



CRITICAL ANALYSIS OF THE JUNCTURES BETWEEN E- CONTRACT AND INDIAN LEGAL SYSTEM

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ABSTRACT

E-contract is any sort of contract established through the interaction of two or more persons using electronic means, such as e-mail, with an electronic agent, such as a computer program, which is programmed to recognize the existence of a contract. Since the Internet is no longer limited to pure correspondence or data measurement and analysis, electronic contracts are now the order of the day and there are no differences between online and offline contracts.

In the modern era, the whole contract can be completed in seconds but still the traditional, rules of contracts are applicable in E-contracts. E-Contract is an aid in the drafting and negotiation of effective e-commerce and related services contracts for customers and businesses; and this includes model contracts for selling products and providing digital goods and services to customers and companies alike.

This paper focuses primarily on the broader context of E-contract. More precisely, the first part of the paper seeks to clarify the Specific laws regulating e-contract rules in India and highlights the technicalities of e-commerce and e-contract; whereas the

second section focuses on issues relating to e-contracts covering the issue of jurisdiction, online signing requirements, minor entering into e-contracts, problems of unfair position and restrictive negotiation in standard form of contract etc; further it also deals with the interrelationship between e-contracts and competition law, and the penultimate part of the paper deals with the jurisprudential nature of e-contracts with specific reference to subjective theory of contract, the legality of e-contracts in government tenders; and lastly it deals with the role of arbitration in E-contract.

KEYWORDS-E-commerce, E-contract, Standard Form of Contract, Competition Law, Arbitration, Government Tenders.

I. INTRODUCTION:

“A technological revolution is transforming society in a profound way, if harnessed and directed properly information and communication technologies have the potential to improve all aspects of our social, economic and cultural life. It can serve as an engine for development in the 21st century and as an effective instrument to help us achieve all the goals of millennium declaration”¹

-KOFI ANNAN

The latest form in which instant contracts can be made is to enter into contracts through computer internet, which is the networking system's most innovative mode; through which messages can be transmitted from the sender to the addressee via e-mail. The internet connects countless networks all over

¹Kofi Annan, MESSAGE FROM UNITED NATIONS SECRETARY-GENERAL KOFI ANNAN, World Summit on the Information Society, (Mar. 27, 2020, 11: 25 AM),

<https://www.itu.int/net/wsis/annan.html>.on the Information Society, (Mar. 27, 2020, 11: 25 AM), <https://www.itu.int/net/wsis/annan.html>.



the world and hence it is easy to enter into contracts through exchanging offer and acceptance by electronic means.

The Internet era has brought along with itself a series of revolution where now it has also led to an impact on the preferred mode of doing business by the people. Pertinent to note paperless mode of doing business is given due regards also because of its go-green initiative, thus reducing huge amounts of paper waste. An Electronic Contract just like a paper contract is largely governed by the provisions of The Indian Contract Act'1872(herein; ICA'1872) just in the same manner as any other traditional contract; essentially being the digital version of a paper contract. Businesses and individuals enter into it by means of an e-mail or a specialized software, the most commonly used one being Contract Management Software. Used in concluding agreements like that of employment, sales, services, or tenancy, E-Contracts in essence serve the purpose of speedy transaction for the ultimate convenience of the users. Any contract to be executed under the ICA'1872 has to go through the testing metal of satisfying the essential elements of a contract that we are already aware of. When E-contract comes into the picture alternate user conduct like exchange of e-mail/fax, downloading or accepting a condition can also imply a contract.

With regard to the relevant law of the electronic contract, we find it necessary to shed some light on issues of e-contract in

various fields, including the legality of government tenders through e-contract, competition law related concerns, jurisprudential dimension of e-contracts and its outreach in arbitration.

II. ADOPTION OF SPECIFIC RULES FOR E-CONTRACTING:

The concept of contracts being entered via electronic means has been duly acknowledged in the Indian Legal System. The definition of "evidence" as provided under Section 3² of the Evidence Act includes "all documents including electronic records produced for the inspection of the court." Further, Section 47A³ of the Evidence Act stipulates that when the Court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying Authority which has issued the electronic Signature Certificate is a relevant fact, and Section 85B⁴ of the Evidence Act stipulates that unless the contrary is proved, the Court shall presume that

- The secure electronic record hasn't been modified since the specific point of time to which the secure status relates.
- The secure digital signature shall be affixed by the subscriber for signature or approval of the electronic record.⁵

Delhi High Court in the case of *Societe Des Products Nestle S.A and Anr v. Essar Industries and Ors.*⁶ led to the immediate

²Evidence Act § 3 (1872).

³Evidence Act § 47A (1872).

⁴Evidence Act § 85B (1872).

⁵**Anita Baid and Richa Saraf**, *Moving towards digital India: Are e-agreements valid?*, Vinod Kothari Consultants (Mar. 28, 2020, 2:28 PM), <http://vinodkothari.com/2019/10/validity-of-e-agreement-and-e-signature/>.

