

Legal Issues Vis a Vis Online Contracts in Global Scenario

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Abstract

E-contract is a new phenomenon which has grown due to E Commerce. E commerce has created new domains which has no limits in terms of commercial & business transactions. There are no territorial limits in the domain of e-contracts. Physical presence is not a major requirement in e-contracts. However, at the same time the need to govern E contracts has also raised.

E contracts are vital part of the E Commerce which cannot be left in vacuum or unregulated. There are major challenges which are posed while transacting at the electronic medium. These issues and challenges need to be addressed properly in order to create a safe and secure electronic platform. The current research paper shall be discussing the basics of e contracts with the major issues and challenges faced while contracting electronically. The author shall be incorporating a few suggestions at the end to secure electronic contracts regime.

Key-words: Electronic Contracts, Electronic Commerce, Commercialization, Issues, Challenges, UNICTRAL.

1. Introduction

In the last 20 or 30 years, E Contracts have suddenly achieved a great boom. Internet has become a daily basis affair for every person. Internet is within the reach of every lives. Internet has become the basic necessity of individuals. E commerce has assisted every business and corporate to increase the business. This has led to development of e contracts at a large. One of the exceptional features of e contracts is that the consumer may not come to know that he has entered into an e contract. Merely by clicking on “I agree with Terms and Conditions” may amount to entering into

e contract with the respective party at the other end. E Contract had become a very common phenomenon that no aspect of part of life is untouched by it whether it is Online Shopping through Amazon or flipkart, Grocery, Travel Booking, hiring taxi online food delivery and so many innumerable things.

However, we need to understand at this juncture that, e-contracts cannot be left to be unregulated or uncontrolled. A strict regulatory regime is mandatory in order to govern the e-contracts. There are major issues which we need to address in order to ratify the e-contracts such as capacity of parties, jurisdictional aspect, governing law etc. The paper will be addressing all these major challenges faced at the e-contract medium.

2. A brief Insight into E - Contracts

Electronic contract are those contracts which are formed between the parties at electronic medium. Parties involved may be two or may be more than two at specific situations. It should be kept in mind that negotiations do also take place at the electronic medium. A brief outline as the contract is prepared at the electronic medium also. The intricacies involved in each clause of the contract are discussed agreed upon.

There are a few other names of electronic contracts such as digital contracts, cyber contracts. Actually they are similar to the traditional contracts which are drafted on the paper for the exchange of services and goods for a specific amount of consideration. The only difference and feature of the e contracts is that the whole transaction shall take place an electronic medium through internet.

There is a contract life cycle involved in the electronic contracts. Contract life cycle refers to the whole process of contracting at the electronic medium. Such as, there shall be a formal drafting of the contract. There shall be discussions and negotiation with respect to the clauses inserted into the contract. Negotiations shall take place in order to make the contract more lucrative. A proposal shall be based on that contract in the electronic medium. Acceptances are done through the digital signatures. There shall be some sort of consideration involved into electronic contracts. The factors pertaining to the performance and certainty of performance are also checked in the electronic contracts. The aspect of free consent and competency is also one of the important factors in the electronic contracts.

There are different forms of electronic contracts such as click wrap which are usually found in the agreements which contain “I agree or I disagree” clicking option. These are assent based electronic contracts after understanding the terms and conditions as displayed on the web page. The

other form is shrink-wrap agreement which is generally found in the CD Rom of the software. All terms and conditions are provided on the CD cover. The last form is Electronic Data interchange contract. This is mostly found in the contracts which enable the trading transactions. It enables the transfer of data from one computer to other computer.

3. History and Development

E contracts have got their significance relevance post 1950's at global level. Before that e contracts were not of that larger significance, one cannot say that there were no e contracts before 1950s, but the use and implication of the same were not of that significant. Sir William Anson has defined e contracts in the most subtle way: As per Sir William Anson, "A contract is a legally binding agreement executed between two parties or more than two parties by which rights are acquired by one or more acts of forbearances on the part of the other party or parties."

The development of e contracts has taken place through the e commerce website, portal or applications. E contracts are formed in the course of e-commerce by the interaction of two or more parties by the use of electronic devices or means such as interaction of a party with electronic agent or through e-mail or may be through a computer program, or the interaction of at least two electronic agents that are programmed to understand and recognize the formation and existence of an agreement or a contract.

The rules and maxims applicable to the traditional styled contracts are applicable in the electronic contracts as well. This is called as electronic contract. Electronic contract is assistance to drafting, forming and negotiating successful contracts for consumer in business e-commerce and incidental related services. It is formed in a way to provide aid to parties to the contract in drafting and executing commercial contract policies within electronic business. It contains model contracts for sale of the products and supply of digital products and services to both consumers and businesses.

4. Challenges in E Contracts

Although E contracts come up with a package of manifold advantages such as ease of doing business, no complicated compliances, easy and simple negotiations, no physical appearances. These all advantages have enhanced the use of e contracts in the commercial businesses and transactions. However, we also need to understand that the regime of e contract has various challenges also. These

challenges and issues need to be addressed properly so that e contract platform doesn't become an unregulated and uncontrolled platform. A few of challenges are discussed as below:

Capacity to contracts: It is one of the essential requirements as laid down under the section 10, 11, 12 of The India Contracts Act, 1872. In the traditional contracts, capacity and competency to contract is read in the lines of age and soundness of mind. In the Electronic contracts also, competency and capacity of the parties is the basic requirement. In an electronic contract, parties to the contract must take steps to ensure that the contract is binding, e.g., that the major elements of the contract are complied with and are agreed upon in the same sense by the parties. In the electronic contracts it is to be ensured that the parties entering into the agreement have the legal competence and capacity to enter into an agreement.

