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# **E-CONTRACTS IN INDIA**

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## **INTRODUCTION**

The Indian Contract Act, 1972 is the primary legislation governing contractual relationships between the parties. However, the concept of e-contract is not provided in the Act. E-contracts get their legal validity from Section 4 and Section 10 A of the Information Technology Act, 2000 which places both e-contracts and physical contracts at the same pedestal as far as their validity is concerned. According to Section 4, a document which, according to the law by which it is governed, can be in typewritten or printed form shall also deem to include the document made in electronic form with the condition precedent that it must be available for future reference of the concerned parties. Also, Section 10A of the Act states that a contract shall not be deemed to be invalid solely on the grounds that it has been made and concluded in electronic form. Apart from this, the Supreme Court has also given a favorable stance for the validity of e-contracts and have accepted the same to be placed with the age-old physical contracts in Trimex International FZE Ltd. v. Vedanata Aluminium Ltd<sup>1</sup>.

Insofar as the execution of e-contracts are concerned, the same can be concluded after an offer from one party and acceptance after due communication to the other through emails<sup>2</sup>. Post the acceptance of the terms and conditions of the agreement, the same must be mandatorily affixed with an e-signature. Two separate modes of e-signatures have been provided in the IT Act affixing which can result in execution of a legally binding contract. The first mode of signature is the 'digital signature'<sup>3</sup> which was later called an 'electronic signature' through the 2008 Amendment to the IT Act. An electronic signature can be referred to anything, including an image of

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<sup>1</sup>Trimex International FZE Ltd. v. Vedanata Aluminium Ltd, (2010) 3 SCC 1

<sup>2</sup>Trimex International FZE Ltd. v. Vedanata Aluminium Ltd, (2010) 3 SCC 1

<sup>3</sup>Information Technology Act, 2000, s.3, s.5

handwritten signature or typed signature which is uniquely linked to the signatory in such a manner that complete control over all data used to create the signature vests with the signatory. The second method is the signature through Aadhar card via third party forums.

### **CONCEPT OF E-CONTRACTS**

Section 2(h), of the Indian Contract Act, 1872, tells us that the term 'contract' is an agreement that is enforceable under the law. Interestingly, in the case of an E-Contract, the essence of Section 2(h) is still sustained by only tweaking the mode in which the Contract comes into existence.

Hence, an E-Contract is an agreement that is enforceable under the law and is in all respects drafted, negotiated, and executed digitally. Unlike a traditional contract which is paper-based, E-Contracts are digital in their entirety. In an E-Contract, though there is an absence of a physical meeting of the parties, a meeting of minds is present absolutely. The parties communicate with each other over the internet or through telephonic media. An E-Contract is a step ahead of traditional pen-paper contracts and comes into existence through electronic and digital mediums.

### **LEGAL VALIDITY OF E-CONTRACTS IN INDIA**

As much as we are accustomed to performing our Contractual Obligations in the traditional method, in the current era, we are also warming up to the idea of Electronic Contracts largely due to the hassle-free nature of such transactions and primarily because it is recognized by the Indian Judicature. In order to further understand as, how is an E-Contract legally recognized under Indian Law it is imperative to emphasize the nexus between Section 10 of the Indian Contract Act, 1872 and Section 10-A of the Information Technology Act, 2000.

Section 10 of the Indian Contract Act, 1872 provides the crucial pre-requisites for a Contract to be legally valid. It is mandatory that a Contract satisfies the essentials specified in Section 10 of the Contracts Act, i.e.,

1. Offer
2. Acceptance to Offer
3. Consensus ad Idem
4. Lawful Consideration

Like traditional contracts, electronic contracts should also possess the said elements. It should be noted that electronic contracts are specifically not referred to in the Indian Contract Act. Through Section 10-A of the Information Technology Act, 2000, we can procure the validity of the contracts formulated through the electronic medium.

## LAW RELATED TO GOVERNING E-CONTRACTS

### 1. Indian Contract Act, 1872

The Indian Contract Act, 1872 regulates the contracts in India. Like ordinary contracts, the e-contracts are also primarily governed by the codified provisions of the Indian Contract Act. An e-contract to be legally enforceable should fulfill all the essential requirements of the provisions that are provided under the Act.

### 2. Information Technology Act, 2000

E-Contracts have also found statutory recognition under the Information Technology Act, 2000. According to Section 3 of the Act, the verification of e-contracts is affirmed by fixing the 'e-signature; or 'digital signature' of both the parties on them. Section 4 of the IT Act, 2000 provides lawful acknowledgement of the e-records, where the information is related as a hardcopy or printed structure and is made accessible to the client for further reference. Section 65 to Section 71 of the IT Act provides for punishments related to cybercrimes in India.

