ELECTRONIC CONTRACT AND ITS LEGAL VALIDITY: A JURISPRUDENTIAL PERSPECTIVE

-Sukriti Verma[1]

ABSTRACT

Contracts are present in our lives from time immemorial. The barter system is the representation of how contracts form an integral part of our lives. Besides if abiding by these contracts became a matter of individual discretion, the entire social and economic order founded on contracts would fall down. Therefore, the contract law was formed and was given legal recognition. However, times have changed and most of the agreements and contracts are formed in the online mode. This paper elucidates the evolution of contracts in pen and paper mode to their electronic version. It explains the concept of contract through live agreements and examples. The paper justifies the need for contracts and further explains it's essentials under the law. The paper studies the historical aspect and juristic concept of the e-contracts. It studies the how and where the disputes arising from the e-contracts will be dealt with, taking into consideration a judicial approach.

INTRODUCTION

"It has become appallingly obvious that our technology has exceeded our humanity."

-Albert Einstein

We live in a progressive world and progress means new technological advancements. The journey from a one-room-sized computer to touch screen laptops is evidence of these advancements. Our lives are completely dependent on technology, from waking up to the ring of our alarm clock to eating toast, to driving to work, to using our smartphones, to working on Wi-Fi, to tracking everything on our smartwatches, to cooking dinner in the microwave, the device you are reading this on is also technology, hence, anything and everything cannot be possible without technology. The object of technology is to make our lives easier and things more accessible.

[1] 7TH SEMESTER STUDENT AT VIVEKANANDA SCHOOL OF LAW & LEGAL STUDIES.

Humans are social animals, so they can't live in isolation, they need to communicate with each other. So, another aim of the technology is to facilitate communication. As new communication systems have replaced the traditional snail-paced systems of communication. Also, Companies, government organizations, businesses, and consumers are making use of such new communication systems and computers more and more to transmit and store information in electronic form. Information Technology (IT) has erased the distance between communities, and people. Communication leads to either agreement or disagreements. Agreements are the ones that can turn into contracts. According to section 10 of the Indian Contract Act, 1872, all agreements are contracts if they are made by the free consent of the parties competent to contract and for a lawful consideration and a lawful object, which is not expressly declared to be void.

But with ever-changing technology, it is not possible to rely on physical contracts completely. New technology has to be applied to contracts because executing contracts physically by postal means will take many days. Moreover, an overseas contract or a local party has to meet the international party to sign the contract which is also not feasible. Hence adopting electronic contracts is the need of the hour. Electronic contracts also known as e-contracts are a species of an enforceable agreement created fully or partly in an electronic form. It is not a paper-based contract, but rather a contract affixed/agreed by the means of an electronic signature. The essentials of an E-Contract are the same as that of a regular contract.[2] The main benefit of it is that it overcomes the delay involved in a manual system. These are involved in various online transactions and are used everywhere in cyberspace, for example, every "I Agree" we click on is an e-contract, these are called clip-wrap contracts, may it be for cookies on a website, may it be when we install different applications on our smartphones or computers, may it be the software we are using in our computers, may it be when we purchase a brand-new phone, we have to click "I Agree" to the terms and conditions.[3]

Contract of Partnership, contract of agency, contract of sale of goods, etc. can be concluded electronically, subject to the essential of a contract plus the electronic signature, they may be entered into, either fully or partly through electronic means.

Evolution of E-Contracts:

[2] *R.K. Singh, Law Relating to Electronic Contracts 110 (LexisNexis, Haryana, 2nd edn., 2016).*
[3] *Ibid.*

Apart from the time and distance factor which led to the invention of e-contracts, the evolution of e-contracts is based on E-commerce models. Which refers to buying and selling products and services over the internet and the World Wide Web (www). It involves all kinds of online transactions, which gave birth to online contracts, which is a form of e-contract. Though both these terms are generally used interchangeably, they do not mean the same. E-contract is a wider expression, and an online contract comes within its purview. Former may be concluded by SMS, MMS, email, MP3 audio file, etc. on a mobile, computer, laptop, etc., the latter is a contract, which restricts itself to the transactions over the internet.

There are 4 types of online transactions:

1. Business to Customer (B2C): In this transaction one side is the individual customer and on the other side it is the business entity. For example, Flipkart, Myntra, Nykaa, etc.

2. Business to Business (B2B): type of e-commerce where there is an exchange of products, services, and information between businesses using the internet.

3. Customer/Consumer to Business (C2B): where individual customers sell products and services to companies that are prepared to purchase them. For example, a link that takes to an online business which facilitates the purchase of some product such as a book on amazon.com, and the author receives consecutive revenue from upcoming successful sales.

