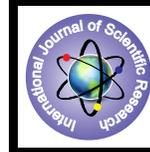


E-Contracts and its legal implications



Law

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ABSTRACT

Law of contract is significant for attaining business processes, interoperability and for enforcing them properly. As E-Contract is an aid to drafting and negotiating successful contracts for consumer and business e-commerce and related services. It is designed to assist people in formulating and implementing commercial contracts policies within e-businesses. It contains model contracts for the sale of products and supply of digital products and services to both consumers and businesses. The researcher through this article has thus made an effort to analyse the functionality of e-contracts and to ascertain its legal implications

INTRODUCTION:

The Internet is decentralised and self-regulatory. The use of modern means of communication, such as electronic mail, for the conduct of international trade transactions has been increasing rapidly and this trend is expected to continue in future. The exponential increase in international e-trade increases the need for legal recognition that the use of and reliance on electronic messages are valid and enforceable².

It's an undisputed fact that E-Commerce has become a part of our daily life. One such justification for the popularization of E-Commerce would be immoderate technological advancement. E-Commerce, as the name suggests, is the practice of buying and selling goods and services through online consumer services on the internet³.

The 'e' used before the word 'commerce' is a shortened form of 'electronic'. The effectiveness of E-Commerce is based on electronically made contracts known as E-Contracts. Although E-Contracts are legalized by Information Technology Act but still majority feels insecure while dealing online. The reason being lack of transparency in the terms & conditions attached to the contract and the jurisdiction in case of a dispute that may arise during the pendency of a transaction with an offshore site.⁴

Electronic transactions are fast emerging as an alternative means of carrying out transactions instead of paper based transactions. However with the increase in the transactions taking place on the internet the issue of authenticity and veracity was looming large. Contracts worth huge sum of money were being entered into without ensuring the validity and authenticity of the parties.⁵

In a number of countries existing legislation governing communication and storage of information is inadequate or out dated in that it does not contemplate the use of electronic messages in commerce. Although the use of EDI and electronic mail for the conclusion of contracts is widespread, the need for legal certainty was also felt in many countries when faced with out-dated forms of communication techniques, such as telex and telex transmissions.

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE:

It is noted that the uncertainties relate not so much to the fact that legislation requires pieces of paper and therefore excludes electronic alternatives, but rather the fact that legislation was written in an era when technologies did not exist to replace documents in writing' with e-mail messages, or signatures with encrypted data blocks. This need for legal certainty prompted the United Nations Commission on International Trade Law to establish a Working Group to draft legal rules on electronic commerce. The UNCITRAL Model Law on Electronic Commerce was adopted on 12 June 1996 and aims to create a more secure legal environment for what has become known as 'electronic commerce' by providing a tool for states to enhance their leg-

islation as regards paperless communication and storage of information. In May 1997 the 'Guide to Enactment' was published. The Guide summarises the consensus of the discussions by the Commission and the Working Group and provides explanatory information aimed at assisting national governments enacting legislation based on the Model Law (ML).⁶

UNCITRAL was prompted to formulate model legislation on electronic commerce to address the legal lacunae that developed as the result of technological innovation. The purpose of the Model Law is to provide national legislators with a set of internationally acceptable rules to facilitate electronic commerce. The Model Law also seeks to obviate barriers to international trade arising from inadequate or outdated national legislation.⁷

The drafting of the Model Law was undertaken because it was realised that, in practice, solutions to most of the legal difficulties raised by the use of modern means of communication are sought within contracts.⁸

Electronic Commerce is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. A commercial transaction can be divided into three main stages: the advertising and searching stage, the ordering and payment stage and the delivery stage. Any or all of these may be carried out electronically and may, therefore, be covered by the concept of 'electronic commerce'. Broadly defined, electronic commerce encompasses all kinds of commercial transactions that are concluded over an electronic medium or network, essentially, the Internet. E-commerce covers three main types of transactions, i.e. business-to-consumer (B2C), business-to-business (B2B), and business-to-government (B2G).⁹

E-contracts are most commonly entered into when purchases are made via websites, but they can also be formed by exchange of emails representing the offer and acceptance stages required to form a contract. The supplier will usually attach their terms and conditions to their email and these will form the basis of the contract between the parties.

