

E-Contracts, Legal issues and challenges involved: An overview

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Abstract

Nowadays, with recent progress in the fields of computer technologies, telecommunications, electronics and information technology, people's living conditions have improved in an unprecedented way. Because of the constraints of geography and time, contact is no longer constrained. Knowledge is extensively and more quickly distributed and received than ever before. And this is where electronic commerce gives the business environment versatility in terms of place, time, space, distance, and payment. The purchase and sale of information, products and services through computer networks is associated with this e-commerce. It is a way of electronically transacting business, generally, over the Internet. It is the system that contributes to 'market integration'. There is a rapid progression in the use of e-contracts with the emergence of e-commerce. But the deployment of electronic contracts at three stages, namely philosophical, logical and execution, raises a lot of challenges. We have covered the scale, existence and legality and numerous other e-contract related issues in our paper.

E contracts, or electronic contracts, are an online form of contract. There can be several different technological means of contact between the parties in the formulation of the contract: e-mail, a computer application, or two electronic agents designed to understand the formation of the contract. The Standardized Information Technology Act provides guidelines on the creation, administration, and specific terms of an e-contract. Principles and remedies under contract law refer to e-contracts. E-contracts and e-signatures are valid and enforceable, as are standard paper contracts.¹

Introduction

An electronic contract is a document that has been produced and signed in electronic form, i.e., no paper or other hard copies are used. For e.g., on your computer, you write a contract and email it to a business partner, and the business partner emails it back with an electronic signature signaling approval. An e-contract can also be in the form of a Click to agree contract, widely seen for downloaded applications: before the agreement can be concluded, the user clicks the I Agree button on a page containing the software licensing terms.

Computer networks are now evolving, despite slow advancement in the field of artificial intelligence, and can function not just automatically, but also autonomously. Artificial Intelligence mechanisms include the

¹ *E Contracts: Everything You Need to Know*, UPCOUNSEL, (Dec. 21, 2020, 10:55 PM), <https://www.upcounsel.com/e-contracts>.

creation of intentions, decision-making, and permission giving and withholding, which ensures that humans may have considerable decision-making autonomy that helps computer systems to perform extremely complex tasks requiring specific decisions. Now the question that emerges in our minds is whether the mechanisms that are called free will of humans can be repeated by a computer machine and what the legal implications will be.

Essential of a Valid E-contract.

The term 'contract' is defined under Section 2(h) of the Contract Act, 1872 (Contract Act) as an agreement enforceable by law. Although, Contract Act does not specifically provide for electronic contracts (e-contracts), it does not prohibit them per se. Like any other form of contract, an e-contract is also primarily governed by provisions of section 10 of Contract Act. The essential elements required for validating an e-contract set out under Contract Act are as follows:²

- Lawful offer and acceptance
- Lawful object
- Lawful consideration
- Free consent
- Parties to be competent to contract
- Intention of parties to create legal relationship
- Not expressly declared to be void, it will meet the test as a valid and binding contract

Nature of Electronic Contracts.

- No need to meet physically, in most situations.
- No physical borders exist.
- No handwritten signature is needed, and no handwriting is required in most cases.
- Since there is no optimal security, the risk factor is incredibly high.
- Jurisdictional concerns in the event of a violation are a significant setback for e-contracts.
- Particularly in shrink wrap contracts, there is no single authority to track the entire process.
- Digital fingerprints are used and electronic archives are used as need arises as testimony in court.³

² Harsh Arora & Raj Nandini, *India: Understanding E-Contracts*, MONDAQ, (21st Dec. 2020, 11; 15PM), <https://www.mondaq.com/india/contracts-and-commercial-law/993976/understanding-e-contracts>.

³ Benita Eziegbo, *E-contracts. Essentials, variety and legal issues*, Academic Paper, 2017.

Understanding the forms of E-contracts

E-contracts are generally of three types⁴

1. Browse Wrap Agreements

An agreement is called a browser wrap agreement which, by the use of the website, is meant to be binding upon the contracting party. That involve the website's use. Both include the Access Policy and Website Terms of Use which are in the form of "Terms of Use" or "Terms of Service" and may be used as links on or at the bottom of the page.

2. Shrink Wrap Agreements

These licenses are a licensing arrangement under which the contracting parties are enforced under the terms and conditions of the contract which are typically present on the plastic or in the documentation surrounding the digital goods that are bought by the customer.

3. Click Wrap Agreements.

This agreements enable the user to consent to the terms and conditions known as the End User Agreement and, by pressing the "Ok" or "I agree" button, restrict the permitted use of apps.

Drawbacks of Electronic Contracts.

1. Electronic Verification

Electronic verification must be achieved through "electronic records and digital signatures" in the online medium. Under the rules of evidence and procedure, electronic documents are to be validated.

