

# CRITICAL STUDY ON ONLINE CONTRACT IN THE INTERNATIONAL ARENA – with special reference to Indian legislation

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## ABSTRACT

*The Law is an organic being which has always managed to evolve to keep up with changes in society. An online contract is simply a communication between two parties in regard to transfer of goods/services. However, the challenges posed by the growth of internet is perhaps its biggest yet not just because of its utter size, nor the speed with which it has developed. The relationship between law and the internet is based upon a simple conflict: laws exist to regulate society; the internet has created a new society founded upon the principle that it should be wholly unregulated.<sup>1</sup>*

*Though online contracts have been given recognition by the Information Technology Act, 2000, but, it is only a step in the right direction. However, in the case of online transactions, it can be regarded as an enabling statute which must be read in consonance with the Indian Contract Act, 1872 in order to determine whether the online transaction does indeed constitute a valid contract. Due to this, 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.*

**Keywords:** *Information Technology Act 2000, Law, Online Contract.*

## INTRODUCTION

The growth of e-commerce has created the need for vibrant and effective regulatory mechanisms, which would further strengthen the legal infrastructure that is crucial to the success of electronic commerce. The rapid development of Information Technology presents challenges to legal systems across the globe. Transactions accomplished through electronic means have created new legal issues. The challenge before the law makers is to balance the sometimes conflicting goals of safeguarding

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<sup>1</sup> Kevan, T. and McGrath, P.; "E-mail, the Internet and the Law", 1<sup>st</sup> Indian reprint, (Universal Law Publishing Co. Ltd. Delhi, 2007), p. 5.

electronic commerce and encouraging technological development.<sup>2</sup> It was also noted that the three major concerns for international online contracting are authenticity, enforceability and confidentiality. Authenticity involves the verification of the person that one is dealing with electronically. Enforceability includes the legal scope of the license granted or the warranty given under a national law. It also includes the provability and verification of the contractual terms of an online transaction. Confidentiality revolves around the protection of sensitive information such as payment information and trade secrets. The fear is that the public domain nature of e-commerce makes such information, susceptible to fraud and misappropriation by third parties. The minimum level of due diligence pertaining to these three concerns entails a workable knowledge of the legal requirements of forming and proving a contract formed through the internet.<sup>3</sup>

## BACKGROUND OF STUDY

The formation of a contract in cyber space is indeed an issue which is still to a certain extent unsettled or in other words, occupies an evolving field. Different jurisdictions world over have already enacted legislations to clarify the rules of formation of online contracts; however, some issues still remain perplexing. These legislative provisions of online contracts by and large follow the traditional rules of contracting in the physical world which are interpreted or marginally modified as per the characteristics of the online world. Hence it is very clear that the present Law of Contract could not face the contracts based on new technologies such as internet contracts and other contracts through electronic media & devices. The use of Computer & Internet is frequent now a days and present law has no provision to regulate the contracts based on these devices. The global medium has been transformed into a single community.<sup>4</sup> With the increasing use and reliance on electronic means in international trade, the field of electronic commerce is getting increasingly important and nobody can deny that the use of electronic means is playing a key role in an efficient worldwide growing field of international commerce.

## SIGNIFICANCE OF STUDY

As cyber law develops around the world, there is a growing realization among different nation states that their laws must be harmonized and international best practices and principles must guide implementation. Many countries are trying to establish harmonized legal regimes in order to promote online commerce.

As e-commerce growth becomes more and more significant, countries such as India must not only address and appreciate its potential for the growth of trade and industry but also as a means of

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<sup>2</sup> Ryder, Rodney D.; "Guide to Cyber Laws", 1<sup>st</sup> Edn. (Wadhwa and Co., Nagpur, 2001), Preface

<sup>3</sup> DiMatteo, Larry A.; "Law of International Contracting", 2<sup>nd</sup> Edn. (Wolters Kluwer, Boston, 2009), p. 428.

<sup>4</sup> Seth, Karnika; "Computers, Internet & New Technology Laws", 1<sup>st</sup> Edn. (LexisNexis Butterworths Wadhwa and Co., Nagpur, 2012), p. 23

survival in the new world of ecommerce-based trade and business. The ability to do so depend on several factors, the most important is infrastructure, both physical (the telecommunication network) as well as the financial and legal framework, including a business and trade environment conducive to electronic commerce. Therefore, it is essential to create a policy and regulatory framework that favours the development of e-commerce and harmonizes national approach in diverse areas such as telecommunications, trade, competition, intellectual property, privacy, and security.

