E-CONTRACT IN INDIA: ISSUES AND CHALLENGES

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Abstract: With the advance use of internet and electronic commerce, online contracts have assumed importance mainly in terms of reach and multiplicity. Advancement in technology, computer programs and the internet has lessened the communication barrier which is essential for Acknowledgment or acceptance for valid contract. E-commerce in India is developing efficiently and speedily with mushrooming demands amongst the different types of consumers to buy varieties of products offered universally. A Contract Law of 1872 regulates legal matters arising out of disputes or breach of traditional contract. E-contract is a result of these growing electronic commercial businesses within country. E-Contract has minimized number of problems faced by E-commerce community. E-Contract has some loopholes which are to be rectified considering the literacy rate in Rural India.

For regulating some issues like formation of contract, authenticity of signature I.T.Act play important role. Indian Contract Act 1872 contains no provisions. It regulates the traditional contract only; it has shortcomings in regulating electronic contracts.

Keywords: Traditional Contract, E-contract, Enforceability, contemporary issues, Information Technology.

I. INTRODUCTION

Present generation living in electronic world wide web era where everything is just a click away from purchasing pens to ordering breakfast/food from buying stocks to exporting goods within country and from one country to another by road or overseas., use of Electronic commerce in India by internet user in 1990 but in true sense this e-contract gained momentum in recent years.

During the period 2013-17 Indian e-commerce market shows 53% more than China (33%), Indonesia (31%), Malaysia (30%) & South Korea(12%) increase in the Compound Annual Growth Rate (CAGR).Thus it can be said that Globalization and Digital Era has a positive outcome over the Indian economy. With establishment of various e-business platforms like Club factoryFlipkart, Myntra, Amazon, OLX, Uber, big basket, Netmeds etc. the consumers throughout the globe have been found more inclined towards buying and selling different products online which is creating a legal obligation and legal relation between the parties for its performance with lawful enforceability.

Easy access to internet through Google and technical facilities like software and hardware, laptops and smart phones enables the consumers globally to enter into e-contracts. These contracts through any medium has universal acceptance which bridges the gap of distance, and intricacies with respect to place amongst the countries.

Illustration:

Mr. Bean, a German company, who wants to buy an Organic products from India can easily enter into E-contract rather than arranging meetings for deciding the terms of the contract which helps the business by saving time and money.

Hence, it felt a need for an appropriate Indian enactment which can effectively regulate and govern the electronic contracts. Presently, E-business market is governed under the provision of Indian Contract Act, 1872 along with the Information Technology Act, 2000 which was passed by Indian Parliament for providing authenticity to Digital Signature.
II. MEANING OF E-CONTRACT

Present generation living in electronic world wide web era where everything is just a click away from purchasing pens to ordering breakfast/ food from buying stocks to exporting goods within country and from one country to another by road or overseas, in E-contract interaction between two or more individuals and use of electronic means like email, MP3 audio file, multimedia-message, etc. is must. In other words, E contracts, or electronic contracts, can be formed online, it is also a binding agreement between parties where lawful object and consideration and other conditions under section 10 of the Traditional Act are present. The term Contract is defined under Indian Contract Act, 1872 as ‘Agreement enforceable by law’.

III. ESSENTIALS OF E-CONTRACT

To constitute a legally enforceable and binding e-contract there is an absolute need of fulfilling all the conditions specified not only under Indian Contract Act of 1872 but also of Information Technology Act of 2000.

1. OFFER

One of the most essential elements of online contract is the requirement of an offer to be made. An offer is said to be made when one party expresses his willingness to do or abstaining from doing something in order to receive assent of the other party of such act or abstinence. The person making an offer should have his willingness and intention to create legal relationship and also get legally bound by it. In E-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. An offer is considered to be made when it comes within the knowledge of the offeree.

2. ACCEPTANCE

When a proposal or offer is made is accepted by the person to whom the offer is made, it becomes a promise. The acceptance of the proposal must be unconditional and absolute and must be communicated to the proposer or the offerer. 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. When the person receiving such offer provides assent for it, it is considered acceptance under Section 2(b) of Indian Contract Act of 1872. It is necessary to communicate the acceptance to the offerer. When any person competent to contract agree by clicking ‘I Agree’ to the terms and conditions of the provider it is a form of acceptance.

