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# **E-CONTRACTS IN INDIA: THE LEGAL FRAMEWORK, ISSUES AND CHALLENGES**

AUTHORED BY - PRAVIN MASHERE

## **Abstract:-**

The advent of revolutionary technologies has ensured robust e-commerce in the country. However the usage of technology without adequate legal framework will lead to chaos in the society and will prove counterproductive to the business. The Indian Contract Act, 1872, The Information Technology Act, 2000 and The Indian Evidence Act, 1872 are the crucial legislations which determine the validity of an e-contract. E contracts are formed by way of exchange of Emails and through on line agreements viz. browse wrap, shrink wrap and click wrap agreements. All the said forms are valid under Indian law as if they comply with the prerequisites of a valid contract. Major issues which arise pertain to capacity to contract, free consent, decision on the applicable law and decision on the court jurisdiction. Though the Indian legal system adequately addresses the e-contracts, the challenge before the law makers will be to keep abreast of the issues which will arise with evolving technologies and to adequately address them.

Keywords-E-contracts — forms - issues – legal – validity

## **1 . INTRODUCTION:-**

Electronic commerce has existed since the 1990s in India, but this trend has gained traction in recent years. In parallel with the governmental policies of Indian digital India, globalisation has a successful outcome for the Indian economy. In new business countries from 2013 to 2018, a survey shows a 53 percent rise in the Compound Annual Growth Rate (CAGR) . The country's consumers were even more likely to purchase and sell online products with the development of multiple digital platforms such as Flipkart, Myntra, Amazon, OLX, etc. With the advent of numerous digital channels such as Flipkart, Myntra, Amazon, OLX, etc., customers in the country have become more likely to purchase and sell online products. The basis of these contracts or business agreements is the agreement that is the basic documents that provide a legal obligation for the parties to enforce it with the capacity to execute it again with legal force. Simple access to the internet, technical devices, mobile phones, etc. has resulted in electronic contracts for the country's citizens either by clicking or email, etc. These agreements are embraced internationally,

bridging, for example, the distance between the parties; Mr. X, an American company who wants to purchase India's Khadi goods, may easily enter into an e-contract. This paperless contract has eased business in terms of time and resources. Therefore, legislation that can govern and monitor such contracts effectively has prompted the greatest need. In fact, the laws regulating e-contracts in India are the Indian Contract Act, 1872 and the Information Technology Act, 2000, along with the Proof Act, 1872. This paperless contract has eased business in terms of time and resources. Therefore, legislation that can govern and monitor such contracts effectively has provoked the greatest need. In fact, the laws regulating econtracts in India are the Indian Contract Act, 1872 and the Information Technology Act, 2000, along with the Proof Act, 1872. As a result, we have a strong obligation not to carry out bad deeds, but no reciprocal duty to act to avoid them. According to the Indian Contract Act, the "contract" of 1872 is described as a "law-enforceable agreement." However, the definition is not fully applicable when defining the term 'e-contract' since it has a wider superiority over conventional contracts and can even be understood as 'any contractual agreement between parties having legal object and appreciation of their contact with various networks such as email, audio file MP3, multimedia message, etc. Therefore, because the legislator has not established an e-contract in any legislation, his interpretation is the only prevailing opinion with regard to its context

## **2. DEFINITION OF E-CONTRACTS:**

The "contract" of 1872 is defined as a "lawenforceable agreement" in accordance with the Indian Contract Act. Since the term "e-contract" has a wider meaning, the definition is not entirely applicable when defining it. It has much more superiority over traditional contracts and could even be interpreted as any contract between parties with a legal purpose who are aware of their contacts on various networks, including email and audio files, the MP3, multimedia message, etc. Thus, an E-Contract is an agreement that is legally binding and is created, negotiated, and executed entirely digitally. E-Contracts are entirely digital, as opposed to conventional contracts, which are paper-based. Despite the parties' inability to physically meet, a meeting of the minds exists in an E-Contract. Internet or telephonic media are used by the parties to communicate with one another. A step up from conventional penand-paper contracts, an E-Contract is created using digital and electronic channels.

