

E-CONTRACT IN INDIA: ISSUES AND CHALLENGES

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Abstract: Indian e-commerce is developing briskly with burgeoning demands amongst the consumers to buy different varieties of products from the pool offered globally. A contract plays a vital role in it and is the most sensitive and important in respect to legal matters of business. E-contract is a result of these growing electronic commercial businesses within this country. Elevation in technology, computer programs and the internet has diminished the communication barrier leading to wide acceptance of these contracts. E-contract have various advantages over the traditional contracts. The basis of such contracts includes parties, lawful object, lawful consideration, etc. and they are few essentials required for formation of legally enforceable electronic contracts. The Indian Contract Act of 1872 regulates the traditional contract, however has shortcomings in regulating various aspects of electronic contracts. Some of these issues in respect to formation, authenticity of signature, etc. were solved with introduction of Information Technology Act, 2000. This present article deals with a precise explanation of E-contracts, contemporary issues faced by it, analysis of its enforceability in our country. This information will help to enshrine the challenges faced by electronic contracts, with judicial prospective over these scenarios.

Keywords: E-contract, enforceability, contemporary issues, Information Technology.

I. INTRODUCTION

Electronic commerce has existed in India from the 1990s, however this trend has gained upsurge in recent years. Globalization, in hand with governmental policies of 'digital India' has a positive outcome over the Indian economy. A survey shows an increase in 53% of Compound Annual Growth Rate (CAGR) in countries online retail market from the period of 2013 to 2017¹. With establishment of various digital platforms like Flipkart, Myntra, Amazon, OLX, etc. the consumers of the country have been more inclined towards buying and selling products online. The basis of these transactions or business deals are the contract which are basic documents which create a legal obligation over the parties for its fulfilment with legal enforceability.

Easy access to internet, technical facility, smart phones, etc. has resulted the residents of the country to enter into electronic contracts either through 'a click' or emails, etc. 'These contracts have global acceptance, it bridges the gap of distance, place amongst the parties for example; Mr. X, an American company, who wants to buy Khadi products from India can easily enter into E-contract rather than arranging meetings for deciding the terms of the contract or signing of it'². This paperless contract has eased business in terms of time and money. Therefore, an utmost need has arisen for legislation which can effectively regulate and govern these contracts. At present, Indian Contract Act, 1872 and Information Technology Act, 2000 along with Evidence Act, 1872 are the legislatures which regulate E-contract in India.

¹India is fastest growing e-commerce market: Report, available at: <https://timesofindia.indiatimes.com/business/india-business/india-ifastest-growing-e-commerce-market-report/articleshow/66857926.cms>, (Last modified on Nov 29th, 2018)

²All about E-contract- Meaning, Types and Law, available at: <https://taxguru.in/corporate-law/all-about-e-contracts-meaning-types-and-law.html> (Visited on March 13, 2019)

II. MEANING OF E-CONTRACT

We belong to an era where everything is just a click away from purchasing shoes to ordering food from buying stocks to exporting goods overseas, contract has a viable influence over our daily lives. Therefore, the term 'Contract' as per Indian Contract Act, 1872³ is defined as "Agreement enforceable by law". But the said definition is not fully applicable when defining the term 'e-contract' as it has a broader realm over traditional contract and can be understood as 'any binding agreement between parties having lawful object and consideration with their interaction over electronic means like email, MP3 audio file, multimedia-message, etc.'⁴ As the legislator has failed to define e-contract in any statute therefore its understanding is the only a general view with reference to its context.

III. ESSENTIALS OF VALID E-CONTRACT

To constitute a legally enforceable contract there is an absolute need of fulfilling all the conditions specified under Indian Contract Act of 1872 read with Information Technology Act of 2000:

1. OFFER

An 'offer' is said to be made when one party expresses his willingness to do or abstaining from doing something in order to receive assent of the other party of such act or abstinence⁵. The person making an offer should have an intention to get legally bound by it. In E-contract, an offer is considered to be made when it comes within the knowledge of the offeree. In simple sense, while scrolling an online shopping site, what they offer to public is 'invitation to offer', our acceptance to their terms and conditions for purchasing any item at the price fixed is 'offer or proposal'⁶.

