



A
DISSERTATION ON

**ADVANTAGES OF E-CONTRACTS OVER TRADITIONAL CONTRACTS;
E-CONTRACTS AND E-COMMERCE IN INDIA.**

SUBMITTED IN THE PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE
DEGREE OF MASTER OF LAW

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CERTIFICATE

This is to certify that the entire work embodied in the practical paper titled
**ADVANTAGES OF E-CONTRACTS OVER TRADITIONAL CONTRACTS;
E-CONTRACTS AND E-COMMERCE IN INDIA.**

Has been carried out by VIJAYSINH SHASHIKANT PISAL under my supervision and guidance in the Department of Law, New Law College, Bharati Vidyapeeth Deemed University, Pune for the L.L.M. 1 YEAR Course.

Place:-Pune

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Dr. Jyoti Dharma

(Research Guide)

DECLARATION

I hereby declare that the entire work embodied in the practical paper titled **ADVANTAGES OF E-CONTRACTS OVER TRADITIONAL CONTRACTS; E-CONTRACTS AND E-COMMERCE IN INDIA** is written by me and submitted to New Law College, Bharati Vidyapeeth University, Pune. The present work is of original nature and the conclusions are based on the data collected by me. To the best of my knowledge this work has not been submitted previously, for the award of any degree or diploma, to this or any other university.

Place: Pune

Date:

Signature:

VIJAYSINH SHASHIKANT PISAL

L.L.M. 1 YEAR COURSE

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CHAPTER 1
INTRODUCTION

1.1) INTRODUCTION:

Contracts form the basis of commerce and, thus, the corporate world; from the sale of a chocolate to the merger of companies, from the lease of a house to the hiring of employees. In short, the entire commercial world (and indeed, our day-to-day existence as we know it) would come to a grinding halt if we did not have the Law of Contracts to make sure that the deals we enter into with people are honoured. Contract Law also forms the basis for study of a number of other subjects that we will come across during this programme; Corporate Laws would seem like Greek if we did not understand the basics of Contract Law; Insurance Law would be rendered meaningless if there were no Contract Law to back it up.

The Indian Contract Act, 1872 (“the Contract Act”) governs contracts in India but it is not an exhaustive code. Its function is “to define and amend certain parts of the law relating to contracts” (Preamble to the Contract Act). Where the Contract Act deals with an issue specifically, it is exhaustive on the subject. Where it does not, and no other authorities in Indian law are available, the courts may refer to the judgments of English Courts.

Contract Law is mainly about the enforcement of promises between two or more people. Courts do not enforce all promises. To enforce a set of promises, courts will check for the presence of certain essential elements. If all these elements are present, a court will hold that the agreement is a contract.

1.2) AIM AND SCOPE OF RESEARCH:

- To study the concept of Traditional contract.
- To study the concept of Electronic contracts.

- A comprehensive and comparative study of both the above concepts.
- To study the scope of E Commerce in India
- Enforceability of both traditional and e-contracts.

1.3) HYPOTHESIS:

E-contracts are more advantageous than traditional contracts along with positive impact of E-Commerce in India.

1.4) METHODOLOGY OF RESEARCH:

The whole research is based on Doctrinal type of research.

The contents of this research have been taken from various:

- Textbooks
- Acts
- Articles
- Journals
- Websites

1.5) ABSTRACT:

Electronic commerce (or e-commerce) encompasses all business conducted by means of computer networks. Advances in telecommunications and computer technologies in recent years have made computer networks an integral part of the economic infrastructure. More and more companies are facilitating transactions over web. There has been tremendous competition to target each and every computer owner who is connected to the Web.

Although business-to-business transactions play an important part in e-commerce market, a share of e-commerce revenues in developed countries is generated from business to consumer transactions. E-commerce provides multiple benefits to the consumers in form of availability of goods at lower cost, wider choice and saves time.

People can buy goods with a click of mouse button without moving out of their house or office. Similarly online services such as banking, ticketing (including airlines, bus, railways), bill payments, e-commerce will increase exponentially in coming years. Business to business transactions will represent the largest revenue but online retailing will also enjoy a drastic growth. Online businesses like financial services travel, entertainment, and groceries are all likely to grow and its booking etc. have been of tremendous benefit for the customers.

CHAPTER 2

HISTORICAL BACKGROUND AND SOURCES

2.1) INTRODUCTION:

It is necessary to understand the general principles of contract and also the laws governing it under the Indian context. Contract is nothing but an agreement between two or more parties to conduct any business transaction. Such contract are said to be valid and legally binding on the parties to mutually benefit their interests and transactions. Such contract can be oral or written as may be required by the law in specific cases and as validated by the law.¹

Before the evolution of complex legal system, the agreements were oral and carried out by mutual legal trust. In community setting any breach of contract is dealt with community adjudication system, which enquired into the breach and set right things. The society grew complex and so did the complexity of transactions. With the evolution of legal system, the contracts were governed by specific laws under the respective legal system. E-contracts can be understood only on the basis of the general principles of contract.

E- Contracts facilitate transactions and agreements electronically without the parties meeting each other i.e. through electronic mode. E commerce to succeed such contracts need to be validated legally an alternate mode of transaction through online using the latest technological developments.²

Such electronic transactions will depend on appropriate legal framework, which recognises electronic records or writings of digital signatures. It should facilitate secure system of transaction and should create evidentiary value of it.

¹Understanding Electronic Contracts; Chapter 3 by R.K. Singh

² ibid

With the advancements in technology, telecommunication and information technology the use of computer networks has gained considerable popularity in the recent past, computer networks serve as channels between for electronic trading across the globe. By electronic trading we don't mean the use of computer networks to enter into transactions between two human trading partners by facilitating a communication but electronic trading or electronic commerce also means those contracts which are entered between two legal persons along with the help of computer program which acts as a agent even when it does not have a conscious of its own but also by initiating it. Broadly defined, electronic commerce encompasses all kinds of commercial transactions that are concluded over an electronic medium or network, essentially the Internet.³

Internet is one component which has recently become the key ingredient of quick and rapid lifestyle. Be it for communication or explorations, connecting with people or for official purposes, 'internet' has become the central-hub for all. Resultantly, Internet growth has led to a host of new developments, such as decreased margins for companies as consumers turn more and more to the internet to buy goods and demand the best prices, as observed by C.K Prahalad, Professor, Business School, University of Michigan.⁴ The internet means that traditional businesses will change because "incumbents (in markets) and large firms do not have the advantage " just by virtue of being there first or by being of big, he said. The implication of perfectly competitive market as the world will observe is that markets will produce an efficient allocation of resources. Internet has truly been an effective agent in changing the fundamental ways of doing business.

In any market with no entry barriers – the Net is biggest of them, the continuous influx of competition will, automatically, drive down the prices. In such a case, in long term all firms could only earn normal profits.⁵

In India the concept of electronic commerce has paced up in the last decade. Nowadays, the geographical as well as the constraints with respect to the time limit has very well been overcome by the increasing use of information technology.⁶

³ Enforceability of E-Contracts on www.lawyersclubindia.com

⁴ Delhi Business Review

⁵ Perfect Competition from Myth to Reality by Yogesh Upadhyay and S.K. Singh

⁶ Ibid. fn. 3

Electronic commerce or business is more than just another way to sustain or enhance existing business practices. Rather, e-commerce is a paradigm shift. It is a “disruptive” innovation that is radically changing the traditional way of doing business. Ecommerce is showing tremendous business growth in our country. Increasing internet users have added to its growth. Ecommerce has helped online travel industry in many ways and added a new sales avenue through online retail industry in our country.⁷

The internet revolution was really about people customer and fundamental shift of market power from seller to buyer. In the new economy customers expectations are very different than before. This difference when understood by the company and its ability to capitalize on it will be the key to success. The web, the internet and emerging computing and communication technologies have redefined business erasing traditional boundaries of time and geography and creating new virtual communities of customers and suppliers with new demand to product and services .e- commerce only forms a fragment of e business.⁸

2.2) HISTORICAL BACKGROUND AND SOURCES:

Of Traditional contracts:

It is one of the theories of political science that the society and state is based on contract. If it is not true, then even the importance of contract cannot be denied at all. All groups, sects, associations etc are formed on the basis of like minded people on the basis of contract between two and more persons which subsequently establishes state or society. The law of contract is based on the natural principles of contract itself for contracting parties. In ancient India there was no specific law of contract as it appears today. All religious groups got there own law of contract. Hindu’s were having Hindu law of Contract & Muslim’s were governed by Muslim law of contract which was visible only after the advent of Mughal rule in India. The residuary parts of these laws are still available. The rule of Damdupat, among Hindu’s is still applicable which that any money lender cannot recover amount of interest just double of the amount. When the British came & established there Kingdom in India, the principle’s of English Law of Contract, under the garb of doctrine of equity justice & good conscience,

⁷ E-commerce in India: a Review by Abhijit Mitra

⁸ An International Journal on Impact of E-commerce

were incorporated as a law of contract for Indians. The First Law Commission made best efforts to chalk out a proper law of contract for India, consequently on the recommendation of the first law commission 'Contract Act 1872' was passed to avoid the conflicting law of contract for different communities in India. Later on two chapters regarding sale of goods & partnership were separated from the original contract act and separate sale of goods act and partnership act were formed.⁹

It was enacted mainly with a view to ensure reasonable fulfilment of expectation created by the promises of the parties and also enforcement of obligations prescribed by an agreement between the parties. The Law Commission of British India formed in 1861 under the stewardship of chairman Sir John Romilly, with initial members as Sir Edward Ryan, R. Lowe, J.M. Macleod, Sir W. Erle (succeeded by Sir. W.M. James) and Justice Wills (succeeded by J. Henderson), had presented the report on contract law for India as Draft Contract Law (1866). The Draft Law was enacted as The Act 9 of 1872 on 25 April 1872 and the Indian Contract Act, 1872 came into force with effect from 1 September 1872.

Before the enactment of The India Contract Act, 1872, there was no codified law governing contracts in India.

In the Presidency Towns of Madras, Bombay and Calcutta law relating to contract was dealt with the Charter granted in 1726 by King George I to the East India Company. Thereafter in 1781, in the Presidency Towns, Act of Settlement passed by the British Government came into force. Act of Settlement required the Supreme Court of India that questions of inheritance and succession and all matters of contract and dealing between party and party should be determined in case of Hindu as per Hindu law and in case of Muslim as per Muslim law and when parties to a suit belonged to different persuasions, then the law of the defendant was to apply. In outside Presidency Towns matters with regard to contract was mainly dealt with through English Contract Laws; the principle of justice, equity and good conscience was followed.¹⁰

⁹ Formulation and Validity of E-Contracts by Dr. Gokulesh Sharma

¹⁰ www.wikipedia.com

Of Electronic contracts:

The present Law of Contract could not face the contracts based on new technologies such as email contracts and other contracts through electronic media & devices. The use of Computer & Internet is frequent now a days and present 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. A survey was conducted which was headed by Justice Fazal Ali who strongly recommended for a separate law regulating based on electronic devices. He refused to modify the present law of so as to include electronic devices into the preview of present law of contract. It was also noted that in contracts and other commercial activities shall mostly be based on electronic devices due to its smoothness and fastness. Legislatures then decided to form a new law in this regard which was called 'Electronic Commerce Act 1998'. The act has overview of various foreign laws also. Maximum provisions of Singapore have been borrowed in Act.

For eg :

SECTION 2 (p) "Digital signature"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (q) "Electronic.

Source: Illinois Electronic Commerce Security Act §5 - 105;

SECTION 2 (r) "Electronic device"

Source: Uniform Electronic Transactions Act 102(6) (September 1998 draft); UCC

Article 2B 2B - 102(19)(August 1998 draft).

SECTION 2 (s) "Electronic record"

Source: UNCITRAL Model Law, Article 2(a).

SECTION 2 (t) "Electronic signature"

Source: Singapore Electronic Transactions Act 2.¹¹

CHAPTER 3

TRADITIONAL CONTRACTS

3.1) INTRODUCTION:

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. It determines the circumstances in which promises made by the parties to a contract shall be legally binding on them. All of us enter into a number of contracts everyday knowingly or unknowingly. Each contract creates some rights and duties on the contracting parties. Hence this legislation, Indian Contract Act of 1872, being of skeletal nature, deals with the enforcement of these rights and duties on the parties in India.¹²

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

¹¹ Supra at 9

¹² www.clatjunction.com

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.

At present the Indian Contract Act may be divided into two parts

- Part 1:deals with the General Principles of Law of Contract Sections 1 to 75
- Part 2:deals with Special kinds of Contracts such as
 - (1) Contract of Indemnity and Guarantee
 - (2) Contract of Bailment and Pledge
 - (3) Contract of Agency¹³

3.2) MEANING AND DEFINITION:

The definition of Contract is given under S.2(h)¹⁴, 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 u/s 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. Therefore, in order to form an agreement there must be a proposal or an offer by one party and its acceptance by other party. In short Agreement=Proposal + Acceptance

¹³ www.wikipedia.com

¹⁴ Indian Contract act, 1872

The second part of the definition deals with enforceability by law. An agreement is enforceable u/s 10 if it is made by competent parties, out of their free consent and for lawful object and consideration. Therefore, a Contract = Agreement + Enforceability. Thus all contracts are agreements but all agreements are not necessarily contracts.¹⁵

3.4) ESSENTIAL ELEMENTS OF A VALID CONTRACT (Section 10):

According to Section 10¹⁶, “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;¹⁷

- 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 offeror.

What is an Offer or a Proposal?

An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in- return for a promise, act or forbearance. Section 2(a) defines proposal or offer as "when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

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 vague. For example, a promise to pay an increased price for a horse if it proves lucky to promiser, is too

¹⁵ www.lawnn.com

¹⁶ Indian Contract Act, 1872

¹⁷ www.referableknowledge.over/blog.com

vague and is not binding.

(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. A offers his car to B for Rs. 10,000. It is an express offer. A bus plying on a definite route goes along the street.

This is an implied offer on the part of the owners of the bus to carry passengers at the scheduled fares for the various stages.

(d) The communication of the offer may be general or specific. Where an offer is made to a specific person it is called specific offer and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals i.e. the world at large, it is a general offer and can be accepted by any member of the general public by fulfilling the condition laid down in the offer. The leading case on the subject is *Carlill v. Carbolic Smoke Ball Co.* The company offered by advertisement, a reward of £ 100 to anyone who contacted influenza after using their smoke ball in the specified manner. Mrs. Carlill did use smoke ball in the specified manner, but was attacked by influenza. She claimed the reward and it was held that she could recover the reward as general offer can be accepted by anybody. Since this offer is of a continuing nature, more than one person can accept it and can even claim the reward. But if the offer of reward is for seeking some information or seeking the restoration of missing thing, then the offer can be accepted by one individual who does it first of all. The condition is that the claimant must have prior knowledge of the reward before doing that act or providing that information.

In India also, in the case of *Harbhajan Lal v. Harcharan Lal*¹⁸, the same rule was applied. In this case, a young boy ran away from his father's home. The father issued a pamphlet offering a reward of Rs. 500 to anybody who would bring the boy home. The plaintiff saw the boy at a railway station and sent a telegram to the boy's father. It was held that the handbill was an offer open to the world at large and was capable to acceptance by any person

¹⁸ AIA 1925 All. 539

who fulfilled the conditions contained in the offer. The plaintiff substantially performed the conditions and was entitled to the reward offered.

An Offer must be distinguished from invitation to make an offer:

(a) An invitation to treat or an invitation to make an offer: e.g., an auctioneer's request for bids (which are offered by the bidders), the display of goods in a shop window with prices marked upon them, or the display of priced goods in a self-service store or a shopkeeper's catalogue of prices are invitations to an offer.

(b) A mere statement of intention: e.g., an announcement of a coming auction sale. Thus a person who attended the advertised place of auction could not sue for breach of contract if the auction was cancelled.

(c) A mere communication of information in the course of negotiation: e.g., a statement of the price at which one is prepared to consider negotiating the sale of piece of land (Harvey v. Facey¹⁹)

An offer that has been communicated, properly continues as such until it lapses, or until it is revoked by the offeror, or rejected or accepted by the offeree.

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

¹⁹ (1893) A.C. 552

offeree may be accepted or rejected by the offeror.

Revocation of Offer by the Offeror

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 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.”²⁰

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 prescribe the mode of acceptance but not the mode of rejection. In *Felthouse v. Bindley* (1865), F offered by letter to buy his nephew's horse for £ 30 saying: "If I hear no more about him I shall consider the horse is mine at £ 30". The nephew did not reply, but he told an auctioneer who was selling his horses not to sell that particular horse because it was sold to his uncle. The auctioneer inadvertently sold the horse. Held: F had no claim against the auctioneer because the horse had not been sold to him, his offer of £ 30 not having been accepted.

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

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

(c) 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.²¹

²¹ *Lalman Shukla vs Gauri Dutt*(1913)

2) Consensus-ad-idem (meeting of minds):²² 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.

3) Intention to create legal relationship: When the two parties enter into an agreement, there must be an intention by both parties to legally bind the other as a result of such agreement. Thus, agreements of social or household nature are not contracts.

4) Capacity of parties (competence): The parties to the agreement must be capable 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: According to Section 23, the consideration or object of an agreement is lawful, unless-

- It is forbidden by law; or

²² www.educonz.com

- Is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or
- Involves or implies, injury to the person or property of another; or
- The court regards it as immoral, or opposed to public policy.

8) Agreement not declared void or illegal: Agreements which have been expressly declared void or illegal by law are not enforceable at law; hence does not constitute a valid contract.

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.²³

3.4) TYPES OF CONTRACTS:²⁴

(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)]²⁵: 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

²³ www.referableknowledge.over.blog.com

²⁴ Ibid fn 23

²⁵ Indian contract Act, 1872

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)]²⁶: 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

²⁶ ibid

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.

CHAPTER 4

ELECTRONIC CONTRACTS

4.1) INTRODUCTION:

Since ages the basic structure of the society runs on the concept of give and take according to the necessities, comfort and enjoyment of life. Understanding of a person with other or others for certain rights or to incur certain obligations, when recognized by law, is called a contract. A contract is an agreement enforceable by law which offers personal rights and imposes personal obligations; which the law protects and enforces against the parties to an agreement. A contract can be defined in various ways as under:

- The Indian Contract Act, 1872,²⁷ defines contract as “an agreement enforceable by Law.”
- According to Black Law’s Dictionary, “contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing.”
- “Written or spoken agreement especially one enforceable by law.”²⁸

Contracts in general provide the basic premise for any commercial or trading activity. Unless an enforceable contract is concluded, no commercial transactions can take place either in the brick world or the click world. Business contracts are mutual agreements between two or more parties engaged in various types of economic exchanges and transactions. They are used to specify the obligations, permissions and prohibitions for which the signatories should be held responsible to state the actions and penalties that may be taken in the case when any of the stated agreement is not being met. A contract can be viewed as a legal document consisting of finite set of articles, therein consisting finite set of clauses.

In general it is possible to distinguish two types of clauses:-

²⁷ Section 2(h)

²⁸ According to Oxford Dictionary

1. Definitional clauses: defines relevant concepts occurring in the contract.
2. Normative clauses: regulates the actions of the parties for contract performance and includes modalities such as obligations, permissions and prohibitions.

4.2) MEANING AND DEFINITION OF E-CONTRACTS:

Traditionally, the contracts were paper based, but with the introduction of internet, businesses are departing from the notion of traditional based contracts and are going online. This shift from paper based contracts to online contracts has led to the emergence of new species of contract i.e. “electronic contracts”. It means a contract formed electronically.²⁹

An E-Contract is a contract modelled, executed and enacted by a software system. Computer programs are used to automate business processes that govern E-Contracts.

It aims at:³⁰

- To create a secured atmosphere of transacting online with alternative mode to paper and writing.
- To create an electronic documentation system which will safeguard the contracting parties on par with the traditional mode of contracts?
- To create statutory status monitoring/verifying authorities for such electronic transactions.
- To check frauds, intentional and unintentional transactions to promote and build confidence in genuine online transactions.
- To create necessary legal structure to oversee such transactions to establish standard rules and regulations for smooth functioning of online transaction.
- To make Digital Signature legally valid and incorporating the same with the existing legal regime of contracts, sale of goods, evidence and consumer acts.

²⁹ Electronic Contracts and the Law in India by Asian School of Cyber Law

³⁰ Insights to e-contracts by Sachin Rastogi

Definition:

- The UNCITRAL Model Law on Electronic Commerce³¹ instead of defining an E-Contract, it merely states that “ a contract can be made by exchanging data messages and when a data message is used in the formation of a contract, the validity of such contract should not be denied.³²
- A transaction formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as a routine step in forming of the contract.

The Information Technology Act, 2000, defines ‘data’ as a representation of information, knowledge, facts, concepts or instructions which are prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or a computer network, and may on any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.³³

According to UNCITRAL Model Law, ‘data messages’ means ‘ information generated, sent, received or stored by electronic, optical or similar means including, but not limited to Electronic Data Interchange(EDI), electronic mail, telegram, telex or telecopy.³⁴

4.3) CLASSIFICATION OF E-CONTRACTS:

Broadly speaking e-contracts can be classified under two heads- contracts executed by

- Electronic Data Interchange
- Cyber contracts.³⁵

³¹ Model of 1999

³² Article 11, communication of data messages, UNCITRAL Model Law on E-Commerce, 1996

³³ S.2(o) of Information Technology Act, 2000

³⁴ Article 2(a) of UNCITRAL Model Law on E-Commerce, 1996

³⁵ Chapter 2 of Insights to E-Contracts in India by S. Rastogi

(1) Electronic Data Interchange (EDI):

Means the computer to computer exchange of structured business information in standard electronic format. It means the electronic transfer of information from computer to computer, using an agreed standard to structure the information.³⁶ These contracts provide direct exchange of business information among the parties through computers, in computer process able format and are generally used by the parties having continued business relationship.

Definitions:

- EDI can be defined as: a set of standards used to exchange business information between computers and carry business transactions electronically.”³⁷
- “The electronic interchange of machine process able structured data which has been formatted according to the agreed standards and which can be transmitted directly between different computer systems with the aid of telecommunication interface with or without human interference.”³⁸

EDI is the electronic exchange of structured business data in standardized formats which involves data exchange among parties knowing each other and making arrangements for one to one connection usually dial up.

In 1960's businesses realised that many of the documents they exchanged were related to shipping of goods, such as invoices, purchase orders and bills of lading. These documents included the same set of information for almost every transaction. It was also realised that businesses were spending a good deal of time and money entering this data into their computers, printing paper forms and re-entering data on other side of transaction. Although the purchase order invoice, bills of lading for each transaction contained much of the same information- such as item numbers, descriptions, prices and quantities- each paper form usually had its own unique format for presenting that information. By creating standard set of formats for transmitting that information electronically, businesses were able to reduce errors, avoid printing and mailing costs, and eliminate the need to re-enter the data.

³⁶ Article 2(b) of UNCITRAL Model Law,

³⁷ E-commerce legalities, www.wiki.media-culture.org.au/index..E-commerce_and_the_law

³⁸ Dr. Farooq Ahmed, Cyber Law in India- Law on Interest, 2nd edition

Businesses that engage in EDI with each other are called as “trading partners”. The standard formats used in EDI contain the same information that businesses have always included in their standard paper invoices, purchase orders, and shipping documents. These parties before establishing any contractual relationship generally exchange an agreement called the “trading partner agreement” in which the details about the warranties disclaimers, liabilities and the relevant rules that will be applicable in case of disputes are mentioned.³⁹ The information which is stored on one computer is converted into standard EDI format by software programs to transmission to one or more trading partners. Trading partner’s computer, further, retranslate the information using software programs into an understandable form. Working with trading partners and trading partner agreements, EDI reduces paper handling and input errors, facilitates just-in-time delivery and decreases administrative and processing expenses. Unlike email and telex, which involve free text in human readable form, EDI communicates “coded information in a structured format”. EDI eliminates human involvement and enables the exchange of information directly between computers.

One serious problem that potential users of EDI faced was the high cost of implementation. Until the late 1990s, undertaking EDI meant buying expensive computer hardware and software and then either establishing direct network connections using leased telephone lines to all trading partners or subscribing to a Value Added Network(VAN). VAN is an independent firm that offers connection and transaction forwarding services to buyers and sellers engaged in EDI and were responsible for the security of data transmitted. VANs not only facilitate the transmission of messages but also provide storage, security, translation between standards, reformatting and conversion services.⁴⁰

EDI involves multiple contractual relationships.⁴¹

- The underlying trade relationships, such as sale of goods

³⁹ Supra, fn 30

⁴⁰ Vakul Sharma, Information Technology Law and Practice- Cyber Law & E-Commerce, Universal Law publishing Co. Pvt. Ltd.

⁴¹ A.H. BOSE- Electronic data interchange agreement

- The contract governing electronic exchange of information, which structures the communication relationship between the partners, called as 'interchange agreement' or 'trading partner agreement'.
- The system rules or network agreements, which govern the relationships between each EDI partner and its VAN.

EDI allows for electronic contracting, though not all electronic messages create a contract. Messages with purely informational content do not create an electronic contract.

