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# Online Contracts: Torch Bearer of Digital India

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## ABSTRACT

*Today with huge development in the field of computer technology, communication technology, IT sector have raised living standard of every individual immensely. There no longer limitation of time and geography in doing business. Dispatchment of information even goods and service are more rapid than ever before. E-commerce has provided with new speed to the business that a no longer requires physical presence of two parties at the time of contracting. Last decade is an evidence to the fact that E-commerce and E-contract has become part of our daily lives. Online contracting has blended so well with our daily life that an user get into a contract many times in a day from booking cabs or making transactions via Paytm or various similar platforms. E-commerce and E-contract offers flexibility to ease of business in terms of place, time, space, distance and payment method. The E-contract means buying and selling of product, goods and services through computer or internet network.*

*It is means of doing business electronically usually by the means of internet. It is the tool that leads to 'enterprise integration'. With the rapid growth of E-commerce, there is a huge uprise in the use of E-contract. Keeping this growth in mind there are certain questions posed by E-contract. This article undertakes an endeavor to answer these questions.*

## I. INTRODUCTION

With recent technological advancement, there is an immense change in the standard of living of people. Thus, communication is no more restricted within its geographical limits and information is transferred much widely and quickly than ever before. Electronic commerce has made its way and many problems are removed through the use of e-commerce which flow as a traditional data. Electronic commerce is a means of the transaction of business electronically and is associated with the buying and selling of information, products and services over computerized communication networks. Though, it is a much broader term encompassing not only Electronic Data Interchange but also other forms of communications such as Electronic Mail and Electronic Bulletin Board.

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With the emergence and steady growth of e-commerce, there is a quick elevation in the use of e-contracts. But the concept of e-contract is still not unclouded, it faces lot of challenges. The law of contract in India gives a statutory recognition to the common contractual rule. The Indian Contract Act, 1872 does not lay down the rights and duties which the law will enforce but it deals with the limiting principles, subject to which parties may create right and duties for themselves. E-contract is a contract that governs the use of a website by netizens of the site and it publish it on a website.

“Online contract is also known as E-contract”

Information Technology Act 2000 does not define e-contracts but gives validity to them. E-contracts are those contracts which are entered into by the parties to the contract through internet or computer network or by use of any other electronics. Through the term “computer resources” has been defined under Section 2 (1)(K) of IT Act 2000 as “computer resource” means computer, communication device, computer system, computer network data, computer database or software.

## **II. ESSENTIALS ELEMENT OF AN E-CONTRACT**

The essential element of online contract is discussed below:

- **Offer** – Just like paper made or conventional contract, one of the most essential elements of online contract is the requirement of an offer to be made. There must be a lawful proposal or offer made by one party known as the proposer and it is the starting point of a contract. By browsing and choosing the goods and services available on the website of the seller, the consumer makes an offer to purchase such in relation with the invitation to offer made by the seller. <sup>2</sup>

- **Acceptance** –In case of an online contract, offer and acceptance can be made through e-mails or by filing requisite form provided in the website. They may also need to take an online agreement by clicking on ‘I Agree’ or ‘I Accept’ for availing the services offered.

- **Intention to create legal relationship** –Agreement of social or domestic nature do not create legal relationship, hence they are not contracting and are not enforceable by law. In the case of arrangements regulating social relations, it follows as a matter of course that parties do not intend legal consequences to follow. For example, an invitation for marriage to

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<sup>2</sup> Avatar Singh, Law of Contract & Specific Relief, Eastern Book Company,2013, p.3

a friend or family through e- mails or fax or through any means of telecommunication is not a contract.<sup>3</sup>

- **There must be a lawful object** – Parties to the agreement must contract for a legal object. A contract is only enforceable by law only when it is made for a lawful purpose. It must not defeat any provision of law and must not be fraudulent in nature. Thus, a contract on a website designed for the purpose of selling illegal substances online is a void contract. If an agreement is made to cause injury to any person or his property, such agreement is not lawful and therefore to be considered as void. If any competent Court regards any agreement as opposed to public policy, it is a void contract.

- **There must be a legal or lawful consideration** – Consideration is one of most important elements of a contract. The basic rule is that when a party to a contract promises to perform his promise, he must get something in return for the performance of his promise. Consideration is something of some value in the eyes of law. It may be of some benefit, right, interest or profit given to the party as inducement of promise. An act constituting consideration must be moved at the desire of the promisor and must be legal, real and not imaginary. Promises that are physically impossible to perform cannot have real consideration. For example. An online site that offers purchase of land in moon.<sup>4</sup>

- **Capacity of parties** – Parties to a contract must be capable of entering into a contract. He must attain the age of majority and must be of sound mind. He must not be disqualified from contracting by any law for the time being in force. In our country an agreement where either party is a minor has no significance. It is considered as void ab-initio. As per Section 12 of the Indian Contract Act, 1872, any person who is in a position to judge and safeguard his own interest is of sound mind and capable enough to enter into a contract. When a person is declared insolvent by any competent Court, he cannot enter into a contract relating to his property. In the old age foundation case of **Mohori Bibee vs. Dharmodas Ghose**, it was held by the Privy Council that an agreement by a minor is void.<sup>5</sup>

