
E-CONTRACT: A NEW NORMAL

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ABSTRACT

COVID-19 has now been proved to be a crisis which is forcibly changing India and pushing it towards digitalisation. In today's time, online classes, webinars, online conferences has become a trend, and commercial legal contracts are not an exception. E-contracts is not something that our legal system was not aware of but the pandemic has brought it up to a new extent as it became really difficult for people to enter into a physical contract because of the lockdown. Further, the question arises whether e-contracts will become the new mode of determination of rights, liabilities and obligation and what issues can be faced due to digitalization of contracts? This article is an attempt to address such questions. This article has dealt with effects of COVID-19 on E-contracts and the issues faced because of it.

Keywords: E-contract, COVID-19, lockdown

INTRODUCTION

With the evolution and massive development in the computer system and IT along with the increase in the innovations, E-commerce has evolved since last decades. E-contract is an essential part of E-commerce. E-contract is legally recognised by law and therefore, the trust of the customers has increased with the passage of time and the outbreak of COVID-19 has given it a new path to grow. In India, the E-contract is governed by many laws such as the provisions of the Indian Contract Act, 1872 are applicable to validate E-contracts as they are quite similar to the general contracts. The provisions of The Information Technology Act, 2000 has given them statutory recognition and the provisions of The Indian Evidence Act, 1872 makes them enforceable.

E-contracts are basically the execution of an agreement electronically or digitally. To form and validate an E-contract, it is necessary to fulfil the essential conditions similar to the traditional contracts i.e., paper-based contracts, the only difference is that it is created and executed electronically.

Historical Background

As E-commerce is an essential part of E-commerce, first we need to understand the history of E-commerce before E-contract. In the 1960s businesses were using Electronic Data Interchange (EDI) to conduct e-transaction.¹ E-commerce was properly accepted in 1991, when the Internet was used for commerce. A huge number of companies such as Amazon and eBay, started to provide their services through the internet with the invention of the World Wide Web in 1990.

In India, Rediff was the first to introduce the concept of E-commerce in the late 1990s. Indian Railway Catering & Tourism Corporation Limited (IRCTC) was the first company to start an E-commerce portal in India.

Further, in order to legalise the E-commerce transactions in India and to keep pace with the globalisation of the trade and transaction, the Indian Parliament enacted the Information Technology Act in 2000

¹ money.howstuffworks.com/history-e-commerce.htm The History of E-commerce BY DAVE ROOS The History of E-commerce | HowStuffWorks

The Rules and Regulations related to the E-commerce and finally the E-contract are provided under The Brussels Convention on Jurisdiction and Recognition of Enforcement of Judgements in Civil and Commercial Matters, 1968; Convention On The Law Applicable To Contractual Obligation, 19 June 1980 (known as “the Rome Convention”); the Hague Conference on Private International Law (HCPIL) 30 June 2005 has issued a Convention and Commercial Matters; and United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

E-Contracts

With the quick development in Information Technology, it has become easier to enter into E-contract for business transactions. It has become quite efficient to enter into such contracts instantly by the exchange of communication of offer and acceptance by electronic mode. Nowadays, when going to the markets or mall is way too risky, we all enter into E-contract, for example, to purchase groceries, books, garments, watching online movies, etc.

Types of E-contracts/Agreements:

- a. **Click Wrap Agreement-** These are those agreements which popup before entering into a website and require the user to give his consent to the terms and conditions by clicking on ‘I accept’, ‘Ok’, ‘Allow’ or ‘I agree’.
- b. **Browse Wrap Agreement:** These agreements do not require the user to give his consent to the terms and conditions. It has the automatic acceptance of the agreement by entering into the website and using it. Terms and conditions of such agreements are provided at the bottom of the website.
- c. **Shrink Wrap Agreement:** These are the agreements formed when a sure buys a product. In such agreements, products are enclosed in a shrink wrap implying that the goods can only be viewed by the customer who purchases it and usage of such product is deemed acceptance of the agreement.