⁶2006 (33) PTC 469 Del.



introduction of Section 65A⁷ and 65B⁸ in the Indian Evidence Act of 1872 relating to the admissibility of computer generated in a practical way to eliminate the challenges to electronic evidence.

Section 10-A⁹ of the Information Technology Act, 2000 (herein; IT Act'2000) says "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, such contract shall not be deemed to be unenforceable solely on the ground that such electronic means of form was used for that purpose".

Section 13¹⁰ of IT Act' 2000, read with section 4¹¹ of the ICA' 1872, provides that acceptance is binding on the offeror when acceptance is outside the control of the originator, and for offeree when the acceptance enters the information system of the offeror.¹² It has been noted that these rules apply only to non-instantaneous forms of communication considered to be e-mail.¹³ For instantaneous forms of communication, such as 'web click' contracts the contract is concluded when the addressee is in receipt of the acceptance.¹⁴ In the case of contract formation through the exchange of e-mails, the risk of non-delivery lies with the offeror-

he will be bound by acceptance once it has been sent, whether or not it has received acceptance; whereas, the offeree will only be bound if the message enters the information system of the offeror.¹⁵

The risk of non-delivery may be shifted through acknowledgements of receipt, Section 12¹⁶ of the IT Act, deals with the default in acknowledgement of receipt process and it can be inferred that an acknowledgement may be given by any communication by the addressee or any conduct sufficient to indicate to the originator that the electronic record has been received.¹⁷

Receipt acknowledgment does not change the binding nature of the receipt of electronic records, but where the originator has stipulated that the electronic record is binding only after receipt has been received by her of an acknowledgment of such electronic record, the electronic record shall be considered never to have been submitted by the originator until such receipt has been obtained.¹⁸ Thus, it can be concluded that India has followed a complex theory of reception with the complexities of receipt recognition.

III. WHAT IS E-COMMERCE?

Globalization, in combination with digital India's government policies, has a positive

⁷Evidence Act § 65A (1872).

⁸Evidence Act § 65B (1872).

⁹Information Technology Act §10 (2000).

¹⁰Information Technology Act §13 (2000).

¹¹Indian Contract Act §4 (1872).

¹²See also CM Abhilash, *E-Commerce law in developing countries: an Indian perspective*, Information & Communication Technology Law, 269, 274 (2002).

¹³*Bhagwandas Goverdhandas Kedia v Girdharilal Parshottamas and Co.*, AIR 1966 SC 543.

¹⁴*Supra* note 12.

¹⁵Tana Pistorius, *From snail mail to e-mail — a South African perspective on the web of conflicting rules on the time of e-contracting*, 39, *The Comparative and International Law Journal of Southern Africa*, 178, 207 (2006).

¹⁶Information Technology Act §12 (2000).

¹⁷*Supra* note 15.

¹⁸*Supra* note 15.



impact on the Indian economy. A survey shows a 53 per cent rise in the Compound Annual Growth Rate (CAGR) in online retail countries between 2013 and 2017.¹⁹ Simple access to the internet, technological facilities, mobile phones, etc. resulted in the country's citizens entering into electronic contracts. Such contracts are accepted internationally; crossing the distance between the parties. The European Initiative in Electronic Commerce defines e-commerce as follows:²⁰

Any form of business transaction in which the parties interact electronically rather than by physical exchanges. It covers mainly two types of activity; one is the electronic ordering of tangible goods, delivered physically using traditional channels such as postal services or commercial couriers; and the other is direct electronic commerce including the online ordering, payment and delivery of intangible goods and services such as computer software, entertainment content or information services on a global scale.

Hence, it is the purchasing and selling of products and services on the Internet and is often synonymous with any transaction involving the transfer of ownership or the right to use goods or services through a computer-mediated network.²¹ According to a

joint ASSOCHAM – Forrester Study Report, India's e-commerce revenue is forecast to rise from \$30 billion in 2016 to \$120 billion in 2020, at a 51% annual growth rate.²² It can be inferred that e-commerce means; the use of electronic communication and digital information processing technology in business to establish, transform and redefine value-creating relationships within or within organizations and between individuals.²³

III.1. TYPES OF E-COMMERCE

An electronic contract generally speaking can be described as below:²⁴

- Business-to-Business (B2B)
- Business-to-Consumer (B2C)
- Consumer-to-Business (C2B)
- Consumer-to-Consumer (C2C)
- A/G2A/G or B/C [this involves communication with other administrations or with businesses and consumers between administrations / governments (local, regional or national)].

III.1.i. BUSINESS TO BUSINESS (B2B)

A B2B process includes electronic transactions between and within companies. It is a system usually in the context of electronic data exchange or electronic transfer of money. Due to the dramatic rise in

¹⁹India is fastest growing e-commerce market: Report, The Times of India, Nov 29, 2018, <https://timesofindia.indiatimes.com/business/indiabusiness/india-ifastest-growing-e-commerce-market-report/articleshow/66857926.cms>.