- **There must be free and unaffected consent** – Consent which is defined under Section 13 of the Indian Contract Act, 1872 is an essential requirement of a contract. It is basically the meeting of minds of the parties. When both agree upon the same thing in the same manner, they are said to consent. In case consent is caused by coercion, it is voidable at

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<sup>3</sup> Pollock & Mulla, The Indian Contract & Specific Relief Act, Lexis Nexis, 2013 (14<sup>th</sup> Edn), p.6

<sup>4</sup> Cheshire & Finfoot, Law of Contract, Lexis Nexis, 2010 (10<sup>th</sup> Edn), p.10

<sup>5</sup> L.R. (1903) 30 Cal.539

the option of the party whose consent was so caused. Coercion includes physical compulsion, threat, and violence.<sup>6</sup>

- **Possibility of performance** – The terms and conditions of agreement must be certain and not vague and must also be such as are capable of performance. An agreement to do an act impossible in itself cannot be enforced as per section 29 of the Indian Contract Act, 1872.

### III. TYPES OF E-CONTRACTS

Online contracts can be of three types mainly i.e., shrink-wrap agreements, click or web-wrap agreements and browse-wrap agreements. In our everyday life, we usually witness these types of online contracts. Other types of online contracts include employment contract, contractor agreement, consultant agreement, Sale re-sale and distributor agreements, non-disclosure agreements, software development and licensing agreements, source code escrow agreements.

- Shrink-wrap agreements are usually the licensed agreement applicable in case of software products buying. In case of shrink-wrap agreements, with opening of the packaging of the software product, the terms and conditions to access such software product are enforced upon the person who buys it. Shrink-wrap agreements are simply those which are accepted by user at the time of installation of software from a CD-ROM, for example, Nokia pc-suite. Sometimes additional terms can be observed only after loading the product on the computer and then if the buyer does not agree to those additional terms, then he has an option of returning the software product.

- Click- wrap agreements are web-based agreements which require the assent or consent of the user by way of clicking “I Agree’ or “I Accept” or “Ok” button on the dialog box. In click –wrap agreements, the user basically have to agree to the terms and conditions for usage of the particular software. Users who disagree to the terms and conditions will not be able to use or buy the product upon cancellation or rejection. A person witnesses web-wrap agreement almost regularly. The terms and conditions for usage are exposed to the users prior to acceptance. For agreement of an online shopping site etc.

- An agreement made intended to be binding on two or more parties by the use of website can be called a Browse wrap agreement. In case of browse wrap agreement, a regular

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<sup>6</sup> Avatar Singh, Law of Contract & Specific Relief, Eastern Book Company, 2013, p.3

user of a particular website deemed to accept the terms of use and other policies of the website for continuous use.<sup>7</sup>

#### IV. LANDMARK JUDGEMENT ON E-CONTRACTS

The following cases are landmark judgments in relation to E-contracts:

- **Arizona Retail System Inc. Vs. Software Link-** A question arose as to the question arose as to the building nature of the shrink wrap contracts in relations to the original copies of the software. Arizona Retail System Inc. purchased software from software link. There was a shrink wrap attached along with the real copy at the time of delivery.

- However, several other copies were sent later on to Arizona Retail System Inc. and shrink wrap was not attached to them . The U.S. district court for the district of Arizona held that shrink wrap applies only to the original copies.

- **Pro CD Inc. Vs. Ziedenburg** – It was held that the defendant is bound by the terms of the license as he clicked on the box containing “**I agree**” thereby indicating his assent to be bound.<sup>8</sup>

- **Hotmail Corporation Vs. Van \$ Money Pie Inc.** – It was held by the Appellate Division of Superior Court of New Jersey, that by clicking the “**I agree**” option given in the dialogue box the plaintiff has entered into a valid and binding contract and can be held liable for the terms and conditions laid down in the contract.<sup>9</sup>

#### V. E-CONTRACTS AND LEGAL POSITION

E-Contract exists in a borderless environment. Hence create concern whose jurisdiction, where to take action, what test and laws to be followed when resides outside jurisdictional area. This calls for single jurisdiction.

##### ➤ **Validity of e-Contract**

The Information Technology Act, 2000 provides various procedural, administrative guidelines and regulates the provisions relating to all kinds of electronic transactions. These include computer data protection, authentication of documents by way of digital or electronic signature. Though electronic contracts have been given recognition by the IT Act, 2000, but majority feels it less secured to get into any kind of online contracts as there are no concrete judicial precedents for the validity and enforceability of online contracts in India. In case of

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<sup>7</sup> <http://www.legalserviceindia.com> visited on 6.2.2021

<sup>8</sup> ProCD. Inc. Vs. Zeidenberg 86F .3d 1447 (7<sup>th</sup> Cir.1996)

<sup>9</sup> Hotmail Corporation Vs. Van\$ Money Pie Inc., 1998 WL 388389 ( N.D. Cal .Apr 16,1998)

browse wrap contracts, we usually accept the terms and conditions of the contract by clicking the button that indicates ‘ I Agree’ and in case of shrink wrap contract or purchase of a software product, assent is given by the consumer or the purchaser with tearing of the wrapper and using it. Many have the tendency of not reading the terms and conditions carefully before agreeing to such. But these actions should be taken consciously and carefully only after reading the terms of the contract properly as it leads to a valid contract and the terms can be strictly enforced against them.

