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NEW EMERGING TRENDS OF CONTRACTS IN INDIA ISSUES AND CHALLENGES

A DISSERTATION SUBMITTED TO

LAW COLLEGE DEHRADUN, UTTARANCHAL UNIVERSITY

IN PARTIAL FULFILMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

B.A.LL.B.(HONS.)

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2024

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I, ABHISHEK KAJLA, a student of **B.A.LL.B.(Hons.),** final year of Law College Dehradun, Uttaranchal University, Uttarakhand with roll no. 1912000213 and **Enrollment No.UU1912000006**, do hereby declare that this dissertation "**NEW EMERGING TRENDS OF CONTRACTS IN INDIA ISSUES AND CHALLENGES**" is an original work of mine and is a result of my own intellectual efforts. I have quoted titles of all original sources i.e. original documents and the name of the author whose work has helped me in writing this research paper have been placed at appropriate places. I have not infringed copy rights of any other author.

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This is to certify that dissertation entitled "NEW EMERGING TRENDS OF CONTRACTS IN INDIA ISSUES AND CHALLENGES" which is being submitted by **ABHISHEK KAJLA** for the award of degree of **B.A.LL.B (Hons)** is an independent and an original research work carried out by her.

The dissertation is worthy of consideration for the award of B.A.LL.B (Hons.) degree of Law College Dehradun , Uttaranchal University, Uttarakhand.

Mr. ABHISHEK KAJLA has worked under my guidance and supervision to fulfill all requirements for the submission of this dissertation.

The conduct of research scholar remained excellent during the period of research.

Date:

Place: Dehradun **Dr. Khaleeq Ahmad**

(Assistant Professor)

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Date -

Place - Dehradun **(ABHISHEK KAJLA)**

PREFACE

The subject research work has been divided into five major Chapters and further divided into various sub topics and sub to sub topics.

The first Chapter, Contracts and agreements have played a crucial role in human societies for thousands of years, facilitating various economic, social, and political interactions. In India, a land with a rich historical and cultural heritage, the concept of contracts can be traced back to ancient times

The second chapter deals with the overall scenario of the world has gone sea change with the advent of Internet and hence its effect on the law of contract is not an exception. It has affected every walk of life. The Supreme Court has time and again reiterated and reaffirmed that law has to keep pace with the technology and promotes to include every kind of technology in the present law of contract keeping in view the flexible language of the Contract Act.

Chapter three deals with the The law relating to contracts in India is contained in Indian Contract Act, 1872. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to all the states of India except the state of Jammu and Kashmir.

Chapter four deals with the global medium has transformed the world into one single community; one single ‘global place’ powered by high speed and having enormous potential.

Chapter five deals with the conclusion and suggestions of the evolution of contracts and agreements in India reflects the country's historical, cultural, and economic journey. From its ancient roots in religious texts to the amalgamation of indigenous practices with English common law during colonial rule, India's contract law has continually adapted to meet the changing needs of its people.

LIST OF ABBREVIATIONS

AIR	All India Reporter
Art.	Articles
CISG	Contracts for International Sale of Goods
CPC	Civil Procedure Code
ICC	International Chamber of Commerce
S.	Secion
SNS	social networking sites
UNCITRAL	United Nations Commission on International Trade Law

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CHAPTER –ONE
INTRODUCTION

1.1 INTRODUCTION

Contracts and agreements have played a crucial role in human societies for thousands of years, facilitating various economic, social, and political interactions. In India, a land with a rich historical and cultural heritage, the concept of contracts can be traced back to ancient times. Over the centuries, the evolution of contracts and agreements in India has been influenced by diverse factors such as religion, trade, colonial rule, and legal reforms. This article explores the fascinating journey of how contract law has developed in India, from its ancient roots to the modern legal framework. India's contract law landscape is continually changing due to a number of causes, such as expanding legal frameworks, shifting market dynamics, and technological improvements. A number of recent developments have caused the Indian legal system's perspective on the formation, negotiation, and enforcement of contracts to start to shift. This changes present opportunities as well as difficulties, so stakeholders must be creative and flexible to stay ahead in a setting that is changing quickly. This essay will examine some of the most significant recent modifications to Indian contracts, emphasizing the difficulties and problems they raise. Stakeholders, including companies, lawyers, and lawmakers, can more skillfully negotiate the complexity of contemporary contracting processes by being aware of these patterns and their ramifications.

The concept of contract has been known to man since the dawn of human civilization. Contract law is invariably used every day, in every manner of transaction be it large or small every now and then. The growth of commercial and industrial culture, law of contract acquired significance. Original contract law was designed to handle agreements that was reached by persons knowing well to each another and in case of contract between person at a distance, problems posed by contract formation was evolved over time, thus contract law apparently developed to handle oral transactions were slowly replaced by written documents, then telegraphic, and finally telephonic communications. It has handled those changes amicably. In its present form, contract law can be traced back to the middle of the nineteenth century. At that time, the new worlds of the telegraph and the railroad led to the adoption of such novel doctrines as the law of consequential damages and the law of third-party beneficiaries.

Sir Henry Maine in his first documented work on *concept of contract* named as '*Ancient Law*' and according to it, in early societies, both static and progressive, the legal condition of the individual was determined by status and the march of progressive societies witnessed the dismantling of

status and determination of the legal condition of the individual by free negotiation on his part. This was expressed in the dictum, "The movement of progressive societies has hitherto been a movement from status to contract".[1] He also propositioned that family was the unit of ancient society which in the present society shifted to individual. The disintegration in the family system and end of the dependency on the *pater familias* hurled emergence of contractual relations among individual. Further development in society brought in different classification amongst persons based on their class. With this, there was change in perception of one's rights and such rights varied from person to person based on their class or status. Most of the times, transactions between persons were mainly based on trust, faith and goodwill. The society was very simple and people carried on their transaction orally with absolute belief in other person. Performance of one's role was considered as highest moral conduct and society always appreciated such high moral conduct. On the other hand, non-performance of one's role was considered as out of low morality. People believed in high moral conduct and any person not showing such high moral conduct was looked down by other members. Law gradually and accordingly recognized the individual as the sole subject matter of rights and duties instead of *pater familias* which was previously the sole repository of power.

Now coming to contracts, it is treated as right *in personam*. Generally, a contract is a promise or a set or promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. The correlation between contracts and title has been described by Salmond as acts in the law 'and whereas Paton described such relation as juristic act. According to Paton, by juristic acts, legal persons create, modify, or destroy rights and duties and there by affect legal persons.[2]

In the 1990s, however, things began to change. The period since then witnessed use of computers by individuals. Presently, almost each and every home owns a personal computer or laptop. In the developed world, the present generation cannot imagine life without computers and internet. Presently, large chunk of population is fastened to social networking sites (SNS), a future is about to come where in a baby of a year old will own an account on social networking sites. Every departmental work is carried out online, either it may be procurement contracts or announcing of exam results. Computers have invaded every aspects of the human life and the impact has been so quick that it caught the institutions of law and justice unprepared. The new developments in

[1] As cited in Nancy S. Kim, "Two Alternate Visions of Contract Law in 2025", 52 *Duquesne Law Review* 303-321 (2014).
[2] G.W. Paton, *A Textbook of Jurisprudence*, 4th Ed., Oxford University Press, London, 1972, p. 308.

information and communication technologies are posing challenges to the fundamental principles of law, which worked well before the advent of this technology. The problems have been compounded by the introduction of World Wide Web. The advent of the internet gave rise to two parallel developments, both of them challenged the law of contract formation. An electronic contract is a document that has been produced and signed in electronic form, i.e., no paper or other hard copies are used. For e.g., on your computer, you write a contract and email it to a business partner, and the business partner emails it back with an electronic signature signaling approval. An e-contract can also be in the form of a Click to agree contract, widely seen for downloaded applications: before the agreement can be concluded, the user clicks the I Agree button on a page containing the software licensing terms. Computer networks are now evolving, despite slow advancement in the field of artificial intelligence, and can function not just automatically, but also autonomously. Artificial Intelligence mechanisms include the creation of intentions, decision-making, and permission giving and withholding, which ensures that humans may have considerable decision-making autonomy that helps computer systems to perform extremely complex tasks requiring specific decisions. Now the question that emerges in our minds is whether the mechanisms that are called free will of humans can be repeated by a computer machine and what the legal implications will be.

1.2 DEFINATION

"An agreement enforceable by law is a contract."

This definition is a fundamental principle of contract law and was formulated by Sir James Fitzjames Stephen, who played a crucial role in drafting the Indian Contract Act.

1.3 SCOPE

The scope of the Indian Contract Act, 1872, encompasses the comprehensive legal framework governing the formation, execution, and enforcement of contracts in India. It defines the essential elements of a valid contract, including offer, acceptance, consideration, and the intention to create legal relations. The Act specifies the rules for various types of contracts, such as express and implied contracts, and addresses the capacity of parties to contract, ensuring that only those with legal competence can enter into binding agreements. It emphasizes the necessity of free consent and the legality of object and consideration, outlining conditions that can invalidate a contract. Furthermore, the Act details the performance and discharge of contracts, providing remedies for breach, including damages and specific performance. Special provisions for contracts of

indemnity, guarantee, bailment, pledge, and agency are also included, making the Act a fundamental pillar in the regulation of contractual relations in India.

1.4 TYPES OF CONTRACTS

(A) On the basis of validity

1. Valid contract: An agreement which has all the essential elements of a contract is called a valid contract. A valid contract can be enforced by law.

2. Void contract [Section 2(g]: A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may be valid and binding on the parties. It may subsequently become void. – There are many judgments which have stated that where any crime has been converted into a "Source of Profit" or if any act to be done under any contract is opposed to "Public Policy" under any contract—than that contract itself cannot be enforced under the law.

3. Voidable contract [Section 2(i)]*:* An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract. If the essential element of free consent is missing in a contract, the law confers right on the aggrieved party either to reject the contract or to accept it. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.

4. Illegal contract: A contract is illegal if it is forbidden by law; or is of such nature that, if permitted, would defeat the provisions of any law or is fraudulent; or involves or implies injury to a person or property of another, or court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void-ab-initio. “All illegal agreements are void agreements but all void agreements are not illegal.”

5. Unenforceable contract: Where a contract is good in substance but because of some technical defect cannot be enforced by law is called unenforceable contract. These contracts are neither void nor voidable.

(B) On the basis of formation

1. Express contract: Where the terms of the contract are expressly agreed upon in words (written or spoken) at the time of formation, the contract is said to be express contract.

2. Implied contract: An implied contract is one which is inferred from the acts or conduct of the parties or from the circumstances of the cases. Where a proposal or acceptance is made otherwise than in words, promise is said to be implied.

3. Quasi contract: A quasi contract is created by law. Thus, quasi contracts are strictly not contracts as there is no intention of parties to enter into a contract. It is legal obligation which is imposed on a party who is required to perform it. A quasi contract is based on the principle that a person shall not be allowed to enrich himself at the expense of another.

Examples

- claim for necessaries supplied to person incapable of contracting or on his account
- Reimbursement of person paying money due to another, in payment of which he is interested
- obligation of person enjoying benefit of non gratuitous act
- Responsibility of finder of goods
- Liability of person to whom money is paid or thing delivered

(C) On the basis of performance:

1. Executed contract: An executed contract is one in which both the parties have performed their respective obligation.

2. Executory contract: An executory contract is one where one or both the parties to the contract have still to perform their obligations in future. Thus, a contract which is partially performed or wholly unperformed is termed as executory contract.

3. Unilateral contract: A unilateral contract is one in which only one party has to perform his obligation at the time of the formation of the contract, the other party having fulfilled his obligation at the time of the contract or before the contract comes into existence.

4. Bilateral contract: A bilateral contract is one in which the obligation on both the parties to the contract is outstanding at the time of the formation of the contract. Bilateral contracts are also known as contracts with executory consideration.

1.4 HISTORICAL DEVELOPMENT OF CONTRACT LAW IN INDIA

The 18th and 19th centuries witnessed the growth of commercial and industrial culture and with that law of contract also acquired significance. In early societies, both static and progressive, the legal condition of the individual was determined by status and the march of progressive societies witnessed the dismantling of status and determination of the legal condition of the individual by free negotiation on his part. Social contract theories were the basis of the notion of free contract of agreement between people and the rulers. The concept of liberty, equality and fraternity of the French revolution, doctrine of in alienable natural rights of man of the American Declaration of Independence; philosophy of laissez faire in economic, political and legal theories; relationship between master and servant; employer and workmen, wife and husband, parents and children etc. are the examples to support the dictum movement from status to contract. Gradually society recognized individual rights and the concept to fright attained some prominence During European renaissance every right arose from a title. The term title 'is derived from the term Titulus of Roman law and Titre of French law.[3] So also legal protection, of an interest without its legal recognition cannot make it a legal right. It is commonly agreed that right exists upon the base of obligations. In this chapter, the researcher has tried to find traces of contractual obligations since antiquity.

1.4.1 Vedic and Medieval Period

During the entire ancient and medieval periods of human history in India, there was no general code covering contracts. Principles were thus derived from numerous references - the sources of Hindu law, namely the Vedas, the Dhramshatras, Smritis, and the Shrutis give a vivid description of the law similar to contracts in those times. The Smritikaras dealt contract law by taking up titles one after another. That doesn't mean they did not say anything about general principles of contracts. They did say a good deal about the competence of persons to enter into contracts, about fraud vitiating all contracts, about damages for breach of contracts and etc… Manu declares that a fraudulent mortgage or sale, fraudulent gift or acceptance, and any transaction where the fraud is detected, shall be null and void and also what is given under the threat of force, what is enjoyed under the threat of force, and any document prepared under the threat of force all transactions executed under the threat of force has declared to be void.

The rules governing contracts form a part of the law called Vyavaharmayukha. The concept of contract originated in the Vedic period when read can be linked to Smritis.[4] The general rules of contract bear a striking resemblance to the modern law of contract. For e.g. as mentioned in the Manusmriti, the first and the foremost requirement for a contract process to start is the competence of the persons who are willing to enter into a contract. This norm laid down for competence

[3] V.D. Mahajan, *Jurisprudence and Legal Theory*, 5thEd., Eastern Book Company, Lucknow, 2010, p. 275.
[4] Chesire and Fifoot and Furmston, *Contract Law;* (1986) Butterworth and Com. Id at p.19-26

corresponds with the provisions of the present law, namely, dependents, minors, sanyasis, persons devoid of limbs, those addicted to vices were incompetent to contract (Section 11, Indian Contract Act). Manu Smriti's Chapter VIII para 163 gives list of person incompetent to enter into contract. A contract, entered into by an insane or intoxicated person, a cripple, a dependent, an infant (minor) or a very old person or by a person not authorized by the party on whose behalf he entered into the contract, is invalid.[5]

The Naradsmriti categorizes competent persons into three, the king, the Vedic teacher and the head of the household. In this regard Naradasmriti says an infant upto eight to an embryo. After that age till sixteen it is boyhood. After sixteen only a person is competent to enter into contract. But one becomes independent after one's father's death. From this we can understand that earlier the age of majority was sixteen.[6] The concept of liability in contract law finds its birth in the Vedic period too. Spiritual debts were referred asrina 'and it was constantly reinforced by the Smritis that failure to pay back the debts meant re-birth as a slave, servant, woman or beast in the house of creditor. So, the son was liable to pay of his father's debts even if he did not inherit any property from him. Towards the end of the medieval age, the law of contracts was pretty much being governed by two factors, the moral factor and the economic factor. Activities like transfer of property, performance of services etc. required rules for agreements and promises, which covered not just business and commercial transactions, but also personal relationships in all walks of life. This takes us to the next source, i.e. the Arthashastra by Kautilya, which is considered to be the only existing secular treatise on politics and governments. Kautilya repeats the same disqualifications and further includes another disqualifications such as a father's mother, a son, a father having a son, an outcast brother, the youngest brother of a family of undivided interests, a wife having her husband or son, a slave, a hired. labourer, any person who is too young or too old to carry on business, a convict (Abhisasta), a cripple, or an afflicted person.[7] During Chandragupta's reign, contract existed in the form of bilateral transactions between two individuals of group of individuals. The essential elements of these transactions were free consent and consensus on all the terms and conditions involved. It was an open contract openly arrived at. It was laid down that the following contracts were void contracts formed during the night. Contracts entered into the interior compartment of the house. Contracts made in a forest contracts made in any other secret place.

The concept of liability was developed as early as the Rig Vedic period. It was constantly

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[5] *Ibid*.

[6] Justice M. Rama Jois, *Legal and Constitutional History of India*, 1st Ed., Universal Law Publishing Co. Pvt. Ltd., Delhi, reprint 2005, p. 75

[7] Kautilya, *Arthashastra*, trans. R. Shamasastry, Government Press, Bangalore, 1915, p.213

reinforced by the Smritis that failure to pay back the debts implied rebirth of the defaulter as a slave/servant/woman or beast in the house of the creditor. So, the son was liable to pay off his father's debts even if he did not inherit any property from him.

Ancient Indian Society, unlike Christian and Islamic Society, accepted money lending as an occupation. Usury was a sin when the usurer cheated the debtor, or for example, when he lent goods of a lower quality, but received goods of a higher quality in return, or if he extracted fourfold or eightfold return from a distressed debtor. The creditor could advance a loan on adequate pledge or deposit with a mutual friend, or a reliable surety, if the transaction was made in writing or in the presence of a witness. Debtors of all castes were liable to pay interest agreed to with creditors of all castes. The interest would be fixed with reference to the article pledged, or surety given, or with reference to a totally unsecured debt, in the latter case, the interest could be higher. Although, all commentaries are not in agreement with the amount of interest to be charged, they all agree that it was sinful to take exorbitant interest, and that interest rated imposed by force could not be enforced in a court. The Yajnavalkya Smriti provided that in the case of cattle being loaned, their progeny was to be taken as profit. The fact that debts were not necessarily recoverable from a man himself, his descendants were also liable, and hence there was practically no limitation for bringing a suit for money lent. The rule also encouraged creditors to allow interest to increase. The rule of Damdupat is followed in many parts of India.[8]

Katyanana says, about breach of contract that where there is a failure (to perform a contract) even though an earnest had been given by one party, then (the king) should make the other party (who is in default) pay double (of earnest). The purpose of taking an earnest is to make the party suffer the loss of it when he does not abide by the agreement.

There were certain exceptions to clandestine contracts such as: Contracts made toward off violence, attack and Contracts made in celebration of marriage Contracts made under orders of government Contracts made by traders, hunters, spies and others who would roam in the forest frequently. The rights and duties (of a bailee) in a bailment, as we know it today in the form of sections 151 and 152 of the Indian Contract Act, 1872, has its root to the Katyaynasmriti containing a special provision called the Silpinyasa' dealing with the deposit of raw materials with an artisan talking about the degree of care attached. The text laid down that if an artisan does not return the things deposited with him during the stipulated time, he should be made to pay its price even in the cases, where the loss is due to acts of God or King. The artisan, however, is not responsible for the loss of an article which was defective at the very time of bailment, unless the loss is due to his own fault.

[8] Law of Contract until 1950.

It is also interesting to note that there was no limitation 'for bringing a suit for money lent. This was because of the rule of Damdupat' which laid down that the amount of principle and interest recoverable at one time in a lump sum cannot be more than double the money lent.' It took into consideration the fact that debts were not necessarily recoverable from a man himself, his descendants were also liable. Thus there was no concept of a limitation period' for filing a suit. The rule of damdupat is still prevalent in Calcutta and Bombay as it has been upheld to be a valid custom and thus enjoys enforceability under the savings clause, section.[9]

1.4.2 Islamic Law

Islamic Law had a complete and comprehensive law of contract providing for general principles applicable to all contracts.[10] It also supplied rules to govern specific contracts of commercial, mercantile and proprietary nature, like agency (Vakalat), guarantee and indemnity (Zamanat and Tamin), partnership (Shirkat), one person's money and another's work (Muzarabat), bailment (Kafalat),. All transactions were treated as secular contracts, and rules were provided for settlement of all types of disputes, even relating to property and succession.

During the Muslim rule in India, all matters relating to contract were governed under the Mohammedan Law of Contract. The word contract in Arabic is Aqd meaning a conjunction. It connotes conjunction of proposal (Ijab) and acceptance which is Qabul. A contract requires that there should be two parties to it one party should make a proposal and the other accept it, the minds of both must agree that is there declaration must relate to the same matter and the object of contract must be to produce a legal result. It also supplied rules to govern specific contracts to commercial, mercantile and proprietary nature like agency (Vakalat), guarantee and indemnity (Zamaanat and Tamin), partnership (Shirkat), one person's money and another's work (Muzarabat), bailment (Kafalat). All transactions were treated as secular contracts and rules were provided for settlement of all types of disputes even relating to property and succession.

Another thing to be noted is that under Islamic Law even marriages (Nikah) were treated as contracts and till date the situation remains the same. Either of the parties to the marriage makes a proposal to the other party and if the other party accepts, it becomes a contract and the husband either at the time of marriage or after it has to pay an amount to the wife as a symbol of respect known as Mahr. Also the Mahommedans were the firsts to recognize the concept of divorce. This way, a party to marriage could absolve itself of the contractual obligations under marriage. Muslim marriages are thus considered contracts for these reasons[11].