Essentials of E-contract:

Since E-contracts are practically taken as seriously as offline contracts, the principles applied in offline contracts will apply here also. The following are the essentials of E-contract:

1. **Offer:** The Indian Contract Act of 1872 defines an offer as an indication of a willingness to engage into a legally binding contract with another party, according to Section 2(a). When a person responds to an email or fills out any online forms, he is making an offer for a specific item, and it is now up to the receiving party to accept or reject the offer by express confirmation or by any other means. As a result, an invitation to offer is insufficient to convert it into a legally binding contract by accepting its terms and conditions unless it is accepted.

“When asked by MMCB to guarantee the obligations of a subsidiary company, in the case of *Kleinwort Benson v. Malaysia Mining Corporation Berhad*, it was stated that it is their policy to ensure that the subsidiary company's operation is in a position to satisfy its liabilities at all times. It was decided that this was not a proposition, and that the phrase "it is our policy" just expressed an intention to do something, not to persuade the offeree to agree to it. As a result, MMCB was unable to sue Kleinwort Company for breach of contract when the subsidiary was allowed to fall insolvent.”²

The same is applicable to the electronic contracts also.

2. **Acceptance:** Once the offer is accepted, there is a formation of an agreement. But the postal acceptance rule is an exception to it. The offer is accepted when it is posted, according to this rule. As a result, the proposer's communication of acceptance is regarded complete when it is placed in the course of transmission to him, whereas the acceptor's communication of acceptance is regarded complete when it comes to the knowledge of the proposer.

“The plaintiff in the case of *Lalman Shukla v Gauri Dutt* was a munib. The plaintiff volunteered his assistance to find defendant's nephew, who had gone missing. Despite the fact that he located the boy whose uncle had offered to pay Rs 501 to anyone who found his nephew in this situation. The munib, however, was denied the reward because he just learned about the boy after discovering him.”³

In electronic contracts, after sending the information or offer, the originator may not be confirmed about the receipt of the offer. Hence, it is required to acknowledge the receipt

² *Kleinwort Company vs. Malaysia Mining Corporation Berhad*, 1989 1 WLR 379.

³ *Lalman Shukhla vs. Gauri Dutt*, 1913 11 A11 LJ 489.

of offer from the side of the addressee. The addressee, in case wants to accept such a proposal through the electronic mode, he can do so by transmitting his acceptance through electronic mode or by clicking on 'I agree' or 'I accept' button. Offer and acceptance both can be done via email, website forms or an online agreement.

Section 12 of the Information Technology Act, 2000 says that, there is no agreement about the mode of acknowledgement sent by the addressee between both the parties, the addressee may acknowledge the receipt of electronic records by any communication modes to know the originator as to the receipt of it by the addressee.

3. **Intention to create legal relation:** For a valid contract, the intention of both the parties to create a legal relationship is very necessary. In case of online contracts, the existence of intention is normally automatic.
4. **Lawful Consideration:** It is given under Section 10 of the Indian Contract Act, 1872 that for a valid contract, there must be a lawful consideration. According to section 2(d) of the Indian Contract Act "*when at the desire of the promisor, promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something, such act or abstinence, or promise is called a consideration for the promise.*"⁴ Section 24 of the Act says that "*any contract without a lawful consideration is void.*"⁵
5. **Competent to Contract:** According to Section 11 of the Indian Contract Act, 1872, "*Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which is subject.*"⁶ Both natural and legal persons are capable of making contracts, but computers are plainly not natural persons, and neither American nor English contract law considers them to be legal persons at this time. As a result, computers are unable to enter into contracts. Both the buyer and the seller are natural persons in our scenario, and so are able to be participants to the transaction. However, under current law, the autonomous computer cannot be a contractual party.

⁴ Section 2(d), The Indian Contract Act, 1872.

⁵ Section 24, The Indian Contract Act, 1872.

⁶ Section 11, The Indian Contract Act, 1872.