India being one of the signatories to the UNCITRAL Model Law, was required to give effect to the said resolution and to promote efficient delivery of government services by means of reliable electronic records. Therefore, the Parliament of India passed its cyber law in the form of the Information Technology Act, 2000, which provides the legal framework for electronic commerce. The Act received the assent of the President of India and became the law of the land on 17th October 2000.

It does not specifically deal with the online contracts rather the provisions of the Indian Contract Act, 1872 are applicable to online contracts and the Information Technology Act, 2000 grants legal recognition to the transactions carried out by means of electronic data interchange and other means of electronic communication. The Act aims to facilitate the development of a secure regulatory environment for e-commerce by providing a legal infrastructure governing online contracting, security and integrity of online transactions, the use of digital signatures and other issues related to electronic commerce.

The Act further states that unless otherwise agreed to, the acceptance of a contract expressed by electronic means of communication shall have legal validity and enforceability. The Act facilitates electronic intercourse in trade and commerce, eliminate barriers and obstacles to electronic commerce that result from the celebrated uncertainties relating to writing and signature requirements over the Internet. The objectives of the Act also aim to promote and develop the legal and business infrastructure necessary for implementing electronic commerce.

## **SCOPE OF STUDY**

Present research work under title "A Critical Study of Online Contract in the international Arena with the Special Reference to Indian Law", has taken into account of essential principles of law of contract, which are well settled with respect to traditional contracts, but the same may not find equal applicability for an online contract. It also examined the special features pertaining to the jurisdictional issues in online contract and also look into the lacunae in the existing laws with respect to the security aspects and usage in the area of online contracts.

## **OBJECTIVE OF STUDY**

Main objective of the present study was to appraise various aspects related to Online Contract with the Special Reference to Indian Law. Specific objectives of the study were:

- To analysis the impact of e-commerce in the changing scenario of global trade in products,

services and investments in various fields of commercial activity.

- To make a comparative study of traditional laws of contract and laws relating to online contract in India and other countries.
- To examine the special features pertaining to the jurisdictional issues in online contract, which warrant special laws to prevent and redress disputes and ensure non- exploitation and safety of all the parties who are involved, irrespective of global boundaries.
- To look into the lacunae in the existing laws with respect to the security aspects of online contracts.
- To make suggestion for an appropriate legal and regulatory framework for online contract.

## **HYPOTHESIS**

Based on review of related literature and to realize the aims and objectives of the present research, the following hypotheses have been conceived:

1. Online contract need to be treated separately with specific laws.
2. There is an inadequacy in the current laws that govern online contract.
3. Fixing of jurisdiction, and Autonomy of Parties are the crucial issue, which has not been crystallized by Indian legal system. Apart from above mentioned hypotheses, following research questions were also formulated.

## **RESEARCH QUESTIONS**

1. Whether online contract need to be treated separately with specific laws apart from those laws which apply to traditional contracts?
2. Whether there is a meagerness in the current laws that govern online contract in relation to product, services, Investments and so on, coming within the ambit of e-commerce?
3. What are the jurisdictional issues involved in online contract which require differential treatment from that of traditional contracts?
4. Whether there is a need to amend the laws and modes of administration of laws and justice delivery to ensure enforceability of online contract?
5. Whether the security systems are sufficient and are in co-ordination with the protection of rights of all the parties coming within the sphere of online contract?

## **RESEARCH METHODOLOGY**

Nature of present study was doctrinal and analytical, in which descriptive research methodology is used. For this, both primary as well as secondary data were used. The Primary data have been collected from the Indian Statues Mainly the Indian Contract Act, 1872, Civil Procedure Code, 1908,

Information Technology Act, 2000 and various international treaties/conventions pertaining to online contract and internet laws, whereas secondary sources of information comprised of various committee reports submitted to international agencies, books, research reports, research papers/articles published online or in journals etc.

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## ONLINE CONTRACT AND LEGAL FRAME WORK

The Internet has introduced some uncertainty into many aspects of commercial transactions conducted via electronic means, such as in the areas of the formation of enforceable electronic contracts, jurisdiction, and statutory issues relating to evidence and signature requirements. Slowly, through the combination of common law developments and legislative reform, the legal rules relating the creation of enforceable electronic contracts are becoming increasingly more certain.