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[9] *Ibid*

[10] Tahir Mahmood, *Muslim law of India*, Second Ed., 1983, pp. 188-189.

[11] Shivamlawworld.blogspot.com/.../history-of-indian-contract act 1872.ht.accessed on 22.11.2014

CHAPTER 2

LEGAL PROVISIONS AND LEGAL FRAMEWROK

2.1 Introduction

The overall scenario of the world has gone sea change with the advent of Internet and hence its effect on the law of contract is not an exception. It has affected every walk of life. The Supreme Court has time and again reiterated and reaffirmed that law has to keep pace with the technology and promotes to include every kind of technology in the present law of contract keeping in view the flexible language of the Contract Act. Although it is a fact that Contract Act has not contemplated such exigency but nowhere the contract has prohibited the use of such devices which was not feasible when the Contract Act was passed 144 years ago.

The formation of a contract in cyberspace has puzzled academicians and legislators of several countries. The traditional rules of formation of contracts in the offline world are moiré or less settled. And the same principles may not find equal application on the Internet. For instance, when will a contract be deemed to be formed *i.e*. at the time when an acceptance is sent through click of a mouse of when it is actually read by the recipient? Generally, the e-contracting principles tend to follow the traditional rules of contract formation which are adapted to apply to the online environment.

The position deteriorated further. The present law of Contract could not face the contracts based on new technologies such as Email Contracts and other Contracts through electronic media and devices. The use of Computer & Internet is frequent now a days and present law has no provision to regulate the contracts based on these devices. The legislatures felt a strong need for a law regulating contract based on electronic devices.

In the down of 21st century we have in techno-scientific culture by virtual of techno-scientific culture this new millennium has invented digital revolution cyber revolution. The unprecedented growth of the internet has resulted exponential growth of e-commerce. To recognize the transaction carried out by means of Electronic Data Interchange and other means of electronic communication, Indian Parliament keeping in spirit of UNCITRAL[12] enacted the Information Technology Act, 2000 and again its Amendment Act, 2008. The prime objective of this Act was

[12] United Nations Commission on International Trade Law.

to give Legal Recognition for transaction carried out by means of Electronic Data Interchange[13] system and other means of electronic communication commonly referred to as Electronic Commerce. In other words the communication of proposal, the acceptance of proposal the revocation of the proposal and acceptance as the case are expressed in electronic form or by means of electronic records such contract shall be valid.

2.2 CONTRACT UNDER INDIAN LAW.

Indian Contracts Act, 1872.

The ICA includes all the rules applicable to contracts. All the essentials needed to form a legal contract are covered by this law. Any normal contract that satisfies the specifications of the ICA and is paperless or in electronic form is an e-contract. These contracts are as valid as contracts in writing. Any regulatory inquiry concerning e-contracts will then be settled.

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. 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.

Information and Technology Act, 2000.

The Information Technology Act, 2000, established the regulatory basis for e-commerce, making India just the twelfth nation in the world to have such extensive e-commerce laws. This Act further makes major changes to the Indian Penal Code, the Indian Evidence Act, 1872, and the RBI Act, 1934, in order to put them into line with the digital transaction criteria.

Section 10A of the Information Technology Act, 2000 (IT Act) deals with validity of contracts formed through electronic means and states that if in a contract formation, communication and revocation of proposal/acceptance are expressed in an electronic form or by means of electronic records, it will not be considered as unenforceable solely on the ground that electronic form or means was used for that purpose. For any contract to be valid, signatures of parties to contract are required to showcase acceptance of terms and conditions of contract. In case of an e-contract, an electronic signature comes to play.

[13] Section 4, 5, 6, and10 of the Information Technology Act, 2000.

The Information Technology Act, 2000 comes with prescribed aspects of use of electronic records, like attribution to the originator, acknowledgement of receipt , time and place of dispatch and receipt of electronic records.

The IT Act essentially seeks to address three areas or perceived requirements for the digital era:

(a) To make possible e-commerce transactions—both business to business and business to consumer

(b) To make possible e-governance transactions, both government to citizen and citizen to government.

(c) To curb cybercrime and regulate the Internet.

2.3 ISSUE OF JURISDICTION

"The fundamental incompatibility between legal governance as a function of geopolitical territory, and network governance as a function of IP addressing, makes it difficult to impose local limitations on the global dissemination of information".

One raises the question as the case goes to the court as to how and pursuant to what clause would the court admit the suit? This results in a loophole in the legal positioning of electronic contracts. It was not difficult for the formation. The complexity exists because nothing other than the internet is involved! The Internet is a networking mechanism that does not refer to the geographical location of its component elements.

The object of the jurisdiction is, for example, to provide the court with a portal by which a matter moves. It requires the judge, by the power of law, to hear the matter. Thus, the question in the case of e-contracts arises. How would it happen to hear a query where the statute is silent and the parties are geographically distant? It is said that, from the point of view of both the court and the statute, the' concept of jurisdiction is embedded in territoriality.

Section 20, of the Civil Procedure Code,[14] gives power to the civil courts to trial all the cases unless barred by the law. To the case trial by the court the cause of action should be arose within the limits of the court. The courts have delved into the aspects of the jurisdiction governing the contracts.

2.4 DEVELOPMENT IN INDIA

The first draft of the Indian Contract Act, 1872 make by the Third Indian Law Commission was a simplified statement of the English law with modification suitable to India. There were differences

[14] Sec.20, Civil Procedure Code, 1908.

between the views of the Indian Legislature and the Commission, and the commission resigned. The drafting of the future statutes fell upon the Indian Legislative Department. Some proposals of the Commissioners were rejected, whereas some provisions were borrowed from the draft New York Code of 1862. The final draft was the work of Fitz James Stephen. Sir Frederick Pollock has opined that the framers borrowed from various codes of others countries leaving an incongruous effect. But, he says, after allowing for all drawbacks, the result was a generally sound and useful one.

The Contract Act did not cover the entire field of Contract Law. In cases not provided by the Contract Act or other legislative enactments relating to particular contracts, it was incumbent on High Courts in their original jurisdiction to apply Hindu law to Hindus and Mohammedan Law to Mohammedans. The rule of Damdupat[15] of the Hindu law has been applied and is still in force in Maharashtra[16] and in the Presidency Town of Calcutta,[17] but is not recognized outside that town or in the Madras Presidency. An instance is the rule applicable to Hindus governed by the Mitakshara Law in the Bombay Presidency, that in case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable from the date of demand by way of damages. This rule according to the Bombay High Court is not affected either by the Interest Act, 1839 or by the Contract Act. The rule, however, is not applied to Hindus in the Madras Presidency; but such cases have been few, and the Hindu and Mohammedan Laws of Contract may, for all practical purposes, be regarded as superseded by the Contract Act and other enactments relating to particular contracts.

Besides, where any subject was not dealt with by the Act, the courts followed as principles of justice, equity and good conscience, the rules of English Law so far as applicable to the Indian Society and circumstances.[18]

The Contract Act has been amended from time to time. After the enactment of the Contract Act, not only were the provisions contained in the Contract Act relating to Sale of Goods and Partnership removed and enacted as separate pieces of legislation.[19] But other Acts dealing with particular contracts were also passed, namely, the Negotiable Instruments Act, 1881, the Transfer of Property Act, 1883, the Powers of Attorney Act, 1882, the Indian Railways Act, 1890, the Carriage by Air Act, 1934, the Carriage of Goods by Sea Act, 1925 and The Specific Relief Act, 1877, which provided specific remedies relating to contract.

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[15] The rule of Damdupat provides that interest exceeding the amount of the principal cannot be recovered at any one time

[16] *Gopal Ramchandra Limaye* v. *Gangram Anand Shet* (1895) ILR 21 Bom 721

[17] *Nobinchunder Bannerjee* v. *Romesh Chunder Ghose* (1887) ILR 14 Cal 781

[18] *Waghela Rajsanji* v. *Sheikh Masludin* 14 IA 89; *Dada* v. *Babaji* (1865) 2 BHC 36.

[19] The Sale of Goods Act, 1930 and the Indian Partnership Act, 1932.

However, after 1950 the Indian Contract Act, 1872, continued to be in operation by virtue of Art 372(1) of the Constitution of India. Again, the provisions of the Act would be subject to the provisions of the Constitution. Any provision of the Contract Act, if inconsistent with the Fundamental Rights, would be void under Art 13, of the Constitution. Contract of service under the state must be consistent with the provisions of the Constitution.[20]

The subject of contracts, including partnership, agency, contract of carriage and other special form of contracts but not including contracts relating to agricultural land, falls within Entry 7 in List III of the Seventh Schedule of the Constitution of India in the concurrent list. The Parliament as well as legislature of any state has the power to make laws about these subjects.[21] If any provision made by the state legislature is repugnant to any law enacted by the Parliament, the latter prevails. However, if the provisions made by the state legislature is repugnant to earlier provision of law made by Parliament, the provision made by the state legislature would prevail, if the law is reserved for the assent of the President of India has assented to it.

2.5 DEVELOPMENT OF THE ELECTRONIC CONTRACTING CONVENTION

Advancement of Science & Technology has changed the scenario of the world at large. It has affected every walk of life. The law of contract is exception to it. The present law of contract is inefficient and traditional. It is unable to keep pace with time in society due to new technologies which are being used in the formation of contract. The Supreme Court although tried it all best to include every kind of technology in the present law of contract keeping in view the flexible language of the contract act. Although it is a fact that contract act has not contemplated such exigency but nowhere the contract has prohibited the use of such devices which was not feasible when the contract act was passed 145 years ago. Hidayatullah, C.J.I. convinced that through the law was framed at a time when telephones, wireless, Telstar and Early Bird were not contemplated, and the language of section 4 is flexible enough to cover telephonic communication. The courts should not completely ignore the language of the Act. When the word of acceptances is spoken into the telephone, they are put into the course of transmission to the offer or so as to be beyond the power of the acceptor. The acceptor cannot recall them.

In the down of the 21st century we have inculcated techno-scientific culture by virtual of techno-scientific culture this new millennium has invented digital revolution cyber revolution.

The advent of Internet rendered the present Contract Law 1872 incompatible. The position deteriorated further. The present Law of Contract could not face the contracts based on new

[20] *Delhi Transport Corpn* v. *DTC Mazdoor Congress* AIR 1991 SC 101

[21] Art. 246 of the Indian Constitution.

technologies such as email contracts and other contracts through electronic media & devices. To recognize the transaction carried out by means of Electronic Data Interchange and other means of electronic communication, India Parliament capturing the spirit of United Nations Commission on International Trade Law has enacted the Information Technology Act, 2000 and it's Amendment Act, 2008. The prime objective of this Act was to give legal recognition for transactions carried out by means of Electronic Data Interchange[22] system and other means of electronic communications commonly referred to as "electronic commerce"[23] In other words the communication of proposal, the acceptance of proposal the revocation of proposal and acceptance as the case are expressed in electronic form or by means of electronic records such contract shall be valid.

Until 1996 the most important legal instrument for any international sales of goods was the Contracts for International Sale of Goods (CISG). Although it was and still is a great success, it was drafted before electronic communication was developed and neither its language nor its concept seems to fit for the new achievements in digital communication. It was obvious that, despite interpretation and development of the CISG by jurisprudence, it would not apply to all aspects of electronic contracting. Furthermore by developing different interpretations of the provisions in different countries around the world, the lack of legal certainty and predictability in electronic commerce would grow and cause even more confusion. The only solution was to create a legal instrument dealing exclusively with electronic commerce.

The first step was the elaboration of the UNCITRAL Model Law of Electronic Commerce which started in the early 1990s and was completed in 1996. The Model Law on Electronic Commerce developed a coherent set of legal responses to the principal questions posed by electronic commerce, with the goal to remove barriers that traditional legal rules tended to pose to the new practices.

Its prime principle was the non-discrimination of electronic communication. Article 5 of the Model Law for example stated that electronic communication may not be denied legal effect solely because it is done by an electronic medium and article 6 set out that the legal requirement of writing may be satisfied if the electronic record is accessible to be used for subsequent reference. Following the Model Law on Electronic Commerce, the Working Group started generating a Model Law on Electronic Signatures. This Model Law dealt mainly with the question of reliability of electronic signatures. This issue had not yet been discussed in the Model Law on Electronic Commerce, so it was necessary to pursue the question of electronic signatures. The work was

[22] Section 4, 5, 6, 7 and 10 of the Information Technology Act, 2000
[23] *Ibid.*, Section 10 A.

finalized in 2001 and the Model Law on Electronic Signatures was ready to be adopted.

As mentioned above, both Model Laws were widely adopted and were a great success in the field of electronic commerce. Nevertheless it was said, that the problem of legal uncertainty and non-harmonisation had not yet been solved. The problem was that the Model Laws were not binding and the states had flexibility in choosing provisions to implement them in their domestic laws. So countries which have adopted the Model Laws have done so inconsistently and each country has implemented the Model Law differently. This resulted in a significant variation of electronic commerce legislation.

The EU, for example, promulgated the Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('EU Directive on Electronic Commerce'), which differed significantly in scope and content from the Model Law on Electronic Commerce.

Another problem was that several states had already adopted their own national laws on electronic commerce when the Model Laws were elaborated.

It was said, that only the elaboration of a binding Convention on electronic commerce could overcome the lack of uniformity and harmonisation as well as fill the gaps in the present legislation. Only a binding Convention would be adopted without alterations and changes (except for changes which are expressly allowed under the Convention) and would be binding law for signatory states (see: article 26 of the Vienna Convention on the Law of Treaties 1969).

Nevertheless there were also arguments voiced against a new Convention. One of them was that if countries want to promote or just remove legal barriers in electronic commerce they could do so by adopting the Model Laws. If the Convention says the same thing, it would be superfluous, but if it says something different than the Model Laws it would be confusing. It was also argued that there is a sufficient number of legal instruments on electronic commerce and a new one would not harmonise the legal system, but cause even more confusion.

Different approaches were discussed how to solve the existing problem of legal uncertainty and diversity. Some have proposed a modification of the CISG and its adjustment to electronic commerce as a solution, but soon this option was rejected, as more confusion would be caused, in case some countries would adopt the modernised CISG while other countries would still have the 'old' CISG.

Furthermore there was the risk, that an extensive modification would be required, which would produce more costs and delays than the creation of a new legal instrument.

The International Chamber of Commerce (ICC) proposed the development of a new Model Law[24]

[24] Legal Aspects, A/CN.9/WG.IV/WP.101. See also Legal Aspects, A/CN 9/WG.IV/WP.105.

, where new topics could be subject of opt-in private systems of rules, comparable to the various existing ICC rules. Although the system of ICC rules is widely recognized, it was argued, that a new Model Law as proposed by the ICC was not the appropriate legal instrument, since it would not remove the lack of non-conformity, as once again there would be a variety of different legal standards. Additionally it was unclear, if the adoption of the new rules would require a prior contract between the parties or even a statutory base.

Despite these various opposing arguments and different proposals for an approach, a new Convention was still seen as the best solution.

In 2001 the Working Group was tasked with the elaboration of a new Convention on Electronic Contracting in International Trade.

The work started in March at the 39th Session of the Working Group and was finalized at the 44th session in October 2004. It is quite clear, that the drafters were heavily influenced by the CISG (especially in the first chapter of the Electronic Contracting Convention) and by the Model Laws (which can be seen especially in the third chapter of the Convention).[25]

After the Convention was adopted by the UN General assembly on the 23 November 2005, it is open for signature at the UN Headquarters in New York.

2.6 COMPARISON OF LAWS IN NATIONAL AND INTERNATIONAL

2.6.1 English System

Under English system, the Common Law played an important role in development of law of contract. The remedy was broadly granted by way of writ in actions for accounts, surety, debt, covenants and assumpsit. After industrial revolution, there was development in trade and commerce. Slowly, courts started to interpret contracts in different ways without altering basic legal characters. This led to enactment of Contract Act of modern times with retaining its essential ingredients.

2.6.2 Ancient Indian System

Under ancient Indian civilization, the concept of Dharma played a vital role. This ancient Indian civilization prescribed law consisting as religious duties and civil duties / obligation. Anyone who disobeyed the system was punished and this fear of punishment made people to observe dharma scrupulously. Law of contract during that time included debts, deposits and pledges, sale without ownership, mortgages and gifts. As per Yajnavalkya Smriti, it prescribed a disqualification upon a transaction entered into by a person who is intoxicated or insane or afflicted with disease or in

[25] All similarities and differences of the Convention and the CISG as well as of the both Model Laws will be discussed in detail in the relevant articles.

distress etc. Further, laws of that time prohibited enforcement of contracts executed after obtaining consent by other means.

2.6.3 Islamic System

Under Holy Quran, the law of contract was never a legal concept. Quran doesn‘t give references of law of contract, but it speaks about sale, loan, hire-purchase, mortgage, gifts, surety ship, agency. Law of contract under this system primarily based on consent of two person relating their rights. Like English Law, it also prescribes certain qualifications and conditions for formation of contracts.

Now coming to the core topic, the sum and substances of English Law, Ancient Indian Law and Islamic Law is almost same. As these laws originated at different time, different place and amongst different people, absolute similarities cannot be expected. Further, the difference or any special prescription has to be understood in the proper perspective of that time. Generally, these three systems provided almost similar broad structure of contract law. Though expression of certain terms may be different under different system, but, upon careful examination, it can be said that all these three system have same structure. Further, when time factor is taken into consideration, it appears that the Ancient Indian legal system was much developed. Whereas, the English system changed rapidly especially to suit growing commercial activities.

Finally, one striking feature of these three systems is the amount of scholarship put in by those great philosophers and jurists of that time. Even though English law is universally accepted to be the law governing contracts, the concepts and themes proposed under Indian System and Islamic system have great jurisprudential values and cannot be overlooked easily.

Under these three different systems, consensus of mind has been given prominence. As time passed by, and due to changes in political and economy conditions, the English system governing law of contract was accepted as a standard throughout the world. After advent of Britishraj in India, principles of English contract law dominated human transactions. Thus these principles of English contract law made applicable in India. This application of English law substituted Hindu and Islamic law governing contract. The basic principles of offer, acceptance, consideration and capacity to contract became essential elements to the concept of contract in different parts of the world.

The scope of this research is about E-contracts. Therefore, it was necessary to discuss about the principles of contract under different legal systems. Now, developments in information and communication technologies transformed way of life. Contracts are being executed using electronic technology. This resulted in application of essential ingredients of contract law to the e-transactions and consequently to E-contracts.

With this background, the above discussion was about genesis of contract law. As principles of contracts are entirely applicable to E-contracts and as this study is about legal regulation of e-contracts especially from Indian perspective, it is necessary to throw light on principles envisioned by Indian Contract Act, 1872.

Therefore, now the discussion would be about Indian Contract Act, 1872 so that E-contracts can be better understood in light of principles of Indian Contract Act, 1872.

In this chapter we learnt that contractual obligations were part and parcel of the society since time immemorial for mobilization of resources. Due to advent of information and communication technology the nature of contract has become more pervasive and penetrating.

2.7 LEGAL REQUIREMENTS FOR CONTRACTS

Writing RequirementsIn 1990, the United Nations Commission on International Trade Law (UNCITRAL) identified four reasons why in general terms that contracts were commonly evidenced in writing. These were the expectation that written contracts are able to reduce the possibility of disputes; make parties aware of the consequences of their dealings, provide evidence upon which third parties might rely upon the agreement and to facilitate tax, accounting and regulatory purposes. With the

proper safeguards, electronic contracts should be able to address these concerns as well. At one end of the spectrum of legal requirements, most common day to day contracts are formed without any need for writing as parties come to an agreement orally. On the other end are those contracts required by law to be executed by deed, such as leasehold contracts for a period of over three years. In the residual category of written contracts, only a small number are required by law to be evidenced in writing. Some examples are contracts for the sale of real property or contracts of guarantee are required to be evidenced inwriting.

What constitutes writing is generally governed by section 1 of the Interpretation Act Cap 1, which provides, “writing and expressions referring to writing include printing, lithography, typewriting, photography and other modes of representing or reproducing words or figures in visible form.” However, these general requirements pertaining to writing were extended by the ETA. Section 7 provides that “Where a rule of law requires information to be written, in writing, to be presented in writing or provides for certain consequences if it is not, an electronic record satisfies that rule of law if the information contained therein is accessible so as to be useable for subsequent

reference" (note the agreements and documents excluded from application under the ETA26). Accordingly, as long as the electronic agreement is notexcluded under the ETA and fulfils the condition that it is readily accessible or retrievable for reading.

The writing provisions of the Electronic Transactions Acts are designed to provide functional equivalence of electronic writing, on conditions, where writing is otherwise required or permitted by law.

Many pieces of legislation require contracts to be in writing or evidenced in writing. Such legislation is typically based on the Statute of Frauds 1677 (Imp), the aim of which was to help protect people and their property against fraud and the sharp practice by legislating that certain types of contract could not be enforced unless there was written evidence of its existence and of its terms.27

The decision by UNCITRAL to formulate the template legislation was taken because in 'a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce'.28 In most common law jurisdictions, the Statute of Frauds has been re-enacted in several pieces of legislation. Section 4 of the original statute29 applies to charges on, among other things, agreements upon consideration of marriage or upon sale of lands, tenements or hereditaments It also states that a person is notable to sue upon such contracts unless 'some memorandum or note thereof shall be in writing, and signed by the party be charged therewith, or some other person thereunto by him lawfully authorised'.

