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CLICK-WRAP CONTRACTS, THE ILLUSION OF CONSENT AND RECONCILIATION POST-DPDP ACT, 2023

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1. Introduction and Background

The classical understanding of contract law rests upon the "will theory" and freedom of contract, to which a key central theme was the maxim of '*consensus ad idem*'[1]. This has ideally been conceptualised as free of coercion, misrepresentation and undue influence, to ensure that contractual liability arises only out of free consent of both parties, and courts also refrain from adopting a proactive, immediate role in contractual transactions as to preserve parties' freedom and willingness to enter into contractually binding relationships. The drafting of the Indian Contract Act (hereinafter referred to as "ICA") also heavily drew inspiration from these ideas.[2] However, the ICA's emphasis remains largely centred on *procedural* fairness regarding obtaining free consent, as opposed to *substantive* fairness, which deals with the kind of outcomes generated by the enforceability of a contract.

However, with the emergence of modern, novel contractual relationships, the traditional understanding of free consent as being sacrosanct began to dilute[3]. Foremostly, the advent of standardised written form contracts formed the cornerstone of the derogation of strict consensual requirements with respect to contractual relationships. Further, with the growth of digital technology, the utilisation of digital standard form contracts of adhesion (hereinafter referred to as "SFCs") grew multifold. The *103*rd Law Commission Report[4] highlighted the potential dangers of SFCs, while observing that in such contracts, the "pen of the individual signing on the dotted line" creates a mere *fiction* of agreement rather than a true meeting of minds. This standardization has now metamorphosed into "Click-Wrap" agreements, which require the user to click on an '*I Agree*' button to collect their assent[5], and began to be ubiquitously used for transactions, especially for seeking consent for privacy policies for the access and use of digital interfaces, governing the data of millions. A key characteristic of such agreements is that they function on a boilerplate, 'take it or leave it basis', which effectively reduces the user's "consent" into a reflexive click on a tiny 'I Agree' button, often without completely reading or comprehending the invasive data practices buried within.

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Hence, as such, contract law in India is no stranger to these issues, though, for the sake of brevity and proper academic investigation, the scope of this paper is limited to the contractual relationships created by click-wrap privacy agreements. Both domestically and internationally, digital platforms have used such boilerplate contracts to collect and process data in an opaque and inaccessible manner, under the garb of procedural formalities, while leaving consumers with negligible bargaining/negotiating power and a 'take it or leave' choice[6]. This asymmetry fosters what this paper defines as the 'illusion of consent'.

In light of such agreements, the enactment of the Digital Personal Data Protection Act, 2023 (hereinafter referred to as "DPDP Act") and subsequent rules (hereinafter referred to as "DPDP Rules"), represents a watershed moment. The DPDP Act disrupts the predominant *laissez-faire* approach by codifying a stringent definition of consent under Section 6, by statutorily mandating that consent must be "*free, specific, informed, unconditional, and unambiguous," accompanied by a "clear affirmative action*"[7]. This statutory shift pushes the standard from '*caveat emptor'* (buyer beware) to a rights-based framework that imposes fiduciary obligations on data controllers. The paper seeks to examine the legal position of click-wrap contracts, specifically boilerplate privacy policies, which have traditionally functioned in the form of SFCs of adhesion, as valid consent seeking mechanisms with respect to the new standards introduced by the DPDP Act, 2023[8].

Here, the intricacy of apparent agency becomes crucial. The digital interface suggests an active voluntary transaction, whereas the reality is one of compulsion and information asymmetry on part of the user/data principal. The user, lacking bargaining power and faced with complex legal jargon, provides a procedural assent that superficially satisfies the procedural requirements of the law while violating its spirit. Thus arises the key question this paper seeks to address of whether the traditional, static boilerplate privacy policy can be reconciled with the dynamic, granular consent standards required by the DPDP Act, and what challenges and measures must be anticipated and accounted for to ensure proper implementation, so that the spirit of '*consensus ad idem*' and the supremacy of free consent of parties to a contract can be preserved.