There are three main methods to contract over internet:

- E-mail/ Browse Wrap
- Click wrap
- Shrink wrap agreement

E-MAIL/ BROWSEWRAP:

The text of an e-mail message is simply the digital equivalent of the letter. One may attach things to it, it needs to be addressed, and it needs to be sent to the desired recipient. E-mail is capable of performing all the functions of normal mail. E-mail can be used to send advertisements as well as offer and acceptances. However, there are some technicalities which complicate any comparison between standard mail delivery system and electronic mail delivery systems. Each e-mail message is actu-

ally split into 'packets' which take individual paths to the recipient's computer. The message text is not sent as an uninterrupted whole. Secondly, e-mail messages are generally regarded as instantaneous, where letters are not. This, however, can also be disputed, as it is quite possible for an email message to be delayed, or even to be completely lost in the system due to host of such as system crash.¹⁰

In *Partridge v. Crittenden* [1968] it was held that, e-mail is the digital equivalent of a letter sent through the post. All normal functions of postal mail transpire through email. This includes not only the ability to send advertisements or invitations to treat but also equally offers and acceptances.

When browse wrap, an Internet vendor gives the user the opportunity to look at the terms of the sale, but does not require the user to click on anything to indicate assent to these terms before paying for the product. For example, the web site may contain a button saying "click here for legal terms," which the purchaser may click or ignore.¹¹

CLICKWRAP:

Click wrap contracts are most commonly found in the working of the World Wide Web. The usual process of formation of such a contract begins with the web vendor placing information about a product on the web. This information could be in the form of an advertisement (web advertisement), an invitation to treat, or an offer of a product or service for a sum of money. There is usually a hypertext order form within electronic proximity which the consumer fills out and this form will contain a button labelled 'I Accept', 'Submit', 'Purchase', or some other phrase. When the consumer clicks on this button, the order is sent to the vendor, who usually reserves the right to proceed or not to proceed with the transaction. In many instances however, the order will be processed automatically and in this respect, it is analogous to purchasing goods in a normal shop. Communication in this manner on the World Wide Web has generally been regarded as instantaneous.¹²

In *Specht v. Netscape Communications Corp*¹³, a computer user downloaded software from a web site that contained a message saying, "Please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software," but did not otherwise require the user to review or click agreement to the terms of the agreement.

In *Hotmail Corporation v. Van Money Pie Inc*¹⁴ the court was asked to rule on the validity of the 'clickwrap' contract that the users of the hotmail service were required to execute. The court relied on the decisions that had already been decided on shrinkwrap contract and upheld that the validity of clickwrap contracts stating by clicking the 'I agree' button on the page where the details of the contract are listed, the parties bind themselves to a contract under the terms contained in that webpage.

SHRINKWRAP:

Shrink wrap agreements have derived their name from the 'shrink-wrap' packaging that usually contains the CD Rom of the Software. The terms and conditions of accessing the particular software are printed on the shrink wrap cover of the CD and the vendee after going through the same tears the cover to access

the CD Rom. At times, supplementary terms are also imposed in such licenses which appear on the screen only when the CD is loaded in the computer. The user always has the option of returning the software if the new terms are not to his liking for a full refund.

In *ProCD, Inc. v. Zeidenberg*¹⁵, Judge Easterbrook of the Seventh Circuit held that a shrink wrap license included with a CD-ROM containing a non-copyrightable database was enforceable to limit the rights of the purchaser of the CD. This ruling overturned the district court's opinion holding that the terms contained in the shrink wrap license were unenforceable because the purchaser of the CD-ROM had not agreed to them at the time of purchase.

What can be concluded from these decisions is that the court is happy to hold that contracts concluded electronically over the internet may still be valid provided that the party has sufficient notice that the transaction he/she is about to conclude, is governed by the terms that is contained in a separate page on the web site and that they are bound by the terms of such contract. They cannot subsequently claim that they are not bound by the terms of agreement on the ground that they did not read the same when agreeing to the terms.¹⁶

CONCLUSION

Internet is the one of the best things that could have happened in the last decade of the twentieth century in terms of the availability of technological century means for low-cost individual communication from anywhere in the world to any other place. However, it has been a mixed blessing.¹⁷

The moment you purchase a CD from *flipkart.com* or a book from *amazon.com* you are entering into a contract and are being bound to terms and conditions that regulate your conduct in the same manner as you would, had you signed an agreement on paper.¹⁸ Electronic commerce may be said to be in its infancy in India. The use of internet for commercial purposes by individuals and businesses, certainly at the initial stages, poses special problems, peculiar to the nature of the medium.

One is the anonymity, particularly in consumer contracts, where the buyer does not know with whom he is contracting, much less as to whether the seller is a bonafide entity carrying on business. The other major problem is the legal position relating to evidentiary value of the electronic records that may contain the contract between the parties for the supply of goods or services.

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