

ONLINE CONTRACT IN INDIA LEGAL ISSUES AND CHALLENGES

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INTRODUCTION

In India, its programme like Digital India, e-contracts are very commonly used and accepted in our daily lives nowadays. The term “contract” is defined in sec 2(h) of the Indian Contract Act, 1872 as “an agreement enforceable by law is a contract”. An electronic or digital contract is an agreement “drafted” and “signed” in an electronic form. An electronic agreement can be drafted in a similar manner in which a normal hard copy agreement is drafted, but the difference is that it is signed or acknowledged digitally by the parties, even without seeing each other.

LEGAL ISSUES & CHALLENGES IN INDIA:

E- Contracts can be categorised into three types:

1. Browse Wrap Contract

This Contract is considered as a browse Wrap Contract in which parties are bound by the use of the website, such as using Flipkart, amazon etc and are in the form of terms of use, a user agreement or terms of service, which can be used as the links at the corner or bottom of the portal.

2. Shrink Wrap Contract:

Shrink-wrap agreements are those that are accepted by a user when software is installed from a CD-ROM or any app is installed on a mobile device.

3. Click Wrap Contracts:

These contracts require the user to give their consent to the terms and conditions, which are known as the end-user agreement and govern the licensed usage of the software, by clicking the “ok” or “I agree” button. There are certain kinds of check which ensures that the terms of the agreement are binding upon the contracting parties.

Case: – Rudder v. Microsoft Corporation:-

The plaintiffs commenced a class action lawsuit alleging breach by Microsoft of certain payment-related terms of Microsoft’s MSN Member Agreement. The Member Agreement was an online “click-wrap” agreement that required each prospective member to scroll down through several pages of terms and conditions and then indicate their agreement to the terms by clicking an “I Agree” button before being provided with access to the services. Although the plaintiffs wished to rely on several terms of the Member Agreement, in bringing the action, the plaintiffs disputed the choice of law and forum selection clauses that the defendant Microsoft sought to enforce. The plaintiffs asserted that because not all of the Member Agreement was visible at one time, they did not receive adequate notice of such provisions and that, as a consequence, they were not enforceable. The court determined that the Member Agreement was enforceable, stating that scrolling through several pages was akin to having to turn through several pages of a multi-page paper contract, and to not uphold the agreement “would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium”

EXECUTION OF E – CONTRACTS:

E-Contracts are provided by various laws such as the Information Technology Act, 2000 and the Indian Evidence Act, 1872, E-Commerce Act, 1998, etc. The provisions in the I.T. Act mention the attribution, acknowledgement and dispatch of electronic records and secure electronic procedures. In the Evidence Act, it is mentioned regarding the procedure to be followed by the Judiciary systems.

LAWS GOVERNING E-CONTRACT:-

Section 65A & 65B of the Indian Evidence Act, Section (11) of the Information Technology Act, 2000

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.

Section(12) of the Information Technology Act, 2000

Acknowledgement of receipt-

(1) Where the originator has not agreed with the addressee that the acknowledgement of receipt of an electronic record be given in a particular form or by a particular method, an acknowledgement may be given by—

- (a) any communication by the addressee, automated or otherwise; or
- (b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(2) Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by him, then, unless acknowledgement has been so received, the electronic record shall be deemed to have never been sent by the originator.

(3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

Section (13) of the Information Technology Act:-

Time and place of despatch and receipt of electronic record.-

(1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:—

- (a) if the addressee has designated a computer resource for the purpose of receiving electronic records,—
- (i) Receipt occurs at the time when the electronic record enters the designated Computer resource; or
- (ii) If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;
- (b) If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.
- (3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.
- (4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).
- (5) For this section, —
- (a) If the originator or the addressee has more than one place of business, the principal place of business shall be the place of business.
- (b) If the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
- (c) “usual place of residence”, in relation to a body corporate, means the place where it is registered.

Digital signature:-

When a contract is entered into through the mode of computer internet, it is necessary for the enforcement of such a contract to establish the genuineness of the transaction to prove that the proposal emanated from the originator and acceptance was signified by the acceptor from the appropriate persons. The signature of the parties is taken into consideration. It is a personalised thumbprint, and it is the encryption of an electronic document using a private key. It performs three different functions to ensure the security of the system and genuineness of the transaction:-

1. Data integrity-A digital signature discloses if there has been any data tampering of the file or the message.
2. Data authentication-A digital signature helps in verifying the identity of the person signing the message.
3. No chance of disown-No message signed and sent could be disowned by the receiver.

Case:- Mehta v J Pereira Fernandes

S.A. Facts of the case:-

There was an appeal against a District Court judgment which awarded the plaintiff company JPF a sum of nearly £25,000. The amount was awarded because the defendant Mehta had personally guaranteed the amount. Mehta appealed because the alleged guarantee was not enforceable since it did not comply with the requirements of the Statute of Frauds.