2. ACCEPTANCE

When the person receiving such offer provides assent for it, it is considered 'acceptance' under Section 2(b) of Indian Contract Act of 1872. It is necessary to communicate the acceptance to the offeror. When we agree by clicking 'I Agree' to the terms and conditions of the provider it is a form of acceptance.

3. LAWFUL CONSIDERATION

The term 'consideration' means the benefit or rewards for which the parties have agreed to fulfil legal obligations in the contract⁷. Section 2(d) of Indian Contract Act of 1872 defines "consideration of a promise" as any act where promisee agrees on demand of promisor for doing or abstain from doing any act. Thus, consideration should be such which is not prohibited by law and falls within the ambit of the legal framework.⁸In absence of it the contract will be considered void⁹.

4. LAWFUL OBJECT

The object for entering into a contract must be lawful as per Section 23 of Indian Contract Act of 1872. For Example: Hyderabad Police alleged that many e-retailers on 'Snapdeal' were selling arms to people and arrested 12 people in such regard¹⁰. In this case selling 'arms' is illegal, therefore any contract in relation to it is void.

5. COMPETENCY OF PARTIES

Parties to the contract must be in a capacity to enter into it allowed by the law to form a valid contract¹¹. The parties to the contract must have attained the age of majority, should be of sound mind and not disqualified by law as specified in

³ Section 2(h), Indian Contract Act of 1872

⁴E-contract – An Overview, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/9/09_chapter%202.pdf, (Visited on March 13, 2019).

⁵Section 2(a) of Indian Contract Act of 1872

⁶E-contracts and issues involved in its formation, available at: <http://www.legalserviceindia.com/article/I350-E-contracts-&-issues-involved-in-its-formation.html>, (Visited on March 14, 2019)

⁷Contract laws, available at: http://newhorizonindia.edu/nhc_kasturinagar/wp-content/uploads/2018/05/CHAPTER-2-Contract-Laws-Indian-Contract-Act1872.pdf, (Visited on March 14, 2019)

⁸Section 23, Indian Contract Act of 1872

⁹Section 25, Indian Contract Act of 1872

¹⁰Swords on Snapdeal and FB flourish, send 12 to prison, available at:

http://timesofindia.indiatimes.com/articleshow/62706073.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on March 14, 2019).

Section 11 of Indian Contract Act of 1872. However, in case of e-contract the liability is on the seller to ensure that the other party is competent to enter into the contract. They can ensure it through signing up process, or expressly accepting the age clause.

6. CERTAINTY AND POSSIBILITY OF LEGAL PERFORMANCE

Contract should not be vague, uncertain or whose performance is next to impossible¹². For its validity, it is necessary that the obligations should be such which can be fulfilled¹³. For example, websites selling land on Jupiter.

7. FREE CONSENT

It is necessary for the contracting parties to have consent which is free from any type of fraud, misrepresentation, coercion, undue influence or mistake¹⁴. In e-contracts ascertaining the consent of the parties is difficult, and as it is executed between strangers therefore, the consent can only be presumed.

IV. TYPES OF E-CONTRACT

1. CLICK WRAP CONTRACT

They are derived from 'shrink wrap agreement'. This type of e-contract is executed between the parties when one of them agrees to the terms and conditions specified by the websites by clicking 'I Agree' to it or writing their consent in the dialogue box provided¹⁵. It has pre-determined terms and conditions where the party like in traditional contract does not have bargaining power, they could either accept or reject it wholly. In other words, express consent of the party is required for constituting any contract like after downloading any game or software we are required to expressly accept the terms and conditions, denial of it will also deny us the access to the game or software.

2. BROWSE WRAP CONTRACT

"It is similar to the concept of click-wrap contract as the terms and conditions of the contract are pre-determined though express consent of the user is not required. The website usually provides for a hyperlink at the bottom of the page, connecting users to the page with terms and conditions on clicking it. The act of browsing the website after the opening of a hyperlink is inferred as their consent to contract"¹⁶. In other words, they are not required to expressly agree to terms and conditions for accessing the website but it is presumed that they are browsing the website henceforth, they agree to its conditions.