Examples of electronic documents with offer and acceptance implications are⁴²

- Purchase orders
- Invoices
- Payments
- Solicitation and submission of bids
- Filing documents electronically with the government
- Advertising of goods and services

Trading partner agreement does not cover third parties, such as VANs. On the other hand EDI is effective in category management: satisfying customer wants by having on hand the right product, in the right amount, at the right place, at the right price. Products are categorised into local grouping rather than promoted singly. Firms have been using EDI to improve their purchasing processes and their relationships with suppliers e.g. General Electric, Wal-Mart.

(2) Cyber contracts:

A cyber contract is “a contract created wholly or in part through communication over computer networks.”⁴³ It can be created entirely by e-mails where an offer or acceptance is evident or they can be made by a combination of electronic communications, paper

⁴² The handbook of E-Commerce

⁴³ www.corbinball.com/articles_legal/index

documents, faxes and oral discussions. The most commonly used methods of communication of business information are e-mail and commercial websites.⁴⁴

Cyber contracts include the following:

(A) Electronic mail or Email:

Electronic mail commonly called as “e-mail” is a method of exchanging digital messages across the internet or other computer networks all over the world. It means the transmission of messages over communication networks.⁴⁵

It can be defined as “the exchange of computer stored messages by telecommunication.”⁴⁶

E-mail is perhaps one of the first uses of the internet and is still the most popular one. Email is a service used to send and receive messages quickly and securely through an electronic or computer channel. In computing, email is a network service that allows two or more users to communicate with one another by messages that are sent and received through a computer or similar device.⁴⁷

Email is an important aspect of e-commerce. It is a more up to date method of transmitting data, text files, digital photos, audio and video files from one computer to another over the internet. It is a fast, flexible and reliable method of communication. An email message consists of two components, the message header and the message body, which are email contents.

Anyone interested in communicating business details through e-mail must have an e-mail address for which he has to register himself with the Internet Service Provider(ISP) who runs a constantly accessible mail server. Once the registration is complete by filling up the form which is electronically available, an electronic mail box(inbox) along with the address is allocated to the user. The person wishing to send an offer to another will type the desired contents of the offer on his system with an e-mail address of a party to whom he intends to send the offer which is to be mentioned in the address column. The message then is electronically transmitted by pressing the ‘send’ button to the service provider of the sender and is then forwarded to the recipient’s provider who puts it in the recipient’s mailbox where

⁴⁴ www.corbinball.com/articles.legal

⁴⁵ www.webopedia.com

⁴⁶ www.techiesouls.com

⁴⁷ www.webopedia.com

it is saved. Placing e-mail in the recipient's mailbox does not enable him to know the contents of the message. Similarly, the sender does not know whether the recipient has received the message⁴⁸. An email contract is read by each contracting party, rather than processed automatically by an information system. It can assume any form which the parties are willing to accept.

(B) Shrink Wrap Contracts

'Shrink Wrap contract' refers to license agreements or other terms and conditions of a contractual nature. Such terms or license agreements can only be read and accepted by the customer after opening the product. In this the people agree to the terms by using the software which they have already purchased. When software is licensed, it is packed in such a way that a note is attached at the top of the packaging which contains the terms and conditions for the use of such software. Once the package is opened by the user, the user is deemed to have read such conditions and will be bound by them.⁴⁹

The term Shrink wrap describes the plastic wrapping which is used to cover software boxes but that does not mean that such contracts are limited to software industry only. The license is contained inside a plastic shrink wrapped box containing the software. The idea behind this is that by breaking the seal i.e. pulling off the plastic wrap, the user agrees to the terms of the license. Thus, a Shrink Wrap license can be defined as an unsigned agreement between the purchaser of a mass market computer software program and the computer software company that developed the concerned software. This license purports to define the terms of the transaction as well as placing contractual conditions on the purchaser's use of the software. The license is normally connected to the software in such a manner that the purchaser should notice and read the license prior to using the software.⁵⁰ The terms of the contract must be communicated to the user otherwise lawyers would argue that they are not binding. The opening of the shrink wrap confirms that the customer accepts the terms of the

⁴⁸ Dr. Farooq Ahmad, Cyber Law in India- Law on Internet

⁴⁹ Ragvendra S. Srivastava- Online contracts

⁵⁰ <http://library.findlaw.com>

license. The acceptance of the agreement is inferred by opening the package or using the software even without the license terms being read.

Computer software companies rely a great deal upon the shrink wrap license agreement to guard their perceived interests in the mass market distribution of their software by retaining title to the copy of the software- the software is licensed and not sold to the purchaser. By doing so, the Computer Software Company theoretically attempts to impose conditions upon the licensee, the purchaser, that are not otherwise permissible under copyright law.

The principle terms of shrink wrap license ⁵¹are:-

- Prohibition on making unauthorized copies of the software,
- Prohibition on rental of the software,
- Prohibition on reverse engineering and modifications of the software
- Limiting the use of the software to one central processing unit.
- Disclaiming warranties; and
- Limiting liability

Shrink Wrap contracts usually read something like, "By overling the packaging on this box you agree to the terms and conditions of the license."⁵² The terms and conditions of the license are generally located inside the box. This way an indirect E-Contract is formulated. Most computer users are quite familiar with the so-called "shrink-wrap" license agreement that comes with most software programs for the consumer market. But the irony is that most of them have seen them only as a printed material, and have not actually strained their eyes to go through these small-printed terms and conditions. The shrink-wrap license agreement purports to create a binding legal agreement (so it says) between the software vendor and the user. The agreement is usually found inside the box containing the software, printed on the

⁵¹ <http://library.findlaw.co>

⁵² David Callan, How Click wrap contracts benefit over Shrink wrap contracts, available at <http://www.lawyerintl.com>

envelope containing the CD-ROM or disks, or stated in the user manual. At the beginning appears the usual statement, warning the user not to open the software envelope or use the software, if he or she does not agree with the terms and conditions of the agreement. Use of this type of agreement has become the legal licensing paradigm of the software industry for consumer mass-market software. The term "shrink-wrap" derives from the fact that such agreements used to be included on the outside of the software packaging, visible through the clear plastic shrink-wrap with which the package was sealed.

These are adhesion contracts and hence share procedural and substantive aspects. In particular, each of them shares the following three characteristics. First these contracts are not entered into between the parties as a result of meaningful negotiation. Secondly the agreements are impossible to change. Third, the buyer's or user's assent to the terms may be either absent or ambiguous. These are the three distinguishing traits that form the legal basis for challenging the enforceability of such agreements. Contracts of adhesion differ significantly from the traditional process of contract formation. In an adhesion contract, the parties do not negotiate because the terms and conditions that are presented to adherents are non-negotiable. The lack of meaningful bargaining between the parties leaves the adherent in the position that the deal is either accepted or there is no deal.

(C) Click Wrap Agreements

The third kind of cyber contract is the Click Wrap Agreement. In an online licensing of a software where a particular software is downloaded from a website, the concept of a "Shrink wrap" license will not apply as there is no physical medium through which the software is delivered to the user. In such an event the problem of making the terms and conditions of use binding on the user poses a problem.⁵³ This problem is however solved with the advent of "Click Wrap" agreements. Click-wrap is the electronic equivalent to the shrink-wrap method and allows users to read the terms of the agreement before accepting them. Instead of tearing the shrink-wrap, the enforceability of click-wrap is through the

⁵³ Supra, fn 49

simple act of clicking the "accept" button, without any need for a signature and without an opportunity to change or amend the conditions.

A "click wrap" agreement is also referred to as a "click through" agreement or a "click wrap license". It is mostly found over the Internet, either as a part of installation process of various software packages or in other circumstances where agreement is sought using electronic media. A "click-wrap agreement" sets forth the rights and obligations between parties. The term "click-wrap" is derived from the fact that such online agreements often require clicking with a mouse on an on-screen icon or button to signal a party's acceptance of the contract.

Every person who is a computer savvy comes across many click wrap agreements. In order to access most digital products, services or even to obtain a membership to use some websites he is presented with a click wrap agreement. This agreement specifies to the user what they can or cannot do as a part of the terms of sale or usage. Click Wrap contracts are usually formed when an internet user purchases goods or services via the internet. The purchaser pays the vendor online, often using a credit card. Once the payment details are entered, the purchaser is presented with either:⁵⁴

- The content of the purchase terms and conditions; or
- A link to the purchase terms and conditions, which the purchaser must click in order to continue with the transaction.

In case of Click Wrap agreement, a party posts terms on its website pursuant to which it offers to sell goods or services. To buy these goods, the purchaser is required to indicate his assent to be bound by the terms of the offer, by his conduct i.e. typically the act of clicking on a button stating "I agree". Once the purchaser indicates his assent to be bound, the contract is formed on the posted terms, and the sale is consummated. No paper record is created nor is the signature of the purchaser required. The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the

⁵⁴ www.legalsoucre360.com

Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three buttons or icons: one labelled "Back" and used to return to an earlier step of the download preparation; one labelled "No", which if clicked, terminates the download; and one labelled "Yes," which if clicked, allows the download to proceed. If a user indicates rejection by clicking "cancel" or closing the window, then he cannot use or purchase the product or service. Classically, such a "take-it-or-leave-it" contract was described as a "contract of adhesion, which is a contract that lacks bargaining power, forcing one party to be favoured over the other."⁵⁵

Among other things, click-wrap agreements are used to, establish the terms for the download and use of software over the Internet; set forth a Website's Terms of Service, i.e., the rules by which users may access the Web site or a portion of the Web site such as a chat or message service; and establish the terms for the sale of goods and services online.

A web-wrap license is considered as an Internet contract that asks the user to accept the terms of the license by clicking a "yes" or "no" button before or after seeing the complete agreement. A "yes" gives the user complete access to the website. A "no" prevents the user from gaining access to all or some of the information on the site. This is also known as a click-wrap license.

Types of Click-Wrap Agreements:

- Click wrap agreements are of **two types**:-⁵⁶

- **Type and Click:** In this case user must type "accept" or other specified words in an onscreen box and then clicks "submit" or similar button to indicate acceptance of contractual terms. Without such action, the user cannot proceed to access the targeted Web site, download the desired software, or purchase the desired product or service.
- **Icon Clicking:** In this case the user must click on an "ok", "I agree", or similar icon to signal acceptance of the terms. Access is denied unless the button is clicked. A user

⁵⁵ Martin H. Samson, www.internetlibrary.com

⁵⁶ Rohas Nagpal, Ecommerce- legal issues, Asian School of Cyber Law

indicates rejection by clicking "cancel" or closing the window.

"Type and click" click-wraps provide a high degree of protection as they require clear assent to the terms as evidenced by writing ("I agree") and preclude parties not accepting the terms from accessing the site or desired function. However, this method can be cumbersome as it requires users to type a word or phrase, thereby slowing down the enrolment process, and must account for misspellings, or other errors by users. On the other hand, the "icon clicking" click-wrap provides a slightly lower threshold of protection because it is susceptible to claims of mistake or error e.g., my finger slipped, not present when one is required to type "I accept".

- The Importance of Click-Wrap Agreements

- Click-wrap agreements provide a substitute for direct bargaining between parties in an online environment. It is not practicable, for a Web site owner or other Online Service Provider (OSP) to bargain with each person who visits its Web site. Therefore, the Web site owners places an agreement (the click-wrap) on its Web site and require visitors to assent to the terms of the agreement in order to access the site, download software or purchase a product/service.
- A click-wrap agreement also put users on notice that the material contained on the Web site, as well as any software downloaded from that site, is proprietary and impose a limitation on its use and makes it easier for the Online Service Provider to pursue users for any violations or infringement and to make them liable. Majority of the agreements are in favour of the vendor or online entity offering the terms. It is designed to protect the company against illegal or wrongful use by the user.
- Click-wrap agreements can also be used to limit the OSP's potential liability. For instance, through the use of a click-wrap, an Online Service Provider can attempt to absolve itself from liability associated with content on the Online Service Provider's Website. This includes any losses associated with use of such content, any errors or problems with respect to software downloaded, or products/services purchased, from the Website.

- Since so many transactions are completed online nowadays, the click wrap agreement provides an electronic solution to resolve contractual controversies that may arise in a transaction. Due to the absence of physical paper contracts that contain signatures indicating the acceptance of terms, the click wrap is an alternative way to finalize the sale with a simple click of the mouse button.

Shrink Wrap and Click Wrap⁵⁷

Basis	Shrink Wrap	Click wrap
Knowledge of Terms and Conditions	Consumer does not get to know the key terms of the	Consumer has a clear opportunity to go through the terms and conditions
Acceptance and Agreement	People agree to the terms by using the software which they have already purchased	Allows users to read the terms of the agreement before accepting them
Enforceability	They have questionable enforceability	They on the other hand have gained almost universal acceptance as law binding contracts
Conclusion of Contract	Breaking the seal i.e. pulling off the shrink wrap	Through the simple act of clicking the "accept" button

⁵⁷ Leigh goessl, click wrap agreements explained, available at <http://www.legalsource360.com>

4.4) FORMATION OF E-CONTRACTS:

Under the Indian Contract Act, 1872, the formation of contracts involves the following three stages:⁵⁸

1. The making of a proposal or offer by one person to another.
2. The acceptance of the offer by the person to whom it is made.
3. The expression and communication of such acceptance.

A contract may be formed orally or in writing and can even be conferred from the conduct of the parties. Today with the emergence of online communications, contract can be formed electronically. The advent of internet as the means of facilitating contract formation does not at first blush, present a situation different to that applicable to a facsimile or telex. An electronic contract may be formed either through an exchange of e-mail or by completion of a document on an internet website which is submitted to another party, electronically. It can equally be concluded in a chat room or video conferencing or by intent telephony. Video conferencing is the conduct of video conference (also known as a video teleconference) by a set of telecommunication technologies which allow two or more locations to interact via two way video and audio transmissions simultaneously. It means conducting a conference between two or more participants at different sites by using computer networks to transmit audio and video data. For eg: a point-to-point (two person) video conferencing system works as much as a video telephone. Each participant has a video camera, microphone and speaker mounted on his or her computer. As the two participants speak to one another, their voices are carried over the network and delivered to the other's speaker, and whatever images appear in front of the video camera appear on a window on the monitor of the other person's device.⁵⁹ In such case the parties can make an offer and also its acceptance can be done, thus forming a contract.

⁵⁸ Formation of Contract, Halsbury's Law of India, Vol. 2, p.226

⁵⁹ Video Conferencing, available at www.webopedia.com

The essential elements of electronic contract formation do not differ dramatically from those applicable to the contracts (traditional). There are aspects which are unique to online commerce. For example, the contracting parties do not have to come personally in contact to reach the agreement.

The details of each essential element of a contract have already been done before and some important points in relation to e-contracts:

4.5) ESSENTIALS OF E-CONTRACTS:

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

1. An offer needs to be made:

An offer is the first essential for the formation of a valid contract, because unless there is offer, there can be no acceptance and hence no contract. An offer simply means a proposal.

An offer can be defined as “ a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance having been sought, will result in a binding contract.”⁶⁰ The expression must be about some promise to do or refrain from doing something which is obviously not in jest.

The person making the offer is known as the offeror or proposer or promisor and the person to whom it is made is known as the offeree or the proposee if the offeree accepts the offer he is known as the acceptor or promise.

The formation of E-Contracts also requires the presence of an offer made by the offeror to the offeree.

The Information Technology Act, 2000, identifies three parties to the electronic transmission process:

⁶⁰ Black's law dictionary, 7th edn

1. the Originator
2. the Intermediary
3. the Addressee

originator means “a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated stored or transmitted to any other person but does not include any intermediary.”⁶¹

Originator of data message means “ the person by whom or on whose behalf, the data message purports to be sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to data message.”⁶² simply we can say that the originator is the person who originates the data message i.e. creates stores or sends the data message.

Intermediary with respect to any particular electronic message means” any person who on behalf of any other person receives stores or transmits that message or provides any service with respect to that message”.⁶³ Intermediary, with respect to a particular person, sends, receives, or stores that data message or provides other services with respect to that data messages.⁶⁴

Addressee means a person who is intended by the originator to receive the electronic record but does not include any intermediary”⁶⁵. Addressee of a data message means” a person who is intended by the originator, to receive the data message, but does not include a person acting as an intermediary with respect to that data message”.⁶⁶ Simply he is the person to whom the data message has been addressed that means to whom the data message has been sent by the originator and who received the message.

⁶¹ Sec 2(za) of ITA, 2000

⁶² Sec 2(c) of UNCITRAL Model, 1996

⁶³ Sec 2(w) of ITA, 2000

⁶⁴ Sec 2(e) of UNCITRAL Model

⁶⁵ Sec 2(b) of ITA, 2000

⁶⁶ Sec 2(d) of UNCITRAL Model, 1996

Originator and Addressee are not equivalent to promisor and promise:⁶⁷

The Information Technology Act, 2000, introduces a new functional category of Originator and Addressee. They are not to be considered as equivalent to promisor and promise under The Indian Contract Act, 1872. A promise may act as the originator or the addressee vis-à-vis any electronic message, depending on his/her functional role. When the promisee is sending any electronic message he is referred to as the originator of that electronic message and when he receives the electronic message he is referred to as the addressee. In context of E-contracts, when promisee makes an offer through an electronic communication he is said to be the originator and the person to whom the offer has been made is said to be the addressee. When such addressee accepts that offer and communicates its acceptance through an electronic method then such addressee becomes the originator and the person to whom such acceptance is being sent i.e. the promisor is known as the addressee of that electronic message.

Electronic offer:

For e-contracts also there has to be an offer which may be referred as electronic offer. An electronic offer can be made through websites, e-mails, EDI or electronic agents. In the context of contract formation, otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by the means of data messages. Where the data message is used in the formation of contract, that contract shall not be denied validity or enforceability on the sole ground that data message was used for that purpose.⁶⁸ The consumer browses the available goods and services which are displayed on the website and then selects what to purchase.

An offer in electronic contracts is made in electronic form. Electronic form with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.

⁶⁷ Insights Into E-Contracts in India by Sachin Rastogi

⁶⁸ Articles 11 of UNCITRAL Model, 1996

Information includes data, text, sound, images, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.⁶⁹

An electronic offer must contain all terms which are essential for the transaction otherwise it will not be enforceable, for eg on websites the location of the terms of transaction may be important. It is possible for the terms and conditions to be brought to the attention of possible customer before the contract comes into effect. Website designers need to ensure that unless the customer scrolls through all the terms and conditions and accepts them, they will not be able to access the product or download the software. This is because if the customer declines the terms and conditions and is still able to access the product or software the providing company will not be able to rely on those terms and conditions.⁷⁰

Section 20 of Uniform Electronic Commerce Act, 1999 provides that offer can be extended by means of:

- electronic document
- an action in electronic form, including touching or clicking on an appropriately designed icon or place on a computer screen, or
- Otherwise communicating electronically in a manner intended to express the requisite willingness to the contract.

An electronic agent can also be used to extend an offer to contract, provided the agent can effectively convey the offeror's intention to contract in a manner that would lead a reasonable person to believe that the offeror had intended to effect legal relations with the offeree. For instance, if a computer is programmed to make or accept offers in pre determined circumstances, the intention of the programmer or user to create legal relations may be reasonably inferred.

An "electronic agent" has been defined as a computer program or any electronic means used to initiate an action or respond to an electronic document or action in whole or in part without review by a natural person at the time of response or action.

⁶⁹ Sec 2(v) of ITA, 2000

⁷⁰ www.wikimediaculture.org.au

Communication of offer:

An offer to be effective must be communicated to the person to whom it is made. There can be no acceptance of an offer without the offer being communicated. There can be no contract unless the person giving acceptance has knowledge of the offer. If no offer has been made to a person, then acceptance by such person will not result into a contract.

Though offer may be made to world at large, a contract will arise only by the acceptance of that offer. Therefore knowledge of the terms of offer are essential for acceptance. For eg;⁷¹ the defendant's nephew absconded from home. The plaintiff who was defendant's servant was made to search the missing boy. After the plaintiff left to search for the boy, the defendant issued handbills announcing a reward of Rs. 501 to the one who finds the missing boy. The plaintiff who was ignorant of this reward was successful in finding the boy. When he came to know about the reward, which was announced in his absence, he brought an action against the defendant to claim the reward. It was held that since the plaintiff was ignorant of the reward, his act of bringing the lost boy did not amount to acceptance of the offer, and therefore he was not entitled to claim the reward. The communication of offer is said to be complete when it comes to the knowledge of the person to whom it is made.⁷²

An offer becomes effective when it reaches the offeree and can be withdrawn only if the withdrawal reaches the offeree before or simultaneously with the offer.

Consequently for an e-mail to reach an addressee, it is enough for the e-mail to enter into the server of the addressee. It is immaterial if the addressee has actually read it, or even unable to do so due to some technical problems, as it is within the addressee's sphere of influence to provide for adequate means to ensure that his internal communication functions are satisfactorily.⁷³

An offer communicated electronically is affected at the time of communication. The communication of the offer is complete at the time when it enters into the computer

⁷¹ Lalman shukla vs Gauri Dutt

⁷² Sec 4 of ICA, 1872

⁷³ www.uncitral.org

resource.⁷⁴ The Uniform Electronic Commerce Act, 1999 provides that, unless the parties agree otherwise, an electronic communication is sent when it enters an information system outside the control of the originator or, if they are in the same information system, when it becomes capable of being retrieved and processed by the addressee.

Invitation to make an offer:

In practice, the formation of contract is frequently preceded by preliminary negotiations. Some of the exchanges in these negotiations may contain no declaration at all, for eg one party seeking some information while other may amount only to an invitation to make an offer. An invitation to make an offer is simply willingness to enter into negotiations, it is not an offer. The acceptance of such invitation does not lead to a binding contract.

Hence, a distinction should be drawn between the two i.e. an offer and an invitation to offer.

The same is true in case of electronic contracts. The websites carry statements of the business details to the supplier/consumer. Is the statement an offer or simply information to the prospective consumers (invitation to treat) who may wish to place their order. Advertisements on websites may or may not constitute an offer as offer and invitation to treat are two different concepts. Generally when advertises goods for sale on a website, he is not making an offer but is inviting potential buyers to make an offer. If a web advertisement is regarded as a legal offer to form a contract, then the seller would easily become liable for the delivery of more goods than he has available to ship. When a buyer submits an order, which is an offer, the seller can accept the offer and create a contract. If the seller does not have the ordered items in stock, the seller has the option of refusing the buyers order outright or counter offering with a decreased amount. The buyer then has the option to accept the seller's counter offer.

In e-commerce transactions, however, it may not be easy to differentiate between offer maker and offer taker. This is very critical because the offer is not valid until an offer is accepted and the acceptance is communicated to the offer maker.

⁷⁴ Sec 14 of ITA, 2000

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

The precise test to determine whether a statement is an offer or invitation to offer is the intention of the parties. There can be no thumb rule applicable uniformly to all situations. By virtue of inbuilt flexibility commercial websites serve both as 'shop displays' and 'shop sellers' the fuse the advertising and the selling.⁷⁵

2. The offer needs to be accepted:

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

Procedures available for forming electronic contracts include:

a) E-mail:

Offers and acceptances can be exchanged entirely by e-mail, or can be combined with paper documents, faxes, telephonic discussions etc.

b) Web Site Forms:

The seller can offer goods or services (e.g. air tickets, software etc) through his website. The customer places an order by completing and transmitting the order form provided on the

⁷⁵ Supra at 38

website. The goods may be physically delivered later (e.g. in case of clothes, music CDs etc) or be immediately delivered electronically (e.g. e-tickets, software, mp3 etc).

c) Online Agreements:

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

d) There has to be lawful consideration

e) There has to be an intention to create legal relations

f) The parties must be competent to contract

g) There must be free and genuine consent

h) The object of the contract must be lawful

i) There must be certainty and possibility of performance

3. Non-Interactive Websites:

A site will be non-interactive where it only provides information and any contract with the seller is through other means such as confirmation of an order by phone or delivery of goods. There will be little difference between an advertisement on this type of site and a conventional advertisement. The website will convey through its non-interactive nature the implied intention on the part of the seller to negotiate the terms of any contract.⁷⁶

4. Interactive Websites:

An interactive website may be treated differently, Where a person is able to log into a website, chose an item for sale, enter payment details and conclude the agreement the display on the site may go beyond a mere invitation to treat, interactive websites will also commonly

⁷⁶ Supra fn 67

display the terms of any agreement entered into on the website and the buyer indicates their acceptance of the terms at the time of ordering. This fact together with the design of the site may add further weight to the argument that the website forms an offer and not an invitation to treat.⁷⁷

5. Acceptance:

When the 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", (Section 2(b), The Indian Contract Act. 1872.)

Acceptance to be absolute and unconditional:

Moreover, acceptance to be effective must be absolute and unconditional.⁷⁸ This is also known as the Mirror Image Rule. The rule lay down that the acceptance should be unconditional and without any variance in the terms of the offer. If the acceptance is not in conformation with the offer then it is no acceptance. Thus, an acceptance with variation is not an acceptance but a counter offer⁷⁹ which accepted by the person who made the original offer, before a contract is made.

