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**Concept – Understanding Electronic contracts**

# **UNDERSTANDING ELECTRONIC CONTRACTS**

## **INTRODUCTION**

E-contract is one of the divisions of e-business. It holds a similar meaning of 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.

New models of business demands different organizational charters. E-contract demands an organizational charter which caters to its new marketing needs. This mode of business enables businesses to save time on product design and device products according to the individual customer requirement, track sales and get immediate feedback from the customer.

Contracts have become so common in day-to-day life that most of the time we do not even recognize that we have entered into one. Right from buying a vegetable and hiring a Cab or to buying an airline ticket online, uncountable thing in our daily exists is governed by contracts.

The Indian Contract Act, 1872 rules the way in which contracts are made and completed in India. It rules the way in which the requirements in a contract are implemented and codifies the effect of a breach of contractual provisions.

Electronic contracts (contracts that are not paper based but relatively in (electronic form) are born out of the need for speed, ease and efficiency. Imagine a contract that an Indian manufacturer and an American exporter wish to enter into. One selection would be that one party first draws up two copies of the contract, signs them and couriers them to the further, who in turn signs both copies and guides one copy back. The other option is that the two parties meet someplace and sign the contract. In the electronic age, the whole contract can be accomplished in seconds, with both parties simply fixing their digital signatures to an electronic copy of the contract. There is no need for behind couriers and additional travelling costs in such a situation.

There was primarily a fear between the legislatures to identify this modern technology, but now many countries have legislated laws to recognize electronic contracts. The conventional law involving to contracts is not satisfactory to address all the issues that arise in electronic contracts. The Information Technology Act describes some of the irregular issues that arise in the formation and verification of electronic contracts.

## **The Indian Law of Contract**

### **What is a Contract?**

The Contracts or agreements between various parties are framed and validated by the Indian Contract Act. Contract Act is one of the most central laws that regulates and oversees all the business wherever a deal or an agreement is to be reached at. The following section will tell us what a contract is.

We will see how a contract is defined by The Indian Contract Act, 1872. We will also define the terms as per the Act and see what that means. In these topics, we will decipher all the vivid aspects of the Contract Act. Let us begin by understanding the concept of a contract.

### **Contract Act**

The Indian Contract Act, 1872 defines the term “Contract” under its section 2 (h) as “An agreement enforceable by law”. In other words, we can say that a contract is anything that is an agreement and enforceable by the law of the land.

This definition has two major elements in it viz – “agreement” and “enforceable by law”. So in order to understand a contract in the light of The Indian Contract Act, 1872 we need to define and explain these two pivots in the definition of a contract.

### **Agreement**

The Indian Contract Act, 1872 defines what we mean by “Agreement”. In its section 2 (e), the Act defines the term agreement as “every promise and every set of promises, forming the consideration for each other”.

Now that we know how the Act defines the term “agreement”, there may be some ambiguity in the definition of the term promise.

### **Promise**

This ambiguity is removed by the Act itself in its section 2(b) which defines the term “promise” here as: “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Proposal when accepted, becomes a promise”.

In other words, an agreement is an accepted promise, accepted by all the parties involved in the agreement or affected by it. This definition thus introduces a flow chart or a sequence of steps that need to be triggered in order to establish or draft a contract. The steps may be described as under:

## **The definition requires a person to whom a certain proposal is made**

The person (parties) in step one have to be in a position to fully understand all the aspects of a proposal.

“signifies his assent thereto” – means that the person in point one accepts or agrees with the proposal after having fully understood it.

Once the “person” accepts the proposal, the status of the proposal changes to “accepted proposal”.

“accepted proposal” becomes a promise. Note that the proposal is not a promise. For the proposal to become a promise, it has to be accepted first.

Thus, in other words, an agreement is obtained from a proposal once the proposal, made by one or more of the participants affected by the proposal, is accepted by all the parties addressed by the agreement. To sum up, we can represent the above information below:

Agreement = Offer + Acceptance.

### **Enforceable By Law**

Now let us try to understand this aspect of the definition as is present in the Act. Suppose you agree to sell a unicorn for ten magic beans with a friend. Can you have a contract for this?

Well if you follow the steps in the previous section, you will argue that once you and your friend agree on the promise, it becomes an agreement. But in order to be a contract as per the definition of the Act, the agreement has to be legally enforceable.

