of forms that contain standardized formats for contemporary legal acts.[20]

A major development in the course of standardization appeared when the insurance policies were introduced in the 16th and 17th century. At the time, the institution of insurance was relatively new and which was not provided by Roman law. Moreover, it was not dealt by the guilds either[21].

As the institution of the insurance flourished, it became increasingly important to include those events in the policies too that occurs rarely. Moreover, it became of paramount importance to standardize certain clauses in model policies. Same need was felt afterwards for sale of goods and rest of the commercial activities.

As time went by, guild disappeared and no labor laws entertained such matters. Thus 18th and 19th century saw another phase of progress in respect of standardized contracts. The gap that was created due to the absence of guild and labour laws was either filled by state's regulations as happened in France or manufacturers by making their own rules in the form of factory discipline code. Trade unions were prohibited at that time and therefore these codes were often one sided and had some tedious clauses. It was upon the manufacturer whether a certain provision is applicable over his specific laborer or not. This system was later extended to other branches and services too for instance: Sale of goods, electricity, water and gas delivery, railway and transport etc. [22]

A large number of contracts are done via standard conditions globally. This trend will continue to be used even on the larger scale in the commercial sector because of the e-commerce. However, there is a dire need that it should be more refined so that the interests of weaker party can be safeguarded.

At present, standard form of contract is the most used legal instrument to serve the purpose and this format has become a very common part of commercial transactions and relationships[23]. But it has both advantages and disadvantages. There is no doubt about the efficacy and rapidness of this standardization in business world. Moreover, it has reduced the transaction and agency costs as parties need not to negotiate and form a new contract every

time rather standardized format is already available. There is more certainty in respect of the connotation and context of the terms and conditions of the contract. Regarding disadvantages, courts and experts have time and again showed concerns regarding standard contracts. The jurists are showing concern with reference to the consumer's point of view as he is the vulnerable and subject to the exploitation in such situation. Further, an important question arises whether they have read and understood the standard contract or not. Moreover, there can't be one size-fit all formula in commercial transaction. Since there may be parties who are not well addressed and well treated in lieu of this transaction[24].

The complexity increases with the second layer of standardization. This multiplicity of standard contract arises when the standard contract is utilized by single seller in several and multiple transactions.[25]

1.3.3 Characteristics of Standard Form contracts s

The Standard Form contracts s mainly have two basic characteristics. First, the terms and conditions of the contract are drafted and stipulated by one party i.e., the stronger party. Second, the weaker party has no right to negotiate or bargain the terms and conditions and merely has to adhere to it as brought forward by the stronger party.

American jurist Arthur Lenhoff describes characteristic features of Standard Form contracts s as following;

1. It is based on standardized forms.
2. The purpose of standardization is to cope with mass production and supply of goods and services.
3. The forms are not prepared for a single individual rather these are prepared for indefinite number of individuals.
4. The forms are prepared by giant public or private enterprise which hold superior bargaining power and hold monopolistic position and control over goods and services.
5. The individuals have no bargaining power and the only choice is to either take it or leave it.[26]

In French jurisprudence, a similar characterization of Standard Form contracts s was made containing following features and elements. (i) the offer in Standard Form contracts s is of continuous and general nature. (ii) the reason of such standardization is because the goods and services are provided in bulk. (iii) the offeror holds monopolistic position either factual or legal. (iv) the accepter has no bargaining power and no choice except adhering to it.[27]

The characteristics of adhesion as described by Friedrich Kessler[28] and Lenhoff as mentioned above denotes that the monopolistic nature of the subject matter of the contract is an essential characteristic of adhesion. i.e. the offeror has the monopoly over the goods or services and therefore controls that. According to this approach, as the stronger party hold the monopolistic position therefore the weaker party is always vulnerable to the exploitation. The stronger party will abuse his position to maximize

his profits on the cost of weaker party. However, contemporary jurists do not consider this an essential characteristic. They hold that the Standard Form contracts may or may not contain monopolistic nature of goods or services. George Priest, for instance, believes that Kessler's theory of exploitation is outdated and was only valid until the 1970s when there was no other coherent legal explanation for Standard Form contracts s and that appeared consistent with the market practices at that time.[29]

1.3.4 Standard Form contracts s and the Conventional Contractual Paradigm

As discussed earlier, the concept of adhesion emerged in the nineteenth century as a result of scientific and industrial revolution. The concept was an alien to the traditional contractual regime as understood by the jurists and judiciary. The new phenomena accordingly caught the attention of the jurists and the debate sparked as to the nature and treatment of these contracts and how it fits in and consistent with the traditional contractual paradigm. The new concept of standardized contracts caught the attention of legal jurists who questioned the legality of these contracts and that whether these should be even called or considered a contract? What gave rise to these concerns was the issues in these contracts in respect of consent, lack of freedom and lack of private autonomy as considered essential in conventional forms of contract.

