

“Digital Contracts and Commerce”

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Abstract

With recent technological advancements, the standard of living of people has also changed immensely. Internet has changed the functioning of the society, communication is no more restricted to its geographical limits and information is transferred from one part of the world to another in no time. The traditional methods of entering into a contract, has also seen a change with the commencement of Digital Contracts. A Digital Contract refers to a contract that takes place between two parties through an electronic medium, often without the parties meeting each other. It refers to commercial transactions conducted and concluded electronically. They are also popularly known as electronic contracts or e- contracts. These e- contracts are just like traditional paper based contracts as provided in the Indian Contract Act, 1872, but they are digital in nature.

Section 10 of the Information Technology Act, 2008, gives legislative authority to e-contracts. E-contracts are generally made for speedy entering into contract or for the convenience of parties. They are best made between two parties who live in different parts of the world and have to enter into an agreement. A digital signature is all they require to enter into a contract sitting miles away from each other. In today’s times, it is the most convenient method to enter in a contract.

Digital Commerce refers to the buying and selling of products and services through the internet. It includes all commercial transactions that are based on electronic processing and transmission of data. A digital contract provides a computerized facilitation of contract for facilitating digital commerce progression. In e-commerce, the vendors present their prices and products to prospective buyers, while the vendees can negotiate prices and terms and when they are satisfied, they can place orders and make payments. The vendors then deliver the purchased products and services to the vendees. Such contracts are executed, controlled, and monitored by a software system. In this paper, the author shall explore the wider aspects of digital contracts in India and its validity in the Indian legal system.

1. MEANING OF A CONTRACT

A Contract is an agreement between two parties that creates mutual legal obligations. It is legally enforceable because it meets the requirements and approval of the law. According to Section 2(h) of the Indian Contracts Act, an agreement enforceable by law is a contract². Section 10 of the Contracts Act defines what agreements are contracts. According to this section, all agreements are contracts if they are made by the free consent of parties, who are competent to

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² <http://legislative.gov.in/sites/default/files/A1872-09.pdf>

contract, for a lawful consideration and with a lawful object and such agreements are not expressly declared to be void. In simpler words, a contract is an agreement, binding between two or more parties who are intending to create a legal relationship, in which one makes the proposal while the other accepts the proposal and thus it becomes a promise. Such acceptance has to be certain and not vague and must be free from any undue influence, force or misrepresentation. Both the parties to the contract must have attained majority in the eyes of law, must be of a sound mind and must not have been declared disqualified by any law for the time being in India.

Thus, the essentials to a valid contract are-

- Offer and Acceptance – For making a valid contract, there must be an agreement, i.e., offer and its acceptance should be from the one to whom the offer has been made.
- Lawful consideration – The agreement must be supported by consideration. Consideration is price for which the promise of the other is bought. An agreement without consideration is void.
- Free consent – There must be free consent of the parties, i.e., the parties must agree upon the same thing in the same sense. Consent is said to be free if it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.
- Lawful object – If the consideration or the object of an agreement is unlawful, the agreement becomes illegal. The consideration or the object of the agreement is said to be unlawful, if it is forbidden by law or fraudulent or if permitted, would defeat the provisions of law.
- Contractual capacity – Both the parties must be competent to contract. A person who has not attained majority or is of unsound mind or has been disqualified from entering into a contract by a law or is a convict, is incompetent to enter into a contract.

2. DIGITAL CONTRACTS

Digital Contracts, popularly known as e-contracts are a type of contract which is formed online. The interaction between the parties forming the contract can be by different electronic means. Thus, Digital contracts are formed between two parties through negotiations, by the use of electronic means. They can also be called cyber contracts or online contracts. These contracts are very similar to paper based contracts, wherein goods and services are exchanged for a specific consideration. The only extra element they have is that the mode of contract is digital in nature.

Since e-contracts are presently taken as seriously as offline contracts, the same principles which apply to a valid contract will apply here. An agreement between parties is legally valid if it satisfies the requirements of the law regarding its formation i.e., under the Indian Contracts Act.

This intention is evidenced by their compliance with 3 classical cornerstones i.e. offer, acceptance and consideration.

Essential elements of a digital contract are-

- There must be two parties
- Use of electronic means
- E-proposal & E-acceptance
- Amount of consideration
- Intention to create legal relations
- Competency of parties
- Free consent

2.1 RECOGNITION OF E-CONTRACTS

The Information Technology Act, 2000 gives legislative authority to E-contracts. As per section 10-A, 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.³

An e-signature is a digital file or symbol such as a scanned pen and ink signature or a typed name, that someone attaches to or places on a contract or file to show that person's intent to sign the contract or file. People e-sign documents in many different ways, including typing the signer's name into the signature area, pasting in a scanned version the signer's signature, clicking an "I accept" button, or using cryptographic technology.

