FUTURE STRATEGIES FOR IMPROVING CONSENT IN ELECTRONIC CONTRACTING

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Abstract: China's economy has been running deep into an exciting phrase called “Internet +”. In North America, most businesses have online presence and conduct numerous transactions online. Unprecedentedly, electronic contracts have been governing more Individuals and corporations’ legal relationships in a growing proportion of businesses and everyday life.

E-contracts, usually with no physical architecture, are easy to “sign”—people just click one or two icons on a computer / smartphone screen after “reading” (scroll down) the contents. However, e-contracts are standard form contracts which are provided by vendors\(^1\). Users\(^2\) are easy to become victims of exploitative terms, because their consent has been obtained by the vendors in the e-contracting process. Through analysis on well-known cases and examples in Canada and China (Kanitz v. Rogers Cable Inc., Taobao Riot, Rudder v. Microsoft Corp., JingDong Mall v. Xuchun Wang, etc.), it shows that people’s “consent” on exploitative term like forum selection clause is merely an innocent click on a whole bunch of terms mainly for proceeding with the online transaction—if you want a modern life with Internet, you have to close your eyes and “agree” to those sophisticated terms. Moreover, the signed contracts can later be unilaterally manipulated by vendors because an amendment clause has made users gave long-term, broad and automatic consent to future changes. As a result, all the unfair clauses along with assent can be used by vendors as evidence against users in litigation. It is hard to regard this kind of consent as adequate when entering into contractual relationship.

After referring to Canada and China’s related laws, regulations, literature and the 15 strategies of the Electronic Commerce Subcommittee of the American Bar Association, Wikipedia’s effort and other approaches, the paper dedicates itself to these suggestions: (i) to establish an important-term list among e-terms by contract law legislation to protect the certainty of core interests from being unilaterally manipulated.

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1 This paper uses “vendors”, “companies” or “corporations” to indicate economic entities doing business online.
2 This paper uses “user” to indicate the receiver of the vendor’s e-contract most of the time, because a user could be an online merchant, but sometimes the paper uses “consumer” instead, especially when discussing consumer agreement.
changed; (ii) to replace the one-sided amending and adequate notification regime with online amendment with users’ participation or a multi-participant hearing; and (iii) to adopt separate, one-to-one checkboxes for those important Commercial terms and Legal terms in online contracting process instead of the non-negotiable Yes / No mode. Finally, a workable example of how to manifest adequate consent on inserting a forum selection clause into e-contracts will be provided.

Key words: Electronic Contract; Consent; Canada and China; Standard Form Contract; Online Amendment; Contracting Process.

1. Introduction: problems with consent in e-contracting

Because of the incomparable speed, convenience and attraction of computer and Internet, electronic commerce has become even more widespread and popular than its prosperous early stage of development. In China, people have begun to use value-added services platforms like Alipay to purchase financial products to appreciate their wealth instead of using banks’ financial services, which can also be conducted online; the way of calling a taxi is switching from making a phone call to using smartphone apps, and the payment can be done also by e-platforms like Alipay. In Canada, there are few businesses that do not have an online presence; many are now developing a presence not just on the web, but also on social networks including Facebook and Twitter. Individuals and corporations routinely use the Internet to buy and sell goods and services, acquire information, and engage in a multitude of transactions with contractual implications.

Digitization and Internetization are revolutionary trends for many businesses, with e-commerce being seen by many as the most advanced business model, one that is still rapidly developing. However, e-contract, the dominant way of governing legal

relations between companies and their numerous users (subject to regulatory regimes in various jurisdictions), has not progressed good enough as their counterparts in traditional businesses. As will be discussed below, in some aspects, the situation of e-contracts is even worse than paper contracts. Although e-contract and the process of entering into it (hereinafter, e-contracting) is more efficient, convenient and environmental friendly, one of the core values of contract—consent, has long been considered problematic in this fast and simple way of contracting. As a lawyer and law professor in University of Montreal, Gautrais, V. stated, the color of e-consent is: “red”;⁵ which means the consent in e-contract is a bit dangerous for user. Through many well-known cases and disputes in Canada and China, which will be discussed in this paper, we may discover a prevalent phenomenon that in e-contract disputes with companies, users (including consumers) are usually in a disadvantageous position. One of the primary causes of users’ disadvantage is that users are deemed to have given their consent in e-contracting process to all of the terms just by clicking “I agree”. This can include deemed consent to several unfair clauses which can undermine their ability to seek legal redress in courts or through arbitration.

The consent problem is a widespread, persistent and complex one, which has at least five layers. First aspect of the problem is the inevitable use of standard form contract. A standard form contract (also known as adhesion or boilerplate contract) is a contract whose terms and conditions are set by one party, and the other party has little or no negotiation room.⁶ The universal use of standard form contracts, which has already caused a lot of trouble in offline commerce, is still a major reason of the consent problem in e-commerce. The existence of this method of contract formation may be reasonable for that it does not involve the back-and-forth of the paradigm “bargain” of classical contract law⁷, and it promotes economic efficiency. But unfair clauses like forum selection clauses and liquidated damages clauses do become binding through the boilerplate. According to Radin M. J., standard form contracts are

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⁷ see FARNSWORTH, supra note 30, § 4.26, at 293-94; Slawson, supra note 8, at 552-53.
the “expanding universe” (World B) that doesn’t like World A, the world of voluntary agreement, in which two parties reach a consensus after full bargaining. In World B, you only receive “purported contracts” and are asked to sign (or click agree).

Second, online business is electronic World B, users are even more vulnerable “due to the characteristics of the screen and the medium”. Many authors like Gautrais, v., Radin, M.J., Hilman, A.R. and Rachlinski, J.J. have addressed the reasons why people find it difficult to pay enough attention to e-contracts. For instance, the offeree of an electronic contract expects the process to be quick given the fact that one goes online to save time; we don’t believe that we will ever need to exercise our background legal rights; we need the product or service, and we are eager to complete the transactions. However, laws and jurisprudence have rarely taken the electronic context into consideration. Based on several cases, it appears that the concern about the unfairness of standard form agreements can largely be addressed by the vendor/licensor demonstrating that it has made a reasonable effort to bring the terms of the contract (to the consumer’s attention)...the Clicking requirement would seem to address this concern.

Third, this clicking requirement and notification are not adequate indication of consent to an onerous standard clause, because if you cannot change anything about the contract, and you really need the transaction, you will not bother to read it even if there is adequate notice. A standard clause means a term in standard form contract. If it is too onerous, there will be restrictions on that standard clause provided by law in

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9 Ibid.
12 Ibid.
14 Ibid.
15 see Hillman, A.R. and Rachlinski, J.J. supra note 23 at 479.
traditional businesses (e.g. article 40 of China’s *Contract Law*, which will be mentioned later). So in e-commerce, there should be not only a notice requirement, but also legislative restrictions regarding the content of the terms. Canada has started such attempt, in Ontario, Quebec, and British Columbia, a mandatory arbitration clause can no longer be imposed in a consumer agreement. In China, the restrictions on standard clauses in traditional contract law were put into e-commerce regulations. For example, the *Provisional Regulations of Online Commodity Trading and Relevant Service* rules that, online merchants and ISPs / ICPs shall not use electronic standard form contracts to either mitigate or exempt their obligations and liabilities, or limit or exclude consumers’ important rights. These approaches can be an effective option to prevent the vendors from using consumers’ consent to impose unfair clauses, but it may also be a little simple and crude, for that it is not easy to find out and determine whether a sensitive term buried in other clauses is unfair or reasonable until a number of cases or even a big incident is triggered by that term. A sensitive clause means an important term which governs both parties’ substantive rights and interests. Some consumers might already become subject to the “agreed” terms before the ban. Moreover, among numerous different users, a clause may be unfavorable to some people, but it may not be that onerous on others.

Fourth, the whole system of e-contracting may not yet be adequate for expressing and manifesting meaningful consent, which indicates the will of a user, not just a symbolic click to proceed with the transaction. A contract is a combination of many terms, including several sensitive clauses, which govern important rights and interests of users. Under the current mode of a single binary Yes / No choice, users actually cannot do anything about the content, they have to accept all if they want the goods and services provided online, like everybody else does. Besides, legislative ban on certain clause is a post-event and time-consuming measure, which also tends not to be flexible enough for regulating all types of e-contracts in private sector. Thus, users

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19 State Administration for Industry and Commerce of the People’s Republic of China, *Provisional Regulations of Online Commodity Trading and Relevant Service*, 2.13
need a better-designed e-contracting procedure to express qualified assent and refusal toward different terms. One of the visions of future e-contracting is separate ‘I Agree’ buttons\textsuperscript{20} or to incorporate selective boxes for sensitive clauses. It is a pre-emptive measure which may activate users’ free will to bargain over terms, and the last part of this paper will provide further development of it together with other solutions.

Fifth and finally, even if a fully bargained e-contract is concluded through a better process, it may still contain a clause that allows for its content to be unilaterally changed by the vendor at any time without user’s substantive approval. It seems that users have given a long-term and broad waiver of any say in the future changes to companies. This “consent” is necessary for routine amendments, but when adjusting any sensitive clauses, this automatic assent is obviously unqualified for manifesting a person’s opinion. When a vendor abuses this consent to facilitate an unfair contract adjustment, the change will run against the user’s best interest and will. In Canada and China, this conflict has become one of the major origins of contract disputes in e-commerce.

2. Amendment clause—“automatic” consent to unilateral future changes

2.1 Kanitz v. Rogers Cable Inc.\textsuperscript{21}

A number of Ontario customers found that Rogers, one of Canada’s largest telecommunication and Internet service providers, had broken the User Agreement, so they tried to bring a class action against Rogers. Though it suits the situation, the proposed class action was stayed because of an arbitration clause, which excluded all forms of court procedure.

Despite the question of the clause’s validity (as noted above, this kind of clauses in consumer contract were later banned by Ontario, Quebec, and British Columbia), the way the clause came into the User Agreement is also questionable. When the


consumers first entered their User Agreement with Rogers, there was no arbitration clause. It was unilaterally added by Rogers to the new version of the Agreement some time later. The established agreement could be changed solely by Rogers, because there was another powerful clause in its User Agreement. According to the clause, Rogers could change, add or remove any portion of the Agreement as long as it posted notice on its website, and the changes would bind users who continued using Rogers (i.e. those who didn’t immediately terminate the Agreement after notice was posted). Because this kind of clauses is designed to facilitate the vendor’s one-sided amending, this paper calls it “amendment clause”.

