

ENFORCEMENT OF E-COMMERCE CONTRACTS IN INDIA: JURISDICTION, LEGAL ISSUES AND CHALLENGES INVOLVED

Ms. Shraddha Oberoi¹ and Mr. Sumit Agarwala²

¹Assistant Professor, School of Law, GD Goenka University, India

²Assistant Professor, School of Law, GD Goenka University, India

ABSTRACT

In the tremendous development of computer innovation a lot changes has been brought in the field of information and technology. In the flourishing field of E-Commerce where the business ventures are given versatility in terms of time, space, payment and distance, the efficacy of E-Contracts are increasing. E-Commerce in India have promoted market integration thereby purchasing & selling of goods and exchanging & receiving information worldwide. E-Contracts facilitate strict terms and conditions, authenticate digital verification, create instant legal relationship between parties and facilitate negotiations between them. E-Contracts get validation from the provisions of Indian Contract Act, 1872. The statutory provisions governing E-Contracts are laid down in the Information Technology Act, 2000 and its enforceability is governed under the provisions of Indian Evidence Act, 1872. The legal challenges are faced when the questions pertaining to cross border jurisdiction arises specially when foreign companies set up their operations in India and enter into contracts with local vendors and customers in India. The Indian Courts have jurisdictions within the territorial limits where the cause of action arises or where the defendant resides or carry on with his businesses. Under E-Contracts the difficulty arises to determine the place of contract concluded specially when both the parties are from different locations. Also with the progression of E-Contracts various challenges pertaining to its execution, existence and legality are faced.

In this paper the authors attempt to trace the legal developments in India pertaining to questions related to the validity of E-Contracts, place of business and cause of action. Also the author tries to throw light on the legal challenges faced in the deployment of E-Contracts which happened in three stages namely philosophical stage, logical stage and execution stage in India. The author in this paper tries to propose private dispute resolution methods such as Arbitration wherein the parties get the leverage to decide upon the substantive law which will be applied in case of any dispute that arises outside the territorial limits in order remove any ambiguity. Also the author tries to carve out the disadvantageous site of the parties for not indulging into the modes of mediation and conciliation.

Keywords: E-Commerce, Contract, Indian Laws, Legal Issues, Challenges

1. INTRODUCTION

From the evolution of human civilization, the man is very conscious about his authority on his belongings and hence the concept of contract can be traced from that period. Earlier the transactions were non-monetary in nature and were based on barter system. Such system was based on trust, goodwill and faith. Then, as the society started developing there were tremendous changes in the transactions as well. From the oral transactions, written documents gained immense popularity and hence, required the importance of Contracts.

The state of all the law systems has given validity to the agreements formed between the individuals over exchange of goods and services for a consideration in order to maintain social and economic order. This system of legalising the formation of contracts, providing remedies in case of breach has helped the people to engage into any trade and business activities without being conscious about their rights.¹

Recent developments in the field of technology has witnessed unprecedented changes in the living standards of the society. Information is widely transferred without imposing any geographical limitations and hence, the growth of e-commerce business without any restrictions on time, space, payment and distance. Many business organisations with the aid of internet and technology are conducting their businesses online which has even open up their arenas globally. With the growth of e-commerce business, the demand of e-contracts along with their effective implementation has widely increased. With the gaining acceptability of e-commerce businesses globally, a lot of challenges are being faced by the people in terms of the concept of e-contracts, mechanical changes in the relationship of parties, jurisdictional issues in case of breach and lack of effective laws to deal with the implementation of e-contracts.²

Online transactions taking place in the virtual space are legally binding in nature even though they are different from the traditional contracts. E -Contracts are enforceable in law similarly as the paper based contracts. The provisions regarding the formation and challenging of traditional contracts are crystal clear, however there are ambiguities when it comes to e-contracts as the issues related to formation and enforcement of e-contracts are quite intriguing. No country can restrain itself from the advancement of technology. Regular Amendments cannot solely suffice to deal with multifarious issues pertaining to e-contracts and therefore we do require a comprehensive legislation to keep in line with the technological developments taking place globally.³

This Research Paper is developed to identify certain issues:

¹ J.Beatson, “Anson’s Law of Contract”, Oxford University Press,1998.