However, in the electronic contracts, the individuals entering into a contract are generally nameless parties. The other party who is providing a service has no idea whether the individual who has clicked on the agreement terms icon or text is legally competent to enter into a contract. Such type of situations is majorly faced in the contracts executed at any E commerce portal where any minor who is not competent to contract enters into a contract by clicking on I agree text. These types of situations may be avoided in the corporate contracts entered between two corporate entities. Where an incompetent individual has entered into e contract, then such a contract is void.

Choice of Law: The Choice of law is another aspect which needs in depth deliberation in the e contracts regime. There may be instances where the parties entering into a contract are based at different nations or states. Each respective nation may have its own rules and regulations pertaining to e contracts. In such a case, clash of rules and regulations is quite pertinent feature in case of any dispute between the parties to the contract.

The other problem which has been seen and noted in the choice of law is that courts most often apply the law of the jurisdiction that the major points of contract with the contractual relationship which is known as the personal jurisdiction of the court. The problem rises, if the party is a non-resident, which law would be applicable in such a case. Domestic or local laws of the state where the party is residing or local laws of the state or the nation where the party has committed the offense. In the digital world of contract, fixing or getting a surety as to choice of law becomes a complex issue.

Choice of the Forum: This is again a problem similar to that of the choice of law issue. Parties residing at different states or nations would prefer to make respective their local forum as the governing forum in cases of any disputes. Each party may file a suit at their own respective jurisdiction. The service provider may have to face the suit at multiple jurisdictions. It leads to an

expensive and frustrating affair. Defending suits or complaints at different forums may become a headache for both the parties to the contract. Parties to the contract may have their own preferences; one may choose arbitration as the best suited method to settle the dispute whereas the other party may choose a commercial suit as the best way to settle the dispute. These differences often lead to non-performance of the contract. The choice of forum is one of the never-ending hurdles in the e-contracts.

Electronic Authentication: The common law of contract law has evolved over a period of centuries. Earlier there were pen and papers used to physically authenticate a contract document. But as the contract law is evolving pen and papers have been replaced by digital signatures and e-signs. The major point with electronic authentication is that the authentication has to be done in the guidelines set up by The Information Technology Act, 2000.

All electronic records, documents and signatures need to be validated under the provisions and the incidental rules made under the Information Technology Act, 2000. One must ensure that all the formalities as laid down under the Information Technology Act, 2000 need to be followed and complied with. There have been many instances where the legal framework as provided under the Information Technology Act, 2000 is not followed or complied with. In such a situation, an e-contract formed loses its legal sanctity.

Free Consent: Free consent is one of the essential requirements of a legally enforceable contract. No relaxation can be provided on the lines of free consent in the contract. No negotiations can take place with respect to the aspect of free consent in electronic contracts as well as traditional contracts. Free Consent has got a specific provision under The Indian Contract Act, 1872. But determination of free consent is not possible in the e-contracts. It is impossible to ascertain the status of the acceptor in the cases of e-contracts. Free consent can be easily determined in the cases of physical traditional contracts.

The Supreme Court of India in the case of *LIC of India V Consumer Education and Research centre* held that “In dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power, he has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever. Hence it can be concluded that the user should be prudent while giving his consent to avoid troubles.”

5. Legal Aspects of E Contracts

The Indian Contract Act, 1872, Information Technology Act, 2000, Indian Evidence Act, 1872 gives a valid recognition to the e contracts in India. These all acts have in one way or other lay down foundation for the e contracts in India. The provisions of the Indian Contract Act, 1872 are well supplemented with the provisions of the Information Technology Act, 2000 to enhance the application of e contracts in India. These acts give a lawful acknowledgment to the E business exchanges, encourage Electronic Governance in India. The Information Technology Act, 2000 has a similar arrangement as those UNICTRAL model laws of Business. Section 3 of the Information Technology Act, 2000 confirms electronic records (including E- Contracts) which are possible through computerized marks or a type of electronic records and advanced marks separately. Section 4 and 5 of the Information Technology Act, 2000 provides lawful acknowledgement to electronic records and advanced marks separately. UNICTRAL business laws provide a framework and policy for the e contracts. The Electronic contracts have developed at the instance of the UNICTRAL model laws. The implications as laid down under the UNICTRAL model laws are well followed and have acquired a place in the contract laws of every nation.

6. Conclusion

The standards of E commerce have raised the level of living. Consequently, the standards of electronic contracts have been raised by the virtue of electronic commerce. E commerce provides the ease and flexibility to commercial transactions and businesses. E contracts are well suited to facilitate the re engineering of business process outsourcing at several companies involving a composite of technologies, processes and business policies which will aid the instant exchange of information.

However, E contract's regime is facing manifold issues and challenges, which needs to be addressed properly. The author is suggesting a few suggestions to improve the e contract regimes. Firstly, a proper identification proof of the parties should be exchanged in order to conduct commercial transaction. Secondly, Electronic contract life cycle studies should be introduced at higher secondary level at schools. The introduction of these courses at the higher secondary level shall ensure that the students understand all the intricacies involved in the electronic contracts. Thirdly, the regulatory framework as provided under the Information Technology Act, 2000 should be introduced through different seminars and conferences, so that every individual may be able to understand the E commerce and E contracts framework. With these suggestions, the author would

suggest that E contracts should be promoted more and more so as to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an online global market place with millions of customers and thousands of products and services.

References & Suggested Readings

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