²⁰European Initiative on Electronic Commerce, CORDIS EU research results (Mar. 29, 2020, 07:30 AM), <https://cordis.europa.eu/article/id/8152-european-initiative-on-electronic-commerce>.

²¹Sumit Dutt Majumder, *GST and E-Commerce*, 28 *National Law School of India Review*, 123, 128 (2016).

²²India's e-commerce sector to see \$120 billion revenue by 2020: Assocham-Forrester report, The Economic Times, May 08, 2016, <https://economictimes.indiatimes.com/industry/services/retail/indias-e-commerce-sector-to-see-120-billion-revenue-by-2020-assochem-forrester-report/articleshow/52172120.cms>.

²³E. Lallana et al, *ePrimer: An Introduction to eCommerce*, Philippines DAI-AGILE, 2, (2000).

²⁴S.V. JogaRao, *Computer Contracts & Information Technology Law*, Wadhwa and Company, Nagpur, 1226 (2005).



internet penetration, B2B transactions have seen a remarkable growth and have become a faster growing segment even within the e-commerce setting.

III.1.ii. BUSINESS TO CONSUMER (B2C)

It is the transaction where, on one hand, a trader's agency and, on the other, an individual customer conducts business. The term B2C has been widely used to refer to a sale by a corporation or seller to an individual or 'user' performed over the internet. The Website itself serves a shop's intent in this case.

III.1.iii. CONSUMER TO BUSINESS (C2B)

In this, the sale and purchasing cycle is absolutely reversed. This is very important for initiatives that include crowd sourcing. Individuals make their items or services in this case, and sell them to companies.

III.1.iv. CONSUMER TO CONSUMER (C2C)

This is the transaction involving two or more clients with a business organization that merely offers a web-based interface to promote customer transaction. This website offers the web-based interface and enables users to freely interact with one another.

III.1.v. GOVERNMENTAL AND NON-BUSINESS

The requirements for e-commerce are also found in the government and non-commercial industries. Revenue agencies, law services, airports, branches of defense, universities, and other non-profit, non-

governmental charitable organizations are some of the technology-based institutions, and calling for tenders for public work assignments, called e-procurement.

IV. WHAT IS E-CONTRACT?

E-contract is any agreement entered into by competent parties on the Internet, with lawful consideration, free consent, without any malicious intention and with the intention to create legal relationship.

E-contract can be described as; a kind of contract formed by negotiation of two or more individuals through the use electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.²⁵

The UNCITRAL Model Law on Electronic Commerce²⁶ instead of defining an E-Contract, it, merely states that, the contract can be concluded by exchanging data messages and the legitimacy of such a contract should not be questioned when a data message is used in the formulation of a contract²⁷.

The International Chamber of Commerce refers to electronic contracting as an automated process for entering into contracts through the computers of the parties, whether networked or through electronic messaging²⁸. *Uberrimaefidei's* doctrine should be strictly adhered to in the case of an

²⁵E-Contract Law and Legal Definition, Convenient, Affordable Legal Help - Because We Care!, (Apr. 01, 2020, 09:30 AM), <http://definitions.uslegal.com/e/e-contract/>.

²⁶UNCITRAL Model Law on E-Commerce, (1996).

²⁷UNCITRAL Model Law on E-Commerce, Article 11, (1996).

²⁸Automated e-contracting, ICC Guide For eContracting, (Apr. 03, 2020, 01:20 PM), <https://iccwbo.org/content/uploads/sites/3/2016/11/ICC-Guide-for-e-contracting.pdf>.



electronic contract and no pressure can be placed on one party behaving to its advantage to the other's representation that he is qualified²⁹.

IV.1.TYPES OF E-CONTRACT

Broadly speaking e-contracts can be classified under two heads- contracts executed by

- Electronic Data Interchange
- Cyber contracts³⁰.

IV.1.i.ELECTRONIC DATA INTERCHANGE (EDI):

Electronic Data Interchange (EDI) means the electronic transfer of information from computer to computer using an agreed information structure model. EDI is defined as a set of standards for the sharing of business information between computers and the electronic transfer of business transactions.

IV.1.ii.CYBER CONTRACTS

A cyber contract is a contract created entirely or in part by communication through computer networks.

The Cyber contracts shall include:

- **E-MAIL CONTRACT**

After the exchange of a number of e-mails between the parties, a contract may be concluded and terminated. There the e-mails have the same function as usual letters, if both parties had signed a contract by letters.

- **CONTRACT THROUGH WEBSITES**

A vendor will usually view goods on his website and indicate the cost of such product.

A consumer can navigate through the website previewing the goods or products on sale.

Shrink wrap, click wrap, and browse wrap are typical types of electronic commerce agreements.

