



## Validity of E-Contracts vis-a-vis Traditional contracts-Analysis of legislative framework in India

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Validity of E Contracts vis-a-vis Traditional contracts-analysis of legislative framework in India Abstract With expansion in trade and commerce the importance of law of contract has increased manifold. Contracts are no longer being formed only via traditional paper/oral mode. With development of technology increasing number of contracts are being formed through electronic medium.

### Abstract

*With expansion in trade and commerce the importance of law of contract has increased manifold. Contracts are no longer being formed only via traditional paper/oral mode. With development of technology increasing number of contracts are being formed through electronic medium. Recent pandemic has made the entire world realize the importance of digital platform including E-contracts. E-contracts are contracts concluded digitally i.e. via electronic medium. Information technology Act, 2000 gives legal recognition to such contracts. Other than the mode of formation these contracts are similar to traditional contracts and to be valid must conform to the essentials of a valid contract under the Indian Contract Act, 1872. Such contracts pose a difficult question of jurisdiction of the court. This question can be answered with the help of provisions of the IT Act, however the parties must take care to settle such questions beforehand.*

### Key Words

**Contracts, E-Contracts, Indian Contract Act.**

Law of contract affects our lives in a big way. Right from buying small pins to entering in to million dollar deals people enter into contracts. Indian contract Act 1972 *inter alia* deals with the general principals of law applying to contracts. A contract is defined as an agreement enforceable by law<sup>1</sup>. The definition makes it clear that all contracts are agreements however *vice versa* is not true, as all agreements are not contracts. Only those agreements are contracts which are enforceable by law i.e. which meet the conditions of enforceability as laid down under the Contract Act.

To form an agreement a proposal<sup>2</sup> and its acceptance<sup>3</sup> are required moreover proposal and acceptance must be *consensus-ad-idem* i.e. for the same thing in the same sense. The acceptor must accept the exact thing which the proposer has proposed. If there is no meeting of minds there is no consent<sup>4</sup>. An accepted proposal converts into a promise. An agreement<sup>5</sup> is nothing else but a promise or a set of reciprocal promises<sup>6</sup> i.e. promise for a promise, a situation in which one promise forms consideration for the other promise e.g. A promises to B to paint a picture in consideration of B promising A to give tuitions to his son. Here A's promise is consideration for B's promise and *vice versa*. Section 10 of the Act lays down the conditions of enforceability of an agreement.

### Importance and need of E-Contracts

Contracts may be express or implied or partly express and partly implied<sup>7</sup>. Till the time there is a specific requirement of writing or registration or both, parties are free to form contract in any mode. With the expansion of trade and commerce importance of law of contract has increased manifold. Contracts are no longer happening between two people or a group of people sitting *inter praesentes*, they are increasingly being formed between people staying in different cities or even different countries through, letters, phone, fax, e mails etc. The recent pandemic made the entire world realize the importance of the Electronic communication. Digital platforms, online communication portals, online shopping etc witnessed an unprecedented surge. E-Contracts or contracts through electronic medium have been on a rise. The way world is moving and with the boom in technology, that day is not far when a major chunk of contracts would be concluded via electronic medium.

### Applicable legislative framework

Section 10-A<sup>8</sup> of Information technology Act, 2000 declares the contracts formed through electronic medium as valid and binding. The above section was added in the IT Act in year 2008 through Information technology (Amendment Act) 2008. It was added as recognition of growing importance of electronic means to arrive at commercial agreements. This applies in all the cases where a contract is formed, proposals and acceptances are communicated, revocation of proposals and acceptances are expressed in electronic form or by means of electronic record. The above mentioned section is modeled on section 11<sup>9</sup> of UNCTRAL model law on E commerce 1996. The above amendment Act also led to substitution of the term 'electronic signature' with 'digital signature'. The Indian Contract Act nowhere excludes the concept of E Contracts, the IT Act specifically provides for such contracts. It must be understood that E-contracts are dealt within the IT Act due to mode of its formation. IT Act was passed *inter alia* with the objective of dealing with legal validation of transactions carried on through data exchange electronically or other electronic means of communication or e-commerce, in place of the earlier paper-based traditional method of communication and providing legal recognition to digital signatures for the authentication of any information.

The Indian Evidence Act, 1872 also ascribes due regard to E-Contracts. Electronic documents are recognized by Indian courts as evidence U/S 65A of the Indian Evidence Act. The admissibility of such electronic evidence is subject to various conditions laid down U/S 65 B of the Act.

However it must be understood that E-contract is nonetheless a contract hence in order to be enforceable E-contracts too need to conform to the requirements of the Contract Act, 1872. Despite the difference in its mode of formation in essence it's a contract and hence has the same genesis as any other contract. It too should arise from an agreement following the requirement of a proposal followed with its acceptance. Such an agreement must fulfill the conditions of enforceability laid u/s section 10<sup>10</sup> of The contract Act, as follows:

1. **Competent parties** : The parties to the contract must be major, must not be of unsound mind or disqualified to contract as per any law to which they are subject to (Section 11).

