

# Problems & Concerns with respect to Online Contracts

## Abstract

When parties enter into contracts with one another and move face to face, errors are easier to avoid than once they are remote and contract with one another as a medium via the web. Once parties enter into electronic contracts, the complete contract will be signed by clicking a button in seconds. online acquiring raises novel legal problems that any business trying to line up an internet acquiring web site ought to contemplate. However, most legal hurdles will promptly be overcome by suitably structuring the online web site, getting in associate electronic mercantilism agreement, or (in the rare case) acting one or additional steps of the dealing off line. Clients often surprise what legal pitfalls they will encounter in putting in {a web|an internet|an on-line} page for online acquiring. In fact, jurisprudence principles like supply and acceptance, or the necessity of a signed writing, will usually be accommodated on the web. In some ways that the web is that the ideal surroundings for getting in contracts, as several corporations are discovering. However, bound sensible variations between on-line and offline acquiring ought to be unbroken in mind. A commercial dealing will be divided into 3 main stages: the advertising and looking stage, the ordering and payment stage and therefore the delivery stage. Any or all of those could also be distributed electronically and will, therefore, be lined by the thought of 'electronic commerce'. Loosely outlined, electronic commerce encompasses all types of economic transactions that are all over over associate electronic medium or network, basically, the web. In Asian country the thought of electronic commerce has paced up within the last decade. today the geographical yet because the constraints with relevance the deadline has o.k. been overcome by the increasing use of data technology amongst folk, the state of affairs gift now could be fully completely different to the one that was current a few decade back once the utilization of data technology was restricted to pick people and therefore the standard strategies of getting in contracts were the only real strategies for getting in a legal relationship

## Meaning of electronic contract:

An e-contract is a contract modelled, executed and enacted by a software system. Computer programs are used to automate business processes that govern e-contracts. E-contracts can be mapped to inter-related programs, which have to be specified carefully to satisfy the contract requirements. These programs do not have the capabilities to handle complex relationships between parties to an e-contract.

## What Are Contracts?<sup>1</sup>

The term “contract” is defined in sec 2(h) of the Indian contract act, 1872 as AN AGREEMENT ENFORCEABLE BY LAW IS A CONTRACT; thus for the formation of a contract there must be –

1. An agreement, and
2. The agreement should be enforceable by law

## What are e-contracts?

E-Contract is associated with drafting and negotiating legal contracts for client and business e-commerce and connected services. It's designed to help folks in formulating and implementing business contracts and policies at intervals e-businesses. It contains model contracts for the sale of product and provide of digital product and services to each customer and businesses. An e-contract could be a contract sculptured, drafted and enacted by a software package. pc programs are accustomed change business processes that govern e-contracts. E-contracts are often mapped to inter-related programs, that need to be specified rigorously to satisfy the contract necessities. These programs don't have the capabilities to handle complicated relationships between parties to associate e-contract

An e-contract may be a contract sculptural, drafted and enacted by a code. pc programs are wont to modify business processes that govern e-contracts. E-contracts is mapped to inter-related programs, that should be given fastidiously to satisfy the contract needs. These programs don't have the capabilities to handle complicated relationships between parties to associate degree e-contract. An electronic or digital contract is agreement “drafted” and “signed” in an electronic type. An electronic agreement is written within the similar manner during which a standard textual matter agreement is written. As an example, agreement is written on our pc and was sent to a business associate via e-mail. The business associate, in turn, e-mails it back to U.S. with electronic signature indicating acceptance. An e-contract may be within the variety of a “Click to Agree” contract, ordinarily used with downloaded package: The user clicks associate degree “I Agree” button on a page containing the terms of the software license before the group action is completed. Since a conventional ink signature isn't potential on associate degree electronic contract, individuals use many other ways to point their electronic signatures, like writing the signer's name into the signature space, pasting {in a|during a|in associate degree exceedingly|in a very} scanned version of the signer's signature or clicking an “I Accept” button and lots of additional.

