Al-Misbah, **Vol. 2 No. 3**(2022),8-25
https://almisbah.info/

Research Journal
AL-MISBAH

Modern Approach towards "Standard form" Contracts: A Legal Perspective

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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.In addition to agreements in commercial transactions standard terms and conditions are used in agreements with public authorities, multinational corporations, huge corporations, the banking industry, the insurance industry, the transportation industry, 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 contract freedom principle 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.

1.1 Introduction

In this paper we will discuss the "Standard form" contracts, the 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

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

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

The term "contract" is not properly defined 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 can be described as an agreement that is either upheld by the law or acknowledged by the law as impacting the legal rights and obligations of the parties."[3]

Cheesman presented his definitions in following words. : "A legally enforceable agreement is referred to as a contract."[3]

On the other hand, American Law Institute encapsulated the doctrine of contract as: "A promise or set of promises is referred as a contract if the law permits a duty to perform them or if there is a legal remedy for their break."[4]

While Pakistan's law of Contract defines contract by virtue of Section 2 (h): "The contract is an agreement enforceable by law."[5]

The definitions above make clear that a contract is valid if it may be enforced in court. It implies that there aren't many requirements that must be met for a contract to be considered valid.

These are enlisted below:

1. An agreement must take place between the parties[6]. 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[7].
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[8]. 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.
4. Section 11 of the Act states: "Every person who is of legal age, according to the legislation to which they are subject, of mentally competent, and who is not prohibited from engaging from any law to which they are subject is competent to enter into a contract."[9]

   An Act from Section 12 explicated the mental capability of 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" .

5. 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: "When two or more people concur on the same matter in the same way, it is referred to as consent."[10] These should be arrived without any fraud, abuse of power, deception, and error. Section 14 to 22 discuss these terms in sufficient clarity.
6. 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 aim of an agreement must be legal unless it is prohibited by law, of a character that, if granted, would violate any laws, fraudulent, involves or suggests harm to the person or property of another, the court deems it to be immoral, or it runs counter to public policy. The consideration or purpose of an agreement is deemed to be unlawful in each of these scenarios. Any agreement that has an illegal purpose or value is null and invalid."[11]
7. 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.
8. 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, communal, economic and scientific 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[12] 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[13]. 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 concerning the property right and the law developed at quite quick pace in this regard. Enforceability of rights depended upon the both official and informal arrangements.

The template of formal contract 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 expense of the debt.

Nonetheless the informal contracts too slowly were recognized by the law and were called 'parol' agreements that meant 'by words of honor'. The main obstacle with esteem 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 worth 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.[14]

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 created by one party and signed by a weaker party, typically a customer, who is obligated to abide by the contract's terms and conditions with little to no choice. also known as Adhesive contract, either take it or leave it deal, leonire contract, contract of adhesion.[15]

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. Standard terms and conditions are employed in a variety of contracts, including those with government agencies, large enterprises, multinational organisations, and the financial, insurance, and transportation industries, among others.

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 obey it. Therefore, it is not necessary that all standard contracts are adhesive one but all Standard Form contracts s are for sure standard ones[16].

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

The adhesion to 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, improvement in production techniques, marketing and distribution a new contractual paradigm emerged. The mass production and delivery 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.[17]

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.[18]

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[19].

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. [20]

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[21]. 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 situations 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[22].

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.[23]

1.3.3 Characteristics of Standard Form contracts s

The Standard Form contracts s mainly have two basic characteristics. First, the contracts terms and conditions are drafted and stipulated by one party i.e., the stronger party. Second, the weaker party has no right to exchange 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 arrangements are not ready 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.[24]

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.[25]

The characteristics of adhesion as described by Friedrich Kessler[26] and Lenhoff as mentioned above denotes that the monopolistic nature of the contract of the subject matter 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 old-fashioned and

was only binding until the 1970s standard Form Contracts appeared to be compatible with market practises at the time and could not have another cogent legal justification.[27]

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 perhaps 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 class to traditional contract theory as these are the exclusive work of the stronger party who alone dictated and forced 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.[28]

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. Though, this dispute 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. Additionally, the argument of not to contract is only 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 restrictions and transaction costs generally.