The alleged guarantee arose from an email sent by Mehta to JPF’s solicitors. The email was in the following terms:

“I would be grateful if you could kindly consider the following. If the hearing of the Petition

can be adjourned for a period of 7 days, subject to the following:

A Personal Guarantee to be given for £25,000 in favour of your client – together with a list of my personal assets provided to you by my solicitor.”

The email was unsigned, but the headers indicated that it was from Nelmehta@aol.com. This email address also appeared on other signed emails sent to JPF’s solicitors. Mehta acknowledged that the email had been sent, with his authority, by an employee.

JPF’s solicitors telephoned Mr Mehta and accepted the proposal. Although they also sent him a written agreement, this was never signed by Mr Mehta.

Judgement:-

The court of chancery held that the offer sent through an unsigned e-mail communication is not sufficient, and the e-mail address of the defendant cannot be deemed as his signature.

Legal issues involved in e-contracts

1. How can an electronic record be attributed to the originator?

Solution:-

According to sec 11, the electronic record can be attributed to the originator where:

- It could be determined that the electronic record or electronic data is sent by the originator himself.
- It could be determined that the electronic record has been sent by a person who has the authority to act on behalf of the originator.
- An electronic record has been sent by an information system programmed by or on behalf of the originator.

2. How to determine the acknowledgement of an electronic record when the originator has not agreed with the addressee regarding acknowledgement of receipt?

Solution:-

According to sec (12)(i), the acknowledgement of the electronic record when the originator has not agreed with the addressee regarding acknowledgement of receipt in a particular form can be done in the following manner:

- Any communication by the addressee to the originator, either electronically or otherwise. OR
- Through any conduct sufficient to communicate to the originator that the electronic record has been received by the addressee.

Case law: The United States case *Corinthian Pharmaceutical Systems Inc. v. Lederle Laboratories* serves as a guide. In that case, an “order tracking number” issued by an automated telephone ordering system was found to be merely an acknowledgement of the order, rather than an acceptance which formed a binding contract. Applying the same reasoning to common electronic commerce practices, this could mean that a computer-generated message acknowledging receipt of an electronic order may not be sufficient to create a binding contract. The purpose of the message may be solely to confirm receipt of the order. It does not necessarily signify acceptance.

3. How to determine the time and place of dispatch of an electronic record?

Solution:- Section 13 deals with the time and place of dispatch of electronic records, as if the originator or addressee has or has not agreed, the dispatch of an electronic record is complete when it enters the computer resource of the addressee, as to outside the control of the originator.

- According to section 13 (2), the time of receipt of an electronic record can be determined in the following ways:-
 - (a) If the addressee has designated a computer resource for the purpose of receiving electronic records.

(i) Receipt occurs at the time when the electronic record enters the designated Computer resource.

(ii) If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

- According to section 13(4) :-
 - the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).
- According to section 13(5) :-

(a) If the originator or the addressee has more than one place of business, the principal place of business shall be the place of business.

(b) If the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business.

(c) “usual place of residence”, in relation to a body corporate, means the place where it is registered.

(d)

CASE: – P.R. Transport Agency vs. Union of India & others. Background of the case

Bharat Coking Coal Ltd (BCC) held an e-auction for coal in different lots. P.R. Transport Agency’s (PRTA) bid was accepted for 4000 metric tons of coal from Dohari Colliery. The acceptance letter was issued on 19th July 2005 by email to PRTA’s email address. Acting upon this acceptance, PRTA deposited the full amount of Rs. 81.12 lakh through a cheque in favour of BCC. This cheque was accepted and encashed by BCC. BCC did not deliver the coal to PRTA. Instead, it emailed PRTA saying that the sale as well as the e-auction in favour of PRTA stood cancelled “due to some technical and unavoidable reasons”. The only reason for this cancellation was that there was some other person whose bid for the same coal was slightly higher than that of PRTA. Due to some flaw in the computer or its programme or the feeding of data, the higher bid had not been considered earlier. This communication was challenged by PRTA in the High Court of Allahabad.

Issues raised by PRTA:-

1. The communication of the acceptance of the tender was received by the petitioner by e-mail at Chandauli (U.P.). Hence, the contract (from which the dispute arose) was completed at Chandauli (U.P). The completion of the contract is a part of the “cause

of action”.

2. The place where the contract was completed by receipt of communication of acceptance is a place where ‘part of the cause of action’ arises.

Points considered by the court

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 the 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, “...an 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 a place of business. In this case, it is Varanasi and Chandauli (both in U.P.)