The Ontario Superior Court of Justice concluded that, because Rogers posted the amendments to its website and a customer could find the changes by clicking through five screens, there was adequate notice of the changes to the user agreement which then bound the customers when they continued to use Rogers’ service, and consequently, there was a valid arbitration clause between the parties. These Ontario consumers lost their right of launching a class action in court, because they were said to have “agreed” to the added arbitration clause. This “consent” is not those consumers’ will.

From the adequate-notice perspective, the court’s reasoning is sufficient, but it did not discuss much about the fairness of the arbitration clause. That is why Ontario, Quebec, and British Columbia banned such clauses by consumer protection legislation after the case. However, most provincial and territorial jurisdictions do not limit the ability of parties to agree to arbitrate consumer disputes and therefore bypass the courts. More notably, the question of whether such vital (even unfair) clauses can be “agreed” by this notify-enforce mode has not been addressed. By far, we have

22 Ibid. at [7]. “Amendment. We may change, modify, add or remove portions of this Agreement at any time. We will notify you of any changes to this Agreement by posting notice of such changes on the Rogers web site, or sending notice via email or postal mail. Your continued use of the Service following notice of such change means that you agree to and accept the Agreement as amended. If you do not agree to any modification of this Agreement, you must immediately stop using Rogers and notify us that you are terminating this Agreement.”
24 Teresa Scassa and Michael Deturbide, Electronic Commerce and Internet Law in Canada (Toronto: CCH Canadian Limited, 2012), 73.
to accept the reality that although an agreement matters to both parties and it is supposed to be stable after signing / click, the companies actually can unilaterally change it and almost “make” us “agree” to some harsh terms. This “consent” in e-contracting might sometimes be against our will. This violation of users’ will means that some clauses are unfair and unreasonably counter to users’ interests, therefore these terms would not have been agreed to if they could have been carefully considered. However, because of some problems existing in e-contracting, which will be addressed later, people gave consent to these clauses.

2.2 Taobao Riot

Problems of consent in e-contracting are also causing serious troubles in the world’s largest e-commerce market, China. The most sensational incident is called “Taobao Riot”, which became one of China’s top 10 IT news stories of 2011, and it continued into 2012.

Taobao is the most popular online shopping platform in China with more than 500 million registered users and over 160 billion USD Gross Merchandise Volume. It contains two major sites: Tmall, on which large merchants like Adidas, General Motors, Haier, along with many medium-sized merchants sell high-end goods; and Marketplace, where most small individual businesses sell inexpensive commodities. Taobao charges these merchants an annual service fee (hereinafter, Service fee) for its platform services. Meanwhile, merchants hand in a merchant’s deposit (hereinafter, Deposit) for Taobao to keep. If there is any consumer dispute, compensation will be extracted from the Deposit. The amounts of the Service fee and Deposit are stipulated in Tmall Rules and Taobao Rules (hereinafter Rules).

In 2011, Taobao issued its newly-amended Rules of Tmall, which raised the Service fee from 6,000 to 45,000, and increased the Deposit from 10,000 to 100,000
(the amounts are average numbers, denominated in CNY)\textsuperscript{28}. This sharp rise may be affordable for those large merchants like NIKE, SIEMENS, but it was unaffordable for many medium-sized merchants on Tmall. Most of these merchants would be expelled from Tmall and faced two endings: (i) to move to Marketplace and become a low-end shop, so that their good brand image, brand premium and accumulated customer confidence would be lost; or (ii) to quit Taobao completely and lost their business (Taobao occupied 52.1\% of China’s B2C market and 96.4\% of C2C market\textsuperscript{29}).

Along with Taobao’s dominant market position, the major reason why the platform could push users this far is an amendment clause in the Taobao Terms of Use (hereinafter, TOU). Term 1.4 provided that,

Taobao has the right to enact, amend any Terms and / or Rules at any time by posting the relevant amended and restated Terms and Rules on the Sites without separate notification to you. The amended Terms and Rules will come into force immediately once posted on the Sites. If you do not agree with the relevant changes, you must immediately stop using Taobao services. By continuing to use the Services or the Sites, you agree that the amended Terms and Rules will apply to you.\textsuperscript{30}

Under the authorization of this clause, Taobao can unilaterally change the TOU, as well as the Rules which govern the price and other commercial interests between both of the contractual parties. From Taobao’s view, it was its contractual right to change the price freely because users had agreed to all its terms. However, most of the merchants strongly disagreed to the unilateral changes on important issues such as Service fee. The “agreed” amendment clause left them no choice but in the situation either to pay the unaffordable price or to “immediately stop using Taobao”. Instead, since many merchants had been making a living from running businesses on Taobao

\textsuperscript{30} Taobao service center, “Taobao Terms of Use”, http://service.taobao.com/support/knowledge-1163515.htm?spm=0.0.0.0.E5bueK
for years, they had to find a way to fight against the clause.

The medium-sized merchants launched a nationwide online battle to protest the price increase authorized by the amendment clause. By communicating through voice chat tools and Internet forums, 7,000-50,000 merchants and angry users got “together” and organized.31 Their plan was to “attack” those large stores so as to disable the shopping platform. The ways of attacking were not illegal. The numerous merchants acted collectively to order as many goods as possible from big stores. After only half an hour, several famous big stores were sold completely “empty”—there was no business left to do but striving to make the deliveries on time. Since the stores had never seen so many and intensive orders, their efforts were far behind the 24-hour standard of “lightning deliver”, which is a guaranteed service. Then the merchants, as “consumers”, claimed for compensation for failure to meet this service standard, and Taobao had to pay their claim using the big stores’ Deposits.32

When the multitude of goods finally arrived, the merchants returned all of them and asked for refunds of payments, because according to the law, “consumers” have the right to do so within 7 days after the arrival of goods.33 Meanwhile, the merchants gave 0 or 1 stars out of 5 to each of the items. As a result, the large stores’ high credits (4.7-4.9) that had been accumulated for years fell to around 3, and the refund rates rocketed up to 10,000 per day.34

As the riot went on, many big stores on Taobao, such as UNIQLO, HSTYLE andOTHERMIX had to remove all of their items from the “shelves” and faced huge losses every day.35 Consumers could not find many goods and had to stop shopping on Taobao. The whole trading platform was nearly disabled. Meanwhile, merchants and other protesters were organizing “physical” demonstration against the amendment clause.

35 Ibid.
in front of Taobao’s head quarter.

This brand new form of protest soon became headlines on TV news and newspapers across the country. People were talking, debating and putting comments on social networks about the amendment and riot. The Ministry of Commerce had to calm this matter down. The director required both sides to control the conflict, and hoped that Taobao would respond positively to the voices of small and medium-sized enterprises.36

At last, Taobao issued the Interpretation of the 2012 Taobao Rules, which reversed the aggressive new Rules. The Interpretation provided that the rise of the Service fee would be delayed for regular users who had been running shops on Taobao for years, and Taobao would also bear half of the Deposit for all the merchants.37 Accordingly, most merchants were able to stay on Tmall to continue running their businesses, and the most chaotic period of China’s online shopping was stopped.

2.3 Automatic consent jeopardizes users’ legal rights and commercial certainty

From the Kanitz and Taobao examples, we can easily find that users are much more passive and vulnerable than the vendors in e-contract relationship. Although small claim courts and class action proceedings are designed to advance consumer rights,38 consumers could lose this right because the companies can freely insert arbitration clause into their user agreement (many jurisdictions do not ban such clause). From this perspective, e-contract may deprive consumer’s procedural right.

Furthermore, most merchants’ careers depend on long-term cooperation with the trading platform. After entering into an e-contract relationship, they expect commercial certainty like predictable fees which only change within reasonable scale

and time. Instead, the terms on Taobao authorized the platform to change the price with no limitation, which jeopardized users’ commercial interests.

Although most people don’t “immediately stop using” the services, it is hard to imagine that consumers really agree to waive their right of going to the court when disputes occur. It is even harder to believe that people would agree to a clause which allows their landlord (platform) to raise the rent with no limitation. So according to these well-known examples associated with major corporations in Canada and China, it is safe to say that some clauses in e-contracts actually violate users will, but they can easily get approved through the current e-contracting practice.

In e-commerce, although it seems unlikely that people would consciously agree to unfair terms if given a meaningful choice, their “consent” to these unfair clauses is manufactured by the e-contracting process. That is why consumers lost cases like Kanitz and Dell Computer Corp. v. Union des consommateurs. In the latter, the court dismissed consumers’ motion for authorization to institute a class action because of an arbitration clause in their e-contracts. Between consumers’ opposite claim and the consent manifested in the e-contract, courts in North America routinely chose to favor the latter. When your consent has been manifested to a term that is against your interests, it is very hard to overturn the situation. That is why Taobao users had no lawful measure but launched a nationwide riot to deny that they had given “consent” to the amendment. The following part of this section will discuss how this kind of consent is obtained in the e-contracting process.

2.4 Electronic architecture of online contracting

Although the electronic context is not the cause of e-contract’s unilateral changeability and the related consent problem, it effectively increases the opportunity for contract providers (the companies) to control and modify the agreements. The electronic environment is a truly novel advance in the history of consumerism.

40 Ibid. at para. 3
Comparing with signing paper contracts, e-contracting has been a great trend of technology development, which made e-commerce efficient, time-saving and free of geographic limits. But e-contract seems less reliable to users than an original copy of paper contract. Terms and conditions routinely change over time, and in fact typically state in their terms that the operator of the program has the right to change the terms and conditions at any time…achieving this outside of the virtual world can, however, be expensive and difficult.\footnote{429 (2002): 69.}

In the traditional world of physical architecture of contracting, the content is kept fixed by paper, ink and signature (sometimes with seal). This combination of matter makes it very hard to change the contract without the other party’s awareness. Moreover, one of the original copies was in full possession of the other party. So in order to legally adjust a paper contract, one has to present a new contract / supplemental agreement or modify the two original copies in front of the other party and request the other party to sign on the new documents. In this negotiation, mostly face to face, the other party can have the right not to sign and maintain the current status. This right can also be a bargaining power. If an amendment gets the other party’s approval, it must have obtained solid consent after careful consideration.