2. Offer

The offer is not made on a website that shows the goods for sale at a fixed price. This is simply an opportunity to sell and is thus revocable at any moment up to the point of acceptance. The customer makes the deal on the lacing of the items in the virtual 'basket' or 'shopping cart'.

3. Non-repudiation

Non-repudiation normally refers to situations requiring a written contract, disclosure, or transfer of records. In electronic contracts once signed there is no way to deny that again, Its object is to ensure that a person or entity bound by the terms of the contract, or parties to a specific communication or transmission of information, is not in a position to dispute the validity of their signatures on the documents of the contract, or that they are the originators of a particular message or transfer.

⁴ Dr. S. Sethuram, Deepa C. Kumar, *E-Contracts in India: The Framework, Issues and Challenges*, International Journal of Emerging Innovation in science and Technology.

4. Repudiation Attacks

When a system or application doesn't include protocols or controls for tracking and logging the actions of its users, the system may be manipulated by malicious intruders, who can forge the identifying credentials of new actions, which can't be denied with certainty⁵.

5. Choice of Law

Courts more commonly enforce the rule of the jurisdiction with the largest number of points, a contract with a contractual arrangement known as "personal Jurisdiction" of the tribunal. The thing is, if he is a non-resident, what law will be applicable? Domestic rules of the state in which he lives or is present will be valid. The state's domestic rules whose laws the crime was committed by him. In a Fixing the option of law online becomes a more difficult topic.⁶

E-Contracts under Indian Law.

Indian Contracts Act, 1872.

The ICA includes all the rules applicable to contracts. All the essentials needed to form a legal contract are covered by this law. Any normal contract that satisfies the specifications of the ICA and is paperless or in electronic form is an e-contract. These contracts are as valid as contracts in writing. Any regulatory inquiry concerning e-contracts will then be settled.

Indian Evidence Act, 1872

It is important that the courts accept electronic mode of contracts as an evidence. The case of *Société des products Nestlé S.A v. Essar industries & Ors.* Paved the way for the introduction of Sec. 65A and Sec. 65B in the Indian Evidence Act which is related to the admissibility of computer-generated evidence. This was to eliminate challenges related to e-contracts and other electronic evidence. Further, in the case of *State vs Mohd. Afzal and Ors*⁷. It was held that, "electronic records are acceptable in court"⁸.

Information and Technology Act, 2000.

The Information Technology Act, 2000, established the regulatory basis for e-commerce, making India just the twelfth nation in the world to have such extensive e-commerce laws. This Act further makes major

⁵ *What is Non-Repudiation? A Closer Look at the Principles, Techniques and Best Practices*, Finzan, (23, Dec,2020), <https://blog.finjan.com/what-is-non-repudiation/>.

⁶ Shashank Tyagi and Shivangi Rana, *E-Contracts in India: Issues and Challenges*, International Science and Technology Journal.

⁷ *State vs. Mohd. Afzal and Ors.* 107 (2003) DLT 285.

⁸ Kavish Arora, *E-contracts: Understanding its Implementation and Challenges*, <http://www.penacclaims.com/wp-content/uploads/2020/04/Kavish-Arora.pdf>.

changes to the Indian Penal Code, the Indian Evidence Act, 1872, and the RBI Act, 1934, in order to put them into line with the digital transaction criteria.

Section 10A of the Information Technology Act, 2000 (IT Act) deals with validity of contracts formed through electronic means and states that if in a contract formation, communication and revocation of proposal/acceptance are expressed in an electronic form or by means of electronic records, it will not be considered as unenforceable solely on the ground that electronic form or means was used for that purpose. For any contract to be valid, signatures of parties to contract are required to showcase acceptance of terms and conditions of contract. In case of an e-contract, an electronic signature comes to play.⁹

The Information Technology Act, 2000 comes with prescribed aspects of use of electronic records, like attribution to the originator¹⁰, acknowledgement of receipt¹¹, time and place of dispatch and receipt of electronic records.¹²

The IT Act essentially seeks to address three areas or perceived requirements for the digital era:¹³

- (a) To make possible e-commerce transactions—both business to business and business to consumer
- (b) To make possible e-governance transactions, both government to citizen and citizen to government.
- (c) To curb cybercrime and regulate the Internet.

Issue of Jurisdiction

“The fundamental incompatibility between legal governance as a function of geopolitical territory, and network governance as a function of IP addressing, makes it difficult to impose local limitations on the global dissemination of information”.¹⁴

One raises the question as the case goes to the court as to how and pursuant to what clause would the court admit the suit? This results in a loophole in the legal positioning of electronic contracts. It was not difficult for the formation. The complexity exists because nothing other than the internet is involved! The Internet is a networking mechanism that does not refer to the geographical location of its component elements.