² Chris Reed, “Internet Law –text and material”, Universal law Publishing Co, (2nd ed.) p.173.

³ Henry Chan Raymond Lee, Tharam Dillon The Honkong Polytechnic University, Elizabeth Chang, The University of Newcastle Australia, “E-Commerce – Fundamentals and applications”– John Wiley and Sons – Publication.

- Whether there are any lacunas in the current legislative provisions dealing specifically with giving validity to e-contracts?
- Whether there is any discrepancy regarding jurisdictional issues in cyberspace as compared to jurisdictional questions involved in traditional paper contracts?
- Whether there is any need to develop or amend laws from time to time to ensure effective progress in e-commerce dealing via e-contracts without compromising on security issues?
- Whether there is any need to employ Alternative Disputes Mechanisms to deal with conflicts where parties belong to different countries so that they can get a leverage in opting for substantive law to resort the dispute?

2. DEVELOPMENT OF E- COMMERCE CONTRACTS IN INDIA

Due to advancement of technology worldwide people are able to satisfy their innumerable wants easily. As e-commerce creates a link between consumers and manufacturers in the form of retailers, traders and wholesalers, it has become convenient for the consumers to receive information globally via advertisements. E-Commerce has also allowed consumers to give their feedback about the product which are directly received by the manufacturers and hence they remain aware about the liking and disliking about the consumers through virtual marketing research. The growth of e-commerce has provided greater employment opportunities to transport agencies, warehousing, banking sector and advertisement agencies. Hence, growth of e-commerce has led to faster economic growth and even led to promote social welfare.⁴

Development of internet and World Wide Web has created new paradigms by bringing revolution in the business form. Internet, due its speed, interactivity, potential has been able to spread information without any geographical barriers.⁵

Challenges in E-Commerce

One of the most challenging aspect in e-commerce business is that suppliers who are technologically not advanced are precluded. The multinationals and IT sector have become powerful and are in advantageous position specially if the local industry is weak, require high maintenance charges and security.

Another most important challenge is technological illiteracy in India. As economic transactions are being done virtually there are chances of electronic fraud as well since people are not aware that who is behind the electronic counter. Most of the cyber frauds include data thefts, hacking, phishing attacks, identity thefts and many more.⁶

Nexus between E- Commerce and Electronic Contracts

When one person is ready to meet the requirements of the other person hence bringing both the parties together in the same sense i.e. consensus -at- idem, thereby providing a lawful consideration is called as “Contract.”

⁴ *Ibid.*

⁵ “International Trade Centre, Secrets of Electronic commerce, A guide for small and medium exporters” (Geneva: UNCTAD/WTO), 2000 pp.143-144

⁶ *Ibid.*

Various legal issues and ambiguities have raised as a consequence of applying the principles of traditional contract into paperless, borderless virtual contract. Some of the primary issues are of contract formation, browse wrap agreements and click wrap agreements.

A click wrap agreement in an e-commerce transaction is one where the user by clicking “I Agree” accept to the terms and conditions of the offeror. A browse wrap agreement is one where the user by clicking at the bottom of the website gets the authority to use the website. Other secondary concerns include the lack of clarity regarding the difference between offer and invitation to offer in virtual contracts and also, the place and time of formation of contracts.⁷

One of the most problematic concern in case of e-contracts is the inter-jurisdictional issue due to the borderless nature of e-contracts. Such issue arises due to the overriding legislation which effects the freedom of contract in the jurisdiction where contract was formed.

Therefore, application of standard principles of traditional contracts in virtual contracts may lead to confusion, chaos and raise contradictory questions. Hence, there is a dire need of a legislation which covers all the aspects of e-commerce transactions including formation of contracts, questions of jurisdiction, payment mechanisms, settlement of disputes and remedies.

3. LEGAL ISSUES PERTAINING TO ONLINE CONTRACTS

Online Contract is a developing feature of the Indian Contract Act, 1872. It is enforceable in law and is formed electronically only. The Information and Technology field has witnessed tremendous revolution by communication through internet and technology. Also the economic sector in the form of industries and services is being changed into digitalised economy.⁸

Digital economy is the need of the hour but in order for this economy to show its full potential its important either to develop the trust of the investors in the digital economic system or to develop such framework where exchange of goods and services can be done easily in virtual space backed by effective laws.