Even in some service industries like real estate agencies and car rental companies, where standard form contracts have long been widely used, the companies’ one-sided changes on agreements are not as easy, cheap or free of restrictions as in e-commerce. For instance, though real estate agencies print new version of contract to replace old one every year, the new contracts are prepared to govern new customers. For those old customers who had signed the previous version, the old terms usually still count, because the original content with signatures can be solid evidence on court. In addition, learning from two relevant cases I handled, every new version of contract using in real estate agencies will be examined by local administration for industry & commerce to prevent unfair terms, or customers have the right not to perform that


Put aside the main cause that legitimates vendor’s unilateral amendment, which will be addressed later in section 2.5, the electronic environment itself also has effect of making such adjustment unprecedentedly easy. In e-commerce, electronic contract and digital signature replaced the paper + print + signature + possession architecture. Contracts became an electronic file stored on a company’s web server, and clicking agree on a screen became the “functional equivalent” of signing the contract—the whole contract issue is out of the physical architecture. People do not keep their contracts in hand. Actually, there is no original copy which is as meaningful as a paper contract for users to keep. According to the \textit{Uniform Electronic Commerce Act}, the requirement of original is satisfied if the e-document can be accessed, retained for subsequent reference and assured its integrity.\footnote{see Uniform Law Conference of Canada, “Uniform Electronic Commerce Act” (1999), 11 http://www.ulcc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated} Under this standard, e-contract presented on the website is the original one. Although users can print out a “copy” on paper, it has no original signature and less weight of evidence. The users cannot keep or control an original contract like they used to do, they can only access and refer to it. However, the vendor has full control over the contract stored on its server.

This is perhaps the easiest situation for contract providers to change the contents. First, they don’t have to ask any of the users to sign the new original contract in order to make it enforceable. Technically speaking, to change a signed contract became just one party to rewrite an electronic document and upload it onto a website. It doesn’t need any of the other party’s participation. So no negotiation or bargain is needed to acquire the other party’s cooperation. Second, although in some traditional (offline) businesses, companies can also unilaterally amend their standard form contracts, they have to print a lot of new contracts to replace old ones in every business presence, which can be a costly job. Since previous customers have signed the old contacts and never seen the new version, the vendors face the possibility that the old terms still
govern the transactions with previous customers. After all, those customers have original contracts as hard evidence. In contrast, vendors in e-commerce don’t have these concerns—to modify the one original e-contract on the website means all the contracts with every user are modified, which is low-cost and quick. Besides, as long as a notice is posted on the web, all the users are supposed to be notified. It is a convenient, quick and catch-all procedure to make the amendment enforceable to all users. This process is so easy that amending e-contracts every now and then has become a fashionable routine in online business.

2.5 Amendment clause producing long-term, broad and automatic consent

The electronic environment only helps facilitating the problem. The main cause of e-contracts becoming manipulable by vendors is a clause in e-contracts, which has not received any restriction by far. Normally, to modify a signed contract and make the changes enforceable is similar to conclude a new one, so it needs the other party’s consent. Since adjusting e-contracts does not need user’s participation, the time and frequency of making the adjustments can be solely up to the companies. From the companies’ perspective, the time and frequency of users giving their consent should follow the same rhythm so that the companies can make the adjustments at any time. This consent requirement needs to be fulfilled by some measure to facilitate this convenience. Thus, a standard term was invented and widely adopted throughout the industry—the amendment clause.

In such clause, companies declare that they have the right to change anything in the agreement at any time. Although in most contracts, one party may have the right to change certain matters under some conditions, such completely unlimited privilege is way more powerful, and it has the potential to exploit the other contractual party. The only obligation of the companies described in the clause is that they should post the amendment on the website so that the other contractual party might notice it someday. In fact, the posting is just a needful step to make their amendment enforceable, because the change “will come into force immediately once posted on
the website\textsuperscript{45}. On the other side, the users are imposed more obligations without corresponding right. They have to check whether something has been changed every now and then, because they “must immediately stop using the service” and even notify the companies that they are “terminating this agreement”\textsuperscript{46} if they do not agree to any modification. Any continued use after the notice will be deemed to agreement to and acceptance of the changes.

Under the amendment clause, the normal process of negotiating and deciding whether to sign an adjustment of contract, which is usually a contractual party’s right, is replaced by a long-term pre-authorization. People no longer have the right to decide whether a changed agreement should become effective or the original contract should be maintained. In the light of Taobao’s TOU, the merchants “agreed” that Taobao has the right to raise the price, which means the company can escape from business negotiation. Besides, users also agree to the issue that if they did not notice the changes or cannot stop using the service in time, the changes will bind them. In Kanitz, consumers “agreed” to waive the right of going to court because they did not immediately stop using the service. In e-contracts, consent is no longer individuals expressing their will towards a certain issue, but a long-term and broad waiver of will towards all kinds of unknown issues. Usually, we cannot give consent on unknown things which do not even exist at present. But this broad and even blind consent is produced by the amendment clause.

Because the produced consent is too broad, it leaves the door open to all kinds of terms in the future, including mandatory arbitration clause, forum selection clause, exemption clause and other terms which are drafted by lawyers to minimize legal risks for their corporation clients. Accordingly, users’ risks and obligations are increasing because of the ever sophisticated amendments. This is why people find some of the terms are against their real will, especially when they happen to have

\textsuperscript{45} see Taobao service center, “Taobao Terms of Use”, 1.4, http://service.taobao.com/support/knowledge-1163515.htm?spm=0.0.0.0.E5bueK
\textsuperscript{46} see Kanitz v. Rogers Cable Inc. [2002] 58 O.R. (3d) 299 (Ont. S.C.)
some disputes with the vendor. The lawyers have already anticipated or dealt with such disputes, and they improved the contract for the company’s interest under the broad consent created by the amendment clause.

For self-protection, users have to check the website from time to time to see if there are some unexpected changes, otherwise they may be deemed to have agreed on something they don’t even know. This uncertainty is against the basic spirit of establishing contract relationship. More importantly, the article 40 of China’s Contract Law (hereinafter, Article 40) stipulates that if the provider of a standard form contract increases the responsibility of the other party or rules out any important right of the other party by using standard clause, the relevant clause shall be invalid.47 Forcing users to check the contract every now and then and to respond immediately (e.g. stop using the service) is to increase user’s obligation. And the consequence that the new terms will bind users if they don’t respond is to increases user’s responsibility. As an electronic standard clause, the amendment clause has potential possibility of being invalid at this point, especially the new terms which will become binding set up substantive responsibility to users.

In addition, one of China’s main e-commerce regulations, The Service Standards of the Third Party E-commerce Transaction Platform, rules in its provisions 5.7 and 5.8 (hereinafter, Standards 5.7 & 5.8) that when amending the user agreement or rules, the provider should publicize the amendment 30 days in advance, and users who do not accept it may quit the service in 60 days.48 According to it, a newly-amended contract should not come into force “immediately once posted on the website” but after a 30-day buffer period; users have 60 days to decide whether to accept the amendment. However, most amendment clauses in China authorize the new changes to go into effect at once and require users to respond immediately if they disagree. The legislative intent of protecting users from sudden changes is reasonable, but the

amendment clause violated this piece of regulation.

The Article 40 is a general provision in China, which has the potential to be applied in many situations to protect the other contractual party. Because of its broadness, this provision needs judicial interpretation of legislature or case law to apply it to specific situation / clause. So far there has been no precedent of applying Article 40 to ban the amendment clause. Thus the Standards 5.7 & 5.8 are not inconsistent with Article 40.

However, whether an amendment clause violates Article 40 or not, does not depend on history, but on its effect. If a vendor uses amendment clause to legitimate new onerous terms, then this practice violates the Article 40—the other party’s responsibility is increased by the amendment. If an amendment clause is only used for facilitating the routine improvements of the e-contract, and the new terms neither increase user’s substantive responsibility nor rule out their important right, then this amendment clause is valid. This practice should also be in compliance with the time requirement of Standards 5.7 & 5.8.

Unfortunately, the amendment clause not only facilitates routine improvements, but also let onerous terms into user’s agreement, and it provides no buffer period. So the amendment clause, currently without any legal limitation, is suspected of violating Article 40 and Standards 5.7 & 5.8. From previous analysis, we can see that user’s consent is produced by this clause and turns out a long-term, broad and automatic waiver of decision-making right. Sometimes this automatic assent even becomes the tool of companies to legitimate some unfair terms exploiting users. Therefore, the amendment clause needs to be regulated and restricted, though I acknowledge its necessity of existence. Relevant solutions will be provided in the fourth part of the paper.

3. Forum selection clause—an example of unqualified consent to onerous clause

In e-contract, another prevalent condition of meaningful consent being ignored is
the forum selection clause. In offline businesses, jurisdiction issues have often been a focus between parties in the negotiation and contracting process. Lawyers of both parties usually have to endure rounds of tough negotiations before a forum clause can be settled. The clause is a distribution of legal risks. A choice of forum clause can effectively deny a remedy to injured parties by limiting claimants to bringing suit in a jurisdiction that is very far away.\(^\text{49}\) Moreover, some forum selection clauses also contain choice of law, for instance, the Terms of Use of Alibaba\(^\text{50}\) and Member Agreement of MSN\(^\text{51}\) both choose the law of the selected forum to govern all disputes relating to the e-contracts. Through the experience of lawyer practice, I noticed that a preferable forum selection brings a party more favorable court when dispute arises, more predictable outcome when one thing gets two interpretations under different laws, and lower cost when attending a proceeding, while the other party has to face adverse situation.

In e-commerce, contracting parties are usually far away from each other, sometimes even in different countries. The differences between courts, laws and costs can be very great. therefore, jurisdictional interests become even more crucial. A party to an Internet Contract may find that the contract is governed by laws that it did not expect or account for, and that disputes must be settled in inconvenient or inhospitable jurisdictions.\(^\text{52}\) But surprisingly, inserting a forum selection clause in e-contract under users’ “consent” seems easier than putting a same clause into an ordinary contract in many other businesses. Such clauses, which usually stipulate that any dispute will be governed in the jurisdiction of the company’s domicile, are very common in e-contracts all over the world. This part will analyse the inadequacy of


\(^{50}\) The 12.7 of Terms of Use of www.alibaba.com rules that, The Terms shall be governed by the laws of Hong Kong without regard to its conflict of law provisions. The parties to the Terms hereby submit to the exclusive jurisdiction of the courts of Hong Kong. (Alibaba.com Help Center, http://www.alibaba.com/help/safety_security/policies_rules/others/002.html)

\(^{51}\) The 15.1 of Member Agreement of MSN stimulated that, This Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County. Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership. ([1999] 2 C.P.R. (4th) 474 (Ont. S.C.), at para. [5], http://www.canlii.org/en/on/onsc/doc/1999/1999canlii14923/1999canlii14923.html)

consent on forum selection clause and discuss the validity of the clause, starting with the cases in North America and China.

