

E-contract and Legal Challenges

Abstract

E-Contract is the result of development of Information Communication Technology (ICT). It is a contract modelled, specified, executed and enacted by a software system. When it comes to legality/enforceability of such e-contracts entered between two or more parties we need to look into basic provisions of laws regarding the contracts. There are four main kinds of e-contracts viz. The Click-wrap or Web-wrap Agreements, Shrink-wrap Agreements, Browse –wrap Contracts, Electronic Data Interchange or (EDI). The legal enforceability of these contracts in India is still in the nascent stage. Electronic contract posed various challenges on legal and technical front. Problem revocation in e-contract and minority agreement are the main legal challenges posed by e-contract. In electronic contract the issue of security and a statutory monitoring agency become crucial factors and the same will become crucial aspects of electronic contracts for the consumers to protect their interests and for the business establishments to conduct their business without costly legal battles.

This paper is an attempt to deal with the legal aspects of e-contract and its inherent challenges which defied the conventional notions of contract.

Keywords: E-Contracts, Information Communication Technology (ICT) Click-wrap or Web-wrap Agreements, Shrink-wrap Agreements, Browse –wrap Contracts, Electronic Data Interchange or (EDI).

Introduction

“Society is indeed a contract. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”¹ From the very ancient time till now we have been engaged in various forms of contract in our daily activities. Contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. Right from hiring a taxi to buying airline tickets online, innumerable things in our daily lives are governed by contracts. With the pace of time forms of contracts also changed and now we have moved from conventional mode of contract which takes place in physical world to the e-contract which takes in virtual space or better to say in cyberspace. This new form of contract is the result of development of Information Communication Technology (ICT). E-contract is a contract modelled, specified, executed and enacted by a software system. E-contracts are conceptually very similar to traditional (paper based) commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms (where possible), place orders and make payments. Then, the vendors deliver the purchased products. Computer programs are used to automate business processes that govern e-contracts² While there may be instances where it is not certain whether the particular elements required for the conclusion of a valid contract by means of data messages is one of the fact³.

This paper is an attempt to deal with the legal aspects of e-contract and its inherent challenges which defied the conventional notions of contract.

E-Contract: Meaning

A decade ago, IT through its innovations in business process reengineering led the way in breaking down the inefficiencies within companies. Firms in the new millennium now face relentless pressure to perform better, faster, cheaper, while maintaining a high level of guaranteed results. Firms must thus focus on their core competencies and

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outsource all other activities. Working with a partner, however, requires breaking down the inefficiencies between organizations and coping with frequent change across the entire end-to-end value chain. In this new world of collaborative commerce and collaborative sourcing, a standard business process is simply inadequate. Using e-contracts to build new business relationships and to fulfill e-contracts through the Internet are important trends. E-contracting is however not a new concept.

An electronic contract or an e-commerce agreement encompasses all kinds of commercial contracts that are concluded over an electronic medium or network, that is, the internet.⁴

E-Contract is an aid to drafting and negotiating successful contracts for consumer and business e-commerce and related services. The sole purpose of these contracts is to assist people in framing and executing commercial contracts policies in electronic environment or in cyberspace. It contains model contracts for the sale of products and supply of digital products and services to both consumers and businesses.

An e-contract is a contract modeled, 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.

"Electronic contracts" may be said as legally enforceable promises or set of promises that are concluded using electronic medium. The UNICITRAL Model Law on Electronic Commerce, instead of defining an electronic contract, merely states that a contract can be made by exchanging data messages and when a data message is used in the formation of contract, the validity of such contract should not be denied. Electronic contracts are paperless form contracts are born out of the need for speed, convenience and efficiency. This form of contract makes possible and easier form of cross border contracts. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a scenario.

E-contracts vis-à-vis conventional forms of contracts

When it comes to legality/enforceability of such e-contracts entered between two or more parties we need to look into basic provisions of laws regarding the contracts. Indian Contract Act, 1872 lays down various essentials of a valid contract. The Indian Contract Act, 1872 governs the manner in which contracts are made and executed in India. It governs the way in which the provisions provisions in a contract are implemented and codifies the effect of a breach of contractual provisions. Within the framework of the Act, parties are free to contract on any terms they choose. Indian Contract Act consists of limiting factors subject to which contract may be entered into, executed and breach enforced. It only provides a framework of rules and regulations which govern

formation and performance of contract. The rights and duties of parties and terms of agreement are decided by the contracting parties themselves. The court of law acts to enforce agreement, in case of nonperformance.