The same is required for e-contracts i.e. acceptance of an electronic offer. Where an offer has been made electronically the same has to be accepted in order to form a binding contract. Where the originator sends his proposal to addressee by means of electronic media, the addressee if accepting the same may transmit his acceptance to the originator through internet. An electronic offer may be accepted either by e-mail, or other forms of electronic message, and by conduct such as clicking on a button, 'I Accept' or 'I Agree' or downloading content. A shrink wrap license can be accepted by opening the package.

⁷⁷ Ibid fn 76

⁷⁸ Sec 7 of ICA, 1872

⁷⁹ Counter offer: is an offer made against an offer amounts to rejection of the original offer.

The Uniform Electronic Commerce Act, 1999 provides that an offer can be accepted by means of:

- An electronic document
- An action to electronic form, including touching or clicking on a appropriate designed icon or place on the computer screen, or
- Otherwise communicating electronically in a manner intended to express acceptance.

If an offer is made electronically, it may be implied that the offeror consents to the electronic communication of acceptance of the offer. If it is not specified that acceptance must be communicated electronically, then the acceptance can be given through any other reasonable mode. Electronic offers and acceptances can be made in the following ways;⁸⁰

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

(ii) **Website Forms:** The seller can offer goods or services (e.g. air tickets, software etc.) through his website. The customer places an order by completing and transmitting the order form provided on the website. The goods may be physically delivered later (e.g. in case of clothes, music CD's etc) or be immediately delivered electronically (e.g. e-tickets, software, mp3 etc.).

(iii) **Online Agreements:** Users may need to accept an online agreement in order to be able to avail the services e.g. clicking on "I Accept" while installing software or clicking on "I Agree" while signing up for an e- mail account.

Communication of acceptance

Another important requirement of a legal acceptance capable of forming a valid Contract is that such an acceptance should be communicated to the person making the offer .

⁸⁰ Supra fn 56

Section 3 of the Act⁸¹ says that, “the communication acceptance is deemed to be made by an act or omission of the party by which he intends to communicate such acceptance or which has the effect of communicating it”. In order to result in a contract; the acceptance must be a “matter of fact”.

Similarly in case of e-contracts also, the acceptance should be communicated to the proposer. However, there is a difference of opinion as to when acceptance is communicated in case of e-contracts. One view regards that the communication is instantaneous and is complete when the originator (offeror) receives the acceptance and suggests that the mail box rule will not apply. On the other hand the second view is that receipt of electronic messages may not be instantaneous because even after receiving the message the recipient has to take steps to connect to their mailbox or the mail server before, the communication is complete and therefore the mail box rule should apply.

Furthermore, acceptance is to be made in the manner prescribed or indicated by the offeror. But a departure from that manner does not itself invalidate the acceptance. A duty is cast on the offeror to reject such a departure within a reasonable time and if he fails to do so, the contract is concluded. Where no mode has been prescribed, acceptance must be given in some usual and reasonable manner.

Revocation of offer and acceptance:

The Information Technology Act does not expressly provide for revocation, but section 13 and 14, of Information Technology Act, 2000 read along with sections 4 and 5 of the Indian Contract Act, 1872 provide for revocation through implication. The rules relating to revocation of offer provided in section 5 of the Indian Contract Act, 1872 applies mutatis mutandis to offers made electronically and the legal position has not been altered by the Information Technology Act.⁸²

⁸¹ Indian Contract Act

⁸² Sec 14 of ITA, 2000

6. Intention to create Legal relationship:

There is no provision in The Indian Contract Act requiring that an offer or its acceptance should be made with the intention to create legal relation. But under English law, it is a settled principle that, to create a contract there must be common intention of the parties to enter into legal obligations. The Supreme Court of India has however expressed its reservation about the need of this separate requirement of 'intention to contract' under the Contract Act. A limited recognition of the principle in India could be inferred from the decision of the Supreme Court in *Banwari Lal vs Sukhdarshan Dayal*.⁸³ The fact of the case were that in an auction sale of plots of land, a loudspeaker was spelling out the terms, etc., of the sale, one of the statements being that a plot of certain dimensions would be reserved for dharamshalas. Subsequently, that plot was also sold for private purposes. The purchaser sought to restrain this. J. Chandarchud said that, "microphones ... have not yet acquired notoriety as carriers of binding representations. Promises held out over loudspeakers are often claptraps of politics. In the instant case the announcement was, if at all, a puffing up of property put for sale".

The intention of the party should be collected from the instruments as an entirety. Disproportionate emphasis must not be laid upon a single provision. Words, phrases and clauses should not be isolated, but related to the context and the contractual scheme as a whole, and giving the meaning which accords with the probable intention. The construction of contracts cannot be governed by true import of the word used in the agreement.

It is well settled that the Court in order to construe an agreement has to look to the substance or the essence of it rather than its form. A party cannot escape the consequences of law merely by describing an agreement in particular form through in essence and in substance it may be a different transaction. Where the agreement is construed as a sought of joint venture or a transaction like a partnership which has been given the form of acceptance of a contract

⁸³ (1973) 1 SCC 294

of agency, the law must have its course.⁸⁴ In *State of Orissa vs Titagarh Paper Mill Co. Ltd* the Supreme Court that it is true a nomenclature and description given to a contract is not a determinative of the real nature of the document or the transaction there under. This, however, have to be determined for all the terms and clauses of the document and not by speaking and choosing certain clauses and the ultimate effect.⁸⁵

7. Lawful consideration:

“Ex nudo pacto non oritur actio ”

The above statement means that, no action arises from a contract without consideration. This implies that consideration is indispensable for the contract to be legally binding. The Indian Contract Act, 1872 provides that, "an agreement without consideration is void".⁸⁶

In addition to offer and its acceptance, lawful consideration is also necessary for the formation of a contract. Consideration must be given or promised in exchange for the promise that is sought to be enforced. Consideration is a technical term used in the sense of *quid pro quo* i.e. something in return. When a party to an agreement promises to do something, he must get something in return. This something is consideration.⁸⁷ In the ordinary course, when a person makes a promise to another, he does so with an intention of deriving some advantage which the person to whom the proposal is made is capable of conferring upon him. This advantage is known as consideration.⁸⁸

- According to Blackstone, "Consideration is the recompense given by the party contracting to the other".
- Pollock defines consideration as, "the price for which the promise of the other is bought",

⁸⁴ *CIT Punjab, Haryana, Jammu and Kashmir and Union Territory of Chandigarh vs Panipat Wollen & General mills Co. Ltd.*, Chandigarh, AIR 1976 SC 640, 644

⁸⁵ 1983 SCR (2) 743, 1983 SCC(2) 433

⁸⁶ Sec 25 of ICA

⁸⁷ N.D.Kapoor, *Merchantile Law*

⁸⁸ Noshirvan Jhabvala, *The Law of Contracts*

Section 25, The Indian Contract Act, 1872.

The same principle applies to e-contracts, if there is no consideration in e-contracts; the contract will not be legally binding. For example when software is offered for free such as Acrobat reader, the software provider cannot bind the customer by the terms and conditions, since there has been no consideration given in exchange for the software. The consideration should also be lawful. Consideration of an agreement is lawful unless it is forbidden by law or fraudulent or of a nature that may defeat the provisions of law or if it causes injury to others or is immoral or opposed to public policy.⁸⁹ Thus, if an auction site facilitates a contract between two parties where one person provides a pornographic movie as consideration for purchasing an mp3 player, then such contract is void. The need to prove the existence of consideration is essentially unaffected by the advent of electronic communication technology, since the latter represents a revolution in how contracts are formed, rather than the substance of contracts. Consideration need not to be expressed in a document, but may be proved either by oral or by other evidence.⁹⁰ Mere recital in a document does not prove consideration, but if the document is very old, little further evidence is required to prove consideration.⁹¹ The onus of establishing that document is void, for lack of consideration, is on the person who so contends.⁹²

8. Competency of the parties:

The word 'person' includes both natural as well as legal person, but computers do not fit in either of the two categories.⁹³ Thus, any contract executed by the autonomous computers will not be covered by the Contract Act. In order to give legal recognition to such contracts, two options were available to the legislature before passing the Information Technology Act:-

⁸⁹ Sec 23 of ICA, 1872

⁹⁰ Sec 92, Indian Evidence Act, 1872

⁹¹ Minni Nagiah vs Popular Venkiah, AIR 1950 Hyd 50

⁹² Sudhakar Sahu vs Achutananda Patel AIR 1967 Ori 89

⁹³ Supra at 48

- either to clothe computers with legal personality so as to hold them as parties in their own right or
- to treat them as the agent of the party.

The court precedents support the option of treating computers as the agent of the party.⁹⁴

In E-Contracts, the verification of the identity or capacity of the contracting party is difficult. The complex nature of electronic contracts makes it impossible for the person entering into a contract to know if the other contracting party is competent or not, The parties to a contract being at a distance and the absence of face to face interaction makes it almost impossible for one party to ascertain the competence of the other party. The common illustration of the problem posed by this complexity of the communication is that, of minors ordering goods or masquerading as adults,⁸ Contracts unknown to the merchant may be entered into with minors. Minors are incompetent to contract except for necessities. Hence, the electronic merchants will not be able to recover any monies when they enter into transactions with minors and the contract is subsequently found to be void whilst minors may be able to recover the purchase price from the vendor. In response to these difficulties online merchants have taken precautionary measures like including conditions as to capacity in the terms of the offer, which must then be affirmed by the accentor to be true and correct, before the offer can be accepted.

9. Free consent:

Salmond calls it as error in causa. i.e. error in the including cause for eg. consent caused by coercion , undue influence ,fraud and misrepresentation. ⁹⁵Section 10 requires not only that the parties should consent to the contract but also that such consent should be free . Consent is said to be free when it is not caused by;

⁹⁴ ibid

⁹⁵ Supra at 87

- coercion⁹⁶
- undue influence⁹⁷
- fraud⁹⁸
- misrepresentation⁹⁹
- mistake¹⁰⁰

Generally contracts made by mistake are not enforceable because they lack the requisite intention to enter into legally binding agreement. The principles or law pertaining to mistake vitiating consent of the contracting parties provided in the contract Act are;

- (i) where both the parties are under a mistake as to a matter of fact essential to an agreement, the agreement is void/
- (ii) mistake of fact covers mistake as to law not in force in India but a mistake as to law in force in India does not make a contract voidable,
- (iii) where only one of the parties to a contract is under a mistake as to a matter of fact, contract is not voidable

If these rules are applied to E-Contracts, then several situations will not be covered. These rules if applied rigidly may also prove sometimes oppressive for one party and windfall for the other.

The Uniform Electronic Commerce Act, 1999, (UECA) addresses errors made in dealings between natural persons and electronic agents. They provide that an agreement will have no legal effect and will not be enforceable if;

- The natural person made a material error in the document;
- The agent, did not provide an opportunity to prevent or correct the error;
- The natural person notifies the other person of the error as soon as practicable when the former learns of it and indicates that he or she made an error in the electronic document;

⁹⁶ Coercion means committing or threatening to commit, an act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement; sec 15 of ICA

⁹⁷ Sec 17 of ICA

⁹⁸ Sec 18 of ICA

⁹⁹ Sec 19 of ICA

¹⁰⁰ Sec 20 of ICA

- The natural person takes reasonable steps that confirm to the other person's instructions to return or destroy the consideration received, if any, as a result of the error; and
- The natural person, has not used or received any material benefit or value from the consideration, if any, received from the other person.

Usually in online contracts, especially when there is no active real-time interaction between the contracting parties, e.g. between a website and the customer who buys through such a site, the click through procedure ensures free and genuine consent.¹⁰¹ Considering the complexities involved in online transactions where the likelihood of the occurrence of mistakes is very high, the plea of non est factum i.e. absence of consent, can be made available as provided in general principles of contract. A party to an online contract may not be permitted to avoid the contract on the plea of mistake - a misrepresentation or an omission to look into the terms and conditions will not bail a party out of his contractual obligations. Another facet of mistake of fact can be, as regards mistake as to a person. In e-contracts, chances of misrepresentation are very high and the mistakes as to person can occur frequently. Often in online trading the identity of parties is never certain and therefore contract concluded under the mistake of identity would therefore be void.¹⁰²

10. Lawful object:

The word object means purpose or design.¹⁰³ Every agreement of which the object is unlawful is void. An agreement is said to be opposed to public policy when it is harmful to the public welfare. Public policy is that principle of law which holds that no subject can lawfully do that which has a mischievous tendency to be injurious to the interest of the public, or which is against the public good or public welfare. A contract for selling

¹⁰¹ Supra at 56

¹⁰² S.K.Verma and Raman Mittal, Legal Dimensions of Cyber Space, Indian law Institute, New delhi p.

¹⁰³ Supra at 87

11. Not expressly declared to be void:

An agreement, though it might possess all the essential, elements of a valid contract, must not have been expressly declared as void by any law for the time being in force in the country. The contract act specifically declares certain agreements to be void. A void agreement is one which is not enforceable by law. Such an agreement does not give rise to any legal consequences and is void ab initio. The Indian Contract Act, 1872 declares the following agreements to be void:-

- (a) Agreements by incompetent parties, (sec. 11)(f)
- (b) Agreements made under a mutual mistake of fact. (sec. 20)
- (c) Agreements the consideration or object of which is unlawful, (sec. 23)
- (d) Agreements the consideration or object of which is unlawful in part, (sec. 24)
- (e) Agreements made without consideration, (sec. 25)
- (f) Agreements in restraint of marriage, (sec. 26)
- (g) Agreements in restraint of trade, (sec, 27)
- (h) Agreements in restraint of legal proceedings, (sec. 28)
- (i) Agreements the meaning of which is uncertain, (sec. 29)
- (j) Agreements by way of wager, (sec. 30)
- (k) Agreements contingent on impossible events, (sec. 36) (1) Agreements to do impossible acts, (sec. 56)
- (m) In case of reciprocal promises to do things legal and also other things illegal, the second set of reciprocal promises is void agreement, (sec, 57). Contract can be formed electronically in violation of the above provisions

12. Legal formalities:

It is not that every agreement is binding on a party to it, simply because he agreed to it. Where the law requires that a contract, to be effective, should be executed in a particular way and when certain formalities are laid down to be complied with before certain liability is

created, those formalities cannot be dispensed with. Thus, a mortgage has to be effected not only by the execution of a document, but also by it being registered and attested by two witnesses. Similarly, a contract for sale of land is required to be in writing, signed and registered. In such cases want of either writing or signature or registration will be fatal. Generally, the law does not favor any particular mode of execution of commercial transactions save in exceptional situations where it is expressly provided that a commercial transaction be in writing and signed by the parties so as to be enforceable. In such cases, the contract should be in accordance to the legal requirements or it will not be enforceable. The document acts as a record of the parties' agreement and the signature is the stamp of a person's identity and marks his intention to commit himself legally. The requirements of writing and signature perform a variety of functions. The written document is a permanent record of the transaction which cannot be unilaterally altered and would facilitate the reproduction, so that each party has a copy of the original contract.

The four reasons identified by the UNCITRAL for historically promoting the requirement of writing and signature are:-

- Desire to reduce disputes
- To make the parties aware of the conclusions of their dealings
- To provide evidence
- Facilitating Tax

Now the question arises that for contracts where writing is a requirement, whether documents stored magnetically in digital form comply. Fortunately, Schedule 1 to the Interpretation Act, 1978 contains the following definition:

"writing includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible-, form, and expressions referring to writing are construed accordingly"¹⁰⁴

The UNCITRAL MODEL Law on E-commerce and also The Information Technology Act 2000 has recognized electronic data as equivalent of the traditional mode to writing,

¹⁰⁴ S.R. Sharma, Nature of Cyber Laws edi 1st, Anmol Publications Pvt. Ltd

Electronic data when it conforms to the requirements of the Information Technology Act, 2000 has been clothed with legal sanctity and is also admissible in evidence¹⁰⁵ Section 4¹⁰⁶ provides that, "where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is (a) rendered or made available in an electronic form: and (b) accessible so as to be usable for subsequent reference, "

Article 6 of the Model Law also deals with writing requirement. Article 6 (1) provides that, where the law requires information to be in writing, that requirements are met by a data, message if the information contained therein is accessible so as to be usable for subsequent reference, Article 6(2) provides that paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing. Article 6 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement (which may result from statute, regulation or judge made law) that information be retained or presented in writing.

In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of "writings" in a paper based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of "writings":

- (1) To ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves;
- (2) To help the parties be aware of the consequences of their entering into a contract;
- (3) To provide that a document would be legible by all;
- (4) To provide that a document would remain unaltered over time and provide a permanent record of a transaction;
- (5) To allow for the reproduction of a document so that each party would hold a copy of the same data;
- (6) To allow for the authentication of the data by means of a signature;

¹⁰⁵ *ibid*

¹⁰⁶ ITA, 2000

- (7) To provide that a document would be In a form acceptable to the public authorities and courts;
- (8) To finalize the intent of the author of the writing and provide a record of that intent;
- (9) To allow for the easy storage of data in a tangible form;
- (10) To facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and
- (11) To bring legal rights and obligations into existence in those cases where a "writing" was required for validity purposes.

The purpose of Article 6 is not to establish a requirement that, in all instances, data messages should fulfil all conceivable functions of writing. Thus, when adopting the functional approach, attention must be given to the fact that the requirement of a "writing" should be considered as the lowest layer in a hierarchy of form requirements, which provide distinct levels of reliability, traceability, and inalterability with respect to paper documents.¹⁰⁷

4.6) DIGITAL SIGNATURE:

An electronic contract is an agreement created and "signed" in electronic form -- in other words, no paper or other hard copies are used. For example, you write a contract on your computer and email it to a business associate, and the business associate emails it back with an electronic signature indicating acceptance. An e-contract can also be in the form of a "Click to Agree" contract, commonly used with downloaded software: The user clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed.

Since a traditional ink signature isn't possible on an electronic contract, people use several different ways to indicate their electronic signatures, including typing the signer's name into the signature area, pasting in a scanned version of the signer's signature, clicking an "I accept" button, or using cryptographic "scrambling" technology.

¹⁰⁷ www.uncitral.com

Though lots of people use the term "digital signature" for any of these methods, it's becoming standard to reserve the term "digital signature" for cryptographic signature methods and to use "electronic signature" for other paperless signature methods.¹⁰⁸

Cryptographic Signatures (PKI)¹⁰⁹

Cryptography is the science of securing information. It is most commonly associated with systems that scramble information and then unscramble it. Security experts currently favor the cryptographic signature method known as Public Key Infrastructure (PKI) as the most secure and reliable method of signing contracts online.

PKI uses an algorithm to encrypt online documents so that they will be accessible only to authorized parties. The parties have "keys" to read and sign the document, thus ensuring that no one else will be able to sign fraudulently. Since the passage of the e-signature law in 2000, the use of PKI technology has become more widely accepted. Many online services offer PKI encrypted digital signature systems that function much like we use PINs for our bank cards.

XML-Based Signatures

Other e-signature systems have been developed, including a method for digitally recording a fingerprint, and hardware that electronically records your signature. In addition, the organization that sets Web standards for the Internet, the Worldwide Web Consortium (W3C), developed XML-compliant guidelines for digital signatures. The results of their working group are discussed at the W3C website at.

The signature symbolizes the finality of the deal. It marks the consensus ad idem of parties — a sine qua non for every commercial transaction. The signature on a document is not only the stamp of person's identity but also implies approval on his part to contents of the document. Signatures are also evidence that the signatories agreed to be bound by the document. They can identify the signatory by name or identify another particular characteristic of the signatory such as status.

¹⁰⁸ www.w3.org/Signature

¹⁰⁹ *ibid*

The electronic means of communications do not have any tangible medium. Thus, affixing of parties signature on something that is not physical or tangible is not possible. The solution lies in having electronic signatures on an electronic record. A special form of electronic signatures such as digital signatures can be used to guarantee that the electronic document, which has been signed by way of electronic signature, has not been altered or tampered with. "Electronic signature' means "authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature"¹¹⁰

Digital signature means – authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provision of section 3

The Model Law on Electronic Commerce provides that, “where the law requires a signature of a person, that requirement is met in relation to a data message if (a) a method is used to identify that person and to indicate that person's approved of the information contained in the data message: and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated- or communicated, in the light of all the circumstances, including any relevant agreement".

Statutory Comparison between Handwritten and Digital Signatures:¹¹¹

Statutory Criteria	Handwritten Signatures	Digital Signatures
Purpose	To authenticate the message as originating from the purported signer	To authenticate the message as originating from the purported signer (sender)
1 Affirmative Action	Affixation means aware of the written content/ bound by legal implications of signing.	Affixation means authenticating an electronic record / bound by legal implications of affixing.
Evidence	Distinctive, attributable to	Distinctive,

¹¹⁰ ibid

¹¹¹ Supra at 67

	the signer	computationally infeasible to forge ¹¹² , attributable to the signer only
Signer Identification 'Third party'	Notary / witnesses	Trusted Third Party (Certifying Authority)
Document Identification	Making it impracticable to falsify or alter either the signed matter or the signature with out detection.	Non-repudiation, i.e. preventing a person from unilaterally modifying or terminating legal obligations arising out of a transaction effected by computer based means.

A digital signature is an electronic form of a signature which can be used to authenticate the identity of the sender of a data message or the signer of a document, and also ensure that the original content of the message or document that has been sent is unchanged. It is an electronic substitute for a manual signature and is generated by a computer rather than a pen. It serves the same functions as manual signature, and a lot more. A digital signature is not a replication of a manual or typed signature such as "signed, John Smith", Moreover, digital signatures are subscriber specific i.e. one has to be a subscriber to authenticate an electronic record. The Information Technology Act, 2000 is very specific; It does not provide a non subscriber such a facility. As per the Information Technology (Certifying Authorities) Rules, 2000¹¹³, a subscriber may be an individual (irrespective of nationality), Hindu undivided family applicant (Karta), Company, firm, body of individuals, association of persons, local authority, or government organizations and agencies. Digital signatures are easily transportable, cannot be imitated by someone else, and can be automatically time-stamped. A digital signature can be used with any kind of message, whether it is encrypted or not, simply so that the receiver can be sure of the sender's identity and that the message arrived intact.

¹¹² The digital signature cannot be forged unless the signer losses control of the private key.

¹¹³ Sch 4, rule 23

A digital certificate contains the digital signature of the certificate-issuing authority so that anyone can verify that the certificate is real.¹¹⁴

In technical terms, digital signatures are created and verified by a special application that generates cryptographic messages. Cryptography is a branch of applied mathematics and involves transforming clear messages into seemingly unintelligible forms and back again. For digital signatures to work, two different translation keys are generally used. The first, called a public key, creates the digital signature by transforming the data into an unintelligible code. The second key, called a private key, verifies the digital signature and returns the message into its original form. Digital signatures allow the recipient to determine if the digitally signed communication was changed or not after it was digitally signed. This feature provides integrity and authenticity to a communication that a manual signature does not. The developments in cryptographic techniques and the regulatory mechanism for digital signatures provided by the Information Technology Act have made it possible to have a digital signature in place of physical signatures. The purpose of prescription of a signature is to ensure the authenticity and integrity of a document. These purposes are adequately met by the use of a valid digital signature issued by the Certifying Authority set up under the Information Technology Act. The requirement of delivery is also sufficiently met by electronic transfer of possession and control. Section 4 of the Information Technology Act may be construed as recognizing delivery by electronic means.

In India, the Information Technology (Amendment) Act, 2008 provides for the legal recognition of Electronic signatures. It provides that, "where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained such information or matter- is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government."¹¹⁵

It is intended to remove any doubt regarding the enforceability of electronic signatures. Thus, it can be said that the requirements of writing and signature are very well met by the

¹¹⁴ www.searchsecurity.techtarget.com/definition/digital-signature

¹¹⁵ Sec 5 of ITA, 2000

Electronic Contracts, and the Information Technology Act, 2000 grants it legal recognition also.

Digital signatures help to ascertain the following authentication measures:¹¹⁶

(i)**Authenticity:** The digital signature helps in ascertaining that the signer is whom he or she claims to be. This helps to avert others from pretending to be the originator of a particular document, the equivalent of forgery on a printed document.

(ii)**Integrity:** The digital signature also helps in ensuring that the content has not been changed or tampered. This helps prevent documents from being intercepted and changed without knowledge of the originator of the document.

(iii) **Non-repudiation:** The digital signature helps prove to all parties the origin of the signed content i.e. it proves that the originator of the document is the true originator and not someone else, regardless of the claims of the signer. A signer cannot repudiate the signature on that document without repudiating his or her digital key, and therefore other documents signed with that key.

Thus, E-contracts accomplish the requirement of writing or signature. There are certain categories of contracts which are not enforceable unless the terms are put into writing and signed by both parties. Fortunately, for businesses and people who want to form contracts using e-commerce, writing does not require either a pen or paper. Most courts have held that writing exists when the terms of the contract have been reduced to some tangible form. Courts have been similarly generous in determining as to what constitutes a signature. It is reasonable to assume that a symbol or code included in an electronic file would constitute a signature. After the enactment of the Information Technology Act, 2000, Digital signatures are recognized as valid signatures and are equivalent to hand written signatures. But the narrow compass of the Information Technology Act does not extend to contracts which by virtue of the requirement of certain existing laws require writing and signature. Contracts for sale of immovable property have still to be made in writing with the signature of the parties

¹¹⁶ www.technet.microsoft.com

affixed thereto. Therefore, unless a definite legal framework which encompasses all forms of contract in the electronic forms is in place, any discussion regarding writing and signature vis-a-vis e-contracts appears to be academic.