3. LAWFUL CONSIDERATION & LAWFUL OBJECT

The term consideration means something in return, the benefit or rewards for which the parties have agreed to fulfill legal obligations in the contract. Section 2(d) of Indian Contract Act of 1872 defines consideration of a promise as any act where promisee agrees on demand of promisor for doing or abstain from doing any act. Thus, consideration should be such which is not prohibited by law and falls within the ambit of the legal framework. In absence of it the contract will be considered void. The object of contract must be lawful within the scope of Section 23 of Indian Contract Act of 1872.

4. COMPETENCY OF PARTIES

Parties to the contract must be competent to enter into it. The parties to the contract must have attained the age of majority, should be of sound mind and not disqualified by law as specified Section 11 of Indian Contract Act of 1872. However, in case of e-contract the liability is on the seller to ensure that the other party is competent to enter into the contract. They can ensure it through signing up process, or expressly accepting the age clause.
5. CERTAINTY AND FREE CONSENT

For any valid contract the object must be certain. For example, websites selling house property on Moon. It is necessary for the parties to contract to have free consent i.e. free from any type of fraud, misrepresentation, coercion, undue influence or mistake. As defined under Section 13 - 20 of the Indian contract act 1872. In e-contracts ascertaining the consent of the parties is difficult, and as it is executed between strangers therefore, the consent can only be presumed.

IV. TYPES OF E-CONTRACT

1. CLICK WRAP CONTRACT

This type of e-contract is executed between the parties when one of them agrees to the terms and conditions specified by the websites by clicking ‘I Agree’ to it or writing their consent in the dialogue box provided. It has pre-determined terms and conditions where the party like in traditional contract does not have bargaining power, they could either accept or reject it wholly. In other words, express consent of the party is required for constituting any contract like after downloading any game or software we are required to expressly accept the terms and conditions, denial of it will also deny us the access to the game or software.

2. BROWSE WRAP CONTRACT

It is similar to the concept of click-wrap contract as the terms and conditions of the contract are pre-determined though express consent of the user is not required. The website usually provides for a hyperlink at the bottom of the page, connecting users to the page with terms and conditions on clicking it. The act of browsing the website after the opening of a hyperlink is inferred as their consent to contract.

3. SHRINK WRAP CONTRACT

The user in this type of contract has no negotiation power he either can accept it by shredding the wrap or reject it by returning the product. In Shrink wrap contract thin plastic wrapped around a product or box. Shrink wrap contract refers to license agreement which is wrapped with the software. The users assent to the contract is inferred from his scrapping the wrap for opening the product.

4. E-MAILS CONTRACTS

This type of contracts are entered through electronic communications and are similar to traditional form of contracts as parties have the opportunity to negotiate the terms and conditions amongst each other in such regard. It is governed under Information Technology Act of 2000. It is necessary for the formation of such contract that the electronic communication has been viewed, therefore falls within the category of non-instantaneous communication.

V. ENFORCEABILITY OF E-CONTRACT

Indian judiciary has failed to acknowledge the question of validity of these contracts as there is no precedent till date for providing any type of ground rules over the enforceability of these contracts. Although in the case of L.I.C India v. Consumer Education and Research Centre the honorable supreme court has tried defining such contracts and observed that where the weaker parties do not have a bargaining power, such type of contracts were referred as dotted contracts. Thus, it can be said that the Indian courts have recognized the concepts of these contracts though no guidelines for its regulation have been laid down by it.

If an e-contract fulfills all the essentials like valid offer and acceptance, capacities of the party, free consent, etc., as specified in Indian Contract Act of 1872, it will be considered valid and is enforceable in the court of the country for any kind of breach when undertaken through any electronic means. The growing trend of social media, online shopping, e-retailing has created a difficulty for the law makers in protecting the users from fraud, misrepresentation, identity theft.
and other such challenges. The Information Technology Act of 2000 was implemented for the governance and providing legal sanctity to transactions undertaken through electronic means and also provide for authentication of digital signature, jurisdiction, penalties in case of breach.

In case of Trimex International FZE v. Vedanta Aluminium Ltd. India, the hon’ble Supreme Court recognized that the contract whose terms and conditions are discussed through e-mails between parties, though no formal contract was formed or signed is valid in the eyes of law.