India has legalized the validity of e-contracts under Section 10-A of the IT Act, 2000. Regarding this, the IT Act excludes certain e-transactions from the documents which are negotiable instruments, power of attorney, trust deed, will, sale deed, or conveyance deed about immovable property.

### 3. Indian Evidence Act

Section 65 of the Indian Evidence Act, 1872 provides that the court should recognize the e-documents produced for the formation of the contract. In the case of **Societies Fes Products Nestle S.A & Anr v. Essar Industries & Ors.**<sup>4</sup>, admission of e-contracts in Delhi High Court paved way for the immediate introduction of Section 65A and Section 65B in the Indian Evidence Act, 1872, where according to Section 65 the content of electronic records can be proved by parties in accordance with section 65B of the Act.

In the case of **State of Delhi v. Mohd. Afzal and Ors.**<sup>5</sup>, the Delhi High Court held that "electronic records are admissible as evidence." In the **State of Punjab and Ors. v. Amritsar Beverages Ltd. and Ors.**<sup>6</sup>, the supreme court in this case observed that "Section 63 of the Indian Evidence Act makes media like paper, optical or magnetic forms admissible in courts. Section 65-B of the Indian Evidence Act also provides that the information contained in the form of an electronic

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<sup>4</sup>2006(33)PTC 469 del

<sup>5</sup>(2003) 71 DRJ 178V(DB) 2003 SCC del 935

<sup>6</sup>Appeal (civil) 3419 of 2006

record is admissible in court without procuring the original document. Therefore, the admissibility of the same is subject to various conditions that are prescribed under Section 65-B of the Evidence Act.<sup>7</sup>

## **ESSENTIAL ELEMENTS OF E-CONTRACT**

The essentials of e-contracts remain the same as those of paper-based contracts. For a contract to be valid, it must contain all the following elements:

1. An offer requirement should be made.
2. The offer has been acknowledged.
3. There must be a lawful consideration.
4. There must be an intention to create legal relations.
5. The parties to the contract must be lawfully competent to enter into it.
6. Free consent, the contract must be free and void of coercion, misrepresentation, undue influence, or fraud.
7. The object of the contract must be lawful in order to be valid.
8. There must be certainty and the possibility of legal performance.

## **TYPES OF E-CONTRACTS**

### **1. CLICK WRAP AGREEMENT**

While using any website or any software, we are very familiar with the “I agree” phase, and we press the button without thinking twice. However simple it may appear; it may land us in serious trouble as it gives rise to a legally enforceable valid contract. This type of contract can be legally enforced against the user. Click-wrap agreements are generally referred to as those agreements or long blocks which nobody reads, these blocks contain terms and conditions of the agreement. But it happens many times that we just click on I agree and continue to the next page.

After clicking on the “I agree” button, it means we accepted all written terms and conditions of the agreement. Such types of agreements are less negotiable and the user has to accept this if he really wants to use that software or any other thing related to this agreement.

For example, you have seen two options: either pay or back while sending the money. Or, while installing software. The terms of services, privacy policies, copyright policies and non-disclosure policies are commonly used for the click-wrap agreement. Since it is a convenient way with minimal hassles to enter a contract, it is gaining a lot of popularity nowadays.

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<sup>7</sup><https://blog.ipleaders.in/online-privacy-e-contracts/>

### Features of Click Wrap Agreement

1. These agreements are non-porous i.e., there is no other way to move ahead without clicking the “I agree” button.
2. In this type of contract, the acceptance is very clear as the user will either accept or reject the offer.
3. On the screen, the user should be informed that this is an enforceable contract and a binding on him for his action.
4. The terms and conditions of the agreement shall be in a readable font with sufficient visibility.
5. All the terms and conditions of the agreement shall be consistent with Section 10 of the Indian Contract Act, 1872.
6. The information fed by the user is generally retained by the consumer to avoid any future dispute or litigation.

### 2. SHRINK WRAP AGREEMENT

Shrink-wrap agreements are mostly related to computer software. The software is mostly distributed in CD-ROMs. When the licensing software is opened by the person for his use, it means he accepts the terms and conditions of that software company.

The term “shrink-wrap” refers to the plastic wrapping which covers the software boxes. This wrapping can be understood as the legally enforceable terms and conditions. As soon as the user removes that wrapping, he is entering into a contract. In simple words, a shrink-wrap agreement is a boilerplate or license agreement containing some terms and conditions packaged with the product. The customer automatically gives his consent when he uses the product.