Thus we can say that for an agreement to change into a Contract as per the Act, it must give rise to or lead to legal obligations or in other words must be within the scope of the law. Thus we can summarize it as Contract = Accepted Proposal (Agreement) + Enforceable by law (defined within the law)

## **WHAT IS ELECTRONIC CONTRACT?**

The Indian Contract Act, 1872 governs the manner in which contracts are made and performed in India. It governs the way in which the requirements in a contract are implemented and codifies the effect of a breach of vowed provisions.

Within the outline of the Act, parties are free to contract on any terms they choose. Indian Contract Act comprehends of limiting factors subject to which contract

may be entered into, executed and breach enforced. It only provides an outline of rules and regulations which govern creation and performance of contract. The rights and duties of parties and terms of agreement are definite by the contracting parties themselves. The court of law acts to enforce agreement, in case of default.

Electronic contracts (contracts that are not paper based but rather in electronic practice) are born out of the need for speed, suitability and efficiency. Imagine a contract that an Indian exporter and an American importer wish to enter into. One option would be that one party first pulls up two copies of the contract, signs them and couriers them to the other, who in turn signs both copies and couriers one copy back. The other option is that the two parties meet someplace and sign the contract.

In the electronic age, the whole contract can be completed in seconds, with both parties simply attaching their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a situation. There was initially a hesitation amongst the legislatures to recognize this modern technology, but now many countries have passed laws to recognize electronic contracts.

### **Essentials of an electronic contract:**

As in every other contract, an electronic contract also requires the following necessary requirements:

#### **1. An offer is required to be made**

In many contacts (whether online or conventional) the offer is not made directly one-on-one. The consumer 'browses' the available goods and services showed on the seller's website and then chooses what he would like to purchase. The offer is not made by website showing the items for sale at a particular price. This is essentially an invitation to offer and hence is revocable at any time up to the time of acceptance. The offer is made by the customer on introduction the products in the virtual 'basket' or 'shopping cart' for payment.

#### **2. The offer needs to be acknowledged**

As stated earlier, the acceptance is usually assumed by the business after the offer has been made by the consumer in relation with the invitation to offer. An offer is revocable at any time until the acceptance is made.

### **Processes available for forming electronic contracts include:**

**I. E-mail:** Offers and acceptances can be exchanged entirely by e-mail, or can be collective with paper documents, faxes, telephonic discussions etc.

**II. Web Site Forms:** The seller can offer goods or services (e.g. air tickets, software etc.) through his website. The customer places an order by completing and communicating the order form provided on the website. The goods may be actually delivered later (e.g. in case of clothes, music CDs etc.) or be directly delivered electronically (e.g. e-tickets, software, mp3 etc.).

**III. Online Agreements:** Users may need to take an online agreement in order to be able to avail of the services e.g. clicking on “I accept” while connecting software or clicking on “I agree” while signing up for an email account.

### **3. There has to be legal consideration**

Any contract to be enforceable by law must have legal consideration, i.e., when both parties give and receive something in return. Therefore, if an auction site eases a contract between two parties where one Ecommerce – Legal Issues such as a person provides a pornographic movie as consideration for purchasing an mp3 player, then such a contract is void.

### **4. There has to be an intention to create lawful relations**

If there is no intention on the part of the parties to create lawful relationships, then no contract is possible between them. Usually, agreements of a domestic or social nature are not contracts and therefore are not enforceable, e.g., a website providing general health related data and instructions.

### **5. The parties must be able to contract.**

Contracts by minors, lunatics etc. are void. All the parties to the contract must be lawfully competent to enter into the contract.

### **6. There must be free and unaffected consent**

Consent is said to be free when there is absence of coercion, misrepresentation, undue influence or fraud. In other words, there must not be any agitation of the will of any party to the contract to enter such contract. Usually, in online contracts, especially when there is no active real-time communication between the contracting parties, e.g., between a website and the customer who buys through such a site, the click through process ensures free and genuine consent.

### **7. The object of the contract need to be lawful**

A valid contract presumes a lawful object. Thus a contract for selling narcotic drugs or pornography online is void.

### **8. There must be conviction and possibility of performance**

A contract, to be enforceable, must not be ambiguous or unclear and there must be possibility of performance. A contract, which is impossible to perform, cannot be enforced, e.g., where a website promises to sell land on the moon.