2.9 STANDARD-FORM CONTRACTS IN A WORLD OF PAPER

The principal legal issue that standard-form contracts present is whether the law should enforce boilerplate terms. This basic issue remains the central question in both the real and the virtual worlds of contracting. The doctrine governing enforcement has long been criticized as vague, ill-defined, and easily muddled. Consequently, the underlying justifications for enforcing, or not enforcing, standard terms in the paper world must be identified before determining whether these justifications apply equally well in the virtual world.

[26]Earlier section 'Excluded Agreements and Documents under ETA'.
[27]Sharon Christensen and Rouhshi Low, Moving the *Statute of Frauds* to the digital age, (2003) 77 *Australian Law Journal* 416 and Alan Davidson, 'Electronic transactions and contracts', (2001) *Proctor* 6, 38.
[28]Official Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para 3.
[29]Statute of Frauds 29 Car 2 c. 5.3.4.

A. The Basic Issues Presented by Paper Standard-Form Contracts

1. The Paper Paradigm

People encounter standard forms in most of their contractual endeavors.[30] From significant and infrequent transactions, such as leasing or purchasing a home or car, to every-day transactions, such as checking a coat or buying a ticket to a sporting event, standard forms govern.

Although such transactions differ in details, the standard-form exchange generally involves a face-to-face meeting between a business's agent and the consumer. The agent presents a printed form to the consumer with a few basic terms to be filled in by the parties and the remaining terms already drafted and printed by the business. The business repeatedly employs the form and has invested time and money perfecting it. The form is long and full of legalese. The consumer is in a hurry.

The consumer correctly perceives several realities. First, the agent is not disposed to bargain over the boilerplate or lacks the authority to do so. In short, the business presents the form on a take-it-or-leave-it basis. Second, the consumer would not understand much of the language of the boilerplate even if she took the time to read it. Third, the business's competitors usually employ comparable terms. Fourth, the remote risks allocated by the boilerplate likely will not eventuate. Fifth, the business seeks to establish and maintain a good reputation with the purchasing public and generally will stand behind its product. Sixth, the consumer expects the law to enforce the boilerplate with the exception of offensive terms.[31]

The consumer, engaging in a rough but reasonable cost-benefit analysis of these factors, understands that the costs of reading, interpreting, and comparing standard terms outweigh any benefits of doing so and therefore chooses not to read the form carefully or even at all. She is also under some pressure from the business's agent to sign quickly and she may believe that the events described in the boilerplate are too remote to be worth worrying about.

2. Costs and Benefits of Enforcing Standard-Form Contract Terms

As a general matter, parties are entitled to have courts enforce the terms of a contract, even

[30] Slawson, *supra* note 4, at 529 (asserting that standard forms account for more than 99% of all contracts).

[31] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (1960); John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285, 293 (2000).

standard terms. Although contracting with standard forms seems suspect and fails to satisfy contract law's notions of bargained-for exchange, enforcement of such terms is generally appropriate. Parties are obliged to read and understand the written terms of contracts into which they enter. A clear rule holding parties to the written terms of a contract puts both parties on notice that they should read and understand written terms before signing. Furthermore, standard-form contracting has advantages, even for consumers. Standard forms are ubiquitous precisely because they provide significant economies to businesses and consumers. Experienced businesses best understand what risks they can most efficiently bear and what risks should be allocated to the consumer. Careful allocation of these risks minimizes the cost of the good or service businesses offer.

Standard terms also save businesses and consumers litigation expenses because these terms have withstood judicial scrutiny. Repeat use of standard terms also offers consumers a better chance of understanding the meaning of the terms and courts more of an opportunity to strike offensive ones, thereby fostering the evolution of terms migrating towards the reasonable.

Despite the potential benefits of standard provisions, however, courts are right to treat them with suspicion. The experience that allows businesses to identify an efficient allocation of risks also gives them an opportunity to exploit consumers. Businesses understand the true risks of contracts better than consumers, and hence can include terms in the form that are much more favorable to them than consumers know or appreciate. In effect, businesses have incentives and opportunities both to allocate the risks of the contract efficiently and to impose hidden risks on consumers.

Courts cannot easily distinguish between terms that create a reasonable arrangement of risks from terms that constitute exploitation of consumers. They lack the same incentives and experiences that induce businesses to identify and distinguish between sensible practices and opportunities to exploit consumers. Furthermore, courts will always see the issue framed as a dispute between a single consumer and a business, rather than as an aggregate policy that affects the vast majority of consumers and businesses that happily transact with each other. Courts are thus apt to misidentify terms quite frequently.

3. The Role of Competition

In theory, consumers' best protection against exploitation is not the courts, but their own vigilance and acumen. Consumers concerned about the possibility of exploitation can try to avoid terms they consider exploitative and refuse to transact with businesses that have reputations for offering

and enforcing manipulative contract terms. In addition, the aggregate decisions of many consumers can pressure businesses into providing an efficient set of contract terms in their standard forms. Competition in the market for the goods or services can provide courts with some assurance that businesses will not supply exploitative terms.

Furthermore, even though many, if not most, consumers lack the time, skill, or desire to carefully shop among contract terms, economists argue that even a small percentage of savvy vigilant consumers create adequate incentives to make businesses competitive. Unless a business can easily identify these alert consumers and offer more favorable treatment to them, it must choose between losing a small group of customers and offering efficient terms to the entire market. In a competitive market, providers of goods and services cannot afford to lose even a small group of customers. Consequently, businesses must write their boilerplate so as to compete effectively for the small group of savvy consumers.

Despite these concerns, courts recognize that the combination of businesses' efforts to compete for savvy consumers and businesses' concerns with their reputations will often dissuade them from attempting to exploit consumers with standard terms. Courts are also mindful of their own limited ability to distinguish exploitation from sensible business practices and of the costs associated with mistakenly refusing to enforce a sensible business practice. The adverse consequences of judicial reliance on market discipline might, in many cases, be less harmful than the consequences of judicial interference with sensible business practices. Therefore, courts must be certain that they have identified some failure of the market or of firm reputation before deciding to strike a standard term.

B. *Market Failures and Standard-Form Contracts*

An imperfect market can fail to provide sufficient discipline to protect consumers. Market-failures take many forms, but in the context of standard-form contracts, they distill into roughly four, somewhat overlapping, categories. First, because consumers incur costs in monitoring standard-form language and firm reputation, they could rationally decide that the such costs outweigh the benefits, even though a failure to monitor makes them vulnerable to exploitation. Second, even if they rationally decide the benefits of reading the standard terms outweigh the costs, consumers face social pressures (often arranged by businesses) against investigating the details of the contract. Third, consumers might not react rationally to the presence of exploitative terms in standard-form contracts. Psychological research on judgment and choice combined with descriptions of how consumers think about contracts suggest that consumers will not appreciate

the dangers presented by boilerplate language. Finally, businesses sometimes engage in marketing strategies that mute the effect of firm reputation and savvy consumers on business practices.

1. "Rational" Market Failures

Trying to read and understand boilerplate terms is difficult and time-consuming for consumers. Consumers recognize they are unlikely to understand the lengthy and complicated legal jargon in the boilerplate. To make matters worse, consumers also commonly encounter standard forms when they are in a hurry.[32] Adding still more insult to injury, businesses can create hard-to-read boilerplate by using small print, a light font, and all capital lettering and by burying important terms in the middle of the form.

Furthermore, consumers would gain little from reading and comprehending the boilerplate. Consumers generally understand most of the important terms (such as price and quantity of goods) and know that the remainder of the form probably addresses unlikely contingencies. Consumers also recognize that even if they do understand and dislike the terms, the agent presenting the form lacks the authority to bargain over the terms. Finally, the terms included in standard-form contracts tend to be uniform within an industry, so consumers see little point in attempting to shop around.

2. Social Forces

Rational calculation alone cannot explain consumers' nearly universal failure to read standard-forms. In some circumstances, the market should produce a sufficient number of consumers who attend to the unlikely contingencies covered by the standard form such that businesses feel disciplined. Nevertheless, most commentators agree that the failure of consumers to read and understand boilerplate is nearly universal. If that is correct, then other factors must be affecting consumer behavior. In particular, social forces induce consumers to sign standard-form contracts quickly, even when they should take the time to read and understand them. Just as businesses often present standard-form contracts at moments when consumers are hurried, they are also apt to present them when stopping to read and understand the boilerplate will feel awkward or unpleasant.

Consumers know that reading the boilerplate may not only waste people's time, it can seem confrontational. By stopping to read the boilerplate, a consumer signals to the agent, and any others present, that the consumer does not trust the business or its agent. Particularly after a long

[32] Eisenberg, *supra* note 22, at 242; Meyerson, *supra* note 16, at 1270; Slawson, *supra* note 8, at 532.

negotiation over other terms (such as the price of a car), the consumer often will develop a relationship with the business's agent. Consumers will feel uncomfortable suddenly indicating to the reassuring agent by studying terms covering unlikely events that they do not trust him.

3. Cognitive Factors

Wholly apart from the rational and social factors in the environment of form contracting that dissuade them from reading standard forms, consumers rely on decision-making strategies about contractual risks that further dissuade them from reading the boilerplate. Consumers have limited cognitive resources with which to assess the risks associated with a contract. Consequently, they rely on mental shortcuts or rules of thumb to guide complex decisions about risks. These rules of thumb lead people to worry too much about risks in some circumstances, and not enough about risks in others.[33] Although excessive concern with risk could induce consumers to overcome some of the rational and social factors that discourage them from reading boilerplate, several features of the business-to-consumer standard-form contract suggest that consumers are more apt to worry too little about contractual risks.

4. Additional Business Strategies

Even if consumers can overcome the rational, social, and cognitive hurdles to assessing the risks covered by standard terms, businesses can take further steps to avoid consumer scrutiny. These strategies might defeat the discipline that consumer attentiveness to terms would otherwise impose.

Furthermore, businesses' concern with their reputations may fail to protect consumers from exploitation because many boilerplate terms cover extremely rare risks and consumers might not learn about businesses enforcement of such terms. Businesses might also be managed by unsavory short-term players who are unconcerned with their reputations. Just as courts in products-liability cases do not rely exclusively on businesses' concern with their reputations to ensure that manufacturers provide efficiently safe products, courts worry that reputational concerns inadequately ensure that businesses provide efficient terms.

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[33] Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 696-714 (1999).

5. Summary of the Paper-World Paradigm

In the paper world of standard-form contracting, consumers consistently fail to read their standard terms. This failure undermines market pressure to provide mutually beneficial terms. Despite their institutional limitations, courts therefore have reason to police the terms of standard-form contracts to protect consumers from exploitation.

C .The Law Governing Standard-Form Contracts

Courts and theorists generally accept this account of standard-form contracting, including, at least implicitly, the analysis of market failures. Courts recognize that standard-form transactions do not involve the back-and-forth of the paradigm "bargain" of classical contract law. They understand that despite this lack of bargaining, competitive market pressures might ensure that standard-form provisions include a mutually beneficial exchange. Nevertheless, courts also realize that the consumer market can fail. Precisely because of the dynamics of standard-form transactions–the reasonable failure of the user to read the form, the social pressures to refrain from reading the terms, the cognitive limitations of consumers, and the strategic business practices–courts also worry that the process does not prevent businesses from exploiting consumers.[34] As a consequence, courts enforce boilerplate terms except when they believe businesses have gone too far.

For the most part, current law's approach supports Karl Llewellyn's vision that the law should create a presumption of assent (or "blanket assent") to standard terms. Llewellyn recognized that businesses generally compete to offer reasonable goods and services to consumers, and assumed that businesses, better than judges, can determine the "particular set of terms that 'fits' the practical problems and needs that arise . . . in carrying out the transactions." Although only implicit in his analysis, market failures attributable to the rational, social, and cognitive factors and business strategies discussed above were also part of Llewellyn's vision. He therefore believed courts must be empowered to strike "unreasonable or indecent" clauses.[35] In sum, Llewellyn based his framework on the perspective that, so long as the terms are not unfair in presentation or substance, courts should presume consumers' "blanket assent" to the details they have ignored.

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[34] Slawson, *supra* note 8, at 530-31. "The effect of mass production and mass merchandising is to make all consumer forms standard, and the combined effect of economics and the present law is to make all standard forms unfair . . . . Competitive pressures have worked so long and so thoroughly to make standard forms unfair that we no longer even notice the unfairness." *Id*.

[35] Llewellyn, *supra* note 25, at 370-71

Thus, the limited role of the courts in policing standard terms has been to bar terms that offend public norms. The courts have developed legal doctrines that curb form abuse from three sources: the unconscionability doctrine; the *Restatement (Second) of Contracts* section 211(3); and the doctrine of reasonable expectations.

1. Unconscionability

The unconscionability doctrine, embodied in Section 2-302 of the Uniform Commercial Code (U.C.C.) on sales of goods and liberally applied by courts to other types of contracts, allows courts to strike contracts or terms in order to prevent "oppression and unfair surprise." The doctrine obviously affords courts lots of discretion to police unfair terms directly rather than covertly by manipulating less-applicable rules. Given their limited abilities to discern exploitative from mutually beneficial contracts, courts might not always exercise this discretion wisely. Nevertheless, courts have corralled the standard by following a framework set forth by Arthur Leff.

Leff proposed a judicial inquiry into the manner in which the parties entered the contract to police the quality of assent ("procedural unconscionability") and a judicial perusal of the fairness of the resulting substantive terms ("substantive unconscionability"). Procedural unconscionability consists either of infirmities approaching duress, undue influence, misrepresentation, or of sneaky drafting strategies, such as hiding offensive terms in fine print, contradictory provisions, or incomprehensible terms. In searching out procedural unconscionability, courts examine the transaction to ascertain whether businesses have taken undue advantage of the rational and social factors that hamper consumers from identifying the terms contained in the boilerplate. Substantive unconscionability encompasses manifestly unjust terms, such as terms that are immoral, conflict with public policy, deny a party substantially what she bargained for, or have no reasonable purpose in the trade.

2. *Restatement (Second)* Section 211(3)

Also reflecting Llewellyn, section 211(1) of the *Restatement (Second) of Contracts* initially embarks down the traditional duty-to-read path. However, the reader encounters a fork in the road in section 211(3): "Where the [business] has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." The section, applied thus far most frequently to insurance contracts, authorizes courts to excise terms that are not procedurally unconscionable, but the term must be more than

merely unexpected by the consumer. Specifically what is required is that "(1) the *drafter* of the document (2) had reason to believe (3) that the one manifesting assent would not have agreed to the terms if he had known that the particular term was in the writing." A comment to section 211 illustrates the kind of terms a business should reasonably understand a consumer would resist, namely those terms that defeat the purpose of the deal, that are bizarre and oppressive, and that conflict with bargained-for terms.

Courts have expanded somewhat upon the rule of *Restatement* section 211(3). In one state that has contributed about half of the cases construing section 211(3), courts have ignored the section's endorsement of testing assent through the lens of the reasonable business, and instead measure expectations from the consumer's perspective. In addition, courts have liberally interpreted the requirement that a consumer escape a term only when she would have refused to enter the contract had she been aware of the term. Instead, courts focus on the consumer's state of mind and whether she reasonably expected the term. In short, courts have refocused section 211(3) from the business's expectations to those of the consumer. In doing so, courts have transformed section 211(3) into an inquiry not unlike the doctrine of reasonable expectations.

3. The Doctrine of Reasonable Expectations

The reasonable expectations doctrine, also prominent in insurance form-contract cases, holds that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

The doctrine of reasonable expectations thus creates an affirmative duty on the part of the business to point out and explain reasonably unexpected terms even if they were clearly stated in the contract. The doctrine reflects the reality that consumers do not read their contracts and that they agree to be bound only to reasonable boilerplate. The reasonable expectations doctrine therefore is consistent with Llewellyn's call for enforcement of reasonable boilerplate, provided that courts do not broaden the category of "reasonably unexpected"(and therefore unenforceable) terms to include those that are merely one-sided, but not "unreasonable and indecent."

2.10 ELECTRONIC STANDARD-FORM CONTRACTING

The widespread availability of information technologies in general, and the Internet in particular, has significantly changed consumer activity. Every month witnesses the emergence of new

approaches and technologies created to facilitate commerce, such as new interface designs, coding standards, and "information appliances." (Will we someday enter into contracts with our refrigerators? One can only speculate at this point.) The dust of these changes has not yet settled, as new companies rise and fall in a struggle to claim and defend the high ground in the new economy.

Despite this torrent of innovation, e-commerce relies on methods developed in the real world, as evidenced by the growing success of traditional bricks-and- mortar companies relative to their virtual peers. E-commerce, like conventional commerce, depends upon brand recognition and loyalty, clever marketing strategies, and consumer contracts that carefully allocate the risks and liabilities in agreements between those who provide goods and services and those who consume them. Notably, electronic contracts, like transactions in the paper world, remain dominated by standard-form contract terms. We contend that despite the new innovations, the logic of Llewellyn's "blanket assent," and the legal doctrine that it generates, provides a sensible foundation for assessing the business practices of the new economy.[36]

A. The Electronic Contracting Environment

Consumers enter into electronic contracts in two distinct ways: "browsewrap" and "clickwrap" (or "shrinkwrap") contracts. In browsewrap contracts, Internet users, if they bother to look, will find a "terms or conditions" hyperlink somewhere on web pages that offer to sell goods and services. According to these terms and conditions, using the site to purchase the goods or services offered (or just visiting the site) constitutes acceptance of the conditions contained therein. Because of the Internet's capacity to replace conventional commerce, these kinds of contracts are common. Software consumers encounter clickwrap contracts, for example, when installing new software on their personal computers. Installation processes typically include a step wherein the user must agree to the business's terms in order to complete installation. By clicking in all of the appropriate places, the user has formed the contract.

1. The Electronic Business Climate

To assess the appropriate legal resolution of electronic standard-form contracts, we must understand the business climate that produces these contracts. Although the e-commerce

[36] E. Scott Reckard, *WhyRunOut Outlasts Larger Rivals Internet: Affiliation with Stater Bros. Chain May Represent Industry's Latest Business Model*, Los Angeles Times, July 14, 2001, at C1, *available at* 2001 WL 2502806.

environment is evolving rapidly, some dominant characteristics have emerged. E-commerce's most salient feature is its rapid expansion.

The opportunities for growth presented by e-commerce have spawned thousands of new companies selling everything from software to golf clubs through the Internet.[371] Competition in the new economy is fierce, as companies worry that the early entrants into the world of e-commerce will establish the standards and customs of the business, thereby freezing out competition. Consequently, new companies have struggled to gain market share, often with a complete indifference to revenue and profits. Although the recent shakeout in the new economy has revealed that investors will tolerate this indifference only for so long, e-commerce companies still struggle primarily for market share.

Significant hurdles still confront e-commerce. The companies of the new economy lack experience with the new medium and sometimes lack any business experience at all. To address these problems, e-commerce companies invest heavily in novel marketing techniques made available by the Internet. Internet design companies consult traditional marketing gurus, but also cognitive psychologists and anthropologists in an effort to maximize the number of site visitors and to induce these visitors to engage in the desired responses.

E-consumers also need to be cautious about conducting business on the Internet. Many, if not most, of the e-commerce companies are new, and therefore lack well-developed reputations. Even long-standing companies find themselves doing business in novel ways. The Internet also makes it easy for a fly-by-night operation to convey the impression that it is actually a respectable firm; a fancy web site can just as easily represent a one-person operation as a Fortune 500 company.

Technological impediments to e-commerce also persist. Many would-be e-consumers lack bandwidth and reliable connections necessary to conduct business on the Internet (or have access to it only at work, where they might feel restricted in their use). Concerns about privacy and security on the Internet also deter some consumers. Efforts to protect users' privacy and security can even backfire, as Internet users suffer from "password overload" (failing to remember all of their passwords for various sites). These concerns, as well as the possibility that many people treat the Internet primarily as amusement, information-gathering for real-world transactions, or window shopping, explain why searches over the Internet occur far more often than completed

[37] Zhan G. Li and Nurit Gery, *E-Tailing For All Products?* 43 Bus. Horizons 49, November 1, 2000, *available at* 2000 WL 8786302.

transactions. Some companies report that about three-quarters of their electronic customers withdraw from purchasing at the last moment–at the time of selecting delivery options.

As these problems reveal, consumers in the new economy differ somewhat from those in the old economy. E-consumers necessarily have the understanding and means to own and operate new technologies, and they must also trust these new technologies. Consequently, e-consumers tend to be younger, wealthier, and better-educated than conventional consumers. Com Companies engaged in e-commerce, therefore direct much of their marketing efforts at these groups.

The e-commerce environment also provides the e-consumer with novel defenses against exploitation or fraud. The speed with which information travels on the Internet makes it relatively easy for wary e-consumers to monitor a business's reputation. Consumers in the paper world must simply guess at a business's reputation, perhaps based on her memories of news reports, comments by friends and colleagues about the business, or product reviews by consumer magazines. In contrast, the e-consumer can find such information with a few mouse clicks. In some cases, e-consumers have instant access to a whole categorized or searchable history of comments by other e-consumers.