For any contract to be valid, the signatures of both the parties are required. In case of an e-contract, e-signature comes into play. Section 2(ta) of the Information Technology Act, defines electronic signature as authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.⁴ Further, Section 5 provides legal recognition to electronic signatures. As per this section where any law requires that any information or any other matter be authenticated by affixing a signature or any document signed by or bear the signature of any person, then such requirement shall be deemed to have been satisfied. Electronic signatures serve the same purpose as a handwritten signature.

³ <http://www.bareactslive.com/ACA/ACT632.HTM>

⁴ Information Technology Act, 2000

Section 85C of the Indian Evidence Act, 1872 states that as far as a digital signature is concerned, the courts presume that the information provided in the certificate is true and correct⁵.

Digital contract has definitely made lives easier. All one needs to enter in a digital contract is an e signature and they can enter into a contract even while sitting miles apart. The two main parties to an e-contract are the Originator and the Addressee.

According to the Information Technology Act an Originator is a person who sends, generates, stores, or transmits any electronic message, to be sent, generated, stored or transmitted to any other person and does not include any intermediary⁶. Thus, the person who initiates the process of making the e-contract to send it to the other party, is the Originator.

Similarly, as per the Information Technology Act, an Addressee is a person who is intended by the originator to receive the electronic record, and does not include any intermediary. Meaning thereby, the party which receives the e-contract made by the other party is the Addressee.

2.2 TYPES OF E-CONTRACTS

- a) **Browse wrap** - A Browse wrap contract is the one in which is made binding on parties just by the use of that website by the parties. A regular user of a particular website is deemed to accept the terms and conditions and other policies of the website for continuous use. Pieces of texts which we see regularly on websites such as “By continuing your use of these services, you agree to the terms and conditions” or “By signing up I agree to the terms of use”, are browse wrap agreements.
- b) **Shrink wrap** – Shrink wrap contract is typically licensing agreements for software. These agreements are simply those which are accepted by user at the time of installation of software from a CD-ROM. With the opening of the packaging of the software product, the terms and conditions to access such software product are enforced upon the party who buys it. Sometimes additional terms can be observed only after loading the product on the computer and then if the buyer does not agree to those additional terms, then he has an option of returning the software product. Shrink wrap contracts have a decided advantage over other types of electronic contracts as their acceptance can be reversed by returning the product.
- c) **Click wrap** - Click-wrap agreements are those agreements where a party, after going through the terms and conditions provided in the website or program has to indicate his assent to the same, by way of clicking on an "I Agree" icon or decline the same by clicking "I Disagree". These are the most common types of contracts used on the internet, whether for granting of a permission to access a site or downloading of a software or selling something by way of a website.

⁵ <http://legislative.gov.in/sites/default/files/A1872-01.pdf>

⁶ <http://www.indianbarassociation.org/e-contracts/>

Even though these online contracts have become common in our daily lives, there are no precise judicial precedents on the validity and enforceability of shrink-wrap and click-wrap agreements. Other countries have dealt with these online agreements such as courts in the United States have held that as far as the general principles of contract are not violated, both shrink-wrap agreements and click-wrap agreements are enforceable.⁷

2.3 SPECIFIC EXCLUSIONS

There are certain contracts that are excluded from e-contracting as per the Information Technology Act. They are-

- Negotiable Instruments (other than a cheque)
- Power of Attorney
- Trust deed
- Will
- Sale deed or conveyance deed with respect to immovable property or any interest in such property.

3. ELECTRONIC COMMERCE

Electronic commerce or E-commerce in simple terms refers to the buying and selling of both products and services, through the internet. This includes all commercial transactions that are based on electronic processing and transmission of data, including sound, text and images. These business transactions occur either as business-to-business, business-to-consumer, consumer-to-consumer or consumer-to-business.

According to the book on “Law and Emerging Technology, Cyber law”, e-commerce is the conducting of transactions using network of computers and telecommunication i.e. internet. The book also states that e-commerce is an exchange of goods and services over internet and a financial consideration for them.

E-Commerce business may employ all or any of the following :

- Online shopping websites
- Providing or participating in online marketplaces
- Business-to-business buying and selling
- Gathering and using demographic data through web contracts and social media
- Business-to-business electronic data exchange
- Engaging in pre-commerce for launching new products and services

⁷ <https://blog.ipleaders.in/all-you-know-about-online-contracts/>

Commerce constitutes the exchange of products and services between businesses, groups and individuals and can be seen as one of the essential activities of any business. E-commerce focuses on the use of information and communication technologies (ITC) to enable the external activities and relationships of the business with individuals, groups and other businesses.