The French jurist Raymond Saleilles was probably the first jurist who discussed this new concept and termed these contracts 'Contract of Adhesion'. He depicted an important distinction between traditional contract and the new form of contract which he termed Contract of Adhesion. Saleilles observed that ordinary contracts are the result of similarity and unification of will and freedom. He noted that a contract is the embodiment of mutually agreed terms which are agreed upon on equal footing. He termed this equality in bargaining as 'unification of will'. However, if the terms are exclusively dictated and dominated by one party and the other party has no saying in that then the contract lacks unification of will and there is only one will.

According to Saleilles, Standard Form contracts s were an alien species to traditional contract theory as these are the exclusive work of the stronger party who alone dictated and imposed his final and absolute will on other without negotiation. Apparently, both of the parties expressed their will and consent but for one of the parties, the consent cannot be termed as voluntary because the contract is not the embodiment of the negotiation. He then holds that this situation calls for a new method or theory of contract construction which also take into the account of the position of the weaker party. He holds that these contracts are contracts by name only and do not qualify to be considered real contracts rather it is more like a private law. [30]

Saleilles's argument can be challenged that though the weaker party has no option to discuss or negotiate the terms of the contract but he still relatively has the freedom to whom to contract. And further has the option not to enter into the contract at all. However, this argument carries no weigh and the fallacy of it is obvious due to two reasons. First, most often there is standardization of such terms and conditions in the whole industry of particular good or service. Even if one chose not to contract with one but still, he will face with substantially similar terms elsewhere in same industry. Second, the argument of not to contract is merely theoretical and carry no practical significance. Necessities of life are inevitable for every individual. The inevitability nature of a product or service lefts no option

but to accept the terms and conditions no matter how harsh they are. Such as gas, electricity and transport etc.

French jurist Demogue expressed a different view and challenged Saleilles's anti-contract view. As mentioned earlier, Saleilles hold that these are not real contracts but contracts by name only. Demogues holds that the Standard Form contracts s are the natural evolution of the contract and are inevitable in emerging market and economic practices. It increases efficiency and effectiveness of trade and business and reduces trade barriers and overall cost of transactions.

He noted that: "The legal systems of the western world, inspired largely by the wish to encourage business and the active life, have sought so to arrange the performance of juridical acts, and legal life in general, as to economize time to the utmost, thus making it easier for individuals to act and thereby to create wealth".[31]

However, while it is true that the Standard Form contracts s play important roles in increasing the expediency and efficiency of the businesses, the pure economic treatment of these contracts by demogues was criticized that it does not take into the account the vulnerability and exploitation of individuals. It failed to comprehend that these contracts are the potential tools at the hands of powerful to exploit the individuals by imposing unfair and unconscionable terms. He thus did not propose any legislative or other solution to this problem.

The jurists pointed out that the traditional principles and rules of contract law were insufficient to solve the issues in new form of contracting and to protect the vulnerable weaker party from exploitation. Kessler, for example, pointed out that courts and jurists had failed to realize the emergence of new form of contractual order and wrongly tried to find the solution in interpretation techniques to safeguard the vulnerable party.

He further warned of the consequences and observed: "standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals" and thus called for establishing new legal principles to regulate this novel model of contracting.[32]

1.3.4.1 Principle of Freedom of Contract:

The principle of Freedom of Contract is the cornerstone and the consent is the backbone of Contract law. The Contract can also be defined as bargain between two parties. Both parties make enforceable promises in respect of each other. One of the parties will make the payment against the action that the other party has promised to take. It was construed as 'freedom of contract'. On the basis of this notion, most of the contract law was devised in the nineteenth century. It became the heart of Contract law as Britain was experiencing *laissez-faire* economics. The term is now called 'free market'. It proposes the theory that Market should actually regulate the economic relation between people instead of the intervention of the state.