E-Contracts is classified into 2 sorts i.e. web-wrap agreements and shrink-wrap agreements. someone witnesses these e-contracts everyday however is unaware of the legal intricacies

<sup>1</sup> Indian Contract Act 1872

connected to that. Web-wrap agreements are essentially internet based mostly agreements which needs assent of the party by approach of clicking the “I agree” or “I accept” button e.g. E-bay user agreement, Citibank terms and conditions, etc. Whereas Shrink-wrap agreements are those that are accepted by a user once a package is put in from a fixed storage e.g. Nokia pc-suite package

## ESSENTIALS OF AN ELECTRONIC CONTRACT:

As in every other contract, an electronic contract also requires the following necessary requirements:

1. An offer requirements to be made: In many contacts (whether online or conventional) the offer is not made directly one-on-one. The consumer ‘browses’ the available goods and services showed on the seller’s website and then chooses what he would like to purchase. The offer is not made by website showing the items for sale at a particular price. This is essentially an invitation to offer and hence is revocable at any time up to the time of acceptance. The offer is made by the customer on introduction the products in the virtual ‘basket’ or ‘shopping cart’ for payment.

2. The offer needs to be acknowledged: As stated earlier, the acceptance is usually assumed by the business after the offer has been made by the consumer in relation with the invitation to offer. An offer is revocable at any time until the acceptance is made. Processes available for forming electronic contracts include:

I. E-mail: Offers and acceptances can be exchanged entirely by e-mail, or can be collective with paper documents, faxes, telephonic discussions etc.

II. Web Site Forms: The seller can offer goods or services (e.g. air tickets, software etc.) through his website. The customer places an order by completing and communicating the order form provided on the website. The goods may be actually delivered later (e.g. in case of clothes, music CDs etc.) or be directly delivered electronically (e.g. e-tickets, software, mp3 etc.).

III. Online Agreements: Users may need to take an online agreement in order to be able to avail of the services e.g. clicking on “I accept” while connecting software or clicking on “I agree” while signing up for an email account.

3. There has to be legal consideration: Any contract to be enforceable by law must have legal consideration, i.e., when both parties give and receive something in return. Therefore, if an auction site eases a contract between two parties where one Ecommerce – Legal Issues such as a person provides a pornographic movie as consideration for purchasing an mp3 player, then such a contract is void.

4. There has to be an intention to create lawful relations: If there is no intention on the part of the parties to create lawful relationships, then no contract is possible between them. Usually, agreements of a domestic or social nature are not contracts and therefore are not enforceable, e.g., a website providing general health related data and instructions.

5. The parties must be able to contract: Contracts by minors, lunatics etc. are void. All the parties to the contract must be lawfully competent to enter into the contract.
6. There must be free and unaffected consent: Consent is said to be free when there is absence of coercion, misrepresentation, undue influence or fraud. In other words, there must not be any agitation of the will of any party to the contract to enter such contract. Usually, in online contracts, especially when there is no active real-time communication between the contracting parties, e.g., between a website and the customer who buys through such a site, the click through process ensures free and genuine consent.
7. The object of the contract need to be lawful: A valid contract presumes a lawful object. Thus a contract for selling narcotic drugs or pornography online is void.
8. There must be conviction and possibility of performance: A contract, to be enforceable, must not be ambiguous or unclear and there must be possibility of performance. A contract, which is impossible to perform, cannot be enforced, e.g., where a website promises to sell land on the moon.

#### **Modes of entering into an e-contract:**

An electronic contract is an agreement created and “signed” in electronic type — in different words, no paper or different exhausting copies are used. for instance, you write a contract on your laptop and email it to a business associate, and also the business associate emails it back with an electronic signature indicating acceptance. An e-contract may also be within the style of a “Click to Agree” contract, ordinarily used with downloaded software system: The user clicks “I Agree” button on a page containing the terms of the software license before the dealing will be completed.

