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Paper : **Information and Communication Technology**
Module : **Electronic Contracts**





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DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Law
Paper Name	Information and Communication Technology
Module Name/Title	E-Contracts
Module Id	VI
Objectives	<p>To explain the various kinds of online contracts like EDI contracts, Click Wrap contracts, Browse Wrap contracts etc.</p> <ol style="list-style-type: none">1. To discuss the UNICTRAL Model Law of Contract and its adaptation in various provisions of Information Technology Act, 2000.2. To analyze the diversion of formation of contract from traditional mode of contracting.3. To discuss the importance of digital and e-signature in e-contracting.4. To discuss the cross border issues related to online contracts.



Prerequisites	Knowledge of I.T. Act 2000
Key words	Contract, E-Commerce, Offer, Acceptance

1. Introduction

The advent of technologies has direct relation to the growth and development of society. The second industrial revolution in the form of information technology has changed the nature and perspective of economic and social development. Right from Electronic Commerce to social networking, Information Technology (IT) has connected the whole world and created the notion of globalised world. It has proved itself to be connecting points for individuals, cultures, societies and Governments. In last some 20 years it becomes a reliable medium to transmit, store or disseminate information due to its neutral role. In virtually made the world a globalised village. In the area of economic development, IT defined new concepts of commerce in the form of electronic commerce and mobile commerce. The basis of any commerce online or offline is the formation of contract. The sudden shift from the traditional method i.e., paper based communication to electronic mode of work challenged the traditional notion of validity, enforceability and admissibility of e-contract. For any new system to evolve and creates its credibility requires the following essential characteristics i.e., authentication, integrity, confidence. The current module makes an attempt to analyse the how far e-contract adopts or incorporate these principles.

2. Model Law of Electronic Commerce

The widespread use of Information Communication Technology (ICT) with its inherent nature i.e., speeds, instant and accurate reproduction of information made it an important tool for commerce. Realizing the importance of this technology and potential to change the landscape of commerce the United Nation Commission on International Trade Law (UNCITRAL) adopted the Model of Ecommerce, 1996¹ (MLEC).² The Model Law has been incorporated by majority of countries in their legislation relating to E Commerce. The MLEC was adopted in 1996 with two fold objectives i.e., to facilitate the commerce conducted through electronic means or techniques and uniformity in practice or accepting the rule of ecommerce relating to validity, enforceability of ecommerce by the States. To

¹UNCITRAL Model Law of Ecommerce, 1996 is not an international treaty. It was drafted to guide for individual states to prepare and update their national legislation on the issue of ecommerce. In the process they could reject or accept it entirely or partially modify as per their requirements. The UNICTRAL Model Law with the guidelines are available on the following website

² The General Assembly of the UN by its resolution no.51/162 recommended the member States to adopt it in their national legislation with modification if required.



achieve the above objective, it adopted the fundamental principles of non discrimination, technological neutrality and functional equivalence.

1. Principle of non discrimination requires that the document should not be discriminated on the grounds of legal validity, enforceability mere for the reasons that it is in electronic form.³ The provision has been adopted also in the IT Act.
2. Technological neutrality principle responds to the rapid development of technologies. It requires the rules important to regulate the technology needs to be neutral for any future development.
3. Functional Equivalence lays down the criteria under which electronic communication may be consider equivalence to paper based communication specially related to writing,⁴ original,⁵ signed,⁶ record⁷ purpose.

Therefore, MLEC deals with the modern communication techniques such as Electronic Data Interchange (EDI), Electronic Mail (email) to less advance system of telex and telecopy.⁸ The MLEC is not very rigid on the form of contracts such as it allows the mixture of mediums of electronic communication where the communication may have started with EDI message and reply might be in the form of telecopy of computer printouts or vice versa. Keeping the above fundamental principles as central focus issue MLEC deals with the formation of e contract to revocation of e contract which are equally adopted with the necessary changes in the Information Technology Act, 2000 (IT Act).

3. Concept of E-Contract

Electronic Contracts or Online Contracts are the basis of E-Commerce. The nomenclature of the word suggests that it is a kind of contract formed during the course of electronic commerce between two or more parties through electronic means. The Information Technology Act, 2000 (IT Act)⁹ or the Indian Contract Act, 1872 (ICA)¹⁰ has not defined the term “Electronic Contracts or Online Contracts”. However, the Information Technology Act, 2000 as amended by the Information Technology (Amendment) Act, 2008 deals with “validity of contracts formed through electronic means”.¹¹ It states as, where in a contract formation, the communication of proposals, the acceptance of proposals, the

³.UNCITRAL Model Law of E-Commerce 1996, Article 5, 11.

⁴ *Id.*, Article 6.

⁵ *Id.*, Article 8.

⁶ *Id.*, Article 7.

⁷ *Id.*, Article 10.

⁸.MLEC, Article 2 (a) - Data message means any information generated , sent , received or stopped by electronic, optical or similar means including, but not limited to , electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

⁹ The Information Technology Act, 2000 was enacted keeping in mind the role of Information Communication Technology in the social, economic, cultural and political developments.