3.1 *Carnival Cruise Lines, Inc. v. Shute*\(^{53}\)

The imposition of forum selection clause started from a time when e-contract has not emerged, so our first case is about paper contract in a traditional business—transportation industry (of course, nowadays transportation is highly associated with e-commerce). This old case has factors in common with today’s e-contract issues. Shute was injured on a cruise ship and tried to sue the company in her home state of Washington.\(^{54}\) But because of a forum selection clause, the injured lady had to go to Florida in order to file the suit against the company. The clause was printed on a ticket, so theoretically every passenger would have the chance to read it, though it was buried in other fine print terms. The US Supreme Court validated the clause because it believed that the above facts showed that Shute had willingly accepted the clause. After the case, federal courts routinely cite *Carnival Cruise* as precedent for upholding choice of forum clauses, even in situations where consent by recipients is problematic.\(^{55}\)

Obviously, Shute would not accept this forum selection clause, if: (i) she knew the existence of it; (ii) she understood the adverse situation it could bring; (iii) she had been given meaningful choices to avoid it. The reason why it can get “accepted” into her agreement is because passengers seldom read the agreement on their tickets when booking trips, no matter it is fine print or not. Besides, ticket offices and ship’s crew never remind any passenger that “if you get hurt, you can only seek remedy in a distant jurisdiction”. Even if you notice the unfair clause, when you are getting onboard a flight or vessel on a business trip or tour, it is just inappropriate and useless to argue with the staff about a standard term. Most people just get in, fasten the seat belt and “enjoy the flight”, while the agreement is accepted. There is neither

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\(^{55}\) Ibid.
notification to create awareness nor a requirement of expressing consent for waiver of such an important legal right. In this way, forum selection clauses can “sneak” into agreements without any careful thought being given to them by consumers, so the consent is not meaningful.

3.2 Rudder v. Microsoft Corp.\textsuperscript{56}

Some Canadian MSN users attempted to bring a class action in Ontario against Microsoft Corporation for breach of contract.\textsuperscript{57} Microsoft sought to have the class suit stayed on the grounds that the Ontario Court had no jurisdiction, because the users had agreed to a “Member Agreement”\textsuperscript{58} which contained a forum selection clause. According to the clause, all disputes should be governed by the laws and exclusive jurisdiction of Washington State, U.S.A. The plaintiffs argued that, “because only a portion of the Agreement was presented on the screen at one time, the terms of the Agreement which are not on the screen are essentially ‘fine print’.”\textsuperscript{59} At last, the court gave effect to the forum selection clause and granted the defendants a permanent stay of the proceedings.\textsuperscript{60}

Notably, the court quoted from a previous decision of the British Columbia Court of Appeal in Sarabia v. “Oceanic Mindoro”\textsuperscript{61} where Madame Justice Huddart stated that “[a] court is not bound to give effect to an exclusive jurisdiction clause,” but the choice of the parties should be respected unless “there is strong cause to override the agreement.”\textsuperscript{62} In my view, the plaintiffs did not find any strong argument to overturn the clause, and a court, as being neutral, is not supposed to find such reason for the plaintiffs, so the court had to give effect to the clause. In fact, there might be some approaches to override the clause, which can be borrowed from China’s case and

\textsuperscript{57} Ibid. see para. [4]
\textsuperscript{58} Ibid. see para. [5]
\textsuperscript{59} Ibid. at para. [11]
\textsuperscript{60} see Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law, (Princeton University Press, 2012), chapter one.
\textsuperscript{62} Ibid., at 126 (W.W.R.), see also Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law, (Princeton University Press, 2012), chapter one.
3.3 JingDong Mall v. Xuchun Wang\(^63\)

JingDong Mall (hereinafter, JD) is the largest online direct sales company (sells goods on its own platform) in China in terms of transaction volume in 2013, with a market share in China of 46.5% and more than 60 million registered users.\(^64\) One of its users, Xuchun Wang (Wang), ordered two air-conditioners online from JD with an extremely low price. Claiming that the price was a negligent mistake of a staff member, JD filed a lawsuit to cancel this sales contract in Beijing Haidian District People’s Court (hereinafter, Beijing court), for that the corporation is located there. Wang challenged the jurisdiction of Beijing court, and wished to move the case to his domicile—Shanghai Pudong New Area People’s Court (hereinafter, Shanghai court).\(^65\)

In the JD’s TOU with its users, there was a forum selection clause, which ruled that, when a dispute cannot be resolved by negotiation, any party may submit the dispute to the court in the domicile of this website. According to that term, both parties agreed to have their dispute heard in Beijing court, but Wang alleged that hearing the case in the distant Beijing court would cut down his jurisdictional interest as a consumer, and Shanghai court has legal jurisdiction.

To assume the jurisdiction or to decline it was the core question in front of the Beijing court. And the question had layers. First issue is what did the word “may” in the clause truly means. “Any party ‘may’ submit the dispute to the court in the domicile of this website” could have two explanations: (a) when a dispute cannot be resolved by negotiation, then any party may sue, it should be the court in the domicile of this website; (b) any party may sue in the court of this website’s domicile, it may also sue in other courts. The court quoted article 41 of the Contract Law of People’s

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Republic of China, which rules that, if there is more than one interpretation for a clause in a standard form contract, the interpretation which is more disadvantageous to the contract provider shall be adopted.\textsuperscript{66} Thus the explanation (b) was accepted, which meant that other courts with legal jurisdiction could govern the case.\textsuperscript{67}

The second layer was to assess the legal jurisdiction issue. According to \textit{Civil Procedural Law}, a lawsuit arising from a contract dispute shall be under the jurisdiction of the court of the place where the defendant has his domicile or where the contract is performed.\textsuperscript{68} The fact that the defendant lived in Shanghai was indisputable, so the focus was about where the contract was performed. It has been an important topic of online sales contract, for that the place of delivery and the place of receipt are often far apart. JD declared that it would deliver the goods to the local express company to do the shipping, so the contract was performed in Beijing. But the TOU and the online order showed that JD will deliver the goods to the place appointed by the user (Shanghai). According to the relevant judicial interpretation, if there is agreement on the place of delivery in a sales contract, that appointed place shall be the place where the sales contract is performed. If both parties choose an express company to ship goods, the destination of delivery shall be the place of contract performance.\textsuperscript{69} So Shanghai was the place of contract performance.

At last, the court held that the forum selection clause could not rule out the legal jurisdiction because of the vague word “may”; Even if it could, the clause was still invalid for ruling out the consumer’s right; Thus the case should be governed under legal jurisdiction, which meant that it would be moved to the Shanghai court, where the defendant Wang had his domicile and the contract was performed.\textsuperscript{70}

\begin{flushleft}
\textsuperscript{69} The Supreme People’s Court of The People’s Republic of China, \textit{Opinions of Supreme People’s Court on Issues about How to Apply “Civil Procedure Law of the People’s Republic of China”,} 19, http://law.baidu.com/pages/chinalawinfo/0/58/f1d36080b2cadde89b5179d1cfe58_0.html
\end{flushleft}
3.4 An analysis of the validity of forum selection clause in e-contract

In my opinion, the decision of China’s court is better for consumers and more appropriate from the perspective of contract law. Under the current e-contracting regime, maybe it is better to consider the forum selection clause invalid, unless meaningful consent of consumers can be expressed and obtained better in the future. To make this argument more rigorously and precisely, the next sections divide the comparative trial between forum selection clause and consumer’s jurisdictional right into two aspects—to respond to a suit launched by a vendor and to file a suit against a vendor.

3.4.1 Legal restriction on onerous clause in standard form contract

In the first scenario, when a vendor files lawsuit against its user, the corporation usually chooses to sue in the jurisdiction of its own domicile under a forum selection clause. Then the individual user may have to spend time and money in appearing in that distant court and facing disadvantageous judgment, otherwise the result could be more adverse if not attending. Things could be more difficult in federal countries like Canada for the differences of laws between jurisdictions. It is neither legal nor reasonable to force consumers into this situation by the current e-contracting mechanism. At least it is suspected of violating China’s laws and regulations.

My reason for holding this opinion is that most e-contracts at present, like terms of use, user agreement and member agreement, are standard form contracts, so they should be under legal restrictions for such kind of contracts. E-commerce is about high efficiency and low cost, so standard form contracts are used extremely wide. Typically, vendors unilaterally provide all the contents of e-contracts. E-contract even got a synonym of electronic standard form contract. In China and many other countries, there are several statutory restrictions on standard form contracts. As mentioned above, article 40 of China’s Contract Law has set a basic tone that if the provider of a standard form contract increases the responsibility of the other party or
rules out any important right of the other party by using standard clause, the relevant clause shall be invalid.\textsuperscript{71} Consistent with that law, China’s \textit{Provisional Regulations of Online Commodity Trading and Relevant Service} rules that the online merchant and ISP / ICP shall not insert any unfair or unreasonable provision which excludes or limits consumer’s important rights… into its electronic standard form contract or other rules.\textsuperscript{72} And \textit{The Service Standards of the Third Party E-commerce Trading Platform} also provided that the proprietor of the platform should not…increase the burden to users or rule out the legal rights of the user.\textsuperscript{73} In Canada, legislative restriction on standard form contract is rare, but according to several Canadian scholars, assuming that a Web-Wrap Agreement is valid, it may nevertheless be unenforceable if the terms of a contract are unfair and give an undue advantage to the drafting party.\textsuperscript{74}

The forum selection clause deprives user’s legal right, so it may fall into the relevant legal restrictions. If a party’s right of participating in a proceeding in its own domicile is empowered by law, then that right becomes a legal right. According to China’s \textit{Civil Procedural Law}, a contract dispute should be heard and decided on the court of the place where the defendant has his domicile or where the contract is performed.\textsuperscript{75} As analyzed above, because every online order contains the destination of delivery which is appointed by a consumer and agreed by a vendor, an online sales contract is determined to be performed at the destination of delivery,\textsuperscript{76} which is usually a consumer’s residence. Even if the agreement of the place cannot be found in the contract or order, the actual destination where the goods are sent will still be

\begin{thebibliography}{99}
\bibitem{71} National People’s Congress, \textit{The Contract Law of People’s Republic of China}, 2.40, \url{http://www.gov.cn/banshi/2005-07/11/content_13695.htm}
\bibitem{72} The State Administration of Industry and Commerce of the People’s Republic of China, \textit{Provisional Regulations of Online Commodity Trading and Relevant Service}, 2.13, \url{http://www.saic.gov.cn/ywdt/gsww/zjyw/xb/201006/t20100601_88891.html}
\bibitem{73} Ministry of Commerce of the People’s Republic of China, \textit{The Service Standards of the Third Party E-commerce Trading Platform}, 5.7, \url{http://baike.baidu.com/view/5538772.htm?fr=aladdin}
\bibitem{74} Skip Sigel, Theo Ling, and Joshua Izenberg, “The Validity of Webwrap Contracts.” \textit{Electronic Commerce} (1999): II.
\bibitem{75} see National People's Congress, \textit{Civil Procedure Law of the People’s Republic of China}, 2.24, \url{http://www.court.gov.cn/bsfw/sszn/xgft/201212/t20121231_181558.htm}
\bibitem{76} see The Supreme People's Court of The People's Republic of China, \textit{The Interpretation of The Supreme People's Court on How to Determine The Place of Performance of Sales Contracts in Economic Disputes}, 1, \url{http://vip.chinalawinfo.com/newlaw2002/slc/SLC.asp?Gid=15058}
\end{thebibliography}
determined the place of contract performance.\textsuperscript{77} So when being sued in an online shopping dispute, the consumer, as a defendant who lives at the destination of delivery, has the legal right to ask the case to be heard in the jurisdiction of his / her domicile.

