

“E-contracts: Understanding its Implementation and Challenges”

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Introduction

Technology advancements around the world has led to robust development in trade and commerce. E-commerce industry has become the one of the most lucrative industries in the world. The internet acts as an agent through no conscious of its own and initiates agreements between parties. With the burgeoning of e-commerce, there is rise in E-contracts also. Such lucrative and fast-moving industry need a legal framework to protect the interest of parties involved. The Information Technology Act 2000, The Indian Contract Act 1872, The Indian Evidence Act 1872 determines the validity and enforceability of e-contracts in the country. One can come into an e-contract through email agreements and online agreements such as the Browse Wrap Agreements, Shrink Wrap Agreements and Click Wrap Agreements. We often come across such e-contracts every day in our life but have always been unaware of the legal complexities it possesses. Though, with the help of e-contracts we have advanced from the conventional sources to enter into a contract but still there is a lot of challenges which needs attention such as common awareness and application of law. Just like a coin, e-contracts has two faces. On one hand it, re-engineers and facilitates the growth of e-commerce and on the other hand it poses as challenge for technical and legal understanding.

E-contracts in India: An Analysis

With the wave of industrialisation in the country, deals in businesses have increased along with the monetary stakes. Thus, these deals need to be protected. Luckily, one of the oldest legislations, the law of contracts does the work. A contract is “*an agreement enforceable by law*”.¹ Today for every minor business activity a contract is formed as it legally binds two or more parties in a relationship. In furtherance, when a party breaches to perform any work in the agreement, the other party seek damages through the court of law. The law of contracts is based on the idea that the parties by agreement create a legal obligation which is enforceable by other parties.

Now with the advancement in technologies, people are moving their business over the internet which involves a higher risk compared to the other business. To curtail such a risk e-contracts have come into force and also to relax the various dealings on the internet. An e-contract or electronic contract is a contract which is drafted and signed in an electronic form. Moreover, such contracts are executed through the internet.² E-contracts cab be used as employment contracts, consultant contracts, distribution agreements, Licensing agreements and also Non-disclosure agreements. E-contracts are existing everywhere across the internet. E-contracts can be formed through e-mails, when parties who coming in a contract

¹ Indian Contracts Act 1872 § 2(h).

² Kapil Raina, *Evidentiary Value of E-Contracts*, Legal Service India.

communicate the details of the contract via e-mail. In the case *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*³ the Supreme Court ignored the argument that communication and exchanges over emails does not constitute as a contract and said that “*once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initiated by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initiated*”. Also, various website forms which pop-up on the screen intends to form a legal relationship with the party who accepts such form. Such forms will become contracts as soon as the party accepts it. Furthermore, the EULA (End User License Agreements) is also used form valid contracts at the end of which users click on “I Accept” or “I Accept the Terms” icons to move further. These are most prominently used in various applications downloaded in phone and various online websites.⁴

E-contracts becomes a cost-effective way of to enter into an agreement as it saves the amount used for buying papers as it is paperless. It saves time also as sometimes the party entering into a contract are not in front of each other. Thus, E-contracts negates all the difficulties and ensure faster running of the business.

Understanding the types of E-contracts

E-contracts are of *three* types⁵:

Shrink-wrap Agreement

It is a type of online agreement which is used usually for a licensing agreement to purchase a software. Under these contracts the terms and conditions of the contract are provided which are enforced by the person buying it. Shrink-wrap agreements can also appear once the software has been downloaded in the computer. These agreements are used to absolve the manufacturers from any violation of copyrights or any of the other intellectual property rights. However, the applicability of shrink-wrap agreements does not exist in India because of lack of a judgement or precedent.

Click-wrap Agreement

This type of agreement is used to get the consent of the user regarding the terms and conditions of the contract with the use of “Ok” and “I Accept” options. Such agreements appear before a person starts using a particular software. Subsequently, when the user the denies or does not accepts the terms and conditions, he cannot use the particular software. The terms of the contract are presented to the user before he starts using a particular software and only with the acceptance of the terms and conditions the user can move forward.

³ *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd*, 2010 (1) SCALE 574.

⁴ Kaushal Kumar, *All that you must know about E-contracts*, ipleaders.blog

⁵ Dr. S. Sethuram, Deepa C. Kumar, *E-Contracts in India: The Framework, Issues and Challenges*, International Journal of Emerging Innovation in science and Technology.

Browse-wrap Agreement

Browse-wrap agreements are the agreements which can be seen on the internet on daily basis. These agreements are intended to bind two parties in a contract through the use of a website. For the continuous use of the website the terms of the website need to be accepted by the user. The terms include the ‘user policies’ and the ‘terms of service’ of the website and are in the form of a “terms of use” or “terms of service”.

These agreements have become of a common use in businesses these days but there is lack of judicial precedent for these agreements. Various countries like USA has held such agreements enforceable. Though, in India there is lack of judicial precedent but when the essentials or the general principles of contract are followed these agreements can be enforced.