The principle of freedom of contract consists of mainly two components; First, the freedom of every individual in respect of contract or not to contract with another. Second, the

freedom of the parties to chose and determine the contents of their contract. According to the principle of Freedom of Contract and especially based on the second component, the court court will not entertain any action claiming unfairness of the terms. The court will not interfere with the contract and, especially, it will not examine the reasonableness and fairness of the terms of the contract.[33]

The concept of freedom of contract assumes that the contracting parties hold equal bargaining power and stand on equal footing. The principle indicates that the individuals are not only free to choose the other party to the contract, but are also able to negotiate and determine the contents and terms of the agreement by making preferences to what best suits them. It is presumed that what was agreed between two independent individuals is just and fair according to the principles free consent.

In the heydays of the doctrine of laissez-faire in the nineteenth century, interference with the outcomes of the market forces was vehemently opposed by the courts. Sir George Jessel, in this regard while defending the doctrine of freedom of contract, stated:

> If there is one thing more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.[34]

The basic idea behind this theorem is that there should be a freedom for the parties to choose whatever the terms they want to agree upon. For this reason, it has not been the tendency of the courts that they have to convert a bad bargain into a good bargain. Their job has been to merely check whether the parties had free will to enter into the contract or not.

Treitel noted in this regard: "In its most obvious sense, the expression "freedom of contract" is used to refer to the general principle that the law does not restrict the terms on which the parties may contract: it will not give relief merely because the terms of the contract are harsh or unfair to one party".[35]

Another feature of the 'freedom of contract' is the intention of the parties to legally bind themselves in the contract by their free will. Parties freely accept terms and conditions and bind themselves in the legal consequences. Disadvantageous terms for one party too will be accepted if parties are equal with respect to the bargaining strength and they both freely accepted the terms and conditions[36]. On the other hand, it is also the manifestation of the freedom of the contract that if any of the party was made to enter into any contract through coercion, misrepresentation, false information or concealment of material facts render the contract nullified. It is because these factors are contradictory to the free will. All other rules of contract law too reflect the 'freedom of choice'. It echoes in the cases of 'discharge' too where a party was just able to perform the contract partly and other party can accept it and pay for on this part thereof. Likewise, if any term is violated, it will give the other party right to give up his own obligation and the entire contract or to continue the contract and only accept the payment for the breach.

Therefore, it became an established principle of contract law that a signed contract, including all of the terms and condition was entered into freely. The burden lay on the

complaining party to prove that he had no freedom of entrance into this particular contract. Thus, different defenses were available to the complaining party such as duress, fraud, misrepresentation etc. However, while the court would invalidate a contract not freely entered into, but it would not assist the " fool."[37]

Consent is Contract

Freedom of Contract necessitates ***consensus ad idem,*** which means the reciprocity of the parties for a valid agreement. It would not give rise to a valid contract unless the mutuality is reflected from the agreement. Law will not recognize any such agreement where one party kind of forces other party to take its goods or services when there is no such intention from the other party. Consent is contract[38]. This statement of scholars indicates the prime importance of consent in a contract. A contract is to legally bind oneself and others in some terms and conditions. This is kind of private law where two parties voluntarily agree to make a law for themselves to the extent of that contract. Consent is essence of that contract.[39] By consenting, both parties make themselves legally liable for non-performance of the agreement. This consent theory creates the balance in a contract. Offer from one party is a manifestation of the desire to change the relationship with other party and wants to bind both of them against some consideration. Acceptance from the other party is a final consent to the terms of the contract offered in that contract. [40] This consent theory doesn't necessitate that both parties must know every minute detail of the contract but at least they should have an overall idea of the nature of the contract[41]. This rule ***consensus ad idem,*** is enshrined in the statutes and in the rules of the common law. Unsolicited Goods and Services Act 1971 entails the same. For this reason, Contract law questions and makes sure if there was a real bargain and whether it was enforced in letter and spirit or not. Various Case laws elucidates that courts were interested in existence of the real bargain that is enforceable and do not interfere in the quality of the bargain that parties arrive at.[42]

The principles of law of contract prevalent in the nineteenth century worked well as contracts were negotiated individually. One cannot claim any relief regarding the unfairness of any term after singing and entering into the contract after negotiating and understanding all the terms therein.[43]

However, the process of the formation of contracts had changed radically by the turn of the century when the new form of contracts i.e., adhesion or standard form were emerged as a result of scientific and industrial revolution as discussed earlier. Even though initial judicial response to the new form of contracts in common law was that they made no distinction between ordinary contract and contract of adhesion. They applied the classic principles and rules of contract law to the new form of contracts and made no difference. This approach obviously caused injustice and unfairness to the weaker party.