3.4.2 The importance of jurisdictional right in e-commerce

The only question left is whether such legal right is important enough so that it should not be deprived by any standard clause. Due to the long distance between the goods / service provider and its consumer in e-commerce (in most cases), the right to participate in litigation in “home” jurisdiction is usually more crucial and worth fighting for than such right in many other businesses such as real estate. The core of the question is whether a consumer should be ensured the right to solve a dispute near his / her home. In the context of traditional shopping, a consumer does not have to worry about buying a jacket would bring a lawsuit in a strange city far away. This consumer knows that he can get any potential dispute solved on a local court, because the merchant is in the same jurisdiction. In the circumstance of e-commerce, transaction parties are usually far away from each other. Potential legal troubles in other jurisdictions could have prevented some consumers from online shopping, but thanks to the relevant laws (if they can be honored well in e-commerce), consumers retain the same right of solving disputes in local courts as in traditional shopping. As mentioned above, if a vendor wants to sue a consumer, it should file the lawsuit in the jurisdiction of the consumer’s residence, for that is where the defendant lives and the contract is performed. The legislative intention here is to provide e-commerce consumers with the same level of protection as traditional shopping. This convenience in dispute resolution is empowered by legislation.

However, this legal right is being jeopardized by more and more forum selection clauses. All the disputes are “agreed” to be decided in the jurisdiction of the vendor’s domicile, despite that the defendant and the contract performance are not in that jurisdiction. If such deprivation is routinely granted by courts, ordinary consumers

\textsuperscript{77} The Supreme People’s Court of The People’s Republic of China, \textit{Opinions of Supreme People’s Court on Issues about How to Apply “Civil Procedure Law of the People’s Republic of China”}, 1.19, http://law.baidu.com/pages/chinalawinfo/0/58/f1d36080b2cadddede965179d1cfe58_0.html
will have to spend lots of unnecessary money and time on long distance travels, out-of-town accommodation and other troubles, if they want to try their best to get a just result. Comparing this inconvenience and resource consumption with the average amount of single transaction involved in most online shopping disputes, reasonable consumers would rather suffer the loss than appear in court. Even though some disputes which involve large amounts of money are worth fighting for, to win a case which is decided in the jurisdiction where the opposite large corporation is located in can be difficult for individuals. What is worse, consumers are forced to be the party which bear the risk of wasting extra money and time on “away games” when losing a case. This extra loss will never be the concern of the vendors for that they will always be in the “home game”. This dispute resolution governed by e-contracts has become far more inconvenient and unfair for consumers than the situation in traditional shopping.

In brief, an e-commerce consumer, who usually lives in the place of contract performance, is empowered the legal right to have the dispute solved in the jurisdiction of his / her domicile by law, especially when the consumer is the defendant. This important right cannot be deprived by a standard clause in a standard form contract according to contract law. The forum selection clause in e-contract which a vendor provides is an electronic version of a standard clause. Thus the clause should not be determined valid, unless, the e-contracting process which is too simple and lack of choices can be improved in the future to obtain meaningful consent for giving up such an important legal right.

3.4.3 Taobao TOU—a sophisticated forum selection clause

Now move to the other aspect of the question that whether an e-commerce consumer / user should be assured the right to sue a vendor in the jurisdiction of his / her own domicile. Although normally a plaintiff can file many kinds of lawsuits in his domicile, many vendors are using forum selection clauses to ‘contract out’ that right so as to reduce the chance of being sued.
For example, the latest (amended on April 11, 2014) Taobao TOU 9.3 stipulate that, once any dispute occurs, you and the proprietor of Taobao platform both consent to the exclusive jurisdiction of courts in the domicile of the defendant (first instance).78 Although this clause does not directly rule out users’ jurisdictional right, it is technically a sophisticated provision for the following reasons. Taobao is the party which provides services, and it is liable jointly and severally if any merchant’s goods or service causes any damage while it cannot provide the merchant’s identity, address or contact information to consumers.79 Apart from paying, consumers are the party which merely accepts the services and merchandise. So the possibility of a consumer suing Taobao (or merchants) is way higher than that of the other way around. Thus the effect of this provision is that most of the lawsuits between Taobao and its users, including potential ones of which consumers are thinking, are governed or will have to be submitted to Taobao’s jurisdiction—Hangzhou Intermediate People’s Court.

Hangzhou is where Taobao’s headquarters is located since 1999. There are two factors which have to be taken into consideration. One is that the corporation which runs Taobao is one of the largest taxpayers (AAA Rating Taxpayers) in Hangzhou,80 and it is a frequenter of Hangzhou’s large taxpayer honor roll.81 Usually, local governments are somewhat relying on the big corporations in their jurisdictions to maintain their fiscal revenues. The other factor is that achieving complete judicial independence is our ultimate goal, but District courts might still have some kinds of connections with local governments. The possibility that a district court may more or less look after the local enterprises cannot be completely ruled out. So comparing with the relationship between ordinary consumers and the courts in their residences, the connection between a large corporation and the court in the

domicile of its headquarters seems more likely to be questionable. Obviously a large vendor is the “dominant and repeat-player corporate litigant” in its local court. Even in America, you can find that the IT companies in Silicon Valley prefer the jurisdiction of California from their TOUs. For instance, Apple’s *iCLOUD TERMS AND CONDITIONS* used in The United States, Canada, & Puerto Rico choose the laws of California and the courts in Santa Clara, California to govern and resolve dispute arising from the agreement.83 Almost everybody prefers ‘home court’, and it is the vendors who usually get the ‘home game’, because they can place relevant clauses in the e-contracts.

Using the phrase “jurisdiction of courts in the domicile of the defendant” instead of “Hangzhou Intermediate People’s Court” is pretty sophisticated for that the euphemistic expression may reduce the alertness of the regular users (when checking the amendment) and the prospective users (when checking the TOU), if these users ever read the content in dispute resolution.

3.5 The inadequacy of current e-consent for legal rights waiver

Sometimes legal rights can be waived through certain lawful acts, mostly under freely given informed consent. That is the foundation of the mechanism that the legal jurisdiction can be replaced by a lawful forum selection clause. In businesses where paper contracts and negotiations are commonly used, forum selection clauses usually do not cause many disputes between parties. There are several conditions for this arranging of jurisdiction in contract disputes, for example, it has to be in written form; there should be real and substantial connection between the potential dispute and the jurisdiction, like the jurisdiction where the contract is signed; it should be a certain and exclusive selection, and so forth.84 These conditions are met by electronic forum

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83 The “Governing Law” of “iCLOUD TERMS AND CONDITIONS” of Apple stimulated that, this Agreement and the relationship between you and Apple shall be governed by the laws of the State of California, excluding its conflicts of law provisions. You and Apple agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California, to resolve any dispute or claim arising from this Agreement. (http://www.apple.com/legal/internet-services/icloud/en/terms.html)
84 see National People’s Congress, *Civil Procedure Law of the People’s Republic of China*, 2.34,
selection clauses. However, there are another two essential preconditions for the waiver of legal jurisdiction right, which need to be fulfilled better in e-commerce.

First requirement is the authenticity and consensus of both parties’ intentions. Because it is a waiver of jurisdictional interest and an actual increase of legal risks, forum selection clause (including choice of law) needs user’s meaningful consent on it, which demands adequate awareness of its existence, full understanding of its serious consequence and meaningful other choices to avoid it if the user really cannot accept it. As analyzed before, jurisdiction issues in e-commerce are more complex and important than traditional business, so the validity of such clause’s existence in e-contracts is too sensitive to be decided by a single click with no careful consideration but a quick scroll down. I suppose that the hasty consent generated in the current e-contracting process might not fulfill this requirement.

This problem of unqualified consent is a very complex one in several respects. First, lots of people did not notice any sensitive clause at all, though vendors allege that they provided “adequate” notices. A Canadian scholar, Gautrait, V. provided five reasons for this phenomenon, in which I felt most crucial, is: features of computer monitor and the Internet make people expect the purchasing process (contracting process) to be quick. Second, it is impossible for many ordinary users to know the serious consequence of a forum selection clause until someday they find themselves in potential legal disputes.

The third respect is the most complicated one. Even if a few users are able to discover and comprehend the meaning behind the terms, are they able not to click the agree button? According to Radin, M. J., an American scholar, firms regularly use “boilerplate” (standard form contract) to transport customers into an “alternative legal universe” (means an unfair situation imposed by contract). She gave seven reasons why those contracts can still be accepted by people. The causes I found most vital are: we need the product or service and have no access to a supplier that does not impose

http://baike.baidu.com/view/544580.htm?fr=aladdin
onerous clauses; we don’t believe that we will ever need to exercise our background legal rights. In e-business, there is hardly any alternative provider with a “clean” e-contract, so people have to accept it just like everybody else does. Moreover, as psychological research has shown, we don’t expect misfortune to befall us, and people only believe what they want to believe. Thus, people agree to unfair terms because they have no choice, and they choose to believe that the mistake will not lead to a real misfortune.

In short, many people click agree on e-contracts which contain unfair clauses, because they do not notice or comprehend these clauses, or they have no choice but close their eyes to the imposed risks. I find it hard to deem this kind of consent on unfair clauses as qualified.

Apart from the consensus of both parties’ intentions, the other essential requirement for a lawful forum selection clause, according to China’s law, is that it should neither break the law nor harm the public interest. The essence of a normal forum selection clause is that both of the contractual parties jointly choose one court, which is acceptable for both sides. It has nothing to do with public interest, for that it can only hurt one person’s jurisdictional interest at most. However, in online business, a standard forum selection clause in e-contracts is totally another story—it can affect millions of people. For instance, as analyzed above, consumers can have their sales contract disputes solved in their local courts under legal jurisdiction. However, a forum selection clause can block this convenient justice by choosing a remote forum. A large proportion of Internet users will have to give up their claim from the beginning. For those who persist, the difficulty of winning a case also increases because a large corporation might be too important not to be looked after by its local court. Millions of people’s procedural rights stipulated by law are limited by the clause, and it raises the cost of seeking justice in a society, even in several countries.