There must be an offer and an acceptance

There must be two or more separate parties to the contract. These two parties must be in agreement with each other, i.e., consensus ad idem. They must intend to create a legal relationship with each other and there has to be a consideration.

In the present scenario we must analyse if these essentials are complied with or not while entering into a contract with the aid of a computer program.

Offer⁵ and Acceptance⁶

When a product is advertised on a website and someone accesses that website in order to buy them then the seller of the goods makes an invitation to offer to public at large through ways similar to advertisements, catalogues and shop displays, in such a case the seller does not become the offeror because he is merely inviting offers and not making an offer which a well-established doctrine of law of contracts, now the buyer of the goods make an offer by accepting the terms and conditions of the seller and offers the seller of the goods to sell the goods at the price marked. When it comes to acceptance, the question which arises in our mind is that what constitutes an acceptance? Acceptance as defined in the Indian Contracts Act 1872 means, when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. The Act also lays down the provisions regarding the situation when communication is complete, s. 4 of the Act lays down that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of acceptance is complete. As against the proposer, when it is put in course of transaction to him, so as to be out of the power of the acceptor.

As against the acceptor, when it comes to the knowledge of the proposer.

After analysing these two concepts under the Contracts Act, the question that arises in our minds is that whether the offer made by the buyer comes to the knowledge of the seller before the acceptance is made by the computer program on his behalf, whether the acceptance on part of the computer program would amount to a valid acceptance or not. In cases of e-contracts, even though the communication of acceptance is not complete and the computer program itself accepts the offer on behalf of the acceptor and that too without any knowledge of the acceptor but still these contracts are deemed to be legal.

In present scenario, if an offer has been made, then prima facie the seller's computer uses the set of instructions to accept the offer and evince an intention to assent to that offer. But whose intention is it exactly? There appear to be three possibilities

1. Intention may be of the seller's computer alone but since computers are not capable of being parties, it must follow that we do not have a meeting of minds by the parties themselves; or

2. Intention may be the seller's alone, this view, however, is problematic given that the seller never knows of the transaction; or
3. Intention may be the seller's though embodied in an e- program of the computer. Can this view be realistic, though, when the decision to make the offer in question has been formed autonomously by the seller's computer?

If a question before the court of law comes about the legality of such a contract entered between the parties through a computer program, in my view the first and the second possibilities are not at all applicable to the present scenario. The third possibility, however, is more useful because this is particularly in light of powerful evidence that English courts, at least, are willing to use the option or unilateral contract device both actively and creatively.

Parties to the contract⁷

On the question as to who is capable, by law, of being a party to a contract? It is generally accepted that both natural persons and legal persons are capable of entering contracts, Computers are clearly not natural persons, and neither American nor English contract law, at present, deem them to be legal persons. Computers, therefore, are not capable of being parties to contracts. In our scenario, both the buyer and the seller are natural persons, and consequently, are capable of being parties to the transaction. The autonomous computer, however, clearly cannot be a contractual party as the law now stands.

Consensus ad idem⁸

According to the definition, the minds in question have to be the minds of the parties to the agreement. In our scenario, can it be said that there is a meeting of the minds in any meaningful sense? In both American and English contract law, the normal analytical tool used to test for such a meeting of minds is that of offer and acceptance which has already been discussed.

Intention to create legal relationship

Another criterion to be considered is that of the intention to create legal relationship. To constitute a valid contract, the parties must intend to create binding legal relations between themselves. As in the case of offer and acceptance mechanism, the courts analyse the intentions of the parties from an objective standpoint. In the case of ordinary, commercial transactions, the courts start from the presumption that legal relations were indeed intended. If either party wishes to challenge that presumption, the burden of proof is on the party who asserts that no legal effect was intended. Hence in the case of the e-contracts in the present scenario it is for the court to make clear that there is existence of a usual presumption applies. In the event that the court proves unwilling to apply the presumption because of the involvement of an autonomous computer, we must ask ourselves similar questions to those we addressed when considering the elements of offer and acceptance. In relation to the present scenario, the buyer's intention to create legal relations gives rise to no difficulties whereas the seller's intention faces the same three difficulties as discussed above. It is more problematic to deem that an autonomous computer is capable of forming an intention which is

relevant, or to claim that the human trader has a specific intention as entered by the computer program and the buyer.