2. Electronic Boilerplate

Although e-commerce incorporates a host of innovations, standard-form contracts still dominate. Whether they are entering into contracts for goods or services over the Internet or installing software, e-consumers face a host of standard terms presented in electronic form. Electronic boilerplate has flourished along with e-commerce.

As with their paper-world counterparts, e-consumers face an unavoidable set of realities when confronted by standard-form language. E-businesses present standard terms in a distinct take-it-or-leave-it fashion. The terms are also long, detailed, full of legal jargon, about remote risks, and one-sided. They include the usual litany of terms that are sometimes unenforceable in the paper world, such as arbitration provisions and remedy limitations. Furthermore, e-consumers cannot negotiate because the web page or installation software does not allow for the possibility of interaction with a live agent. E-consumers also cannot find answers to their questions about the terms. As with her paper-world counterpart, the e-consumer knows (or quickly recognizes) that reading through the boilerplate is unlikely to be of any benefit. Instead, she likely casually believes there is little risk to agreeing to standard terms.

To date, whether e-businesses will compete for customers with more advantageous contract terms is an open question. Consumers who look carefully will find some important variances in terms offered by e-commerce competitors. For example, in its standard-form agreement, Barnes and Noble's web site promises to indemnify consumers against fraudulent transactions conducted in their name, whereas Amazon's boilerplate allocates the risk of such fraud squarely on the consumer. Just as the Internet has maintained dispersion of both quality and price for many commodities, it might also have produced dispersion in the contract terms e-businesses offer. As e-businesses gain experience, however, the economic pressures that produce uniformity in the paper world might have a similar effect on e-commerce.

E-commerce brings several new realities to standard-form contracting. Because companies engaged in e-commerce are highly sensitive about their reputations, they might be extremely careful about the content of their boilerplate, or at least might refrain from enforcing some of it. Companies doing business on the Internet realize that with a few mouse clicks, disgruntled e-consumers can broadcast their dissatisfaction to thousands of potential customers.

B. *Electronic and Paper Standard-Form Contracts Compared*

Given the benefits of standard-form contracting to both businesses and consumers, it should not be surprising that e-businesses use them as frequently as their paper-world counterparts. Electronic boilerplate can efficiently allocate contractual risks just as easily as paper boilerplate. The use of electronic boilerplate might, in fact, be essential to e-commerce inasmuch as negotiating the terms of a contract would likely require interrupting the electronic transaction and interjecting a human agent to conduct the negotiation for the business. This interruption would eliminate a critical efficiency associated with electronic contracting–namely, that it does not require businesses to use human agents.

At the same time, the novelty of e-commerce suggests that many of the benefits associated with paper boilerplate have not, as yet, been realized. Many new companies are run by their technology-oriented founders who have no real expertise with the kinds of contractual efficiencies that more established business persons might understand.[38] E-commerce itself is so new that many companies engaged in e-commerce are unlikely to have identified the efficient allocation of contractual risks between consumers and businesses. Furthermore, the standard terms used by

[38] Robert McGarvey, *Ding!* ENTREPRENEUR MAG., January 1, 2001, *available at* 2001 WL 4806209.

companies selling electronic goods and services might be untested in the courts.

CHAPTER-THREE
RECENTS TRENDS AND DEVELOPMENT IN INDIAN CONTRACT LAW

3.1 TRADITIONAL CONTRACT

The law relating to contracts in India is contained in Indian Contract Act, 1872. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to all the states of India except the state of Jammu and Kashmir. The Indian Contract Law does not profess to be a complete code relating to contract. It purports to do more than define and amended certain parts of the law. It determines the circumstances in which promises made by the parties to a contract shall be legally binding on them. The Act again does not affect particular usages or customs of trade, which may be enforced, though they are inconsistent with the express provisions of the Contract Act[39].

3.1.1 It's Development

The Act as enacted originally had 266 Sections, it had wide scope and included:

- General Principles of Law of Contract- Sections 01 to 75
- Contract relating to Sale of Goods- Sections 76 to 129
- Special Contracts- Indemnity, Guarantee, Bailment & Pledge- Sections 125 to 238
- Contracts relating to Partnership- Sections 239 to 266

Indian Contract Act embodied the simple and elementary rules relating to Sale of Goods and Partnership. The developments of modern business world found the provisions contained in the Indian Contract Act inadequate to deal with the new regulations or give effect to the new principles. Subsequently the provisions relating to the Sale of Goods and Partnership contained in the Indian Contract Act were repealed respectively in the year 1930 and 1932 and new enactments namely Sale of Goods and Movables Act 1930 and Indian Partnership Act 1932 were re-enacted.

3.1.2 Meaning and Definition

[39] *Irrawaddy Flotilla Co*. v. *Bugwandas*, (1891) 18 Cal 620

The definition of Contract is given under S. 2(h),[40] which provides 'a contract is an agreement enforceable by law'. Thus a contract is an agreement made between two or more parties which the law will enforce.

From the above definition it could be seen that the definition of contract consists two elements-

1. An agreement and its enforceability by law

An agreement is defined under Section 2(e) as "every promise and every set of promises, forming consideration for each other". When a proposal is accepted it becomes a promise. Thus an agreement is an accepted proposal.

The second part of the definition deals with enforceability by law. An agreement is enforceable under Section 10 if it is made by competent parties, out of their free consent and for lawful object and consideration. Thus all contracts are agreements but all agreements are not necessarily contracts. According to Section 10, "All agreements are contracts if they are made by free consent of parties, competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void".

The essential elements of a valid contract are;

1) Agreement: To constitute a contract there must be an agreement. There must be two parties to an agreement, i.e. one party making an offer (offeror) and the other party accepting the offer (offeree). The terms of the offer must be definite and acceptance must be absolute and unconditional. The acceptance must be according to the mode prescribed and must be communicated to the offer or.

What is an Offer or a Proposal?

Offer or proposal is made when a person expresses his/her willingness, to enter into a contract with an intention to bind himself/herself and consequently, bind the person to whom the offer is made on the assent of such person. Such an offer could be in the form of an act, or an omission or abstinence which means a person could be willing to do something or abstain from doing something to the secure assent of the person to whom such offer is made against such act or abstinence[41]. The person making such offer is called the 'offeror' or the 'promisor' and the person

[40] Indian Contract Act, 1872
[41] Section 2(a) of the Indian Contract Act, 1872.

to whom such offer is made is called the ‘promiseee’ or the ‘offeree’.

Rules Governing Offers

A valid offer must comply with the following rules:

(a) An offer must be clear, definite, complete and final. It must not be imprecise.

(b) An offer must be communicated to the offeree. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.

(c) The communication of an offer may be made by express words-oral or written-or it may be implied by conduct.

(d) It is not necessary that an offer must be made to an ascertained person, but it does not crystallize into contract until and unless a particular person comes forward and meets or performs the conditions set out in the proposal. The principle can be stated as “an offer need not be made to an ascertained person but no contract can arise until it has been accepted by an ascertained person”. This is the reason why, depending upon the nature of subject matter, offer is made either to a specified person or to group of persons.

Lapse of Offer

Section 6 deals with various modes of lapse of an offer. It states that an offer lapses if,

(a) it is not accepted within the specified time (if any) or after a reasonable time, if none is specified.

(b) it is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, e.g., by sending a letter by mail when early reply was requested

(c) the offeree rejects it by distinct refusal to accept it;

(d) either the offerer or the offeree dies before acceptance;

(e) the acceptor fails to fulfill a condition precedent to a acceptance.

(f) the offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

Revocation of Offer by the Offeror

The proposal or offer may be withdrawn at any time before it is accepted on the following ground:[42]

(a) By communication of notice of revocation by the proposer to the other party,

(b) By lapse of time prescribed in such proposal for its acceptance, in case no time is prescribed by the lapse of reasonable time without communication of acceptance,

(c) By the failure of the acceptor to fulfil a condition precedent,

(d) By death or insanity of the proposer if this fact comes to the knowledge of the acceptor before acceptance.

A proposal may be invoked at anytime before acceptance, though the proposer has promised to keep the offer open for a specified time. Notice of revocation or the communication of revocation should reach the offeree before acceptance is out of his power. To make this point more clear, "A proposes B a letter sent by post to sell his apartment to B. B accepts the proposal by a letter sent by post. A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards." Therefore it is essential in order for the revocation of offer to be effective it must reach the offeree. Before he mails his acceptance consequently putting it out of his power.

Where consideration is paid to keep an offer open for .a certain period of time it becomes irrevocable for that specified period of time. The proposer cannot withdraw or cancel it during that period and the offeree could accept it notwithstanding the revocation. The communication of revocation if at all necessary has to come from the offeror himself or any other person who has been authorised to do so it would be satisfactory if the offerer knew reasonably well that the offer has indeed been withdrawn.

An offer may be revoked by the offeror at any time before acceptance. Like any offer, revocation must be communicated to the offeree, as it does not take effect until it is actually communicated to the offeree. Before its actual communication, the offeree, may accept the offer and create a binding contract. The revocation must reach the offeree before he sends out the acceptance. An

[42] Sec. 6 of the Indian Contract Act 1872

offer to keep open for a specified time (option) is not binding unless it supported by consideration.

Acceptance

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under the Contract Act "when a 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."[43]

Rules Governing Acceptance

(a) Acceptance may be express i.e. by words spoken or written or implied from the conduct of the parties.

(b) If a particular method of acceptance is prescribed- An offer must be accepted in the prescribed manner.

(c) Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.

(d) Counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, e.g., where a horse is offered for Rs. 1,000 and the offeree counter-offers Rs. 990, the offer lapses by rejection.

(e) Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Where the offeree merely intended to accept but does not 20 Section 2(b) of Indian Contract Act communicate his intention to the offeror, there is no contract. Mere mental acceptance is not enough.

(f) Mere silence on the part of the offeree does not amount to acceptance. Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree as an acceptance. In other words, the offeror can prescribed the mode of acceptance but not the mode of rejection.

(g) If the offer is one which is to be accepted by being acted upon, no communication

[43] Section 2(b) of Indian Contract Act.

of acceptance to the offeror is necessary, unless communication is stipulated for in the offer itself. Thus, if a reward is offered for finding a lost dog, the offer is accepted by finding the dog after reading about the offer, .and it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.

(h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.

(i) An acceptance never precedes an offer. There can be no acceptance of an offer which is not communicated. Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance. Where a servant brought the boy without knowing of the reward, he was held not entitled to reward because he did not know about the offer.

Consensus-ad-idem (meeting of minds): To constitute a valid contract, there must be meeting of minds i.e. consensus-ad-idem. The parties should agree to the same thing in the same sense and at the same time.

Intention to create legal relationship: There is no explicit provision under the Indian Contract Act which deals with the 'intention of the parties'. It arises out of the prevalent acceptance of this principle in common law and as reflected in various judicial interpretations. 'Intention to create legal relationship' implies the need of the parties to bind each other in the sense of enforcing mutual obligations into a legal consequence. This naturally as it comes to anyone's mind, is not something that can be easily ascertained but will involve a string of parameters in the form of the terms of the agreement and the circumstances in which such terms where made, making such test of confirmation objective in nature.

The Courts generally view the intention from the available terms and existing circumstances as pointed out in *Rose* v. *Crompton*.[44] In case of matters, purporting to regulate relations social in nature it follows as a natural corollary that the parties did not intend to legal consequences to follow and in the case of business relationships the presumption being the exact opposite that the parties intended legal consequences to accrue. This does not however mean that family or social matter cannot give rise to a legally binding contract. It only means that the law required the patties to intend legal consequences.

4) Capacity of parties (competence): The parties to the agreement must be capable

[44] (1923) 2 KB 261.

of entering into a valid contract. According to Section 11, every person is competent to contract if he or she,

1. is of the age of majority;

2. is of sound mind; and

3. is not disqualified from contracting by any law to which he is subject.

5) Lawful Consideration: An agreement to form a valid contract should be supported by consideration. Consideration means "something in return" (quid pro quo). It can be cash, kind, an act or abstinence. It can be past, present or future. However, consideration should be real and lawful.

6) Free consent: To constitute a valid contract there must be free and genuine consent of the parties to the contract. It should not be obtained by misrepresentation, fraud, coercion, undue influence or mistake.

7) Lawful object: The object of the agreement must not be illegal or unlawful. Section 23:

Section 23 deals with both legality of object and consideration, in some cases they may be the same thing but it is normally seen that they are two different things in each of these case the consideration or object of an agreement is said to be unlawful every agreement of which the object or consideration is unlawful is void.

(i) If it is forbidden by law

(ii) defeat the provision of law

(iii) fraudulent

(iv) immoral

(v) opposed to public policy

(vi) injurious to person or property

(vii) immoral

8) Agreement not declared void or illegal: Giving the meaning of void agreement, the Act says an agreement not enforceable by law is said to be void.[45]

The following type of agreement are declared to be void

(i) Agreement unlawful in part

(ii) Agreement without consideration

(iii) Agreement in restraint of marriage

(iv) Agreement in restraint of trade

(v) Agreement in restraint of legal proceeding

(vi) Unmeaning agreement

(vii) Wagering agreement

9) Certainty and possibility of performance: The terms of agreement must be certain and not vague. If it is not possible to ascertain the meaning of the agreement, it is not enforceable at law. Also, agreements to do impossible acts cannot be enforced.

10) Legal formalities: A contract may be oral or in writing. If, however, the law requires for a particular contract, it should comply with all the legal formalities as to writing, registration and attestation.

3.2 RECENT TRENDS

Central Inland Water Transport Corporation Ltd. V Brojo Nath[46]

In this case one of the clauses in a contract of employment provided that the employer (corporation) could terminate the services of a permanent employee by giving him a 3 months' notice or 3 months' salary. In accordance with the above clause, the services of the respondent Brojo Nath and others were terminated instantly by giving them the notice , accompanied by cheque for 3 months' salary. The **Supreme court** held Rule 9 of service Discipline And Appeals of 1979 frames by the corporation empowering that such a clause in the service agreement between

[45] Indian Contract Act, 1872, Section 2(g).
[46] A.I.R 1986 S.C 1571.

persons having gross inequality of bargaining power was wholly unreasonable and against **public policy** and was therefore void under section. 23 of the Indian Contracts Act.

Some general observation must be added upon the doctrine of **Public Policy** in the current law.

Since public policy reflects the fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era. There is high authority for the view that in matters of public policy the court should adopt a broader approach than they usually do to the use of precedents.

3.2.1indian Cases Adopting English View On Public Policy:

The circumstances in which a contract is likely to be struck down as one opposed to public policy are well established in England. So a contract of marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract are all unlawful things on the ground of public policy.

"The Indian cases also adopt the same view." In Gherulal V Mahadeodas Maiya[47] enshrine the present position of the doctrine of public policy in India. One of the question raised was whether the contract in dispute were illegal under HINDU LAW and immoral because of the doctrine of pious obligations of the sons to discharge the father's debt, It was held that the tenets of Hindu Law could not be imported to give a novel content to the doctrine of public policy in respect of contract of gaming and Public policy is an elusive concept; it has been described as an "untrustworthy", "unruly horse", etc.

Explaining the scope of the expression public policy and the role of the judges, C.REDDY of the Andhra Pradesh High Court observed[5]:

The twin touchstone of public policy are advancement of the public good and prevention of public mischief and these questions have to be decided by the judges not as men of legal learning but as experienced and enlightened members of the community representing the highest common factor of public sentiment and intelligence. Indorsing this view, the Supreme Court added that going by prevailing social values, an agreement having tendency to injure public welfare is opposed to public policy.

Muniammal v. Raja.[48] A wife who is entitled to maintenance can give up her right in consideration of a lump sum payment. But the surrender of the right to claim revision of the amount in the context of rising prices would be opposed to public policy.

[47] AIR 1959 SC 781
[48] AIR 1978 Mad 103

3.2.1 Contracts With Government

The executive power of the Union of India and the states to carry on any trade or business, acquire, hold and dispose of property and make contracts is affirmed by article 298 of the constitution of India. If the formal requirements required by article 299 are complied with, the contract can be enforced against the Union or the states. The public policy and the public interest underlying article 299(1) is that 'the State should not be saddled with liability for unauthorised contracts which do not show on their face that they are made on behalf of the state'. Article 299 of the constitution of India provides:

1. All contracts made in the exercise of the executive power of the Union or of the state shall be expressed to be made by the President, or by the Governor of the state, as the case may be, and all such contracts and all assurances of property made in the exercise of that power, shall be executed on behalf of the president or the Governor by such persons and in such manner as he may direct or authorise.

2. Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this constitution, or for the purpose of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

The authorities of the President or the Governor may be conferred by the general order or an ad hoc order upon a particular contract. It may be proved by a notification or by any other evidence. A special authority may validly be given in respect of a particular contract or contracts by the governor to an officer other than the officer notified.

A contract complying with the article can be enforced by or against the government. It is subjected to the general provisions of the contract law, and its terms cannot be changed by resorting to article 14 of the constitution. A contract not complying with any of the conditions of article 299(1) of the constitution is not binding on or enforceable by the government, and is absolutely void, though not so for collateral purposes and cannot be ratified and no damages can be claimed for breach unless the contract is complete under this article.

An officer who enter into a contract without complying with the terms of the article will be personally liable. An agreement not complying with article 299 was held to be a contract for the purposes of disqualifying candidate for election. This was the reasoning of **Chhaturbhuj's case** that article 299, though mandatory, did not render the contract void, as it was capable of ratification, is no longer sustained by later decisions, but it has been suggested that the conclusion that it would disqualify a candidate is correct.

3.2.2 Contracts Illegal At Common Law On Grounds Of Public Policy

Certain types of contracts are forbidden at common law and therefore prima facie illegal. The first essential to an understanding of this head of the law, which has been clouded by much confusion of thought, is to discover if possible the principle upon which the stigma of illegality is based. The belief of judges of earlier period was that they would not tolerate any contract that in their view was injurious to society. It can be inferred from such belief's that the judges were determined to establish and sustain a concept of public policy. This contention has its own disadvantage as it is imprecise. Modern judges have in fact taken more realistic view of this part of the law and have concluded that the so called illegal contracts fall into two separate groups according to the degree of mischief that they involve.[49] Some agreements are so obviously inimical to the interest of the society that they offend almost any concept of public policy; others violate no basic feelings of morality, but run counter only to social or economic expedience. The significance of their separation into two classes lies in different consequences that they involve.

Assuming that contracts vitiated by some improper element must be divided into two classes, how are the more serious examples of 'illegality' at common law to be distinguished from the less serious? Which of the contracts that have been frowned upon by the courts are so patently reprehensible – so obviously contrary to public policy – that they must be peremptorily styled illegal? Judicial authority is lacking, but it is submitted that the epithet 'illegal' may aptly and correctly be applied to following types of contracts:

- A contract to commit a crime, a tort or a fraud on a third party.
- A contract that is sexually immoral.
- A contract to the prejudice of the public safety.
- A contract prejudicial to the administration of justice.
- A contract that tends to corruption in public life.
- A contract to defraud the revenue.

A final observation may be made as to the way in which the courts may determine the content of public policy. Apart from reliance on previous precedents, this is done by a priori deduction from broad general principles. It is not the practice in English courts for the parties to lead sociological or economic evidence as to whether particular practices are harmful and it is doubtful to what extent such evidence would be regarded as relevant if it were adducted.

[49] [1952] I KB 249

- A contract to commit a crime, a tort or a fraud on a third party:

An agreement is illegal and void if its object, direct or indirect is the commission of the crime or a tort. An agreement made with the object of defrauding or deceiving a third party is illegal.An illustration of this is where A agrees to recommend B for a post whether public or private, in consideration that B, if appointed, will pay part of the emolument or a secret commission toA. In this context it is appropriate to remember the ambit of the crime of conspiracy and that any agreement that which results in a criminal conspiracy will also be an illegal contract.

- A contract that is sexually immoral

Under the precise ambit of this legal head it has been plausibly argued that sexual mores have changed radically and that public policy should reflect this, but it is not easy to state how far the changes have gone. It seems that if a landlord rents a prostitute ten times of the normal rent, knowing that she will use it to receive clients, the contract is surely illegal. On the contrary, an agreement where it is intended to bring about illicit cohabitation is illegal. This requires reconsideration. It is extremely common for landlords to let accommodation, knowing of reasonably suspecting that the occupants are living together but are not married. The courts have shown no disposition to resolve landlord – tenant related disputes like such cases by invoking public policy. Likewise, it is quite common that such unmarried couples enter into agreements to pool their incomes and also the acquisition of certain assets. Several cases like this have been there before the court and it has been assumed with a principle that such agreements are capable of being binding because of the reason that in such relationships there are other considerations to support it.

- A contract prejudicial to the public safety

Detrimental contracts within the meaning of this statement are those which tend either to benefit an enemy country or to disturb the good relations of a country with another. Contracts which are made in time of war must clearly react upon a contract made with an alien enemy by a person subject to such country since it may result in injury to such country. The expression alien enemy is not necessarily restricted to its popular meaning. The king's subject cannot trade with an alien enemy, i.e. a person owing allegiance to a government at war with the king, without the king's licence[50] It denotes a status that depends not upon the nationality of the contracting party, but upon whether he is voluntarily resident in or carrying on a business in the enemy's country or in a

[50] AIR (1902) AC 484, 499

country within the effective control of the enemy. So it goes without saying that a contract made during war with an alien enemy is illegal.