However, with the passage of time, it was realized that parties to the contracts can't be granted unlimited freedom and law has to interfere for the protection of the parties. The need was realized because often times parties do not have equal bargaining power and one party can dictate the terms at the expense of the other party. Often times Businessmen prefer profit of the business instead of the individual needs of the customers. For this reason, consumers needed to be more protected. This gave birth to the notion of Consumer Protection and many examples of protectionism can be found in law.

1.3.5 Initial Judicial Response to the Contracts of Adhesion

1.3.5.1 Application of Strict contract theory

Initially, the courts applied strict contract theory to the new form of contracts. They made no difference between an ordinary contract or Standard Form contracts and therefore applied rules and principles as they have been applying in ordinary contracts.

The application of strict contract theory to Standard Form contracts s obviously brought grave injustices. The classic case of L'Estrange v. F. Graucob Ltd.[44] is important in this regard and highlights the problem. The plaintiff bought a slot machine and signed a standard form contract. The standard form contained one special clause stating: ". .. any express or implied condition, statement or warranty, statutory or otherwise not stated is hereby excluded." The machine turned out to be defective and the purchaser brought an action for damages for the breach of an implied warranty about the fitness of the machine for purpose. The plaintiff contended that she did not read the contract and also that the said term could not possibly have been read due to the small and unreadable print. While deciding against the plaintiff, judge Scrutton L.J. reiterated the following rule: "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."[45]

The traditional approach towards Standard Form contracts s is further exemplified by Lewis v. Great Western Railway. This case was decided by the Court of Exchequer in 186o and jurist Wigmore identifies it as a leading case in this regard. In this case the plaintiff brought an action to recover damages for the loss of a parcel. The defendant i.e. the company took the plea that the plaintiff's claim was barred because it was not made within the period as specified in terms of the form which plaintiff had signed. The trial judge upheld the company's plea. The plaintiff had testified that he had signed the form provided by the company. He stated "I did not read the paper. A person told me to sign it. He did not call my attention to the conditions or read them. I think I must have seen the word 'Conditions'." Plaintiff counsel's argued that "if the plaintiff did not, in fact, consent to enter into such a contract, he was not bound," however, the court unanimously decided for the company. Baron Bramwell's speech in this case characterizes the attitude of the courts in that time:

> It would be absurd to say that this document, which is partly in writing and partly in print, and which was filled up, signed, and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this must know that he signs it for some purpose, and when he gives it to the Company must understand that it is to regulate the rights which it explains. I do not say that there may not be cases where a person may sign a paper, and yet be at liberty to say, "I did not mean to be bound by this," as if the party signing were blind, and he was not informed of its contents. But where the party does not pretend that he was deceived, he should never be allowed to set up such a defence.[46]

This view has been continuously adopted and repeated by the courts in the nineteenth century and in the first half of twentieth century. As part of general principles of contract, they applied it to the standard form documents among others.[47]

1.3.6 Modern approach towards Standard Form contracts s

With the passage of time, the jurists and the courts realized that the applicability of strict contract theory to the new Standard Form contracts s causing grave injustice to the weaker and vulnerable party. It was realized that weighing both conventional and Standard Form contracts s with the same scale is creating great imbalance and injustice to the vulnerable party. Kessler in this regard warned of the consequences and stated: "standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals" and thus called for establishing new legal principles to regulate this novel model of contracting.[48]

Henceforth, the approach towards Standard Form contracts s gradually changed. The courts started taking a lenient view for the protection of weaker party from the exploitation. The courts started deviating and departing from the applicability of strict contract theory in such cases. This change in approach probably was inevitable and linked to the fact that the use of new form of contract was emerging rapidly and hence the probability of vulnerability and the exploitation of weaker party was also increased. However, this deviation was not of very substantial nature. The courts while remaining within the ambit of conventional contract theory tried to find the solution to the problem. For that, they used different tools and devices to create a balance and to redress the grievances of weaker parties. These tools were the principles and doctrines which either were already prevalent or newly introduced. These include doctrine of unconscionability, doctrine of public interest, doctrine of superior bargaining power, doctrine of informed notice, doctrine of reasonable expectations etc.