4.7) E-CONTRACTS ARE CONTRACTS OF UBERRIMAE FIDEI:

E-Contracts are contracts attracting principles of Uberrimae fidei in which the contracting parties are not dealing at arm's length but one party is entirely dependent upon the information supplied by the other party on the basis of which alone he expresses his willingness to contract. The doctrine of Uberrimae fidei should be considered the foundation of e-contracts as the chances of misrepresentation or suppression of material facts is most likely to occur in such transactions. Although legal capacity is not explicitly dealt by the Information Technology Act, the law presumes that once an online contract is concluded, both the parties are presumed to be competent to do so. In other words, neither party is allowed to raise an objection at a later stage that the contract is unenforceable for want of competence on the part of the parties. The doctrine of Uberrimae fidei will be strictly adhered to in case of electronic contract and one party acting to his detriment on the representation of the other that he is competent should not be put to any prejudice.¹¹⁷

¹¹⁷ Supra at 67

CHAPTER 5
LEGISLATIVE FRAMEWORK

5.1) NEED FOR LEGAL FRAMEWORK:

The advent of internet and related technologies has made irreversible changes to the world today. The world today is moving steadily towards an information society and knowledge economy; therefore it is essential that law must contribute its inputs to promote E-Commerce. The Law is an organic being which has always managed to evolve to keep up with changes in society. However, the challenges posed by the growth of internet is perhaps its biggest yet not just because of its utter size, nor the speed with which it has developed. The relationship between law and the internet is based upon a simple conflict: laws exist to regulate society; the internet has created a new society founded upon the principle that it should be wholly unregulated.

The growth of E-Commerce has created the need for vibrant and effective regulatory mechanisms, which would further strengthen the legal infrastructure that is crucial to the success of electronic commerce.¹¹⁸ The rapid development of Information Technology presents challenges to legal systems across the globe. Transactions accomplished through electronic means — collectively 'electronic commerce' - have created new legal issues.

The shift from paper based to electronic transactions has raised various questions concerning the;

- Recognition, or
- Authenticity, or
- Enforceability of electronic documents and signatures.

The challenge before the law makers is to balance the sometimes conflicting goals of safeguarding electronic commerce and encouraging technological development,

¹¹⁸ Pavan Duggal, Harmonisation of E-commerce laws and Regulatory system in South Asia available at www.unescap.org

The rapid pace with which E-Commerce has developed has generally left the legal system struggling to keep up and gasping for breath. As companies doing E-Commerce keep inventing new business procedures and rules; likewise the legal system is trying to adapt existing laws to fit new settings where it is simply unclear how these laws will apply.

5.2) UNCITRAL MODEL LAW

In 1996, the United Nations came up with the UNCITRAL Model Law on E-Commerce. The model law aimed at providing regulatory framework for E-Commerce. This law encouraged member states to legislate various national laws and regulations keeping in with the principles contained in the Model Law. In 2001, the United Nations drew up the UNCITRAL Model Law on Electronic Signatures. As cyber law develops around the world, there is a growing realization among different nation states that their laws must be harmonized and international best practices and principles must guide implementation. Many countries are trying to establish harmonized legal regimes in order to promote online commerce.¹¹⁹

As E-Commerce growth becomes more and more significant, countries such as India must not only address and appreciate its potential for the growth of trade and industry but also as a means of survival in the new world of E-Commerce-based trade and business. The ability to do so will depend on several factors, the most important of which will be infrastructure, both physical (the telecommunication network) as well as the financial and legal framework, including a business and trade environment conducive to E-Commerce. It is essential, therefore, to create a policy and regulatory environment that favours the development of E-Commerce and harmonises national approaches in diverse areas such as telecommunications, trade, competition, intellectual property, privacy, and security.¹²⁰

5.3) INFORMATION TECHNOLOGY ACT, 2000

India being one of the signatories to the Model Law was also required to give effect to the said resolution and to promote efficient delivery of government services by means of reliable

¹¹⁹ *ibid*

¹²⁰ Diddar Singh, Electronic commerce, issues of policy and strategy for India,

electronic records. Therefore, the Parliament of India passed its cyber law in the form of the Information Technology Act 2000, which provides the legal infrastructure for E-Commerce. The Act received the assent of the President of India and became the law of the land on 17th October 2000, It does not specifically deal with the electronic contracts rather the provisions of the Indian Contract Act, 1872 are applicable to E-Contracts and the Information Technology Act grants legal recognition to the transactions carried out by means of electronic data interchange and other means of electronic communication, The Act aims to facilitate the development of a secure regulatory environment for electronic commerce by providing a legal Infrastructure governing electronic contracting, security and integrity of electronic transactions, the use of digital signatures and other issues related to electronic commerce. The Act stipulates numerous provisions in order to provide for the legal framework so that legal sanctity is accorded to all electronic records and other activities carried out by electronic means. The Act further states that unless otherwise agreed to, the acceptance of a contract expressed by electronic means of communication shall have legal validity and enforceability. The Act would facilitate electronic intercourse in trade and commerce, eliminate barriers and obstacles to electronic commerce that result from the celebrated uncertainties relating to writing and signature requirements over the Internet. The objectives of the Act also aim to ¹²¹promote and develop the legal and business infrastructure necessary for implementing electronic commerce.¹²²

5.4) ISSUES INVOLVED IN CASE OF E-CONTRACTS

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

¹²¹ Supra at 122

¹²² Radha Krishan, Law in Online business with special focus on India

(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. Furthermore, an e-mail message being like an open post card can be intercepted at any place on line, modified, altered, changed or even made to appear to have come from a person other than the actual sender, and the recipient cannot detect it. Therefore, whether in a physical environment where the parties are at a distance or in cyber space, the contracting parties must be sure about the: party sending or receiving the communication; communication: time of communication, before they execute a contract.¹²³ This raises a number of issues like:

- The identification and attribution of data messages,
- The conclusion of the contract, and
- Where there-mail is an instantaneous communication? These issues are dealt individually as under.

(A) Issues Related to Identification and Attribution

E-Commerce requires methods of establishing accountability, which in turn requires the identification of the other party. Privacy protection, on the other hand, aims at hiding the real identities of persons and preventing any association between them and their electronic activities. The more personal information is revealed and the easier the access to such information, the greater the risk of unauthorized use. 'Personal information can often serve as 'authentication information' and be used to assume the identity of its subject. Attempts to

¹²³ Supra at 48

authenticate the other party may also violate privacy laws. Accordingly, it may not be possible to request any additional authentication information to ascertain the identity of the other party.

Every person has the right to decide with whom to contract. Such choice is often based on the creditworthiness or special skill(s) of the other party. Consequently, intention may be directed at a particular person. A mistake as to the identity of the other party prevents the formation of the contract. Irrespective of the approach, the intention to contract with a specific person is evaluated objectively and presumes the possibility of identifying this other person. Problems of identification are not new but become exacerbated by the online environment. Strangers transact with strangers, they deal at a distance, and the information about the other party is scarce and unreliable. Moreover, persons often assume different identities for their on-line activities.

Problems of identification are usually discussed in relation to attribution. Absent statutory provisions or agreement, open electronic networks, do not change the basic principle of attribution: a person is responsible for the legal effects of an act, if he or she performed or authorized such act. Problems of attribution are therefore not Internet-specific.¹²⁴

Attribution focuses on accountability for an act, intention relates to the existence and contents of a contract. Both attribution and the intention to contract with a specific person are premised on the possibility to identify this person. Analysing problems of identification requires a precise and consistent terminology. It also requires a clear sequence of analysis. In particular, the relationship between, identification, authentication and attribution must be explained.

Authentication and Identification:

To 'authenticate' means, amongst others, 'to establish as genuine'¹²⁵. The term can be used in multiple senses: to authenticate a document means to 'associate oneself with its contents, as

¹²⁴ A.H.Boss, Searching for security in the Law of Electronic Commerce, at 592 SUPRA AT 41

¹²⁵ The free dictionary available at www.thefreedictionary.com

in to sign.’ Authentication may also involve the validation of documents. For attribution purposes, authentication refers to the verification of a person's identity.

Authentication must be set apart from identification. To 'identify' means to recognise as a particular person¹²⁶. Identification is the process of presenting an identifier to a system so that the system can recognize an entity and distinguish it from others.¹²⁷ Identification answers the question: who are you? Authentication consists in proving who you are. Identification is a unique name or number assigned to an object; authentication verifies that a person or object is who he or she claims to be.¹²⁸

Person to be distinguished from Identity:

Persons must be distinguished from 'identities\ It is always a person who "assumes an identity - that of an existing person or a fictitious one The one, who enters a shop, writes a letter or sends an e-mail is always a person, A person assumes different identities for different roles. Transacting under a different identity is not prohibited and need not constitute a misrepresentation or impersonation of a third party. 'Identities must be distinguished from 'names'. Both names and identities point to persons. As persons cannot be distinguished by names alone, they are co-defined by their attributes. Identity can be regarded as a construct of a name and one or more attributes. This interpretation underlies the common understanding of 'identity theft\ i.e. the theft of identifying information in order to engage in transactions as the person whose identifying information was stolen. In many instances 'identity' can be used interchangeably with name.

While identification always precedes attribution, the core concept is authentication — the verification of an identity. When analysing attribution or identification, one always encounters problems of authentication.

Authentication comprises two steps: identification and verification. The second step involves the presentation of authentication information that corroborates the association between the

¹²⁶ www.definitions.net

¹²⁷ www.ietf.org

¹²⁸ Supra at 38

person and the identifier. In real life, identification and authentication occur concurrently, traditionally taking the form of recognizing a person's facial features and/or voice. Authentication technologies produce evidence of different probative value in establishing that messages came from the purported source.

Non- Repudiation:

Repudiation is the false denial of responsibility for an act. Non-repudiation provides evidence of the signer's identity thereby preventing him from successfully disavowing the message. It consists in the ability to prove that a message originated with a certain person. Non-repudiation can be regarded as either a prerequisite or a consequence of attribution. Both the cases deal with the question: can a message be indisputably linked to a sender? Both are technology dependent and come in varying degrees. Non-repudiation concerns proof, attribution - accountability.

Non repudiation is concerned with holding the sender to the communication he or she has sent. The sender should not be able to deny having sent the communication if he or she did, in fact, send it, or to claim that the contents of the communication as received are not the same as what the sender sent if, in fact, they are what was sent, When a contract is in dispute, the part relying on it in must be able to prove that the other side actually agreed to the deal.¹²⁹ Attribution goes beyond determining whether a person is same, who he or she claims to be. It encompasses the question: who is the other person? A name-holder cannot be attributed with the message only because his or her name was used.

Integrity:

Integrity is concerned with the accuracy and completeness of the communication. Both senders and receivers of electronic communications must be able to answer the following questions:

¹²⁹ Supra at 43

- (1) Is the message sent identical to the message received?
- (2) Is the message complete or has something been lost in transmission?
- (3) Has the message been altered in any way either in transmission or in storage?

Messages sent over the Internet pass through many routing stations and packet-switching nodes. Hence, there are many opportunities for messages to be altered along the way to their final destination.

Everybody who reads any writing can relate it to its issuer and signer and determine, without any reasonable doubt, the origin of the text. Thus, a signature can be used to identify a person and to associate the person with the content of that document. If it is accepted that a signature deems a document authentic in the case of a paper record, the question that arises is whether the same doctrine and standards can be made to apply as regards electronic records. The signature can always be related to a physical person even if the juridical subject, to whom the act should be related, is a legal person. In the case of computer records, data is attributed to the person having sole control of the information system, whether or not he or she is/ was the actual author.¹³⁰

In electronic commerce, the online nature of acceptances can make it relatively easy for identity forgers to pose as others. This situation can however be avoided by the use of digital signatures to establish identity in online transactions. In general, courts will not hold a person or corporation whose identity has been forged to the terms of the contract; however, if negligence on the part of the person or corporation contributes to the forgery, a court may hold the negligent party to the terms of the contract. Thus, if a company was careless about protecting passwords and allowed an imposter to enter the company's system and accept an offer, a court might hold that company responsible for fulfilling the terms of that contract. The message authenticity, integrity and non-repudiation, which are three essentials of a record to form legal basis of a claim, can be achieved by the different encryption method¹³¹.

¹³⁰ Nandan Kamat, Law relating to Computers, Internet and Ecommerce, 3rd edn

¹³¹ Supra at 38

Authentication under the Information Technology Act:

Section 3 of the Information Technology Act, 2000 deals with the authentication of electronic records and provides that any subscriber may authenticate an electronic record by affixing his digital signature.

The Information Technology (Amendment) Act, 2008 inserted a new section 3A which provides for electronic signatures.

The creation of digital signature involves two distinct steps. First the electronic record is converted into a message digest by using a mathematical function known as 'hash function' which digitally freezes the electronic record thus ensuring the integrity of the content of the intended communication contained in the electronic record. Any tampering with the contents of the electronic record will immediately invalidate the digital signature. Secondly, the identity of the person affixing the digital signature is authenticated through the use of a private key which attaches itself to the message digest and which can be verified by any person who has the public key corresponding to such private key. This enables any person to verify whether the electronic record is retained intact or has been tampered with. It will also enable a person who has public key to identify the originator of the electronic message.

Attribution:

After authentication the next question is of attribution where an offer has been made through electronic media, it is necessary to know as to whom the offer can be attributed to. Very often data messages are generated automatically by computers without direct human intervention. The computers are programmed by the person (originator) to do this. These situations are also covered by the IT Act through the incorporation of the concept of attribution of electronic records.¹³²

¹³² Supra at 130

Section 11, The Information Technology Act, 2000 deals with attribution of electronic records and provides that:

An electronic record shall be attributed to the originator, -

- (a) if it was sent by the originator himself;
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
- (c) by an information system programmed by or on behalf of the originator to operate automatically."

This section can best be understood with the help of suitable illustrations.¹³³

Illustration 1: Rishi logs in to his web-based gmail com e-mail account. He composes an e-mail and presses the 'Send' button, thereby sending the e-mail to John. The electronic record (e-mail in this case) will be attributed to Rishi (the originator in this case) as Rishi himself has sent it.

Illustration 2: Rishi instructs his assistant Paul to send the above - mentioned e-mail. In this case also, the e-mail will be attributed to Rishi (and not his assistant Paul). The e-mail has been sent by a person (Paul) who had the authority to act on behalf of the originator (Rishi) of the electronic record (e-mail)

Illustration 3: Rishi goes on vacation for a week. In the meanwhile, he does not want people to think that he is ignoring their e-mails. He configures his gmail.com account to automatically reply to all incoming e-mail messages with the following message:

"Thanks for your e-mail I am on vacation for a week and will reply to your e-mail as soon as I get back.

Now every time that gmail.com replies to an incoming e-mail on behalf of Rishi, the automatically generated e-mail will be attributed to Rishi as it has been sent by an information system programmed on behalf of the originator (i.e. Rishi) to operate automatically.

¹³³ Supra at 56

Section 11 of the Information Technology Act, 2000, does not make an attempt to identify a particular person who has sent the electronic message rather the section presumes that the sender of the electronic message is identifiable. However, once the sender is identified, the question is as to whom the electronic message sent should be related to? Is it necessarily the sender who is the 'originator'. To whom the message is attributed? In other words, who is the author of the electronic message? The author and the sender of the message might or might not be the same person. Section 11 presumes that the sender of the message has been identified. Thereafter, it identifies the author to whom the message would be attributed that is the originator.¹³⁴ Section 11 of the Information Technology Act, 2000 is based on Article 13 of the UNCITRAL Model Law on Electronic Commerce, 1996.

Article 13 deals with attribution of data messages

The purpose of Article 13¹³⁵ is not to assign responsibility. It deals rather with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.

Early drafts of Article 13 contained an additional paragraph, expressing the principle that the attribution of authorship of a data message to the originator should not interfere with the legal consequences of that message, which should be determined by other applicable rules of national law. It was later felt that it was not necessary to express that principle in the Model Law but that it should be mentioned in this Guide.

5.5) CONTRACT CONCLUSION: WHEN AND WHERE?

The next issue involved in case of e-contracts is the conclusion of contract i.e. when and where the contract is formed.

¹³⁴ Devashish Bharuka, Perview of ITA, 2000 in S.K.Verma and Raman Mittal

¹³⁵ UNCITRAL Model,1996

A) Time of Contract Formation:

To form a binding contract acceptance must be given unambiguously and must be communicated to the person making the offer. In establishing whether electronic acceptance has been communicated unambiguously it is important to understand when acceptance will take place, the method of communication of acceptance, and what happens when electronic messages are sent.

Contracts can be formed face to face or at a distance. In face to face dealings, one party speaks, the other listens, the moment words are spoken the other party hears them. Communication is actual and instant. Acceptance is effective the moment it is manifested; there is no difference between dispatch and receipt, or between receipt and notification. On the other hand, when parties deal at a distance, the dispatch of acceptance may be distinct from its receipt. The delay is the result of spatial remoteness; its length derives from the method of communication. The implications of delay are twofold. First, generally an offer may be revoked until acceptance is received. The longer the delay, the greater the risk of revocation; secondly, the delay creates a state of uncertainty for both parties, as neither knows whether and when a contract came into being. So, when dealing at a distance, the parties must use an intermediary or device in order to communicate.

But the communication landscape has changed. Distance is no longer synonymous with delay. Internet based methods of communication can reduce the interval between dispatch and receipt to the point of non-existence. Timing of acceptances can be important in determining if there is a binding contract. That is an offer can generally be revoked, if it has not yet been accepted. What happens if the person who made the offer revokes it, but the other party's acceptance is already in the mail? Under the so called 'mail box rule', there would be a contract. The acceptance would take effect as soon as it was out of the sender's control, if it was sent in a manner and by a medium invited by the offer. Timing can be important when a contract sets a deadline for acceptance. For example, in one case, a fax transmission was not effective notice, because it was started before the deadline passed, but

not completed until afterwards. Electronic transmissions may pose similar problems especially since there can be a delay between sending and receipt.

There are two rules in context to acceptance as follows:

Receipt Rule or the Acceptance rule:

The receipt rule is used where two parties have instantaneous communications in such a case whether it be through the telephone, telex or in person, the offeror must hear the acceptance for the contract to be created.

Instantaneous Communication:

When the instantaneous means of communications appeared on the scene, it was initially thought that the mailbox rule applies to such communications also till *Entores v. Miles Far East Corporation Ltd.*¹³⁶ where offer and acceptance were communicated by telex. In this case, Lord Denning held, that telex is a 'virtually instantaneous' form of communication which when used makes mailbox rule inapplicable. It was further held that in instantaneous means of communication 'receipt rule' applies and contract in such cases comes into existence where acceptance is 'received'. The rationale behind this rule is that the offeree will always know whether his acceptance has been received and can react immediately to a fault or misunderstanding.

The rule of instantaneous means of communication laid in *Entores* was also followed by the Supreme Court of India in *Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas and Co.*¹³⁷ The Apex court confined the operation of section 4 of the Indian Contract Act, 1872, to the postal communications, and laid down that in case of instantaneous means of communication, the contract is concluded where acceptance is received

¹³⁶ 1955 2 QB 327

¹³⁷ AIR 1966 SC 543

Mailbox Rule or Post box Rule:

Under this rule, the contract is formed when the acceptor sends his acceptance to the proposer. The consequence of this theory is that the risk of transmission is borne by the proposee. Under Common Law system this theory is called the mailbox rule or post box rule. By virtue of the postal rule, a complete contract comes into existence when the properly stamped and addressed letter is put in the course of transmission so as to be out of the power of the acceptor and it is immaterial whether that letter reaches the offeror or not. In short, the postal rule was created to provide certainty in contractual formation at a time when the communication system involved unavoidable delays, because the postal stamp enables us to determine easily the time of posting an acceptance.

The mail box rule was first laid down in *Adams v. Lindsell*. In this case, the plaintiff was a manufacturer of woolen items located in Bromsgrove. The defendant was a wool merchant in St. Ives now in Cambridgeshire, some distance away. The defendant made an offer by post to sell wool to the Plaintiff requiring an answer in the course of the post. But due to the negligence of the defendant, letter was delayed by three days. Almost immediately upon receiving it the plaintiff wrote back accepting the offer. In the meantime, not having received a reply by the date he expected, the defendant sold the wool to a third party. The plaintiff successfully sued for breach of contract as the court decided that the contract was made when the letter of acceptance was posted. It was held that even in such a contingency acceptance must be taken to be complete as soon as the letter of acceptance is posted and not when it is delivered. It was observed, 'for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they answer and assented to it; and so it might go on ad infinitum'¹³⁸

It is clear from the aforesaid judgments that the courts have reinterpreted the contractual obligations of offeror/acceptor by evaluating the technological applications. It is established law that the contract is complete only when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received.

¹³⁸ S.C.Mitra, Law of Contracts, 2nd edn

The SC of India in *Bank of India vs O.P.Swarnakar*¹³⁹ held that law relating to offer and acceptance is not simple. The said Judgement quoted,

“The rules of offer and acceptance are usually favourites of law students, they are easily stated and tend to be rather mechanical in their operation. They also involve situations that are relatively easy to grasp and which various policy considerations are close to the surface. However, one should not assume that one has mastered the law of contracts simply because one is conversant with rules of offer and acceptance. In the writings of modern contracts scholars tend to deprecate the importance of the rules of offer and acceptance”.

B) Applicability of Existing Basic Principle to Electronic Communication:

It is interesting to note that electronic communications do not fit perfectly in any of the above two broad categories of communications. All electronic communications may not be as instantaneous as widely believed. Depending upon a given situation, these communications may or may not be instantaneous. Thus, they occupy a functional position somewhere between the traditional letter and telephone communications. At the time a contract is formed electronically there can be questions regarding when and where the contract was formed. The familiar postal acceptance rule provides that an offer can be accepted at the time a properly prepaid and addressed letter is posted as opposed to the time that letter is received; while the common law is not settled it seems that if communication is instantaneous such as by telephone, acceptance will occur and a contract will form when the offeror receives the acceptance.

A more difficult situation arises where an electronic communication is sent across a network which stores the message for some time before it is delivered to the other party. In this situation it is quite possible that the postal rule might apply.

It may also be agreed that the postal rule should apply, all the more, so if the offer has been sent in the same form, this is because it could be said that the offeror has impliedly accepted the risk of using that form of communication by making the offer in the same manner.

¹³⁹ (2003) 2SCC 721

A final complication in this respect is that even if the postal rule applies the exact timing of the posting may be in doubt. It could be when the offeree presses 'send' on his computer or alternatively when the network receives the communication. If the analogy with the snail mail is kept then it would seem more likely that it is when the network actually receives it. This would be equivalent of the letter dropping into the post box.

There is little case law on acceptance by electronic message. On one hand, some cases suggest the general rule that the acceptance must be received by the offeror and that the mailbox rule is only a narrow exception. On the other hand, receipt of electronic messages may not be instantaneous and since the mailbox rule has been extended to telegrams, it could be argued that it should be extended to electronic mail. However, there are some electronic message systems, such as private EDI networks which provide almost immediate transmission, anecdotal evidence suggests that internet e-mail is inconsistent and could take minutes, hours or even days to reach its destination. The possible situations are discussed here:

Electronic Data Interchange (EDI)

EDI transmission may be simultaneous when principal trading partners are linked directly. However, a direct link is rare and expensive. EDI communication is generally established through value added networks (VAN) or service providers. Thus, an EDI message will be first received by the senders VAN and then recipients VAN and finally by the recipient. Where parties are linked directly, it is argued that receipt rule should apply and when they are connected by intermediaries then postal rule should apply,

As with the contract formality issue, EDI trading partners try to resolve the communication of acceptance rule in their Trading Partner Agreement (TPA). The standard TPA has an interesting way of balancing the risk. The TPA states that no document is legally binding until received, thereby eliminating the possibility of the 'mailbox rule' being applied. The sender, therefore, bears the risk of transmission failure. But this risk can be reduced by provisions such as requiring the recipients to promptly acknowledge receipt of any message,

to notify the sender of any communication, which they reasonably suspect to be incomplete, erroneous, corrupted in transmission, or not intended for him.

E-mail:

Electronic communications by e-mail are not directly sent from the offeror to the offeree and contracting parties are not connected directly as it involves several mail servers and there is a strong element of store and forward. The recipient will be unaware of the message until he checks his inbox which is possible only sometime after delivery. It is not possible for the sender to know whether and when an e-mail was received and whether it was received in an original form or was modified or entirely changed. The software in certain systems make it possible to have read or receive receipts, but these receipts as well as 'bounce back error message' do not ensure that the contents of the message have been received in an original form by the recipient. The messages sent by an e-mail may take different routes and do not pass as a single unit but broken into digital chunks (packets) with the result that they are delayed and sometimes may not be delivered at all.

These attributes of e-mail communication bring it closer to non-instantaneous means of communication. It is therefore argued that e-mails are more suitable for the application for the postal rule. This issue is dealt in detail in the next topic.