¹⁰Indian Contract Act was enacted way back in 1872 at a time when the ICT as a technology was not even conceptualized and therefore it deals with the traditional forms of contract.

¹¹ Section 10A of Information Technology Act, 2000



revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose. Therefore, any agreement where any form of electronic form is used to convey the consent or terms and condition of the agreement is part of electronic contract. Generally there are following types of online contracts which are used mostly.

3.1 Electronic Data Interchange (EDI)

Electronic Data Exchange is the oldest form of electronic contracts existing between Business to Business (B2B) forms of transactions. It consists of standards business messages being transmitted from one computer to another computer. It is based on a standard or code that is agreed between the parties like generating or process inquires or transmit information in the form of purchase orders, invoices, shipping notices, export import information, carrier to carrier waybill etc. In these cases the parties have to rely on using the same EDI messaging standard. Parties may enter into trading partner agreement giving the validity to such data messages.¹²To some extent there

The Validity of Click Wrap Agreements was raised in various cases in US. The Courts in various cases such as *Hotmail v. Money Pie Inc.* 1998 WL 388389 (N.D. Cal., 1998), *Compuserve v. Patterson* 89 F.3d 1257 (6th. Cir. 1998), *Specht v. Netscape Communication Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *Register.com, Inc. v. Verio Inc.*, 356 F. 3d 393(2d. Cir. 2004) validated the Click Wrap Agreements.

is similarity between EDI and emails contracting as both are electronic generated messages to be transmitted through electronic means. The difference is with regards to the internal structure and content of the data message. While email message is not intended to be processed by the receiving system, the EDI messages are structured intentionally for automatic processing.¹³

3.2 Click Wrap Agreements

Click Wrap is derived from the concept of Shrink Wrap Agreements in real world. A Shrink Wrap Agreement is broadly a prior license agreement enforced upon the buyer on purchase of the original Compact Disc (CD) of Software. The cover package of the CD incorporates the terms and conditions of use of software. As soon as buyer tears the cover, it is presumed that he agreed to those terms and conditions. A Click Wrap is online version of the above concept. On the download of free software or purchase of the software online, the owner of software lists out terms and conditions of use of software in the box opened. Terms and conditions are the license rights and related to modification,

¹²United Nation, 'Information Economy Report 2006: The Development Perspective' (<http://unctad.org> 2006) <http://unctad.org/en/docs/sdteecb20061ch8_en.pdf> accessed 10.08.2014

¹³Nanadan Kamath, *Law relating to Computers Internet and E-Commerce* (2nd, Universal Law Publishing Co.Pvt. Ltd., New Delhi 2006) 557.



deletion, alteration, unauthorized use, copying, transfer, ownership, jurisdiction, choice of law etc. of software. Depending on the nature of software¹⁴ terms and conditions of agreements may vary. Buyer after going through the terms and conditions has to provide his assent by clicking on the icon of “I Agree/I Accept” or “Cancel”. Final choice of buyer is important for the formation of contract. On the click on icon the buyer, users or downloader binds himself to the conditions specified in the agreement. There is no scope for bargaining between buyer and seller during the contract as the terms and conditions are created by one party and access to download is only possible if the buyer accepts the terms and condition in *toto*. The above nature of the contract is also known as “take it or leave it” agreements.

The US Courts have been inconsistent in deciding the validity of the Browse Wrap Agreements. However, they have streamlined the principles that if the Website Owner/ISP/Owner of the product or services provides adequate information about agreement and takes reasonable steps to bring it to the notice of end users, then the agreement will be valid, otherwise not. In the case of *Specht v. Netscape Communication Corp.*, the Court denied the enforceability of contract on the ground that the users would not first have noticed or learned of the existence of the license before downloading the software and Netscape did not take reasonable steps to bring the end user agreement to their attention.

3.3 Browse Wrap Agreements

Browse Wrap agreement is also offspring of the Shrink Wrap Agreements, but it is different from the Click Wrap Agreement as it does not require the express consent in the form and nature of Click wrap Agreements. In Browse Wrap Agreements the access to or use of software is allowed by the concerned website by displaying the terms and conditions in the form of a link at the bottom of the screen which is to be opened at another page. The consent is in implied form as the software is accessed and allowed by the service provider or the owner of the websites. The nature of the agreements or the license restricts the users from distributing, copying or preparing derivative works. The Browse Wrap contract terms the conditions as “By using this site, you agree to these terms of use. If you do not agree to these terms, you may not use this site.” The user can access the website or software without proceedings to the terms and conditions. However, this type of contract does not leave any scope of negotiation relating to the terms and conditions of the use and therefore it is also one sided agreement.

3.4 Contract through Email

¹⁴ Freeware, opesource or proprietary software.