➤ **Click wrap**

A click-wrap agreement is used mainly as part of the software package installation process. The term 'click wrap' originates from the use of 'shrink wrap contracts' in sales of boxed software. This has pre-determined terms and conditions where the party has no bargaining power like in the conventional contract, they will either agree or refuse this completely.

➤ **Shrink Wrap**

Shrink Wrap means licensing agreements or other formal terms and conditions. These terms or licensing agreements can only be read and approved by the consumer after the product has been delivered. When the user opens the packet, the user is considered to have read and will be bound by certain conditions.

The validity of the Shrink-wrap agreements was first given relief in the famous case, *ProCD, Inc v. Zeidenburg*³¹ where it was held that, the very fact that, after reading the terms of the license outside the wrap tag, the purchaser opens the cover along with the fact that he acknowledges all the terms of the tag appearing on the computer with a key stroke.

➤ **Browse Wrap**

²⁹Raghavendra S. SrivatsandSukruta R., *Capacity of parties, Online Contracts*, (Apr. 05, 2020, 10:05 PM), <http://14.139.60.114:8080/jspui/bitstream/123456789/722/9/Online%20Contracts.pdf>.

³⁰SachinRastogi, *Insights Into E-Contracts In India*, (Lexis Nexis, 2013).

³¹ 86 F.3d 1447, 39 U.S.P.Q.2d 1161, 1 ILRD 634 (7th Cir. 1996).



First time the term "browse-wrap" appeared in *Pollstar v Giganima Ltd.*³² to describe a Web site agreement to which the user assents by visiting the Website.

In most cases, the website or the browse wrap includes a statement that the user's continued use of the website or the downloaded software manifests assents to those terms.³³ In comparison to a click-wrap agreement, where the user must express consent to the terms and conditions by clicking on a - 'I accept' button, a browse-wrap agreement does not allow this form of express consent. Rather, the user of the website purports to give his or her consent by merely using the product - such as accessing the website or downloading software.

V. PROBLEMS WITH E-CONTRACT

As discussed above the IT Act, 2000 has laid down certain provisions for the validity and the formation of online contracts but there is still no specific legislation incorporated for the validity of online contracts in India.³⁴ This leads to a number of issues in transacting and concluding such contracts.

V.1. TECHNICALITY ISSUES:

• JURISDICTIONAL ISSUES

Jurisdiction determines the applicability of the legislation of a particular country whether it's about interpretation of law or resolving a dispute. In common parlance when it comes to traditional contracts the place of execution

of contract is the appropriate jurisdiction. In matter of E-Contracts, the contracting parties are far away from each other and hence there is no as such place of execution; they are executed in a virtual space. The boundlessness of Internet creates dilemma as to the determination of jurisdiction. The parties may mutually agree upon the jurisdiction but that still does not do away with the uncertainty jurisdiction by default in absence of a "place of execution". As per Section 13(3)³⁵ of the IT Act 2000:

- a) The place of business of the originator will be deemed to be place where the information was dispatched, and
- b) Place of business of the addressee will be deemed to be the place where the information was received.

In the U.S. in order to determine the jurisdiction the "Purposeful Availment Test" introduced in the case of *Hanson v. N.R. Denckla*³⁶ is significant to note that lays stress on the strong purpose behind the action of a party instead of a mere act of the party i.e., action should be purposefully directed towards the resident of the state to ascertain the jurisdiction which has a high burden to prove. In the case of *P.R. Transport Agency v. UOI*³⁷, it was established that the place of business is the deciding factor for determination of jurisdiction. It therefore raises the question of the jurisdiction of the courts, as the case may arise in the e-contract at the place where the electronic information was sent, irrespective of the fact of the

³²170 E Supp. 2d 974 (E.D. Cal. 2000).

³³Nancy Kim, *Setting the Parameters of Presumed Assent: A Proposed Methodology*, Clicking And Cringing: Making Sense Of Click wrap, Browse wrap and Shrink wrap Licenses (Apr. 06, 2020, 12:25PM), https://law.stanford.edu/index.php?webauthdocument=event/266730/media/slspublic/Kim_clicking_and_cringing.pdf.

³⁴Ajay Thakur, *All you need to know about Online Contracts*, iPleaders Intelligent Legal Solutions (Apr. 07, 2020, 9:34 AM), <https://blog.iplayers.in/all-you-know-about-online-contracts/>.

³⁵Information Technology Act § 13(3), (2000).

³⁶357 U.S. 235 (1958).

³⁷AIR 2006 All 23, 2006 (1) AWC 504.



primary place of business.³⁸ This becomes all the more difficult when parties are situated in different parts of the world as in matters of virtual space strict jurisdiction cannot be applied.