## **3. ESSENTIALS OF VALID E-CONTRACT:**

As much as we are used to fulfilling our contractual obligations in the conventional manner, in the modern era, we are also becoming more open to the concept of Econtracts, largely because

such transactions are hassle-free and primarily because it is recognized by the Indian Judicature. The relationship between Indian Contract Act of 1872 (section 10) and the Information Technology Act of 2000 (section 10-A) must be emphasized in order to better understand how an E-Contract is recognized legally under Indian law. The essential requirements for a Contract's legal validity are laid out in Section 10 of the Indian Contract Act of 1872. A Contract must meet the requirements listed in Section 10 of the Contracts Act, i.e.

- A. Offer
- B. Agreement to Accept
- C. Competency of Parties
- D. A Legal Consideration

E-Contracts should have the same elements as conventional contracts. It should be noted that the Indian Contract Act expressly excludes references to electronic contracts. We can ensure the legality of contracts created using electronic means thanks to Section 10-A of the Information Technology Act, 2000. "Information Technology Act of 2000 (Section 10-A): Validity of agreements made electronically. In the event that a contract is formed and proposals, acceptances, and revocations of proposals and acceptances, as applicable, are communicated electronically or through the use of an electronic record, the contract shall not be deemed unenforceable solely on the basis that such an electronic form or means was used for that purpose. ". The relationship between Income Tax Act (Section 10-A) and Indian Contract Act (Section 10) is that when an E-Contract complies with Section 10 of the Indian Contract Act's requirements, under Section 10-A of the Income Tax Act, its legal validity cannot be questioned

## **4. CONTRACTS IN INDIA**

### **4.1 CONTRACT:**

The word Contract was derived from a Latin word Contractum. The word contractum means drawn together. According to Salmon "A contract is an agreement creating and defining obligations between the parties."

### **4.2 E CONTRACT:**

An e-contract is a contract modeled, executed and enacted by a software system. It is a contract "drafted" and "signed" in an electronic form

## **. 5. FORMS OF ELECTRONIC CONTRACTS**

The following forms of Electronic Contracts are in vogue in the Indian business scenario.

### **5.1 E-Mail Agreements:**

The e-mails which convey the clear intention of parties can be treated as a binding contract. This can be inferred from the decision in the case of Trimex International FZE vs Vedanta Aluminum Limited, in which while recognizing the change in execution of commercial transactions the Supreme Court disregarded the argument that exchanges over e-mail did not qualify as contracts and held that “once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed”.

## **5.2 Online Agreements:**

Online agreements are of three kinds

### **5.2.1 Browse Wrap Agreements**

An agreement is considered as a browse wrap agreement which is intended to be binding upon the contracting party by the use of the website. These include the use of the website. These include the User Policies and terms of service of web sites and are in the form of a “terms of use” or “terms of service”, which can be used as the links at the corner or bottom of website.

### **5.2.2 Shrink Wrap Agreements**

These contracts are the license agreement by which the terms and conditions of the contract are enforced upon the contracting parties and are usually present on the plastic or in manuals accompanying with the software products which the consumer buys.

### **5.2.3 Click Wrap Agreements**

These agreements require the user to give his consent to the terms and conditions which are known as end user agreement and govern the licensed usage of software by clicking “Ok” or “I agree” button

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

The validity of e contract is to be arrived at considering the provisions of The Indian contract Act, 1872, The Information Technology, 2000 and Indian Evidence Act, 187

### **6.1 INDIAN CONTRACT ACT,1872**

The law relating to contracts is governed by the Indian Contract Act, 1872. The Indian Contract Act 1872 has defined in Section 2(h) that “An Agreement enforceable by Law is a Contract”. The Act provides a basic contractual rule that a contract is valid if it is made by competent parties out of their free consent for a lawful object and consideration. There is no specific way of

communicating offer and acceptance; it can be done verbally, in writing or even by conduct. It is the acceptance of offer and intimation of that acceptance which results in a contract. This intimation must be by some external manifestation which the law regards as sufficient. Thus Electronic contracts are as valid as written contracts; the only condition is they should possess all the essentials of a valid contract.

