

ELECTRONIC CONTRACTS IN INDIA: AN OVERVIEW

Shubhada Gholap

Principal, Yashwantrao Chavan Law College, Pune, Maharashtra, India

Received: 30 Jul 2018

Accepted: 10 Aug 2018

Published: 18 Aug 2018

ABSTRACT

The electronic contract is generally different from traditional contracts. E-contract is a contract executed and enacted by way of software systems. The internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical shopping. A viewer from any part of the world may want to get into contract to purchase a product as advertised. In this transaction, the issue is raised for its execution and protection of the consumers. Fundamental Principles of contract law continue to prevail in contracts made on the internet. Nevertheless, not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts. In India, the recognition of an electronic contract is mainly supported by the Information Technology Act, 2000. This paper is divided into basic research issues in e-contracts, including conceptual analysis of e-contract, standard forms of e-contracts, and the ways in which e-contract is concluded, the laws governing to it in India and the consumer's protection in e-contract.

KEYWORDS: *Conceptual Analysis of E-Contract, Dealings Between Companies and Public Administration, Lawful Consideration*

INTRODUCTION

The latest mode of making instant contracts is to enter into contracts through computer internet. Though the computer internet, which is the most revolutionary mode of the communication system, it is possible to send messages across the world from one part of the globe to another part of the globe. These messages through e-mail reach from the sender to the addressee instantly. Every thousand of millions of messages pass on across the world between the persons of the same country. The internet connects countless networks throughout the world, which include corporate networks, universities, international business house and other individuals. Now the internet software system has proved to be a big plus point for entering into several contracts within the country and outside the country. By exchange of communication of offer and acceptance between the parties, it is very much feasible to enter into contracts instantaneously these offers and acceptance between the parties may be exchanged by means of the electronic record. The legality and enforceability of the E-contracts is no way affected merely because the formation of the contract depends on the electronic record that being resorted.¹

E-Commerce

Electronic commerce in a very general sense refers to buying and selling products and services over the internet and the World Wide Web (www). E-commerce however, in actuality, includes all forms of commercial transactions involving both organizations and individuals that are based upon the electronic processing and transmission of data including text, sound, and visual images. Thus e-commerce supports and govern commercial activities.

Types of E-Commerce

Business to Customer (B2C): It is the transaction where a trader's entity on one side and an individual customer on the other hand conduct business. The expression B2C has been commonly used to refer to a sale by a business enterprise or retailer to a person or 'consumer' conducted through the internet. For instance, www.rediff.com, www.flipkart.com and the like which provides facilities for customers to buy goods from the website. It is an example of a B2C e-business. In this situation, the website itself serves the purpose of a shop.

Business to Business (B2B): It is the type of e-commerce where two business organizations conduct commercial transactions with each other using the internet.

Customer to Customer (C2C): It is the transaction which involves two or more customers with business entity merely providing a web based interface to facilitate the consumer to consumer transaction. The expression C2C generally refers to the sale of a product pertaining to a consumer to another consumer either directly or through an intermediary exclusively dedicated to this activity. One best example of C2C website is www.ebay.com, where any person can buy and sell, and exchange goods and articles using this website. This website provides the web-based interface (i.e. the website with its database and other functions) and users can transact freely with each other.²

Consumer-to-Business (C2B): In this, a complete reversal of the selling and buying process takes place. This is very relevant for crowdsourcing projects. In this case, individuals make their items or services and sell them to companies. Some examples are proposals for a company site or logo, royalty free photographs, design elements and so on.

Business-to-Administration (B2A): In this kind of e-commerce transaction, there are dealings between companies and public administration. It encompasses different services, such as social security, fiscal measures, legal documents, employment and so on.

Consumer-to-Administration (C2A): In this e-commerce model, electronic transactions are carried out between individuals and public administration. Some examples are distance learning, information sharing, electronic tax filing, and so on.³

E-Contracts

Definition: E-contract is a kind of contracts formed by negotiation of two or more individuals through the use electronic means, such as email, the interaction of an individual with an electronic agent, such as a computer program or the interaction of atleast two electronic agents that are programmed to recognize the existence of a contract.⁴

E-contract is one of the divisions of e-commerce or e-business. It holds a similar meaning to traditional business wherein goods and services are switched for a particular amount of consideration. The only extra element it has is that the contract here takes place through a digital mode of communication like the internet. It provides an opportunity for the sellers to reach the end of consumer directly without the involvement of the middlemen.