Williams v.Thomas Furniture Co.[49] has been identified as one of the cases indicating the departure from the traditional approach. This is an important case in adapting the doctrine of unconscionability to provide the relief to adherents. However, it also finds its roots deeply imbedded in the traditional approach. Judge Wright observed as follows:

> Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[50]

While the price and risk of Standard Form contracts s are high, but its benefits in business efficiency are also so convincing that the courts, despite the scholarly support, have never adopted a flat rule regarding unfair terms in standard form contracts. Instead, an

intermediate position has been adopted in common law: when a court is confronted with a contract of adhesion, it must first conduct a review of its terms. If court finds any such terms as "harsh or overly one sided," it must refuse to enforce such term wholly or partly. This rule is derived from the doctrine of unconscionability. According to this doctrine, the courts must generally enforce the terms of the contracts private parties made, but should not enforce an "unconscionable" contract or Clause.[51]

1.3.6.1 Doctrine of Unconscionability

Doctrine of Unconscionability is most frequently used by the courts especially in America to strike excessively one-sided terms in contracts of adhesion. This defence is also incorporated in Uniform Commercial Code (U.C.C.). Though Uniform Commercial Code originally applicable to sale of goods contracts, but it is also applied to other contracts by analogy. In *Williams v. Walker-Thomas Furniture Co.*, unconscionability defined as, "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party."[52]

John R. Peden while discussing the historical evolution of the concept states that:

> ... Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law *laesio enormis,* which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery Court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenthh century hardened the exercise of these powers by emphasizing the freedom of the parties to make their own contract. While the principle *of pacta sunt servanda* held dominance, the consensual theory still recognized exceptions where one party was overborne by a fiduciary, or entered a contract under duress or as the result of fraud. However, these exceptions were limited and had to be strictly proved.[53]

Doctrine of Unconscionability is good tool and probably a good safety valve in dealing with the terms so unfair that shock the conscience. The courts have been applying this doctrine primarily in consumer transactions. According to this, court tend to strike down a term wholly or partly whose unreasonableness and unconscionability is beyond doubt. However, the courts did not apply this concept straightforwardly. The reason is that the judicial attitude towards contracts is deeply rooted in traditional contractual regime and they did not want to open the way for post-hoc judicial review into every contract as that would be against the norms of freedom of contract. Therefore, the common law has applied a two folded test in order to succeed in establishing unconscionability in contract. This includes procedural unconscionability and substantial unconscionability. The procedural aspect of the test refers to the procedure of how bargaining is concluded; the substantive aspect refers to that what bargain actually concluded. Mostly the courts view Standard Form contracts s ipso facto as procedurally unconscionable.[54]

This two-way test applied in NEC Technologies, Inc. v. Nelson wherein the court analyzed the unconscionability in respect of both procedure and substance. Procedural unconscionability focuses on procedural aspects as process of contract making and other factors as parties' experience, business acumen, bargaining power, understanding of the language of contract etc. while in substantial unconscionability courts focus on substantial issues as reasonableness of the terms etc.

However, practically the impact of the doctrine of unconscionability is controversial, Corbin in this regard observe that:

> Most claims of unconscionability fail. The mere fact that there is a lack of equivalence between the performances of the parties does not even get close to the establishment of unconscionability. A harsh result alone is an insufficient ground for a finding of unconscionability. Superior bargaining power is not in itself a ground for striking down a resultant contract as unconscionable.[55]

Further, in this regard Farnsworth discusses that:

> On the whole, judges have been cautious in applying the doctrine of unconscionability, recognising that the parties often must make their contract quickly, that their bargaining power will rarely be equal, and that courts are ill-equipped to deal with problems of unequal distribution of wealth in society.[56]

In short, the doctrine of unconscionability is useful tool in addressing the unfair, unreasonable and unconscionable terms and contracts however it also carries limitations with it.