4. Customer to Customer (C2C): it includes two or more customers with a business enterprise merely providing a web-based interface which facilitates the consumer-to-consumer transaction, which is just an intermediary. For example, ebay.com, a seller on amazon.com.

So, all these businesses use an online contract to carry out transactions.

But let us discuss the essentials of a valid e-contract before going into further details of an e-contract.

LEGAL ESSENTIALS OF AN ELECTRONIC CONTRACT:

1. Offer**:** In electronic form, the offer is not made in a conventional way through a proposal, but rather it is made when a buyer browses the goods or service displayed by the seller/ vendor, on a particular website and chooses what he wants to buy. For example, the food items listed on the menu of a restaurant on Zomato is the offer to contract (this is an internal contract within a contract with a Zomato and the consumer, the first contract is when the consumer installed the app and the offer at

that time was the display of terms and condition for using Zomato application, then he was asked to click “I Agree”.

2. Acceptance: This offer needs to be accepted, and it can also be revoked any time before acceptance. For example, when we order from Zomato by completing the payment or when we install the Zomato app and continue to click “I Agree”. In the first scenario, we conclude a contract with a restaurant and in the second scenario when we click “I Agree” to Zomato’s Terms and Conditions.

Which consists of the definition of terms used within the contract like customer, merchant, content, and restaurant. Then an eligibility clause is present. Then there is a change clause, in which Zomato can make amendments to the contract unilaterally which will be deemed to expressly accepted by the use of the app itself. Then there is a clause where we agree that Zomato can disable our account. Then there is a clause where we agree that Content on these Services is for informational purposes only, e.g., any certification, licenses or permits or information that may be displayed on the Restaurant's listing page or Nutrition Products’ listing on the Zomato Platform is for informational purposes only. Then we agree that Zomato has a right to charge the subscription fee, & Zomato exclusively owns the copyrights, trademarks, service marks, logos, trade names, trade dress and other intellectual and proprietary rights throughout the world associated with the Services and Zomato Content. Which implies that we have a personal, limited, non-exclusive and non-transferable license to access and use the Services for self-use. Then we agree to grant Zomato rights related to the content we post on the platform like comments, or content shared by any business user having access to a 'restaurant business page' where the object is to manage claimed business listings. Additionally rights like irrevocably grant Zomato a perpetual, irrevocable, world-wide, non-exclusive, fully paid and royalty-free, assignable, sub-licensable and transferable license and right to use our Content, and Zomato takes no liability for that content, and can remove it also, then there is its privacy policy which we agree to. Then we agree that the funds collected by Zomato for charitable object is deposited to third party bank account, and Zomato is not involved in its collection and utilization, then we agree that it can charge us a delivery fee for delivering, and it can be increased in abnormal traffic and weather condition called as traffic surge. Then you agree that if the order fails to reach you can collect a coupon from Zomato of worth Rs.250 or the amount of the order, whichever is lower within 24 hours, and this coupon shall be valid only for 7 days, provided that this failure to

deliver the order is not caused by you. Finally, we agree to its cancellation and refund policy[4] and so on.

So, when we click "I Agree" on installation of the app, this is called acceptance. It is dealt with under section 4,7,8,9 of the ICA, 1872.

3. Competency of the parties: According to Sections 11 and 12**,** all parties to the e-contract should be competent to contract, and agreements entered into by incompetent parties such as minors, lunatics, insolvents, etc. are void.

4. Free Consent**:** According to section 14 of ICA, 1872 the contract should be entered by the free consent of the parties, free from coercion, misrepresentation, undue influence, mistake, or fraud. In the Zomato example, there is no real-time interaction between the parties, when such phenomena are difficult to be infliction upon the party. It must also be noted that the party must agree to the terms of the contract in the same sense, same as what the other party asks. Under section 13 of the Contract Act, 1872 consent means when both parties agree to a thing in the same sense of mind or unison of mind.

5. Lawful Consideration: just like any other form of contract, any agreement formed electronically, to be enforceable should be for some lawful consideration.

6. Lawful Object**:** According to section 10 of ICA, 1872, the object of the parties shall be lawful.

7. Intention to Create Legal Relations: there has to be an intention to enter into contracts legally, if there is no intention then no contract is likely to take place between the parties. Therefore, agreements of domestic and social nature are not contracts.

8. Certainty and Possibility of Legal Performance: A contract to be enforceable should not be vague, uncertain, or ambiguous, meaning that there must be a possibility of performance of such agreement. For example, A agrees to sell 100 tons of oil to B but didn't specify what kind of oil, therefore, this agreement is void, another example can be: A Emails to B writing that he agrees to sell "all the goods in his godown", this is a very vague agreement, hence void.