### **TYPES OF ELECTRONIC CONTRACTS**

Generally, there are three types of E-Contracts, as follows;

**Click Wrap Contracts:** A click wrap Contract is mostly found as a part of a software. These agreements are rigid in nature and there is no chance of negotiation in it. Because the user of such software has only two options, that is to agree and use that particular software or to disagree with terms and conditions and not to use that particular software.

**Browse Wrap Contracts:** A browse wrap agreements are generally found in a website or a downloadable product, these contracts are published on a particular webpage and user have to find these terms and conditions by browsing to that particular web page. Because generally these contracts are hidden

**Shrink Wrap Contracts:** A Shrink Wrap contract is the former license agreement required upon the buyer when he buys software. Before he or she tears the pack to use it, he or she is made mindful by tearing the cover or the wrap that they are sure by the license agreement of the manufacture. This is done as previous deliberated to protect the interests of the manufacturer where the consumer cannot replicate the package, copy it or sell it or donate it to others moving the sale of the software. The license, which is contracted and enfolded in the product, which becomes enforceable and taken as consent before the buyer tears the package. The usual sections that are part of the shrink-wrap license are that of:

- a) prohibiting illegal creation of copies
- b) prohibiting payments of the software
- c) prohibition of contrary engineering, de-compilation or adjustment
- d) prohibition of usage in more than one computer definite for that purpose

e) disclaimer of contracts in respect of the product sold

f) limitations of responsibility

The reason and business sense is that to guard the manufacturer of the package, as it is easy to copy, operates and duplicate under other brand name. Critiques contend that shrink-wrap license agreement is in contradiction of the basic principle of contract of offer, consideration and acceptance as the licensee is unsettled.

## **LEGAL FRAMEWORK RELATING TO E-CONTRACT**

With the growing importance and value of e-contract in India and across the world, the different stakeholders are continuously identifying and evaluating the nuances of legal outline relating to it. The participation of different service providers in the transaction of e-contract, which includes a payment gateway, the main website, the bank or card verification website, the security authorization website and the final service provider which can also comprise the shipping agent has made the E-contract business more complex. Therefore, the need for amendable it has augmented. In India, till date there are no definite legislations or guidelines protecting the buyers and sellers of goods and services over the electronic medium. 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**

Like any other types of business, E-contract business also works on the basis of contracts. It is therefore, structured by the Indian Contract Act, 1872. Any valid and legal E-contracts can be designed, completed, and enforced as parties replace paper documents with electronic parallels. The contracts are move in between the service providers or sellers and buyers.

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. The actual scope of the security provided under these regulations would only be known after judicial interpretation of the provisions. However, now it has been



explained that even foreign intermediaries delivered to provide service can be sued in India.

The authority of the transactions of E-contract is established under the Information Technology Act, 2000 (IT Act, 2000). It explains the reasonable mode of acceptance of the offer. IT Act, 2000 also rules the revocation of offer and acceptance. However, definite provisions that regulate E-contract transactions conducted over the internet, mobile phones, etc. are vague. With numerous cross border transactions also being conducted over the internet, specific law guarding the Indian customers and Indian businesses are essential and Indian laws are gravely insufficient on this issue.

In a bid to safeguard security, the government has made digital signatures necessary in several E-contract transactions mainly in the government to government (G2G) or government to business (G2B) framework with a view to safeguarding the identity of the transacting parties. E-contracts transactions on these modes require digital signatures as essential parts. They are used for the verification of the electronic contracts. These are controlled by the IT Act, 2000 which provides the outline for digital signatures, their issues and verification. The Act thus tries to safeguard that trust between both the parties is maintained through verification of identities and help prevent cybercrimes and ensure cyber security practices.

### **Signature and Jurisdiction for Electronic Contract**

Information Technology Act, 2000 recognizes digital signature as validation of e-contract contracts. Information Technology (Amendment) Act, 2008 has substituted the term 'digital signature' with the term 'electronic signature.' A digital signature is the technology specific and is irreversibly unique to both the document and the signer. However, an electronic signature is technology unbiased and general in nature. However, there is no standard for electronic signature. It can be either a typed name or digitized image of a handwritten signature.

Indian courts do recognize contracts executed over email. For instance, in the case of Trimex International FZE Limited, Dubai vs. Vendata Aluminum Ltd., the Supreme Court of India held that the contract between the parties was unconditionally accepted through e-mails and was a valid contract which satisfied the requirements of the ICA.

Since e-contracts are not physically signed and are concluded in a virtual space, determining territorial jurisdiction in case of any dispute might be a challenge.