With the advancement in Science and Technology, the scenario in E-Commerce has completely changed. The Supreme Court has tried to incorporate the e-contract provisions in the traditional Indian Contract Act, 1872 but even then there are certain shortcomings.

Provisions related to Online Contracts

In earlier times people were reluctant to perform online businesses due to lack of legal framework. The legislation was quite aware that e-commerce is the near future in India and therefore in 1999 they came up with the bill named ‘Electronic Commerce Bill, 1999’ which after receiving the

⁷ John J.A. Burke, “Standard Form Contracts” available at <http://www.lexek.org/sfc/discussion.html> (Last accessed on November 9, 2022).

⁸ Linhof, Swape of Compulsory Contracts Proper”, (1943) 43 col.LR.586.

assent of the houses is now popularly called as the Information Technology Act, 2000. The Act gets amended from time to time and it contains all the provisions pertaining to online transactions.

The Act was enacted to provide legal recognition to transactions carried out by electronic communication or data interchange which is popularly known as e-commerce. The Information and Technology Act, 2000 deals with the facilitating of International Trade as an alternative to paper based communication system. This Act renders various government services in maintaining and sending of electronic documents but it is not covered under the UNCITRAL Model Law on electronic commerce.⁹

The Act was enacted with two fold motives, one that the national perspectives of information technology should not be ignored and secondly it must contain the international perspectives as inferred by the Model Law. Therefore, with this motive it was laid down in *Konkan Railway Corporation Ltd. V. Rani Construction (P) Ltd*¹⁰, that the he Model law cannot be used as a guide to interpret the provisions of the Information and Technology Act, 2000.

The online contracts get its validity from section 10(A) of the Information and Technology, Act, 2000. The section deals with giving legal recognition in formation of online contracts through electronic means.¹¹ The section gives authentication to all the essentials of the contract such as offer, acceptance, communication and revocation. The said section is in consonance with Article 11 of the UNCITRAL Model Law, 1996. Even after amendments the section fails to give clarity on the principles of contract formation.¹²

The conditions regarding the attribution of electronic records are laid down under section 11 of the Act which pertains to circumstances when the electronic message has been originated by the originator. This section is in consonance with Article 13 of the Model Law, 1996 but the section is comparatively more rigid as under few circumstance principles of attribution are not applicable as per the Model Law.

Acknowledgement of electronic receipt and issues pertaining to it are dealt under section 12 of the Act. This section however lays down the presumption that the acknowledgement process is at the discretion of the originator but fails to lay down the legal consequences in sending the receipt apart from the creation of the receipt of the data message.

⁹ Willmott, L., Christensen, S., Butler, D., & Dixon, B.; “Contract Law”, IIIrd Edn., (Oxford University Press, North Melbourne, 2009), p. 17.

¹⁰ *Konkan Railway Corporation Ltd. V. Rani Construction (P) Ltd* (2002) 2 SCC 388.

¹¹ Sharma, Gokulesh (J.); “Formation & Validity of E-Contracts”, available at: <http://www.drgokuleshsharma.com>, (accessed on 17 November 2022).

¹² Sharma, Vakul; “Information Technology Law and Practice - Cyber Law & E-Commerce”, 5th Edn., (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2006), p. 4.

The provisions regarding time and place of dispatch of the information has been recognised under section 13 of the Information and Technology Act, 2000. However, this provision has loopholes as it does not address the problems when there is no dispatch of information or where there has been dispatch of information but due to malfunctioning of the recipient's information system the information is not received by the party.¹³

The legislature has enacted the Information and Technology Act, 2000 while keeping in mind the provisions of the UNCITRAL Model Law, 1996 and no reference is mentioned about the Contract Act. However, the Amended Information and Technology Act, 2008 and the Indian Contract Act, 1872 contain provisions for e-contracts but it is important to understand that the Contract Act was formed at the time when technology was not advanced and therefore it does not completely fulfil the requirements of formation of online contracts for e-commerce businesses.