2. The Architecture of the "Illusion": Click-Wrap and Adhesion Contracts

The validity of electronic/digital contracts in India derives statutory legitimacy from Section 10-A of the Information Technology Act (hereinafter referred to as "IT Act")[9]. While

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the *form* of these contracts is legally recognized, the *substance*, especially the method of obtaining consent via Click-Wrap mechanisms, has birthed a distinct crisis of autonomy. These contracts, depending upon a non-negotiable "I Agree" button, function as digital SFCs of adhesion, creating an architecture where consent is manufactured rather than freely given.

a. Standard Form Contracts and the Information Asymmetry

Relying upon Herbert Simon's theory of *Bounded Rationality*[10], it can be argued that the presumption of '*consensus ad idem*' in SFCs is itself shaky. The modern digital economy's replacement of bilateral negotiations with unilateral impositions manifests when a contract drafted exclusively by the dominant party (data fiduciary/digital entity) is presented to the weaker party (data principal/user) on a "*take it or leave it*" basis. The users are cognitively incapable of processing tens of pages of legal jargon, thus, their "*I Accept*" is a reflexive action, not an informed decision. This opacity of processing of data adds to the information asymmetry by creating a "*black box*"[11], where the data fiduciary holds complete knowledge of the algorithmic processing, third-party sharing of data, and monetisation strategies hidden in the terms, effectively obfuscating the actual nature of the value exchange.

Thus, it becomes crucial to understand that user consent turns into legal fiction. Users generally consent to usage of interface, and not necessarily the terms of the contract, and signatures being replaced by clicks is weaponised - creating a reflexive gateway to access to the uninformed principal's data. This reduced transparency lack of active engagement reduces the user to a passive data source rather than an active contracting party.

b. "Take it or Leave it" Paradigm and Bargaining Power

Hence, the absence of bargaining power and conscious choice become hallmarks of boilerplate SFCs of adhesion. The widespread use of "nonsalient terms"[12] which are obscurely placed in the fine print, often "escape the notice of the party to whom they supposedly apply"[13], hence tricking users into agreement either by arbitrariness or by elusiveness. With reference to essential digital services such as email or banking, "freedom of contract" becomes illusory. The user has no leeway to negotiate the terms of privacy. In the event of disagreement with a specific clause, the user's only recourse is to forgo the service in toto. This creates a coercive ecosystem where "consent" is not an exercise of agency, but of capitulation.

In the case of *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly*[14], the

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Supreme Court of India took note of such imbalance of negotiation power, and held that unconscionability doctrine as enshrined in the Section 23, ICA[15] also extends to arbitrary and unfair imbalance of power dynamics. While Brojonath dealt with public sector employment, its ratio can be successfully extended to Click-Wrap contracts as well since doctrines of equity and unconscionability target impropriety in bargaining conduct[16], and in the digital age, digital presence becomes a prerequisite for socio-professional participation and prosperity. Click-Wrap privacy mechanisms exploit this lack of alternatives, forcing users to surrender constitutional liberties (privacy) in exchange for service access.

c. Judicial Trends Pre-2023: Validity of "I Agree"

The Supreme Court of India upheld the legality of digital contracts in various cases, significantly accommodating the dynamic nature of the same in *Trimex International Fze Limited v. Vedanta Aluminum Limited*[17], stating that digital communication via e-mail (akin to Click-Wrap) is legally binding and enforceable, even in the absence of physical signature, provided that intent is present and key terms of the contract were agreed upon. Furthermore, in *Tamil Nadu Organic Private Ltd. v. State Bank of India*[18], the court upheld the validity of contracts via an e-auction process, affirming that contractual obligations can arise via electronic means and are legally enforceable, if aligning with provisions of the IT Act, 2000.

Internationally, courts have also largely upheld the validity of SFCs provided there is reasonable notice and an opportunity to review. In the case of *Hotmail Corporation v. Van Money Pie Inc.*[19] the Northern District Court of California held that the terms of service contained in a Click-Wrap contract at the time of creating an e-mail account are enforceable, thus, positing that Click-Wrap contracts hold legal force, regardless of whether the users had read the terms or not.

Though, it is noteworthy that courts also carry out a balancing act between freedom of contract and protecting the interests of the weaker parties, by trying to uphold equity and good faith under the doctrine of conscionability. In the case of *Uber Technologies Inc v Heller*[20], the Supreme Court of Canada held an arbitration clause of a digital SFC to be unconscionable and unenforceable for being contrary to public policy due to the imbalance in bargaining power. Similarly, the Indian Supreme Court in *LIC of India v Consumer Education & Research Centre*[21] held that in SFCs of adhesion, there must be reasonable notice with reference to the terms of the contract, and if any term is unconstitutional or unconscionable due to being

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opposed to public policy, it can be struck down. So far, there is consensus as to the settled position about the validity of SFCs only with regard to unconscionability.