The object of the jurisdiction is, for example, to provide the court with a portal by which a matter moves. It requires the judge, by the power of law, to hear the matter. Thus, the question in the case of e-contracts arises. How would it happen to hear a query where the statute is silent and the parties are geographically distant? It

⁹ Harsh Arora & Raj Nandini, *India: Understanding E-Contracts, MONDAQ*, <https://www.mondaq.com/india/contracts-and-commercial-law/993976/understanding-e-contracts>.

¹⁰ S. 11.

¹¹ S.12.

¹² S. 13.

¹³ Aniket Waghdhare, *E-contracts and issues involved in its formation*, Legal Service India, (22, Dec.,2020)<http://www.legalserviceindia.com/article/l350-E-contracts-&-issues-involved-in-its-formation.html>

¹⁴ Wendy A. Adams, *Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve*, 10 Int'l J.L. & Info. Tech. 71 (2002).

is said that, from the point of view of both the court and the statute, the 'concept of jurisdiction is embedded in territoriality.¹⁵

Section 20, of the Civil Procedure Code,¹⁶ gives power to the civil courts to trial all the cases unless barred by the law. To the case trial by the court the cause of action should be arose within the limits of the court. The courts have delved into the aspects of the jurisdiction governing the e-contracts.

One of such case is, *Rediff Communication Ltd v. Cyber booth and Anr*,¹⁷ where the plaintiff used the Rediff.com domain name and the defendant began business by using the Radiff.com domain name. The plaintiff lodged a complaint against the defendant corporation for passing away. The two names were assumed to be almost identical and there is every chance that the Internet user may be fooled and puzzled. The court then acknowledged the plaintiff's prayer and barred the appellant from using the contested domain name.

Electronic Contracts in United States of America.

In the vicinity of 1998 and 2002 most nations adjusted their household business enactment to perceive electronic contracts and marks as lawfully legitimate instruments. Still some less-created nations are achieving this assignment. All things considered, in spite of the relentless extension of web based business and the declaration of laws securing online business contracts, numerous organizations and Internet clients don't know unequivocally what law applies to their web based business contracts.

The accompanying laws constitute the essential lawful structure of electronic contracts in the United States. Notwithstanding these particular laws, there are some global laws that may well apply to electronic contracts if the legally binding gatherings choose to submit to them. The Uniform Electronic Transactions Act (UETA) is an imperative U.S. enactment material to electronic contracts. UETA, as explicitly characterized in Articles 3 and 4, just applies to exchanges identified with business, business, and government matters; and to exchanges led by electronic means.¹⁸

The U.C. Electronic Signatures in Global and National Commerce Act (E-Sign Act), 2001. The Act perceives the legitimacy of agreements entered electronically, and where electronic marks have been fused. The primary reason for this Act was to give on electronic contracts, an indistinguishable specialist from its paper-based partner. Uniform Computer Information Transaction Act (UCITA) is an important U.S. set of proposed

¹⁵ Rishabh, Jurisdictional Issues in E- Contracts, Read more at Legal Bites © Reserved: <https://www.legalbites.in/jurisdictional-issues-in-e-contracts/>.

¹⁶ Sec.20, Civil Procedure Code, 1908.

¹⁷ AIR (2000) AIR Bom. 27

¹⁸ UNICITRAL, Model Law on Electronic Commerce, 1996.

display rules relevant to the development of electronic contracts, particularly to those e-contracts on electronic materials, or "computer data exchanges" as the Act calls them.¹⁹

Conclusion

The Contract Act involves the meeting of minds and the participation of two sides in negotiation. Except in the event of e-contracts, the minds that meet are the minds of programmed computer programs. The Information Technology Act includes provisions pertaining to electronic records allocation, recognition, dispatch and reception. The IT Act has sought to properly take care of the specifications of e-contracts.

However thanks to E-commerce, the quality of living of individuals is changed entirely. This is where versatility is provided by electronic commerce. In terms of location, time, space, distance, and space, the market climate about transaction. With the advancement of e-commerce, there is a steady progress of making use of e-contracts. E-contracts are ideally suited to promote the reengineering of several businesses through a business procedure requiring a mixture of tactics, practices and business methods that help the instant information exchange.

There are own merits and demerits of the e-contracts. On the one side, cost savings, time saving, consumer fastening and enhance the quality of service by minimizing paper work, thus reducing Automation improves, and the legislation regulating E-contract, on the other hand, ignores such clauses such as there is little to assess the parties plan to enter into a legally enforceable arrangement.

E-contracts are the ultimate example of demonstrating how complex law is and how it adjusts itself according to society's needs. E-contracts are one of the most desirable fields of law, along with all the difficulties and concerns, because they satisfy the needs of the masses. With relevant legislative changes and judicial precedents, India will be productive in the evolution of e-contracts.

¹⁹ S.R. Shubashini, Shajim M, *Legal Issues arising in E- Contract in India: An Analysis*, International Journal of Pure and Applied Mathematics Volume 120 No. 5 2018, 4601-4618.