4. JURISDICTION AND ENFORCEMENT OF E-COMMERCE CONTRACTS

The term 'Jurisdiction' means power to decide cases at a given point of time. It is the power which is granted to the courts for enforcement. The major challenge faced by the e-commerce businesses is the jurisdiction and enforcement of cross border e-contracts.

The legal provision of such e-contracts is not clear and is ambiguous in nature. Although the Information Technology Act, 2000 clarifies the provision up to certain extent but the enforcement of cross border e-contracts is not clear and continues to remain a problem.

The major concern under such cases is that in case of cross border e-contracts, which law would be applicable and secondly whether the Indian Courts have the jurisdiction to deal with such contracts.¹⁴

Due to the disperse nature of the internet, e-contracts can be formed with multiple parties scattered all over the world. In such a case it becomes difficult to ascertain the place of formation of contracts. Also, there is no uniformity in laws, regulations, rules which add more complexity as the foreign country is not bound by the Information Technology Act, 2000 or any other Indian provisions. Hence it is difficult to enforce such contracts. In *Bachanan vs India Abroad Publications Incorporated*¹⁵ an e-contract was formed by an Indian national who at the time of dispute got favourable judgement in United Kingdom but could not enforce the decree in New York because of difference in laws.

¹³ Nandan Kamath, Law Relating To Computers, Internet And E-Commerce: A Guide To Cyber Laws, 20 (Universal Law Publishing Co. Pvt. Ltd, 4th edn., 2009).

¹⁴ Dr Sachin Rastogi, Insights Into E-Contracts In India, 122 (1st edn., 2014).

¹⁵ *Bachanan v. India Abroad Publications Inc.*, 154 Misc 2d 228 (April 13, 1992).

As per the section 28 of the Indian Contract Act, 1872 the parties are free to determine the jurisdiction but in case they are is no agreement as to determine the jurisdiction then they'll be governed under section 20 of Civil Procedure Code. The court will determine the jurisdiction according to the parties' place of business or residence. However, section 20 of CPC is difficult to impose upon e-contracts as it is difficult to determine when and where the offer was accepted in virtual space.

For the enforcement of contracts the provision is available under section 13 of CPC which deals with enforcement of foreign decrees except in cases where such decrees are against principles of natural justice, not issued by competent court or obtained by fraud. Similarly, the Indian decrees are enforced in foreign countries which are listed under section 44A of CPC or with countries which entered into enforcement contract with India. Now, the problem lies where e-contract has been formed with a country which does not fall on the above mentioned grounds. Hence, in spite of having provisions in certain cases it become incompatible to enforce e-contracts.¹⁶

Legal development of E-commerce Contracts in India

In the case of *PR Transport Agency v/s Union of India*¹⁷ the court determined the place of business in case when contracts are formed virtually. On relying upon section 13(3) of the IT Act, 2000 the court held that when a mail is sent to the respondent where his place of business is would be jurisdiction where the cause of action has raised.

In *WWE v/s M/S Reshma Collections*¹⁸ the plaintiff was a registered company in USA who had a registered trademark in India and abroad of branded consumer products. The respondents were the residents of Mumbai and it was alleged that they counterfeited the plaintiff's logo in selling their products. Hence a suit for injunction for infringement was filed against them. The court held that for the purpose of carrying on business it is not necessary for physical presence as the physical shop has converted into virtual shop because of enhancement in technology and hence the court gave due recognition to e-contracts.

In *Himalayan Drug Company vs Sumit*¹⁹ the court applied the Effect Test wherein any impact of particular e-transaction is felt in India then the Indian courts will have jurisdiction to entertain such matters. In the current case the plaintiff suffered damages and the respondents belonged to Italy. An *ex parte* order was granted and damages were awarded.

Challenges of E-Commerce Disputes in Arbitration

¹⁶ *Supra* Note 14.

¹⁷ *PR Transport Agency v. Union of India*, AIR 2006 All 23 (Allahabad High Court).

¹⁸ *WWE v. M/S Reshma Collections*, 2014 (58) PTC 52 (Delhi High Court).

¹⁹ *Himalayan Drug Company v. Sumit*, 2010 PTC 739 (Delhi High Court).