HISTORY OF E-CONTRACTS

[4] https://www.zomato.com/policies/terms-of-service/

Although from a very broad perspective, electronic commerce emerged in the nineteenth century with the invention of the telegraph and the telephone. However, another area wherein E-contracts are formed, 'electronic commerce' is typically used in connection with the expansion, and of commerce using computers and modern communications, and most notably the internet and cyberspace. It was not until the creation and growth of computers and the internet, and the development of this realm called cyberspace, that the legal system faced real challenges in private, public, and criminal law. The development of security protocols has given huge support to the fast expansion of electronic commerce by substantially reducing the commercial risk factor.

The requirement of "offer and acceptance" in contract formation with new modes of communication is as much essential as it is essential in contract formation through postal communication. The postal rule says that if the offeree accepts by post, the offer will be accepted when the letter is posted, not when it reaches the offeror (*Adams v Lindsell*).

There are quite a few reasons, why the offer and acceptance rules are important in practice. Firstly, the offer and acceptance rules provide the answer to the question of whether or not a contract is formed; secondly, they answer whether an online contact is formed'; and thirdly, they also answer 'where the contract is formed. The answers to these questions decide different issues, such as, whether an online vendor is bound by an apparent agreement (should a vendee accept that online offer) to sell goods at a significant undervalue arising out of a pricing error on its website. The precise moment at which an offer is held to have been communicated; the precise moment at which the acceptance takes effect; the place where the contract is formed for purposes of jurisdiction), so on and so forth. The common law deals with the issues of E-contracting by applying or expanding familiar principles to both familiar and unfamiliar/unusual problems. The real challenge for the common law has been to apply familiar solutions to unfamiliar/unusual problems.

JURISPRUDENCE

The juristic concept of contract can be defined as below:

The nature of contract law is substantive, i.e., which creates *rights in personam*, which means rights available against an individual or a particular party. These are different from *rights in rem,* which is available against the whole world.

The juristic concept of the contract includes two constituent elements according to John Salmond: *"The Law of contracts is not the whole law of agreements nor it is the whole law of obligations; it is*

the law of those agreements which create obligations and those obligations which have their source in agreements".[5] Hence the two constituents for a contract are obligation and agreement. Prior means a legal tie, which imposes the certain necessity of doing or necessity of not doing upon a party or a person, any act. The sources of these obligations are quite a few, originating from torts or delicts, meaning where the obligations are imposed by law, rather than by agreement, by law means, by the means of the judgment of courts or recognition by the legislature. They can also originate by quasi-contracts, where certain relations resembling those created by contracts are created by the court, based on the principle of justice, equity, and good conscience. However, all obligations are not contracts, but all contracts are civil obligations, which are voluntarily created by the parties. Similarly, all agreements are not contracts but all contracts are agreements entered by the parties. Many agreements are beyond the scope of contract law, as they do not fulfill the requirements of a contract specified by law (section 10 of ICA, 1872). As discussed earlier, only the offer and acceptance with free consent is not enough but the intention to enter into legal relations is also important, which should also be for a legal object and lawful consideration. For example, a father promises his daughter to buy her a phone, if she scores the highest in the class if later the father denies the same upon her scoring the highest marks, then remedy is available for the fulfillment of the contract, another example can be taken, if the husband promises his wife to take her to Paris for a trip, and if he denies that later, she has no remedy for the enforcement of such contract, that is because there was no intention to enter into legal relations.

The Legal jurisprudence determined the legal nature of an electronic contract into three perspectives:

I. Some Jurists who are French, Arab, and English say that the electronic contract is a contract of compliance because one party can only select a number of commodities or services, that are available on the other parties' website, and the accepting party can, after seeing the specifications and details of those agree to buy or not to buy.[6] Rather than discussing the terms of the contract and making amends to it for their convenience, the accepting party can shift to some other party's website to search for what they were looking for. additionally, if he likes to continue then he has the option to accept the contract or if he dislikes it then he has the option of rejecting it. The supporters of this

[5] The Law of Contracts is not the whole law of agreements nor is it the whole law of obligations, can be accessed here: https://www.lawyersnjurists.com/article/the-law-of-contracts-is-not-the-whole-law-of-agreements-nor-is-it-the-whole-law-of-obligations/#:~:text=It%20is%20the%20law%20of,an%20offspring%20of%20tort%20law

[6] Rudainah M. Ridha Majeed, "The Jurisprudential and Legal Basis for an Electronic Marriage Contract" 17 PalArch's J. Archaeol. Egypt/ Egyptol 12414-15 (2020).

trend say that the economic criterion is the paramount factor. This contract of compliance arises is based on the principle of inequality, and economic imbalance.