Essentials of E-contracts

To make an E-contract a valid contract all the essentials required to make a valid contract, enumerated in Sec. 10 of the Indian Contract Act need to be fulfilled such as free consent, lawful consideration, competency of the parties and the others. The agreement with the parties is legally binding if it satisfies the requirements of law.⁶

An offer from one party needs to present to in order to form a valid e-contract. But one needs to understand that an advertisement on the internet may not constitute to be an offer as invitation to offer and offer are two different concepts. To identify whether an advertisement is an offer or an invitation to treat the test of intention is performed. A customer when files a responds a mail or fills an online form of a website, he is understood to make an offer. The manufacturer or the seller can either accept such an offer by conduct or expressly confirming it.

After an offer is communicated an unconditional communication of acceptance is required to create a valid e-contract. The most important task after acceptance is to identify at which point the contract comes into existence. There is a settled rule that acceptance is completed when it is received. It is important in e-contracts to identify the actual point of receipt as to decide the jurisdiction in which the e-contract will be concluded. If the server in the working is trusted than the postal rule can be applied. However, if the server cannot be trusted the postal rule should not be applied. The “receipt at the mail box” rule is preferred in such situations.

A contract only comes into existence when promise made in exchange of something valuable. This is called as consideration of the contract. It is essential to understand that contracts work on the principle of *quid pro quo*. The present principle also applies to E-contracts. Various consumers feel concerned about the transaction’s security over the internet. This has been reduced widely due to different methods such as a written confirmation sent to the consumers, consumers having the right to withdraw from the transaction, reimbursement

⁶ Vasudha Tamrakar & Pratibha Pal, *E-Contracts and its legality*, Legal Service India.

from various fraudulent activities. Such e-directives have made online transactions safer and viable.

Problems with E-Contracts

E-contracts have been a recent development in the legal field. Its implementation faces a lot of issues and challenges.

Capacity to Contract

It is a very essential element to ensure that the parties who come under a contract have the capacity to do so. If a person does not have legal competence than the contract stands void. Problem of capacity to contract arises because often there are nameless individuals who enter into contracts and there is a possibility that these individuals who agree to the terms and conditions of an e-contract might be minors.

Free Consent

Free consent is an essential element to form a valid contract. E-contracts does not provide any party to negotiate with the existing offer as the parties are not aware of each other. Further, the user cannot use nay system or software without accepting the terms and conditions. Thus, an e-contract only provides a “take it or leave it” offer. In such a scenario, the user will only have two options either to accept the terms and conditions which he is unwilling to or to forego the service which he requires.

Non-repudiation of Contracts

When one accepts the terms and conditions of an online contract, he cannot change the terms of the contract. This puts the person accepting such terms in an unfair condition has he has no means to change or alter any part of the contract as the parties present in such contracts do not know each other. Moreover, these contracts bind them legally for a long period of time and they cannot alter the terms of the contract to benefit themselves.

Court Jurisdiction

E-contracts have a very wide course of action and takes place in wide geographical areas, which will lead to filing of cases in different and far away places. Defending suits at such far away places increases expenditure and time wastage. Service providers limit the exposure to the jurisdiction which is near them. The user has no option in such agreements to select the jurisdiction and are exposed to whatever jurisdiction the service provider limits themselves to. This puts the user in an unfavourable position.

E-Contracts: Legislative Analysis

Indian Contracts Act, 1872

All the laws related to contracts are covered by the ICA. This legislation provides all the essentials required to form a valid contract. Any normal contract which fulfils the conditions

given by the ICA and is paperless or in electronic form is an e-contract. These contracts are as valid as written contracts. Thus, any legal query which includes e-contracts can be solved using the ICA.

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.*⁷ 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.*⁸ it was held that, “*electronic records are acceptable in court*”.

Information & Technology Act, 2008

The IT Act gives legislative authority to e-contracts under Sec. 10 of the act. In furtherance, any contract to become valid requires signatures from both the parties. In e-contracts, digital signatures come into play. Sec. 2(p) of the IT Act defines electronic signature used in e-contracts. These signatures are very necessary in several contracts like in government to government (G2G) and in government to business (G2B). Furthermore, there are two parties involved in e-contracts – the originator and the addressee both of which are defined by the act.⁹ Thus, the IT Act safeguards that the interests of the parties are maintained through its various provisions.

Moving Forward: Conclusion

E-contract facilitates re-modelling of the businesses into fast and pacey industry with its time and cost saving benefits. With the help of e-contacts people can make agreements from different parts of the world at the same time. With lack of paperwork and increasing productivity e-commerce is expected to have a revolutionary change in the business, legal and technical know-hows. Though e-contracts with all its benefits absences in proper implementation because of lack of proper legislations. The legislations present right now mostly is mostly exclusive to the needs of the originator or the service providers. The needs of the addressee or the users are well ignored. Thus, proper concrete legislation needs to be enacted to protect not only the originator but the addressee as well. E-contracts is the epitome to show how law is dynamic and it changes itself according the needs of the society. Even though with all the challenges and issues, e-contracts is one of the most desirable field in law because it caters the needs of masses. With proper legislative developments and judicial precedents, the evolution of e-contracts will be productive to India.

⁷ *Société des products Nestlé S.A v. Essar industries & Ors*, 2016 SCC OnLine Del 4279.

⁸ *State vs Mohd. Afzal And Ors.*, 107 (2003) DLT 285.

⁹ Nikhil Nair, *E-Contracts*, Indian National Bar Association, <https://www.indianbarassociation.org/e-contracts/>