He noted that: "The goal of the western legal systems has been to organize the performance of legal acts and social life as a whole in a way that maximizes time efficiency. This has made it simpler for people to act and, in turn, facilitates the creation of wealth."[29]

Though, it is true that the Standard Form contracts s play vital roles in increasing the expediency and efficiency of the businesses, the pure economic treatment of these contracts by demouse 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, the courts and jurists had made the mistake of trying to protect the weak party through interpretation tactics while failing to recognize the formation of a new type of contractual order.

He also outlined the negative effects and stated that "standard contracts in particular could thus become powerful instruments in the hands of wealthy industrial and economic overlords enabling them to enforce a new feudal order of their own manufacturing upon a vast host of vassals." As a result, he urged the creation of new legal principles to govern this novel form of contracting.[30]

1.3.4.1 Principle of Freedom of Contract:

The principle of Freedom of Contract is the cornerstone besides 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 choose and determine the contents of their contract. According to the principle of Freedom of Contract and especially based on the second component, the court will not amuse 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.[30]

The idea of contractual freedom is predicated on the idea that both parties to a contract have an equal amount of negotiating power. According to the idea, persons are not only free to select other party to a contract, but they are also free to negotiate and decide the agreement's terms and contents by giving consideration to what will suit them the most. According to the principles of free consent, it is assumed that whatever was decided upon by two independent entities is just and fair.

Courts passionately rejected interfering with the results of market forces during the height of the laissez-faire ideology in the nineteenth century. Sir George Jessel, in this regard while defending the doctrine of freedom of contract, stated:

> If there is one thing that public policy demands more than anything else, it is that men of full maturity and competent understanding have the greatest freedom possible when making contracts, and that their agreements, when made voluntarily and freely, be respected and upheld by legal authorities. As a result, you must take into account the crucial public principle that you must not lightly interfere with this contractual freedom.[31]

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: "The term "freedom of contract" is most commonly used to refer to the general idea that the law does not impose restrictions on the conditions on which the sides may contract: it will not grant relief just because the terms of the contract are onerous or unjust to one party."[32]

Another feature of the 'freedom of contract' is the purpose 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[33]. 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 accomplish 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 easily entered into, but it would not assist the " fool."[34]

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[35]. 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.[36] 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. [37] 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[38]. 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.[39]

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.[40]

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 negotiating 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.

Evidently, severe injustices were caused by the application of rigid contract theory to Standard Form contracts. The classic case of L'Estrange v. F. Graucob Ltd.[41] is important in this regard and highlights the problem. The plaintiff entered into a typical form contract and purchased a slot machine. One specific clause in the normal form stated: ". .. any express or implied condition, statement or warranty, statutory or otherwise not stated is hereby excluded." The machine was found to be defective, and the buyer filed a lawsuit for compensation for the violation of an implicit warranty regarding the machine's suitability for its intended use. The plaintiff argued that because the print was so small and difficult to read, it was impossible for her to have read the entire contract. While deciding against the plaintiff, judge Scrutton L.J. reiterated the following rule: "In the absence of fraud or, I'll add, deception, the party signing a document containing contractual obligations is therefore bound, and it is totally irrelevant whether he has read the text 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 instance, the plaintiff filed a lawsuit to seek compensation for the loss of a package.The defendant i.e. The business argued that the claim of the plaintiff was barred because it was not filed within the time frame set forth in the provisions of the form that the plaintiff had signed. Judge at trial affirmed company's plea. The plaintiff had stated in court that he had signed the statement readily accessible by the business. He stated "I skipped reading the paper. I was told to sign it by someone. He didn't read the terms to me or draw my attention to them. I must have seen the word "Conditions," I believe.." Plaintiff's attorneys contended that the plaintiff was not legally bound if he did not, in fact, consent to entering into such a contract," 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 could be ludicrous to claim that the plaintiff is not bound by this agreement, which was completed, signed, and made sensible by him and is partially written and partially printed. When signing a document like this, the signer must be aware of the purpose for why they are doing so, and they must also be aware that the document's goal is to govern the rights it explains. I'm not denying that there might be situations in which someone signs a document but retains their right to speak. I did not wish to be bound by all this," like the signatory were deaf and unaware of what was said in the document. But in cases when the party does not claim to have been duped, he should never be permitted to present such a defence.[42]