The enforceability of click wrap, browse wrap and shrink wrap contract have been challenged in various US Courts. Like, in case of Feldman v. Google, Inc. the validity of Clickwrap contract was discussed and the hon’ble US court observed that Feldman had sufficient notice of terms and conditions of the contract as he went through a proper signing up process including scrolling through whole terms and conditions page before assenting for it. Hence, the court held that the contract entered between Feldman and Google was valid.

However, in the case of browse wrap contracts foreign courts are hesitant in enforcing its validity. In such contracts, Judicial opinion holds that for constituting a valid contract it is necessary for the party to have constructive or actual notice of the terms and conditions of it. Therefore, where the defendant failed to specify near the ‘download button’ that the user will be bound to the license agreement if he downloaded the software from the website, no contract was executed between the parties. In light of these, the websites are now a days more inclined towards clickwrap contracts. Similarly, in case of shrink wrap contracts the court infers the assent of the party from their scrapping of the wrap which has terms and conditions attached with it.

VII. ISSUES FACED BY E-CONTRACT

The easy access to the internet, fax, computer programs or smart phones has acted as blood in the body of e-commerce industry of our country. The enforcement of Information Technology Act of 2000 has provided a legislative framework and governance to it. However, this statute also has certain shortcomings pertaining to the raising issues in the country in respect of these e-contracts. Following are the few issues faced by electronic contracts India.

1. JURISDICTIONAL ISSUE

The present legislations governing e-contract have failed to answer questions as to jurisdiction lies in which country in case of dispute, which Law to be applied to solving the disputes between suppliers or consumers/purchaser or how will decision be enforced in both the countries. e-contract are borderless, therefore, it gets difficult to determine the jurisdiction i.e. the extent of the limit of the court’s authority over any suit or appeal at the time of breach of e-contracts. the Allahabad High Court while dealing with the jurisdiction issue In case of P.R. Transport Agency vs. Union of India & others held that the acceptance of the contract was sent through Email and received in Chandauli (U.P) and principle place of business of the petitioner was at Banaras (U.P) thus, the place of jurisdiction on the present case lies in U.P. As electronic transactions have no boundaries, it has become difficult to deal with the jurisdictional issue, especially when both parties belong to different part of the world.

2. COMPETENT PARTIES TO CONTRACT

Under section 11 of the Indian Contract Act of 1872 it is necessary that parties should be major, of sound mind and should not be disqualified by the law however, while executing e-contract the major question arises are over the competencies of the parties. Minors can easily enter into contracts through click wrap or browse wrap contracts with the website. So, the legal liability is on the websites to ensure that the party contracting is competent under Indian Contract Act of 1872 for it. To ensure the competency of the party, the online websites have come up with various methods such as signing up to the site, in which the person enters personal details including birth date ensuring the website that the party has the capacity to enter into the contract. It is sometimes accompanied with a dialogue box containing pictures, and users are required to identify things in them to ensure the lunacy of the party. Despite these methods the enforceability of e-contract is in question due to lack of stringent legislation to deal with such issue in depth.
3. E-SIGNATURE AUTHENTICATION

E-contract being generated through electronic means cannot be signed traditionally by the parties, as Indian Contract Act of 1872 recognizes both oral and written contracts, for the valid E-contract it is not mandatory to be signed by the parties. The signature in traditional contracts signifies the intention of the party to constitute the contract and has more legal value in the eyes of law. Indian Copyright Act, 1957 provides for the contract to be signed by both parties. The major drawback of it is that not e-signature is not valid on every document. Documents like (a) Negotiable instrument except the cheque (b) Powers of attorney (c) Trust Deed (d) Real Estate Documents which are required to be physically signed by the parties and Information Technology Act 2000 has no applicability over it.

4. LOSS DUE TO DIGITAL DATA

E-contracts are documents which are entered into by the parties through electronic transmissions and are stored in the digital world. Like paper transactions there is no safety in the information stored in the world. Though, it is believed that anything which enters the digital world always exists and is never lost yet there are no administrative, legal or judicial guidelines over the scenario where the whole information or part of information is lost due to the failure of the technology.

VII. CONCLUSION

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. Information Technology Act of 2000 has failed to lay down rules for the identifying theft, privacy protection, data protection in internet banking, considering the short comings of the present legislature. There is a need of stringent and separate legislation for governance of e-contract in India.

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