

“E-CONTRACTS IN INDIA: ISSUES AND CHALLENGES”

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INTRODUCTION:

Contracts are very commonly used and accepted in our daily lives nowadays. Right from buying household items from a store to withdrawing money from an ATM, everything is governed through a contract. Computer & Internet being the greatest inventions of mankind is nowadays used in almost everything, such as, e-commerce, social networking, dispute resolution, e-mails, etc. Almost all the transactions and other forms of trade are conducted electronically saving time.

For examples- online railway ticket bookings, online auctions, etc. Out of the need for speed, convenience and efficiency, electronic contracts which are in electronic form.¹ Justice Fazal Ali headed a survey which was conducted regarding this issue and strongly recommended for a separate law regulating based on electronic devices. He refused to modify the present law so as to include electronic devices into the preview of present law of contract.

It was also noted that contracts and other commercial activities shall mostly be based on e-devices. It helps to run smoothly the corporate transactions. In India, our Legislation then decided to form new laws in this field that are like, Electronic Commerce Act 1998, The Indian Contract Act, 1872, Consumer Protection Act, 1986, Information Technology Act, 2000 & Indian Copyright Act, 1957 etc.

¹ <https://www.theguardian.com/technology/2017/jul/01/bitcoins-underground-economy-proves-a-hard-sell>.

The authority of the transactions of e-contracts is established under the Information Technology Act, 2000 regulate the transactions and solve issues arising out of such contracts.²

MEANING:

Electronic contracts mean the contracts which are formed between two parties through negotiations, by the use of any electronic means. They are also popularly called as cyber contracts, digital contracts or online contracts. In concept, they are very similar to traditional contracts, which are paper based and wherein goods and services are exchanged for a specific amount of consideration. The only extra element they have is that the mode of contract is digital in nature like the internet/other e- instruments.

Essential Elements of E- Contracts:

1. There must be two parties
2. Use of electronic means.
3. E-Proposal & E- Acceptance
4. Amount of Consideration.
5. Certainty and Possibility of Legal Performance
6. Intention to Create Legal Relations
7. Competency of the Parties & Free Consent

DEFINITION:

According to Sir William Anson: A contract is a legally binding agreement between two or more persons by which rights are acquired by one or more acts or forbearance on the part of the other or others. E-contract is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.³

The principles governing the traditional contracts also apply to the e-contracts. This is also known as electronic contract. E-Contract is an aid to drafting and negotiating successful contracts for consumer in business e-commerce and related services. It is designed in a way to assist people in formulating and implementing commercial contracts policies within e-

² <http://elib.bvuict.in/moodle/pluginfile>

³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2136980.

businesses. It contains model contracts for the sale of products and supply of digital products and services to both consumers and businesses.⁴

FORMS OF E-CONTRACTS:

Generally the basic forms of "E-Contracts" are mentioned following-

1. The Click-wrap or Web-wrap Agreements.
2. The Shrink-wrap Agreements.
3. The Electronic Data Interchange or (EDI).

1. Click-wrap Agreements:

While surfing the internet we generally come across these agreements such as "I AGREE" to the terms or "I DISAGREE" to the above conditions. Click-wrap agreements are those whereby a party after going through the terms and conditions provided in the website or program has to typically indicate his assent to the same, by way of clicking on an "I Agree" icon or decline the same by clicking "I Disagree". These are the most common types of contracts used on the Internet, whether it be granting of a permission to access a site or downloading of a software or selling something by way of a website. The main difference between click-wrap contracts and e-mail is that such contracts are formed instantaneously.

2. Shrink-wrap Agreements:

These are the agreements which are generally containing the CD Rom of software. The terms and conditions are provided on the cover of CD Rom. Sometimes additional terms are given when the licenses of such Roms appear on the screen when the CD is downloaded to the computer. If the new terms and conditions are not to his liking, the user has right to return it. As defined in Section 13(2) of the IT Act, communication of an offer or acceptance in the web-click mode is complete when the addressee is in receipt of the electronic record.

3. Electronic Data Interchange (EDI):

These are the contracts which are used in trade transactions enabling the transfer of data from one computer to another in such a way that each transaction in the trading cycle can be processed with virtually no paperwork. Here unlike the other two there is exchange of information and

⁴ <http://www.lexvidhi.com/article-details/electronic>.

completion of contracts between two computers and not an individual and a computer.

ISSUES AND CHALLENGES:

1. Capacity to contract:

Relying on an electronic contract, the parties should take steps to make sure the contract is binding, e.g., that the essential terms of the contract are complies with, agreed upon, and that the persons who are parties to the electronic contract have the legal competence and capacity to enter into an agreement.

Mostly, who enters into a contract is a nameless individual. The other party (service provider) has no idea whether the individual who has clicked on “I Agree” text or icon is legally competent to enter into a contract, which according the Indian Contract Act, 1872, is one of the pre-requisites of a valid contract[sections 10, 11 & 12]. Contracts entered into by individuals, who are not competent to contract are void. There may arise in a situation, wherein minors who are not competent to enter into a contract are entering into an online contract with the service provider by clicking on “I Agree” text or icon.

2. Electronic Authentication:

Over a period of many centuries, the common law of contract has evolved. It has made the concept of “pen-paper-and-signature” as physical means of authenticating a contract. Now, in the online medium electronic authentication has to be done by the mens of “electronic records and digital signatures”. Electronic records needs to be validated under the rules of evidence and procedure. Digital signature provisions being procedural provisions treats the digital signature as equivalent to a handwritten signature. The Information Technology Act, 2000 provides for the use of digital signatures to authenticate electronic records. The said Act provides a legal framework for facilitating and safeguarding electronic transactions in the electronic medium. It accepts ‘digital signature’ [section 2 (1)(p)] as a means of authentication. Section 3 of the Act provides the whole process of digital signature creation and its verification.⁵ It is based on UNCITRAL’s Model Law on E-commerce.

⁵ http://www.wipo.int/wipolex/en/text.jsp?file_id=185998

3. Choice of Law:

Courts most often apply the law of the jurisdiction that has the most points of contact with the contractual relationship which is referred to as “personal jurisdiction” of the court. The problem arises, if he is a non-resident, what laws would be applicable – domestic laws of the state where he is residing or domestic laws of the state whose laws he has committed the offence. In an online medium, fixing the choice of law becomes a more complex problem.

4. Choice of forum:

Choice of forum clause is given in almost all online contracts. It makes a good legal sense for the online service providers to limit their exposure to one jurisdiction only. Defending lawsuits at multiple geographical locations could be both expensive and frustrating. Thus the online service provider has no other choice but to subject themselves to only one set of forum and applicable laws only. The user has no other choice, but to accept the service provider’s Standard Terms and Conditions by clicking an on-screen text or icon “I Agree”, “I Accept” or “Yes”.

Current Position:

Today, due to reason of E- Commerce the standard of living of people is totally changed. This is where the electronic commerce offers the flexibility to business environment in terms of place, time, space, distance, and payment. With the growth of e-commerce, there is a rapid advancement in the use of e-contracts. E-contracts are well suited to facilitate the re-engineering of business processes occurring at many firms involving a composite of technologies, processes, and business strategies that aids the instant exchange of information. The e-contracts have their own merits and demerits. On the one hand they reduce costs, saves time, fasten customer response and improve service quality by reducing paper work, thus increasing automation. And on the other hand the law governing e-contract lacks certain provisions like -There is nothing to determine the intention of the parties to enter into a legally enforceable contract.

With this, E-commerce is expected to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an online global marketplace with millions of customers and thousands of products and services.