If such contract is made during the peace time with a person who later becomes an alien enemy owing to the outbreak of war and if it involves intercourse with the enemy country nor is in other respects obnoxious from the standpoint of public policy, then it is immediately abrogated in so far as it is still executor.

There is no general rule that all executor contracts with an alien enemy are abrogated. The executor contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy .

- A contract prejudicial to the administration of justice

it is admitted that any contract or engagement having a tendency to affect the administration of justice, is illegal and void. There are many examples of this rule, as for instance an agreement neither to appear at the public examination of a bankrupt nor to oppose his discharge, an agreement not to plead the Gaming Acts as a defence to an action on a cheque given for lost bets, and an agreement to withdraw divorce proceedings, or an agreement by a witness not to give evidence or only to give evidence for one side. Any aagreement which obstructs the ordinary process of justice is void. An agreement to delay the execution of a decree, and a promise to give money to induce a person to give false evidence, have been held void.

It is therefore well established that the courts will neither enforce nor recognise any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution for a public offence.

- A contract liable to corrupt public life

1. It has long been the rule that any contract is illegal which tends to corruption in administration of the affairs of the nation. An agreement by which it is intended to induce a public officer to act corruptly is contrary to public policy. An agreement for example, by which a sum of money was provided to a charity on the condition that latter would procure a knighthood for the plaintiff, was held void and the money irrecoverable. Similarly, an agreement to provide money to a Member of Parliament to influence his judgement is void. Charging of capitation fee for admission to prestigious institutions is contrary to public policy. The Supreme Court has described it as unreasonable, unjust and unfair.

Like if in a situation where A agreed that if by the influence of B he were appointed Customs Officer of a port, he would appoint such deputies as B should nominate and would hold the profits

of office in trust for B. It was held, after A had secured the post, that no action lay against him for breach of this agreement. On the same principle an agreement to assign or mortgage future instalments of the salary of a public office is void, since the law assumes that the object of the salary is to maintain the dignity of the office and to enable the holder to perform his duties in a proper manner.

Agreements not in contravention to section 23

Permission of Collector under section 43 of Bombay Tenancy and Agricultural Lands Act, 1948, it was not required for agreement for sale of lands of old tenure. Permission of Collector was also not required as land was already covered under the provisions of Bombay Tenancy and Agricultural Lands Act. Held that agreement was not in contravention of section 23 as there was no definite evidence on record as to what date these lands were given final plot numbers.

- *Validity of agreement between landlord and tenant during pendency of eviction proceedings:*

Where the agreement between the landlords and the tenants provided that the petition of eviction brought against the tenant and sub tenant of whom the plaintiffs were included would not be contested and nevertheless even if the order of eviction was obtained in that proceeding, no effort would be made to evit the plaintiffs. Court observed that it could not be said that there was anything illegal or against public policy in the matter of that agreement, as there was no law prohibiting the landlord to allow his tenant to continue in possession even after getting an order for eviction, may it be on a higher rent.

- *Copyright agreement could not be said to be violative of public policy:*

Where in an agreement there was merely agreement between two parties under which defendant had assigned certain copyrights in favour of plaintiff. There is no obligation to public. Held that such an agreement could not be said to be violative of public policy as the assignment of copyright was permissible even under Copyright Act.

- *Consideration and Objects unlawful in part*

Section 24 of the Indian Contract Act, 1872 explains the position in cases when only a part of the consideration or object are unlawful. When there are two sets of distinct promises, and when the void part of the contract can be properly separated from the rest, the latter does not become invalid. Thus if A promises to superintend, on behalf of B, legal manufacture of Indigo and an illegal traffic in other articles , and promises to pay to A salary of 10,000 rupees for both the jobs, the whole of the agreement is void. In this case, the object of A’s promise and the consideration for

B's promise are unlawful in part only, but the two cannot be separated. In **Alice Mary Hill v. William Clark**[51] the plaintiff, a married woman agreed to live in adultery with the defendant agreed to pay the plaintiff a single consolidated remuneration of Rs. 50 per month. It was held that because the lawful part could not be severed from the unlawful one, the whole of the agreement was void, and the plaintiff could not recover anything even her services as a house-keeper.

3.3 MERITS AND DEMERITS

Merits of the Indian Contract Act, 1872

1. **Clarity and Precision**:
   - The Act provides clear and precise definitions and provisions, making it easier for parties to understand their rights and obligations.
2. **Comprehensive Framework**:
   - It covers a wide range of contract types and scenarios, including general principles, special contracts (like indemnity, guarantee, bailment, pledge, and agency), and quasi-contracts.
3. **Protection of Parties**:
   - The Act ensures that contracts are made with free consent, lawful consideration, and competent parties, protecting individuals from entering into unfair or fraudulent agreements.
4. **Legal Remedies**:
   - It provides robust remedies for breach of contract, including damages, specific performance, and injunctions, ensuring that aggrieved parties can seek appropriate relief.
5. **Flexibility**:
   - The Act allows for both written and oral contracts, as long as they fulfill the necessary legal requirements, offering flexibility in how agreements are made.
6. **Promotion of Fair Trade**:
   - By defining unlawful agreements and void contracts, the Act promotes fair trade practices and maintains public order and morality.
7. **Judicial Interpretations**:
   - Over the years, Indian courts have interpreted and refined the provisions of the Act, providing a rich body of case law that helps in the consistent application of contract law.

Demerits of the Indian Contract Act, 1872

1. **Outdated Provisions**:

[51] I.L.R (1905) 28 All. 266

- Some provisions of the Act, being over a century old, may not adequately address modern commercial practices and technological advancements.

2. **Complex Language**:
   - The legal language used in the Act can be complex and difficult for laypersons to understand without professional legal assistance.
3. **Lengthy Legal Processes**:
   - The enforcement of contractual rights can be slow due to the lengthy judicial processes and backlog of cases in Indian courts.
4. **Limited Consumer Protection**:
   - The Act primarily focuses on commercial contracts and may not provide sufficient protection for consumers, necessitating additional consumer protection laws.
5. **Inadequate Addressing of Digital Contracts**:
   - With the rise of e-commerce and digital transactions, the Act does not fully address the nuances and specificities of digital and online contracts.
6. **Dependence on Interpretation**:
   - Many provisions require judicial interpretation, which can lead to uncertainty and inconsistency until settled by higher courts.
7. **Regional Variations**:
   - The application of the Act can vary across different states in India due to regional judicial interpretations and state amendments, potentially leading to inconsistencies.

3.4 CHALLENGES OF CONTRACT:

Electronic contracts (e-contracts) are becoming increasingly prevalent due to the growth of online transactions and digital commerce. Several contemporary issues were emerging in the realm of e-contracts. Some of the Key challenges of E-contracts are:

1. Validity and Enforceability: One of the primary concerns with e-contracts is ensuring their legal validity and enforceability. Questions arise regarding whether electronic signatures and methods of contract formation meet the requirements of traditional paper-based contracts, especially considering varying laws across jurisdictions.

2. Consent and Authentication: Establishing the identity of the parties involved and ensuring their genuine consent to the contract terms is essential. Without proper authentication mechanisms, there is a risk of fraud and disputes over the validity of agreements.

3. Data Privacy and Security: E-contracts often involve the exchange and storage of sensitive personal and financial information. Ensuring the privacy and security of this data is crucial to

protect parties from potential cyber threats and data breaches.

4. Cross-Border Transactions: Conducting e-contracts across international borders raises complex legal and jurisdictional issues. Different countries may have diverse regulations and requirements for electronic transactions, creating challenges for businesses operating globally.

5. Electronic Signature Standards: While many countries have adopted laws recognizing electronic signatures, the lack of uniform international standards can complicate cross- border transactions. Harmonizing these standards can facilitate smoother e-contract execution.

6. Digital Accessibility: As digital contracts become the norm, it's crucial to consider the accessibility of these agreements to all parties, including those with disabilities or limited access to technology.

7. Amendment and Termination: Managing amendments and terminations in e-contracts can be more challenging than with traditional contracts. Ensuring proper documentation and tracking changes are essential to avoid disputes.

8. Evidence and Record Keeping: Maintaining clear and reliable records of econtracts is essential for evidentiary purposes in case of future disputes. Establishing robust record-keeping practices becomes increasingly important in a digital environment.

9. Automated Contracts and Smart Contracts: The rise of automated contracts and smart contracts, which are self-executing agreements based on predefined conditions, brings new legal and technical challenges, such as coding errors and unintended consequences.

10. Consumer Protection: E-contracts often involve consumers, who may be less familiar with digital transactions and their rights. Ensuring that consumer protection laws adequately cover e-contracts is essential. It's important to note that the legal landscape surrounding e-contracts is continuously evolving, and it will be seen that some of these key issues will be solved with time.

3.4.1 Ancient Traditions of Contractual Agreements

The early history of contracts in India can be found in the sacred texts of Hinduism, such as the Vedas and the Manusmriti. These texts, dating back to as early as 1500 BCE, outlined the principles of agreements and the consequences of breach. During this period, contracts were often established orally and were considered binding through moral and ethical obligations.

The ancient Indian legal system, embodied by the Dharmashastra, also recognized different types of contracts, including mutual promises, agreements to perform certain tasks, and joint ventures. These contracts were governed by the principles of fairness, good faith, and mutual consent, which continue to influence modern contract law in India.

3.4.2 Impact of Colonial Rule on Contract Law

The advent of European colonial powers, particularly the British East India Company, had a profound impact on India's legal landscape, including the concept of contracts. During the 18th and 19th centuries, British colonial administrators sought to impose their legal systems on Indian society, leading to a blending of indigenous practices and English common law.

In 1872, the British Indian Contract Act was enacted, drawing heavily from English contract law principles. The Act provided a comprehensive framework for understanding and enforcing contracts in India, distinguishing between valid, void, and voidable contracts. It also introduced the concept of consideration, where both parties must provide something of value for the contract to be legally binding.

3.4.3 Modernization of Contract Law in Independent India

With India gaining independence in 1947, the legal system underwent significant reforms to suit the needs of a modern nation. The Indian Contract Act of 1872 remained the backbone of contract law, but numerous amendments and judicial interpretations were introduced to address contemporary challenges.

One of the most significant developments was the recognition of specific types of contracts, such as contracts of guarantee, indemnity, and bailment, which were previously not explicitly addressed. Additionally, the law began to acknowledge the importance of free consent, competent parties, and lawful object as essential elements of a valid contract.

3.4.4 Evolution of Specific Contractual Forms

Over time, certain types of contracts gained prominence due to societal changes and economic advancements. Some of these specific contractual forms include:

1. Partnership Contracts: With the rise of trade and commerce, partnerships emerged as crucial business structures. The Indian Partnership Act of 1932 provided a comprehensive legal framework for the formation, rights, and dissolution of partnerships, promoting business collaborations across the country.
2. Sales and Commercial Contracts: The Sale of Goods Act, 1930, established uniform rules for the sale of goods in India. It defined the rights and responsibilities of buyers and sellers, warranties, and conditions for the transfer of ownership, boosting trade and consumer confidence.
3. Employment Contracts: As industrialization progressed, employment contracts became prevalent. Labor laws were introduced to safeguard workers' rights and regulate working conditions, leading to significant developments in the employer-employee relationship.
4. Government Contracts: In India, contracts with government bodies gained prominence, and the law evolved to address public procurement procedures, transparency, and accountability.

Contemporary Contract Law

With the passage of time, India's legal system continued to evolve, and contract law kept pace with changing societal norms and economic conditions. The Supreme Court of India played a crucial role in interpreting and refining contract law through landmark judgments.

The doctrine of "frustration of contract" was introduced to address situations where unforeseen circumstances rendered a contract impossible to perform. The principle of "quantum meruit" was adopted to ensure fair compensation for partial performance of a contract.

Additionally, India embraced the international trend of adopting electronic contracts, recognizing the validity of contracts formed through electronic means as long as the essential elements of a contract are satisfied.

CHAPTER -FOUR
JUDICIAL APPROACH

4.1 OVERVIEW

Unlike the conventional world, territorial borders do not exist in the virtual world. On the internet, there are neither political barriers nor any territorial demarcations. The cyberspace is one single space devoid of any national boundaries. This global medium has transformed the world into one single community; one single 'global place' powered by high speed and having enormous potential for exchange of information. Internet has several positive attributes, including speed, accuracy, quick access of information, effective communication, convenience and cost and time saving characteristics which make this medium the most effective and pervasive. But at the same time, the peculiarities of this medium, in particular, difficulties in determining jurisdiction and the feature called 'anonymity' often puzzles the online community. Indeed, one of the most cryptic issues that evolved jurisprudence in internet law is the fundamental issue of jurisdiction in the cyberspace.

Commerce has grown to become the buzzword in corporate circles. The lure of conducting global operations through a web site has become irresistible. Ironically, because a page on the World Wide Web can reach web arises the issue of where exactly a person who has a cause of action, based surfers in every state in the nation and perhaps every nation on earth, there upon a web transaction, may sue. The prospect that placing a page on the Internet can subject the web publisher to a lawsuit anywhere on earth can certainly have a chilling effect on perhaps the most powerful medium in the history of communication. Some commentators have heralded the emergence the Internet as signalling a near-evisceration of traditional choice-of-law analysis. As users and system operators (sysops) encounter conflicts and seek to resolve disputes, they take action to establish rules and decide individual cases.

Moreover, the Internet's decentralised nature makes it likely that any given Internet transaction will involve parties from more than one jurisdiction. All this creates a new form of lawa law of cyberspace based on private contracting on a global basis and enforced by a combination of the sysop's ultimate right to banish unruly users and the users' ultimate right to migrate to other online service providers.

Imposing the traditional common law principles of jurisdiction to the borderless world of internet transactions has proved to be very challenging for the courts and has resulted in the application of a myriad of different tests and principles.

Is the internet necessitating an evolution or a revolution in legal thinking? The legal community disagrees about whether the internet is yet another breakthrough that can be incorporated into the classical legal principals or whether the medium is so inherently different from reality that an entirely new paradigm is necessary.[52] The preceding notions of jurisdiction are based on a physical reality which does not exist in cyberspace. Actions in the virtual world of the internet, however, have legal ramifications in the tangible world. For that reason, and due to the undefined dangers involved in the wholesale creation of new legal principals, established norms should be used to regulate this new technology. Personal jurisdiction arising from internet contacts poses the most difficult application of traditional law. Lot of attention has been paid recently to jurisdictional issues arising from the maintenance of websites. There are, nevertheless, other methods by which persons can cross jurisdictional lines via the internet.

4.2 GENERAL ASPECT OF JURISDICTION IN CONTRACT

The effectiveness of a judicial system rests on a bedrock of regulations which define every aspect of a system's functioning and principally its jurisdiction. A Court must have jurisdiction, venue, and appropriate service of process in order to hear a case and render an effective judgement. Jurisdiction is the power of a court to hear and determine a case. Without jurisdiction, a court's judgement is ineffective and impotent. Such jurisdiction is essentially of two types, namely subject matter jurisdiction and personal jurisdiction, and these two must be conjunctively satisfied for a judgement to take effect. It is the presence of jurisdiction that ensures the power of enforcement to a court and in the absence of such power, the verdict of a court, is, to say the least, of little or no use. Moreover, only generally accepted principles of jurisdiction would ensure that courts abroad also enforce the orders of other judicial bodies.

In a recent case the Supreme Court dealt with the jurisdiction in Cyber space. The petitioner responded to the advertisement regarding a tender for a particular project in Gujarat, the advertisement being published in the Times 0f India in circulation in West Bengal. He submitted the tender by fax message from Calcutta and received reply of it in Calcutta. A writ petition was filed before the Calcutta High Court on plea of part of the cause of action having arisen in Calcutta. The court observed" merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not in our (court's) opinion,

[52] Cheryl L. Conner,*CompuServe* v. *Patterson. Creating Jurisdictionthrough InternetContacts*

constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax message from Calcutta and received a reply at Calcutta, would not constitute an integral part of the cause of action."[53]

As a general term, jurisdiction refers to "a government's general power to exercise authority over all persons and things within its territory; a court's power to decide a case or issue a decree; or a geographic area within which political or judicial authority may be exercised."[54]

The term "cyber-jurisdiction" is often used to refer to the internal governance established by the Internet users and operators, however in this work cyber-jurisdiction or jurisdiction in cyberspace will refer to physical government's power and court's authority over Internet users and their activity online. While online transactions are borderless, the net-users themselves physically reside in a specific country. Under certain conditions, country A, to which such activities are transmitted, can exercise jurisdiction over a person residing in another country B on the basis that the activities of that per-son reached the country A. In 1998 the Committee on Cyberspace Law of the American Bar Association launched the jurisdiction project which was aimed at analyzing jurisdictional problems which impact global electronic commerce. The working group has compiled a "Model for Jurisdictional Analysis" and based their research on the traditional principle of jurisdiction. This thesis will apply the same approach to the framework of jurisdictional analysis.

According to the traditional principle, jurisdiction can be divided into three categories: jurisdiction prescribe (legislative jurisdiction); jurisdiction to adjudicate (judicial jurisdiction); and jurisdiction to enforce (executive jurisdiction).

a) Jurisdiction to Prescribe

Jurisdiction to prescribe means a State's authority to make its substantive law applicable to particular persons and circumstances.[55] Given that activities on the Internet can involve several countries, the question arises as to which nation's rules are binding upon activities or persons in cyberspace. For example of jurisdictional problems, occurs when a contract between persons residing in different countries was made entirely via the Internet. Because a transaction on the Internet could have no substantial relationship with any physical place, it is a hard task to specify

[53] *Oil and Natural Gas Commission* v. *Utpal Kumar Basu*, (1994) 4 SCC 711.
[54] Bryan A. Garner, Editor in Chief, Black's Law Dictionary 7th Edition (West Group, 1999).
[55] Restatement (Third) of the Foreign Relations Law of the U.S. 401 cmt. a (1987), at 230-31

which nation's law applies to it.

b) Jurisdiction to Adjudicate

Jurisdiction to adjudicate is defined as a "state's authority to subject persons or things to the process of its courts or administrative tribunal, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings".[56] While jurisdiction to prescribe is connected to the choice of law problem, the choice of forum problem in cyberspace arises from the application of jurisdiction to adjudicate.

Even if it is unclear whether a state can establish laws which are applicable to a nonresident defendant who breaks the laws on the Internet, it is technically possible for a country to unilaterally declare that its laws are applicable to a nonresident who engages in an activity the laws prohibit. For example, in the Statement on Internet Jurisdiction, the Minnesota attorney general asserted that "persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws.

Even if a state authority did not assert that its law can be applicable to persons who reside outside of its boundaries, the court in that state would decide if a nonresident defendant could be prosecuted on the charge of breaking one of its existing laws. Therefore, central to this choice of forum issue is the question of what standard can be used by a court to exercise jurisdiction to adjudicate over non residents who are sued for illegal activity on the Internet.

c) Jurisdiction to Enforce

Jurisdiction to enforce deals with a State's authority to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through its courts or by use of executive, administrative, police, or other non-judicial action.

Even if court in a country A passes a judgment in a case (jurisdiction to adjudicate) applying its national laws (jurisdiction to prescribe), that state cannot take measures that violate country B's sovereignty. It is a violation of international law for a country to send its agent to other country's territory in order to arrest a person convicted of criminal offense in the country. There are multilateral or bilateral agreements concerning recognition and enforcement of court decisions

[56]supra note 50, 401(b).

and arbitral awards, however, it is highly unlikely to expect these agreements to deal with peculiarities concerning jurisdiction to enforce raised by the Internet activities.

To examine jurisdiction in cyberspace as a whole, these three types of jurisdiction should be separately analyzed. However, this work principally deals with jurisdiction to adjudicate. It focuses on the requirements for a court to subject an Internet user residing abroad to proceedings in the court on the basis that the net-user's online activity has a certain connection with the country where the court is located.

4.3 CHOICE OF LAW : ITS HISTORY AND DEVELOPMENT

The Internet is a unique market place in terms of market penetration. Any computer, anywhere in the world, connected to the Internet can access a Web site and may conclude, though that site, an electronic contract. The potential for cross-border disputes in web contracts is, obviously, much greater than in actual reality where most consumer contracts, and a high degree of commercial contracts, are domestic in nature. Issues of private international law, and in particular choice of law, are therefore to the fore when disputes arise.

Assuming a Web site operator is based in Scotland, which legal system regulates his contracts with overseas customers? At common law, the proper law of the contract, usually the *lex loci contractus*, governed the contract. In essence, this is the position today, but now the proper law of the contract will be interpreted in light of the Contracts (Applicable Law) Act 1990 which introduced the Rome Convention into the UK. The convention provides rules to assist in the identification of the proper law of the contract, in effect replacing the common law in most areas. Throughout this section, reference will be made to the convention, and to the report of Professors Giuliano and Lagarde,[57] in an attempt to answer this question.