- **SIGNATURE REQUIREMENT**

Under Section 2(p)³⁹ of the IT Act, an electronic signature is defined as "digital signature" means the authentication by a subscriber of any electronic record by means of an electronic method or procedure in accordance with the provisions of section 3.⁴⁰ Section 2(A)⁴¹ of UNCITRAL Model Law on Electronic Signatures'2001, Electronic Signature mean data in an electronic form in, affixed or logically associated with, a data message, which may be used to identify the signature in relation to the data message and to indicate the signatory's approval of the information contained in the data message. Although signature is not a pre-condition for executing contracts under ICA, there are still few types of contracts that mandate signature of the party like under Copyright Act and transfer certificates in case of immovable property. Thus it is necessary for establishing the genuineness of transaction. The IT Act'2000 gives recognition to digital signature in order to give legal validity to E-Contracts. When a party appends his signature to a document he gives his acceptance by affirming his identity and may not revoke it later on. The bottom-line is that there is still no standard provision of E-

Signature notified by the government. It can be either a typed name or digitized image of a handwritten signature.⁴²

- **MINORS ENTERING INTO A CONTRACT.**

One of the requisites for a valid contract is that parties to the contract must have attained the age of majority which is 18 years according to Indian Standards. In the case of *Mohori Bibee vs. Dharmodas Ghose*⁴³, it was held that an agreement by a minor is void.⁴⁴ E-Contracts on the other hand are contracts conducted by online medium where the parties can be easily duped or the identity of either of the parties cannot be determined with certainty. This leaves the party who contracts with such a minor party in a disadvantaged position as he has little remedy in case the minor commits a breach. The confirmation of age before the contract is just a self-made commitment and does not guarantee the veracity. In cases of Click Wrap Agreement or Browse Wrap Agreements, it becomes way more difficult as it enables a minor to get into such contracts easily. Many times websites, in order to check the age validity stipulates signing up steps to gain access to age related information. Even after all such consideration, it still poses problems for checking the authenticity in lack of a proper legislation in place.

- **STANDARD FORM OF CONTRACTS**

³⁸Ayushi Singh and Sukhwinder Singh, *E-Contract in India: Issues and challenges*, 7, (International Journal of Interdisciplinary Research and Innovation, 2019), <http://www.researchpublish.com/download.php?file=E-CONTRACT%20IN%20INDIA-7286.pdf&act=book>.

³⁹Information Technology Act §2(p), (2000).

⁴⁰Information Technology Act § 3 (2000).

⁴¹UNCITRAL Model Law on Electronic Signatures § 2(A), (2001).

⁴²*Electronic Contracts: Validity and Enforcement in India*, Little Law Book (Apr. 09, 2020, 9:34 PM), <https://www.littlelawbook.com/electronic-contracts-in-india/>.

⁴³(1918) ILR 40 All 325.

⁴⁴*Supra* note 34.



In a standard form of contract there is no scope of negotiation with the terms being decided beforehand leaving the other party to either accept the condition or leave it. Many online contracts belong to the 'Click-Wrap' category, a standard contract form in which all conditions are specified on the software website or installation page and both parties are allowed to use a click on the required terms and conditions button which leaves no room to negotiate.⁴⁵ As far as India's situation is concerned, Section 15(3)⁴⁶ of the Indian Contract Act states that if a party holds a dominant position and enters into a contract with another party and the agreement appears unfair on its face or on the evidence given, it must burden an individual in the dominant position to show that the contract has not been concluded under pressure.⁴⁷ In the case of E-commerce platforms the scope of negotiation is further reduced which leads to unequal bargaining position leaving users in an unfair position. The manufacturer, wholesaler, distributor, a carrier and other large entities with giant economic power are in a favorable position to determine terms and conditions and the other negotiating party is quietly unable to insist on its terms.⁴⁸ In the case of *L.I.C India v. Consumer Education and Research Centre*⁴⁹, the Hon'ble 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.⁴

⁴⁵Daisy Roy, *All that you must know about E-Contracts*, iPleaders Intelligent Legal Solutions (Apr. 10, 2020, 9:34 AM), <https://blog.ipleaders.in/all-that-you-should-know-about-e-contracts/>.

⁴⁶Indian Contract Act § 15(3), (1872).

⁴⁷*Supra* note 48.

⁴⁸ShubbhadaGholap, *Electronic Contracts in India: An Overview*, 6, (Impact Journals, 2018),

• STAMP REQUIREMENTS

The Indian Stamp Act and various state legislation require that documents must be stamped in which rights are defined or transferred. A document that is not properly stamped shall not be accepted as evidence in a court of law, or even a competent authority, until it has been levied (a fine of 10 times the amount of the stamping duty required). However, documents cannot be stamped for an online contract until this date.⁵⁰

V.2. SECTORAL ISSUES:

V.2.1 ISSUES OF E-COMMERCE IN COMPETITION LAW:-

The Competition Commission of India (CCI), has time and again recognized this issue of unequal bargaining power between the e-commerce marketplace platforms and their users which form the core of several issues faced by the stakeholders.⁵¹

The year 2019 also witnessed the CCI undertaking investigations against the alleged anti-competitive practices of technology and internet-based companies. Online travel agencies such as MakeMyTrip and Oyo are being investigated for allegedly imposing vertical restrictions and abuse of dominance by denying market access, predatory pricing, etc. NCLAT has also laid down innumerable times that entities cannot safeguard their own commercial interests and they are affirmed a

<https://journals.indexcopernicus.com/api/file/viewByFileId/356274.pdf>.