## **6.2 THE INFORMATION TECHNOLOGY ACT, 2000**

### **6.2.1 Validity of E-contracts:**

The provisions of the Information Technology Act, 2000 give legal recognition to an Electronic Contract. This can be inferred from Section 10-A of the Act which states "Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."

### **6.2.2 Digital signature:**

A signature is a schematic script related with a person. A signature on a document is a sign that the person accepts the purposes recorded in the document. Section 3 of the Act delivers for the verification of Electronic Records by affixing Digital Signature. Verification of electronic record by electronic signature or electronic authentication technique shall be considered reliable. Thus an electronic contract can be created by digital signatures and is recognized by the laws in India.

## **6.3 INDIAN EVIDENCE ACT, 1872**

The courts in India recognize electronic documents under Section 65- A of Indian Evidence Act, 1872. The procedure for furnishing electronic documents as evidence is provided under Section 65-B of the Indian Evidence Act, 1872. The latter section provides that, any information contained in an electronic record produced by a computer in printed, stored or copied form shall be deemed to be a document and it can be admissible as evidence in any proceeding without further proof of the original. But, admissibility of the same is subject to various conditions prescribed under section 65-B of the said act. It is required that the document or e-mail sought to be produced from a computer, was in regular use by a person having lawful control over the system at the time of producing it; the document or the e-mail was stored or received during the ordinary course of activities; the information was fed into the system on a regular basis; the output computer was in a proper operating condition and has not affected the accuracy of the data entered. An e- contract is basically a communication between two parties in respect of the transfer

of goods or services. Thus, any e-mail communication and other communication made electronically is recognized as valid evidence in a Court of law.

## 7. ENFORCEABILITY OF E-CONTRACT

India is transforming into a digital jungle with internet becoming part and parcel of our life. The growing trend of social media, online shopping, e-retailing has created a predicament for the law makers in protecting the users from fraud, misrepresentation, identity theft and other such challenges. The Information Technology Act of 2000 was implemented for the governance and providing legal sanctity to transactions undertaken through electronic means and also provide for authentication of digital signature, jurisdiction, penalties in case of breach, etc. Section 10-A of the said Act<sup>20</sup> has recognized the validity of these e-contracts. It specifies that if an e-contract fulfils all the essentials as specified in Indian Contract Act of 1872 of a traditional contract i.e. valid offer and acceptance, capacities of the party, free consent, etc., it will be considered valid and is enforceable in the court of the country for any kind of breach when undertaken through any electronic means. As in case of *Trimex International FZE v. Vedanta Aluminium Ltd.*<sup>21</sup>, the hon'ble Supreme Court recognized that the contract whose terms and conditions are discussed through e-mails between parties, though no formal contract was formed or signed is valid in the eyes of law. The enforceability of click wrap, browse wrap and shrink wrap contract have been challenged in various US Courts. Like, in case of *Feldman v. Google, Inc*<sup>22</sup> the validity of Clickwrap contract was discussed and the hon'ble court observed that Feldman had sufficient notice of terms and conditions of the contract as he went through a proper signing up process including scrolling through whole terms and conditions page before assenting for it. Hence, the court held that the contract entered between Feldman and Google was valid. However, in the case of browse wrap contracts foreign courts are hesitant in enforcing its validity. In such contracts, Judicial opinion holds that for constituting a valid contract it is necessary for the party to have constructive or actual notice of the terms and conditions of it<sup>23</sup>. Therefore, where the defendant failed to specify near the 'download button' that the user will be bound to the license agreement if he downloaded the software from the website, no contract was executed between the parties<sup>24</sup>. In light of these, the websites are now a days more inclined towards clickwrap contracts. Similarly, in case of shrink wrap contracts the court infers the assent of the party from their scrapping of the wrap which has terms and conditions attached with it. In the case of *ProCD, Inc v. Zeidenburg*<sup>25</sup>, Zeidenburg protected his price discrimination policy of the product through shrink-wrap licensing agreement however, ProCD after purchasing the product uploaded the