Hence, e-contracts should mention what would be the governing laws and which court would have jurisdiction to try disputes arising out of the contract.

If any jurisdiction is not mentioned in an e-contract, the jurisdiction can be determined based on the principal place of business of either party. For instance, in the case of PR Transport Agency vs. Union of India, the Allahabad High Court decided the territorial jurisdiction based on the principal place of business of the petitioner (PR Transport Agency) for a contract communicated and accepted over email.

The process of paying stamp duty as defined under the stamp laws is applicable only for physical documents and is not feasible for e-contracts.

### **Is Electronic Contract Unfair to Customers?**

In general, there is little or no scope for negotiations between e-commerce platforms (websites) and end users (customers) for the terms of online contracts. Most of the time, it's the case of take-it-or-leave-it for the end user i.e. either the end user will have to accept all the terms in the contract, for example – delivery time, replacement/warranty terms or mechanism for dispute resolution, and accept the same or don't accept the terms and leave the site.

Then the questions arise whether such standard contracts could be considered unfair, i.e. unconscionable and may be struck down by the courts.

Indian courts have dealt with cases where the parties to a contract had unequal bargaining positions. Indian Contract Act states that if the consideration or object of the contract as opposed to public policy or is immoral or is fraudulent or involves injury to the person or property of another person, then the contract cannot be valid.

Also, in such cases, the courts can put a burden on the person in the dominant position to prove that the contracts were not induced by undue position.

In the case of **Lily White v R Munuswami**, the court held that a limitation of liability clause printed on the back of a bill issued by a laundry, which restricted the liability of the laundry to 50% of the market price of the goods in case of loss, was against public policy and therefore void.

In the case of **LIC India v. Consumer Education & Research Center**, the Supreme Court declared certain clauses in the policy, which restricted the benefit of the policy only to the Government employees, as void under article 14 of the Constitution.

Hence, it is essential to have well thought out terms in online contracts, giving adequate opportunity to the customers to familiarize themselves with the terms of the contract

## **POSITION OF E-CONTRACT IN INDIA**

Indian Railway Catering and Tourism Corporation Limited

Indian Railway Catering and Tourism Corporation Limited (IRCTC) is certainly the major e-commerce site in India and in India's answer to private capitalist ventures. IRCTC was set up as a subsidiary of the Indian railways for the exclusive purpose of providing catering services and ticketing services for the Indian Railways. However, of late, it has extended its wing and now covers sectors such as flights and hotel bookings. The flagship was established in 2002 and has transformed the online travel booking business in India. IRCTC functions both in the business to business and business to consumer segment. According to the data released by IRCTC, it has more than 4-4.5 lakh reservations per day.

The site offers the only link for purchasing Indian railway tickets online and even agent sites (B2B) have to link them to IRCTC to provide online booking services for customers. IRCTC offers a large option for consumers for payment of buying tickets online. IRCTC however, is one of the few enduring e-commerce sites which charged transactions charges from customers, which is different bank to bank.

Through IRCTS several customer enter daily into a new dimension of contract i.e. E-contract. E-contract now plays an important role both for the customer and the seller. Customer has a lot of choice to choose a product and seller through e-contract reach to large customers.

## **CONCLUSIONS**

E-contract in India has definitely come a long way from the days of bazee.com which underway as the first large online retail website. At present, with the increase in number of internet user, e-contract is organized to grow further. The growing trend of internet banking and credit or debit cards along with the rise in the number of educated and computer literate persons will further support this growth. The need of the hour is law which covers all the aspects of e-contract extending from payment mechanism and maintaining minimum standards in the

delivery of services. Such a legislation will help to restrain the growth of websites which rise within a few days and then stop functioning in the absence of suitable funds for sustenance. As all business through e-contract sites is ended through the internet without any direct physical interfaces, the main basis connections is the trust of the customers which should be engaged at any cost. A law in this field will detect the criminals who have used the internet as a source for making quick money. This will also act a defense for the genuine e-contract websites and help in further growing of business. There is also a need for the creation of an authority in the consumer court to look into the grievances arising out of e-contract transactions. Such an authority should have experts in area such as payment security. This will embolden speedy redressal of disputes and promote e-contract transactions. E-contract which is a developing segment in the commercial arenas scheduled to grow and it is the accountability of the prevailing players to ensure that growth is not hindered by their acts and policies.