⁴⁹1995 AIR 181.

⁵⁰*Supra* note 48.

⁵¹Soumya Hariharan et al., *Competition law in India: Work in progress*, Business Today, Jan. 17, 2020, <https://www.businesstoday.in/current/economy-politics/competition-law-in-india-a-work-in-progress-cci-e-commerce-sector-corporate/story/394066.html>.



special responsibility being the dominant entity.

The growing share of E-Commerce and the boom of digital platforms in India have led to a host of competition-law related concern. A detailed study has been undertaken by several other jurisdictions to address the innumerable digital sector concerns shadowing the economy. In April 2019, the CCI launched a market study into electronic commerce (e-commerce) titled “Market Study on Ecommerce in India”. The purpose of the study was to better understand the functioning of e-commerce in India and its implications for markets and competition.⁵² They identified the following issues:-

- Platform Neutrality: - This is a major concern among the sellers/ service providers where the online platforms when acting as a marketplace as well as a competitor on the marketplace go for policies like “preferred sellers” and “private labeling of products”. In preferred sellers policy the platforms favor their preferred vendors and influence the market position to their advantage. In the latter policy the platforms use their own private label and hence enter into the competitive arena. This leads to turning around the market outcomes by compromising on the merit aspect.
- Unfair Contract Terms for the sellers/providers: - The online platform’s main focus is on increasing their profit and due to that they often tend to make the business users compromise on their quality, profit and the equity of the brand. There is no fairness and equity in setting the terms and conditions by these online platforms and

goals which are akin to the business users. The result is that the business users enter into unilateral engagements or a revision of commission rates and hence take advantage of their superior bargaining position. Most of the times, even the discounts offered on various product or services is also done without consulting the business entity and for the sole reason of increasing crowding on the particular platform. All this leads to trust deficit of business users on the online platform.

- Exclusive agreements:- The major chunk of sellers/service providers in the travelling or food services enter into exclusive arrangements with a particular platform for advertising and selling their product. This leads to an unfair trade practice as customers in that case do not have a large variety of products to make a prudent choice by way of making comparison.⁵³

V.2.1.i. JURISPRUDENTIAL ASPECT OF E-CONTRACT IN RELATION TO COMPETITION

• E-CONTRACTS & SUBJECTIVE THEORY OF CONTRACT

The basic law of contract formation has retained the formalistic character of subjective theory of contract law. The offer-and acceptance paradigm is not well suited to modern contracting practices and obscures and complicates contract doctrine. Subjective contract theory advocates freedom, will and bargaining for the parties to the contract. The nature of the contract is said to be a meeting of the wills of the parties; the agreement is the product of a free and consenting mind.⁵⁴ Therefore, it was conceived as the

⁵²MARKET STUDY ON E-COMMERCE IN INDIA, 23, (2020), https://www.cci.gov.in/sites/default/files/whats_new_document/Market-study-on-e-Commerce-in-India.pdf

⁵³Id.

⁵⁴Anson, *Law of Contract*, 3, (25thEd., Oxford University Press, London, 1979).



law's obligation to give effect to the wills of the parties, and it was believed that as few limitations as possible should be imposed on 'freedom of contract.'⁵⁵ Anson pointed out Maine's writings, which were written at a time when the proponents of individualist social theory had challenged the legal and social limits within which rights were enshrined that were almost entirely indefensible; the freedom of contract was the result of these attacks as a badge of victory. But when we see the encroachment of e-contract then it can easily be inferred that this 'freedom of contract' is diminishing and losing its life. The lack of the parties' bargaining power' to contract in an e-contract is in direct contradiction with the principle adopted by this theory's proponents. In today's age, which is dominated by standard form of contract and where much of the contract is linked to e-commerce; it is an illusion to have the ability to negotiate while formulating a contract.

Today with the advent of e-contract, the position is seen in very a very different light. Freedom of contracting is just limited, so that no injury is done to the economic interests of the community at large. This has ceased to have much idealistic appeal in the more complex social and economic circumstances of a collectivist society. It is now recognized that economic equality still does not exist in the practical sense, and that individual interests must be rendered to represent those of the community when contracting parties are in an unequal bargaining position.