information on less rate over the internet violating the license agreement. The court, in this case, held that ProCD had the option to reject the terms and conditions of the contract by returning it, but his scrapping the wrap providing terms and conditions was inferred by the court as his consent, thus he is bound by it. Indian judiciary has failed to acknowledge the question of validity of these contracts as there is no precedent till date for providing any type of ground rules over the enforceability of these contracts. Although in the case of L.I.C India v. Consumer Education and Research Centre<sup>26</sup> the hon'ble court has tried defining such contracts and observed that where the weaker parties do not have a bargaining power, such type of contracts were referred as 'dotted contracts.' —Thus, it can be said that the Indian courts have recognized the concepts of these contracts though no guidelines for its regulation have been laid down by it. The reliance can be placed on the foreign judgments based on the facts and circumstances of the case, yet a strong necessity for proper legislative structure for its implementation has aroused as the Indian economy is moving to paper less transactions.

## **8. ISSUES AND CHALLENGES:**

### **8.1. Capacity to Contract:**

One needs to ensure that the persons who are parties to the electronic "contract" have the legal competence and capacity to enter into an agreement. Often it is a nameless individual entering into a contract. The service provider has no idea whether the individual who has clicked on "I Agree" text or icon is legally competent to enter into a contract. Capacity of parties is one major requisites of a valid Contract as under the Indian Contract Act, 1872. Sections 10, 11 & 12 of the Act provide for the competence of parties. Contracts entered into by individuals, who are not competent to contract are void. There may arise in a situation, wherein infants who are not old enough to enter into a contract are entering into an online contract with the service provider by clicking on "I Agree" text or icon.

### **8.2 Free consent:**

Free consent is an essential prerequisite of a valid contract. In on line contracts there is no scope for negotiation. This is a great disadvantage for the user. But the option "take it or leave it" transaction is always to the user. In the case of LIC of India Vs Consumer Education and Research Centre, the Supreme Court has held that "In dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power". He has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever." Hence it can be concluded that the user should be prudent while giving his consent to avoid troubles.

### **8.3. Decision on the Applicable Law:**

The Indian law provides two choices to apply personal jurisdiction, i.e., to apply the law of the forum, or to apply the law of the site of the transaction, or occurrence that gave rise to the litigation in the first place. The courts do have a judicial right to determine the choice of law by identifying the system of law with which the transaction has its closest and most real connection. There is no bar that law of a foreign country cannot be applied or an Indian party could not be subject to foreign jurisdiction. The emphasis is on to select proper law.

### **8.4 Decision on the Court Jurisdiction:**

E-contracts gives wide scope for cause of action arising at very many geographical locations. This might lead to filing of cases at different places. Defending lawsuits at multiple geographical locations could be both expensive and frustrating. Hence choice of forum clause should be included in all online contracts. It makes a good legal sense for the online service providers to limit their exposure to one jurisdiction only. Thus the online service provider has no other choice but to subject themselves to only one set of forum and applicable laws only. The user has no other choice, but to accept the service provider's Standard Terms and Conditions by clicking an onscreen text or icon "I Agree", "I Accept" or "Yes"

### **9. CONCLUSION:-**

The legislation in India addresses all avenues of e-contract. However the advancement of technologies will bring in new challenges for the law makers and the government departments. Law needs to be updated and upgraded from time to time it to keep up with the evolving technologie. E-contracts offer numerous advantages, such as convenience, efficiency, and cost-effectiveness. However, addressing the legal, technical, and practical challenges associated with e-contracts is essential to ensure their smooth operation and enforceability in India. Clear communication, robust authentication mechanisms, compliance with relevant laws, and dispute resolution mechanisms are key factors in overcoming these challenges and fostering trust in electronic transactions.

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