Over history, courts and the theorists have developed various models for determination of choice of laws in a conflict of law situation. None of these can be considered to be universally accepted or applied, but each serves to provide some level of guidance. The US Restatement of Conflict of Laws, first promulgated in 1934, created a series of simple, mechanical rules for choosing what law to apply in inter-jurisdictional litigation. The substance of the claim whether the case was based in tort, contract, or property determined the applicable rule. In tort cases, the First Restatement applied a simple choice-of- law rule (*lex loci delicti*, or "the law of the place of the

[57] *Report on the Rome Convention* [1980] OJ C282/1. The report may be considered wheninterpreting the Convention. See s.3(3)(a) of the Contracts (Applicable Law) Act 1990

wrong". Under this rule, a reviewing court would apply the law of the place "where the last event necessary to make an actor liable for an alleged tort takes place". For contracts, the First Restatement applied a similarly formal rule. The law of the place where the contract was made would govern the validity of a contract. The place of making was defined as the place where the "principal event necessary to make a contract" had occurred.[58] Under the First Restatement, real property was governed by the *lexsitus* the law of its physical location. Those rules were modified by the Second Restatement, in 1971, whereby a rule was laid down, namely that "when faced with a choice between jurisdictions, courts should apply the law of the jurisdiction with the most significant relationship to the litigation".

If the law courts do not permit technology development in the court proceedings, it would be lagging behind compared to other sectors. Technology is definitely a tool. The UNCITRAL Model Law was in only taken into account in drafting of the Arbitration and Conciliation Act, 1996 is patent from the statement of objects and reasons of the Act. The Act and the Model Law are not identically drafted. The Model Law and judgments and the literature thereon are, therefore, not a guide to the interpretation of the Act.[59]

When dealing with cross-border contracts, choice of law issues are pertinent on three levels. For formal contracts we must determine which law applies in answering the question whether the contract is formally valid. That is to ask, have all necessary formal requirements been complied with? This will include issues such as requirements of writing, witnessing and signatures.[60] As most Internet contracts are currently of an informal nature formality will not be discussed further here, except to say that regulation of this area may be found at Article 9 of the Rome Convention and is discussed at some length in the Giuliano and Lagarde report. Secondly, we must deal with the issue whether the contract is materially invalid, that is to ask whether the contract has actually been formed, and is legally valid, according to the laws of the jurisdiction which apply to the contract.[61] If there is the possibility that the contract is materially invalid, the courts have to decide whether this is the case, by applying the law of some particular jurisdiction. The question is, though, if the parties have not agreed this, which jurisdiction's laws should apply? This is regulated by the Article 8 of the Convention, which states that 'the existence and validity of a contract, or of any term of a contract, shall be determined by the law which *would* govern it under

[58]*Supra* note 1.
[59]*Konkan Railway Corporation Ltd*. v. *Ram Constructions (P.)Ltd*., (2002) 2 SCC 368.
[60]All these matters are dealt with as matters of formal (contractual) validity not matters of pro *Supra* n.81. at C282/28-C282/32.
[61] See Cheshire and North, *supra* n.80 at 507.

this Convention if the contract or term were valid'. Material validity is established, therefore, using the proper law of the contract, discussed below. This may seem unreasonable if, as one of the parties is obviously claiming, there is in fact no contract. The best explanation for the terms of Article 8(1) is provided by Giuliano and Lagarde who state that, 'this is to avoid the circular argument that where there is a choice of the applicable law no law can be said to be applicable until the contract is found to be valid.[62] Finally, we have the issues covered by the applicable law, for example questions of interpretation, performance and the consequences of breach of contract. These, like the question of material validity, are dealt with by establishing the proper law of the contract in accordance with Articles 3, 4 and 5 of the Convention as follows.

The Convention applies to choice of law issues in contract, and begins by identifying the law applicable to the contract. The general principle is that the parties are free to choose the law applicable to the contract. This choice can be made expressly or can be implied from the circumstances. This means that, generally, a Web site operator may include a choice of law clause in the terms and conditions of the Rome Convention, the law of the place identified will govern the contract.

If the parties to the contract choose no applicable law, the issue becomes more complicated. Article 4 of the Convention regulates such occurrence. In such a case, the applicable law is the law of the country which has the closest connection with the contract. Article 4(2) contains a presumption to help identify this country stating, 'the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or for traders the country in which their principal place of business is located'. The characteristic performance of a contract is usually the act for which payment is made. This may be the supply of goods or services or the provision. The effect of this is that the courts will usually apply the law of the country where the person who has to provide/supply the required goods or service maintains their principal place of business or is habitually resident. Thus, to give an example, if Company A, which is based in Edinburgh, runs a Web site offering to supply software and that software is bought and downloaded by Company B in Germany, then, in the absence of a specific choice of law clause, the contract will be governed by Scots law, as the company carrying out the characteristic performance (the supply of the software) has its principle place of business in Scotland.

The above analysis alters substantially if we replace company B with consumer B. The Rome

[62] Report on the Rome Convention, *supra* n.81 at C282/30.

Convention ensures that consumers can rely on their usual consumer protection measures when contracting with overseas traders. If the object of the contract is the supply of goods or services to a party who is not buying in the course of trade then Article 5 applies to the agreement. The effect is that if the seller advertises in the consumer's country of residence the contract will be regulated by the law of the consumer's place of residence, not the place of residence of the party carrying out specific performance. Thus, to return to our example, if company B is replaced with consumer B, German law, not Scots law, now regulates the contract. The provisions of Article 5(2), though, qualify this. The buyer's place of habitual residence comes into play only if: (1) conclusion of the contract was preceded by a specific invitation from the seller to the buyer or the seller intended to advertise to consumers such as the buyer, (2) the seller received the buyer's order in the country in which the buyer was habitually resident, or (3) if the contract is for the sale of goods, and the buyer traveled from the country of his habitual residence to another country to give his order, and the seller arranged his journey with the intention of inducing him to enter into the contract. If none of these circumstances arises the proper law of contract as determined by Articles 3 and 4 will govern the contract. Transactions concluded over the World Wide Web raise many issues when dealing with Article 5(2). Is a web advertisment made in the country of the buyer's habitual residence or is it made in the seller's country of residence? Where is the order received? By putting an advertisement on the Web does the web advertiser *intend* it to reach consumers in all 214 wired countries? These questions are causing problems, both for the determination of choice of law and for consumer protection.

4.4 APPLICATION OF MINIMUM CONTACTS

Constitutional due process gives the upper limit for state jurisdiction; it does not define it. State law determines state court jurisdiction within the constitutional boundaries; and in response to the relaxed requirements for jurisdiction, many States rewrote their laws. Some state long-arm statutes have defined jurisdiction as that which is allowed under the (US) Constitution, while others are more specific. Courts located in States that describe personal jurisdiction with more specificity may not exercise jurisdiction over a person, even though jurisdiction would not violate due process, unless the acts giving rise to the claim fall within one of the statutory categories. Typically, federal courts may exercise personal jurisdiction. Only to the extent a State court, in the State in which the federal court sits, may exercise jurisdiction under its long-arm statute. There are few statutory exceptions.[63] Accordingly, federal courts also rely on the 'minimum contacts'

[63] Those exceptions include, the Securities Exchange Act, 15 USC 78 aa, die Clayton Act, 15 USC 22; RICO, 18 USC 1965; ERISA, 29 USC' 1451

analysis to establish personal jurisdiction.

The circuit courts have not been consistent in their application of the 'minimum contacts' test. There has, however, been movement toward uniformity with the development of a three-prong test. (1) the claim underlying the litigation 'arisesout of or relates to the defendant's contacts with the forum (2) the defendant 'purposefully avail itself of the privilege o f conducting activities within the forum State'; and (3) 'maintenance o f the suit does not offend 'traditional notions of fair play and substantial justice'.

One of the overarching principles courts in both Canada and the US have looked to on questions of jurisdiction is that of reasonableness with regard to the circumstances. In Canada, the courts have framed this as a 'substantial connection' test, whereby connecting factors such as the location of the content provider, the host server, the intermediaries and the end user, are considered in the overall analysis. In the US, the reasonableness requirement is captured in the 'minimum contact' or 'purposeful availment' test. The principle being that a defendant cannot be brought before a court of a particular State unless that person has: minimum contacts... such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. In *Sayeedi* v *Walser2S*[64] a US trial court refused to exercise jurisdiction over an e-Bay transaction between two individuals on the basis that one sale, 'without more, does not constitute sufficient purposeful availment to satisfy the minimum contacts necessary to justify summoning across State lines, to a New York court, the seller of an allegedly non-conforming good'.

Another approach to determining jurisdiction was outlined in the US case of ***ZippoManufacturing v Zippo Dot Com.*** The Court, in this case, applied a passive versusactive test to the question of jurisdiction which involved a 'sliding scale analysis' computing the nature and quality of the commercial activity of the defendant on the internet. To invoke jurisdiction, the *Zippo* test requires an interactive website and commercial activity. The passive versus active approach has been criticized for discouraging interactivity in a time when websites are in fact becoming more interactive. [65]

More recently, courts have looked towards effects or targeting tests, determining jurisdiction on the basis of the actual impact of the action in the locality. The principle was set out in the pre-internet case of *Colder v Jones*[66]: the fact that the *action had an effect* in the other jurisdiction was

[64] 2007 NY Slip Op 27081. (a US Trial Court judgment)
[65] Michael Geist, supra, n 23
[66] 465 U S 783 (1984).

factored into the equation in order todetermine whether jurisdiction existed in that forum. Under this 'effects test', jurisdiction is determined by analyzing the effects intentionally caused within the forum by a party's online conduct outside the forum.

The internet age and the scores of transactions between parties across the globe, while having an impact on several areas of law, have also led to the (need of) evolution of a new variety of jurisdictional jurisprudence. The two major factors that need to be considered vis-a-vis a court extending its jurisdiction over e-business, that have in fact acted as the twin reasons for the various case laws on this point, and the evolution of the law, are first, the chief reason behind corporate houses choosing business over the internet is precisely because of its cost effectiveness, and to now factor in the potential costs of defending against litigation in every place where they could be accessed would be a major dent in their cost planning, making the web-based business more expensive. Second, on the other hand, to allow the business and service providers to insulate themselves against the jurisdiction in every state, except the place where they are physically located, would be troublesome and unreasonable to the consumers situated across the globe, who have a much lesser bargaining power and resources to litigate in a foreign country.[67]

To achieve a balance between these two diverse considerations, the US courts have applied the principles of minimum contact, effective functions, and the theory of long arm statutes, generally used in traditional contracts, with necessary adaptations to CONTRACTs. The courts, in most cases, assume jurisdiction where it is proved that the corporate on its own volition marketed and contracted with the other party belonging to the forum State, with the cause of action arising out of its actions[68]

In 1945, the United States Supreme Court in ***International Shoe* v. *Washington,*** created a "minimum contacts" test for states to use as a basis for exercising jurisdiction over an out-of-state defendant. The Court stated that to the extent that a corporation enjoys the privilege of conducting activities within a state, it also enjoys the protections and benefits of that state. Since these privileges may also give rise to obligations which arise out of or are connected to the activities within the state, requiring a corporation to answer to a suit in that state is not an undue burden. Thus, the conclusion that sufficient contacts were established between the defendant and the forum state, "make it reasonable and just according to our traditional conception of fair play and

[67] J N Adams, *Atiyah's Sale of Goods* (9th edn., New Delhi: Butterworths Publications, 1995), at 165.
[68] Irini AS Matandi et at, *Perspectives on Intellectual Property in the New Digital Environment*

substantial justice to permit the state to enforce the obligations incurred there."

This test has thence been modified, to include even individuals, and not just corporations.[69] In ***Hanson* v. *Denckla,*** the Court stated that while progress in communications and transportation has made defense of a suit in a foreign tribunal less burdensome, yet for the exercise of jurisdiction to comport with due process, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum state.

Courts have therefore expanded and contracted the contacts test over time, perhaps to keep pace with simultaneous changes in science and technology. The moot question, however, is whether this test, or the others highlighted above, can be made applicable to the Internet.

4.5 INTERNET JURISDICTION

The whole trouble with Internet jurisdiction is the presence of multiple parties in various parts of the world who have only a virtual nexus with each other. Then, if one party wants to sue the other, where can he sue? Traditional requirements generally encompass two areas- firstly, the place where the defendant resides, or secondly, where the cause of action arises. However, in the context of the Internet, both these are difficult to establish with any certainty. Even a childishly simple transaction can give rise to a mind-boggling issue of jurisdiction on the Net. For example, A, in India, decides to download an article from a website, and pays money for it through a credit card, and then is unable to perform the download. He wants to sue the owner of the site. But the owner is in Thailand, The site itself is based in a server in Brazil. Where does the defendant reside? The transaction occurred on the net. So was it in India, or in Brazil?

Issues of this nature have contributed to the complete confusion and contradictions that plague judicial decisions in the area of Internet jurisdiction. Considering the lack of physical boundaries on the internet, is it possible to reach out beyond the court's geographic boundaries to haul a defendant into its court for conduct in "cyberspace"?

It is worth examining the decision in ***Cybersell, Inc*. v. *Cybersell, Inc*.[70]** as a typical example of a fact-situation involving a conflict over jurisdiction. The case involved a service mark dispute between two corporations, one at Orlando and another at Arizona. The court had to address the issue of whether the mere use of a web-site by the Florida Corporation was sufficient to grant the

[69] *Kullo* v. *Superior Court*, (1978) 436 US 84.
[70] 1997 US App LEXIS 33871 (9thCir., December 2, 1997).

Court, in Orlando, jurisdiction. The Court answered the question in the negative, focussing on traditional analysis established by the US Supreme Court concerning the due process aspects of personal jurisdiction: "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The Court rejected the plaintiff's argument that by employing a web page, without more, a web publisher was subject to jurisdiction in the plaintiff's forum. The Court also rejected the plaintiff's reliance on the "effects test", holding that the test does not apply with the same force to a corporation as it does not apply with the same force to a corporation as it does to an individual "because a corporation does not suffer harm in a particular geographic location in the same sense than an individual does".

The Court ruled that "juries are properly instructed to apply the community standards of the geographical area where the materials are sent," and that the community standards of Tennessee should therefore apply. The defendants argued that they did not cause the images to be transported to Tennessee. They merely made the images available online for members of the bulletin board; it was the postal inspector who caused the images to enter Tennessee by downloading them.

While dismissing this argument, the court noted that the defendants were technologically able, if they had so chosen, to limit user access in jurisdictions with more restrictive obscenity laws than those in California. Because defendants knew they had a member in Memphis, they could be held to the moral standards of that community. Thus, because the defendants entered into a transaction with a member in Memphis, they could be judged by reference to those standards.

4.5.1 Cases of Cyberspace Jurisdiction

The earliest reported decision is ***PresKap Inc.* v. *System One, Direct Access, Inc.,***[71] which involved electronic contacts through a computerized airline reservation system. The plaintiff owned and operated a computerized airline reservation system. The computer base for the system, as well as the plaintiff's main billing office, was in Florida. A branch business office operated out of New York. The defendant, a New York Corporation, owned and operated travel office in New York. The two parties negotiated a lease contract in New York, the breach of which was the subject of the lawsuit. The court found only two contacts between the defendant and the forum state Florida, namely that the defendant forwarded lease payments to a billing office in Miami, and that the defendant's computers made electronic contacts with the plaintiff's computer base in Florida.

[71] 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

Citing ***Burger King Corp*. v. *Rudzewicz***,[72] the court found that a contract with an out-of-state party alone could not establish jurisdiction. That left only the electronic contacts for the court to consider. The Florida Appeals Court held that electronic contacts with a computer database located in the forum state were insufficient to establish personal jurisdiction. Thus, the defendant did not purposefully avail himself of Florida's jurisdiction, and the first prong of the test failed. In addition, the court warned about the unfairness of allowing jurisdiction where the only contacts are between computers.

4.5.2 The "Totality of Contacts" Theory (Zippo Test)

The totality of contracts theory was established by the United States District Court for the Western District of Pennsylvania in ***Zippo Manufacturer* v. *Zippo.Com***,[73] a California based company Zippo, rendered internet news service. The users in Pennsylvania, constituted 2 per cent of Zippo Dot's client. The defendant used the word 'Zippo' to render its online news service in Pennsylvania. The plaintiff, a company that produced tobacco, lighters had registered its trademark 'zippo'. The plaintiff manufacturer contended that the defendant by transacting business in Pennsylvania had caused infringement of its trade mark 'zippo'. They also alleged that the defendant had caused dilution of their trademark. When a case was filed in the US States District Court of Pennsylvania, the court held that it had specific jurisdiction over the defendant. The 'theory of specific personal jurisdiction' was satisfied as there were active purposeful contacts with the Forum State as Zippo Dot contracted with local service providers and with residents of Pennsylvania who were its customers. The litigation also arose out of the defendants' activities in Pennsylvania and it was observed that there would be no hardship on the defendants to defend themselves in Pennsylvania. In this case, mere use of its name in Pennsylvania fulfilled requirement that the litigation arose out of its contacts with the Forum State. The Court for the first time laid down the 'Zippo Sliding Scale Approach'. According to the Sliding Scale Test, on one extreme end are 'passive websites' that disseminate mainly information to internet users and would not attract exercise of personal jurisdiction. In the middle of the spectrum are the 'interactive websites' where internet users may input some information on the website. In this case exercise of personal jurisdiction depends on 'the level of inter-activity and commercial nature of exchange of information' by means of the website. On the extreme other end of the spectrum are the 'active websites' wherein the defendant undertakes activities over the internet and

[72] (1985) 471 US 462
[73] *Zippo Mfg. Co*.v.*Zippo.Dot.com*.In(52F supp.1119,1124)(W.D.Pa.1996),(later cited as"Zippo")

constantly interacts with the website. In the Zippo case the court took the view that the defendant would fall in the category of 'active websites' and held the exercise of personal jurisdiction over the defendant was fair and justified.

Thus the "totality of contacts" test can bring a clear cut solution only when it is undeniably obvious if the website is "passive" or "active", however in the most cases the courts have to deal with disputes that arose from the interactive websites. In those situations the "totality of contacts" test fails to bring about consistent solutions.

4.5.3 The "Effects" Test

A second theory that some courts have adopted when deciding the issue of jurisdiction is the effects test. This approach was based on the Supreme Court's decision in *Calder* v. *Jones*. In that case, the court stated that jurisdiction of Californian forum was proper because of the defendants' conduct in Florida had "effects" in California. Also part of the court's rationale centered on the fact that the "defendants were not guilty of mere untargeted negligence, but of intentional actions expressly aimed at California."

The first time the "effects" test was applied to the assessment of internet jurisdiction was in ***Bunn-O-Matic Corp*. v. *Bunn Coffee Service, Inc*.**[74] There, Illinois Federal District Court cited the Calder case to assert jurisdiction over a defendant, who was accused of infringing trademark rights through his website.[75]He did not sell any products or services directly in Illinois but maintained an informational web page that used allegedly infringing marks. Nevertheless, relying on an "effects" approach, the court held that jurisdiction in Illinois was proper, explaining that "the harm alleged occurred, if at all, in the plaintiff's forum state of Illinois."

Similarly, in *EDIAS* ***Software International, L.L.C.* v. *Basis International Ltd*.[76],** an Arizona Federal District Court, citing Calder, found jurisdiction proper over the defendant company because it "had emailed alleged defamatory material about the plaintiff to Arizona, causing harm in Arizona".

On the other hand in *Spacey* v. *Burgar*[77]the California court did not find jurisdiction based on the

[74] *Bunn-O-Matic Corp*. v. *Bunn Coffee Service, Inc*., 46 U.S.P.Q.2d (BNA) 1375 (C.D. Ill. 1998).

[75]*Id* at1378

[76] *EDIAS Software International, L.L.C*. v. *Basis International Ltd*, 947 F. Supp. 413 (D. Ariz. 1996).

[77] *Spacey* v. *Burgar*,207 F.Supp.1037, 1038[C.D.Cal.2001]

"effects" test. There the defendant registered the address "kevinspacey.com" without actor Kevin Spacey's authorization. The court lacked jurisdiction over the Canadian defendant; "even though the website focused on celebrities and the entertainment industry, it did not cause any effects in the forum state". The court also held that the "likelihood that [the plaintiff] would be injured in California, [the forum state], [was] no greater than in [any other state]" since the website can be accessed from "all over the world."

When applying the "effects" test to Internet cases the US courts instead of asserting the characteristics of the website (Zippo approach) focus on the actual, evident effects that the website has in the forum state. Although this method brings about more consistency than the Zippo's test of "sliding scale", the courts have not been completely satisfied with it. The "effects" test fails in many COMMERCE cases involving corporations, because it is rather difficult to contend whether a large multi-forum corporation is harmed by a certain action online.

4.5.4 Targeting Approach to Jurisdiction

For the reasons stated in the last paragraphs of sections II.2 and II.3 of this thesis, some US courts have moved to the "targeting" approach in defining jurisdiction over the Internet transactions. One of the most crucial decisions that both questioned the effectiveness of the Zippo and "effects" tests and helped develop the targeting approach was the ruling in ***Cybersell, Inc.* v. *Cybersell, Inc.***[78]

There, an Arizona corporation was asking the court to establish that a Florida corporation had sufficient contacts with the state of Arizona for the exercise of personal jurisdiction. The US Court of Appeals for the Ninth Circuit found that "the minimally interactive site, posted by defendant, without any other contact, was insufficient to find jurisdiction over the Florida Corporation.