In spite of slow progress within the field of computing, laptop systems are currently rising which will operate not simply in an automatic manner however autonomously still. The processes of computing includes forming intentions, creating decisions and giving and withholding consent which implies humans will provide substantial autonomy in deciding which allows laptop systems to complete extremely advanced tasks involving precise judgements. Currently the question that arises in our minds is that whether or not a system will replicate the processes that are thought to be power of the humans and what would be the legal consequences of it. These are the queries that create individuals apprehensive whereas moving into an advert contracts with the help of a system. Written agreement rights should be determined with relevancy people, the necessity of the hour is to determine the whether or not the present jurisprudence ism will deal with the new laws of technology.

## Types of Electronic Contracts

Broadly, e-contracts may be classified into following three types. While the shrinkwrap transaction has been around for some time and actually exists in a paper environment, the other two types of transactions (click-wrap and browse-wrap) are suitable to electronic commerce:

- **Click-wrap Agreements**
- **Shrink-wrap Agreements**
- **Browse-wrap/Web-wrap Contracts**

### Click-Wrap Agreements

In click-wrap agreements, a party after going through the terms and conditions provided in the website or programme has to, normally, indicate his assent to the same, by way of clicking on an 'I Agree' icon or decline the same by clicking 'I Disagree'. This type of acceptance is usually done before receiving the merchandise. These sorts of contracts are extensively used on the internet, whether it be granting of a permission to access a site or downloading of any software or selling something via a website. This may be called the creation of contracts by conduct.

By clicking on any of these choices, he accepts or declines the terms. If he does not agree, the process is terminated. Click-wrap agreements can further be of the following kinds:

- **Type and Click:** In this case, the user must type 'I accept' or other specified words in an on-screen box and then click a 'Submit' or similar button. This demonstrates acceptance of the terms of the contract. A user cannot proceed to download or view the target information without observing these steps.
- **Icon Clicking:** In this case, the user must click on an icon of 'I agree' button on a dialog box or pop-up window. A user may signify rejection by clicking 'Cancel' or closing the window.

### Shrink-Wrap Agreements:

The sale of software in stores, by mail and over the internet has resulted in quite a few specialized forms of licensing agreements. For instance, software sold in stores is commonly packaged in a box or other container and then wrapped in the clear plastic wrap. Through the clear plastic wrap on the box, the purchaser can see the warning that states the use of the software is subject to the terms of a license agreement contained inside, an agreement that cannot be read before purchase of the software. The license agreement generally explains that if the buyer does not wish to enter into a contract by purchasing the software, he must return the product prior to opening the sealed package containing the CD on which the software resides. If the software is returned with the sealed package unopened, a refund will be obtained.

## Browse-wrap/ Web-wrap Contracts

In browse-wrap contracts, the internet users will find the terms or conditions hyperlink somewhere on web pages that proposes to sell goods and services. According to these terms and conditions, using the site for buying the goods or services offered itself constitutes acceptance of the conditions contained therein.

## Jurisdiction of Courts under E-Contracts:

The Code of Civil Procedure, 1908 ("CPC")<sup>2</sup> prescribes the manner of determining the jurisdiction of civil courts in India, based on two fundamental principles:

- (i) the place of residence of the defendant; and
- (ii) the place where the cause of action arises.

Subject to the above, while the parties remain free to determine the choice of courts to adjudicate their disputes, they can choose only such court(s) which is/are not barred from exercising jurisdiction, i.e. parties cannot confer jurisdiction upon a court which does not have jurisdiction to entertain their case.

Ordinarily, contracts contain a specific provision with respect to the place of execution thereof, and the courts of such a place would have territorial jurisdiction to entertain and try the disputes arising under such contracts if in accordance with the CPC as aforesaid. However, since e-contracts are not physically signed/executed and are concluded in a virtual space, simply imposing the traditional principles of jurisdiction, applicable to physical contracts, to such transactions can prove to be challenging.