2. **Free consent (Section 14) :** Mere consent in a contract is not enough, the consent must be free i.e. it must not be obtained through exercise of coercion (Section 15), undue influence (Section 16), fraud (Section 17), misrepresentation (Section 18) and mistake (Section 20, 21 and 22). The first four elements make a contract voidable while mistake leads to a void agreement.
3. **Lawful object and Consideration :** The object and consideration of a contract must not be forbidden by law or calculated to defeat the provisions of some law, or is fraudulent or involves or implies injury to the person or property of other or is immoral or is against public policy (Section 23).
4. **Have not been expressly declared to be void under Contract Act, 1872 :** The Act declares few agreements as void:
  1. Agreements where object or consideration is unlawful (Section 23).
  2. Agreements without consideration (Section 25).
  3. Agreements in restraint of marriage (Section 26).
  4. Agreements in restraint of trade (Section 27).
  5. Agreements in restraint of legal proceedings (Section 28).
  6. Uncertain agreements (Section 29).
  7. Wagering agreements (Section 30).
  8. Agreements contingent on impossible events (Section 36).
  9. Agreement relating to initial impossibility (Section 56).

E-contracts too need to comply with all the above mentioned pre requisites. The Contract Act has not laid down any particular modality relating to formation of contracts as mentioned earlier it can be through words-written or oral (express) or even through conduct (implied) E contract is as valid as a traditional contract as long as it fulfills the essential conditions of a contract as prescribed under the Contract Act. In *Trimex International FZE Ltd Dubai v. Vendata Aluminium Ltd*<sup>11</sup>, Apex Court held that a contract which was formed through unconditional acceptance through e mails is a valid contract which satisfies the requirements of The Contract Act.

### Take it or leave it

Any contract which takes place through electronic medium without parties being on presence of each other is an E-contract. Some examples of E-contracts are : Browse Wrap agreements-e.g. agreements on Amazon or flipcart i.e. online shopping, Shrink Wrap agreements-e.g. License agreements which lay down the terms and conditions to be applied in manuals accompanying the software products, Click Wrap Agreements-e.g. agreements which govern the licensed usage of the software by clicking 'ok' or 'I agree' icon.etc

One of the concerns relating to above mentioned examples of E-contracts is that it leaves no room for negotiation and are on 'take it or leave it' basis, This problem is similar to that of standard form contracts in area of traditional contracts. The courts in India have developed few safeguards for protection of the weaker party in case of standard form contracts e.g. reasonable notice, terms and conditions must not be arbitrary, there must be no fundamental breach of the contract etc.

### Jurisdictional issue

Another important question which arises is regarding jurisdiction of courts under E-contracts. There can be following places where a court has jurisdiction:

1. The place where contract is entered into.
2. The place where contract is performed.
3. The place where defendant resides.

Subject to the above the parties are free to decide the court to adjudicate their disputes, however they cannot confer jurisdiction where is none. Due to nature of E-contract (E-contracts are not physically signed but are formed in virtual space) an important question is which court would have territorial jurisdiction to adjudicate on disputes arising from such contracts. To a particular extent such jurisdictional issues have been addressed by the IT Act. Section 13<sup>12</sup> Time and place of dispatch and receipt of electronic record and addresses the issue of deemed jurisdiction. The reading of this section clarifies that the place of contract would be deemed to be the place where the originator has his place of business and where the addressee has his place of business. However the above section is subject to the mutual agreement of the contracting parties as to the place of contract.

In *PR Transport agency v. UOI*<sup>13</sup>, Allahabad high Court decided the issue of the place where cause of action has arisen on basis of places where the petitioner has his places of business.

## Conclusion

It is clear that the core legislative framework dealing with contracts is also applicable on E-contracts which find specific mention under the IT Act due to mode of its formation. The most vexing question in area of E-contracts is that of territorial jurisdiction as there are no set topographical and national boundaries for execution of such contracts. Though the IT Act and judicial decisions have clarified the position to some extent, the parties must specify jurisdiction to avoid conflicts. Similarly the parties must also lay down law of their choice (if required, as this problem arises when the contract is formed between people staying in different countries) beforehand.

The legislative and judicial intention is clear that any agreement which is enforceable by law would remain to be enforceable even if formed electronically or digitally. An E-contract would be valid only when it fulfills essentials of a traditional contract as prescribed by the Indian Contract act, 1872.

## References

1. Section 2(h) Indian Contract Act, 1872
2. Section 2(a)-When one person signifies to another his willingness to do or to 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.
3. Section 2(b)-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.
4. Section 13-Consent' defined.—Two or more persons are said to consent when they agree upon the same thing in the same sense.
5. Section 2(e)-Every promise and every set of promises, forming the consideration for each other, is an agreement.
6. Section 2(f)-Promises which form the consideration or part of the consideration for each other, are called reciprocal promises.
7. Section 9-Promises, express and implied. —In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.
8. Section 10-A-Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be,



are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.”

9. Article 11 is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed.
10. Section 10-What agreements are contracts. —All agreements are contracts if they are made by the 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.
11. (2010)3 SCC 1.
12. Time and place of dispatch 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 despatched 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 the purposes of 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.
13. 2006 (1) AWC 504

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