3. SHRINK WRAP CONTRACT

'Shrink wrap' means thin plastic wrapping around a product or box. Shrink wrap contract refers to license agreement which is wrapped with the software.¹⁷ "The users assent to the contract is inferred from his scrapping the wrap for opening the product. The user in this type of contract has no negotiation power he either can accept it by shredding the wrap or reject it by returning the product."¹⁸

4. E-MAILS CONTRACTS

"This type of contracts is entered through electronic communications and are similar to traditional form of contracts as parties have the opportunity to negotiate the terms and conditions amongst each other in such regard. It is necessary for

¹¹Section 10, Indian Contract Act of 1872

¹² Section 29, Indian Contract Act of 1872

¹³Section 56, Indian Contract Act of 1872

¹⁴Section 10, Indian Contract Act of 1872

¹⁵E-contract in India, available at: <https://archanabala.com/2015/06/03/e-contracts-in-india/>, (Visited on March 14, 2019).

¹⁶E-contract – An Overview, available at:

http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/9/09_chapter%202.pdf, (Visited on March 15, 2019).

¹⁷What is a Shrink Wrap Agreement? available at: <https://www.legalmatch.com/law-library/article/shrink-wrap-agreements.html>, (Visited on March 16, 2019)

¹⁸The Origin of Click-Wrap: Software Shrink-Wrap Agreements, available at:

<https://www.wilmerhale.com/en/insights/publications/the-origin-of-click-wrap-software-shrink-wrap-agreements-march-22-2000>, (Visited on March 16, 2019)

the formation of such contract that the electronic communication has been viewed, therefore falls within the category of non-instantaneous communication. It is governed under Information Technology Act of 2000¹⁹.

V. ENFORCEABILITY OF E-CONTRACT

India is transforming into a visual jungle with internet becoming part and parcel of our life. The growing trend of social media, online shopping, e-retailing has created a predicament for the law makers in protecting the users from fraud, misrepresentation, identity theft and other such challenges. The Information Technology Act of 2000 was implemented for the governance and providing legal sanctity to transactions undertaken through electronic means and also provide for authentication of digital signature, jurisdiction, penalties in case of breach, etc. Section 10-A of the said Act²⁰ has recognized the validity of these e-contracts. It specifies that if an e- contract fulfils all the essentials as specified in Indian Contract Act of 1872 of a traditional contract i.e. valid offer and acceptance, capacities of the party, free consent, etc., it will be considered valid and is enforceable in the court of the country for any kind of breach when undertaken through any electronic means. As in case of *Trimex International FZE v. Vedanta Aluminium Ltd. India*²¹, the hon'ble Supreme Court recognized that the contract whose terms and conditions are discussed through e-mails between parties, though no formal contract was formed or signed is valid in the eyes of law.

The enforceability of click wrap, browse wrap and shrink wrap contract have been challenged in various US Courts. Like, in case of *Feldman v Google, Inc*²² the validity of Clickwrap contract was discussed and the hon'ble court observed that Feldman had sufficient notice of terms and conditions of the contract as he went through a proper signing up process including scrolling through whole terms and conditions page before assenting for it. Hence, the court held that the contract entered between Feldman and Google was valid. However, in the case of browse wrap contracts foreign courts are hesitant in enforcing its validity. In such contracts, Judicial opinion holds that for constituting a valid contract it is necessary for the party to have constructive or actual notice of the terms and conditions of it²³. Therefore, where the defendant failed to specify near the 'download button' that the user will be bound to the license agreement if he downloaded the software from the website, no contract was executed between the parties²⁴. In light of these, the websites are now a days more inclined towards clickwrap contracts. Similarly, in case of shrink wrap contracts the court infers the assent of the party from their scrapping of the wrap which has terms and conditions attached with it. In the case of *ProCD, Inc v. Zeidenburg*²⁵, Zeidenburg protected his price discrimination policy of the product through shrink-wrap licensing agreement however, ProCD after purchasing the product uploaded the information on less rate over the internet violating the license agreement. The court, in this case, held that ProCD had the option to reject the terms and conditions of the contract by returning it, but his scrapping the wrap providing terms and conditions was inferred by the court as his consent, thus he is bound by it.