PC programming organizations are mainly dependent upon this type of agreement. It is a sort of unsigned undertaking given by the customer while submitting to the terms and conditions.

Following are the terms and conditions which can be made through the Shrink-wrap agreements-

- License
- Fees and payments
- Warranties
- Limitations of liability

### The legality of the Shrink Wrap agreement

The validity of the shrink-wrap agreement came into question in the case **ProCd Inc vs.**

**Zeidenberg.**<sup>8</sup> In this case, the manufacturer has included a shrink license in its packaged software. The customer purchased the software but did not follow the license restricting its commercial usage. To enforce the license, the appellant filed for an injunction. The court denied the injunction while stating that though the terms and conditions are not explicitly provided, the license was to be treated as an ordinary contract. Thus, it is enforceable.

### **3. BROUSE WRAP AGREEMENT**

Browse-wrap agreements are probably seen on many websites while searching or reading anything on websites. They are some kind of pop-ups that ask you to click “OK” or “I AGREE” though, you can use the website with or without clicking there.

In this agreement, there is a hyperlink or website containing the terms and conditions over the screen of the website. When the person agrees to the above-stated terms and conditions, he can access the material available and download the product available therein.

For instance- Electronic commerce websites such as Amazon and Paytm provide a disclaimer while entering their website stating that by accessing or browsing the website, the user has consented to all the terms and conditions. The terms and conditions clause is hyperlinked. However, it is also observed that sometimes the browse wrap clause is hidden or not explicitly shown on the website page. It may lead to conflict in the future.

#### **The legality of Browse Wrap Agreements**

The legality of the Browse wrap agreement is not very clear. Unlike the click-wrap agreement, this type of agreement doesn't ask for any explicit consent from the user. So, the court presumed that it is not binding or enforceable against the customer. The Burden of proof lies on the website owner to demonstrate that the user has complete and actual knowledge of all the terms and conditions mentioned therein.

### **4. ELECTRONIC DATA INTERCHANGE**

Electronic Data Interchange means to exchange any type of document of a contract by electronic means.

For example, Exchange of bills by fax.

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<sup>8</sup>86 F3d 1447 (7<sup>th</sup> CIR 1996)

## **5. E-MAIL CONTRACTS**

Any type of contract where the offer and acceptance are discussed with the help of email is called an e-mail contract.

## **6. E-COMMERCE CONTRACTS**

The digital contract which is used to buy or sell from the website online is called an E-commerce contract or online shopping contract.

Buying shoes from Amazon is an E-commerce contract

## **EXECUTION OF E-CONTRACTS**

Execution of any contract finds its basis in the classic principle of consensus ad idem. Parties entering a contract should agree upon the same thing in the same sense. The traditional way of executing agreements requires parties to be present physically, affix their signature and pay the necessary stamp duty. But there are other ways too through parties can execute agreements, as permissible under the Indian law.

Section 3 and 3A of the IT Act envisage that users can authenticate electronic records through digital and electronic signatures. Hence, parties can sign e-contracts either through digital signatures, or electronic signatures.<sup>9</sup>

## **FORMATION OF E-CONTRACTS AS PER THE INFORMATION TECHNOLOGY ACT, 2000**

First, of all, electronic records are legal. Hence, an electronic contract is legal. Section 4 of IT Act, provides for legal recognition of electronic record. It says that where any law requires information in written/ typewritten/ printed form, providing the information in electronic form would suffice.

Further, Section 10A of the IT Act specifically provides for validity of contracts formed through electronic means. It states that the communication of proposals, acceptance of proposals, and revocation of proposals in electronic form shall not be unenforceable solely because the parties performed it using electronic methods. closer look at the contract formation process.

### **1. Originator and Addressee**

There are two parties to an e-contract: Originator (Sameer) and Addressee (Pooja). The Act defines Originator under Section 2(1)(za) as a person who sends, stores, generates, and transmits

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<sup>9</sup>The Law on Digital Signature, and its position in the Law of Evidence (mylawrd.com)

any electronic message to any other person. It defines Addressee under Section 2(1)(b) as the person intended by the originator to receive the electronic message.

Note: We would be using e-mail address/ computer resources/ information systems interchangeably. Similarly, we shall be using offer/ email/ electronic record interchangeably.

## **2. Attribution of electronic records**

Section 11 of IT Act, 2000 provides for the attribution of electronic records. An electronic record can be attributed to an originator (Sameer or Pooja)-

where the originator himself sends an electronic message,

or where an authorized person is acting on behalf of originator,

or where the originator has programmed an information system for this purpose.