Elaborating on this issue the court refused to apply the "interactivity" of the website test established in Zippo and focused on finding other approaches to jurisdiction assessment. It was stated that the main jurisdictional criteria in the context of Internet is "deliberate, intentional (albeit electronic) activity directed by the defendant corporation towards the forum state". The court found that the Florida corporation "entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Inter-net to Arizona. The only message it received over the Internet from Arizona was

[78] *Cybersell,* Id. at 414.

from Cybersell AZ".

Asserting the "effects" test, the Ninth Circuit pointed out the test's limited applicability in commercial contexts. The court noted that the "effects" test does not "apply with the same force to a corporation as it does to an individual because a corporation does not suffer harm in a particular geographic location in the same sense that an individual does." Thus, the court concluded that deliberate action, rather than the more problematic notions of "interactivity" and "effects," is the key to commerce jurisdictional development.

After Cybersell several courts started applying targeting approach in thecontext of electronic commerce. In ***Millennium Enterprises, Inc*. v. *Millennium Music, L.P*.**, an Oregon district court refused to exercise jurisdiction over a South Carolina record store in a trademark infringement suit because the defendant's website was not aimed at consumers in Oregon.

The court raised the standard for finding jurisdiction over a commercial website when it held that "the middle category of the Zippo scale, where fact-finding is necessary to determine the level of commercial interactivity, requires deliberate action aimed at the forum state consisting of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state." Since Zippo does not require deliberate action for a finding of personal jurisdiction, the court by its ruling effectively rejected the Zippo approach, underlining that the post-Zippo case law is "inconsistent, irrational, and irreconcilable."

The main difference between a "targeting" approach and an "effects" test lies in the intention of the defendant. In their book "Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities, Computer & Internet Law" Carole Aciman and Diane Vo-Verde stated that: "whereas an effects framework focuses on whether the defendant could have foreseen its activities impacting a forum state, a targeting analysis requires that a defendant specifically aim its online activities at forum to come under the jurisdiction of that state. A targeting approach removes much of the un-certainty that accompanies the ambiguous "effects" test.

In ***EDIAS Software International, LLC* v. *BASIS International Limited***, the parties had signed an agreement wherein EDIAS became a distributor of software manufactured by BASIS in European Region. The law of New Mexico was the governing law of the contract and the contract was also signed in New Mexico. BASIS terminated this agreement due to a dispute with EDIAS and accordingly informed its customers and staff members. It also displayed on its web page that EDIAS had not granted written consent to sell its products at a fair market price and to provide

adequate technical assistance. The plaintiff filed the suit in Arizona alleging that the defendant, by terminating the agreement, breached the contract and by placing the alleged reasons for termination posted different defamatory and libelous statements causing tortious interference with the contract.

The defendants challenged the suit for lack of personal jurisdiction as it was based in New Mexico and had no office or employee in Arizona. The court found that the defendant had sufficient purposeful availment with Arizona to justify the exercise of personal jurisdiction over it. The defendant had made several telephone calls, faxes and e-mails with the plaintiff in Arizona for the contract in question and conducted meetings within the Forum State, apart from selling to the Plaintiff its software and selling to Arizona customers software worth approximately $50,000. As regards the posting of defamatory statements, the court took the view that the defendants could foresee that its activities shall have a direct impact in Arizona and fulfil the 'effects test'.

The court concluded that BASIS had purposefully availed the benefits of doing business in Arizona and the exercise of jurisdiction over the defendants satisfied the constitutional due process requirements.

4.6 CONTRACTUAL OBLIGATION IN CYBERSPACE

Under traditional contracts, the governing law is the law of the State where the transaction occurred, unless agreed otherwise by the parties to the contract, for which the rules of private international law were used in case of transnational contracts. Nonetheless, moving over to contracts, where the parties belong to different countries, and where there is no specific factor to determine the place of consummation of the contract, and there is no mention of what the proper law is, in the rules of most of the domestic legislations this sets the courts in motion to apply the law of the country that has the closest and most substantial connection to the contract, with the courts again differing in the factors that they take into consideration in arriving at the decision.

Nevertheless, most contracts concluded online, be it B2B or B2C, specify both the jurisdiction and the governing law of any subsequent dispute. In such cases, the court usually upholds the contract between the parties, giving way to contractual autonomy, although with certain limitations especially for B2C contracts that are contracts of adhesion, thus, requiring the intervention of the courts to induce reasonability of the terms and fairness. 'This is basically for

the reason that the issue of consumer protection is closely intertwined with public policy, and legislatures the world over have realized the unequal bargaining power of the consumers in determining the jurisdiction and governing law of the contract, similar to the determination of the other relevant terms of the contract, giving a significant scope for forum shopping by the corporate.

In India, the Indian Contract Act of 1872 helps for the rules regulating the general contract in the visible world. On the contrary, in the age of Super Computers and the internet, there is no specified, contract or electronics contract in the world of electronics. If such a law is provided, the formation of the electronic contract viz. digital signature system can have a complete legal space in space where the contracts or agreements are made and concluded in computer base or electronically. On the other hand, it can be remembered that when a sender transmits the message through e-mail or other mode of electronic messaging it is held that the message has been transmitted, sent or received. But such message enters a system where the sender or transmitter loses his power to take return. And same message is held to be received when it enters into the system or mail box. If the computer problem comes between two then these become a problem for either or both the parties. The important point to be remembered about the authentication of the electronic contract through the Information Technology law and rules made there under though there is no special provision for contract or click wrap agreements.

Furthermore, the legislations of various countries and international conventions themselves provide for the consumer protection in such contracts of adhesion and prohibit the exclusion o f their jurisdiction by the contractual terms. For instance, S. 28 of the Indian Contract Act and S. 11(2) of the Consumer Protection Act 1986 (India) spell out for the protection of the rights and remedies that the Indian law provides to its consumers, and allows the court to disregard the agreement between the consumer and the seller in so far as the choice of forum and the governing law are concerned.

At the International level, on 30 October 1999, a Special Commission of the Hague Conference on Private International Law adopted a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (‘Preliminary Draft Convention, or ‘PDC’). The Preliminary Draft Convention text, besides covering the questions of jurisdiction, provides a focus on provisions of particular concern in the areas of intellectual property rights and electronic commerce.

4.7 JURISDICTION IN CASE OF CLICKWRAP AGREEMENT

4.7.1 Clickwrap Agreement

In online contracts a user is asked to read the terms and conditions and disclaimers posted on a website. These terms of service contain various clauses on the rights and obligations of a user when user seeks to avail the services of a website. Generally, such agreements contain the choice of the 'Governing law' as well as 'Forum Selection Clause' which are legally valid and enforceable in a court of law, When a user browses a website, he may not read the terms and simply click on the '1 agree' button. However, ignorance of law is not excuse and he is deemed to have consented to the terms and conditions in the agreement to form a clickwrap agreement.

There are no cases as on date on clickwrap agreements under Indian law. However, it will be interesting to discuss the approach in United States as it may have a persuasive value in case such cases are considered in India. As regards statutory position, according to the Indian Contract Act, 1872 if parties have agreed to a forum selection clause, it will be valid and enforceable. This should also apply to the online sphere incase of cickwap agreements or browsewrap agreements unless a contract is unduly burdensome and ouster of a forum is patently unfair or against public policy in the facts and circumstances of a given case. For example, when the claim is small and the terms of contract oust the jurisdiction of court located in plaintiffs jurisdiction and it will be unduly burdensome on plaintiff to seek recovery of damages in the defendant's jurisdiction. Insuch a case the courts may hold that the forum selection clause is void due to being unconscionable and/or being opposed to public policy and violative of Section 23 of the Indian Contract Act, 1872, In United States, the contractual choice of law clause usually prevails till the time the forum selected by parties has substantial relationship with the parties or the underlying transaction. The clause should be reasonable and not violate any fundamental policy of a forum by use of the chosen law. The use of chosen law should not violate the fundamental policy of a Forum State involving greater interest in issue.

In the **United States in *Bremen* v. *Zapata***, the court examined an issue as to whether the enforcement of a forum selection clause is unreasonable. The court adopted a nine factor test that based on parameters such as place of execution of a contract, location of the parties and witness, relative bargaining power, conduct of parties, public policy of the Forum State and concluded that the enforcement of a forum selection clause is not unreasonable. In another case ***Groff* v. *America Online Inc*,** the question involving the binding nature of a clickwrap agreements was analysed by the court. The plaintiff, a resident of Rhode Island, the subscriber of America Online filed an action alleging the violation of State consumer protection laws. In the subscription agreement,

there was a forum selection clause that provided Virginia courts as a forum for dispute resolution. The plaintiff had pressed the 'I agree' button. The court held that the plaintiff in the facts and circumstances of the case had consented to the choice of the forum and the clickwrap agreement so formed was valid and binding between the parties.

In ***Carnival Cruise Lines, Inc* v. *Shute***, the plaIntiff had booked for seven days cruise on the ship of the defendant. The defendant mailed the tickets to the plaintiff in Washington. The ticket contained a printed declaration to the effect that acceptance of the ticket would amount to accepting the agreement which included a foruth selection clause mentioning Florida as a chosen forum for dispute resolution. The-plaintiff who boarded the ship in California was injured as she slipped and fell on the deck. Though the ship was in Washington, the forum selection clause indicated Florida as the appropriate forum. When the plaintiff contended that Florida would be an inconvenient forum to adjudicate the dispute between the parties, the Supreme Court took the view that the forum selection clause was fully valid and enforceable.

Therefore, internet users ought to be very prudent while entering into any clickwrap agreements and need to carefully read the terms and conditions mentioned on the website of a service provider before consenting to avail its services.

4.7.2 Divergent Views on Clickwrap Agreements

Certain courts have adopted a divergent view on binding nature of clickwrap agreements. In ***Comb* v. *Paypal, Inc*.,** the United State District Court for Northern District of California dismissed an action that sought to enforce a clickwrap agreement wherein the customer of Paypal consented to an arbitration clause choosing American Arbitration Association as a forum to arbitrate disputes between the parties. According to the court, arbitration clauses were 'unconscionable' both from a procedural and substantive standpoint. The amounts in dispute were very small, the Paypal Customers were also 'unsophisticated' and there was no clarity on whether alternative sources offering similar services could be accessed without arbitration clauses. In a class action law suit, ***William* v. *American OnLine, Inc*.** a user installed software that damaged his system before he consented to the agreement. The defendant on its website had set a default choice of 'I agree' button and a user needed to click on the 'read now' button twice to read the entire agreement. In the circumstances of the case, the damage caused to the user's computer even before he signed the contract as the damaged started at the installation stage itself before a user could review and click on the 'I agree' button due to the default code set in. In these circumstances, the forum selection clause was held to be unenforceable. The court also took the view that enforcing such

contract would be against the public policy and is unreasonable to require a Massachusetts based resident with small disputed amounts in question to file an action in Virginia.

In India, contracts have been judged as unconscionable and void where at the making of a contract there is gross disparity between parties giving one an excessive advantage over another and if undue influence can be proved.[79] This view is in keeping with the UNIDROIT principles that elucidate parameters to determine unconscionablity of contracts. Even in cases where no undue influence is alleged if a contract and its terms are patently unfair, courts may declare a provision (if severable) or a contract itself (as the case may be) as void being against public policy under Section 23 of the Indian Contract Act, 1872 as explained hereinbefore.

4.7.3 Determining Personal Jurisdiction Brussels Regulation, 2002

The American and Indian approach to determine present jurisdiction in cyberspace (which is quite similar) is different from the European approach. In European Union (EU), the Brussels Regulation issued by the EU was brought into effect on 1st March, 2002. The Brussels' Regulation prescribes rules to determine jurisdiction and rules for the enforcement of judgment in civil and commercial matters. This replaces the Brussels' Convention, 1968. Conventions are binding on member countries which codify its principles only on ratification and then the convention enters into force in a particular State. Although these regulations apply in EU, the Regulation can affect jurisdiction over non-EU entities conducting business in EU Member States (including e-businesses) incase these incorporate the principles of the Brussels Regulation in their internal conflict of laws legislations and a European court may assume jurisdiction on this basis. According to the Regulation, if a person is domiciled in one State, irrespective of his nationality, such person can only be sued in the courts of that State (Article 2). For matters relating to a contract, a person domiciled in a contracting State may be sued in another contracting State in the courts for place of performance of obligations delineated in the contract (Article 5.1). This is different from Section 20 of the Code of Civil Procedure in India wherein a case may be instituted where the defendant resides or carries on business or where part of whole of cause of action arose giving rise to a right to sue. For all tort i.e., delictual or quasi-delictual claims, the courts at the place of occurrence of the harmful event shall have jurisdiction (Article 5.3). In India, under Section 19 of the Code of Civil Procedure, a plaintiff can sue either where defendant resides or where the tort was committed. Article 5.3 includes the place of the event giving rise to the harm and also the place where the damage actually occurred. Where a contract contains a choice of court clause, the

[79] *U.Kesavulu Naidu* v. *ArithulaiAmmal*, (1912) 36 Mad 533, 22 IC 769;

principle of party autonomy is upheld and clause is considered enforceable. This rule is consistent with the Indian approach. According to the Brussels Regulation, a consumer may file an action in his home Late if the trader carries out 'commercial activities in the member State of the consumer's domicile or by any means directs such activities to that member State'.

This includes any advertising or other form of solicitation of business and will include COMMERCE activities. The BC Commission brings within the ambit of Article 15(1) and (3) only those websites which are interactive. The Commission clause does not explain the targeting criteria or the interactive criteria. Contrary to this, Indian courts have explained and adopted target based approach as followed in the United States. According to the Brussels Regulation, 2002, there is no longer a requirement that a consumer must prove that he took within the home State adequate steps required for concluding a contract. Earlier the Convention prescribed provisions in Article 14, para 1 of the Convention that a consumer has the option to sue a party to a contract in the courts of his State of domicile or in the State of other party's domicile. By virtue of Article 14, para 2 the other party can sue the consumer in the country where the consumer is domiciled. A consumer was earlier required to show that he received a specific invitation or advertising in his domiciled State and he performed some actions in that State to form the contract after the advertising was made. In this case if a consumer satisfies the condition, it will be deemed sufficient to attract the jurisdiction of the consumer's State. Now this requirement of a consumer performing some action has been deleted by the Brussels Regulation, 2002 and only requirement is that consumer received specific invitation or advertising in his domicile State. The parties are free to choose the jurisdiction for settlement of their requisites different from the jurisdiction indicated in the Regulation. This is possible with respect to such agreements which are formed after a dispute arises between the bulks that entitle a consumer to sue in the courts apart from those courts mentioned in Articles 13 and 14 of the Convention. This choice of forum also prevails when a consumer and the other party are either domiciled or habitual residents of the same member State at the time of forming the contract, so long as the agreement does not violate the law of that member State.

Rome Convention applies to EU to create a unified choice of law regime. It only has a persuasive value in India in cases where private international conflict of issues may arise require courts/arbitral tribunals to decide applicable or substantive law that applies to the merits of a case. Article 3 of the Rome Convention provides that the parties have the freedom of choice to decide the applicable law in a contract. This choice can be declared expressly or impliedly by the terms of the contract particular circumstances of each case.

A choice of law clause, however, cannot escape the mandatory provisions of a State which is substantially connected with the contract and also the Forum States where a dispute is being decided. In case there is no express choice made by the parties, Article 4 of the Rome Convention states that the contract will be governed by the law of the place which has the closest connection with the contract. In case of commercial contracts, the law of the place where the main office of the business entity is established or where performance of a contract is to be made could also be a place which is closely connected with the agreement. indisputes involving immovable property, the *lexsitus* rule applies i.e. law of the place where immovable property is situated. Article 5 of the Rome Convention is applicable to such contracts wherein supply of goods or services to a consumer is being made for a non-commercial purpose (for one's personal use) or to such contracts wherein a credit is being provided for a similar purpose. Article 3, that entitles a party to choose the law that would govern a contract, offers protection to a consumer in such a manner that it does not take away any additional protections available to a consumer under the mandatory law of a country where he habitually resides, in case the consumer have responded to an advertisement or invitation to form the agreement in that country or the second party accepted the purchase order of the consumer in that country or if the contract for sale of goods made the consumer travel from one country to another where he placed his order, if the consumer's travel was organised by the seller to enable the consumer to make a decision to buy.

Article 7 provides definition of 'mandatory rules' as rules which must be followed irrespective of the applicable law chosen by the parties. To decide the nature of a rule and whether it is mandatory in the *lexfori* or the place where the contract has its closest connection, the court usually considers the nature, objective and results that will ensue in case they are applied or not applied. In case the parties have not expressed any choice of law, the contract shall be governed by the law of the place of habitual residence of a consumer. However, this is inapplicable in case of contract of carriage or for supply of services where the services are provided to a consumer in another country which is not his place of habitual residence. According to Article 5 of the Rome Convention, a choice of law clause in a Business to Consumer (B2C) contract shall not deprive a consumer of the protection offered by the mandatory laws of their place of residence and this is the case where the choice of law clause may even apply to other aspects in a contract. The EU Rules adopt the principles in the Rome Convention and uphold the freedom of the parties to decide the choice of forum clauses. Certain exceptions to this rule include employment, insurance or consumer contracts.[80] The EU rules protect the consumers in choice of forum clauses through various pro-

[80] EC Convention on the Law Applicable to Contractual Obligations, 19th June, 1980, 80/934/EEC 1980 OJ (L266) 1, Art.4(2).

consumer directives such as the unfair contract terms Directive. Even the Brussels' Regulation adopts a similar approach as discussed above. It is pertinent to point out that in United States a choice of law and forum clause in a consumer contract may be rendered unenforceable due to public policy grounds. In internet law cases where clickwrap contracts are formed, the United State courts have adopted a strict approach to adjudge the validity of a consumer choice of law or forum clauses. In many internet cases the parties may prefer to agree to arbitration as a mode of settling their disputes or may provide that disputes shall be settled by court of a particular jurisdiction. In case the parties have equal bargaining power, there is generally no legal hurdle in enforcement. But where there is inequality in bargaining power coupled with unconscionability or public policy considerations, a court (such as an Indian or United State court) may decide on its enforceability depending on the choice of forum and law and how burdensome it is on the consumer.

4.8 INDIAN LAWS TO DETERMINE PERSONAL JURISDICTION

Indian law, on the assumption of jurisdiction in internet disputes is theoretically close to the position in the United States. Section 20 of the Civil Procedure Code 1908 (CPC) deals with jurisdictional aspects, and states that a court may assume jurisdiction in a case, when the cause of action arises within its sphere. This section, although more relevant to domestic courts and is essentially the domestic law of a country, yet it can be interpreted so as to apply to transnational issues as well as private international law.

This provision for jurisdiction based on the cause of action is quite wide in its ambit, enabling the court to assume jurisdiction over a dispute regardless of where the principles are resident or the *situs* of the business, so long as a portion of the cause of action takes place within the local jurisdiction, while still having an implied standard set, in a way similar to the US long-arm jurisdiction provisions.Moreover, the Indian procedural law also provides for the recognition and enforcement of such decisions—its own as well as the enforcement of foreign decisions—since a mere assumption of jurisdiction, and passing a judgment without it being recognized and enforceable in another country would have no effect. S. 13 of the CPC provides for the effect of foreign judgments on Indian courts; it also provides for their enforcement in all cases except under a few circumstances, in which case the courts would delve into the issues of jurisdiction of the court, the public policy, and morality of the decision to be enforced, keeping the merits of the case as off-limits.[81] By virtue of S. 44A of the CPC, the decrees of the Indian courts are enforceable in

[81] *Govindan*v. *Sankaran,* AIR [1958] Ker 203;*Rajarathnam*v. *Muthuswami,* AIR [1958] 203.

countries which the central government has declared by notification under the section, and those which have entered into reciprocal agreements with the Government of India, in respect of the enforcement of their decrees in the Indian courts. Such agreements and reciprocal relationships are of quintessence particularly in internet contracts, where the parties have an international existence, needing a mutual cooperation between countries in effecting the valid judgments of each other.

However, in case, a country that does not have a reciprocal agreement with India, then enforcement of any judgment can be done only by commencing a new action for enforcement in that court, which might often be complicated, since the foreign court may wish to re-assess the merits of the case or re-assess the Indian court's assumption of jurisdiction before giving effect to the decisions. This difficulty in the recognition and enforcement of judgments in other countries exists not only for the Indian courts, but for other jurisdictions too, and mainly occurs because of the possibility of multiple jurisdictions hearing a particular matter arising over the internet, and the wide range of laws that may govern the dispute.

A Uniform Code, as it exists in the United States, dealing with interstate jurisdictions providing for the jurisdictional questions and choice of law if enacted for international jurisdiction in contracts, along the lines of the CISG (Convention on International Sales of Goods) for the sale of goods would bring in a legal certainty, solving most of the controversies and confusion regarding jurisdictional matters. S. 13 of the IT Act addresses the issues of the time and place of dispatch and receipt of an electronic record, thus, addresses the issue of jurisdiction in electronic contracts. Clause (1) provides that the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. With regard to receipt of the record, the law distinguishes between whether the originator has sent the message to a computer resource designated by the recipient to receive communications or a non-designated computer resource. Receipt takes effect at the time the electronic record enters the designated computer resource unless the record was sent to a non-designated computer resource, in which case it occurs at the time when the electronic record is retrieved by the addressee. Hence, it would seem that when the acceptance of an offer is emailed to a computer system designated by the offeror, the mailbox rule would not apply. Ultimately, the location of the computer resource is irrelevant. S. 13(3) states that an electronic record is deemed to be dispatched from 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.