Indian judiciary has failed to acknowledge the question of validity of these contracts as there is no precedent till date for providing any type of ground rules over the enforceability of these contracts. Although in the case of *L.I.C India v. Consumer Education and Research Centre*²⁶ the hon'ble court has tried defining such contracts and observed that where the weaker parties do not have a bargaining power, such type of contracts were referred as 'dotted contracts.' "Thus, it can be said that the Indian courts have recognized the concepts of these contracts though no guidelines for its regulation have been laid down by it. The reliance can be placed on the foreign judgments based on the facts and circumstances of the case, yet a strong necessity for proper legislative structure for its implementation has aroused as the Indian economy is moving to paper less transactions"²⁷.

¹⁹Emails and contracts - communication and validity, available at: <http://www.legalservicesindia.com/article/2326/Emails-and-contracts---communication-and-validity.html>, (Visited on March 17, 2019)

²⁰ Information Technology Act, 2000 (added with the 2008 amendment act)

²¹ 2010 (1) SCALE 574

²² 513 F. Supp. 2d 229 (E.D Pa. 2007).

²³ How Binding Is Your Browse Wrap Agreement, available at: <https://www.lexology.com/library/detail.aspx?g=4b4b93da-c40a-4724-916c-3bdd9011698d>, (Visited on 16 march, 2019)

²⁴ *Specht v Netscape Communication corps*, 2002 U.S. App. Lexis 20714.

²⁵ 86 F.3d 1447 (7th Cir. 1996)

²⁶ 1995 AIR 1811

²⁷All you know need to know about online contracts, available at: <https://blog.ipleaders.in/all-you-know-about-online-contracts/>, (Visited on 17 March, 2019)

VI. ISSUES FACED BY E-CONTRACT

The concept of virtual world has impacted commerce of various countries including India. The easy access to the internet, fax, computer programs or smart phones has acted as blood in the body of e-commerce industry of our country. The enforcement of Information Technology Act of 2000 has provided a legislative framework and governance to it. However, as nothing is perfect in this whole world, this statute also has certain shortcomings pertaining to the raising issues in the country in respect of these e-contracts. Following are few issues faced by electronic contracts in our country:

1. JURISDICTIONAL ISSUE

Paperless transactions like e-contract are borderless, therefore, it gets difficult to determine the jurisdiction i.e. the extent of the limit of the court's authority over any suit or appeal at the time of breach of e-contracts²⁸. As per Section 13(3) of the Information Technology Act of 2000:

- a) the place of business of the originator will be deemed to be place where the information was dispatched, and
- b) place of business of the addressee will be deemed to place where the information was received.

“This implies that the location of computer sources through which it was dispatched and received, places no role in determining the jurisdiction of the case. However, this section limits the power provided by Section 20 of Code of Civil Procedure, 1908. As Section 20 ‘clause c’ specifies that the suit can be instituted in the court within whose local jurisdiction the cause of action has arisen. Therefore, it raises the question over the jurisdiction of the courts as cause of action may arise in e-contract at the place where the electronic information was dispatched, irrespective of the fact of principle place of business”²⁹. In case of P.R. Transport Agency vs. Union of India & others³⁰, the Allahabad Court dealt with the question jurisdiction and held that the acceptance of the contract was sent through Email and received in Chandauli (U.P) and principle place of business of the petitioner was at Vanaras (U.P) thus, the place of jurisdiction on the present case lies in U.P.

“As electronic transactions have no boundaries, it has become difficult to deal with the jurisdictional issue, especially when both parties belong to different part of the world. The present legislations governing e-contract have failed to answer questions as to jurisdiction lies in which country in case of dispute, Law to be applied to solving the disputes (suppliers or consumers) or how will decision be enforced in both the countries.”³¹.