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. Online contracts are much cost effective and delay can be instantly removed in comparison to traditional paper based contracts. There is less chance of committing errors due to automated process. It also 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. The Indian Contract Act, 1872 provides a basic contractual rule that a contract is valid if it is made by competent parties out of their free consent for a lawful object and consideration. The Indian Contract Act, 1872 does not prescribe any specific provision for communicating offer and acceptance; it can be done verbally, in writing or even by conduct. Thus, oral contracts are as valid as written contracts; the only condition is they should possess all the essentials of a valid contract. There is no specific rule in case of breach of online contract, thus, the rules regarding remedies for breach of contract can be followed as provided in The Indian Contract Act, 1872. As per Indian Evidence Act, 1872, any e-mail communication and other communication made electronically is recognized as valid evidence in a Court of law. 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 online contracts have been given recognition by the Information Technology Act, 2000, but, it is only a step in the right direction. However, in the case of online transactions, it can be regarded as an enabling statute which must be read in consonance with the Indian Contract Act, 1872 in order to determine whether the online transaction does indeed constitute a valid contract. Due to this, 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.

Although, the validity of contracts formed through electronic means has been legally recognized under Sec 10(A) of Indian Information Technology Act, 2000. But, this sub-section of Information Technology Act, 2000 does not specify how communication of proposal, the acceptance of proposal or the revocation of proposal and acceptance reaches the other party, means it does not state that the electronic record is to be transmitted electronically through the means of a computer. Therefore, this section will apply even to case where an electronic record is transferred manually, say in the form of a magnetic disk which is delivered to the opposite party by courier.

An attribution of electronic records has been legally recognized under Sec. 11 of Indian Information Technology Act, 2000. The rule of attribution incorporated in this Section is rigid and is bound to cause inconvenience in many situations such as, where an addressee knew or had reason to know that the message received by him is not that of the originator or where the originator has sent notice to the addressee before acting upon the message, that the message received by him is not his, or where error is apparent on the face of the record. To understand section 11 of the Information Technology Act, 2000, one has to read it along with section 88A of the Evidence Act, 1872, which deals with 'presumption as to electronic message'. This section is self-explanatory as it purports to follow the basic rules of a valid hard-copy agreement.

Section 12 of the Information Technology Act, 2000 elucidates the receipt rule and mandates acknowledgement of receipt of each and every message. The provisions of Section 12 of the Information Technology Act, 2000 are based on the assumption that acknowledgment procedures are to be used at the discretion of the originator. This section is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message.

The time and place of dispatch and receipt of electronic record has been legally recognized under Sec 13 of Indian Information Technology Act, 2000. However, the Information Technology Act, 2000 under section 13, does not explicitly addresses the question of possible malfunctioning of information systems as a basis liability, specifically, where the computer resource of the addressee does not function at all, or functions improperly, or while functioning properly, it cannot be entered into by the data message (e.g. in the case of a telecopier that is constantly occupied), as a result of which, the electronic data message does not enter the computer resource, there is no dispatch of the electronic data message under the law.

The main trouble and problem about the online jurisdiction is the presence of multiple parties in various parts of the world who have a virtual nexus with each other. The question arises in such cases that if one party wants to sue the other, then where can one sue? The municipal laws traditionally require two areas, the place where the defendant resides, and where the cause of action arises.

The Information Technology Act, 2000 is not a complete code for online transactions. The Indian Contract Act, 1872 is still the basic law governing contract formation including online contracts. However, these two Act are supplementary to each other and the Information Technology Act, 2000 not only acts as a 'gap filler' to provide solutions to the issues generated by the introduction of electronic means of communication which are not covered by the Indian Contract Act, 1872, but in certain cases fundamental principles laid down in the Indian Contract Act, 1872 have been modified. Although online transactions are at the helm, one must realize that the laws governing these transactions are yet to emerge and develop. Indian Information Technology Act, 2000 and its Amendment Act, 2008 are not sufficient to deal with online transactions in India.

The Convention was created to ensure the global recognition of international contracts formed using electronic means.<sup>55</sup> It aims at facilitating the use of electronic communications in international trade

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<sup>5</sup> UNCITRAL: "United Nations Convention on the Use of Electronic Communications in International Contracts" (New York, 2005), available at: <http://www.uncitral.org>, accessed on 19 Oct. 2016.