E-Contracts are contracts attracting principles of Uberrimaefidei in which the contracting parties are not dealing at arm's length but one party is entirely dependent upon the information supplied by the other party on the basis of which alone he expresses his willingness to contract. The doctrine of Uberrimaefidei should be considered the foundation of e-contracts as the chances of misrepresentation or suppression of material facts is most likely to occur in such transactions. Although legal capacity is not explicitly dealt by the Information Technology Act, the law presumes that once an online contract is concluded, both the parties are presumed to be competent to do so. In other words, neither party is allowed to raise an objection at a later stage that the contract is unenforceable for want of competence on the part of the parties. The doctrine of Uberrimaefidei will be strictly adhered to in case of electronic contract and one party acting to his detriment on the representation of the other that he is competent should not be put to any prejudice.⁵ E-contract is made through electronic mode with the help of internet. According to the mode of its formation, there are different types of electronic contracts. They are stated below.

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.⁶

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.⁷

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.

E-Contract and Standard Forms of Contracts

The concept of contract as a freely negotiated bargain has received severe strains in the modern age of mass production, mass marketing and mass consumerism and transportation. One must admit that the consumer has very little economic strength to dictate the terms and conditions favorable to him in a contract. On the other hand, the manufacturer, wholeseller, producer, a carrier and other big companies having giant economic strength are in a favorable position to dictate terms and conditions and the other party contracting with them are quiet unable to insist their terms. Consequently these companies or producers etc. have drawn up standardized forms of contracts which are also known as adhesion.⁸ E-contracts are standard forms of contracts. Instead of using a printed paper they are entered into a by electronic mode. A standard form of contract is a contract prepared by one party to it, otherwise, than by a process of negotiation drafted by one party it enables the other party, to sign on dotted lines. The terms are prepared beforehand by the former and the latter party is made to or deemed to agree to the terms where under the latter does not have much say. The terms are put in a standardized form.

E-contracts and Consumer Protection

The practice of concluding contracts in standard forms has arisen out of the modern necessity for a uniform set of printed conditions which can be used time and again and for a large number of persons and at less cost than an individually negotiated contract. The freedom of the practice to negotiate is limited by such contracts. Although a party often a consumer is free not to deal with a particular retailer and to negotiate prices, delivery dates etc. but where the similar terms are offered by other retailers the individual has either to accept the terms laid down in toto or go without. It being not feasible to go without many much goods or services the individual is effectively compelled to adhere to those terms.⁹

In e-contracts, the dominant party stipulates terms and conditions so as to absolve itself from the liability. This has given rise to the problem of consumer protection. The consumer protection Act was passed in the year 1986. Since then the trading system has changed drastically. This Act has lacunas for modern consumer protection, therefore the new Consumer Protection Bill has made certain changes like the definition of 'consumer' Sec.2 (8) Explanation (b) it has the expression "buys and goods" and "hires or avails any services" include the transaction made through any modes inclusive of but not limited to offline through electronic means. Teleshopping or direct selling or multilevel marketing. Under Sec.32¹⁰ filing of complaint electronically and the payment of fees for such complaints in electronic form is prescribed. So the time of these e-buyers is saved.

Essentials of a Valid Contract vis-à-vis an Electronic Contract

All the fundamental principles of contract law, have been developed over the years through the judicial decisions of the courts apply to all contracts notwithstanding whether they are formed electronically, orally or through paper-based communications. Many of the issues that arise for consideration relate to how these conventional contract law principles will apply to modern forms of technology. As in every other contract, an e-contract also requires the following necessary elements:

Offer

Like every other case, an offer is to be made to form an e-contract. In several transactions (whether online or conventional), however, the offer is not made directly one-on-one. The consumer 'browses' the available goods and services displayed on the vendor's website and then 'chooses' what he would like to purchase.

Acceptance

The offer needs to be accepted. The acceptance is more often than not undertaken by the business/ vendor after the offer has been made by the consumer in response to the invitation to treat. The offer is revocable at any point of time before the acceptance is made.

Lawful Consideration

There has to be a lawful consideration. Any agreement formed electronically, to be enforceable by law, must have a lawful consideration.

Intention to Create Legal Relations

There has to be an intention to create legal relations. If there is no intention on the part of the parties to create legal relationships, then no contract can be formed between them. By and the agreements of a domestic or social nature are not contracts and are, therefore, not enforceable.

Competency of the Parties

All the parties to the contract must be lawfully competent to enter into a contract. Agreements entered into by incompetent persons, such as minors, lunatics, insolvents, etc are void.

Free Consent

There must be free and genuine consent. Consent is said to be free when it is not caused by coercion, misrepresentation, undue influence or fraud. In short, there must not be any subversion of the will of any party to the contract to enter into such contract. Generally, in online contracts, especially when there is no active interaction between the contracting parties, e.g., between a website and the customer who buys through such a site, but the 'click through procedure' ensures free and genuine consent.