2. PARTIES TO CONTRACT

Transactions in an electronic contract are between parties which are stranger to each other. This poses threat to both the contracting parties.³² As for validity of the contract under section 11 of the Indian Contract Act of 1872 it is necessary that parties are not minor, lunatic or disqualified by the law however, while executing e-contract the major question arises are over the competencies of the parties. Minors can easily enter into contracts through clickwrap or browse wrap contracts with the website. So, the legal liability is on the websites to ensure that the party contracting is competent under Indian Contract Act of 1872 for it³³. “To ensure the competency of the party, the online websites have come up with various methods such as signing up to the site, in which the person enters personal details including birth date ensuring the website that the party has the capacity to enter into the contract. It is sometimes accompanied with a dialogue box containing pictures, and users are required to identify things in them to ensure the lunacy of the party. Despite these

²⁸All that you must know about E-Contracts, available at: <https://blog.ipleaders.in/all-that-you-should-know-about-e-contracts/>, (Visited at March 17, 2019)

²⁹Legal regulation of E-contract in India, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/14/14_chapter%207.pdf, (Visited on March 17,2019).

³⁰2005 SCC OnLine All 880

³¹Legal regulation of E-contract in India, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/14/14_chapter%207.pdf, (Visited on March 17,2019).

³²Legal validity of e-contracts: a study with special reference to consumer contracts in online shopping, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/107814/12/12_chapter%20v.pdf, (Visited on March 17,2019).

³³E-Commerce in India, available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/E-Commerce_in_India.pdf, (Visited on March 17,2019)

methods the enforceability of e-contract is in question due to lack of stringent legislation to deal with such issue in depth.”³⁴

3. SIGNATURE AUTHENTICATION

“Indian Contract Act of 1872 recognizes both oral and written contracts, therefore, it is not mandatory under this law for the valid contract to be signed by the parties. The signature in traditional contracts signifies the intention of the party to constitute the contract and has more legal value in the eyes of law. However, certain statute provides for the contract to be signed by both parties such as in case of Indian Copyright Act, 1957, etc. E-contract being generated through electronic means cannot be signed traditionally by the parties, so, it is required to be signed electronically through electronic signature or digital signature as defined under section 3-A³⁵ or Section 5³⁶. But, the major drawback of it is that not e-signature is not valid on every document. Documents like:

- a) Negotiable instrument except the cheque
- b) Powers of attorney
- c) Trust Deed
- d) Real Estate Documents

These are the documents which are required to be physically signed by the parties and Information Technology Act 2000 has no applicability over it”³⁷.

4. LOSS DUE TO TECHNICAL ERROR

E-contracts are documents which are entered into by the parties through electronic transmissions and are stored in the virtual world. But, like paper transactions there is no safety in the information stored in the world. Though, it is believed that anything which enters the digital world always exists and is never lost yet there are no administrative, legal or judicial guidelines over the scenario where the whole information or part of information is lost due the failure of the technology³⁸.

VII. CONCLUSION

The technological advancement has inspired the population of the country to adopt with the growing surge of internet. These trends had made E-contract blood and sweat of e-commerce industry in India. But such changes require strong guidance for proper implementation and administration of these contracts in India. Information Technology Act of 2000 has failed to lay down rules for the phishing, identity theft, privacy protection, data protection in internet banking, etc.

There is a need of stringent and separate legislation for governance of e-contract in India covering the short comings of the present legislature and providing structural framework towards the technical or legal aspect of these contracts.

³⁴Legal Regulation of E-contract in India, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/38507/14/14_chapter%207.pdf , (Visited March 17, 2019)

³⁵Information Technology Act of 2000 (added with 2008 amendment act)

³⁶Information Technology Act of 2000

³⁷All that you must know about E-Contracts, available at: <https://blog.iplayers.in/all-that-you-should-know-about-e-contracts/>, (Visited at March 17, 2019)

³⁸Information technology act, 2000 — a contractual perspective, available at: <https://www.ebc-india.com/lawyer/articles/2004v1a2.htm>, (Visited on March 17, 2019)