by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The UN Convention on Use of Electronic Communication in International Trade was held with the objective of removing the uncertainty and legal hassles which come in the way of International Contracts carried out through electronic means. The setting up of a legal structure to govern such contracts would enhance the legal certainty and help states gain access to modern trade routes. The Electronic Communications Convention applies to the "use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States". "Electronic communication" includes any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The word "contract" in the Convention is used in a broad way and includes, for example, arbitration agreements and other legally binding agreements whether or not they are usually called "contracts". The Convention, on the Use of Electronic Communications in International Contracts adopted by the United Nations General Assembly in 2005, provides that a party's place of business is presumed to be a location indicated by that party, unless another party demonstrates that the indication was incorrect. If a party has not indicated its place of business, or has more than one place of business then a judge or an arbitrator will select the one, which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. However, the convention states that a domain name or electronic mail address connected to a specific country does not create a presumption that a given party has a place of business in that country.<sup>6</sup> The Electronic Communications Convention affirms in article 8 the principle contained in article 11 of the UNCITRAL Model Law on Electronic Commerce that contracts should not be denied validity or enforceability solely because they result from the exchange of electronic communications. In spite of convention being hailed as 'one of the most important developments in international e-commerce law',<sup>7</sup>

The UNCITRAL Model Laws on E-Commerce has influenced many developed countries with respect to legislative drafting and proposals. Recent enactments and uniform laws now circulating in Canada and the United States were heavily influenced by the Model Law, and drafting committees from the two countries are exchanging ideas on the subjects.<sup>8</sup> In the European Union, the Electronic Commerce Directive and the Electronic Signatures Directive were also influenced greatly by the Model Law and Draft Rules. Furthermore, drafting committees for the implementation of these proposed laws appear to be directly influenced by each other's work, thereby reducing diverging interpretations. In spite of this influence, however, harmonization lags well behind technology. This

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<sup>6</sup> Article 6 of *The Convention on the Use of Electronic Communications in International Contracts*, adopted by the United Nations General Assembly in 2005.

<sup>7</sup> Leng, T.K.; "Towards Uniform Electronic Contracting Law", *Sing.Acad. L.J.*, Vol 18, (2006), pp. 234-35.

<sup>8</sup> Poggi, Christopher T.; "Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation", *Va. J. Int'l L.*, Vol 41, (2000), p. 238.

is a product of differing legal systems and a tendency toward comprehensive, detailed law reform in some EU nations contrasted by the less hands-on approach in the US.<sup>9</sup>

## JURISDICTIONAL ISSUES IN ONLINE CONTRACT

### – INTERNATIONAL CONVENTIONS AND TREATIES

The three important pre-requisites of jurisdiction for a judgement to be valid and enforceable are:

- The jurisdiction to prescribe
- The jurisdiction to adjudicate
- The jurisdiction to enforce<sup>10</sup>

Any sovereign state has the exclusive jurisdiction, power and authority over the persons and property only within its territorial jurisdiction and not on outsiders or persons who do not fall within their territorial jurisdiction. In *Pennoyer v. Neffit* was held that only in case a person was served process when he was physically present within the territory of the state, the court would have personal jurisdiction over a person. The court would attain "in rem jurisdiction" over a non-resident who owned a property situated within the State's territory. The State in this case would be required to satisfy that the plaintiff had duly served the process and then it would attach the property before entry of judgement. On enactment of the 13<sup>th</sup> amendment, the nonresident defendant could claim that asserting such jurisdiction "the jurisdiction in rem" by a foreign State clearly violated the due process rights.<sup>11</sup>

The enactment of long arm statute allowed the local courts to exercise personal jurisdiction over non-residents as long as it complies with the principles of due process elucidated in the 14<sup>th</sup> Amendment of the Constitution of United States<sup>12</sup>. In *Hess v. Pawloski*<sup>167</sup>, the Supreme Court of United States upheld a Massachusetts Statute that provided that the non-residents who use the roads in Massachusetts would be deemed to submit to jurisdiction in Massachusetts as legally valid.

The issues of Jurisdiction are more intriguing at the international level where not only the Jurisdiction of the Courts but also the applicable law will have to be determined. The problem becomes complicated because of the diversity of the laws. For instance, comparative advertising is prohibited in Germany but not in India or America. Similarly, advertising aimed at children is

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<sup>9</sup> Overby, A. Brooke; "Will Cyber law Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce", *Tul. J. Int'l & Comp. L. Vol 7*, (Spring 2000), p. 234.

<sup>10</sup> Seth, kanika. "Computers, Internet & New Technology Laws", 1<sup>st</sup> Edn. (LexisNexis Butterworths Wadhwa and Co., Nagpur, 2012), p. 25. <sup>164</sup> 1995 US 713 (1877).