6. **Lawful Object:** Section 23 of the Indian Contract Act, 1872 states “*The consideration or object of an agreement is lawful, unless- it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.*”

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”⁷

The goal of such a contract must be lawful by definition. The courts will not enforce contracts that are illegal or against public policy. Such contracts are regarded as null and void. An agreement that requires the conduct of a crime is void because it is prohibited. A person could not, for example, enforce a contract with another party to burn down a house. Furthermore, any agreement that requires the conduct of a civil wrong (such as a tort) is void.

7. **Free Consent:** Section 13 of the Indian Contract Act, 1872, defines ‘Consent’ as “*Two or more persons are said to consent when they agree upon the same thing in the same sense*”⁸ Section 14 of the act clearly defines ‘Free Consent’ as “*Consent is said to be free when it is not caused by-*

(1) Coercion, as defined in section 15, or

(2) Undue influence, as defined in section 16, or

(3) Fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of section 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.”⁹

⁷ Section 23, The Indian Contract Act, 1872.

⁸ Section 13, The Indian Contract Act, 1872.

⁹ Section 14, The Indian Contract Act, 1872.

Such assent must be freely given. This is difficult to assess because the margin used to determine the stringent norm of free consent can become narrower with time.

E-contracts under Information Technology Act, 2000

Electronic contracts (E-Contracts) and electronic signatures (E-Signature) are legal in India and are governed by the Information Technology Act of 2000. (IT Act). The necessity for any information or matter to be in writing, typewritten, or printed form under any legislation shall be deemed satisfied if such information or matter is in an electronic form and is accessible so that it can be used for future reference, according to Section 4 of the IT Act. Section 4 of the Information Technology Act reads as:

“Section 4: Legal recognition of electronic records: Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.”¹⁰

Proposals and acceptances may also be sent, accepted, and withdrawn electronically or through electronic records, according to Section 10A of the IT Act. Section 10A says:

“Section 10A: Validity of contracts formed through electronic means- Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electric form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.”¹¹

In light of the aforementioned provisions of the IT Act, Indian courts have upheld the validity of contracts made in an electronic format on a number of occasions.

“The Hon'ble Supreme Court of India had held in the case of Trimex International FZE Ltd. Dubai vs. Vedanta Aluminium Ltd., where the parties had communicated their offer and

¹⁰ Section 4, The Information Technology Act, 2000.

¹¹ Section 10A, The Information Technology Act, 2000.

acceptance via email in the absence of signed documents, that once a contract is concluded orally or in writing, the fact that a formal contract must be prepared and initialled by the parties would not affect the contract.”¹²

“The High Court of Madras applied the provisions of the IT Act to an e-auction in *Tamil Nadu Organic Private Ltd. vs. State Bank of India*, finding that contractual duties might arise through electronic methods and that such contracts might be enforced under law. Section 10A of the IT Act certifies contracts established with electronic means and Section 10B of the IT Act permits the use of electronic records and electronic methods for contract conclusion as long as the contract complies with the Indian Contract Act, 1872.”¹³

Therefore, when it comes to contract signing, electronic signatures are regarded as comparable to traditional wet signings and are legally recognised under Section 5 of the Information Technology Act. Section 5 states:

“Section 5: Legal recognition of electronic signature- Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.

Explanation- For the purpose of this section, “signed”, with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression “signature” shall be construed accordingly.”¹⁴

Admissibility of E-contracts

The Indian Evidence Act, 1872 (Evidence Act) was also revised to bring it in line with the IT Act's introduction of electronic ways of document execution. Electronic records, electronic agreements, and electronic contracts are admissible in evidence under the Evidence Act. “In the case of *State of Punjab and Ors. vs. Amritsar Beverages Ltd. and Ors.*, the Supreme Court

¹² Trimex International FZE Ltd. Dubai vs. Vedanta Aluminium Ltd., 2010 (2) AWC 1170 (SC).