E-mail is certainly more instantaneous than the post but not necessarily as instantaneous as a telephone or facsimile. The e-mails differ from the telex and standard fax in that e-mails may be stored on a host computer which is external to the offeror who may access this computer only at intermittent intervals. For example, a business in New York may send an e-mail message to a business in London via an internet access company in Paris. The e-mail is stored in Paris until accessed by someone in London. If a message accepting a contractual offer arrives at the access provider's computer on one day and is not read until the next, on which day does the acceptance take effect? It could be argued that a message arrives at the external service provider's computer, the service provider is the agent of the principal and delivery to the agent is delivery to the principal. However, there are some similarities between e-mail and post. For instance, dispatching an e-mail is identical to dropping a letter

in a post box. Just like for the sender of a letter, the sender of an e-mail will have no control over it after having pressed the send button as it will be transmitted to his Internet Service Provider (ISP).

It is suggested that, the contract will be formed at the earliest when the acceptance is received by the offeror's e-mail system, and is available to be read. At the latest, it should be regarded as complete after the passing of reasonable period of time for the acceptance to have been read as expected.

The communication of acceptance via a website represents a reverse scenario of e-mail. The parties are connected directly as no mail server or intermediary is involved. The communication is almost simultaneous and parties know whether their message has been received or not. If there is a transmission error, a message [reading 'server not responding will automatically appear on the sender's system; which will enable him to know that the message has not been received. Due to the instantaneous nature of the web communications, application of receipt rule is recommended.

With regard to a web agreement, the contract would be made where the offeror had acknowledged to the offeree that his or her offer was accepted, either by means of a direct response on the website or by a subsequent e-mail, which is called the 'information duty'. The online-contract cannot be binding on the parties until there has been an agreement.

C) Place of Formation of Contract:

"For determining the jurisdiction of the Court in a dispute between the contracting parties, it is necessary to know where the contract in question was concluded. The place of formation of the contract determines the jurisdiction of the court where breach of contract gives rise to cause of action. It is now well settled law that contract is concluded (a) where letter of acceptance is posted in case of postal communication and (b) where letter of acceptance is received in case of instantaneous communication.

Quite different from the above two rules, the Information Technology Act lays down rules for place of dispatch and receipt of electronic records which may not necessarily be the actual place of dispatch or receipt of the electronic record.¹⁴⁰ Furthermore, it is quite possible that a contract may be actually concluded at a place different from that where the electronic record is deemed to be received. The Information Technology Act has laid down an objective test which is the place of business of the originator or that of the addressee where an electronic record is deemed to have been dispatched or received as the case may be. The location of the computer resource is not a determining factor. In a given situation the computer resource of the originator or addressee used for the dispatch or receipt of the electronic record, may be located in a jurisdiction other than that in which the originator or addressee has a place of business. Further, parties may not be aware of the location of the computer resource used for dispatch or receipt of the electronic record. To address this uncertainty, precise test has been laid down which takes into account place of business, regardless of the location of the computer resource. However, contracting parties are free to agree on a different rule.¹⁴¹

The place of business has been used in a generic sense. Place of business can be defined as, "any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location', Where the originator or the addressee has more than one place of the business, the principal place of business shall be the place of business: and where either of them does not have a place of business, his usual place of residence shall be deemed to be the place of business. In case of body corporate, its usual place of residence shall be the place where it is registered.¹⁴²

In case of E-Contracts the communication of offer and acceptance being instantaneous with some exceptions, the contract is complete only at the end of the originator where the acceptance is received by him. Even in the cases of contracting though telex, and telephone the above said principle applies thereof. Thus, in such case the cause of action accumulates at

¹⁴⁰ Sec 13(3), ITA, 2000

¹⁴¹ Sec 13(1) ITA, 2000

¹⁴² Supra at 30

the place where the acceptance is received by the originator. That is why as the internet being instant medium of communication of offer and acceptance an e-contract by such medium is complete at the end of the originator where acceptance is received by him. In case of E-Contracts the jurisdiction of courts is the place of the originator of proposal where the acceptance is received since cause of action arises thereof. Thus, the courts at the originator's place have the jurisdiction to enforce the E-Contracts entered into through internet.¹⁴³

D) Legislative Framework:

Above discussion makes it clear 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. The rules incorporated in the UNCITRAL Model are:

Time and place of dispatch and receipt of data messages:¹⁴⁴

"(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

¹⁴³ *ibid*

¹⁴⁴ Article 15, UNCITRAL Model, 1996

- (i) At the time when the data message enters the designated information system; or
 - (ii) If the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
- (b) If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4),

(4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

- (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
- (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence."

Section 13, The Information Technology Act, deals with the time and place of dispatch and receipt of electronic record.

According to Section 13(1), the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator. The process of 'despatch' involves 'sending off (electronic transmission) of the electronic record to a destination. The act defines the time of despatch of an electronic record as the time when it enters or is available for

processing within a computer resource outside the control of the originator which may be the computer resource of the addressee or an intermediary.¹⁴⁵

For the originator, the intended purpose of sending the electronic record is that it should reach the addressee. The electronic record shall not be considered to have been despatched if it merely reached the computer resource of the addressee but failed to enter it - meaning that the said record has not been processed within that computer resource successfully.

Hence, it is important that for a successful communication process of the electronic records, there shall be an agreement between the originator and the addressee about the use of specific software in the creation and dispatch of the electronic records. It may also be noted that the Act does not expressly address the question of possible malfunctioning of information systems as a basis for liability. In particular, where the computer resource of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the electronic message, dispatch under the above sub section does not occur.

Sub section (2) lays down condition for the time of receipt of an electronic record for (a) a designated computer resource and (b) a non-designated computer resource. In the digital signature environment the use of 'Time Stamping Service' of electronic document will be quite effective in creating the digital evidence and ascertaining whether the said electronic document was created or signed at (or before) a particular point of time.

According to sub section (3), a more objective criterion is set forth, namely, the place of business of the parties (both the originator as well as the addressee). An electronic record is deemed to be despatched from the place where the originator has the place of business, and is deemed to be received at the place where the addressee has his place of business.¹⁴⁶

As per sub section (4), the location of computer resource is irrelevant and it shall in no way effect the applicability of the time and place of dispatch and receipt of electronic records between the originator and the addressee. Merely because a communication has been sent by

¹⁴⁵ Supra at 40

¹⁴⁶ Supra at 40

an electronic mode, would not imply that the place of despatch and receipt of the electronic record would change as and when the physical location of the computer resource changes.

Sub section(5) has to be read and understood along with sub section (3) of the Act, Sub section (5) looks into the critical aspect of location of 'business addressees' of both the originator and the addressee. It lays emphasis on the principal place of business as well as the usual place of residence.¹⁴⁷

A landmark judgment was given by the Allahabad High Court with respect to the formation of e-contracts in P.R. Transport Agency v. Union of India & others¹⁴⁸

The court held that the acceptance was received by the appellant at Chandauli/Varanasi and the contract became complete by receipt of such acceptance. Since these places were within the territorial jurisdiction of the High Court of Allahabad, Therefore, a part of the cause of action had arisen in U.P. and the court had territorial jurisdiction. The Court considered the following points:-

1. With reference to contracts made by telephone, telex or fax, the contract is complete when and where the acceptance is received. However, this principle can apply only where the transmitting terminal and the receiving terminal are at fixed points.
2. In case of 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 may be located anywhere and can be retrieved by the addressee account holder from anywhere in the world. Therefore, there is no fixed point either of transmission or of receipt.
3. Section 13(3) of the Information Technology Act has covered this difficulty of 'no fixed point either of transmission or of receipt'. According to this section "...a/2 electronic record is deemed to be received at the place where the addressee has his place of business:'
4. The acceptance of the tender will be deemed to be received by PRTA at the places where it has place of business. In this case it is Varanasi and Chandauli (both in U.P.)

¹⁴⁷ Supra at 134

¹⁴⁸ AIR 2006 All 23 , 2006 (1)

5.6) E-MAIL: WHETHER INSTANTENOUS AND WHICH RULE APPLIES TO IT?

(A) Does the postal rule apply to e-mail?

The question does the postal box rule apply to e-mail requires the examination:

- (i) Whether e-mail is instantaneous?, and
- (ii) Whether the sender has control of the communication process? Whether E-mail is instantaneous?

(i) Whether e-mail is instantaneous?

The alleged instantaneousness of e-mail is the main reason most commentators refuse to subsume it under the exception. The term is used with little precision: e-mail is called 'absolutely', 'not completely', 'nearly', 'almost', 'virtually', 'more or less', or 'in fact', instantaneous. Only few commentators suggest that e-mail is not instantaneous. As the term is used to justify the choice between the receipt and postal rule and has important legal consequences a more clear and consistent meaning is desirable.

Is 'instantaneous' a legal or a technical term? A legal definition permits a liberal approach and the adaptation of the term to the purposes of a given argument. A technical approach forces a more disciplined analysis. Interestingly, even if we adopt a purely 'legal' definition, it must be admitted that instantaneousness is a question of fact. Maintaining a division between instantaneous and non-instantaneous methods of communication implies that at some stage courts will have to justify this division. A technical confrontation is unavoidable.

The term instantaneous means 'occurring with no delay'.¹⁴⁹ Another definition states, 'occurring, done or completed in an instant'.¹⁵⁰ Simultaneous refers to events 'existing, occurring, or operating at the same time'.¹⁵¹ 'Delay' and 'instantaneousness' can be regarded as different sides of the same coin: if communication is instantaneous there is, logically, no delay. Qualifiers like 'virtually', 'almost' or 'more or less' permit the existence of some delay.

¹⁴⁹ www.thefreedictionary.com

¹⁵⁰ www.dictionarreference.com

¹⁵¹ Supra at 149

The question here is that how much delay is tolerable for a communication to remain instantaneous? The delay between dispatch and receipt comes in varying degrees. It ranges from days, in the case of horse-carts, to microseconds in the case of some electronic communications. Premising the postal box rule exclusively on the length of delay necessitates a gradation: if the delay is longer than 'X' acceptance is effective on dispatch, otherwise acceptance is effective on receipt.

(ii) Whether the sender has Control of the Communication Process?

The second argument against subsuming e-mail under the post box rule relates to 'control'. The post box rule assumes that upon posting the letter, senders lose control and cannot be held liable for any subsequent failures. If senders retained control and were able to guarantee receipt, there would be no justification for making acceptance effective on dispatch. 'Control' need not consist in the possibility to influence transmission by determining the exact route of a message or the moment of its delivery. It relates to the outcome of the communication process - knowledge whether receipt occurred or not,

Treitel combines control with instantaneousness. The post box rule cannot apply to instantaneous methods of communication because 'The acceptor will often know at once that his attempt to communicate was unsuccessful.' Citing Entores and Brinkibon, he states that the sender is responsible to make a proper communication, 'but a person who accepts by letter which goes astray may not know of the loss or delay until it is too late to make another communication.' As a result, 'control' is premised on the ability to ensure receipt or at least, the possibility of knowing whether receipt occurred. It remains unclear, whether such knowledge should relate to successful or to failed receipt. Ensuring receipt presumes notice of communication failure, whereas confirmation of receipt appears to be a question of proof and non-repudiation. It effectively absolves the sender of any further obligations relating to the communication of acceptance.

(B) Does the Receipt Theory apply to E-mail?

Are e-mail communications sufficiently similar to face-to-face dealings to apply the principle? E-mail can be compared to the post, reason being the existence of intermediating distributing platforms, periodic transfer and the mechanics of message dispatch and retrieval. On the other, e-mail does not involve a substantial delay between dispatch and receipt in the way the post does, such interval being one justification for the Post box rule. Furthermore, if both contracting parties attend their computers and regularly poll their mail-servers for new messages, it could be claimed that they can exchange messages 4as if they were having a conversation.

To determine which communication method resembles dealing face-to-face, a number of issues must be examined. First, the difference between 'transmission' and 'communication' is revisited, including their dependence on devices; second, the two-way nature of face-to-face dealings is discussed.

Transmission and Communication:

Communications over the phone are treated like face-to-face dealings. This treatment, however, is only justified if both parties simultaneously use the device. When messages are left on answering machines it cannot be claimed that the communication process approximates the quality of face-to-face dealings. Communication is delayed due to the very fact that the other party is not present and only later accesses the message, assuming such technical possibility exists. According to Coote, 'the mere use of an instantaneous mode of transmission is never decisive by itself. It would always be necessary to know in addition whether the parties were thereby placed in instantaneous communication with each other.

Devices providing instantaneous transmission need not provide instantaneous communication. Instantaneous transmission does not bestow the communication process with the characteristics of face-to-face dealings as it does not provide one of the most important characteristic of such dealings i.e. concurrent awareness. While concurrent awareness is not a

prerequisite of a valid contract, it can serve to distinguish distant dealings from direct dealings i.e. dealings at a distance from dealings face-to-face. The delay between receipt and communication is inherent in methods that do not require the presence of the addressee.

In the case of e-mail, instantaneity relates to the speed of transmission to the addressee's mail-server, it does not imply that the addressee immediately accesses or retrieves the message. When an e-mailed acceptance arrives at the mail-server, the addressee need not be present at his computer and the computer need not be on-line. The message need not be automatically and immediately delivered to the mail-client. Instantaneous communication is only possible on the assumption that both parties attend their machines and regularly request messages from their respective mail-servers.

An important clarification must be made. It is beyond doubt that receipt can occur outside the business hours or if the device is unattended or malfunctioned. If receipt is the legally relevant event, occurrences precluding receipt on the addressee's side are disregarded. Receipt is either deemed or the addressee is stopped from denying it. If, however, acceptances are effective on dispatch, receipt is irrelevant altogether.

Two-way:

An important characteristic of face-to-face dealings is their two-way character. This is reflected in the Restatement (Second) of Contracts: 'acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other. Substantial instantaneousness requires transmission without any substantial lapse of time, two-way an interaction among the parties, so that ambiguities and misunderstandings, if perceived, can be cleared up on the spot.¹⁵² Accordingly, instantaneity is only one of the two necessary elements for the interactions to resemble face-to-face dealings. Despite the use of the term 'medium' in relation to the telephone, it must be assumed that the Restatement refers to communication devices or methods in general.

¹⁵² American Institute of Law

The Restatement applies the post box rule to situations where the parties are not in each other's presence and the means of communicating acceptance involves a delay between dispatch and receipt. As in the case of 'control,' the two-way characteristic is related to the possibility to obtain a confirmation of receipt or failure notification: '[a]n important premise upon which those rules are predicated is the notion that delayed media, such as mailed writings, do not provide either party the ability to verify in a timely fashion that receipt of a message has occurred and that the message as received is without errors'.

The receipt rule should apply where the means of communication is instantaneous and bi-directional, the postal exception - where communication is time-delayed and unidirectional.

E-mail compared to Instant Messengers and Web-applications:

The difficulty in treating e-mail communications at post box rule with face-to-face dealings becomes apparent when e-mail is compared to instant messengers and web-applications.

Instant Messengers (IM)¹⁵³

In principle, dealings via instant messengers occur in real-time as both parties must be on-line to exchange messages. A message is typed and immediately appears on the screen, becoming visible to both parties at the same time. Dispatch and receipt are simultaneous; communication is instantaneous. Both parties monitor the communication process in real-time: if a message cannot be delivered, there is an immediate notification to that effect or the message does not appear on the screen. The communication process is interactive, instantaneous and two-way. Not only can senders ensure receipt, assuming that the immediate failure notification is interpreted as such, but also actual communication.

A number of clarifications must be made to avoid oversimplifications of the communication process via instant messengers and to illustrate the difficulty of replicating the characteristics of face-to-face dealings.

¹⁵³ Supra at 30

First, virtually all IM applications display so-called presence indicators, which inform whether a person is on-line or off-line. Users can also design their own descriptions. Status information indicates whether a particular person can or desires to be contacted. Some indicators change automatically, i.e. when a person is inactive for a predefined time the status turns to 'idle' or 'away, ' others are changed manually, such as, 'do not disturb/ As a result, senders can tailor their communication behaviour to the addressee's presence information. To complicate matters, whenever an addressee is on-line then irrespective of his or her status as 'away', 'idle' or 'busy' some IM applications can still technically receive messages. 'Away' does not automatically imply that the addressee is 'off-line.' As many computers remain online for months and parties do not log-off their IM application, the 'away' or 'busy' status can be interpreted as an unwillingness to communicate. In other words, despite the technical ability to receive messages, the addressee's status indicates delayed communication. Much depends on the wording of the specific status indicator.

Furthermore, in cases where the addressee is not online, some applications also provide for the option of 'deliver now or 'deliver later. Another variation is the possibility to send messages despite the addressee's off-line status. Although a failure notification is displayed instantly, the message is delivered once the addressee returns on-line. In principle, senders know whether their messages are received and whether the addressee is on-line.

Second, IM applications differ in their treatment of addressee inaction. It may be the case that when a message appears on the screen, no failure notification is issued, yet no reply from the addressee is forthcoming. Some IM applications display information when the other party is typing, others don't. In such cases where there is no such notification the sender may not know why the addressee is not replying. The sender knows, however, that the message has been successfully delivered or not. Situations like these illustrate the inability to fully replicate the qualities of face-to-face dealings absent actual physical presence. As mentioned above, the latter is not a prerequisite of receipt, but an assumption of face-to-face dealings.

Third, most popular instant messaging applications provide video conferencing as well as the possibility to place voice calls. In both cases, the communication process displays even more resemblance to face-to-face dealings. With increasing bandwidth it will become easier to

fully replicate the characteristics of such interactions by ensuring visual contact. Although there are technical differences between e-mail and instant messengers, either method can be used in ways resembling the other. E-mail can be used to exchange messages in real-time, when both parties attend their computers, instant messengers can be used for delayed communications when senders type messages for later delivery. Despite such possibilities and the numerous permutations introduced by presence information, it can be assumed that as a general rule, instant messaging applications provide instantaneous two-way communication, whereas e-mail is one-way and its instantaneous character depends on a number of variables, including the length of permitted delay as well as mail-server and mail-client configuration. The communication process enabled by instant messengers unquestionably resembles face-to-face dealings.

Moreover, E-mail may be said to be instantaneous in comparison to the post, but not, in comparison to instant messengers. Its speed is relative and depends on what it is compared to. There are also two groups of users. Those who are familiar with internet-enabled communication methods and those who have acquired internet skills later in life and are generally not comfortable with new technologies. The latter group perceives e-mail as fast and essentially does not use instant messengers; the former regards e-mail as slow and prefers instant messengers and text messaging. Taking into account today's fast paced business environment, a delay of even five minutes may appear unacceptable to many. The focus of the business community and software suppliers is shifting to those methods of communication that enable instant communication. The key words are 'online, ' 'presence detection' and 'real-time' — the instantaneity of transmission is taken as a given.

Last but not the least; it is possible to combine e-mail and instant messengers. Yahoo.com can serve as an example: being a web-based application it is accessible from any browser, without the need to download a separate e-mail or instant messaging client. Users can opt between e-mail and instant messaging from the same interface, depending on the specific communication goal at hand such as urgency of reply, necessity to ensure immediate notification and the communication status of the addressee, which is permanently displayed.

Push E-Mail:

Push e-mail is used to describe an e-mail system that provides for an always-on capability, in which new e-mail is actively transferred (pushed) as it arrives by the Mail Delivery Agent (MDA) commonly called the mail server, to the Mail User Agent (MUA), also called the e-mail client. E-mail client includes smart phones and less strictly, IMAP personal computer mail applications. Push e-mail utilizes a mail delivery system with real time capacity to "push" e-mail through to the client as soon as it arrives, rather than requiring the client to poll and collect or pull mail manually. With a push e-mail smart phone, for example, the client's mail box is constantly updated with arriving e-mail without user intervention, Smart phones announce the arrival of a new e-mail with an alert. Push e-mail is a method of having e-mail received for a user on a server automatically forwarded to a mobile device. This works by keeping an active connection open between the mobile device and the server so that the server can notify the mobile device immediately when new e-mail has arrived.

Regardless of whether the receiver uses polling e-mail, outgoing mail is generally pushed from the sender to the final mail delivery agent and possibly intermediate mail servers using Simple Mail Transfer Protocol. However, if the receiver uses a polling e-mail delivery protocol, the final step from the last mail delivery agent to the client is done using a poll. At login and at later intervals, the mail user agent (client) polls the mail delivery agent (server) to see if there is new mail, and if so downloads it to a mailbox on the user's computer. Extending the push to the last delivery step is what distinguishes push e-mail from polling e-mail systems.¹⁵⁴

Push e-mail differs from the conventional e-mail systems that are 'pull oriented.' Usually, when e-mail is sent, it arrives at the recipient's Internet Service Provider's (ISP's) mail server, where it is held for collection. In case of a web based e-mail, it might arrive at a website server. In both the cases, e-mail remains on the mail server until the recipient uses an e-mail program to poll the mail server. If new mail is present, the e-mail client 'pulls' the mail to the

¹⁵⁴ www.wikipedia.org

client's computer. The difference between this scheme and push e-mail is that, with push e-mail, the mail is pushed through to the client without waiting for polling. Push e-mail can be somewhat simulated using an e-mail client set to frequently poll for new mail. However, this requires the e-mail client to be open and running. Polling involves 'handshaking'⁵ between the client software and the mail server. If the server is busy, the delay in completing the handshake can get longer, causing the client to time out.¹⁵⁵ In a typical non-push (pull) scenario, the mobile device would poll the server at some user specified time interval (such as every hour) and ask the server if any new mail has arrived. If new mail has arrived even after a second the server is polled, it will sit there waiting until the next time that the mobile device checks for mail.¹⁵⁶ in many cases, delay of a minute or two between pull and push email schemes may not matter but in some cases a minute can make all the difference. Push email can be specially crucial to field reporters, stock market businessmen and other professionals for whom time is essence. A one minute delay can make all the difference in breaking a story, losing money or making a crucial sale.¹⁵⁷

It is clear that push e-mail system is a mode of instant communication since the mail is immediately displayed on the smart phones as soon as they arrive. Therefore, it can be suggested that in case of push e-mail the receipt rule of acceptance should be applied.

The BlackBerry Controversy:

BlackBerry was the first personal digital assistant (PDA) to offer push e-mail. BlackBerry became very popular, in part because it offers remote users 'instant' e-mail; new e-mails appear on the device as soon as they arrive, without the need for any user intervention. One of the most significant features of this Smartphone was its extreme security in messaging through advanced encryption techniques. It has a higher level of encryption that does not allow monitoring of the enterprise e-mail (e-mail run for companies) and messenger services. The encryption is much higher than permitted under the Department of Telecommunications

¹⁵⁵ www.wisegeek.com/whatispushemail.htm

¹⁵⁶ www.mobileburn.com

¹⁵⁷ Supra at 155

Guidelines. No one can access the data available on the BlackBerry server, not even RIM. However, the Home Ministry of India banned the services in India as it posed a threat to the National security. The Home Ministry asked the Company to provide a decryption solution for the extremely secure messages; for this the ministry proposed that RIM can shift the servers for the Indian Network to India or create copies of data sent over Indian networks, archive it for 6 months and give access to those copies to the Indian Government. RIM could not grant this request as it was unfeasible for the company to compromise their customer's security and privacy. However after several meetings with the Indian Government, RIM proposed to share the IP address of BlackBerry Enterprise Servers (BES) and the PIN (Personal Identity Number) and IMEI (International Mobile Equipment Identity) numbers of BlackBerry mobiles. Even this was not sufficient, so finally RIM has agreed to provide manual access to the BlackBerry Messenger services.¹⁵⁸

Web based communication:

It differs from email and instant messenger and, due to the inherent immediacy of response, raises few problems with regard to effectiveness. The web was designed not as a method of communication but as a system of information retrieval. The interactivity of many websites is the result of applications running on the server- or client side. A distinction between downloading a website and interacting with a website must be made, 'Downloading consists of requests for a particular resource and a response in the form of delivery of that resource. If the resource, which is generally in the form of a website, cannot be delivered, an error code is displayed. If the request in the form of typing in a URL or activating a link is treated as the dispatch of a message, then the response from the mail-server must be regarded as immediate. The process can be described as two-way: users requesting web-sites can monitor the responses from the web-server in real-time. Depending on the bandwidth, the requested resource 'appears' on the screen with varying speed.

In the case of server-side or client-side applications, the process is not confined to information retrieval but bears signs of interactivity. Users not only request websites but

¹⁵⁸ Rishabh Prasad, BBM and Blackberry for enterprise ban in India available at www.youthkiawaaz.com

provide input by filling out forms or activating buttons thereby actively modifying the contents of websites displayed (i.e. sent) in response to their requests. Irrespective of whether user input is processed on the client-side or on the server-side, the response from the website is immediate and can be monitored by the user in real-time. Most essentially, as the transmission of user input and the manner of its processing are prescribed and controlled by the web-merchant, it must be assumed that the latter bears all the risks of failed receipt. Although responses may be delayed by seconds, or even minutes in cases of server overload or slow connections, the interaction can still be described as instantaneous and two-way. The delay may be perceptible, but the communication process can still be monitored.

A comparison of e-mail, instant messengers and web-applications demonstrates the difficulty of including all three under one rule.