## **3. Acknowledgment of receipt**

Section 12 of IT Act provides for methods using which a party (addressee) can give the acknowledgment of receipt of an electronic record (simply, the mode of acceptance). Where the originator and addressee have not agreed on a particular mode of communication, a party can give acknowledgment of receipt through any way of communication (automated or otherwise).

For instance: Sameer (originator) sends a message to Pooja and offers to buy her car. Pooja (addressee) is on a vacation and has set an automated reply to the incoming messages on her Gmail. Sameer receives an automated reply. This reply means Pooja has acknowledged the receipt of Sameer's message.

### **Acknowledgment through conduct:**

The addressee can also send acknowledgment through any conduct sufficient to indicate to the originator that it has received the message. E.g. Pooja doesn't send an acknowledgment to the above offer but shares pictures of her car.

### **No acknowledgment, no offer:**

With reference to Section 12(2) of the Act, if Sameer asks for receipt of an acknowledgment and says that the offer to buy the car will stand only if Pooja sends an acknowledgment but Pooja doesn't send one, Sameer's offer will be treated as if he never sent it.

### **If acknowledgement not received despite asking:**

With reference to Section 12(3) of the Act<sup>10</sup>, if Sameer doesn't say that the offer will stand only if Pooja sends an acknowledgement, nor says that he needs an acknowledgment within a certain period of time, then he can give notice to Pooja if she fails to acknowledge his offer. If Pooja doesn't send an acknowledgment even after giving the notice, then the electronic record (offer)

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<sup>10</sup><https://indiankanoon.org/doc/1968067/>

should be treated as if Sameer never sent it.

#### **4. Time and place of despatch and receipt of electronic record**

Section 13 of the Act provides for the time and place of despatch and receipt of electronic records.

**Time of Dispatch:** With reference to Section 13(1) of the Act, if Sameer presses the “send” button at 01:00 p.m. and the e-mail reaches an information system that is out of her control, the time of despatch will be 12 noon.

**Time of receipt:** As per Section 13(2)(a)(i) of the Act, if Sameer places the offer on Pooja’s designated e-mail address (or information system), the time of receipt will be when the email reaches the designated e-mail address or information system. If Sameer doesn’t send the offer on the designated email address, then the time of receipt will be when Pooja accesses the offer.

[Section 13(2)(a)(ii)]

If Pooja has not designated any address/ information system for the purpose of receiving offers/ electronic records, the time of receipt will be when the electronic record enters any of her information systems. [Section 13(2)(b) of the Act]

**Jurisdiction:** Section 13(3) of the Act states that the electronic record is deemed to be despatched at the place of the business of the originator and electronic record is deemed to be received at the place of business of the addressee. If the originator/ addressee has multiple places of business, then the despatch/ receipt will be at the principal place of business.

Further, if the originator/ addressee does not have a place of business, his usual place of residence will be the place of business.

#### **ADMISSIBILITY OF E-CONTRACTS IN COURTS**

Section 3 of the Indian Evidence Act, 1872 includes electronic records as documentary evidence in the definition of “Evidence”. For an electronic record to be admissible as evidence in a court, it should meet the conditions mentioned under Section 65B of the Evidence Act.<sup>11</sup>

#### **ENFORCEMENT OF E-CONTRACT- STAMPING**

In India, states levy stamp duty under the Indian Stamp Act, 1899, and under various state legislations. E-contracts are not mentioned in the definition of an instrument [Section 2(14)] under the act. After the amendment in the Stamp Act by Finance Act, 2019, an “instrument” includes only electronic documents created for a transaction in a stock exchange or depository. However, states like Maharashtra, Uttar Pradesh, Gujarat, and Karnataka have amended their

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<sup>11</sup>The Law on Digital Signature, and its position in the Law of Evidence (mylawrd.com)

stamp act to include electronic records as an instrument. E-agreement must be stamped before or at the time of execution (signature) of the e-document and not after the execution.

In case the parties don't attach the proper stamp value to the contract, the contract will still be valid. However, the court will impose a penalty on the parties before going ahead with any suit.

## **CONCLUSION**

E-contracts are agreements made electronically instead of physical meetings between the parties involved in the transaction. E-contract forms a significant part of E-commerce. E-contracting is a fragment of e-business. Contracts entered verbally or digitally are subject to the same fundamental principles of contract law. E-contracts must contain all these necessary elements in order to be enforceable and legally binding in India. E-contracts are becoming increasingly important in today's world of rapid digitalization and e-commerce to execute a significant number of business transactions in a variety of industries. The Information Technology Act, 2000, Section 10A, focuses on the legality of agreements made using electronic methods. According to the Evidence Act of 1872, an electronic contract has equal legal validity as a paper-based contract.