Arbitration has become a recent trend to resolve conflicts specially in e-commerce business due to its efficacy and expediency in settlement. The parties are free to determine the choice of law, place of jurisdiction, arbitrators to be appointed which brings a lot of ease at doing e-businesses and making e-contracts.²⁰

There are various challenges in resolving e-commerce disputes through arbitration, namely- Firstly, in traditional arbitration contracts the parties confer the jurisdiction on tribunals but in e-contracts conferring of jurisdiction is difficult due to non-availability of parties to negotiate the terms of agreement in business to consumer e-contracts. Secondly, in business to business e-contracts the CPC does not allow the parties to limit the scope of jurisdiction but arbitration allows the parties to exclude the jurisdiction of courts. Thirdly, though Part 1 of the Arbitration and Conciliation Act, 1996 deals with provisions to enforce foreign awards but it is difficult to enforce for e-commerce contracts as after the Bhatia International Case²¹ the foreign awards are exposed for enforcement only with due intervention of courts hence, defeating the purpose of arbitration for e-commerce disputes.

5. CONCLUSION AND SUGGESTIONS

The standard of living of people have drastically changed after the advancement in technology. The information is now widely spread and transmitted without any geographical barriers. With the enhancement in technology the e-commerce businesses have flourished immensely. With this the demand for e-contracts have raised but at the same time it poses severe threats on security, trust and privacy of users in case of online transactions. Country's economic, political, social development is also linked with the positive progress in the e-commerce businesses.

To maintain the economic development in the country, it is imperative to ensure the enforceability of online contracts. The current challenge is to accommodate the traditional provisions of Contract to online disputes. Initially when the Indian Contract Act, 1872 was framed, the makers didn't foresee such technology era, however amendments do take place from time to time to accommodate such online disputes but still we require a comprehensive legislation to keep in line with global progress. Also, the amendments alone cannot solve all the multifarious problems pertaining to online contracts.

The main objective of the paper was to appraise the following issues:

- Whether there are any lacunas in the current legislative provisions dealing specifically with giving validity to e-contracts?
- Whether there is any discrepancy regarding jurisdictional issues in cyberspace as compared to jurisdictional questions involved in traditional paper contracts?

²⁰ *Supra* Note 14.

²¹ Bhatia International v. Bulk Trading SA, AIR 2002 SC 1432 (Supreme Court of India).

- Whether there is any need to develop or amend laws from time to time to ensure effective progress in e-commerce dealing via e-contracts without compromising on security issues?
- Whether there is any need to employ Alternative Disputes Mechanisms to deal with conflicts where parties belong to different countries so that they can get a leverage in opting for substantive law to resort the dispute?

In the light of the above objectives and on the basis of the extensive research, the researcher has come up with the following findings:

- The current legislation does not comprehensively deal with all the issues and challenges pertaining to jurisdiction, time and place of formation of contract and therefore, we do require a separate legislation to accommodate all the present and on going challenges.
- Jurisdictional issues in India are determined by either place of business or residence of the parties. In case of electronic transactions the Information Technology Act, says that place of business would be the place from where the electronic record has been dispatched. Hence, there is a discrepancy between traditional contracts and E- Contracts.
- There is a dire need to keep the Acts amended from time to time to as the present legislation does not provide protection of the interests of the consumers because of the vulnerability of the status of the consumer online. It is difficult to ascertain the authenticity of the seller during online contracts.
- Alternative Dispute Resolution which includes Arbitration and Mediation can be viable solution for resolving e-disputes. Even European Union under Article 17 of their Directive on Electronic Commerce has considered ADR as a viable source for solving cross border e-commerce disputes.

On the basis of the conclusion drawn, the following suggestions are proposed to enhance e-commerce businesses and enforceability of e-contracts:

1. E- evidence should not be admissible without any corroboration as e-records can be easily tampered.
2. Training must be imparted to law officers and judges to check the admissibility of e-signatures.
3. Need of creating more forensic labs to investigate the electronic data and also to employ human force with technical expertise and knowledge to investigate digital evidence.
4. Also online accountability to be introduced pertaining to online transactions.
5. Exclusive law to be framed for the protection of the online consumers in consonance with international treaties and guidelines.