5.7) OTHER LEGAL PROVISIONS:

Apart from the above mentioned provisions of the Information Technology Act, there are certain other provisions which are necessary for facilitating E-Commerce and in turn the formation of E-Contracts. The Information Technology Act which is based on the UNCITRAL Model Law on E-Commerce also provides for the:-

- (a) Legal Recognition of Electronic Records
- (b) Legal recognition of Electronic Signatures¹⁵⁹
- (c) Acknowledgement of Receipt of data messages

Chapter 3 of Information Technology Act covers the area of legal recognition to certain paper based concepts and functions in electronic form. This chapter includes the principle of functional equivalence. This principle is based on the analysis of the purposes and functions of the traditional paper based requirements with a view to determining how those purposes or functions could be fulfilled through electronic commerce technique. This approach singles out the basic functions of paper based form requirements, with a view to providing criteria which, once they are met by electronic documents, enable such documents to enjoy the same

¹⁵⁹ Electronic Signatures substituted by Act 10 of 2009, sec 2, for 'digital signatures'.

level of legal recognition as corresponding paper documents performing the same function enjoy. Once the electronic documents are able to perform the same functions as performed by the paper based documents, they attain legal acceptability.

(A) Legal Recognition of Electronic Records:

Section 4 of the Information Technology Act provides for the legal recognition of electronic records.

The section deems the fulfilment of the requirement of any information to be in writing, in typewritten or printed form, if such information fulfils two conditions. Firstly, such information should be rendered or made available in an electronic form (for example, in a floppy disk). Secondly, such information is accessible as to be usable for a subsequent reference. Electronic form¹⁶⁰ means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film computer generated micro fiche or similar device.

The word 'accessible' as per the UNCITRAL Guide, is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word 'usable' is not intended to cover only human use but also computer processing. 'Subsequent reference' seems to imply merely the need for future reference. The purpose of the section is basically to provide legal sanctity to production of any information on electronic form. Whether such information is correct, or authentic, or unaltered, or reliable is not within the purview of this section.¹⁶¹

¹⁶⁰ Sec 2(1)®, ITA, 2000

¹⁶¹ Supra at 134

(B) Legal Recognition of Electronic Signatures:¹⁶²

The Information Technology Act also provides legal recognition to electronic signatures. Section 5 of the Act incorporates the law regarding legal recognition of electronic signatures. Prior to the Amendment Act, 2008 the word digital signature was used, but the Amendment Act has substituted the word electronic signature for the word digital signature.

This section creates a functional equivalent of 'hand written signature' in the form of 'electronic signature' to authenticate any electronic record. It is important to note that electronic signatures are subscriber¹⁶³ specific. One has to be a subscriber to authenticate an electronic record. The Act is very specific; it does not provide a non-subscriber such a facility. A non-subscriber has no legal right to authenticate an electronic record.¹⁶⁴

The purpose of the above section is to merely introduce and give legal sanctity and acceptance to the use of Electronic signatures. It is not necessary as to what is the mode of signature; it may be paper based or electronic. However, so long the functions of signature are being performed; such signature will receive legal recognition.¹⁶⁵

As per the Information Technology (Certifying Authorities) Rules, 2000, a subscriber may be an individual (irrespective of nationality)/Hindu Undivided Family applicant (Karta), Company / Firm / Body of Individuals / Association of Persons / Local authority, or Government Organizations / Agencies.¹⁶⁶

(C) Acknowledgement of Receipt of Electronic Record

Another relevant matter pertaining to E-Contracts is the acknowledgement of receipt of electronic record. Acknowledgement of receipt plays a very significant role in the communication process involving computer, computer system, and computer network, Acknowledgement does not amount to acceptance. It only signifies that the message has been received. In e-contracts, technology permits die use of functional acknowledgements which

¹⁶² Supra at 159

¹⁶³ Subscriber means a person in whose name the electronic signature certificate is issued. Sec 2(1)(zg), ITA, 2000

¹⁶⁴ Supra at 40

¹⁶⁵ Supra at 134

¹⁶⁶ Ibid at 164

would parallel the system, known as Registered Post Acknowledgement Due (RP/AD) in the conventional postal systems. The Information Technology Act does not impose the use of any such procedure. However, taking into account the commercial value of a system of acknowledgement of receipt and the widespread use of such systems in the context of electronic commerce, the Information Technology Act addresses the legal issues arising from the use of acknowledgement procedures. Section 12 of the Act deals with the acknowledgement of receipt and is based on the assumption that acknowledgement procedures are to be used at the discretion of the originator.¹⁶⁷

It must be noted that whether or not sending the acknowledgement amounts to acceptance of the offer or not, is not dealt with by the Act. For this one will have to refer to the provisions of the Indian Contract Act.

Form of Acknowledgement:

The sub-section (1) gives two options, one to the addressee, where he has a choice to acknowledge the originator through any means (automated or otherwise) and second to the originator, where he has to infer from the conduct (acts or omissions) of the addressee about receipt of electronic record.¹⁶⁸ Automated implies that the addressee has programmed its information system in such a way that the receipt of an electronic record by the system automatically triggers an acknowledgement which is sent to the originator. Otherwise would imply anything but automated. This, in its wider ambit, would cover electronic acknowledgement, verbal acknowledgement and paper acknowledgement. It means that if, by any form or method, the addressee communicates to the originator that he has received an electronic record that would amount to acknowledgement within the meaning of section 12(1). Acknowledgement by conduct implies that if the addressee's conduct sufficiently indicates to the originator that the electronic record has been received by the addressee, then this will amount to acknowledgement of receipt of electronic record. For example Parag (a consumer) sends an e-mail to Shashank (a retailer) for sending him 100 kgs of wheat. If Shashank sends Parag the required quantity of wheat, then Shashank's conduct of sending the

¹⁶⁷ Supra at 130

¹⁶⁸ Supra at 40

wheat is an acknowledgement of his receipt of the electronic record as well. The section also requires that the conduct should be 'sufficient to indicate to the originator . Thus, only when such conduct comes to the knowledge of the originator and is sufficient to indicate that the electronic record has been received.¹⁶⁹

Effect of Acknowledgement

Sub sections (2) and (3) of section 12 primarily deal with the effect of non-acknowledgement of an electronic record by the addressee. These sub-sections lay down various situations under which an originator will or will not be bound by the electronic record depending upon the stipulation of acknowledgement he has requested from the addressee. A bare perusal of these sub-sections reveals that they would operate in cases of unilateral stipulation by the originator as to the requirement of acknowledgement of receipt of electronic record and as to the effect of non-receipt of the acknowledgement.¹⁷⁰

Under sub-section (2) the originator stipulates that the electronic record sent would be binding on him only on receipt of an acknowledgement. The sending of an electronic record is made conditional to its acknowledgement. For example, the stipulation could be 'Message sent conditional to acknowledgement' or 'Message binding only when acknowledgement is received.'¹⁷¹ In such cases if the acknowledgement is not received, the effect will be that the electronic record shall be deemed to have been never sent by the originator.¹⁷² Therefore, in such cases the onus rests on the addressee to ensure that the originator did receive the acknowledgement as sent by him.

Sub-section (3) deals with the situation where, the originator has not stipulated that the electronic record shall be binding on him only on receipt of the acknowledgement. The originator only states that the addressee should acknowledge the receipt of the electronic record. Time limit for acknowledgement may or may not be stated. For example, 'Acknowledgement due' or Acknowledge the receipt of electronic record within 10 days'. In

¹⁶⁹ Supra at 134

¹⁷⁰ Supra at 134

¹⁷¹ Ibid

¹⁷² Supra at 130

the absence of a binding stipulation regarding acknowledgement, one of the following situation occurs:-

(1) A time was specified by the originator within which acknowledgement was to be given and the acknowledgement has not been given within the time frame provided.

(2) A time limit was agreed upon by the originator and the addressee within which the addressee was required to acknowledge the receipt of electronic record and he failed to do so within the stipulated time.

(3) No time was specified or agreed upon for acknowledgement but the addressee failed to acknowledge within a reasonable time.

In any of the above situations, the originator has to follow, a procedure before he can treat the electronic record sent as 'never been sent'.. The procedure requires the originator to give a notice to the addressee stating that no acknowledgement has been received by him. Such notice should also specify a reasonable time by which the acknowledgement must be received by the originator. If no acknowledgement is received within the time limit, even after the notice, then the originator has to give another notice to the addressee. It is only after taking the above two steps that the originator can treat the electronic record as 'never been sent'.

A basic difference between sub-section (2) and (3) is that in former, the electronic record will be deemed to have never been sent unless an acknowledgement is received whereas in latter, unless the procedure lay down is adhered to, the electronic record would be deemed to have been sent. The originator only by using proper phrase while requesting for acknowledgement can escape the procedural claptrap of sub-section (3) of section 12.¹⁷³

¹⁷³ Supra at 134

CHAPTER 6

E COMMERCE IN INDIA

6.1) INTRODUCTION:

The cutting edge for business today is e-commerce. E-Commerce stands for electronic commerce. It means dealing in goods and services through the electronic media and internet. On the internet, it relates to a website of the vendor, who sells products or services directly to the customer from the portal using a digital shopping cart or digital shopping basket system and allows payment through credit card, debit card or EFT (Electronic fund transfer) payments. E-commerce or E-business involves carrying on a business with the help of the internet and by using the information technology like Electronic Data Interchange (EDI). More simply put, E-Commerce is the movement of business onto the World Wide Web. E-Commerce has almost overnight become the dominant online activity. There is no single definition of E-Commerce, it means only commercial activity which is performed or linked to or supported by Electronic Communication. The effects of e-commerce are already appearing in all areas of business, from customer service to new product design. It facilitates new types of information based business processes for reaching and interacting with customers like online advertising and marketing, online order taking and online customer service. In now days E-commerce uses the WWW at least some point in transaction lifecycle. It can also reduce costs in managing orders and interacting with a wide range of suppliers and trading partners, areas that typically add significant overheads to the cost of products and services. For developing countries like India, e-commerce offers considerable opportunity. In India it is still in nascent stage, but even the most-pessimistic projections indicate a boom. There has been a rise in the number of companies' taking up e-commerce in the recent past. Major Indian portal sites have also shifted towards e-commerce instead of depending on advertising revenue. Many sites are now selling a diverse range of products and services from flowers, greeting cards, and movie tickets to groceries, electronic gadgets, and

computers, etc. With stock exchanges coming online the time for true e-commerce in India has finally arrived.¹⁷⁴ Electronic commerce (e-commerce) as part of the information technology revolution became widely used in the world trade in general and Indian economy in particular. As a symbol of globalization, e-commerce represents the cutting edge of success in this digital age and it has changed and is still changing the way business is conducted around the world. The commercialization of the Internet has driven electronic commerce to become one of the most capable channels for inter-organizational business processes. Consequently, Internet growth has led to a host of new developments, such as decreased margins for companies as consumers turn more and more to the internet to buy goods and demand the best prices. Internet has accurately been an effective instrument in changing the straightforward ways of doing business. In any market with no entry barriers – the ‘Net’ is biggest of them, the continuous arrival of competition will, routinely, drive down the prices. In such a case, in long term all firms could only earn normal profits. Electronic commerce (or e-commerce) encompasses all business conducted by means of computer networks. Advances in telecommunications and computer technologies in recent years have made computer networks an integral part of the economic infrastructure. More and more companies are facilitating transactions over web. There has been tremendous competition to target each and every computer owner who is connected to the Web.¹⁷⁵

6.2) SCOPE OF E-COMMERCE:¹⁷⁶

E-commerce is not limited to the purchase of a product. It includes, besides e-mail and other communication platforms, all information or services that a company may offer to its customers over the Net, from pre-purchase information to after-sale service and support. There are essentially two major uses of e-commerce. The first is to use it to reduce transaction costs by increasing efficiency in the use of both time and procedures and thus lowering costs. The other is to use it both as a marketing tool to increase sales (and customer

¹⁷⁴ www.indianresearchjournals.com

¹⁷⁵ www.iiste.org

¹⁷⁶ Supra at 120

services) as well as to create new business through it—for example, Information Technology (IT) enabled business, call-centres, software and maintenance services, etc. as well as ‘digital commerce’. It is thus a tool for both existing businesses as well as an opportunity for new business, both for existing companies as well as for new entrants. Though the future of e-commerce may still be unpredictable, it should be noted that in possibly a short span of time, all businesses will need to know how to make use of it—much as most businesses had to learn to adapt to the phone and fax, only more so as more and more trade transactions and supply chains become digital and on-line.

E-commerce, however, is more than just electronics and commerce added together. It represents an entirely new way of doing business over a medium that changes the very rules of doing that business. It is, therefore, far more about strategy and business management than it is about technology. In order to understand e-commerce and its implications for developing countries, it is important, therefore, to see it from the perspective of the transactional aspects of e-commerce, i.e. those that represent the business between the different players, as well as the framework aspects, i.e. those basic requirements that are needed in developing countries for it to develop.

6.3) STATUS OF E-COMMERCE:

Today E-commerce is a byword in Indian society and it has become an integral part of our daily life. There are websites providing any number of goods and services. Then there are those, which provide a specific product along with its allied services.¹⁷⁷

A. Multi Product E-Commerce

Some internet portals provide almost all categories of goods and services in a single site; hence, they are targeting buyers of every possible product/service. The most popular examples are www.indiaplaza.com, www.thebestofindia.com, www.khoj.com, www.sify.com, www.rediff.com, www.indiatimes.com and so on. These Indian e-commerce

¹⁷⁷ Article on Prospect of Ecommerce in India by Sweta Sharma and Sugandha Mittal

portals provide goods and services in a variety of categories like; apparel and accessories for men and women, health and beauty products, books and magazines, computers and peripherals, vehicles, collectibles, software, consumer electronics, household appliances, jewellery, audio/video entertainment goods, gift articles, real estate and services, business and opportunities, employment, travel tickets, matrimony etc.

B. Single Product E-Commerce Some Indian portals/websites deal in a specialized field, for example;¹⁷⁸

1) Automobiles: In Automobiles, the portals are <http://www.indiacar.com/> and <http://www.automartindia.com/>, on these sites we can buy and sell four-wheelers and two-wheelers, new as well as used vehicles, online. Some of the services they provide are: Car research and reviews, Online evaluation, Technical specifications, Vehicle Insurance, Vehicle Finance.

2) Stocks and shares and e-commerce: In India today, we can even deal in stocks and shares through e-commerce. Some of the services offered to registered members are: Online buying/selling of stocks and shares, Market analysis and research, Company information, Comparison of companies, Research on Equity and Mutual Funds.

3) Real estate and e-commerce: They provide information on new properties as well as properties for resale. One can deal directly with developer through consultant. Allied services: Housing Finance, Insurance companies, Architects & Interior Designers, NRI services, Packers & Movers.

4) Travel & tourism and e-commerce: India has a rich history and heritage and e-commerce is instrumental, to a large extent, in selling India as a product, encouraging Indians as well as foreigners to see its multifaceted culture and beauty. A major Government of India portal, <http://www.tourisminindia.com/> has a vast variety of information for a potential tourist. The tourist destination sites are categorized according to themes like: eco-themes pertains to jungles, flora and fauna, beaches of India, architectural attractions, forts and places, hill resorts, adventure-trekking, mountain climbing etc. Allied services offered are passport and

¹⁷⁸Article on E-Commerce in India: A Review by Abhijit Mitra

visa, travel & accommodation information, weather information, festival & fair dates, shopping, tour operators and more. There are also sites that highlight the tourist destinations of a specific region in India, like <http://www.incredibleindia.org/>, which covers North East India.

5) Gifts and e-commerce: In the bygone days, one had to plan what to gift a loved one, trudge across to your favourite shop, and browse for hours before purchasing a gift. One such site is <http://www.indiangiftsportal.com>. The gifts are categorized as: Collectibles like paintings and sculptures, Luxury items like leather goods, perfumes, jewellery boxes, etc, household curios and carpets, etc, Toys & games, Chocolates, Flowers, Woodcraft & metal-craft.

6) Hobbies and e-commerce: The most popular hobbies from time immemorial are reading, music and films. The books cover a wide range of topics like Business, Art, Cookery, Engineering, Children's Stories, Health, Medicine, Biographies, Horror, Home & Garden, etc. On the India website <http://www.firstandsecond.com/> one can buy more than 300000 titles of books, cassettes, VCDs and DVDs.

7) Matrimony and E-commerce: It is said that marriages are made in heaven, but in the world of E-commerce they are made on marriage portals like <http://www.jeevansathi.com/> and <http://saadi.com/>. One can search for a suitable match on their websites by region of residence (India or abroad), religion or caste. Allied services for registered members: Astrological services, Information on Customs and Rituals, Legal issues, Health & Beauty, Fashion & Style, Wedding Planners.

8) Employment and e-commerce: Two major portals like www.Monsterindia.com and www.naukri.com (meaning job.com in Hindi) are instrumental in providing job seekers with suitable employment at the click of a mouse. The service for job seekers is free and for Employers they charge a nominal fee. Jobs are available online in fields ranging from secretarial to software development, and from real estate to education.

6.4) FACILITATORS OF E-COMMERCE:¹⁷⁹

A. Information directories: The products and services are listed with appropriate sub-headings to make it easy for a serious information-seeker to find what he wants. Allied services provided by them: Message boards, chat rooms, forums, etc.

B. Banks:

1) Net banking/phone banking: This is an online banking facility available for savings account holders as well as current account holders. Some of the special Net banking services are: Demat accounts for sale/purchase of stocks and shares, Foreign Exchange services, Direct/Instant payment of bills on the account-holder's behalf, Financial Planning & advice, Electronic Funds Transfer, Loans to account-holders.

2) Credit/Debit Cards: Banks facilitate E-commerce by providing the most vital trade instrument, namely the Credit or Debit Card, without which E-commerce would be impossible.

6.5) CATEGORIES OF E-COMMERCE:

• Business-to-business (B2B):

B2B transactions are largely between industrial manufacturers, partners, and retailers or between companies. Business-to-Business refers to the full spectrum of e-commerce that can occur between two organizations. Among other activities, B2B ecommerce includes purchasing and procurement, supplier management, inventory management, channel management, sales activities, payment management, and service and support. The foreign branded companies are eager to take full advantage of the growing Indian market and are trying to create market for their products over the net. Gucci Co. an Italian iconic fashion and leather goods label is eager to make its hold in India with Business to business transactions. Some of the key B2B exchanges in India are tradeindia.com, matexnet.com, Alibaba.com,

¹⁷⁹ Article on Emerging Trends of Ecommerce in India: some crucial issues, prospects and challenges by Sarbapriya Ray

auctionindia.com, indiamart.com, teaauction.com, metaljunction.com, chemdex.com, fastparts.com, freemarkets.com.

• **Business-to-Consumer (B2C):**

B2C transactions take place directly between business establishments and consumers.

Although business-to-business transactions play an important part in e-commerce market, a share of e-commerce revenues in developing countries like India is generated from business to consumer transactions. Business-to-Consumer e-commerce refers to exchanges between businesses and consumers, e.g., Amazon.com, Yahoo.com and Schwab.com. Similar transactions that occur in business-to business.

E-commerce also takes place in the business-to-consumer context. For instance, as with smaller business-to-business, transactions that relate to the “back office” of the customer (i.e., inventory management at the home) are often not tracked electronically. However, all customer-facing, or “front office” activities are typically tracked. These include sales activities, consumer search, frequently asked questions and service and support. Railway and Airlines have played a vital role in e-commerce transactions in India. Travel portals are exploding in India. Recently, Make My Trip.com has shown Rs 1000 crores of turnover. Travel alone constituted 50% of Rs 4800 crore online market in 2007-08. In India, online services like ticketing, banking, tax payment, bill payment, hotel room booking, entertainment, online games, matrimonial sites, job sites, etc. are showing signs of development in business-to-customer transactions. There has been tremendous boost in the online business with the stock exchange coming online. Online valentine gifts and Diwali gifts are also becoming popular along with the birthday cakes. No doubt, the total value of the B2B transactions is much larger than that of the B2C transactions, because typically B2B transactions are of much greater value than B2C transactions. It seems that the B2C market in India will take time to grow as compared to the B2B market.

- **Consumer-to-Consumer (C2C):**

C2C sites don't form a very high portion of web-based commerce. Most visible examples are the auction sites. Basically, if some one has something to sell, then he gets it listed at an auction sites and others can bid for it. Consumer-to-Consumer exchanges involve transactions between and among consumers. These exchanges may or may not include third-party involvement as in the case of the auction-exchange eBay. Other activities include: classified ads(e.g., www.numberoneclassifieds.com), games (www.heat.net), jobs (www.monster.com), Web-based communication (www.icq.com), and personal services (e.g., Yahoo!Personals, webpersonals.com).

- **Consumer-to-Business (C2B):**

Consumers can band together to form and present themselves as a buyer group to businesses in a consumer-to-business relationship. These groups may be economically motivated as with the demand aggregator, Mercata.com, or socially oriented as with cause-related advocacy at voxcap.com.

6.6) FUTURE OF E-COMMERCE IN INDIA:

Today, we are talking about e-commerce progress level of India, the seventh-largest by geographical area, the second-most populous country, and the most populous democracy in the world. Indian Ecommerce space percentage is getting higher as more and more online retailers enter the market. Although this level of entry in the e-commerce market is good from a long term perspective, the challenge is that most entrepreneurs don't have the resources or capital to wait for years before they can get profits.

The past 2 years have seen a rise in the number of companies' embracing e-commerce technologies and the Internet in India. Most e-commerce sites have been targeted towards the

NRI's with Gift delivery services, books, Audio and videocassettes etc. Major Indian portal sites have also shifted towards e-commerce instead of depending on advertising revenue. The web communities built around these portal sites with content have been effectively targeted to sell everything from event and movie tickets the grocery and computers. This is not to say that the e-commerce scenario has been bad in India as highly successful e-business like baba bazaar and India mart have proved. Indian Banks too have been very successful in adapting EC and EDI Technologies to provide customers with real time account status, transfer of funds between current and checking accounts, stop payment facilities. ICICI Bank, Global TRUST BANK AND UTI-Bank also have put their electronic banking over the internet facilities in place for the up coming e-commerce market speed post also plain to clone the federal express story with online package status at any moment in time .The future does look very bright for e-commerce in India with even the stock exchanges coming online providing a online stock portfolio and status with a fifteen minute delay in prices. The day cannot be far when with RBI regulations will able to see stock transfer and sale over the Net with specialized services.¹⁸⁰

6.7) CONCLUSION:

Towards a strategy for India

Whether as a tool for development and governance domestically, or to promote and increase export growth and international trade, India needs to adopt a proactive role. It needs to ensure that the benefits of e-commerce accrue to those trying to overcome economic marginalisation due to geographic, financial, technological, or educational handicaps. Indeed, the need to close the gap between those with abundant information at hand and the 'information poor' provides a strong rationale for the development of e-commerce as a national objective.

¹⁸⁰ Supra at 177

As has been brought out in this study, it is essential to create a policy and regulatory environment that favours the development of e-commerce and harmonises national approaches in diverse areas including telecommunications, trade, competition, intellectual property, privacy and security. Since the key to this is the telecom and Internet network, proactive and supportive policies are a must to reap the benefits of this emerging opportunity. Research is, therefore, required to examine different initiatives worldwide and their relative success and adaptability for India.

Development objectives

A developing country such as India faces a special challenge and responsibility to create a conducive policy environment that, on the one hand, allows for the development of e-commerce and, on the other hand, ensures the social objective of providing access and benefits for those that cannot afford it. Electronic governance, public Internet terminals, rural access at subsidized cost, awareness etc. are some of the initiatives that must be considered and promoted. Simultaneously ensuring that the regulatory approaches are transparent, harmonised, and independent of specific technologies along with open and competitive telecommunications policies is necessary in order to attract the investment needed for telecom and e-commerce promotion.

CHAPTER 7
JUDICIAL APPROACH

7.1) INTRODUCTION:

The first thing that strikes everybody's mind while entering into a contract electronically is that, are such contracts binding i.e. can they be enforced through a Court of law. E-Commerce has grown to be a buzz world in corporate circles. The lure of conducting global operations through a website has become irresistible. The Internet's decentralised nature makes it likely that any given internet transaction will involve parties from more than one jurisdiction. Jurisdictional issues arise when parties dispute a contract and try to decide which Court has jurisdiction over it. The Information Technology Act in India is an illustrative of the prevailing confusion in the area of jurisdiction in the context of internet. Broadly speaking two issues are related to Judiciary in context top E-Contracts;

- 1) Are E- Contracts enforceable
- 2) If yes, jurisdictional issue.

7.2) ARE E-CONTRACTS ENFORCEABLE:

Electronic contracting has experienced a sea change in the last two decades. Although some issues raised by e-contracts can be adequately dealt with under traditional contract principles, these contracts also present new and sometimes difficult issues. One of these new issues that have received attention is the enforceability of shrink wrap, click wrap and browse wrap agreements. The enforceability issue can be studies under three broad heads;

1. Enforceability of Shrink wrap
2. Enforceability of Click wrap
3. Enforceability of Browse wrap agreements

1) Enforceability of shrink wrap agreements:

Shrink wrap agreements get their name from the clear plastic wrapping that encloses many software packages. They contain a notice that by tearing open the shrink wrap, the user asserts to the software terms enclosed within. The crucial case regarding enforceability of shrink wrap licenses was *Step Saver Data Sys. Inc vs Wyse Tech*¹⁸¹.. the case focussed on the issue of contract creation and whether the transaction was at all governed by the shrink wrap license terms. The U.S. Court of Appeals for the 3rd circuit held that shrink wrap license did not become part of the contract and was not valid notification to a previously existing contractual relationship for the sale of pre- packaged computer software.