3. The New Paradigm: Consent under the DPDP Act, 2023

The DPDP Act, 2023 has significantly altered the legal conceptualisation of 'consent' with respect to data privacy within the ambit of contractual relationships. Its enactment marks the legislative rejection of the "constructive notice" doctrine established in *Hotmail*[22] and tacitly accepted in *Trimex*[23]. The DPDP Act's strict and meticulous definition of consent places an affirmative fiduciary duty upon entities that collect, store and manage data.

a. Deconstructing Section 6: Free, Specific, and Granular

Consent in the DPDP Act is conceptualised in Section 6 as "free, specific, informed, unconditional and unambiguous with a clear affirmative action"[24], hence, statutorily mandating collection of data for a "specified purpose"[25] - which directly opposes the bundled, 'take it or leave it' practice for seeking consent. This introduction of a granular, purpose-oriented form of collection of consent is a step in the right direction in upholding and preserving user agency by allowing them to choose the data usage for functions for which they consent to. Earlier, entities 'bundled' essential and non-essential functions while seeking consent, however, now this prevalent practice is statutorily prohibited due to the requirement of granular collection of data for specific purposes and its use for only that purpose.

Furthermore, the requirement of "clear and plain language"[26] along with options for different languages is a step towards diversity and inclusivity, which will allow non-English speaking users to provide informed consent. While this would require massive technological overhaul, it allows users to become active participants in a contract that deals with potentially sensitive data and its utilisation by digital entities. The granularity requirement imposed by DPDP Act essentially does away with the simple click on 'I Agree', and might necessitate a shift to a toggle-based or other separate, individual consent seeking mechanisms that sort out purposes into distinct categories which the users can evaluate. For example, a person ordering items may consent to providing their location (essential) to the quick-delivery app, but may decline sharing ordering history with third-party marketing services (non-essential).

Under Section 6, if a strict construction is adopted, a digital entity cannot coerce or trick a data principal to provide bundled consent by projecting non-essential services as being linked

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to essential ones, it may arguably be in contravention of the DPDP Act. Thus, the introduction of the DPDP Act has necessitated a reworking of the pre-existing policies, pushing them to bear in mind the rights and agency of users.

b. Notice Requirements and the Obligation of Itemization

The conceptualisation of consent under the DPDP Act is invariably linked to the doctrine of notice. Section 5[27] mandates that notice given by the data fiduciary must precede or accompany seeking of consent from the data principal, and must itemise and inform the user about: (1) the data sought and the purpose for which it is required, (2) their rights under Sections 6 and 13 of DPDP Act for grievance redressal and withdrawal of consent, and (3) the mode and procedure of grievance redressal.

This necessity of pre-contractual disclosure is a more stringent and rigorous standard than the one of reasonable notice in the IT Act, 2000. In the pre-2023 era, it sufficed if parties buried essential information and terms in the fine print, or simply hyperlinked hundreds of terms of service and privacy at the bottom of the screen in a miniscule font. Now, post the introduction of DPDP Act, the data fiduciary can no longer bury the purpose of data processing in paragraph 45 of a linked document - it needs to be clearly itemised and presented to the user/data principal for them to validly consent to it.

c. Extraterritorial Applicability and Global Compliance Implications

Another interesting facet of DPDP Act is that it mandates cross-jurisdictional application of the statute under Section 3, provided that the data principal is situated in India and the processing of digital personal data is with respect to "activity related to offering of goods or services"[28], thus, widening the scope of liability by accounting for the fluid nature of digital data. This 'long-arm' jurisdiction fundamentally opposes the 'one size fits all' operational model of international giants.

Historically, international conglomerates used boilerplate SFCs of adhesion for their privacy policies and data management, which were drafted to cater to international counterparts of DPDP Act, such as the American statutory requirements, but largely using the European Union's GDPR[29] as a standard, and then replicated them across all jurisdictions globally[30]. However, specific statutory requirements under DPDP Act will now require contractual splintering and formation of terms in compliance with Indian laws specifically. This may have

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economic implications for the efficiency of SFCs.