Lawful Object

The object of the contract must be lawful. A contract presupposes lawfulness of the object of contract. Therefore, an agreement for selling narcotic drugs or pornography films online is void.

Certainty and Possibility of Performance

There must be certainty and possibility of performance. A contract, to be enforceable, should not be vague or uncertain or ambiguous; and there must be the possibility of its performance. A contract, which is impossible to perform, is void, e.g., where a website promises to sell land on the moon. Similarly, an agreement, the meaning of which is not certain or capable of being made certain is void.

Benefits of E-contract Over Traditional Contracts

In general, e-contract system helps to move away from a paper-based system to an electronic system for formation of contracts. It is more transparent and quick. The e-contract procedure is simple and right it reduces the hardship of the parties. There is a minimum risk in these contracts. It is cost saving also. Electronic bookkeeping, authorization, alerts, and tracking is also possible with an e-contract system. In this type of contract, producers are improving quality of their products to survive in the competitive market. Therefore e-contract enactment systems can be used for management of even an e-government contract that are otherwise very complex. Therefore, e-contract enactment systems can be used for management of even an e-government contract that is otherwise very complex.

The Ways in which an Online Contract can be Concluded

With the advent of the internet as a means of facilitating contract, formation is not, a situation different from that is applicable to a fax or telex. An e-contract may be created either through an exchange of e-mails or by completion of a document on an internet web-site which is submitted to another party electronically. There are three broad classes of subject-matter for e-contracts:

Sale of Physical Goods

Goods are ordered over the internet with payment via the internet, but delivery is made in the usual way, at consumers doorsteps.

Sale of Digitized Products

In this category, the Goods, such as software, can be ordered, paid for and delivered online.

Supply of Services

Examples of this category include electronic banking, sale of shares, financial advice, or consumer advice. These methods are giving modern dimensions to the accepted methods of contract formation without requiring any particular changes to the law.

Emails

The simplest e-contract is created by the exchange of text documents via electronic communications such as e-mail. Offers and acceptance can be exchanged totally by e-mails.

The Electronic Data Interchange (EDI)

The data messages expressing offer and acceptance granted solely by computers without human intervention namely contracts effected through electronic data interchange (EDI), may lack the requisite intention. Computers now can be programmed to make their own decisions and sophisticated judgments.¹¹ It is possible for computer users to instruct the computer to carry out transactions robotically. For instance, in today's supermarket, the computer updates its inventory as items are scanned for sale. When the stock of an item falls to a predetermined level, the computer is programmed, without human involvement, to contact the computer of the supplier and place an order for replacement stock. The supplier's computer, exclusive of human intervention, accepts the order and the next morning automatically prints out worksheets and delivery sheets for the supply and transport staff.¹² These electronic agents are programmed by and with the authority of the purchaser and supplier. The legal status of electronic agents has not been clarified by the courts, but the most common view is that like any other piece of equipment under the control of the owner, the owner accepts responsibility.¹³ Such electronic agents exhibit characteristics which are very close to human characteristic features of electronic agents resemble to human characteristics such as, intelligence, autonomy and proactiveness.

Laws Governing E-Contracts in India

It is a revolution which modified contracts into e-contract. But one thing we need to understand that Electronic contracts are popularly known as the E- contracts poses a lot of challenges and legal issues which need to be taken into consideration.

Indian Contract Act, 1872

The Indian Contract Act, 1872 governs the manner in which contracts are made and performed in India, so every contract made should necessarily comply with the provisions of the Act to make it legally enforceable. The provisions of the Indian Contract Act are wide enough to cover such transactions. In the context of contract formation unless otherwise agreed with by the parties an offer and acceptance of an offer or either of them, may be expressed by means of data messages or electronic record. Where electronic record is used in the formation of contract that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose. As between the originator and the addressee of the electronic record, a declaration of will or other statements should be valid, effective or enforceable even though it is in the form of database.¹⁴

Information Technology Act, 2000

The electronic contracts would be considered absolutely valid under the Information Technology Act, 2000. As per Section 4 of the Information Technology Act, 2000 legal recognition of electronic records, where any Information is in writing, typewritten or printed form is made available to a user in the electronic form for subsequent reference shall be deemed to have satisfied the requirement of law. In a layman's language, this means that any document which is in the written or printed version would be treated same and will have the equal validity in the electronic form also. As per the newly introduced Section 10A¹⁵ of the Information Technology Amendment Act, 2008" clearly states that the "Validity of contracts through electronic means, that "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 electronic 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." The Act also lays down the instruments to which the Information Technology Act, 2000 does not apply, it includes negotiable instruments, power of attorney, a trust deed, a will, and contracts for sale or transfer of Immovable Property.¹⁶