Consideration⁹

In the present scenario, once an item has been supplied and the price has been paid, the consideration is executed and the requirement is satisfied. Problems may arise at a time when the consideration is merely executory. This arises when the seller's computer has done no more than "promise" to supply that item. A key intention that lies behind such promises is, of course, the intention to be bound by that promise in other words, the intention to create legal relations. We have already examined this intention to create legal relations above. Another intention that can be associated with each promise is the intention to fulfil the promise. In my view, however, this intention can be seen as a corollary to the intention to create legal relations and thus does not require separate treatment.

It is clear from the above discussion that the involvement of an autonomous computer in the contract formation process gives rise to considerable doctrinal difficulties and hence the conventional laws with respect to the contracts between two or more legal persons embodied under the Indian Contracts Act, 1872 cannot be applied in cases of e-contracts.

Most of the provisions of the Information Technology Act as promulgated, deals with citizen interaction with government and certainly a proper and far-reaching mission towards e-governance. But there are several hurdles before this becomes a reality. The main being that government departments not only lack the hardware for electronic transactions but will also need to reorient their systems and procedures before they are ready to interact through electronic documents.

Earlier there was an apprehension amongst the legislatures to recognize this modern technology based contracts, but now most of the countries have enacted laws to recognize electronic contracts. It is very evident fact that the conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. Therefore there is need of some specific legislation to regulate this form of contract, Information Technology Act (IT Act) 2000 solves some of the peculiar issues that arise in the formation and authentication of electronic contracts.

Information Technology Act (IT Act) 2000 and Electronic Contract

Indian law provides for the authentication of electronic records by affixing a digital signature. The law provides for use of an asymmetric crypto system and hash function and also recommends standards to be adhered. IT Act validates the contracts through electronic means¹⁰. Apart from that Chapter IV of the Information Technology Act, 2000 contains sections 11, 12 and 13 and is titled Attribution, Acknowledgment and Dispatch of Electronic Records. Attribution of Electronic Records¹¹

An electronic record shall be attributed to the originator

1. if it was sent by the originator himself;
2. By a person who had the authority to act on behalf of the originator in respect of that electronic record; or

3. By an information system programmed by or on behalf of the originator to operate automatically.

According to this act, originator¹² is a person who

1. sends, generates, stores or transmits any electronic message or
2. Causes any electronic message to be sent, generated, stored or transmitted to any other person.

The term originator does not include an intermediary.

Acknowledgment of Receipt¹³

According to section 12(1) of the IT Act

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

1. Any communication by the addressee, automated or otherwise; or
2. Any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

According to section 2(1) (b) of the IT Act, Addressee means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

According to section 12(2) of the IT Act

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.

According to section 12(3) of the IT Act

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.

Time and place of dispatch and receipt¹⁴

According to section 13(1) of the IT Act

Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

According to section 13(2) of the IT Act

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,
 - 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.

According to section 13(3) of the IT Act

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.

According to section 13(4) of the IT Act

The provisions of sub-section (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 sub-section (3).

According to section 13(5) of the IT Act

For the purposes of this section,

1. If the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;
2. 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;
3. "Usual place of residence", in relation to a body corporate, means the place where it is registered.

Different modes of E-Contract

Generally the basic forms of "E-Contracts" that a person comes across if he is computer savvy are:

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

Click-wrap agreements are those whereby a party after going through the terms and conditions provided in the website or program has to typically indicate his assent to the same, by way of clicking on an "I Agree" icon or decline the same by clicking "I Disagree". These types of contracts are extensively used on the Internet, whether it be granting of a permission to access a site or downloading of a software or selling something by way of a website.