In the year 2015, an initiative known as ‘Digital India’ was launched by Narendra D. Modi, the present Prime Minister of India. This campaign was launched to ensure that government services available to the citizens of our country in any electronic way which will lead to the improvement of online infrastructure and internet connectivity in our country. The citizens of India are encouraging the concept of Digital India, but there are no definite legislations relating to the transactions done over computerized communication networks. Several laws such as The Indian Contract Act, 1872, Information Technology Act, 2000, Indian Copyright Act, 1957 has provided validation of online contracting. <sup>10</sup>

➤ **Law of Evidence and E-contract**

In a country like India, where the literacy rate is not so high, the concept of ‘Digital India’ is a far reach. People still feel insecure to do online based transactions mainly because the terms and conditions of such contracts are not transparent. Another major issue is the nature of the law governing the electronic contracts. Even if the IT Act, 2000 has legalized electronic contracts, there are no definite provisions mentioned in the Act. Documents are mainly registered for conservation of evidence, assurance of title and to protect oneself from fraud. The evidentiary value of electronic contracts has been given recognition and can be understood in the light of various sections of Indian Evidence Act. Sec 65B of the Indian Evidence Act deals with the admissibility of electronic records. As per Sec 65B of the Indian Evidence Act any information contained in an electronic record produced by the computer in printed, stored or copied form shall deemed to be a document and it can be admissible as an evidence in any proceeding without further proof of the original subject to following conditions are satisfied such as the computer from where it was produced was in regular use by a person having lawful control over the system at the time of producing it, during the ordinary course of activities the information was fed into the system on a regular basis, the

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<sup>10</sup><https://www.mondaq.com/india/contracts-and-commercial-law/699022/validity-of-electronic-contracts-in-india> visited on 6.2.2021

output computer was in a proper operating condition and have not affected the accuracy of the data entered.

➤ **Intellectual Property Right and Online Contract**

There are mainly three types of intellectual property right infringement in relation to the online contract:

**Copyright Infringement**

- Website Software
- Hyperlink
- **Patents-** Functionality of the software.
- **Trademark Infringement**
- Cyber squatting
- Meta tagging
- **Remedies for Breach of Online Contract**

There is no specific rule in case of breach of online contract but the rules regarding remedies for breach of contract can be followed as provided in The Indian Contract Act. A valid contract gives rise to co- relative rights and obligations and they are enforceable in the court of law when infringed on breach of contract. The Contract Act mainly talks about two remedies for the breach of contract such as Damages and Quantum Merit. But few other remedies are also available as provided in the Specific Relief Act such as specific performance of contract and injunction restraining the other party from making a breach of contract.

Sec 73 and Sec 74 of the Indian Contract Act, 1872 deals with the rules regarding the remedy of damages on breach of contract. The person whose rights are infringed by the breach of contract may bring an action for damages or compensation in terms of monetary value for the loss suffered by the party. There are two main aspects to be considered when any action of damages i.e remoteness of damage and measure of damage. Sec 73 to 75 provides rules regarding the assessment of damages based on the famous case **Hadley vs. Baxendale**<sup>11</sup>. According to the rules laid down in this case, there can be damages which naturally arose on the usual course of things from such breach of contract and can be called ordinary damages and secondly, damages for loss arose from special circumstances i.e., special damages. There

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<sup>11</sup>Hadley vs. Baxendale, (1854) EWHC J70, (1854)156 ER 145

are also other kinds of damages mentioned in the Act such as nominal damage, pre- contract expenditure, compensation for mental agony and liquidated damages. Nominal damages are those substantial damages awarded by the Court in recognition of right of the aggrieved party.

### **Conclusion**

An online contract is designed and enacted with an aim to provide security to online transactions. It is formed to check frauds to promote and build confidence in genuine online transactions and to give a legal status to the concept of digital signature. Online contract is a much efficient concept in the interest of time and money in comparison to the traditional method of paper and writing contract. But to keep a pace with the fast advancement of the technology, a separate legislation in regard to electronic or online contract has to be enacted in India.

With the wide spread expansion and globalization of technology, existence of online contract has become regular in our life right from buying daily groceries from the market to withdrawing money from an ATM. Electronic contracts by use of technology is much cost effective and delay can be instantly removed in comparison to traditional paper based contracts. There is less chance of committing errors as it is much automated. It provides an opportunity to the seller to reach millions of consumers irrespective of distance and most importantly without the involvement of middlemen or any brokers.

An online contract is simply a communication between two parties in regard to transfer of goods/services. And as per Indian Evidence Act any e- mail communication and other communication made electronically is recognized as valid evidence in a Court of law.

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