In *PR **Transport Agency v Union o f India***, the Allahabad High Court held that since the acceptance (through e-mail) was received by the petitioner at Chandauli/ Varanasi, therefore, the contract became complete by receipt of such acceptance. And, as both these places were within the territorial jurisdiction of the High Court of Allahabad, therefore, a part of the cause o f action had arisen in UP and the High Court had territorial jurisdiction. Further, the High Court considered following points for its decision:

i. With regards to contracts made through telephone, telex or fax, the contract is complete 'when the acceptance is received' and at the place 'where the acceptance is received'. However, this principle can apply only where the transmitting terminal and the receiving terminal are at fixed points.

In case of an e-mail, the data (in this case, 'acceptance') can be transmitted from anywhere by the e-mail account holder. It goes to the memory of a 'server' which can be located anywhere and can be retrieved by the addressee Accordingly, there is nofixed point either of transmission or of receipt.

ii. account holder from anyplace in the world.

iii. Section 13(3) of the IT Act has addressed this intricacy of 'no fixed point either of transmission or of receipt'. In accordance with this section, '...an electronic record is deemed to be received at the place where the addressee has his place of business.'

iv. The acceptance of the tender shall be deemed to be received by the PRTA at the place where it has place of business. In the instant case, it is Varanasi/ Chandauli (both in UP).

4.8.1 Governing Law

Under traditional contracts, the governing law is the law of the State where the transaction occurred, unless agreed otherwise by the parties to the contract, for which the rules of private international law were used in case of transnational contracts. Nonetheless, moving over to CONTRACTs, where the parties belong to different countries, and where there is no specific factor to determine the place of consummation of the contract, and there is no mention of what the proper law is, in the rules of most of the domestic legislations this sets the courts in motion to apply the law of the country that has the closest and most substantial connection to the contract, with the courts again differing in the factors that they take into consideration in arriving at the

decision.

Nevertheless, most contracts concluded online, be it B2B or B2C, specify both the jurisdiction and the governing law of any subsequent dispute. In such cases, the court usually upholds the contract between the parties, giving way to contractual autonomy, although with certain limitations especially for B2C contracts that are contracts of adhesion, thus, requiring the intervention o f the courts to induce reasonability of the terms and fairness. 'This is basically for the reason that the issue of consumer protection is closely intertwined with public policy, and legislatures the world over have realized the unequal bargaining power of the consumers in determining the jurisdiction and governing law of the contract, similar to the termination of the other relevant terms of the contract, giving a significant scope for forum shopping by the corporate.

Furthermore, the legislations of various countries and international conventions themselves provide for the consumer protection in such contracts of adhesion and prohibit the exclusion o f their jurisdiction by the contractual terms. For instance, S. 28 of the Indian Contract Act and S. 11(2) of the Consumer Protection Act 1986 (India) spell out for the protection of the rights and remedies that the Indian law provides to its consumers, and allows the court to disregard the agreement between the consumer and the seller in so far as the choice of forum and the governing law are concerned.

At the International level, on 30 October 1999, a Special Commission of the Hague Conference on Private International Law adopted a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ('Preliminary Draft Convention, or 'PDC'). The Preliminary Draft Convention text, besides covering the questions of jurisdiction, provides a focus on provisions of particular concern in the areas of intellectual property rights and electronic commerce. Art. 7 of the Preliminary Draft Convention raises some important questions in the burgeoning area of electronic commerce, and provides that a consumer may bring suit in the courts of the State in which he is habitually resident, if the consumer's claim relates to trade or professional activities thac the defendant has engaged in or has directed to that State irrespective of the terms of the contract.

There has been an ongoing effort to form new rules that would apply to the online environment reflecting a growing consensus to accord appropriate respect to the freedom of contract of the parties, while providing some protection to the consumers in terms of reasonability for facilitating the development of electronic commerce.

However, there are no strong and pervasive laws as such for contracts at present at the international level, both for determining the governing law of the contract, and also for the establishment of the *forum conveniens,* and the recognition and compulsory enforcement of such decisions in other jurisdictions. Nevertheless, one viable suggestion would be to frame an international convention for the recognition, enforcement, and determination of the substantive laws of a contract that would solve various problems relating to contracts at a practical level.

4.8.2 Indian Case Laws vis-à-vis COMMERCE

Unlike US Courts, courts in India are not frequently confronted with the issue of jurisdiction in matter relating to cyber space. In *C**asio India Co. Ltd***v. *Ashita Tele Systems Pvt Ltd*, Delhi High Court held that once a web site can be accessed from Delhi, it is enough to invoke the territorial jurisdiction of the Court. It is further held in ***India TV Independent News Service Ptv Ltd*****v. *India Broadcast Live LLC***[82], that the mere fact that a website is accessible in a particular place may not itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website. However, where the website is not merely passive but it is interactive permitting the browsers to not only access the contents thereof but also to subscribe to the services provided by the owners, then the position would be different.

In ***National Association of Software and Service Companies*** **v.** ***Ajay Sood& Others***, decided by Delhi High Court in 2005, the defendants were operating a placement agency involved in `head-hunting' and recruitment. In order to obtain personal data which they could use for head-hunting, the defendants composed and sent emails to third parties in NASSCOM's name. Court granted Injunction and Rs. 16 lakhs as damages.

Delhi High Court in ***SMC Pneumatics (India) Private Limited*** **v.** ***JogeshKwatra***granted an injunction and restrained the employee from sending, publishing and transmitting emails which are defamatory or derogatory to the plaintiffs.

In ***Syed Asifuddin&Ors***v. ***State of Andhra Pradesh &another*** Employees of a completing mobile services company lured the customers of the above company to alter / tamper with the special (locking) computer program / technology so that the hand-set can be used with the competing mobile services. Held: such tampering is an offence u/s 65 of IT Act as well as Copyright

[82] 2007 35 PTC 177 Delhi

infringement u/s 63 of Copyrights Act.

In ***Casio India Co. Limited*** **v.*Ashita Tele Systems Pvt. Limited*** was a passing off action where the defendant was carrying on business from Bombay. The defendant had managed to get a registration of domain name www.casioindia.com and defendant no. 2 was the Registrar with whom the domain name had been registered. The plaintiff, on the other hand, claimed to be a 100% subsidiary of Casio Computer Ltd., Japan (Casio Japan), which was the registered owner of the trade mark 'Casio' in India used for a large number of electronic and other products. He had registered a large number of domain names in India like 'CasioIndiaCompany.com', 'CasioIndia.org', 'CasioIndia.net', etc. Defendant No. 1 had obtained the above domain names during the time when it held a distributorship agreement with the plaintiff. It was held by the learned single Judge after referring to the decisions in ***Rediff Communication Ltd*****. v. *CyberBooth***[83]and ***Dow Jones & Co. Inc*****. v. *Gutnick***[84]that "once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant." According to the learned single Judge, since a mere likelihood of deception, whereby an average person is likely to be deceived or confused was sufficient to entertain an action for passing off, it was not at all required to be proved that "any actual deception took place at Delhi. Accordingly, the fact that the website of Defendant No. 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this Court."

In ***Banyan Tree Holding (P) Limited*** **v. *A. Murali Krishna Reddy***Delhi HC overuling its prior *Casio judgment* held that for the purposes of a passing off action, or an infringement action where the plaintiff isnot carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, inorder to satisfy the forum court that it has jurisdiction to entertain the suit, the plaintiff would have to show that the defendant 'purposefully availed' itself of the jurisdiction of the forum court. For this it would haveto be prima facie shown that the nature of the activity indulged in by the defendant by the use of thewebsite was with an intention to conclude a commercial transaction with the website user and that thespecific targeting of the forum state by the defendant resulted in an injury or harm to the plaintiff within theforum state.

4.8.3 Selection of Forum by Choice

The parties to a contract are free to decide the forum where they agree to decide their disputes.

[83] A.I.R. 2000 Bom 27 (India)
[84] (2002) H.C.A. 56 (Austl.)

This principle of autonomy of parties is a settled principle of Private International Law. In case more than one court holds jurisdiction in a transaction, the parties are free to choose any one forum to adjudicate their disputes. In case where there is a conflict of jurisdiction, the choice of jurisdiction shall be made by the plaintiff based on convenience unless a law excludes such option of access or it would amount to abuse of process of court or against public policy. 'Public Policy' means not merely policy of a government but also includes matter which is for public interest and public good. The concept of public policy varies with changing requirements of society. The legislations drafted by nations may incorporate few laws to meet these requirements and the remaining needs are met by courts that fill up the lacuna. However, a provision or term will be declared void on the ground of public policy only when public harm is quite apparent and is not merely a subjective perception of judges. If the forum selection has been expressly made by the parties, the parties are bound by the forum selection clause. This is a settled principle of International Law which has gained acceptance on a universal footing. In many jurisdictions, a State may assume jurisdiction over a person based on a choice of law clause and the forum of choice clause in a contract.

It is pertinent to note that in case where no jurisdiction exists, the parties cannot confer jurisdiction by expressly choosing a court of a different jurisdiction. Likewise in United States and Europe a choice law and forum selection clause incorporated in B2B contracts is enforceable in law provided there is connection between the parties and the selected forum for dispute resolution and clause is. reasonable. The parties cannot by agreement divest the court of its jurisdiction to hear and decide a case. The only exception in this case is where the parties choose to arbitrate their disputes or adopt other out of court settlement mechanism.

4.8.4 Jurisdiction under the IT Act, 2000

The recent IT Act passed in India is illustrative of the prevailing confusion in the area of jurisdiction in the context of the Internet. The Act begins by saying in clause (2) to Section 1 that it shall extend to the whole of India and save as otherwise provided in the Act, it applies also to any offence or contravention thereunder committed outside India by any person. Clause (2) of Section 75 of the Act also simply states that "… this Act shall apply to an offence or contravention committed outside Indian by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India". Provisions of this nature are unlikely to be effective for a number of reasons.

Firstly, it is unfair to suggest that the moment an Indian computer system is used, an action defined

by Indian laws as an “offence” would be subject to the jurisdiction of Indian Courts. To illustrate, let us consider a website located in a foreign country. The site may host content that would be perfectly legal in its home country, but may be considered offensive or illegal in India. If an Indian chooses to view this site on a computer situated in India, does that mean that the site can be prosecuted in an Indian court? This would appear to violate principles of justice. As explained earlier, the judicial trend of examining the amount of activity that a site undertakes in a particular jurisdiction is a far more equitable method to determine jurisdiction.

Further, even if Indian Courts are to claim jurisdiction and pass judgments on the basis of the principle expostulated by the IT Act, it is unlikely that foreign Courts will enforce these judgments since they would not accept the principles utilized by the Act as adequate to grant Indian Courts jurisdiction. This would also render the Act ineffective.

In this context, it is necessary that Indian courts take a leaf out of the books of their American counterparts and develop justifiable grounds on which extra-territorial jurisdiction may be validly exercised. The times ahead promise to be very interesting.

CHAPTER -FIVE

CONCLUSION AND SUGGESTIONS

5.1 CONCLUSION

The evolution of contracts and agreements in India reflects the country's historical, cultural, and economic journey. From its ancient roots in religious texts to the amalgamation of indigenous practices with English common law during colonial rule, India's contract law has continually adapted to meet the changing needs of its people. As a modern nation, India now boasts a comprehensive legal framework that addresses diverse types of contracts, aligning with international legal practices. The journey of India's contract law showcases the nation's commitment to upholding the principles of fairness, justice, and contractual freedom, making it an integral part of India's legal heritage and future growth.

The Contract Act involves the meeting of minds and the participation of two sides in negotiation.

Except in the event of e-contracts, the minds that meet are the minds of programmed computer programs. The Information Technology Act includes provisions pertaining to electronic records allocation, recognition, dispatch and reception. The IT Act has sought to properly take care of the specifications of e-contracts. However thanks to E-commerce, the quality of living of individuals is changed entirely. This is where versatility is provided by electronic commerce. In terms of location, time, space, distance, and space, the market climate about transaction. With the advancement of e-commerce, there is a steady progress of making use of e-contracts. E-contracts are ideally suited to promote the reengineering of several businesses through a business procedure requiring a mixture of tactics, practices and business methods that help the instant information exchange. There are own merits and demerits of the e-contracts. On the one side, cost savings, time saving, consumer fastening and enhance the quality of service by minimizing paper work, thus reducing Automation improves, and the legislation regulating E-contract, on the other hand, ignores such clauses such as there is little to assess the parties plan to enter into a legally enforceable arrangement. E-contracts are the ultimate example of demonstrating how complex law is and how it adjusts itself according to society's needs. E-contracts are one of the most desirable fields of law, along with all the difficulties and concerns, because they satisfy the needs of the masses. With relevant legislative changes and judicial precedents, India will be productive in the evolution of e-contracts.

Contracts are well suited to facilitate the re-engineering of business process occurring at many firms involving a composite of technology, process and business strategies that aid the instant exchange of information. The contracts have their own merits and demerits. On the one hand they reduce costs, save time, fasten customer response and improve service quality by reducing paper work, thus increasing automation. Furthermore contract is expected to improve the productivity and competitiveness of participating business by providing unprecedented access to an online global market place with million of customers and thousands of products and services. On the other hand, since in electronic contract, the proposal focuses not on humans who make decisions and specific transaction but on how risk should be structured in an automated environmental therefore, the object is to create default rules for attributing a message to a party so as to avoid any fraud and discrepancy in the formation of contract.

The problem is not whether the internet should be regulated, but how. This entirely new sort of communication poses several entirely new sorts of problem for regulators. The Information Technology Act, 2000, essentially seeks to address three areas or perceived requirements for the digital era:

(a) To make possible E-Commerce transactions—both business to business and business to consumer

(b) To make possible e-governance transactions—both government to citizen and citizen to government

(c) To curb cyber-crime and regulate the Internet.

As more and more activities are carried out by electronic means, it becomes more and more important that evidence of these activities be available to demonstrate legal rights and obligation that flow from them. Internet facilitating E-Commerce has besides great advantages, posed many threats because of its being what is popularly called, 'faceless and borderless. For instance, sending an e-mail message (offer here) does not require disclosure of the identity of the sender, nor can recipient ordinarily be able to know the sender.

No doubt, the process of regulation does not impinge upon creativity, democratic value and liberties; thereby it is becoming a source of distinctive to the technological process itself. On the other hand it is equally true that the capability of modern information technology for automatic processing and worldwide transfer of data have changed information not only from a quantitative but also qualitative view point, and decisively expanded both its potential for good and danger.

To establish the formation of an contract using the internet, the general common law of contract and the doctrine of international law are legitimate and there are little found a mental difference in the process of offer and acceptance in the real world to the Internet. As with the introduction of all new technology, the internet has created some level of uncertainty in formation of contract. However, an offer remains an expression of readiness to enter into a legally binding promise under agreed terms. An acceptance remains to be willing act of accepting the offer with no further negotiations or dialogue. True, the internet has changed contract but the foundations of offer and acceptance in contract law remains firm, it is only the evidential requirements of fact that have changed.

The overarching purpose of contract law is not to improve the efficiency of transactions or redistribute wealth—it is to enforce the intent of the parties and protect their reasonable expectations. Other considerations—efficiency, fairness, and redistribution—pertain to the reasonableness inquiry. Contract law fails when it disregards parties' intent and their reasonable expectations. When contract law fails, other law must fill the gap.

Contract law is failing in the area of consumer contracts, leaving this area ripe for regulatory and legislative action. Consumers are being held to contracts to which they did not intend to agree. This is especially true with wrap contracts, which are both ubiquitous and unobtrusive, and therefore, often ignored. Consumers do not reasonably expect to be bound by contracts they did not actually see much less read. Not surprisingly, we are already seeing sector specific regulations of consumer contracts in certain areas, most notably banking but also increasingly, privacy. If courts fail to adopt a more equitable approach to consumer contracts—one that reflects reality—then other regulation will certainly follow. The role of the courts and contract law will shrink accordingly and consumer contracts as a category will grow increasingly more segmented and subject to different legal rules and regulatory regimes.

By contrast, the behaviors and needs of parties in sophisticated commercial transactions differs from those of parties in mass consumer transactions. Contracts between two sophisticated commercial entities typically do reflect their intentions and courts should defer to the contract and to the extralegal channels approved by the parties. Even in business-to-business transactions, contracts play different roles. Contracts may be more aspirational than regulatory in some business relationships but not others. They may be viewed as works-in-progress in some transactions but not others. They may be customized and heavily negotiated or they may be standardized and unread. Contract law in 2025 should recognize the different roles contracts play depending upon the nature of the transaction or relationship.

A judiciary that applies rules without context ignores the intent of the parties—and so loses sight of contract law's purpose. Commercial actors may seek alternative forms of dispute resolution, essentially "opting-out" of contract law. Meanwhile, legislators and regulators may seek to right contractual wrongs ignored by the judiciary. Consumer protection laws will step in where courts fear to tread. As in the past, contract law's domain may then be carved into subspecialties, such as employment or insurance law, or overrun by other areas of the law such as property, privacy, or tort. Under this vision, contract law in 2025 is diminished and meager, muscled out in the consumer arena by other laws and shunned in the business-to-business environment by commercial entities mistrustful of what courts may do.

But there is a more promising, alternate vision of contract law. Under this vision, contract law responds to the needs of contracting parties in a flexible manner that recognizes marketplace needs and realities. The judges who administer the law realize that a mass consumer contract is not the same as a negotiated commercial agreement.

They understand that a contract has different functions in different transactions and that a contract's role, and the application of doctrinal standards, may shift depending upon the type of transaction and the parties involved. Under this vision, the judiciary takes advantage of the adaptability of contract law to fulfill its promise—to promote the intent of the parties and protect their reasonable expectations.

It is clear from the study that there is no uniform rule applicable in all situations to determine the time for the formation of contract electronically and this uncertainty cannot be resolved by applying the Contract Act's provisions alone. One has to ascertain the time when the electronic record was despatched by the originator and received by the addressee, in order to find out when the contract was concluded. The UNCITRAL Model Law on Electronic Commerce has laid down rules for ascertaining the time and place of dispatch and receipt of data messages. In India the Information Technology Act, 2000 has adopted verbatim the rules of the UNCITRAL Model Law to determine the time for receipt of electronic records.

5.1 SUGGESTIONS

Some suggestive policy is being tendered for kind consideration with the existing legal framework may ensure a unassailable enforcement of contracts.

1. The government could tie up with verified third party companies that could scrutinize verify contracts and provide a stamp of approval. Only when verified, is the contract valid

Since contracts are recent in nature and thus not as popular as written contracts, there may be a chance that parties that are knowledgeable and in more dominant position may take advantage of the less knowledgeable and weaker parties and leave them exploited. Hence there should be a dedicated oversight mechanism that aims to check and prevent such exploitation.

2. E-Commerce websites such as Flipkart and Amazon should clearly display the terms and conditions of the use of the website so as to give reasonable notice to the user

As laid down in Spechtv. Netscape Communication Corp.,85 contracts or licenses are not enforceable if there is no reasonable notice of the same and if as a consequence, there is

[85]*Specht* v. *Netscape Communication Corporation*, 306 F.3d 17 (2002, United States Court of Appeals for the Second Circuit).

unambiguous consent to the terms and conditions of the contract or license. Hence websites should place the 'terms and conditions' link on a prominent position on the webpage so as to give reasonable notice to the user about the terms and conditions he will be bound by should he choose to carry out a transaction on the webpage. The font and the lettering used in such links should be large enough and in position where they do not escape the notice of a reasonable man.

3. **Shrink wrap contracts should not be applicable in case of e-commerce transactions**

Since in case of shrink wrap contracts, the user gets notice of the terms and conditions only after he starts using the product, they should not be allowed to be used in case of e-commerce transactions.

This is because shrink wrap contracts defeats the purpose of giving reasonable notice to a potential user of a particular product, which is a necessity while entering into a contract.

4. **The mailbox rule should not apply in case of contracts. Rather an alternative to the same should be found**

It is proposed that the mailbox rule which is an accepted norm in case of written contracts should not be applicable to contracts. This is because in a situation where the email may not have reached the proposer, a dilemma may arise wherein the proposer is bound by the contract but the acceptor is not. One such alternative is that the proposer can be bound only after he receives the acceptance from the acceptor and an automatic receipt of such acceptance is sent to the acceptor. The acceptance will lapse 15 days from the communication of such acceptance to allow for situations where the acceptance may not have reached the proposer at all.

5. **The e-commerce website should be made party to suits related to non-delivery or delivery of damaged goods**

E-commerce sites are usually aggregators. They do not sell the product but aggregate other sellers to sell their products on the e-commerce platform. This absolves them of any responsibility with respect to delivering damaged goods or no goods at all, since the contract is not between the buyer and the e-commerce platform but is in fact between the buyer and the actual seller of the product. Since the e-commerce site is first to initiate the contact between the desired good or service it would be fair in the interest of if they be made a party to the suit as well.

6. There should be specific laws dealing specifically with the enforcement of contracts

All the laws and directives used in the enforcement of contracts in the United States and the European Union are recent laws and deal specifically with the enforcement of Contracts.

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