However, the law governing shrink wrap licenses took a dramatic turn in *ProCD, Inc. v. Zeidenberg*.¹⁸² In this case the plaintiff, ProCD had compiled data from 3000 telephone directories into a searchable computer database. Over \$10 million were spent by ProCD to compile the database, develop its search functionality and to keep it current. ProCD sold both commercial licenses and consumer licenses to the data which was encoded on CD-ROM disks. The exterior of the box stated that the software was restricted according to the terms of the enclosed license. In addition, the user's manual contained the license and the license appeared on the user's screen every time the program was run. Zeidenberg, a graduate student seeking a Ph.D. in Computer Science, purchased a consumer package of the database off the shelf at a retail store. The consumer version of the software was restricted under the terms of the shrink wrap license to non-commercial uses. Zeidenberg was aware of the license restrictions and chose to ignore them. He began making the data from the ProCD database available over the Internet at prices below those offered by ProCD. The District Court reviewed the *Step-Saver* and *ARS* cases and applied a similar analysis under the UCC. Zeidenberg was the offerer, the retail store was the offeree, and the contract was formed in the store before Zeidenberg discovered or assented to the license terms contained in the box. The court concluded that, despite the references to the license on the box, the license

¹⁸¹ 939 F.2d 91 (3d Cir3d1991)

¹⁸² L. Padmavati (ed.) *E-contracts- emerging dimensions*, 1st edn; 86 . 3d 1447 (7th Cir 1996)

restrictions in the shrink wrap license were not part of the contract between ProCD and Zeidenberg.

On appeal, the Court of Appeals for the 7th Circuit reversed the decision of the lower court. The court noted that it would be impossible to print the entire license terms on the exterior of the box to be viewed before sale. The court found "notice on the outside, terms on the inside, and a right to return the software for refund if the terms are unacceptable.... may be a means of doing business valuable to buyers and sellers alike".

Despite the radical departure from the approach of the Step-Saver and ARS, the ProCD court appears to have reached the right decision when judged on the equities.

In the case of Gateway¹⁸³, the equities that supported the decision in ProCD were reversed and now lay with the consumer purchaser, not the seller. They need to only communicate that fact unequivocally in their dealings with consumers in their marketing and at the outset of their contacts with consumers during the telephone or online ordering process.

2) Enforceability of Click-Wrap Agreements:

Click wrap agreements came into use when software vendors began distributing software by means other than disks, such as when the software is pre-installed on a computer for the user, or when the software is downloaded from the Internet. Upon downloading, installation or first use of the application, a window containing the terms of the license opens for the user to read. The user is asked to click either "I agree" or "I do not agree ". If the user does not agree, the process is terminated. The click wrap agreements often remove many factual questions whether the user had adequate notice of the license terms and manifested assent to them. With respect to software downloads, the click wrap terms often are displayed at the very start of the contract formation process, although often the terms are contained in a scrollable window that requires the user to scroll down to read all of the terms.¹⁸⁴

¹⁸³ 246 A.D 2d 246, 676 NYS. 2d 569

¹⁸⁴ www.mudorch.edu.au/elaw/issue

Whether such forms of agreements are enforceable has raised much controversy worldwide. The enforceability of click wrap agreements remains an open issue. Most of the cases in this area analyze the enforceability of shrink-wrap agreements (i.e., software licensing agreements included along with software diskettes and packaging materials, which the seller deems to be accepted by the user when the software is opened and not returned for a refund) and do not directly involve the enforceability of click wraps.

Their legal status is still a bit unclear, however, the common thread of consensus favours click-wrap over shrink-wrap agreements. The reasons for this relates to the method of acceptance. As stated, the acceptance of shrink-wrap agreements is by ripping the plastic wrapping used to wrap software boxes in order to get to the Terms and Conditions enclosed within. The user, however, without having the opportunity to first read the terms, has already accepted. Click-wrap agreements on the other hand, are more likely to be accepted and enforceable as the user can first review the conditions and then accept the terms by clicking 'I agree'. The Courts in the U.S have responded to this problem by ruling that Click Wrap agreements will be binding on the user if he is given a chance to read the terms and conditions and if he is required to convey his consent before he actually accesses such web site or uses the service offered. The requirements of such agreements to be binding on a user are that the terms and conditions should be conspicuously visible on the website and that the user should be required to click on the 'I agree' or 'proceed' button, after having a reasonable opportunity to read the terms.¹⁸⁵

The terms of service or license do not always appear on the same webpage or window, but are always accessible before acceptance, such as through a hyperlink embedded in the product's webpage or a pop-up screen prior to installation. In order to be deemed to have accepted the terms of service, the purchaser must be put on notice that certain terms of service may apply. If the terms of service are not conspicuously visible and/or accessible, courts have found the notice requirement to be lacking and as such, the purchaser may not be bound to the terms of the agreement. An arbitration clause sought to be relied on by a service provider was held to be not binding on the user, as manifesting assent to the terms of the

¹⁸⁵ Ragvendra S. Srivatsa and Sukrata R, Online contracts, in S.K.Verma and Raman Mittal

license agreement was not made a requirement for the downloading, but was published only as an invitation to the user to read the terms. The web page, at the bottom, contained a note requesting users to look into the terms, but neither the terms were made readily available for reference, nor was it a prerequisite for downloading the software.

Lawyers have long opined that click-wrap agreements are enforceable contractual arrangements. The first judicial pronouncement on this subject came in, *Hotmail Corporation v. Van Money Pie Inc., et al*¹⁸⁶, in which the court held that click-wrap agreements are enforceable and that the defendants were bound by the Terms of Service posted on the website as a result of their act of clicking on a button "I agree".

The court held that "the evidence supports a finding that plaintiff will likely prevail on its breach of contract claim." As stated above, this contract was contained in plaintiff's Terms of Service which was breached by defendants' use of Hotmail accounts and the Hotmail mark in their transmission of spam. To reach this conclusion, the Court first had to hold that the plaintiff and defendants were parties to an enforceable agreement. By so doing, the Court indicated its willingness to uphold the validity of a click-wrap agreement, as defendants agreed to be bound by plaintiff's Terms of Service solely by clicking "I agree" after being presented with an opportunity to view the Terms of Service and granted a preliminary injunction prohibiting the defendant from sending thousands of "spam" e-mails in violation of Hotmail's click-wrap agreement.¹⁸⁷

Again in, *Via Viente Taiwan LP v. United Parcel Service*¹⁸⁸, the Court, However, found that "click-through set up process that included terms of service would hardly be a surprise to anyone who has ever installed software on a computer, much less the employees of a sophisticated company which boasts international operations," i.e. the customer should have been aware that the terms of service would be presented upon the installation of the software. The court believed the customer likely supervised the UPS's (United Parcel Service) employee during the installation process, and would have been at least generally aware that

¹⁸⁶ C98-20064(N.D.CA. April 20, 1998)

¹⁸⁷ www.internetlibrary.com/publications

¹⁸⁸ E.D. Tex. No. 08-301, 2/17/09

use of the software required acceptance of the license agreement. Finally, and most importantly, the court found that the customer used and derived benefit from the software. To then allow the customer to benefit from portions of the contract while allowing it to disavow others would be inequitable.

Much of the litigation regarding click wrap licenses concerns forum selection clauses and arbitration clauses. In most cases, the courts have found the click wrap terms to be enforceable. The courts and commentators alike have embraced the policy reasons behind forum selection clauses expressed by the U.S. Supreme Court in *Carnival Cruise Lines v. Shute*.¹⁸⁹ A typical case is *Caspi v. Microsoft Network*¹⁹⁰ in which the plaintiff entered into a click wrap agreement with Microsoft as an online subscriber to Microsoft's MSN network. MSN's membership agreement appeared in a scrollable window containing the terms. The subscriber was prompted to click either "I agree" or "I don't agree", which aborts the registration process. Caspi alleged that Microsoft engaged in "unilateral negative option billing" by rolling subscribers onto more expensive plans without their consent. The case was a class action purporting to represent 1.5 million subscribers. The membership agreement contained a forum selection clause requiring jurisdiction and venue in Microsoft's backyard, King County Washington. The Caspi court enforced the forum selection clause. The court ruled that 1) there was no fraud or overweening bargaining power, and 2) the clause did not violate public policy. Further, the court ruled that the MSN members had adequate notice of the clause because they were free to scroll through the computer screens displaying the terms for any number of time before accepting.

The fact that click-wrap agreements can be enforced does not imply that any particular agreement is in fact enforceable. The parties to a contract must still turn to ordinary contract law principles to determine the enforceability of particular agreements.

In, today's digital environment, click wrap agreements seem to be a good alternative to the absence of paper contracts. But one problem that arises because of the use of click wrap agreements is that companies often put too much "legalese" in their terms of use or service

¹⁸⁹ 499 US 585(1991)

¹⁹⁰ 323n.j. Super 118; 732 A.2d 528

and as a result users and consumers have become immune to them. As a consequence people quickly select "I agree" button so that they can continue with their transaction. Unfortunately it is not until after the fact people sometimes realize they do not agree with the terms and are not happy with their transaction, but are bound to the terms because they agreed. Therefore, it is always a good idea to take the time and go through the terms which may be offered and not be so hasty to select "I agree". Perhaps someday companies will realize the problems associated with lengthy and complicated contracts and make strides to simplify the wording into layman's terms, but the law is complicated and businesses have to cover all angles. It is often a catch-. Until then, we have click wraps. The good news is that once we get the hang of reading the contractual terms, some legal terminology and understand the basic framework of how click wrap agreements are structured, they become a little easier to understand. It is in our best interest to make an effort to read the terms before ever clicking "I agree". So next time a box pops up with pages of conditions in a print, too small to read, refrain from scrolling down to the bottom of the page and choosing the 'accept' option immediately. Instead, one should probably read the clauses to see what one could potentially be accountable for.¹⁹¹

3) Enforceability of Browse-Wrap Agreements:

Browse wrap agreements do not appear on the screen. The user is also not compelled to accept or reject the terms as a condition of proceeding with further computer operations. Rather, a browse wrap agreement appears only as a hyperlink which can be accessed by clicking on the link. It is optional, not required. This makes browse wrap agreements much more subject to challenge on the grounds of lack of reasonable notice and bona fide assent to the browse wrap terms.

Basically there are three important differences between click wrap and browse wrap agreements. First, in the case of click wrap agreements, users have constructive notice of the terms of the agreements because they are presented with all the terms of the agreements prior to entering into the agreement. However, with browse wrap agreements the terms of the

¹⁹¹ Sukhia Rishab, Click-wrap agreements; What are they and are they enforceable available at www.ezinearticles.com/clickwrapagreements

agreement are displayed to users only if they click on the hyperlink that brings up the "terms and conditions" page. Second, in order to carry out their primary purpose (e.g., downloading software or purchasing tickets online), users must acknowledge the presence of both the click wrap agreement and the displayed terms by clicking on a button. With a browse wrap agreement, users can carry out their primary purpose without ever clicking on the hyperlink that links to the "terms and conditions" and without ever seeing the agreement or its terms. Finally, with a browse wrap agreement users may not even realize that a contract is being formed. It is precisely because of these differences that courts have treated enforcement of these agreements differently.

The leading case in this area is *Specht v. Netscape Communications Corp.* *Specht*¹⁹² received a free download of Netscape's "Smart Download" software that enhances the downloading files from the Internet. In a class action, the plaintiffs charged that Netscape had used the software to obtain web usage information from Smart Download users in violation of their privacy. The browse wrap terms included an arbitration clause. The software was available on Netscape's web site as well as from other free download sites. On Netscape's site, the link to the browse wrap terms was not visible in the first window view, but only visible if the user scrolled down the screen further. On non-Netscape sites, the Smart Download software could be obtained with any links to the browse wrap contract terms whatsoever. Netscape's site did not require users to click the browse wrap link. It merely stated, 'Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software.' The *Specht* court ruled that 'please review' was an invitation and not a condition, and thus could not constitute the assent necessary to make the arbitration enforceable. The browse wrap agreement, if noticed, remains optional to the user, and there is scant little evidence that proves the user knew that they were entering into an agreement at all by simply using the software. Here, the equities lie with protecting ignorant users from forfeiting their rights to trial. Providers of online services and software have more reliable option of a click wrap agreement, and if they

¹⁹² 150 F.Supp.2d 585(S.D.N.Y. 2001)

fail to use it, they do so at their peril. Another case, *Comb v. PayPal, Inc.* also rejected the validity of the terms in a browse wrap agreement.

As the agreement goes, if we refuse to enforce browse wrap agreements, a site owner will simply impose the same restrictions via click wrap or shrink wrap. Every court has found click wrap licenses to standard form terms, enforceable. A majority of the courts in the last fifteen years have enforced shrink wrap licenses on the theory that people agree to the terms by using the software they have already purchased. Finally and more recently an increasing number of courts have enforced "browse wrap" licenses, in which the user does not see the contract at all but in which the license terms provide that using a website constitutes an agreement to a contract whether the user knows it or not. Virtually all the cases that have refused to enforce a browse wrap license have done so in order to protect consumers; conversely, virtually all the cases that have enforced browse wrap licenses have done so against a commercial entity. And shrink wrap and click wrap cases, while enforcing some contracts against consumers, have protected those consumers against certain clauses considered unreasonable. Businesses however are presumed to know what they are doing when they access another company's website, so courts are more likely to bind them to that site's terms of use.¹⁹³

7.3) JURISDICTIONAL ISSUES:

The effectiveness of a judicial system rests on bedrock of regulations -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 judgment. Jurisdiction is a legal term describing which law is in effect at a given period of time and which court's decision will be binding. Jurisdiction is the authority by which courts take cognizance of and decide cases¹⁹⁴. Jurisdiction is the power of the court to

¹⁹³ *Supra* at 181

¹⁹⁴ Raman Mittal, *Dispute Resolution in Cyber Space; Determining jurisdictional and applicable law*, in S.K.Verma and Raman Mittal

hear a case and resolve a dispute involving person, property and subject matter¹⁹⁵. Without jurisdiction a court's judgment is ineffective and impotent.

The word jurisdiction is of large and comprehensive import, and embraces every kind of judicial action. Such jurisdiction is essentially of two types, namely subject matter jurisdiction and personal jurisdiction, and these two must be conjunctively satisfied for a judgment to take effect. Subject matter jurisdiction means the power of a particular court to hear the type of case that is then before it. Personal jurisdiction means the power of the court to render a judgment against a party to an action or a proceeding¹⁹⁶. 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 the 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.¹⁹⁷

One of the greatest legal difficulties presented by e-commerce arises from one of the greatest advantages of the internet-that it crosses national and jurisdictional boundaries. This immediately raises questions relating to the area of law described by lawyers as Private International Law or alternatively Conflict of Laws. In particular, the two immediate questions in this context are: (a) which law will apply to any contract; (b) would the Indian courts have jurisdiction to entertain an action based upon such a contract.

In the offline world, disputes are largely resolved through the traditional process of court litigation which is principally structured on a territorial basis, i.e. each country has its own laws and courts, which decide disputes falling under their jurisdiction, mostly on the basis of the application of local laws. As long as the parties to a dispute arising on the internet belong to the same jurisdiction, there is no problem, as the dispute in such a case would be resolved in the same manner as any other offline dispute. For example, XYZ enterprises have their web site through which they are selling goods manufactured by them. XYZ enterprises are based in Delhi and their customers are also in Delhi. In case any dispute

¹⁹⁵ Supra at 40

¹⁹⁶ *ibid*

¹⁹⁷ Supra at 130

arises between XYZ enterprises and their customer, it would be resolved according to the laws applicable in Delhi. But the problem would arise when their customers are from different countries and they are transacting with them through their web site. This dispute resolution mechanism, based on territoriality, faces a number of challenges when applied to disputes arising on the Internet.

The internet is by definition international and can be accessed from almost any place on earth hence multi-jurisdictional. On the internet digitised data may travel through various countries and different jurisdictions in order to reach its destination. For example, a dispute may arise between two parties who entered into contract on the internet and who belong to different countries. now, question is the courts of which country should have jurisdiction to determine this dispute? The laws of which country should be relied upon to determine the dispute? What laws should be used to decide a particular dispute? These are perplexing questions currently being faced by courts worldwide because of the transnational nature of the internet by which people can surpass borders readily and rapidly. While most laws have territorial nexus, the internet defies the notion of territoriality.¹⁹⁸

NATIONAL PERSPECTIVE

Due to the near unanimity of the laws applicable throughout India, the only question most likely to arise at the national level is the question of Jurisdiction of the courts. Jurisdictional issues in India are determined either by the place of residence or place of business test or cause of action test.¹⁹⁹ The first test is an objective one and easy to determine. It is unlikely to pose any serious issue in e-commerce disputes. The cause of action test is a subjective test and is most likely to be debated in e-commerce cases.²⁰⁰

Where the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business; and where either of them does not have a place of business, his usual place of residence shall be deemed to be the place of

¹⁹⁸ Supra at 194

¹⁹⁹ Sec 20, CPC, 1908

²⁰⁰ Supra 38

business.²⁰¹ The Courts in India will be called to determine the compatibility of the above provision with Section 20 of the Civil Procedure Code, 1908. In the absence of any choice of forum by the parties the rules regarding jurisdiction are determined with regard to section 20, Civil Procedure Code, 1908.

So the court before assuming jurisdiction would have to examine where the defendant resides or carries on business or where the cause of action arose, for example, where the contract was formed. At its broad level a contract basically consists of an offer and acceptance. Where is it formed - at the place where the offer was made, or where it was accepted? By and large it is the view that a contract comes into force at the place where the offer was accepted. Another factor is the place of performance of the contract, where did the parties intend or which place was the contract intended to be performed at.

The cause of action means every fact that would be necessary for the plaintiff to prove, if traversed, in order to support his right to the Judgment of the court²⁰². It does not include every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. Even an infinitesimal fraction of a cause of action will be part of the cause of action and will confer Jurisdiction on the court within the territorial limits of which that little occurs.²⁰³ It appears that the scope of 'cause of action' as a possible ground for filing a suit in a particular court has been reduced. Section 20 of the Civil Procedure Code, inter alia, provides that every suit shall be instituted in a court within the jurisdiction where the defendant(s) carries on business or where the cause of action wholly or partly arises. The breach of contract gives rise to a cause of action and suit in such case may be instituted under Section 20 of the Civil Procedure Code either at a place where the contract is formed²⁰⁴ or where the defendant carries on business.

But the Information Technology Act fuses the place of formation of the contract with the place of business and lay down that the place of business shall be deemed as the place of dispatch or receipt of the electronic record as the case may be. This means that the place of

²⁰¹ Sec 13, ITA, 2000

²⁰² Mohammad Khalil Khan vs Mehbub Au Mian AIR 1949 P.C. 78: 75 I.A. 121

²⁰³ Manirangappa vs Venkatappa AIR 1965 Mys. 316

²⁰⁴ Ramco Textiles vs Union of India, AIR 1960 Ker 257, at p 258

business shall be the place where a case has to be instituted in case of breach of contract which may not be necessarily the place where the contract has been concluded.²⁰⁵

In one of the landmark case, *Oil and National Gas Commission v. Utpal Kumar Basu*,²⁰⁶ the Supreme Court dealt with the jurisdiction in cyber space. The petitioner responded to the advertising regarding a tender for a particular project in Gujarat, the advertisement being published in the Times of 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 the ground that a part of cause of action, arose 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 opinion, 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.'

It further appears that Section 13 of the Information Technology Act is not in harmony with Section 11 of the Consumer Protection Act, 1986. (CP Act). Section 13²⁰⁷ inter alia, provides that where the originator (offerer here) or the addressee (offeree here) has more than one place of business, then principal place of business shall be deemed as the place where the electronic record has been dispatched or received as the case may be. The place of business will determine the Jurisdiction of the court and in case there is a dispute between the parties involving contract formed electronically, then the suit shall be in the court within the local limits of whose jurisdiction, inter alia, principal place of business of the opposite party is situated.

Against this, the Consumer Protection Act, 1986, provides that a consumer can file a complaint against the opposite party in a District forum within the local limits of whose jurisdiction the opposite party inter alia, has a branch office.²⁰⁸ There is an apparent conflict between the two provisions and rule incorporated in Section 13 is likely to cause

²⁰⁵ Supra at 38

²⁰⁶ (1994) 4 SCC 711

²⁰⁷ ITA, 2000

²⁰⁸ Sec 11 OF Consumer Protection Act, 1986

inconvenience to the consumers especially where the opposite party has principal office outside India - an inconvenience which the Consumer Protection (Amendment) Act, 1993 removed by incorporating the present rule.

The above mentioned possible conflict could have been avoided if the expression, "the place of business is that which has the closest relationship to the underlying transactions," incorporated in the Model Law, had been adopted in the Information Technology Act along with the expression "principal place of business", presently provided.

It has been made abundantly clear by the judicial gloss that the formation of the contract is a part of the cause of action and where a suit is for damages for breach of the contract, it can lie at any place where the contract was made, notwithstanding that the place where the contract was to be performed and the place where the breach alleged in the plaint occurred, are both outside such jurisdiction.²⁰⁹ The place where a contract is concluded will be either the place where acceptance is posted or where acceptance is received depending upon the medium of communication used. However, as already discussed, in case of electronic communications used for executing contracts, place of business or place of residence, as the case may be, will be deemed as a place of contract formation, notwithstanding that the contract may actually be concluded at a different place.

After the initial disagreement expressed by the courts regarding the offer forming part of the cause of action, the controversy has been now set at rest by the Indian Supreme Court in *A.B.C Laminant Pvt. Ltd. v. A.P Agencies, Salem*²¹⁰ wherein it was laid down that making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation to the offerer results in a contract and hence a suit can be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else.

²⁰⁹ *A.B.C Laminant Pvt. Ltd. v. A.P Agencies, Salem*, AIR 1989 SC 1239

²¹⁰ *Ibid*

The next issue is whether access to a web site gives rise to a cause of action and consequent jurisdiction to the court within the local limits of whose jurisdiction web site has been accessed? There is near consensus to regard information available on the Internet as an invitation to treat unless contrary intention may be inferred.²¹¹ The courts, as stated above, have declined to consider offer as a part of the cause of action. Invitation to treat is much less in degree than the offer. If offer does not give rise to the cause of action, the question of invitation to treat forming part of the cause of action does not arise. Thus, whether information on web site is construed offer or invitation to treat, mere access to web site cannot give rise to the cause of action. However, it should be differentiated from a situation where information itself gives rise to the cause of action. For instance, in case of false or misleading advertisement under the Consumer Protection Act, 1986 or defamation under law of torts.²¹²

Moreover, Section 20 of Civil Procedure Code does not talk about the due process or minimum contact principles. So, under this theory mere web site access could be sufficient for a court to assume jurisdiction. The moment the plaintiff shows that the Web site is accessible from India; he can show that a part of the cause of action has arisen here because Indian viewers are likely to view the Web site.

But we find that the courts in India are, to a large extent, looking at something beyond mere access of a web site. In *Tata Sons v. GhassanYacoub and others*²¹³, the defendant, GhassanYacoub, was based in the U.S.A and had registered the domain name *Tatagroup.com*. The defendant had registered the domain name with Network solutions Incorporated, which is a registrar based in the U.S.A. The Delhi High Court did not go extensively into the question of jurisdiction but made a statement to the effect that the internet has transactional ramifications, which means that it potentially impacts almost every jurisdiction where it is accessible and one has to look where the impact is felt. Based on this reasoning the High Court of Delhi granted an *ex pane* interim injunction against the defendants restraining them from using and transferring the infringing domain name

²¹¹ *Supra* at 38

²¹² *ibid*

²¹³ 2004 (29) PTC: 522

Tatagroup.com. The court accepted the contention put forth by the plaintiff that in matters concerning internet communications, the effect of the impugned transaction in India is an important factor for determining jurisdiction. The above principle was also upheld in the case of Himalyan Drug Company v. Sumit.²¹⁴

TRANSNATIONAL PERSPECTIVE

Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility and legitimacy of laws based on geographical boundaries. The Internet ignores international boundaries, and 'place' has little meaning in the networked world. The Internet enables transactions between people who do not know, and in many cases cannot know, each other's physical location. The system is indifferent to the physical location of those computers, and there is no necessary connection between an Internet address and a physical jurisdiction. It can be very problematic to identify and localize the parties to the transaction and to determine where they are resident. It can be equally difficult to identify all the computers used in a communication over the Internet. In transactions over the internet, one or more of the parties involved including consumers, vendors, businesses, service and content providers may be and often are located in different countries with their own legal systems. The same is the case with the assets of businesses and other processes used in transacting over the internet like, technology systems and computer servers. This leads to uncertainties and ambiguities as to where the impugned activities are taking place and where the consequences are being felt. These activities themselves can have intended and unintended consequences around the world, which results in uncertainties when a dispute arises as to the location of the dispute, determining the applicable law, and the manner of pursuing enforcement.²¹⁵

Jurisdictional issue raises one more risk i.e. of unanticipated foreign law suits. Foreign here means a different State or country. Although the laws regulating e-commerce vary, the

²¹⁴ 126 (2006) DLT 23

²¹⁵ Supra at 194

general opinion of the courts imply that companies engaged in online activities or advertising may have to defend lawsuits in different jurisdiction if those activities violate the local laws. Consider the case of an Architect, working out of Paris, employing an engineering consulting firm, working out of Geneva for the design of a specialty component of a project in Michigan. The architect and consulting firm engage in an e-contract and they never physically meet; collaboration and submission of work is completed online. During construction it was discovered that the consulting firms design were faulty and did not meet the Michigan code. The architect deducts the value of the change from the firms pay, the firm is opposed to this and stops working; a dispute arises. The question is: which state law has Jurisdiction over this dispute? The issue of Jurisdiction in this example may be even more challenging if the error was discovered after the construction was complete and the different states involved have differing statutes of limitations and/or statutes of repose. Enabled by online project collaboration systems and ecommerce tools the probability of the risk is on the rise²¹⁶.