3.1 TYPES OF ONLINE TRANSACTIONS

There are three ways in which online transactions can happen-

- **Business-to-customer transactions (B2C)** – In this form of online transaction, a business entity and an individual customer conduct business together. The term B2C is commonly used to represent a sale by a business enterprise or retailer to a person or customer on the internet. Example- online shopping sites like Amazon, Myntra, E-bay etc that provides facilities for customers to buy goods from their websites.
- **Business-to-business transactions (B2B)** – This type of e-commerce refers to two business organizations who conduct commercial transactions with each other using the internet.
- **Customer-to-customer transactions (C2C)** - It refers to the sale of a product that travels from one customer to another customer either directly or through an intermediary, who is exclusively dedicated to this activity. Example – E-bay where any person can buy and sell, exchange goods and articles and freely interact and transact with each other as customer to customer.

4. ISSUES AND CHALLENGES

- a) **Capacity to contract** – At most times, who enters into a contract is a nameless individual. The other party has no idea whether the individual who has clicked on “I Agree” icon is legally competent to enter into a contract, which according to the Indian Contract Act, 1872, is one of the pre-requisites of a valid contract. Contracts entered into by individuals, who are not competent to contract are void. There may arise in a situation, wherein minors who are not competent to enter into a contract are entering into an online contract with the service provider by clicking on “I Agree” icon.
- b) **Electronic authentication** - In the online medium of contracts, electronic authentication has to be done by the means of electronic records and digital signatures. Electronic records need to be validated under the rules of evidence and procedure. Digital signatures are treated as equivalent to a handwritten signature. The Information Technology Act, 2000 provides for the use of digital signatures to authenticate electronic records. The said Act provides a legal framework for facilitating and safeguarding electronic transactions in the electronic medium.

- c) **Jurisdiction of court** - If one of the parties is a non-resident of India, what laws would be applicable to the contract i.e., domestic laws of the state where the party is residing or domestic laws of the state where he has committed the offence, becomes a complex problem in an online medium.
- d) **Choice of forum** - The online service provider has no other choice but to subject themselves to only one set of forum and applicable laws only. The user has no other choice, but to accept the service provider's Standard Terms and Conditions by clicking on the on-screen icon "I Agree", "I Accept" or "Yes".

5. LEGAL FRAMEWORK

In India, till date there are no definite legislations or guidelines protecting the buyers and sellers of goods and services over the electronic medium⁸. However, several laws acting in unification are trying to regulate the business transactions of E-contract. They are as follows:

- Indian Contract Act, 1872
- Consumer Protection Act, 1986
- Information Technology Act, 2000
- Indian Copyright Act, 1957

Earlier, there was no definite law to regulate the intermediaries such as verification service providers and shipping service providers to safeguard that the product or service is actually delivered. However, the government has recently acquainted the Information Technology (Intermediaries Guidelines) Rules 2011.⁹

The legal framework for e-commerce has been provided by Information Technology Act, 2001, which makes India only the twelfth country in the world which has such a comprehensive legislation for e-commerce. This act also effects consequential amendments in the Indian Penal Code, 1860, Indian Evidence Act, 1872 and the Reserve Bank of India Act, 1934, to bring them in line with the digital transactions.

5.1 ADMISSION OF E-CONTRACTS IN COURT

The validity of contracts entered into by email has been discussed in the case of **Trimex International Fze. Limited, Dubai v. Vedanta Aluminium Limited, India**¹⁰. The Supreme Court has deliberated over the issue of agreements executed over emails and held that unconditional acceptance of contract concluded orally or in writing or by e-mail. Mere absence of a signed formal contract, would not affect either unconditional acceptance of contract or implementation thereof. The case further elaborates that proof of contract in the absence of a

⁸ Akshat Razdan, *The Future of E-Commerce in India*, LAW WIRE

⁹ PTLB, *Information Technology (Intermediaries Guidelines) Rules 2011 of India*

¹⁰ *Trimex International Fze. Limited, Dubai v. Vedanta Aluminium Limited, India*, (2010) 3 SCC 1

signed agreement can be established from documents approved and signed by the parties in the form of exchange of e-mails, letters, telex, telegrams and other means of telecommunications. In this case, acceptance was conveyed via e-mail using the words “we confirm the deal for five shipments”.

In the case of **Ambalal Sarabhai Enterprise Limited v. KS Infraspace LLP Limited**, the Supreme Court examined the validity of agreements entered into by parties using a combination of communications over email and WhatsApp. The key inference drawn was the nature and language of the correspondences, which did not directly equate to affirmation, and therefore the agreement, was held invalid. The means of communication was not a concern, however, the Court stated that, “the WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its content is to be proved during trial by evidence-in-chief and cross examination. The e-mails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not. The use of the word ‘final draft’ in the e-mail cannot be determinative of offer or acceptance by itself”.¹¹

The courts, therefore, have accepted and provided that agreements may be executed electronically, so long as they meet the minimum criteria provided under the Contracts Act and the Information Technology Act. This includes agreements entered into via email as well as WhatsApp.