<sup>11</sup> Burke, John Ia, *Lex 2K*, "Conflict of laws", available at: <http://www.lex.2k.org>, accessed on 18 March 2015.

<sup>12</sup> Seth, Karnika, "Computers, Internet & New Technology Laws 2012", 1<sup>st</sup> edn. (LexisNexis Butterworths Wadhwa and Co., Nagpur, 2012), p.32. <sup>167</sup> 273 US 352 (1927).

forbidden in Scandinavian countries but not in India. Thus it is quite possible that any business activity executed over web site may be perfectly legal in one country but may not be so in another. This is no more hypothetical issue. Much before the advent of the e-commerce, European Community has, to facilitate trans-border commerce within the Member States, adopted the Brussels Convention, for jurisdictional matters and Rome Convention, 1980 for applicable law to contractual obligations. European Directive of Distance selling was enacted in June 1997 for providing homogeneous consumer protection rules which were due to come into force in the year, 2000.

## RECOMMENDATION

Based on conclusions of the study, following suggestions have been made to enhance e-commerce and effectively of legal system related to online contract:

1. Imparting of technical knowledge to the government staff and creating awareness, among the general public is an argent need to make digital India a success, through which Government is planning to prove various services through online.
2. If India has to become a stronghold in ecommerce, mere advancements in the information technology sector and increased awareness of the public as to electronic transactions itself will not suffice. Unless law keeps pace hand in hand with advancements and awareness progressive development cannot be achieved in the years to come. A lasting and effective IT regulation can take place only by international consensus and harmonization. Results of the study suggest an exclusive law to be enacted for the protection of online consumers.
3. E-records are very easy to be tempered, hence, it is very crucial to authenticate the data to ensure justice. E-evidence should not be made admissible without corroboration unless genuine reasons are there to admit without corroboration.
4. Computers are now an integral part of our lives, it appears that there is still a gulf between the legal and technical world that must be narrowed. The functionaries having the first access to electronic evidence must be trained to handle data as not to lead to any alteration while copying or preserving.
5. There is a need to train law officers and judges to comprehend the admissibility of e-signatures and equip them to look into the admissibility of e-signatures on case by case basis as the electronic evidence. More importantly, judiciary must be able to take into account the ease with which electronic records can be used by both sides and make the best use of the e-records itself to meet the ends of justice.
6. India has very less number of forensic labs to investigate, examine or recover the electronic data. Hence, it takes more time to identify, extract, document and interpret computer data. Hence, the need is to establish more forensic labs and also to create a human force having knowledge to recover and investigate digital evidence.
7. There is a need to introduce accountability online in relation to the transactions on the

internet

## CONCLUSION

It can be concluded that the contract that follows the communication is valid too and Indian law thus recognizes the validity of online contracts. But, any of the Indian Laws, related to contract/online contract does not regulate the process of formulating an online contract, thus, it cannot be challenged based on technical grounds. 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. To keep a pace with the fast advancement of the technology, there is a dire need for a specific legislation.

Advancements in the field of information technology have had an impact on the economy of a country and also on the quality of human life. The technological developments have created tremendous opportunities as well as challenges for both the developed and developing countries. One of the chief areas wherein the information technology has made a tremendous impact is – 'business and commerce'. The speedier means of communication has abridged the time and distance factor in transacting business. The information technology has brought forth an incredible revolution in the field of contract-formation.

In the latest rounds of negotiations at UNCITRAL on a new electronic contracting convention, proposals similar to those described above were made in order to deal with error. An argument has been made, however, that to the extent the provision deals with substantive matters of contract, it should be deleted. Such an argument fails to recognize that as electronic contracting evolves, the issues it raises will cease being unique to an electronic environment, but will have to be addressed to accommodate modern market practice.

The US and European Union have each enjoyed successes and failures in their attempts to bring contract law doctrine into line with the commercial realities of the 21st century.

Among the most fundamental challenges any legislator will face in assessing the relevance and efficacy of traditional contract law doctrine in light of technological innovation will be finding an appropriate response to the development of more powerful systems for negotiating and forming contracts. Competitive pressures will encourage businesses to seek to replace humans with automated contracting processes, but automated processes may embody technical norms that are not altogether consistent with law or public policy. The turmoil in the realm of information privacy law and practice may be an indication of the kind of controversy that will arise in the realm of contract law

as new, more powerful electronic commerce technologies come into widespread use. Mechanisms to keep the development of technical standards in tune with both competitive market forces and the requirements of law and public policy will have to be found.

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