87 Ibid
Thus, the unregulated use of forum selection clauses in e-contracts effectively harms the public interest more or less.

Through the analysis above, we can see that the consumer’s “consent” on the forum selection clause is not qualified but merely an innocent click on a whole bunch of terms mainly for proceeding with the online transaction—there is neither careful consideration nor meaningful alternative choices on this important clause. Besides, preventing large numbers of consumers from their local courts harms the public interest. The current forum selection clause in e-contracts may be invalid for failure in meeting the requirements of legal right waiver. And these can be the “strong cause[s]” mentioned by the Sarabia and Rudder courts to override the clause. It is a pity that the plaintiffs did not present any of these causes for the court to consider.

I am not suggesting that such clause should be completely banned, but the problem of unqualified consent must be fixed. Besides, to prevent the suspicion of hurting public interest, meaningful consent on forum selection clause also needs to be expressed and acquired in e-contracting process. If individuals could be provided with certain room for basic bargain and flexible choices instead of the simple Yes / No mode, the qualified consent towards sensitive clauses would be able to expressed and obtained in the future.

4. Potential solutions for improving e-consent

4.1 A list of important terms for legal protection from unilateral change

In the light of Kanitz, Taobao Riot and other cases, we found that users were vulnerable in contractual relationship, because their consent manifested in e-contracting may misrepresent their will when some unfair clauses are inserted to their e-contracts, and this consent and unfair clauses can be used by vendors as evidence against users in litigation. This manipulable consent on future changes is mostly caused by the amendment clause, for it produced a long-term and broad waiver of user’s own choices toward all kinds of unknown issues. It also imposed a responsibility of checking the contract every now and then to users, or they will be
bound by any change. According to China’s law, such an onerous standard clause can be unenforceable. So the first solution of this paper is to restrict the power of amendment clause.

I suggest that law reform should be introduced in e-commerce to stipulate what kinds of issues/terms in e-contracts cannot be unilaterally amended under the authorization of a general amendment clause. These minority but sensitive clauses, which usually govern users’ substantive rights and interests, are too important to be changed under a broad, long-term and even uninformed consent. Other terms, which are the majority but not that crucial, can still be adjusted by the amendment clause plus adequate notification mode.

So a protected list of important clauses in e-contract can be established by the law to protect the vital minority. The question is to decide what kinds of terms should be protected in that list. Since most e-contracts are consumer agreements or commercial contracts, I suggest that we divide the terms in e-contracts into several basic categories: (1) Commercial terms. Take Amazon Prime Terms & Conditions as an example. The provision of “Fees and Renewal” is a typical commercial term, which states that

The annual membership fee for Prime is stated in the Prime section of our Help pages. From time to time, we may offer different membership terms, and the fees for such membership may vary. The Prime membership fee is non-refundable except as expressly set forth below. Taxes may apply on either or both of the membership fee and the reduced shipping charges for Prime. OUTSIDE QUEBEC, UNLESS YOU NOTIFY US BEFORE A CHARGE THAT YOU WANT TO CANCEL OR DO NOT WANT TO AUTO RENEW, YOU UNDERSTAND YOUR PRIME MEMBERSHIP WILL CONTINUE AND AUTOMATICALLY RENEW EVERY TWELVE MONTHS, AND YOU AUTHORIZE US TO COLLECT THE THEN-APPLICABLE MEMBERSHIP FEE AND ANY TAXES….89

Commercial terms are used for locking down a balanced point of both parties’ commercial interests, such as how much service fee a vendor can collect, how long the period of service is, what membership benefits and shipping benefits a user can get. These are usually the core concern of both parties and meaning of transactions, which need solid terms to ensure their stability.

(2) Legal terms. For instance, in Terms of Use of www.alibaba.com and www.aliexpress.com, the term 12.7 rules that, The Terms shall be governed by the laws of Hong Kong without regard to its conflict of law provisions. The parties to the Terms hereby submit to the exclusive jurisdiction of the courts of Hong Kong.90 These terms govern serious legal issues like dispute resolution, mandatory arbitration, forum selection, privacy policy, confidentiality and limitation / exemption of liability. They tend to be ignored easily by ordinary users (in the current e-contracting, it is too easy for users to click through without realizing the legal repercussions91), but such clauses can be vital when dispute occurs. Legal terms distribute legal risks between contractual parties.

(3) Technical terms. Take Amazon as an example. The provision of “Eligible Purchases” states that … Changing or combining orders, or changing your shipping address, speed, or preferences might affect Prime eligibility. Certain Prime eligible purchases may only be entitled to Standard shipping because of their size, weight, and other shipping characteristics.92 Take Alibaba as another example. The 4.1 and 4.2 of its TOU provide that:

User must be registered on the Sites to access or use some Services… Alibaba.com shall assign an account and issue a member ID and password (the latter shall be chosen by a registered User during registration) to each registered User. An account may have a web-based email account

with limited storage space for the Member to send or receive emails.\textsuperscript{93}

In e-commerce, we can find a large number of terms which mainly govern technical issues, such as the conditions and procedure of user registration, how sellers should list their products, payment methods, how to arrange the shipping, and so forth. These detailed matters are indispensable for online transactions, and they have been moving forward and changing quickly every year, because Internet technology and e-commerce is a fast developing industry. Besides, these technical issues do not really affect legal risks or commercial interests substantially, and the upgrades of these terms are usually favorable to both parties.

Although there may be a few complex terms which contain not only commercial content but also legal matter or technical issue, in general, it is still easy to identify what term belongs to which category. Among the three kinds, we may draw a conclusion that the commercial terms and legal terms are governing both parties’ major rights and core interests. These two kinds of terms, just like the arbitration clauses in \textit{Kanitz} and \textit{Dell}, the forum selection clauses in \textit{Rudder} and \textit{JD}, and the rules stipulating price in \textit{Taobao}, usually turn out to be top concerns in disputes. The reason is simple: the commercial interests between vendors and users are contradictory (e.g. the amount of service fee), and so do the legal risks—to reduce one party’s risks means to increase the relevant risks of the opposite party (e.g. the forum selection). This is why we need contracts—to keep the conflict of interests fixed at a balanced and consensual point, so that neither of the parties can cross the line. Thus, in e-commerce, where contract adjustment is very frequent, the commercial terms and legal clauses should be protected by hard law from the unilateral changes under the “consent” which is produced by the amendment clause.

Oppositely, the numerous technical terms do not need that level of legal protection, not because the issues they govern are not important enough, but because the interests in those issues are mostly consistent between parties. All contractual

parties hope their online transactions to be securer, services to be more efficient, information to be more authentic, and all the hard and soft facilities to be up to date. Users don’t have to worry that the vendor will make changes for exploiting their benefits, because there is no conflict of interests. So a simple consent, which can be conveniently produced by a clause, is qualified for amending technical terms. Moreover, to make change and progress fast is one of the key points of online business. The companies have to frequently amend their contracts and rules to keep up with the developing technology and business mode. This job can be achieved by only updating the terms governing technical issues. Thus, a long-term but low-level consent is needed to authorize the routine updating of the technical terms. The true meaning of the amendment clause should be facilitating this limited consent.

Based on the above analysis, terms of commercial and legal categories should be in the protected list, which is suggested to be stipulated by future law or regulation. The law should prohibit vendors from changing the listed terms on the sole basis of an amendment clause while a user’s qualified consent and substantial cooperation are absent. In contrast, the other numerous terms, which are not listed in the law, are allowed to be unilaterally adjusted by the vendor under the amendment clause. This list of different treatments may also be considered as a standard using in “solution 4.4.3” of this paper to decide whether a clause ought to be a sensitive one which needs a one-to-one checkbox to manifest a separate consent in e-contracting process.

4.2 A multi-participant hearing mechanism for amending the listed terms

The protected list can ensure commercial certainty and keep the distribution of legal risks fixed during the whole contract period. However, commercial interests shift with the economic fluctuation and market competition, sometimes even legal issues can change, they may have to be adjusted after a long period of time or a significant change of circumstances or business mode. When any of the parties feels that it becomes necessary to amend some important commercial or legal terms in the protected list, there will be no convenient way to do so. Thus, a legitimate way of bargaining the listed terms in an existing e-contract is needed between the vendors
and its users.

Comparing with the companies’ “act first, ask questions (notify) later” regime, a hearing mechanism may be more appropriate for its bilateral and formal natures. Any of the contractual parties who wish to amend the terms in the protected list should propose a hearing first. To prevent any circumvention attempt, this hearing procedure should be stipulated in future law or regulation. Notably, to hold a hearing consumes more money, time and resource than just to post a notification, so the number of times of such hearing being proposed should also be limited. For example, each party may propose once a year. This limited frequency also helps to keep the stability of the listed terms.

The most significant advantage of the hearing mechanism is that all interested parties have the opportunity to present their views. Users can have real meaningful choices toward important issues instead of to accept everything or to terminate the contract reluctantly. However, a lot of work needs to be done for achieving this goal. Though it did not favor the consumers, the court in Kanitz found that “the bargaining power between Rogers and its customers was inequitable, in reality, the customers had no bargaining power at all” 94. In order to balance the power, we should manage to let more interested or responsible party take part in, not just the two contractual parties. According to OECD’s 95 Recommendation of the Council on Improving the Quality of Government Regulation, the chance of all interested and relevant parties expressing views is one of the crucial criteria of better policies and regulation. Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government.96 As a measure of regulating contract adjustment, the hearing should absorb the efforts of all related

94 Teresa Scassa and Michael Deturbide, Electronic Commerce and Internet Law in Canada (Toronto: CCH Canadian Limited, 2012), 25.
95 The Organization for Economic Co-operation and Development (OECD) is an international economic organization to promote policies that will improve the economic and social well-being of people around the world.
First of all, the side of users / consumers should be ensured to take part in. In e-commerce, users are spread all over the state (even in other countries), and they are huge in number. It is impractical and unnecessary to get all the affected users to the site of the hearing. Similar to class actions, several representatives will be sufficient for the attendance in most occasions. The representatives can be voluntary, elected online through a pre-hearing process, or chosen by a consumer protection agency. The point is that they should be qualified for representing most of the individual, merchant and company users, and be capable of collecting users’ voices, speaking out in reasonable manners and strive for favorable result.

Secondly, the vendor will certainly participate in the hearing. Since the corporation is usually the party who proposes changes, it might become common that the company will host the hearing and bear most of the cost. However, the company is just an equal participant with a proposed amendment, not the provider of the final version of standard form contract as it used to be.