¹³ Tamil Nadu Organic Private Ltd. vs. State Bank of India, AIR 2014 Mad 103.

¹⁴ Section 5, The Information Technology Act, 2000.

of India held that Section 63 of the Evidence Act covers the admissibility of computer outputs in diverse media such as paper, optical, or magnetic forms. In addition, Section 65-B of the Evidence Act outlines the method for presenting electronic documents as evidence. According to Section 65-B of the Evidence Act, any information contained in an electronic record produced by a computer that is printed, stored, or copied from it is assumed to be a document and can be used as evidence in any proceeding without the need for additional proof of the original. However, under section 65-B of the Evidence Act, the admissibility of the same is subject to a number of restrictions. Procedures for verifying digital signatures are outlined in Section 73A.”¹⁵

Unless the contrary is proven, Sections 85A and 85B of the Evidence Act establish a presumption in favour of the authenticity of digital signatures in electronic contracts, the secure status of electronic documents, and digital signature certifications.

In the case of *Sudarshan Cargo Pvt. Ltd. v Techvac Engineering Pvt. Ltd.*, the court observed that “The Information Technology Act, 2000 provides for legal recognition of transactions carried out through electronic communication that involve the use of alternatives to paper-based methods of communication and storage of information. Section 4 of the act provides that if the information is to be in writing or in the typewritten or printed form, the requirement is deemed to have been satisfied if such information is rendered or available in an electronic form and the same is accessible to be used for a subsequent reference. The Evidence Act, 1872, was also amended by this act.”¹⁶

Issues emerging from e-contracting

Electronic contracts are dynamic, multi-layered transactions by their very nature. Agreement to a contract may not occur at a single moment in time with a layered contract. There is a chain of actions – e-offer, e-acceptance, deliberation, and so on, that can lead to the development of an electronic contract.

The emergence of e-contracts has not only added to the complexity of the process, but it has also produced some serious legal concerns. As a result, in light of the new law, it is critical to investigate the following issues.

¹⁵ State of Punjab and Ors. vs Amritsar Beverages Ltd. and Ors.

¹⁶ Sudarshan Cargo Pvt. Ltd. v. Techvac Engineering Pvt. Ltd., 2013 (4) AKR 654.

1. **Capacity to Contract:** To rely on an electronic communication, the parties should take steps to ensure that the contract is legally binding, such as ensuring that the contract's basic conditions are manifested and agreed upon, and that the parties to the electronic "contract" have the legal competence and capacity to enter into an agreement.

Often, a contract is entered into by an anonymous individual. The opposing party (service provider) has no way of knowing if the person who clicked the "I Agree" text or icon is legally capable of entering into a contract. It is possible that newborns who are not mature enough to enter into contracts enter into an online contract with a service provider by clicking on the "I Agree" text or icon.

2. **Email Box Rule:** Silence or inaction does not indicate acceptance under traditional contract law (common law). An offeree must indicate his agreement to the terms of the offer in order to accept it. Acts such as "saying or sending a letter, a telegram, or other explicit or implicit communication" to the offeror are examples of acceptance. Acceptance can be as simple as receiving an e-mail message.

When a sender sends an e-mail message, it is routed through Internet Service Providers' (ISPs') mail servers before being sent to the recipient. The communication isn't immediate. In other words, e-mail communication is subject to the postal rule, which states that a contract is formed when the acceptor sends his acceptance/assent (e-mail message) out of his control. However, it is important to remember that when the acceptor enters his consent into transmission, he becomes an originator (of an electronic record), and the law states that an electronic record is presumed to be dispatched from the originator's place of business, implying that the contract is complete in the acceptor's location of acceptance.

3. **Electronic Authentication:** Over many years, the common law of contract has developed. It has solidified the concept of "pen-paper-and-signature" as a tangible mechanism of contract authentication. Electronic authentication must now be viewed through the lens of "electronic records and digital signatures" in the internet medium.