Indian Evidence Act, 1872

It is pertinent to contextualize at this juncture that evidence recorded or stored by availing the electronic gadgets is given the evidentiary status. For instance: the voice recorded with the help of a tape recorder. Now-a-days, the digital voice recorder, digital cameras, digital video cameras, video conferencing are adding a new dimension to the evidentiary regime. The emergence of information and communication witnessed a sea change by elevating the status of the evidence recorded, generated or stored electronically from the secondary to primary evidential status. The evidentiary value of e-contracts can be well understood in the light of the various sections of Indian Evidence Act. Sections 85A, 85B, 88A, 90A and 85C deal with the presumptions as to electronic records, whereas, Section 65B relates to the admissibility of the electronic record.¹⁷

CONCLUSION

Fundamental principles of Indian Contract Act will prevail in contracts made on the internet. All the principles will not apply in the same manner that they apply to traditional paper-based and oral contracts. Placing an advertisement on the internet is basically advertising or offer out to the world at large. A consumer from any part of the world may want to enter into a contract to purchase a product as advertised with the help of internet. On a single screen, he can see advertisements, catalogues, shop displays/windows. E-contracts are beneficial to every consumer. It is time-saving. In today's lifestyle of people, e-contracts are inevitable. Not only individual customers are purchasing goods etc. through electronic/online mode, even the libraries of schools and colleges are purchasing books online. These e-contracts have a dark side also. If a person is not technosavvy or with sufficient technical knowledge, chances of his being deceived are there. Under the Information Technology Act 2000, the amendment of 2008 to Sec.10 in the form of Sec.10A has true relevance and genuine concern with the present situation wherein all of us enter into e-contracts in our daily transactions.

REFERENCES

1. *The Law of Contracts & Tenders with a Special Chapter on E-Contracts*, T.S. Venatesa Iyer's & Co., ed. 10th, S. Gogia & Company, at p.106.
2. http://shodhganga.inflibnet.ac.in/bitstream/10603/49009/14/14_chapter%206.pdf
3. [https://www.kartrocket.com/blog/ecommerce-business-models-types-pros-cons/visitedlast seen on 19-6-2018](https://www.kartrocket.com/blog/ecommerce-business-models-types-pros-cons/visitedlast%20seen%20on%2019-6-2018).
4. US definitions, available at <http://definitions.uslegal.com/e-contract> last seen on 17-6-2018.
5. http://elib.bvuict.in/moodle/pluginfile.php/183/mod_resource/content/0/Advantages%20of%20E-Contracts%20over%20Traditional%20Contracts%20-%20E-Contracts%20and%20E-Commerce%20in%20India%20-%20Vijaysinh%20Shashikant%20Pisal.pdf
6. <http://www.philipnizer.com>.
7. See, David G Post & Dawn C, Nunziato, 'Shrink-wrap Licenses and the licensing on the Internet', *Technology Licensing and Litigation* (1997), at p- 519.
8. *The Indian Contract Act Sale of Goods Act*, Trikamal R. Desai, Lexis Nexis Butter worths Wadhava Nagpur, 20th Ed. at p-64.
9. *The Indian Contract Act, 1872*, Dr. Narender Kumar, 1ST ed. 2015, Allahabad Law agency, at p.870-871.
10. *The Consumer Protection Bill 2015*.
11. *Pollock and Mulla Indian Contract Act and Specific Relief Acts*, Mr. R.G. padia, 13th ed. 2006, Lexis Nexis Butterworths Wadhawa, Nagpur at p.153.
12. Sneha J. Joshi, *A Study of Challenges and Benefits of Electronic Commerce*, *IMPACT: International Journal of Research in Humanities, Arts and Literature (IMPACT: IJRHAL)*, Volume 6, Issue 8, August 2018, pp. 25-32
13. *Overview of Electronic Data Interchange (EDI) Services*; downloaded from <http://www.tid.gov.hk>.
14. Alan Davidson, *The Law of Electronic Commerce* (Port Melbourne: Cambridge University Press, 2009), at p 73.

15. *UNCITRAL Model Law o Electronic Commerce (1996). The Informatioon Technology Act, 2000 doses not make such express provisions. For contracts which may not be made in electronic form see The Informatin technology Act 2000, S.1(4) as reffered in Pollock and Mulla Indian Contract Act and Specific Relief Acts, Mr. R.G. padia, 13th ed. 2006, Lexus Nexus ButterworthsWadhawa, Nagpur at p.153.*
16. *inserted by the Informatioin Technology (Amendment) Act, 2008 (10 of 2009, Sec.9 w.e.f. 27-10-2009.)*
17. *Sec.1(4) of Information Technology (Amendment)Act, 2000.*
18. *<https://taxguru.in/corporate-law/all-about-e-contracts-meaning-types-and-law.html>*