This perspective can be criticized by the saying that it is not based upon the principle of inequality or economic imbalance but rather the driving factor of this perspective is the convenience, accessibility, feasibility, and its time-saving quality.

II. The second perspective says that the electronic contract is not all compliance contract but rather they are consensual contract because the accepting party always contact the proposing party in case it does not like the commodity or service, the basic deviation from this perspective is the case of monopoly contract where the competition is very less, for example, the supply of gas and electricity. In this example, the party cannot resort to others, if it finds itself unheard, due to the unavailability of a substitute, and will have to accept the current contract. [7]

III. the third perspective supports that there must be a distinction in the method of concluding electronic contracts when determining their legal nature. That is either the contracts that are concluded by e-mail to the contractors (e-mail form) or via the Internet through search engines for websites (website form). While the prior is often consensual contracts the latter may contain the features of compliance contracts. The email form of the contract is negotiated by sending emails between the parties through portals like Gmail, Yahoo, etc. until the response of one of the parties is accompanied by the acceptance of the other, and therefore the contract is completed. The parties do not meet in one place, as in the case of a normal contract.

There are 4 types of e-contracts:

1) Individually negotiated contracts (using electronic mode)- these are formed through any medium which facilitates communication, whether it be Emails, WhatsApp, or any other platform.

2) Click-wrap Contracts- these are basically formed when a person clicks “I agree” on a website or a platform.

3) Shrink-wrap Contracts- they are license agreements which are printed on the products in a summarized manner. The mere use of the product signifies the acceptance of the contract by the

[7] Rudainah M. Ridha Majeed, “The Jurisprudential and Legal Basis for an Electronic Marriage Contract” 17 PalArch's J. Archaeol. Egypt/ Egyptol 12414-15 (2020).

user. The term 'Shrink Wrap' illustrates the plastic packaging which coats software packs/boxes which quotes the terms and conditions which come with products.

4) Browse- wrap/Web-wrap Contracts- they occur before the use of materials available on a website or downloadable product. Only if the person agrees to the terms and conditions on the web page, then he can access the contents of the web page. [8]

LEGAL PERSPECTIVE/ VALIDITY

When it comes to the legal perspective, the first thing that comes to my mind is the Jurisdiction of the contract enforcement mechanism.

Jurisdiction Aspect:

So, let us discuss if the postal rule or telecommunication rule applies to e-contracts or not, so as to determine the jurisdiction of the dispute.

The postal rule states that the moment when the acceptance letter is posted, the contract is completed, and from wherever it is posted that place is the jurisdiction of the contract enforcement mechanism, where the dispute shall be addressed[9] by the court or by other alternative dispute resolution mechanisms. The telecommunication rule states that when an acceptance over the telephone is instantaneous, there are no third parties involved in the communication of the acceptance. So, when the offeree party clearly understands that his offer has been accepted, then only there is a contract. But if there is disturbance due to which he could not hear or the call dropped, then there is no contract[10] and if it is in the knowledge of the acceptor that his acceptance couldn't be heard, it is his duty to redial and make it heard.[11] If the offeree is not able to hear his acceptance clearly, then it is his duty to redial and ask the acceptor. Hence the place where the acceptance is heard is the jurisdiction.[12]

But whether these rules apply to the e-contracts? We need to determine when the contract is completed? Either when the email is read by the offeror? Or when the email arrives on the server

[8] E-contracts – What are Shrink Wrap, Click Wrap, and Browse-Wrap Agreements? By Sakshi Bhatnagar. Can be accessed here: https://blog.ipleaders.in/e-contracts-shrink-wrap-click-wrap-browse-wrap-agreements/
[9] Entores Ltd v Miles Far East Corporation, (1955) 2 QB 327 (CA).
[10] R.K. Singh, Law Relating to Electronic Contracts 96 (LexisNexis, Haryana, 2nd edn., 2016).
[11] R.K. Singh, Law Relating to Electronic Contracts 97 (LexisNexis, Haryana, 2nd edn., 2016).
[12] Bhagwandas Goverdhandas Kedia v M/S Girdharilal Parshottamdas, (1966) AIR 543

which manages the offeror's email? Or when the email ought to have reasonably come to the offeree's attention.