The whole nuisance with internet jurisdiction is the presence of multiple parties in different parts of the world who only have a virtual nexus between them. 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 context of the internet, both these are difficult to establish with any conviction. 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 website. 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 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

²¹⁶ Supra at 181

reach out beyond the court's geographic boundaries to haul a defendant into its court for conduct in "cyber space"?

Can a person domiciled in India file a suit against a non resident foreigner on the basis of a cause of action which arises within India? and can a person domiciled in India file a suit against a non resident foreigner who is carrying on business through his agent in India on a cause of action that arises outside India?

As regards the first question, the Allahabad High Court has in *Gaekwar Baroda State Rly v. Habibullah*²¹⁷ made it clear that the language of Section 20 of the Civil Procedure Code is wide and flexible enough to cover the cases of non resident foreigners whose cause of action arose within India and there is nothing which makes an exception as regards them. However, the court cautioned that the sanctity of the decision in a foreign country should not be confused with the actual legal position.

The apprehension of the court regarding the enforcement of the decision in another country proved true in *Bachchan v. India Abroad Publications Incorporated*,²¹⁸ where an Indian National got a favourable judgment in the United Kingdom but could not get judgment enforced in New York. The court held that the United Kingdom law applicable to the case is not in harmony with United States law and therefore, the decision cannot be recognised as enforceable in the United States. This issue of enforcement of the court decision in a jurisdiction other than that where the decision was pronounced is likely to be faced by the courts frequently in e-commerce disputes.

The second issue was raised before the Privy Council in *Annameli v. Murugesu*,²¹⁹ but was left undecided. This issue has become much important now than it was before the birth of Multinational Corporations and the present economic liberalization undertaken by the Government of India. The solution to this problem can be found by giving wide interpretation to the expression "carries on business" used in Section 20 of the Civil Procedure Code so as to include "any business carried on by himself or through an agent".

²¹⁷ AIR 1934 All 340

²¹⁸ 585 NYS 2d 661

²¹⁹ LLR 26 Mad. 544

This interpretation is supported by the fact the expression "carries on business" has been used in addition to the expression "personally works for gain." The two expressions are quite distinct from each other and one of the distinctions is the physical involvement of the person concerned. Thus, the person who is not carrying on business in India personally but through an agent or any other instrumentality may be considered as carrying on business for the purposes of the section.

Businesses may also face legal action, not in their own country but in another country where its web site has been accessed. In *R. v. Weddon*, the defendant was found to have violated U.K.'s Obscene Publication Act by supplying pornographic material for sale in UK through various web sites, although the web sites, on which obscene material was loaded, were based in California. The court ruled that since the obscene material could be accessed or down loaded in the U.K., its publication was deemed to have taken place in the U.K. notwithstanding that it was hosted on a web site outside the UK.

The determining factors to exercise Jurisdiction in cases which involve out of State defendants vary in each country. In India, as discussed already, place of business or residence or cause of action forms the basis of exercising Jurisdiction.

Active web sites facilitate establishing of contractual relationships and acts as a "Window Shop" for the defendant to do actual business on the Internet. Courts exercise personal Jurisdiction where a defendant is found to be operating an active web site on the ground that he purposefully avied the Jurisdiction of the forum state as he intentionally reached beyond his own state to engage in business with residents of the Forum State.

Interactive web sites enable users to exchange information with the host computer. The exercise of personal Jurisdiction depends upon the level of interactivity and the commercial nature of the exchange of information. The courts have failed to lay down any objective criteria with the result there has been no unanimity on the standard to determine the required level of interactivity and commercial nature of the information on the interactive web site.

Passive web sites only make information available and nothing else. They cannot form a ground for the exercise of the Jurisdiction in a forum state where it has been accessed, unless additional business contacts of the defendant within the forum state related to the issue in question have been shown. In the opinion of the courts, it does not give rise to minimum contacts or "purposeful availment." Unless the information available on the web site itself gives a cause of action, courts have generally refused to exercise personal jurisdiction in case of passive website.

The issue of Jurisdiction, applicable law and enforcement of the judgments are not confined to only national boundaries. The problems raised are global in nature and need global resolution. An international treaty providing homogeneous rules for governing e-commerce, between parties of different countries, on the lines of the instruments already in vogue in Europe, with necessary changes, can provide solution to the present uncertainty. E-Commerce is likely to be stifled if the legal environment in which it is to operate is uncertain. The legal position of the businesses using web site for executing contract is at present precarious. However, they have various alternatives available to safeguard their interests which include:

- (a) Choice of forum and law: The transactions in which an order is placed online and the goods or services are physically delivered offline to the customer may be governed by the existing rules of Private International Law. However, for transactions that are performed completely online i.e. the order is placed online and the delivery is also made online, the place of performance may be difficult to ascertain. Would it coincide with the location of the purchaser's computer e.g. software that is downloaded to the customer's computer; or the seller's system e.g. the online purchase of securities, which takes place through computing processes on the seller's server? To avoid these potential issues, online agreements should, whenever possible, designate the place where performance under the contract may be deemed to have taken place, or better, specify the court or courts which the parties agree will have jurisdiction if a dispute arises as argued by the parties.

Disputes relating to contract can be of two types. One, in which a provision has been incorporated as to jurisdiction of a particular court and the application of particular laws in case a dispute arises; second, is the one where no such clause forms the part of the contract. Courts generally try to look into what was the choice of the parties, what have the parties put into the contract, and which courts did they intend should cover their transactions. If the contract says that the courts at New Delhi should have exclusive jurisdiction in this regard, then only New Delhi courts will ordinarily have jurisdiction. The general regulatory principle, as codified in relevant National and International instruments, is to respect the choice of law made by the parties.

In India parties are free to make choice of forum by making a contract to that effect where two or more courts have Jurisdiction and that contract will not be hit by Section 28 of the Indian Contract Act, 1872 which provides that through a contract one cannot divest any party of his rights or remedies that he can get in a normal court or tribunal. If a contract contains such a clause, the Act seems to suggest that under section 28 any such clause would violate the Contract Act and therefore that clause would not be recognised. But here it should be noted that Section 28 makes void only those agreements which "absolutely" restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. It has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried²²⁰. It should be further noted that, it is not open to the parties to confer Jurisdiction on a court, by agreement, which such court does not possess under the Civil Procedure Code.²²¹ The parties however, do not have choice in case of applicable law because the Central Acts are almost applicable throughout India. Section 28 would not militate against such term nor would it make the term void.²²² Thus, where in case of a global tender the work under contract was to be performed by a foreign company at Baroda in India and there was therefore a specific term that the contract would be governed by Indian Laws and that Indian Courts shall

²²⁰ Supra at 194

²²¹ Hakkam Singh vs Gammon India Ltd. (1971) 3SCR 316

²²² Supra at 194

have jurisdiction to hear and determine all actions and proceedings arising out of the contract. It was held that in absence of any special circumstance like fraud, coercion etc. which go to vitiate a contract, the term was binding on parties.

- (b) Conspicuous Notice: Businesses using web site can give notice conspicuously at the beginning of the web page restricting the countries to which web site is directed or indicating the passive or local nature of the web site.
- (c) To provide standard terms and conditions for each country, a task that is nearly impossible.
- (d) To use sophisticated filtering techniques to make web access possible only to the limited countries. This technique will be acceptable to courts only when it successfully achieves the desired purpose.

Legal issues relating to the internet and ecommerce, in most cases hinge precariously on the issue of the jurisdiction of a particular court with respect to the particular case in question. Jurisdiction is by far the most problematic and vexed legal issue concerning the internet. It is far from clear to what extent the mere fact of having a website will subject the site owner to the laws of a given country. This is an area of law which is likely to develop substantially and one which will affect the utility of the internet as a business tool or forum. From a website owner point of view, the key issue will be whether or not the contents of a particular web page will, unwittingly mean that they are subject to foreign laws or in particular instances where the Indian web site owner has offshore business units with a web site accessible from India, subject to Indian Law and regulations. At present each case must be considered on its own facts and in many instances the answer will depend on the laws in force in the country in which the question is being raised. At the national level, the disputes are being settled through case-by -case determinations of the courts. The courts, however, face myriad, difficult factual circumstances, and must determine whether the exercise of

jurisdiction is proper in situations where the relevant 'contacts' with the forum have been through the network while the defending party is located in another state or country.²²³

7.4) EVIDENTIARY VALUE OF E-CONTRACTS:

It is pertinent to contextualize at this juncture that evidence recorded or stored by availing the electronic gadgets is given the evidentiary status. For instance: the voice recorded with the help of a tape recorder. Now -a-days, the digital voice recorder, digital cameras, digital video cameras, video conferencing are adding a new dimension to the evidentiary regime. Justice Gururajan, the Karnataka High Court judge has held in a civil suit that video conferencing evidence is valid. The emergence of information and communication witnessed sea change by elevating the status of the evidence recorded, generated or stored electronically from the secondary to primary evidential status. The shift in the paradigm owes to the efforts of the working group of the UNCITRAL Model law on electronic commerce and assigning of the legal recognition to e-record or data message.

The evidentiary value of e-contracts can be well understood in the light of the following sections of Indian Evidence Act. Sections 85A, 85B, 88A, 90A and 85C deal with the presumptions as to electronic records, whereas, Section 65B relates to the admissibility of electronic record²²⁴. The above mentioned sections can be explained as follows:

Section 85a:

As regards presumption to electronic agreements, this section is incorporated. It says that every electronic record of the nature of an agreement is concluded as soon as a digital signature is affixed to the record. Section 85A has been added in order to ensure the validity of e-contracts. But there are some restrictions as regards the presumptive value. The presumption is only valid to electronic records, electronic records that are five years old and

²²³ Ibid

²²⁴ Indian Evidence Act, 1872

electronic messages that fall within the ambit of Section 85B, Section 88A and Section 90A of Indian Evidence Act.

Section 85b:

Section 85B provides that the court shall presume the fact that the record in question has not been put to any kind of alteration, in case contrary has not been proved. The secure status of the record may be demanded till a specific time. The digital signature should also be presumed to have been affixed with an intention of signing and approving the electronic record. Further it has been provided that the section should not be misread so as to create any presumption relating to the integrity or authenticity of the electronic record or digital signature in question.

Section 88a:

“The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such message was sent”. This section is self-explanatory as it purports to follow the basic rules of a valid hard-copy agreement. The words “may presume” authorize the court to use its discretionary power as regards presumption. Sections 85A and 85B contained the words “shall presume” which expressly excluded this discretionary power of the court.

Section 90a:

In case of an electronic record being five years old, if proved to be in proper custody, the court may presume that the digital signature was affixed so as to authenticate the validity of that agreement. The digital signature can also be affixed by any person authorized to do so. For the purpose of this section, electronic records are said to be in proper custody if they are in the custody of the person with whom they naturally be. An exception can be effected in case circumstances of a particular case render its origin probable.

Section 85c:

As far as a digital signature certificate is concerned, the court shall presume that the information listed in the certificate is true and correct. Inclusion of the words “shall presume” again relates to the expressed exclusion of the discretionary power of the court.

Section 65b:

Section 65B talks about admissibility of electronic records. It says that any information contained in an electronic record which is printed on a paper or stored/recorded/copied on optical/magnetic media produced by a computer shall be deemed to be a document and is admissible as evidence in any proceeding without further proof of the original, in case the following conditions are satisfied:

The computer output was produced during the period over which the computer was used regularly to store or process information by a person having lawful control over the use of the computer. In case a combination of computers, different computers or different combinations of computers are used over that period, all the computers used are deemed to be one single computer

The information contained should have been regularly fed into the computer, during that period, in the ordinary course of activities

The computer was operating properly during that period and if not, it would not have affected the accuracy of data entered.

A certificate issued is also admissible if it contains a statement which:

Identifies the electronic record containing the statement

Gives information about the particulars of the computer involved in the production of record.

The certificate issued should be signed by a person officially responsible for the use of that device in relation to the relevant activity. The information fed into the computer should be in appropriate form as well as by appropriate device.

CHAPTER 8

CONCLUSION AND SUGGESTIONS

8.1) CONCLUSION:

As rightly said by Koffi Annan-

“A technological revolution is transforming society in a profound way, if harnessed and directed properly information and communication technologies have the potential to improve all aspects of our social, economical and cultural life. It can serve as an engine for development in the 21st century and as an effective instrument to help us achieve all the goals of millennium declaration.”

Internet has a great impact on commerce and has led to the evolution of concept of Ecommerce. A country like India, with its hugely skilled labour force, has exceptional opportunities to get benefit from Ecommerce. There is a growing awareness among the business community in India about the opportunities offered by Ecommerce. Major Indian portal sites have also shifted towards e commerce. With stock exchanges coming online the time for true ecommerce in India has finally arrived.

Electronic commerce (Ecommerce) as part of the information technology revolution became widely used in the world trade in general and Indian economy in particular. As a symbol of globalization, e-commerce represents the cutting edge of success in this digital age and it has changed and is still changing the way business is conducted around the world. The commercialization of the Internet has driven electronic commerce to become one of the most capable channels for inter-organizational business processes. Consequently, Internet growth has led to a host of new developments, such as decreased margins for companies as consumers turn more and more to the internet to buy goods and demand the best prices¹. The internet augments the traditional businesses to be transformed because ‘incumbents (in markets) and large firms do not have the advantage ‘just by virtue of being there first or by

being of big'. The implication of perfectly competitive market as the world will observe is that market will produce an efficient allocation of resources. Internet has accurately been an effective instrument in changing the straightforward ways of doing business.

Advantages of E-commerce:

Some of the advantages of ecommerce are;

- **24 hours a day 7 days a week availability:**

Keeping a retail establishment open for 24 hours a day 7 days a week, can be very costly. There are certain problems like the variable cost, the cost of labour, the high turnover rates for employees, security and diminishing returns. E-commerce is a great way to get the business of these off-peak shoppers. For a very small amount of ,money the company can have its cyber shop open 24/7

- **Savings and customer service staff:**

In the past when the customers had questions about the product they had to call the company. In a company selling variety of products, it can be difficult not impossible for customer service staff to know every detail about every product the company sells. To best serve the customers a detailed description of each product can be put on a web page with details like price, dimensions, test results, pictures and even virtual reality files that let the customers look in the object in three dimensions.

- **Saving on telephone operators and sales people:**

Every customer who makes a purchase online is pne less customer using the company's telephone operators and sale persons. The most customers use Ecommerce to buy products, the less need for telephone operators and sales people. While doing away with these employees entirely is not practical, a reduction in their number can reduce variable selling and administrative expenses.

- **Instant updates of catalogues and prices :**

When prices change frequently printed catalogue can be inaccurate before they reach the customers. This problem can be eliminated by Ecommerce. When a price change is needed, a simple change of the web page will correct it. This saves money on catalogue printing with printed catalogue, to, if a product is added to or taken out of inventory the business has to wait for the next catalogue printing before customers will know about it. With web based commerce, products can instantly be added or deleted.

- **Product targeting:**

Using internet based purchasing inventory control can be made simple. When a shipment is received, the quantity is entered into a computer data base. As customers order the products and the products are shipped, the computer can track down how much of the product are in stock. It not only warns about inventory but also gives a hour by hour picture of what is moving and what isn't.

- **Worldwide visibility:**

With the internet reaching all corners of the world it is economically possible for even the smallest business to engage in global trade. Small companies can advertise globally at a very nominal cost.

- **Increase sales and decreased cost:**

A firm can use Ecommerce to reach narrow market segments that are widely scattered geographically. The internet and the web are particularly useful in creating virtual communities that become idle target markets.

- **Creating opportunities for the buyers:**

Just as Ecommerce increases the sales opportunities for the seller it increases purchasing opportunities for the buyer also. Buyers can use Ecommerce in their

purchasing processes to identify new suppliers and business partners. Ecommerce provides buyers with a wider range of choices than the traditional commerce, because they can consider many different product and services from as wider variety of sellers.

- **An attractive option for the physically challenged:**

Online shopping not only appeals to those who actually shop, but also to those who will not otherwise be able to shop easily like the ones who have mobility challenge.

- **Reduction in distribution cost:**

It establishes direct link between the customers and the suppliers. Commission paid to middlemen is done away with. Moreover the cost of documentation, transportation and cost of collection from the customers are negligible.

- **Time saving:**

A transaction can be completed in few seconds without physically reaching out to the customers. Moreover, there are no office hours in cases of Ecommerce transactions. A customer also may need not visit the place of the supplier. He/ she can make transactions sitting in his/ her home or office.

- **Building customers relationship:**

For the success of any business, building long term relationship with the customers is a must. Internet is a good medium to build this relationship. Regular feedback from the customers can easily be obtained with the help of e-mail. The after sales service becomes easy through the internet

- **Other benefits:**

Electronic payments of tax refunds public retirement and welfare support cost less to issue and arrive securely and quickly when transmitted via the internet. Furthermore, electronic payments can be easier to audit and monitor than payments made by cheque,

which can help to protect against fraud and theft losses.

E-commerce provides multiple benefits to the consumers in form of availability of goods at lower cost, wider choice and saves time. People can buy goods with a click of mouse button without moving out of their house or office. Similarly online services such as banking, ticketing (including airlines, bus, railways), bill payments, hotel booking etc. have been of tremendous benefit for the customers. Online businesses like financial services, travel, entertainment, and groceries are all likely to grow. E-commerce evolved in various means of relationship within the business processes. It can be in the form of electronic advertising, electronic payment system, electronic marketing, electronic customer support service and electronic order and delivery.

Taking into consideration all the above advantages of E-contracts it can be concluded that they are far more beneficial than traditional contracts and definitely plays a very important role in today's world which is absolutely fast moving, as it is the need of the hour. **Hence the hypothesis framed is proved.**

8.2) SUGGESTIONS:

The conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. Some of the infrastructural barriers responsible for slow growth of ecommerce in India are as follows. Some of these even present new business opportunities.

A. Payment Collection: When get paid by net banking one has to end up giving a significant share of revenue (4% or more) even with a business of thin margin. This effectively means y parting away with almost half of profits. Fraudulent charges, charge backs etc. all become merchant's responsibility and hence to be accounted for in the business model.

B. Logistics: You have to deliver the product, safe and secure, in the hands of the right guy in right time frame. Regular post doesn't offer an acceptable service level;

couriers have high charges and limited reach. Initially, you might have to take insurance for high value shipped articles increasing the cost.

C. Vendor Management: However advanced system may be, vendor will have to come down and deal in an inefficient system for inventory management. This will slow down drastically. Most of them won't carry any digital data for their products. No nice looking photographs, no digital data sheet, no mechanism to check for daily prices, availability to keep your site updated.

D. Taxation: Octroi, entry tax, VAT and lots of state specific forms which accompany them. This can be confusing at times with lots of exceptions and special rules.

E. Limited Internet access among customers and SMEs.

F. Poor telecom and infrastructure for reliable connectivity.

G. Multiple gaps in the current legal and regulatory framework.

H. Multiple issues of trust and lack of payment gateways: privacy of personal and business data connected over the Internet not assured; security and confidentiality of data not in place.

Securing payment and delivery services:

To make a successful e-commerce transaction both the payment and delivery services must be made efficient. There has been a rise in the number of companies' taking up e-commerce in the recent past. Major Indian portal sites have also shifted towards e-commerce instead of depending on advertising revenue. Many sites are now selling a diverse range of products and services from flowers, greeting cards, and movie tickets to groceries, electronic gadgets, and computers. With stock exchanges coming online the time for true e-commerce in India has finally arrived. On the negative side, there are many challenges faced by e-commerce sites in India. The relatively small credit card population and lack of uniform credit agencies create a variety of payment challenges unknown in India. Delivery of goods to consumer by couriers and postal services is not very reliable in smaller cities, towns and rural areas. However, many Indian Banks have put the Internet banking facilities. The speed post and

courier system has also improved tremendously in recent years. Modern computer technology like secured socket layer (SSL) helps to protect against payment fraud, and to share information with suppliers and business partners. With further improvement in payment and delivery system it is expected that India will soon become a major player in the e-commerce market.

Educating and bringing awareness amongst lawyers, Judiciary and the general public:

Lawyers need to be trained appropriately about relevant issues relating to e-contracts and the technical nuances of the law pertaining to them. Judges also need to be duly trained about the various issues pertaining to e-contracts. People in the lower and middle level Judiciary are almost completely unaware of the various nuances regarding ecommerce laws. This area needs to be seriously and urgently addressed. Likewise the industry and public at large have also been generally unaware of the provisions and remedies of e-contracts stipulated under the law. Therefore, it is necessary that the end users, lawyers and the Judges be properly trained. This can be done by conducting courses in Cyber laws, establishing community information centres, which may provide broadband, internet access to people in the underdeveloped and under privileged area such as in the North-East and hill area states.

Use of local language:

Since the contents of e-contracts are mostly in English and other foreign languages, a large portion of the content is not accessible to a significant majority of the Indian population. While one hand the local language content and applications need to be developed on the other hand, voice applications on internet accessible through a normal touch tone telephone need to be developed.

Pro-active measures for suppliers trading over the internet:

The pro- active measure that the suppliers can use to ease the burden of consumers protection can be summarised as follows:

- Supplier should obtain complete consumer detail and verify them before contract.
- Provision should be made for upfront payment or at least a payment of deposit before the supplier performs his part of contract.
- An insurance covering the risk of online contracting protecting the suppliers against claim for damages must be made.
- A stipulating clause in the contract must be made stating that the refund resulting from cancellation will be made only after the goods have been returned or used of the services have been stopped.
- Supplier should perform within 30 days of the order, unless the party agrees on a later date for performance otherwise the supplier should extend the date of performance in their standard terms and conditions, if the envisage their performance may be delayed.
- Geographical limitation and limited stock clause should be incorporated in the contract

Acknowledgment of data messages:

A contract is formed to exchange of offers and acceptance. In case of e-contracts also offer and acceptance are involved but they are in the form of data messages. This offer and acceptance poses a threat as to the communication of the data message has to the time of conclusion of the contract. Therefore in case of electronic transaction a third step needs to be included i.e. confirmation.

Print outs should be kept:

E-contracts are formed through exchange of data messages communicate over internet wherein generally e-contracts are not reduced to a written document. Consumers therefore entering into e-contracts should take a print out of the same for any future reference and produce it as evidence

As business will move into the next millennium, ecommerce will become a multi trillion dollar economy, more operations and traditional business, software platform will become integrated with the web platform. Ecommerce may be the way that the international business is conducted. Therefore e-contracts conducted over the internet should not be treated any differently from consumer contracts concluded by traditional means, otherwise, an unfair competitive advantage would be awarded to online businesses.

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LIST OF ABBREVIATIONS

AC	-	Appeal Cases
AIR	-	All India Report
All	-	Allahabad
Bom	-	Bombay
Cal	-	Calcutta
Del	-	Delhi
Ibid	-	Ibidem: in the same place
ILR	-	Indian Law Report
IPC	-	Indian Penal Code (1860)
Ker	-	Kerala
Ltd	-	Limited
Mad	-	Madras
Ori	-	Orissa
SC	-	Supreme Court
SCC	-	Supreme Court Cases
Supra	-	Earlier cited
Vol	-	Volume
Vs	-	Verses
Sec	-	Section
CPC	-	Civil Procedure Code
ITA	-	Information Technology Act
RBI	-	Reserve Bank of India
NRI	-	Non Resident Indian
UP	-	Uttar Pradesh
Sch	-	Schedule
Co.	-	Company
Ker	-	Kerala

Mys	-	Mysore
J &K	-	Jammu and Kashmir
Hyd	-	Hyderabad
ICA	-	Indian Contract Act
Art	-	article
For eg	-	For example
E-contracts	-	Electronic contracts
E-commerce	-	Electronic commerce
E-mail	-	Electronic mail
VAN	-	Value added networks
TPA	-	Trading Partner Agreement
EDI	-	Electronic Data Interchange
E tickets	-	Electronic tickets
PIN	-	Personal Identity Number
IM	-	Instant Messages
ISP	-	Internet Service Provider
MUA	-	Mail User Agent
MDA	-	Mail Delivery Agent
PKI	-	Public Key Infrastructure
www	-	World Wide Web
UTI	-	Unit Trust of India
W3C	-	Worldwide Web Consortium

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