Additionally, under Section 16[31] of the DPDP Act adopts a 'blacklist' approach, where the government can notify the restriction on transfer of data to the mentioned country. This creates contractual uncertainty, and will require the drafters to bear in mind the severability of certain clauses relating to transfer of data, hence, pushing for keeping up with an evolving space of digital data protection laws under the aforementioned compliance framework. This also hints towards the end of judicial arbitrage and the traditional practice of digital boilerplate SFCs which dictated how and where the data was dealt with.

4. The Conflict: Boilerplate Policies vs. Statutory Mandates

Per the discussion insofar, the main contention arises in terms of reconciliation of these boilerplate SFCs with the new user rights-centred compliance framework under DPDP Act. Previously used SFCs are inherently incompatible with granular statutory requirements due to their static and blanket nature. The general trend of reliance upon GDPR[32] inevitably causes issues, especially in cases of inconsistency with the DPDP Act. For example, Section 7[33] of DPDP Act conceptualises a narrow list of 'legitimate uses' defined by the statute as opposed to GDPR[34] which allows for a flexible interpretation of the same by the data fiduciary. This renders previous sweeping clauses in terms of services invalid as per Indian law[35]. Further, Section 8 of DPDP Act creates an obligation upon the data fiduciary to erase data upon the successful fulfilment of the purpose for which it was collected. This almost legislatively inserts a 'sunset clause' into every digital SFC. All contracts henceforth will have to account for multiple such contractual alterations in order to comply with the rigorous framework of the DPDP Act.

5. Contextual Challenges and Socio-Legal Limitations

While the intermingling of the ICA and the DPDP Act creates a robust and framework ground for alteration of approach towards boilerplate SFC privacy policies, there remain certain challenges to proper implementation in terms of behavioural hurdles and cross-jurisdictional implementation. The introduction of newer standards by the DPDP Act fall prey to the fallacy which affects almost every aspect of legislation - the assumption that all parties involved are rational actors who can perform a cost-benefit analysis with respect to every digital transaction[36].

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a. Behavioral Economics: Decision Fatigue and the Privacy Paradox

The primary challenge that arises is due to the fact that users' behaviour is often affected by decision fatigue. Nobel laureate Daniel Kahneman uses this to explain why most individuals use a reflexive, faster, more intuitive thinking process (System 1) as opposed to a slower, deliberative model of thinking (System 2)[37], and this is true in the case of digital SFCs as well.

A user may use multiple apps, websites and platforms, which create a certain amount of cognitive load. Further bombardment by multiple consent requests across platforms is likely to cause significant depletion of mental resources, thus, deterring usage of the platforms. The 'I Agree' button has historically been used by conglomerates as the path of least resistance to ensure usage and retention of their platforms. This tool of cognitive heuristics has been exploited for propagation of unfair and arbitrary contractual terms, which will precisely form the challenge to the granular consent standard.

Data fiduciaries will be reticent in terms of implementation due to the possibility of user experience dissatisfaction, and data principals will face cognitive overload. This leads to largely two choices: either choose not to use the platform or, provide uninformed consent by agreeing with terms for the sake of it. Users more often than not choose the latter by falling victims to hyperbolic discounting[38], to prioritise preservation of cognitive resources and also because they are stuck in System 1 of thinking. This has also been supported by empirical evidence where user attitude with respect to their data is dissonant with their actual behaviour.

b. Cross-Jurisdictional Enforceability Issues

DPDP Act's 'long-arm' jurisdiction may also run into problems. First, if a data fiduciary is located in a jurisdiction over which India has no power to enforce and no servers or offices of that data fiduciary fall within the territory of India, the orders of the Data Protection Board are effectively rendered toothless. Even if India can seek enforcement in a jurisdiction which is a reciprocating territory, the process is long drawn, tedious and commercially onerous. Further, the possibility of blocking the app/website/platform altogether is economically and politically an unviable option, especially in response to a non-performance of civil liability.

In such situations, the small players will bear the brunt of legislation, while giant conglomerates will simply be too big to be banned due to their pre-existing user base dependency.

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6. Conclusion

The trajectory of Indian jurisprudence for laissez faire acceptance of SFCs to the rigorous standard for boilerplate SFCs under the DPDP Act is testimony to the growing concern for user data privacy and greater emphasis on active, willing participation of parties to a contract. This paper has argued that the pre-DPDP Act legal framework facilitated an "illusion of consent", where the data principals were lured into having a semblance of agency. It functioned as a procedural farce where "*meeting of minds*" was replaced by the "*meeting of a cursor and a button*", creating arbitrary and imbalanced contractual relationships between conglomerates and users.