1.3.6.2 Doctrine of Superior Bargaining Power

According to this doctrine, the court will not enforce any contract or term thereof where one party exploits other party by using his "superior bargaining power" to conclude an unfair contract. A party is considered to be exercising its superior bargaining power if it refuses to sell goods or services without his terms and conditions. However, the judicial attempts in order to bring fairness using such covert tools also brought about uncertainty.

This doctrine was successfully applied in Macaulay v. Schroeder Publishing Co. Ltd and Clifford Davis Management Ltd. v. W.E.A. Records. In latter case, two songwriters assigned copyright privileges to the plaintiff via standard form contract. The songwriters were bound by the terms of contract for a period of five years which could be extended for further a period of ten years at the option of the plaintiff. The contract which was a complex legal document drafted by the lawyers, was signed by both parties without it having been fully explained to the songwriters by the company, which held strong bargaining position.[57]

The notion behind this is that bargaining is an essential component of a freely-entered contract however the powerful offeror of Standard Form contracts s uses his position to prevent bargaining. Though the bargaining process, no doubt, is one indicia of free entrance to the contract, but it is not a sine qua non of a freely-entered contract.

1.3.6.3 Doctrine of Informed Notice

According to this doctrine, an offeror is required to inform the offeree about any unexpected or onerous terms or clauses. Without it, such terms shall not be enforced. This doctrine addresses the real problem in Standard Form contracts s. Practically, this doctrine is very useful. It requires the prior notice for only unexpected terms or onerous terms, thereby preserving the efficacy of the standard forms. It also reduces uncertainty for the offeror and on the other hand it enables offeree to have full knowledge of what he is signing to.[58]

1.4 Conclusion

Standard Form contracts s are new form of contracts emerged in nineteenth century as a result of scientific and industrial revolution. These contracts have two main characteristics; first the terms and conditions are already drafted and second, the other party has no bargaining power.

The jurists debated over nature and treatment of these contracts. Initially some jurists such as Saleilles did not consider these as real contracts. However, this view was not generally accepted and the majority of the jurists considered it special evolved form of contract and called for special treatment. The jurists pointed out many jurisprudential problems such as it does not conform to the traditional norm of freedom of contract.

Initially, the courts when confronted with these contracts applied strict contract theory to it. They made no distinction between ordinary contracts and these contracts. The reason behind it was that it was the time when the concept of free market was prevalent and the courts have been aggressively and religiously advocating the concept. The courts refused to intervene in the contract terms on the basis of principle of freedom of contract.

However, gradually it was realized that application of strict contract theory to these contracts causing severe injustices. Especially in second half of twentieth century the courts started departing form earlier approach and took a lenient approach toward these contracts. Henceforth, courts applied different tools and doctrines to these contracts in order to protect weaker parties from unfairness and exploitation. These included doctrines of unconscionability, superior bargaining power, informed notice among others. These tools though made a great difference in treating the adhesion problem.

References:

[1] Assumpsit means an express or implied promise or contract not under seal on which an action may be brought

[2] Ewan McKendrick, *Contract Law: Texts, Cases, and Materials* (Oxford; Oxford University Press, 2018), 3.

[3] G.H. Treital, *An Outline of the Law of Contract*, 3rd ed. (London: Butterworths, 1979), 1.

[4] Henry R. Cheesman, *Contemporary Business Law*, 2nd ed. (New Jersey: Prentice Hall, 1994), 172.

[5] Restatement (Second) of Contracts, Section 1, as mentioned in Chapter 1, Restatements of the law are scholarly books that restate the existing common law principles distilled from the court opinions as a set of rules on a particular topic. Courts often refers to Restatements for Guidance. Roger

[6] Section 2 (h) Contract Act, 1872.

[7] Chris Turner, *Unlocking Contract Law* (Oxon: Routledge, 2014), 13.

[8] Turner, *Unlocking Contract Law,* 13.

[9] Ibid.

[10] Section 11, Contract Act, 1872.

[11] Section 12, Contract Act, 1872.

[12] Section 13, Contract Act, 1872.

[13] Section 23, Contract Act, 1872.

[14] Terry and Guigni, *Business, Society and Law*, Thomas Nelson Australia , 2002, 238.

[15] Turner, *Unlocking Contract Law,* 1.