The jurisdictional issues of e-contracts have, however, been addressed to an extent under the IT Act. Section 13<sup>3</sup> of the IT Act governs the provisions relating to time and place of dispatch and receipt of an electronic record, and addresses the issue of deemed jurisdiction in electronic contracts, as under:

(1) *"...Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*

(2) *Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:*

(a) *if the addressee has designated a computer resource for the purpose of receiving electronic records,*

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<sup>2</sup> Code of Civil Procedure, 1908

<sup>3</sup> Information Technology Act, 2000

- (i) receipt occurs at the time when the electronic record enters the designated computer resource;  
or
- (ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;
- (b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.
- (3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.
- (4) The provisions of subsection (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under subsection (3).
- (5) For the purposes of this section:
- (a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;
- (b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
- (c) "usual place of residence", in relation to a body corporate, means the place where it is registered."

#### **Section (11) of information technology Act, 2000<sup>4</sup>**

An electronic record shall be attributed to the originator—

- (a) if it was sent by the originator himself;
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record;  
or
- (c) by an information system programmed by or on behalf of the originator to operate automatically.

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<sup>4</sup> Information Technology Act,2000

**Section(12) of information technology Act, 2000<sup>5</sup>**

Acknowledgement of receipt-

(1) Where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by—

(a) any communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(2) Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator.

(3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

**Legal issues involved in e-contracts****1. How can an electronic record be attributed to the originator?**

According to sec (11)<sup>6</sup> the electronic record can be attributed to the originator where:

- It could be determined that the electronic record or electronic data is sent by the originator himself.
- It could be determined that the electronic record has been sent by a person who has the authority to act on behalf of the originator.
- An electronic record has been sent by an information system programmed by or on behalf of the originator.

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<sup>5</sup> Information Technology Act,2000

<sup>6</sup> Information Technology Act,2000

## 2. How to determine the acknowledgement of an electronic record when the originator has not agreed with addressee regarding acknowledgement of receipt?

According to sec (12)(i) the acknowledgement of the electronic record when the originator has not agreed with the addressee regarding acknowledgement of receipt in particular form can be done in the following manner:

- Any communication by the addressee to the originator either electronically or otherwise. OR
- Through any conduct sufficient to communicate to the originator that the electronic record has been received by the addressee.

## 3. How to determine time and place of dispatch of an electronic record?

Section 13 deals with the time and place of despatch of electronic records as if the originator or addressee has or has not agreed, the dispatch of an electronic record is complete when it enters the computer resource of the addressee as to outside the control of the originator.

- According to section 13 (2)<sup>7</sup> the time of receipt of an electronic record can be determined in the following ways :-

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records.

(i) Receipt occurs at the time when the electronic, record enters the designated Computer resource.

(ii) If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

- According to section 13(4)<sup>8</sup> :-
- the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).
- According to section 13(5) :-

<sup>7</sup> Information Technology Act,2000

<sup>8</sup> Information Technology Act,2000

- (a) If the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business.
- (b) If the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business.
- (c) “usual place of residence”, in relation to a body corporate, means the place where it is registered.

#### 4. What in case the acceptance is not communicated to the offerer?

According to Section(12)<sup>9</sup> :-

Acknowledgement of receipt-

- (1) Where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by—
- (a) any communication by the addressee, automated or otherwise; or
- (b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.
- (2) Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator.
- (3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

<sup>9</sup> Information Technology Act,2000

## 5. Is e-contract a valid contract?

Contract law does not, as a general rule, set any requirements for the form of a contract in order for a contract to be valid. Both oral and written contracts are legally valid. Only certain types of contract are required to be made in writing. In contract law, entering into an electronic contract is considered equivalent to entering into a written contract. This means that even an offer sent by e-mail and an approval received in response are considered a legally valid contract that binds the parties. The terms of such a contract are based on the e-mail correspondence between the parties and on the laws applicable to the type of transaction.

## CONCLUSION

Today with the recent advancement in the areas of computer technology, telecommunications technology, software and information technology have resulted in changing the standard of living of people in an unimaginable way. The communication is no more restricted due to the constraints of geography and time. Information is transmitted and received widely and more rapidly than ever before. And 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 on-line global market place with millions of customers and thousands of products and services.