V.3. CONSTITUTIONAL ISSUES

- LEGALITY OF GOVERNMENT TENDERS AND E-CONTRACTS:

While the Honorable Prime Minister of India launched the digital India initiative to lift the scientific temper, at the same time government tenders controlled by electronic means, violates Article 14 of the Constitution; as tenders regulated by an e-contract deprives that segment of society from participating in an e-contract which, for some reason, cannot attach to the electronic means by which an e-contract is concluded. In the case of *Maneka Gandhi v UOI*⁵⁶, J. Bhagwati said that, "Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness which logically as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence." At the same time, it is worth mentioning the judgment of the Apex court in the case of *EP Royappa v State of Tamil Nadu*⁵⁷ where it was held that, "equality is a dynamic concept with many aspects and dimensions and it cannot be cabined, crippled and confined. From a positivistic view, equality is antithesis to arbitrariness. If state action is arbitrary then it violates Article 14 of the constitution." It can be said that the existence of e-contract 'cripples' and 'confines' the right to equality enshrined under Article 14.

Text of Article 21 says- life 'or' personal liberty and the marginal note says life 'and' personal liberty. From 1950 to 1978, i.e., from *A.K.Gopalan*⁵⁸ case to *Maneka Gandhi*⁵⁹ case, judiciary was treating life 'or' personal liberty as separate or distinct right but after 1978, Judiciary has changed 'or' into 'and'. So, now there is no contradiction because judiciary has synchronized the

⁵⁵*Id.*

⁵⁶AIR 1978 SC 597.

⁵⁷AIR 1974 SC 555.

⁵⁸*Infra* note 63.

⁵⁹*Supra* note 59.



marginal note and the text of Article 21. From the majority opinion given in *A.K.Gopalan v State of Madras*⁶⁰ which says that, “law means law enacted by state, i.e., law enacted by competent legislature. There is no need of confirmation with the principle of natural justice”, to the judgment given in *Maneka Gandhi v UOI*⁶¹, “law does not mean law enacted by competent legislature only. But law becomes valid only when it confirms with the principle of natural justice. Law must not be mere lex, but jus”. Supreme Court has given massive interpretation to the term ‘law’ mentioned in Article 21. Earlier law was ‘valid law’ but now law should follow principle of natural justice. Therefore we can see the journey from ‘Gopalan case’ to ‘Maneka case’ as a journey from ‘positive law’ to ‘natural law’. Formation of an e-contract through electronic means and depriving another section of the citizen of the right to take part in a government tender infringes the right of the individual referred to in Article 21.

In the case of *National Textiles Workers Union V. P.R.Ramkrishnan*⁶², the Apex court held that it is the duty of the court to apply the principles laid down in Part IV. Since, these duties of the state are socio-economic rights of the citizens; court is changing ‘duty’ to ‘rights’. Article 14, 19 and 21 are considered as triangle having an interrelationship and declared as basic structure of the constitution. If one is violating Article 21, then possibility of violation of reasonableness or arbitrariness is there which results in the violation of Article 14 and 19 also. This triangle has empowered

Supreme Court to change non-justiciable principle to justiciable principle which results in evolving ‘neo-fundamental rights’. This is not ordinary human rights, but it can be discovered from reservoir of fundamental right, i.e., Article 21. The court clarified that right to life includes a ‘dignified life’ in the case of *Olga Tellis v. Bombay Municipal Corporation and others*⁶³ and in *Corlie Mullin v. Administrator and Union Territory of Delhi*⁶⁴. If the dignity of any person is affected by state inaction and flows from non-performance of its obligation mentioned in DPSP, then as per Article 37, these obligations are unenforceable. Judiciary may enforce those duties by converting the nature of those duties into rights by means of a catalyst, i.e. Article 21, as previously done in the case of *Mohini Jain V. State of Karnataka*⁶⁵ and *Unni Krishnan v State of Andhra Pradesh*⁶⁶; where the apex court has made the right to education a fundamental right pursuant to Article 21 which had its presence under Article 45 of Part IV of the constitution.

From the spiritual teachings of Buddha to the political lessons of Gandhi, everyone has advocated social justice and equality. The founding fathers of our constitution were concerned about the equality of every citizen of India and not of any specific or majority community. If that was not the case, then Part III of our Constitution must have used the word ‘majority’ instead of referring to the interests of every citizen of India, and it is therefore advisable that the rights referred to in Article 21 and Article 14 of the Constitution should not be denied to those sections of society which do not have access

⁶⁰AIR 1950 SC 27.

⁶¹*Supra* note 59.

⁶²AIR 1983 SC 750.

⁶³AIR 1986 SC 180.

⁶⁴AIR 1981 SC 746.

⁶⁵AIR 1992 SC 1858.

⁶⁶AIR 1993 SC 2178.



to the Internet and are not in a position to enter into an e-contract.

It can be argued that government tenders concluded by e-contract infringe Article 14, read with 21, because the majority of the population of our country still does not have access to the internet to participate in e-contracts and, furthermore, the apex court should ensure the proper participation of all eligible bidders in e-contracts. In order to do so, it is advisable that the 'duty' of the State referred to in Article 38, with the help of Article 21 as a 'catalyst', should ensure equality and thus maintain the dignity of the individual while participating in an e-contract.