[16] ibid

[17] *Black's Law Dictionary, s.v.* "Standard Form contracts "

[18] Mo Zhong, "Choice of Law in Standard Form contracts ," *Akron Law Review*, 2008, 124.

[19] George Gluck, "Standard Form Contracts: The Contract Theory Reconsidered," *The International and Comparative Law Quarterly* 28, no. 1 (January 1979): 73.

[20] Ibid.

[21] Guild was an association in medieval times of merchants and craftsmen who used to usually hold power and worked towards mutual aid and safeguarding and furthering their professional interest. For details please see: https://www.britannica.com/topic/guild-trade-association (accessed March, 2020)

[22] Christa Friedman, "Unfairness in Standard Form Consumer Contracts, Causes and Cures" (Master's thesis, University of Alberta, 1988), 10.

[23] Mark R. Patterson, "Standardization of Standard-Form Contracts: Competition and Contract Implications", *Wm. & Mary L. Rev. 52* (2010): 327

[24] Patterson, "Standardization of Standard", 328

[25] Patterson, Ibid.

[26] Arthur Lenhoff, 'Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law' *36 Tulane Law Review* 481.

[27] ibid

[28] Friedrich Kessler, 'Contracts of Adhesion - Some Thoughts About Freedom of Contract' 43 *Columbia Law Review* 629.

[29] George L Priest, 'A Theory of the Consumer Product Warranty' *90 Yale Law Journal* no. 6 (1981), 1299.

[30] Sami M., Al-Anzy, "Unfair Contract Terms Under the Kuwaiti Civil Code -A Critical Analysis and Suggestions For Reform" (Master's thesis, University of Glasgow, 2014), 58.

[31] Ibid, 59.

[32] Ibid, 61.

[33] Christa, Unfairness in Standard Form Consumer Contracts, 21.

[34] *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq. 462 at 465.

[35] *G H Treitel* , An Outline of the Law of Contracts *(5th edn, Butterworths, 1995)*

[36] Photo Production Ltd v Securicor Transport Ltd [1980] UKHL 2

[37] George Gluck, "Standard Form Contracts, 73.

[38] Gregory Klass and others, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014), 48.

[39] Nancy S. Kim, *Consentability* (Cambridge: Cambridge University Press, 2019), 97.

[40] Routledge Cavendish, *Contract Law* (New York, Psychology Press, 2006), 10.

[41] Mindy Chen-Wishart, *Contract Law* (Oxford: Oxford University Press, 2018), 282.

[42] *Williams v Roffey Bros & Nicholls Contractors Ltd* [1990] 1 All ER 512.

[43] George, *Standard Form Contracts*, 73.

[44] [1934] 2 K.B. 394

[45] George, *Standard Form Contracts,* 75.

[46] Ibid.

[47] Todd. D Rakoff, "Contracts of Adhesion: An Essay in Reconstruction," *Harvard Law Review* 96, no. 6 (1983): 1185.

[48] See reference no. 32.

[49] 121 U.S. App. D.C. 315, 350 F.2d 445 (1965).

[50] Vera Bolgar, "The Contract of Adhesion: A Comparison of Theory and Practice," *The American Journal of Comparative Law* 20, no. 1 (1972): 74.

[51] Andrew A. Schwartz, Consumer Contract Exchanges and the Problem of Adhesion, 28 Yale J. On Reg. 313 (2011), 355. Available at https://scholar.law.colorado.edu/articles/448.

[52] Shelley Smith, "Reforming The Law Of Standard Form contracts s: A Judicial Response To The Subprime Mortgage Crisis," 14, no. 3 (2010): 1091.

[53] John Peden, *The Law of Unjust Contracts* (Sydney: Butterworth, 1982), 28-29.

[54] Andrew A. Schwartz, Consumer Contract Exchanges and the Problem of Adhesion, 355.

[55] Giuditta Cordero-Moss, *Boilerplate Clauses, International Commercial Contracts and The Applicable Law* (Cambridge University Press, 2011), 86.

[56] Ibid.

[57] For theoretical foundation of the doctrine of inequality of bargaining power Friedrich Kessler's “Contracts of Adhesion- Some Thoughts About Freedom of Contract.” may be visited.

[58] George Gluck, "Standard Form Contracts, 85.