Throughout the nineteenth century and the first half of the twentieth century, the courts repeatedly adopted and reiterated this viewpoint. They used it, among other things, with the standard form documents as part of basic contractual principles.[42]

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: “Thus, powerful commercial and industrial overlords may use standard contracts in particular as effective tools to enforce a new feudal order of their own design on a massive number of vassals.” and thus called for establishing new legal principles to regulate this novel model of contracting.[43]

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.[44] 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:

> Normally, one who signs a deal without fully understanding all of its conditions may be seen to have assumed the risk of engaging in a one-sided deal. However, it is improbable that a party's consent, or even an objective manifestation of his consent, was ever given to all of the terms when that party signs a commercially unreasonable contract with little to no knowledge of its terms and little to no bargaining power and, consequently, little real choice. The standard rule that states that an agreement's terms are not to be questioned should be ignored in this situation, and the court should instead determine whether the contract's provisions are so unjust that enforcement should be deferred.[45]

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.[46]

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, "a lack of significant decision-making on the side of one party combined with conditions of the contract that are too favourable to the other party."[47]

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

> ... A cycle that began with the Aristotelian notion of fairness and the Roman legislation laesio enormis, which in turn served as the foundation for the mediaeval church's notion of a just price and condemnation of usury, comes to a conclusion with unconscionability. These concepts pervaded the Chancery Court's use of its discretionary powers to thwart various unjust business practises during the seventeenth and eighteenth centuries. 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 nonetheless allowed exceptions in cases when one party was forced into entering a contract by fraud or coercion, or was

> overborne by a fiduciary. These exceptions, though, were few and required severe proof.[48]

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.[49]

This two-way test applied in NEC Technologies, Inc. v. Nelson wherein the court analyzed the unconscionability in respect of both technique 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 unconscionability defenses fall short. Even if unconscionability is established, it cannot be done by the simple fact that the parties' performances are not equivalent. A unpleasant outcome by itself is not enough to support a conclusion of unconscionability. Superior negotiating position does not automatically warrant invalidating the resulting contract as unconscionable.[50]

Further, in this regard Farnsworth discusses that:

> Overall, judges have been cautious when using the doctrine of unconscionability because they understand that the parties frequently have limited time to come to a contract, their bargaining power is rarely equal, and courts inadequately deal with issues of unequal wealth distribution in society.[51]

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 prolonged for further a period of ten years at the option of the plaintiff. The firm, which had a powerful negotiating position, did not properly explain the contract to the songwriters before it was signed by both parties. The contract was a complicated legal document created by lawyers.[52]

This is based on the idea that negotiation is crucial to a freely entered contract, but the strong offeror of Standard Form contracts utilizes his position to thwart negotiations. The negotiation process is undoubtedly one indication of a freely entered contract, but it is not a need in and of itself.

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.[53]

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.

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[5] Section 2 (h) Contract Act, 1872.
[6] Chris Turner, *Unlocking Contract Law* (Oxon: Routledge, 2014), 13.
[7] Turner, *Unlocking Contract Law,* 13.
[8] Ibid.
[9] Section 11, Contract Act, 1872.
[10] Section 13, Contract Act, 1872.
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[14] ibid
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[29] Ibid, 59.
[30] Christa, Unfairness in Standard Form Consumer Contracts, 21.
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[51] Ibid.
[52] 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.
[53] George Gluck, "Standard Form Contracts, 85.