Thirdly, consumer protection agency should send representatives to attend the hearing. Such agencies are particularly helpful in equalizing the asymmetry between large corporation and vulnerable individual. The Consumers’ Association of Canada ("CAC") or China Consumer’s Association ("315") may provide assistance to support the users, such as sending specialists with data, survey and other powerful evidence to back up user’s demand, giving financial support to help consumer hire professional lawyer, or even organize a hearing on its own initiative when there is strong demand of improving the contract among users.

Finally, regulatory authority of e-commerce may send officials to audit the hearing. In Taobao riot, the lack of such negotiation mechanism had forced users to launch a nationwide protest. When the escalating conflict went out of control, it is the Ministry of Commerce who helped stabilize the situation by suggesting Taobao to make a reasonable concession to the users. The meaning of hearing is to provide
negotiation opportunity between conflicting interests, the possibility of breaking out serious conflict cannot be ruled out. So a third party with professional background and administrative power is needed to maintain order and mediate by giving constructive suggestions. For example, Industry Canada or the E-commerce and Information Technology Department of Ministry of Commerce of the People’s Republic of China are suitable for playing this role.

This is a public law solution (partial) applying to the private sector. In theory, the competition of market can correct the problem as the invisible hand in private sector instead of public law intervention. Consumers concerned about the possibility of exploitation can try to avoid terms they consider exploitative and refuse to transact with businesses that have reputations for offering and enforcing manipulative contract terms. However, these considerations are important only in competitive markets, which is not necessarily the case in the sector under consideration here where a large wave of mergers and reorganizations has taken place during the years 1999-2000. This is one of the reasons why Microsoft, Yahoo!, AOL, Netscape, etc. have sometimes displayed somewhat exploitative attitudes toward their clients. A monopoly exists when one or a few enterprises are the only suppliers of a particular commodity (service). The same concentration of vendors also took place in China. For instance, Tmall occupied 52.1% of the B2C market shares in 2012, and JD took 22.3%. In C2C department, Taobao Marketplace held 96.4% market share in 2012. Besides, Tmall and Taobao Marketplace belong to a same parent company. These large corporations have occupied the dominant market position in online business.

Although the dominant position does not necessarily mean monopoly, unless the corporations abuse that position or they reach a monopoly agreement, the lack of

99 see Supra note 15.
102 see Standing Committee of the National People’s Congress, The Anti-monopoly Law of The People’s Republic
effective competition itself already can cause market failure. A market, in which users can only get goods or services from a few dominant providers, may fail to allocate resources (e.g. users’ payments). That is why we have no supplier that does not impose onerous clauses\textsuperscript{103}—the vendors don’t worry about losing customers when customers have nowhere else to go. Therefore, though we are dealing with contract issues in private sector, public law solutions (accurately speaking, partially public and partially private) should be introduced in. For decades, governments around the world have been using visible hand like anti-monopoly law and administrative power to eliminate the abuse of dominant market position and protect consumers.

There is another reason for backing up this view. Two professors of Cornell Law School argued in their article \textit{Standard-Form Contracting in the Electronic Age}, that

For any single consumer, the costs of monitoring a business’s standard form contracts outweigh the benefits. At the same time, however, all consumers would benefit if a sufficient number take care to monitor businesses’ practices closely enough to dissuade businesses from including exploitative terms in their standard form contracts.\textsuperscript{104}

Therefore, I recommend the multi-participant hearing mechanism, for it can limit the power of large corporations in the online business market, where competition may be less effective; it can get sufficient savvy consumers and other relevant parties to monitor the important changes of e-contracts so as to benefit every consumer; and it is not very costly for a vendor to organize (comparing with facing the Taobao riot or numerous potential lawsuits).

4.3 Online amendment with user participation—Wikipedia’s attempt

To figure out a mutually satisfactory amendment of e-contracts and relevant rules, a more cost-efficient negotiation mechanism can be conducted online, as long as the procedure is well-designed, democratic and manifesting meaningful consent.

\textsuperscript{103} see Margaret Jane Radin, \textit{Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law}, (Princeton University Press, 2012), chapter one, 12.

Interactive steps among the above-mentioned parties may be conducted in the process, such as a regular online channel for collecting and surveying the “public opinions” of users. Such operations will need vendors to apply various technical measures in their websites or apps. As ordinary users, we are delighted to see such approach has started to be attempted by a few IT corporations.

Now, Wikimedia Foundation (hereinafter, Wikipedia) begins to try online bilateral amending of its Terms of Use with users around the globe. It posts a notification on the top banner of its home page, inviting users to participate in the amending. It explains the long TOU and proposed amendment to users in brief and plain language by providing a “human-readable summary of the TOU”\(^{105}\), and Q&A like “What’s changing”, “What happens next”, etc\(^{106}\). Users can comment on the proposed amendment\(^{107}\) in a 30-day period of time or discuss on Meta talk page so as to improve the coming terms from user’s perspective. All the terms, explanations and user’s suggestions can be presented and read in any language which is most comfortable to a user. Wikipedia’s contracting / amending process is distinguished from many other vendors’ one-sided rule by its bilateral interactivity, considerate design and technological ways of facilitating users’ understanding and expression. Similar to the multi-participant hearing, this advanced online procedure can certainly acquire more meaningful consent expressed by users and conclude a well-bargained e-contract / amendment. Though the bargain space is more limited than a face-to-face negotiation, this online amending mechanism is still a huge progress, and it is a very cost-efficient way for vendors to gain users’ consent and trust.

4.4 Separate checkboxes contracting for sensitive clauses

4.4.1 On the 15 Strategies of the Electronic Commerce Subcommittee

In a well-known project dedicated by the Electronic Commerce Subcommittee of

\(^{105}\) Terms of Use, “This is a human-readable summary of the Terms of Use”, http://wikimediafoundation.org/wiki/Terms_of_Use

\(^{106}\) Stephen LaPorte, Luis Villa, Geoff Brigham and General, Making a change to our Terms of Use: Requirements for disclosure, http://blog.wikimedia.org/2014/06/16/change-terms-of-use-requirements-for-disclosure/

\(^{107}\) Stephen LaPorte, Terms of use/Paid contributions amendment, http://meta.wikimedia.org/wiki/Terms_of_use/Paid_contributions_amendment
the Cyberspace Law Committee of the Business Law Section of the American Bar Association, a group of experts on e-contracting practices and jurisprudence identified 15 strategies to improve readability, consumer’s understanding and consent on e-contracts. The strategies include aspects like opportunity to review terms, display of terms, rejection of terms and its consequences, assent to terms, opportunity to correct errors, and keeping records to prove assent. This part will specifically discuss the 7th strategy, “Choice between Assent and Rejection”.

The strategy suggested that the user should be given a clear choice between assenting to the terms or rejecting them, and the choice must be provided in the e-contracting process to acquire assent. The article gave several examples: According to *Caspi v. Microsoft Network, L.L.C.*, because the user had the ability to walk away from the agreement and he did not click “I Don’t Agree”, the forum selection clause was enforceable, though it was possibly a result of “overweening” bargaining power. Similarly, among other reasons, in *Rudder v. Microsoft Corp.* and *Dell Computer Corp. v. Union des consommateurs*, the courts gave credit to the forum selection clause and arbitration clause because the consumers did not click “I Don’t Agree”. The only counter-example is *Specht v. Netscape Communications Corp.*, in which the court held that the User had not assented to the vendor’s license agreement because of the lack of opportunity to reject—there was only a “Download” icon. However, in another Netscape’s contracting process, since the icons were “Yes,” “No,” and “Back”, the court affirmed the validity of that contract.

Among all the relevant cases, there is only one in which the vendor failed the requirement of the strategy, and the major problem is that the vendor named the icon wrongly. If the buttons were “Yes” and “No”, there would be no assent problem in all of the cases. However, did the forum selection clause, arbitration clause and other

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109 Ibid.
110 Ibid. at 10-11. The case summary below was a reorganization of the cases described in the last reference.
sensitive terms really meet users’ will? No, users’ claims in those cases had showed the contradiction.

The core value of the 7th strategy is to ensure users the right and option to choose “No”, so that the choice of “Yes” can be a qualified consent. The right to say no cannot be assured just by a simple button. A contract is a combination of many terms, and negotiation and bargain usually is carried out term by term. A single Yes / No cannot correctly express the attitudes toward 50 terms. If you only disagree with one or two clauses, you probably will still click yes, but this one or two term could be vital in a future dispute. Moreover, in many cases, people need the product or service and there is no alternative supplier who doesn’t impose sensitive terms, so people have to proceed with the transaction and click yes. The “No” button doesn’t really help when people disagree with a few unfair clauses while they still want the transaction. But the “Yes” button has always been hard evidence of full consent.

From most of the relevant cases, especially in North America, we could see that if a vendor took some notification measure, and a user had clicked “Yes”, the courts probably will determine this user’s consent on the e-contract, no matter that there could be an unfair clause which the user obviously disagree. The courts sided with the vendors mostly on the basis that the “Yes” button had been clicked, not the “No” one. In fact, people click yes because they have no better choice to get what they need and there is no point to read the boilerplate. The single set of Yes / No icons is too simple to determine complex issues. The consent generated in this Yes / No mode is not sufficient to achieve the goal of the 7th strategy. Therefore, the court precedents, based on the click in this simple Yes / No mode, is questionable, at least from users’ perspective.

In order to ensure users’ right to refuse and the solidity of consent of their acceptance, more detailed and flexible choices should be provided in e-contracting process, so that users can have certain room for basic bargain instead of the “take it all or leave it all” mode. Besides, only if people have meaningful options to do something with the contract, to make some basic adjustments they need, will they
start to read the content and take the e-contracting process seriously. Better e-contracting method is needed to achieve the above goals.

4.4.2 The “separate ‘I Agree’ buttons”

A Canadian lawyer of Blake, Cassels & Graydon LLP has proposed a solution, which is called “separate ‘I Agree’ buttons for sensitive clauses”\(^{111}\). According to his article, if some aspects or clauses of the contract are particularly sensitive, website designers should consider separate requirements for the user to click on an “I Agree” button or icon opposite the particular clause.\(^ {112}\) Thus onerous contractual term could be drawn to the reader’s attention, and this additional step could add weight to the reader’s assent. I think this proposal is a substantial progress than the simple Yes / No mode. However, the article did not give detailed suggestions about the situation which could occur a lot—if a user clicks a separate “No” to one clause, what will happen to other terms and his entire transaction? Maybe this method was aimed at helping vendors “bullet-proof” from claims by uses that they hadn’t really consented to particular terms. So it could be improved from the user’s perspective.