The introduction of the DPDP Act is a step in the right direction, however, it needs to break through structural inertia, along with proper judicial support and interpretation. The Indian judiciary has carried out a balancing act when it comes to arbitrary and unconscionable contracts. If they extend the same spirit towards SFCs to protect user rights against coercive and unconscionable methods of seeking consent, the courts may be able to produce both substantial and procedural fairness. In light of our discussion, it is safe to say that the times of a 'black box' are coming to an end, the only challenge remaining is to pry it open.

[1] The maxim refers to meeting of the minds of the contracting parties in the same sense regarding the same thing.
[2] Stelios Tofaris, '*The Regulation of Unfair Terms in Indian Contract Law: Past, Present, and Future*' in Mindy Chen-Wishart and Stefan Vogenauer (eds), *Contents of Contracts and Unfair Terms* (OUP 2020) 113-114
[3] Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon 1985) 731
[4] 103th Law Commission Report (1984) ch 2
[5] Srishti Aishwarya Shrivastava, '*THE ENFORCEABILITY OF ELECTRONIC CLICK WRAP AND BROWSE WRAP AGREEMENTS*' (2016) 6 NLIU Law Review 98-119
[6] James Gibson, '*Boilerplate's False Dichotomy*' (*SSRN*, 2017) < https://ssrn.com/abstract=2947328 > accessed 2025
[7] Digital Personal Data Protection Act 2023, s 6(1)
[8] Digital Personal Data Protection Act 2023
[9] Information Technology Act 2000, s 10A
[10] Gregory Wheeler, '*Bounded Rationality*' (*The Stanford Encyclopedia of Philosophy*, Winter 2024) <https://plato.stanford.edu/archives/win2024/entries/bounded-rationality/ > accessed 29 December 2025
[11] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2016) < https://www.hup.harvard.edu/books/9780674970847 > accessed 4 January 2026
[12] ibid 6
[13] ibid 6
[14] *Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly* 1986 AIR 1571
[15] Indian Contract Act 1882, s 23
[16] Arthur Allen Leff, '*Unconscionability and the Code – The Emperor's New Clause*' [1967] 115 University of Pennsylvania Law Review 485
[17] *Trimex International Fze Limited v. Vedanta Aluminum Limited* (2010) 3 SCC 1
[18] *Tamil Nadu Organic Private Ltd v. State Bank of India* AIR 2014 Mad 103

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[19] *Hotmail Corporation v Van Money Pie Inc* (ND Cal, 16 April 1998)
[20] *Uber Technologies Inc v Heller* 2020 SCC 16
[21] *LIC of India v. Consumer Education & Research Centre* 1995 SCC (5) 482
[22] ibid 19
[23] ibid 17
[24] ibid 7
[25] ibid 7
[26] ibid 7
[27] Digital Personal Data Protection Act 2023, s 5
[28] Digital Personal Data Protection Act 2023, s 3(1)
[29] General Data Protection Regulation Regulation, EU 2016/679
[30] Graham Greenleaf, 'Global Data Privacy Laws 2021: Despite COVID Delays, 145 Laws Show GDPR Dominance' (2021) 169 Privacy Laws & Business International Report <https://dx.doi.org/10.2139/ssrn.3836348> accessed 8 January 2026
[31] Digital Personal Data Protection Act 2023, s 16
[32] ibid 29
[33] Digital Personal Data Protection Act 2023, s 7
[34] ibid 29
[35] For example, this clause from Instagram's privacy policy -"This information would allow third-party ad networks to, among other things, deliver targeted advertisements that they believe will be of most interest to you." - may be rendered invalid if held to the test under DPDP Act.
[36] Daniel J. Solove, '*Privacy Self-Management and the Consent Dilemma*' (2013) 126 Harv. L. Rev. 1880
[37] Daniel Kahneman, Thinking, Fast and Slow (Farrar, Straus and Giroux, 2011)
[38] Alessandro Acquisti & Jens Grossklags '*Privacy and Rationality in Individual Decision Making*' (2005) 3 IEEE Security & Privacy 26 < https://ieeexplore.ieee.org/document/1392696 > accessed 5 January 2026