The contract is completed when the email reaches the mailbox of the offeree party, however, if the email has not reached his mailbox due to his or his agent's fault, still there exists a contract, for example, if he provided an incorrect email address to the acceptor, or his mailbox was full, or he had blocked the acceptor, or when the email automatically got deleted due to his software or moved to junk-box and then got deleted, etc. However, if the acceptor knows that the email has reached not the offeree's mailbox there is no contract because usually when the mail is not sent there is something unusual from which he gets to know about the same.[13]

However, by the virtue of section 12 of the Information Technology Act, 2000, for the completion of the contract, a receipt of acknowledgment needs to be sent by the acceptor to the originator of the contract (which can be communication and or any conduct) and if he fails to submit such acknowledgment then the proposal shall be deemed to have been never sent by the originator in the first place.

This receipt of acknowledgment is nothing but the acceptor communicating his acceptance.

Section 13 of the same act determines the method of time and dispatch of the receipt, by the virtue of the same section, if such place and time of the computer resource of the acceptor is not determined, then the receipt occurs when the electronic record enters the computer resource of the acceptor.

Whereas the jurisdiction of the court or any other dispute resolution authority is the place where the plaintiff has his place of business or place of residence, it shall be his discretion unless and until there is a clause in the contract which determines the place of jurisdiction of the dispute resolution mechanism or of the courts.

In the case of *P.R Transport Agency v Union of India*[14], the acceptor communicated the acceptance through an email and later cancelled the contract through an email. The issue before the Allahabad High Court was to determine the territorial jurisdiction to entertain and hear this writ petition. The court held that the place of the plaintiff's business or residence should be the jurisdiction. According to section 13(3) of the IT Act, 2000 the place (computer resource) of the receipt of acknowledgment

[13] R.K. Singh, Law Relating to Electronic Contracts 110 (LexisNexis, Haryana, 2nd edn., 2016).

[14] AIR 2006 All 23

is deemed to be received at the place where the proposer has his place of business, so in this case because the acceptance was received at there at proposer's place of business and since the proposer was the plaintiff, the enforceability of the contract is at his place of business.

Recognition:

The electronic contracts were first recognized by the Court in the case of *Trimex International Fze Limited, Dubai v Vedanta Aluminum Ltd*[15], the court accepted the unconditional acceptance through emails and held that the same to be a valid contract that satisfied the requirements of section 4 & 7 of the ICA,1982." *The minute-to-minute correspondence exchanged between the parties, all the conditions prescribed which had been laid down, awareness of the urgency of accepting the offer without any further delay to avoid variation, coupled with an email sent on 16th October 2007 at 3:06 pm, subject- " re: offer for imported bauxite"* and reply *" we confirm the deal for 5 shipments".*

Online contract through websites:

Online contracts can be formed by 2 ways- first straightforward or simple and second complex or complicated. Simple one means where a customer goes to the website of the seller and downloads the digital products like software, music, videos, etc. in return for a payment. In such a case the website is a digital vending machine. The complex one is that in which where the performance does not follow the customer's order but comes at a later time, for example, online clothes shopping. Wherein the display of the clothes is a mere invitation to treat by the seller and not an offer.[16] So, the online contract is completed only when the acceptance is communicated.[17]

We can take note of article 8 of the UN convention of Electronic Communications in International Contracts (UNCUECIC) which says *"A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication."* Electronic Contracts to be proved, need to be accompanied by electronic signatures (defined under section 2(ta) and section 3A of the IT Act, 2000. In the case of e-commerce, financial transactions, software distribution, etc. are examples where digital signatures are used, as defined under sub-clause (p) of section 2 of the same act.

[15] (2010) 3 SCC 1
[16] Fisher v Bell (1961) 1 QB 394 (QB).
[17] World Wrestling Entertainment Inc. v Reshma Collection FAO (OS) No. 506 of 2013, para 22.

However, it is not too late to mention that the IT Act, 2000 doesn't apply to a negotiable instrument, a power of attorney, a trust, a will and any contract for sale/ conveyance of immovable property or any interest in such property.

CONCLUSION

"What would make it very difficult to take society back to a repressive time would be technology. The arrival of the internet"

-Hugh Hefner

To conclude, I would like to say that in India e-contracts find their legal validity from the section 10A of the Information Technology Act, 2000, which goes on to say that "*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."* This section corresponds to article 11 of the UNCITRAL Model on E-commerce, 1996, which reads "*In the context of contract formation unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."*

The courts also have recognized the concept of contract formation through electronic mode and dealt with when the contract gets concluded, so as to decide its jurisdiction, i.e., when the acceptance is communicated which is based upon the telephone conservation rule, just as in the case of telephonic conversation, there is instantaneous communication, so is in the case of business over the internet in case of contracting through websites.