In case of **Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas**, it was held that “ordinarily, it is the acceptance of offer and intimidation of that acceptance which results in a contract. This intimation must be by some external manifestation which the law regards as sufficient. Hence, even in the absence of any specific legislation, validating e-contracts cannot be challenged because they are as much valid as a traditional contract is.”

5.2 EVIDENTIARY VALUE OF E-CONTRACTS IN COURTS

The evidentiary value of electronic contracts has been given recognition through various sections of Indian Evidence Act¹². Sec 65B of the Indian Evidence Act deals with the admissibility of electronic records. As per Sec 65B of the Indian Evidence Act, any information contained in an electronic record produced by the computer in printed, stored or copied form shall deemed to be a document and it can be admissible as an evidence in any proceeding without further proof of the original. Section 85A, 85B, 88A, 90A and 85C of the Indian Evidence Act deal with the presumptions as to electronic records. Sec 85A has been inserted later to confirm the validity of electronic contracts. It says that any electronic record in the form of electronic agreement is concluded and gets recognition the moment a digital signature is affixed to such record. The

¹¹ *Ambalal Sarabhai Enterprise Limited v. KS Infraspace LLP Limited*, (2020) SCC OnLine 1

¹² <http://legislative.gov.in/sites/default/files/A1872-01.pdf>

presumption of electronic record is valid only in case of five years old record and electronic messages that fall within the range of Section 85B, Section 88A and Section 90A of Indian Evidence Act.

In the case of **Societe Des Products Nestle S.A & Anr. vs Essar Industries & Ors**, the Delhi High Court paved way for immediate introduction of Section 65A and 65B in the Indian Evidence Act, 1872 relating to the admissibility of the computer generated record in a practical way to eliminate the challenges to electronic evidence¹³. In case of **State of Delhi vs Mohd. Afzal & Ors**, the court held that electronic records are admissible as evidence in courts.

6. REMEDIES FOR BREACH OF CONTRACT

There is no specific rule in case of breach of online contract but the rules regarding remedies for breach of contract can be followed as provided in the Indian Contract Act, 1872. The legal remedies for breach of contract as per the Act are: (a) damages; (b) specific performance of the contract.

Damages: When a contract has been breached, the party who suffers by such breach is entitled to receive, from the party who has breached the contract, compensation for any loss or damage caused to him thereby. Such compensation is not to be given for any remote and indirect loss of damage sustained by the reason of breach. A person who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through non-fulfillment of the contract.

Specific performance: In certain special cases, the court may direct against the party in default “specific performance” of the contract, i.e., the party may be directed to perform the very obligation which he has undertaken, by the contract. This remedy is discretionary and granted in exceptional cases. Specific performance means actual execution of the contract as agreed between the parties.

Specific Performance of any contract may, in the discretion of the court be enforced in the following situations-

- When there exists no standard for ascertaining the actual damage caused by the non performance of the act agreed to be done
- When the act agreed to be done is such that monetary compensation for its nonperformance would not afford adequate relief

The specific performance of a contract cannot be obtained in favor of a person who could not be entitled to recover compensation for the breach of contract. Specific performance of a contract

¹³<https://www.lawyerservices.in/Societe-Des-Products-Nestle-SA-and-Another-Versus-Essar-Industries-and-Others-2015-12-23>

cannot be enforced in favor of a person who has become incapable of performing the contract that on his part remains to be performed, or who violates any essential term of the contract that on his part remains to be performed, or who acts fraudulently despite the contract, or who willfully acts at variance with, or in subversion, of the relation intended to be established by the contract.

7. CONCLUSION

E-contracts are designed and enacted with an aim to provide security to online transactions. It is formed to check frauds to promote and build confidence in genuine online transactions and to give a legal status to the concept of digital signature. Online contract is a much efficient concept in the interest of time and money in comparison to the traditional method of paper and writing contract. But to keep a pace with the fast advancement of the technology, a separate legislation in regard to electronic contract has to be enacted in India because majority of the people still feel it is not very secured to get into any kind of online contracts as there are no concrete judicial precedents for the validity and enforceability of online contracts in India. In case of browse wrap contracts, we usually accept the terms and conditions of the contract by clicking the button that indicates ‘ I Agree’ and in case of shrink wrap contract or purchase of a software product, assent is given by the consumer or the purchaser with tearing of the wrapper and using it. Many have the tendency of not reading the terms and conditions carefully before agreeing to such agreements. But these actions should be taken consciously and carefully only after reading the terms of the contract properly as it leads to a valid contract and the terms can be strictly enforced against them.

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