VI. E-ARBITRATION AND E-CONTRACTS

With increasing number of arbitration institutes adopting the mechanism of E-Arbitration in their practice we can say that the concept is in vogue. The conventional form of conducting arbitration proceedings is governed by The Arbitration and Conciliation Act'1996 (herein 1996 Act) whereas online mode of arbitration along with being governed by the 1996 Act is also regulated by IT Act'2000. The E-Arbitration practice incorporates within itself three dimensions that need to be highlighted. They are; (a) Arbitration Agreement (b) Proceeding and; (c) Arbitral award. Before submitting any dispute to arbitration, firstly, there must be in existence E-Contract containing an arbitration clause to be settled via electronic means or an agreement simply referring online arbitration. The validity of

the agreement via electronic means has time and again been given legal recognition by the courts. Secondly, the proceeding has to be in consonance with the parties. The same is also reiterated by the Article 5(1)(d)⁶⁷ of New York Convention that the procedure has to be in accordance with the parties.

As far as the legitimacy of online evidence is considered, the IT Act '2000 lays down that for the purpose of any evidence the electronic records should not be considered illegal. The definition of evidence in Section 3(2)⁶⁸ has also been amended to accommodate electronic evidence. Thirdly, for the enforcement of arbitral awards Section 31⁶⁹ of the 1996 Act also permits issuing of award via e-mail. For affixing signature not only digital signature but signature by way of any electronic attachment is given permission provided they are of the user and duly recognized by him so that there is no scope of fraudulent practices.

The recognition to the concept of E-Arbitration was given by the Apex Court in the case of *Trimax International FZE Ltd. v. V. Vedanta Aluminium Ltd.*⁷⁰ wherein arbitration was entered into via exchange of e-mails without formally writing an agreement to that effect. In this case the offer as well as the acceptance were also entered into via e-mail and contained an arbitration clause for settlement of dispute which was duly upheld by the Apex Court. In the IT Act of 2000, Section 4⁷¹ read with Section 7(3)⁷² of the 1996 Act also gives legal validity to the Cyber Arbitration Agreement.

⁶⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards § 5(1)(d), (1958).

⁶⁸ Information Technology Act § 3(2), (2000).

⁶⁹ The Arbitration And Conciliation Act § 31 (1996).

⁷⁰ 2010 (1) SCALE 574.

⁷¹ Information Technology Act § 4 (2000).

⁷² The Arbitration And Conciliation Act § 7(3), (1996).



The concept of E-Arbitration has already been recognized by World Intellectual Property Organization by the establishment of WIPO Arbitration and Mediation Centre. With this the need of in-person meetings has been done away with and deliberations and discussions by way of electronic means are encouraged. Under the scrutiny of clear-cut regulations, E-Arbitration can be conducted in a smooth manner by laying down specific laws for governing, the jurisdiction, the procedure to be followed within the scope and applicability of the 1996 Act. Be it Ad-Hoc Arbitration or Institutional Arbitration, the parties concerned should have consensus-ad-idem with respect to the technology used. It is important to understand that since there is no real time communication between the parties hence in case of a virtual space, extra caution has to be maintained in order to ensure the confidentiality in the best interest of the parties.

E-Arbitration like E-contracts is not devoid of legal issues and there lie uncertainties and blank spaces from legal point of view. In a cross-border dispute there are jurisdictional issues. Few other problems that crop up in such a situation would be the law that should govern the arbitration agreement; whether the award given would have a nature of a domestic or a foreign award etc. Although parties while entering into an agreement mutually decide on these aspects or put it as a clause in their agreement but we cannot overlook the lacunas in law that does not provide for a clear cut provision for arrangements made via electronic means. E-Arbitration is still a gray area in the Indian Legal System as there are yet many unsolved pieces to the arrangement.

VII. CONCLUSION

When we step into the third decade of the 21st century, e-commerce will multiply its scale and will become a multibillion economy; being regulated and managed by e-contracts. Moreover, India is on the verge of a major transformation, and there is a need to capitalize on its demographic dividend, which can push it to become the next China-USA story, or even better. This can be done better by improving technological connectivity across the length and breadth of the nation and making the newer generation acquainted with the Internet; which will eventually increase the need for an e-contract that saves a lot of time and is also more economical and eco-friendly as compared to the traditional contract.

Although these e-contracts are adequately covered by the Indian legal system, the challenge before lawmakers is to keep abreast of the problems that will emerge with emerging technology and resolve them appropriately. It is the call of the hour that some major reforms are incorporated in the various laws affecting E-contracts. A Uniform Commercial Code like the one prevalent in U.S. can also eradicate the various loopholes in online contracts.

The creation of an e-contract is due to the drastic shift in the evolving global technological environment; at the same time it can also be argued that the e-contracting laws are still vague in nature and need to be refined to encapsulate all the changes taking place in the complex world of e-commerce and e-contract for greater versatility leading to change of perspective with some simple outlook. So; the next time you press uninterestingly on "I accept" button without seeing the terms and conditions or hastily tearing the software cover without reading the terms typed on it; "Think Twice"!

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