Decision of the court

1. The acceptance was received by PRTA at Chandauli /Varanasi. The contract became complete by receipt of such acceptance.
2. Both 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.
3. **What if the acceptance is not communicated to the offerer?**

Solution:

According to Section(12)

:-Acknowledgement of receipt-

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(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

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acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

Case: – J.K. Enterprises V. State of Madhya Pradesh and Ors.

According to the plaintiff, he made an offer to the defendant for the purchase of Tendu Leave of lot No. 1095 at the rate of Rs. 30/- per standard bag. It is the stand of the plaintiff that he was never informed that his offer had been accepted.

He made the offer on 11-1-1993 and when he did not get the acceptance till 3-3-1993, and thus by a fax message sent on 3-3-1993 he withdrew his offer.

In the return filed on behalf of the defendant, it has been stated that the offer of the plaintiff is dated. 11-1-1993 was accepted, and communication under registered cover on the address disclosed by the plaintiff itself was sent by letter dated. 12-2-1993, which was returned as the address was incomplete.

Defendant further stated in their return that the alleged fax message dated. 3-3-1993, the withdrawal of the offer was not received by the defendant, as it was sent to the wrong fax no.

Thus, according to the above-mentioned facts, the court held that as the communication of acceptance of the offer made by the plaintiff was never made by the defendant and as the defendant failed to communicate his acceptance within the given time period, the offeror can withdraw his offer.

IS E-CONTRACT A VALID CONTRACT?

Contract law does not, as a general rule, set any requirements for the form of a contract in order for a contract to be valid. Both oral and written contracts are legally valid. Only certain types of contracts are required to be made in writing. In contract law, entering into an electronic contract is considered equivalent to entering into a written contract. This means that even an offer sent by e-mail and an approval received in response are considered a legally valid contract that binds the parties. The terms of such a contract are based on the e-mail correspondence between the parties and on the laws applicable to the type of transaction.

Case: – Rudder v. Microsoft Corporation:-

Validity of E-Contracts.

Electronic contracts/records have also found statutory recognition under the Information Technology Act, 2000 ("IT Act"). Amongst other things, it specifically states that a contract shall not be deemed unenforceable, solely on the ground that electronic form/means were used for communication of proposals, acceptance of proposals, revocation of proposals or acceptances, as the case may be. In the case of Trimex International FZE Limited, Dubai vs. Vendata Aluminium Ltd., the Hon'ble Supreme Court of India held that the contract between the parties was unconditionally accepted through e-mails and was a valid contract which satisfied the requirements of the ICA.

Jurisdiction of Courts under E-Contracts.

The Code of Civil Procedure, 1908 ("CPC") prescribes the manner of determining the jurisdiction of civil courts in India, based on two fundamental principles:

- (i) the place of residence of the defendant; and
- (ii) the place where the cause of action arises.

The jurisdictional issues of e-contracts have, however, been addressed to an extent under the IT Act. Section 13 of the IT Act governs the provisions relating to the time and place of dispatch and receipt of an electronic record, and addresses the issue of deemed jurisdiction in electronic contracts.

Case: PR Transport Agency vs. Union of India,

To further illustrate the application of the aforesaid principles, we may refer to the case of PR Transport Agency vs. Union of India, wherein the Allahabad High Court had to decide the question of jurisdiction where the respondent had sent the letter of acceptance by email to the petitioner's email address. Subsequently, the respondent sent another e-mail cancelling the e-auction in favour of the petitioner "due to some technical and unavoidable reasons". When the petitioner challenged this communication in the Allahabad High Court, the respondent objected as to the "territorial jurisdiction" of the Court on the ground that no part of the cause of action had arisen within Uttar Pradesh (UP), and therefore, the Allahabad High Court (UP) had no jurisdiction to try the dispute. In this case, the principal place of business of the petitioner was in the district of Chandauli (UP), and the other place where the petitioner carried on business was Varanasi, which is also in the State of UP. The Court, therefore, based on section 13(3) of the IT Act, held that the acceptance of the tender by e-mail would be deemed to have been received by the petitioner at Varanasi/Chandauli, which are the only two places where the petitioner has his places of business. As both these places fell within the territorial jurisdiction of the Allahabad High Court, the Court assumed jurisdiction to try the dispute.

CONCLUSION

From the above explanation, we can conclude that communication is no longer restricted due to the constraints of geography and time. Information is transmitted and received widely and more rapidly than ever before. And this is where electronic commerce offers the flexibility to the business environment in terms of place, time, space, distance, and payment. With the growth of e-commerce, there is a rapid advancement in the use of e-contracts. So the infrastructure of the Indian judiciary system should be part of the digital India, through which the Information Technology Act can be utilised efficiently, otherwise. It will be a challenge to resolve the dispute.