Types of Click-Wrap Contracts

In an off-line contract, both parties typically indicate their agreement to the terms and conditions thereof by signing. On-line, only one of the parties (usually, the surfer or person using the computer), signifies acceptance by "signing" in the following ways:

Type and Click

The user must type "I accept" or other words in a specified area and then click "send";

Clicking an Icon

The user simply clicks an "I accept" icon to go to the requested page;

Scroll and Click

The user must scroll down the terms of the click-wrap contract and then click an icon marked "I accept" or "I agree".

One of the unique features of a click-wrap contract is that it is a one-sided, "take-it-or-leave-it" proposition. Unlike a paper contract, where the parties may vigorously negotiate the terms of the agreement

before signing, the user in the on-line environment has no bargaining power. The user must either accept the terms of the click-wrap agreement (which will typically be in favour of the proffering party) or not gain access to the desired webpage, product or service.

Purposes of Click-Wrap Contracts

The main purposes of click-wrap Agreements are to ensure contractual certainty, allow access to a particular web site or webpage, download software, and Purchase a product or service', Inform the user of proprietary material on the web site, enumerate a web site's terms of use or service and privacy policy, impose limitations on the use of downloaded material, make it easier for the ISP or OSP to pursue users for violations or infringement and limit the ISP's or OSP's liability for use of content, errors or problems associated with downloaded software, other products or services.

Legal enforceability of Click-Wrap Contracts

As there are no judgment on click wrap contracts, US law on this point is instructive. In the landmark case of Hotmail corporation vs. Van \$ money & Pie Inc.¹⁵ the US court validate the click wrap contract.

Shrink-Wrap Agreements have derived their name from the "shrink-wrap" packaging that generally contains the CD Rom of Software's. The terms and conditions of accessing the particular software are printed on the shrink-wrap cover of the CD and the purchaser after going through the same tears the cover to access the CD Rom. Sometimes additional terms are also imposed in such licenses which appear on the screen only when the CD is loaded to the computer .The user always has the option of returning the software if the new terms are not to his liking for a full refund.

Legal enforceability of Click-Wrap Contracts

The legal validity of shrink wrap contracts has not been addressed by Indian courts. However, the legal enforceability of shrink –wrap contracts has been examined by the US court in the case of ProCD Incorporated vs. Matthew Zeidenberg¹⁶.

Browse-Wrap Agreements

"Browse-wrap" agreements, as distinct from "click-wrap" agreements, do not require the active consent of the user. Acceptance of a browse-wrap is implied from the user's browsing or other activity on the web site, even if the user has not reviewed the electronic contract. Browse-wrap agreements are typically found at the bottom of a webpage in the form of a link to another page on which the terms and conditions are posted. The user is not required to review the contract, much less access the page where it's located, in order to proceed.

Electronic Data Interchange or EDI is the electronic communication between trading partners of structured business messages to common standards from computer application to computer application".

In other words they are contracts used in trade transactions which enables the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgement of export and other official documents, leading eventually to the shipment of the goods) can

be processed with virtually no paperwork. Here unlike the other two there is exchange of information and completion of contracts between two computers and not an individual and a computer.

Challenges

In electronic contract the issue of security and a statutory monitoring agency become crucial factors and the same will become crucial aspects of electronic contracts for the consumers to protect their interests and for the business establishments to conduct their business without costly legal battles. The essential security aspects of E-contract, which need to be taken care in contracts, are: Entity Authentication (identifying with whom you are transacting), Message integrity, Payment non-repudiation, Effective audit and Privacy etc.

Conclusion

The emergence of ICT or cyberspace developed the concept of e-contract which is faster, easier and more convenient from the conventional mode of contract. But at the same time it posed some major challenges before the conventional laws on contract viz. problem revocation in e-contract and minority agreement. Though the IT Act, 2000 provides for some provisions with respect to the e -commerce but these provisions are restricted to the legality of the e -commerce and the security of such a transaction but the act doesn't lays down any specific provisions with respect to the formation of such contract. Therefore, we need a comprehensive legislation on the e-contract and its enforceability in India. To, Conclude it can be said that:

"We need courage to throw away old garments which have had their day and no longer fit for the requirement of new generation." **Fridtj of Nansen**

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