Under the norms of evidence and process, electronic records must be validated. Procedures that treat a digital signature as if it were a handwritten signature are known as digital signature provisions. To authenticate electronic records, the Information Technology Act of 2000 encourages the use of digital signatures.

Before accepting electronic messages in an online medium where parties use digital signatures to authenticate emails (electronic messages), it is critical that the parties exchanging emails seek answers to the following questions:

- (1) Is the digital signature being provided by a licence Certifying Authority?
- (2) Is it true that a digital signature was established in accordance with the law's technology standards?
- (3) Is it possible to tell if the digital signature verification process was successful?

The electronic messages received by the parties will have authenticity, message integrity, non-repudiation, and secrecy if all of the preceding questions are answered affirmatively.

4. **Choice of Law:** The law of the jurisdiction having the greatest points of contact with the contractual relationship shall be applied by the courts. This is commonly referred to as the court's "personal jurisdiction." It investigates a problem from the perspective of a person's "physical presence," whether they were a resident or not. If he is a resident, there is little doubt that he is bound by municipal (domestic) legislation. The issue arises as to which laws would apply if he were a non-resident: municipal laws of the state where he is dwelling or municipal laws of the state whose laws he has broken? When it comes to choosing legislation in an online medium, the matter becomes considerably more complicated.

The law of the forum (*lex fori*) or the law of the transaction, or the occurrence that gave birth to the suit in the first place, are the two options under Indian law for applying personal jurisdiction (*lex loci*).

The courts do have the authority to select the applicable law by finding the system of law with which the transaction has the strongest and most direct link. There is no rule against the application of foreign law or the subjecting of an Indian party to foreign jurisdiction. The emphasis is on choosing the right law.

In the case of *PR Transport Agency v Union of India*, the court held "The acceptance of tender by email would be deemed to have been received by the petitioner at Varanasi or Chandauli, which are the only two places where the petitioner has his place of

business. As both these places fell within the territorial jurisdiction of the Allahabad High Court, the Court assumed the jurisdiction to try the dispute.”¹⁷

5. **Automated Contracts:** It's feasible that a computer's planned reaction to an individual's message in an online medium will be fulfilled without any immediate human awareness or intervention. Would such conversations result in legally binding agreements? It has been argued that the courts should have little trouble converting these scenarios into offers and acceptances. Physical involvement of a machine has no legal ramifications because it is considered to be the result of prior human purpose. As a result, automated offer and acceptance statements are legitimate.

Section 14(1) of the Uniform Electronic Transactions Act (UETA) Online Contracts of the United States, for example, certifies contracts made by electronic agents, even if the terms and agreements have not been reviewed by a human. Contracts can be made when an electronic agent interacts with a person.

Nonetheless, an individual must be given the opportunity to prevent or fix problems in an automated transaction. If you want to avoid the effects of an electronic record, you must warn the other person as soon as possible. If an electronic record is received in error, the individual shall "return it to the other person" or "delete the consideration received." The person must not have used or gotten any profit or value from the erroneous message's consideration.

Conclusion

E-commerce has grown dramatically in recent years, and the use of E-contracts is expanding day by day. Online enterprises have proliferated across the globe, reaching millions of customers. E-contracts will eventually become a necessary feature of statute law to avoid any ambiguous conflicts in online transactions. E-contracts in India are governed by a number of laws that must be followed in order to be legitimate. Indian courts have also affirmed the legality and issued judgments in cases involving the jurisdiction of E-contracts, making it easier to resolve disputes over these concerns.

¹⁷ PR Transport Agency vs Union of India, AIR 2006 All 23: 2006 (1) AWC 504.

Without a doubt, the COVID-19 has made India and other countries far more digitized. We might see new things that were unfathomable to us, whether it was a paperless budget or a paperless court. But there are some issues which make it a little difficult to cope up with the situation. However the government is working to keep this digitalization process going so that more people can benefit from it and engage into various types of contracts by electronic means, which is the New Normal.