4.4.3 Separate checkboxes contracting method

To improve the above strategy of separate buttons for sensitive clauses into a practical level, this paper provides an original solution—checkboxes for sensitive clauses. Under the current Yes / No mode, people can only choose to accept everything or leave, there is no room for bargain, so the universal practice of e-contracting is to scroll down to the end in two seconds and click “I Agree”. As a result, e-contracts became electronic version of boilerplates, which bound everybody but no one really has read. In my opinion, as a party who is about to enter a legal relationship, consumers deserve the right to decide which terms they will accept, which ones they really cannot agree. For those regular users who are already in contract, rights of negotiating new terms or even stay in the old version of contract for


\(^{112}\) *Ibid.*
a certain period of time are reasonable. The law and regulatory authority should guide the vendors to make sure that their customers are able to exercise those rights.

In the future, when designing the interface of website for contracting, vendors are suggested to provide checkboxes beside a few sensitive clauses for users to choose whether to click “√”. Whether a clause should be a sensitive one which needs a one-to-one checkbox depends on whether it governs substantive interest of users, and a detailed standard is provided in “solution 4.1” of this paper. Facing these important clauses which demand separate authorization, most people will stop scrolling and read the highlighted sentences next to the checkboxes at least for a little while. At this moment of careful consideration, a formal feeling of signing a paper contract can be created, because people can directly find that their choice at hand can actually affect their legal rights. The most important point of checkbox mechanism is that, for the first time, users can have a certain degree of bargain room on their e-contracts. To read and access the terms become meaningful. If you think a sensitive clause is acceptable, you may click “√” in its related box to take it into your agreement. You may choose to leave a blank box to another clause which you are unwilling to accept, so that it will not be in your contract. In order to encourage customers to accept some “unfair” terms, a vendor may offer some kinds of prizes. Meanwhile, a vendor may provide notes beside the checkboxes to explain the potential consequence if a user doesn’t choose certain terms. Different Users will be able to select preferable clauses over conditions. After this process, the final version can be a customized, fair and mutually satisfactory e-contract.

There will be at least three advantages which can be brought by this checkbox mechanism. (1) For the numerous users, e-contract can finally be negotiable as a contract is supposed to be. As the boilerplate becomes adjustable, e-contract may partly get out of the World B, in which users can only receive and agree the “purported contracts”, and have one foot in the World A—world of “bargained-for exchange transaction” and voluntary agreement.113 (2) The advantages of standard

113 see Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law, (Princeton
form contract—high efficiency and low cost will not be sacrificed to this improvement of fairness. A normal negotiation needs both sides to actually take part in, bargain for several rounds and then finalize the paperwork. That is against the core value and business model of e-commerce. But using checkboxes, though its bargain room is limited, it will consume less time and human resource of the vendors than any face-to-face negotiation. (3) Meaningful consent or dissent will be manifested, especially for some sensitive clauses. Under the checkboxes mechanism, a user will click “√” in boxes to a few clauses and leave blank boxes to some other clauses so as to complete the contracting process, even the most careless person must finish the separate selection. If a clause is clicked acceptance (not leave blank), excuses like “I didn’t read the e-contract”, “I didn’t notice that particular clause burring among numerous fine prints” and “the notice on the website is inadequate” will be no longer tenable on court. The vendor, user and even court can have more accurate and solid evidence of consent or dissent in disputes.

This is a change which could bring negotiation back into e-contracting process with its bilateral interactivity so as to break the current “boilerplate”, and it could be a chance to make online contracting more formal, lawful and meaningful.

4.5 Example—best practices for lawful insertion of a forum selection clause in future e-contracts

In the end of this solution part, I would like to use one specific example to illustrate how the four proposed solutions of this paper will work as a whole to improve the consent situation in future e-contracting. If a company wishes to add a forum selection clause into its current TOU, there could be four options in the e-contracting process in which user’s consent is better honored.

(1) The current amendment clause plus adequate notification mode. The first one is not actually an option but a potential legal advice, that the vendor should not simply insert the forum selection clause without any user’s substantial act of assent and just
post an online notice to enforce it. As analyzed before, forum selection clause belongs to the category of legal terms, which distributes vital legal risks between contractual parties. The automatic consent produced by amendment clause is for the routine amending of technical terms, and it is unqualified for changes of crucial terms. The forum selection clause should not “sneak” into people’s TOU in the future. Accordingly the courts should no longer side with a vendor who imposes the clause without any mechanism which can obtain users’ meaningful consent on that clause.

(2) Online user-participated amending. To add such an important clause, it is necessary to reach a bilateral consensus. The most cost-efficient way of doing it, is to conduct the interactive process online. First, the new version of contract has to be really brought to people’s attention. A pop-up hyperlink to the contracting page would be adequate when a user enters the vendor’s service, and the user is not allowed to proceed anything further unless click into the contract. Second, the vendor should not expect users to look the whole document up and search for the added clause. The forum selection clause should be presented in an eye-catching style like different color, typeface or size. A new and smarter method is to provide an independent introduction of the coming clause so that people don’t even have to get to the long contract. Instead, they only need to see a human-readable introduction of half-page short, larger font size and plain language.

Third, this introduction will explain the practical effects of the clause on user’s real life, the reasons why the company wants that change and other necessary information in an easily understandable manner. For instance, it may state like this, “You will have to go to a California court to file the suit. However, the probability of this kind of disputes is only 0.002‰ according to our record. You will enjoy a 5% discount on service fee because of the reduction in legal cost of our firm gained by this clause”. Finally, users should be enabled to express their suggestions and exchange views in this online amending process. If it turns out to be several opinions, the decision-making procedure can become a democratic online vote among a corporation’s global users.
(3) The multi-participant hearing mechanism. To add such an onerous clause sometimes might arouse conflict between a vendor and its users. If the online amending shows that most users are angry with the change and even protesting it, or the vendor anticipates that the clause cannot get past through the online amending but it is quite necessary to make that adjustment, the vendor may propose a hearing, which will be a more formal and good-faith way of achieving difficult goals. As suggested before, consumer protection association and regulatory authority of e-commerce should attend the hearing. These third parties are outside of the interest conflict, and they have data, precedents and new trend about many other companies in the industry, so they can provide impartial analysis and comparative study to help both contractual parties in weighing the benefits and risks. In addition, the participation of such association and government can prevent serious conflict like Taobao riot from happening. Because of the physical attendance and full discussion, the balanced outcome of this hearing has the validity in deciding the contract issue, and of course, the consensus reached in this process is qualified.

(4) The separate checkboxes contracting. Some vendors may not choose to host a hearing because of its cost, and sometimes it is impossible to make every user accept the forum selection clause even by a hearing—some users may choose to leave. In order to save cost, or to keep all of the customers in the relationship while giving them certain room of choices, the checkboxes contracting can be applied. Even forum selection can be flexible for bargain in this new contracting procedure, in which there can be designed several blank boxes corresponding to potential courts in different jurisdictions, so that users around the world / country can decide whether to accept.

The first and default option is the court in the jurisdiction where the company’s headquarters is located in. After all, it is the vendor’s motivation of inserting such clause. As consideration, the company may promise to give discount on service fee, some advantages in transactions or other privileges to those who accept this one. The preferential condition may be provided right beside the box relating to this first option. Most people will be very likely to be encouraged by these tangible benefits to choose
to click √ to this option of the forum selection. Since this is not only a meaningful choice after thinking, but also an exchange of considerations, this forum selection clause will definitely obtain qualified consent.

The second option is the court in the jurisdiction of the user’s domicile. The selected forum can be determined by the user’s registration information and IP address, or the user may input the court of his / her residence in a given textbox. This option should be provided because it favors consumer with jurisdictional interest which is quite crucial in e-commerce. Those users who care about intangible legal risks and don’t take lawsuit as rare event will choose this option, which may relatively increase the vendor’s legal risk and cost. As the consideration, the users with this version of forum selection clause will not get the discount, advantage or privilege corresponding to the first option. The third option could be other possible jurisdictions which have substantial connections with the contract, such as the place where the goods are sent to (if the ordered destination of delivery is not the user’s domicile), the place where the lease item is used (if it is an online lease contract), and so forth. Some sophisticated businessmen and other users with special concerns may click √ or input for this option.

Through this selective boxes contracting, companies can insert the forum selection clause, not sneakingly but lawfully, into its users’ TOUs under their meaningful consent. And a vendor can get most users to select the forum which it wants by offering preferential condition—this is a willing exchange of consideration. Meanwhile the rest of consumers neither have to leave, nor reluctantly accept the term, they can enjoy the flexibility of choosing a favorable forum instead. The only price is that they will not get the related benefits—this is also a consensus of free will. In addition, this selective boxes contracting is easy to operate and quite cost-efficient.

Conclusion

The meaning of contract is to fix the conflicting interests of both parties onto a balanced point. It is a consensual distribution of interests which will be protected by
law. However, because of the nature of standard form contract, non-negotiable Yes / No mode and the dominant market position of its provider, e-contract is completely impossible for users to bargain in its formation process. People have to give their consent to the boilerplate for obtaining necessary goods / services, most of the times, without reading the terms. Even if they read them, it does not make any difference in the current situation. It is World-B consent, since it is a choice of no other meaningful options.

Moreover, any future adjustment of e-contracts, no matter routine or huge, is also unilaterally up to the vendors. Companies authorized themselves by a consent which is created by a standard term. It is even worse than World-B consent, because it is an automatic assent to unknown changes, and users may already rely on the product of the vendor. In addition, the electronic context makes the modification of contracts and related notification very convenient. Users are often unknowingly bound by those one-sided changes without their substantial authorization. Thus, consent situation needs to be improved in e-contract.

The first suggested measure is that the law should stipulate a list of important terms in e-contract to protect them from unilateral routine changes of the vendor, despite any clause or acknowledgment in e-contracts or rules that create user’s assent. When comes to the adjustment of these crucial terms, the second suggestion is a multi-participant hearing mechanism, which will be better at rebalancing the conflicting interests and preventing power abusing. The other democracy but more cost-efficient alternative is online user-participant amending, which Wikipedia is trying to apply. Either of the two can take user’s will into account and reach an amendment by mutual consent. The ultimate solution would be to improve the e-contracting procedure by introducing separate checkboxes for sensitive clauses instead of the simple Yes / No mode. Furthermore, several different options can be provided for choosing under one term such as forum selection clause, and the vendor may offer different benefits / conditions relating to the options.

As a contractual party, e-consumers and other users will be returned a reasonable
degree of negotiation room. They will finally have the meaning of reading the
e-contract, at least for those sensitive clauses. They will be able to choose different
combinations of terms and options for their own contracts under the considerations
they prefer. And they will not worry about the established agreement being
unilaterally changed someday. This is not a dream, if we can manage to implement the
above solutions in this paper or other better ideas. I believe in the future, users’
consent will be expressed, obtained and manifested better through e-contracting.

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