Electronic mail is the simplest form of entering into agreements. It resembles the traditional form of contract governed by Indian Contract Act, 1872, where offer and acceptance happens through electronic mode of communication. This mode of agreement gives ample time and space to both parties to do bargaining or fix terms and conditions, unlike in the case of Click Wrap contracts or Browse Wrap contracts which are one sided agreements. Email contracts require two or more parties defined under the IT Act as originator and addressee. The transmission of electronic records in the form of offer and acceptance of the offer happens through the email addresses of the originator and addressee. The email messages split into various packets and sent through various ISPs and routes. Once it reach to email box of addressee or the recipient, till the time they have not opened the email box they may not able to know the content of information. Therefore, even if the internet provides instantaneous services, but formation of contract through email messages fall in the category of non instantaneous communication. The Supreme Court in the case of **Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd.**¹⁵ recognised that the emails exchange between parties regarding mutual obligations constitutes a contract.

3.5 Important Features of E Contract

i. Recognition of Validity

The electronic forms of contracts are similar to a great extent with the traditional forms of contracts. But the nature and operation of electronic means of communications on many issues have raised important legal issues. At international level the attempt of UNCITRAL in the form of MLEC successfully resolved the issues to a great extent. India has incorporated the important principle of the MLEC as per the requirement. The most important challenge posed by the electronic means of communication or e-contract was its reliability or the legal validity of the electronic means of communication or legal sanctity of a contract formed through the electronic means of communication. MLEC take the initiative in Article 5 as it address the legality issue of electronic information by laying down that;

The information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

Further Article 11 provides the legal validity to the contract formed by means of data messages as follows;

In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

¹⁵ Case available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=35946>, accessed on 10.08.2014.



The Information Technology Act, 2000 adopted the legality issues in the form of Section 4 and Section 10A. Section 4 deals with the legality issues of communication as reproduced below;

“Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is,

- (a) rendered or made available in an electronic form; and**
- (b) accessible so as to be usable for a subsequent reference.”**

Section 10A of the Act validates the contract formed through the electronic mode of communication as below;

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and the acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

Therefore, any information which transpires in electronic form acquires a legal sanctity under the Act. Information includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.¹⁶ The electronic form of information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.¹⁷

Therefore, the Act gives legal recognition to any information generated, stored and transmitted through electronic means such as emails etc. has a legal standing. The legality of the e-contracting boost the confidence in the individuals as well as corporate and government.

ii. Formation of Contract

The IT Act does not deal with the formation of contract comprehensively. Therefore, the basic principles of Indian Contract Act, 1872, (ICA) are applicable in this regards. The Indian Contract Act lays down the common law principles of contracts. According to it the formation of valid contract requires the following basic points, (a) two or more parties, (b) offer, (c) acceptance of offer, (d)

Section 1(4) and the First Schedule of the IT Act list out the cases which are outside the purview of the Act;

1. A Negotiable Instrument as defined in Section 13 of Negotiable Instrument Act, 1881;
2. A Power of Attorney as defined in Section 1A of the Power of Attorney Act, 1882;
3. A Trust as defined under Section 3 of the Indian Trust Act, 1882;
4. A Will as defined in Section 2(h) of the Indian Succession Act, 1925;
5. Any contract of the sale of conveyance of immovable property or any interest in such property.

¹⁶ Section 2(1) (v)

¹⁷ Section 2(1) (r)



intention to create legal relationship, (e) consideration, (f) consent of parties (g) capacity of parties (h) lawful purpose (i) possibility of performance (j) not declared to be void or illegal. In traditional form of contract the offer and acceptance is conveyed in between two parties physically present. In case of E Contracting the contract is formed through the electronic mode of communication i.e. email, text etc. and therefore technically involves three parties i.e., the originator, addressee and the Internet Service Providers (ISP). Originator¹⁸ as defined under IT Act may be any person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person. The addressee¹⁹ is a person who receives the electronic record as intended by the addressee. Both of the above definition specifically clear that intermediaries are not part of contract. The offer and acceptance has to be made in between the parties i.e., the originator and the addressee in the electronic form. The communication which may be in the form of offer and acceptance can be transferred in same mode, if the contract stipulates that kinds of provision. Therefore, offer and acceptance can be made through electronic means. The MLEC provides that offer and acceptance can be made through data message and contract so created cannot be denied the legal validity or enforceability solely on the ground that a data message is used for it. The same sentiment is expressed by IT Act in Section 10A.

iii) Attribution to Contract

This provision is equally applicable for the e-contract where the human beings are involved on both the sides in finalising after applying their mind and consented in the same sense. In fact every offer and acceptance shows the consent of both parties. However, sometime sophistication of technology i.e., artificial intelligence is enough to complete the contract by giving acceptance such as the computer after routine checking of the inventory of stock creates an automatic order for product to the vendor through email. Since the order is send by electronic device working in combination of hardware and software, it has no legal personality. The issue therefore is about the validity of transaction in such cases. The MLEC resolved the issue by having the provision of attribution in Article 13. The IT Act has incorporated the provision of such nature in Section 11 of the Act:

1. An electronic record shall be attributed to the originator
 - (a) if it was sent by the originator himself;
 - (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
2. by an information system programmed by or on behalf of the originator to operate automatically.

¹⁸ Section 2(1) (za)

¹⁹ Section 2(1) (b)



Therefore, any acceptance given by computer automatically is valid as per the IT Act provided it has been programmed or authorised by owner in that way.

iv) Acknowledgement of Receipt

In any contract the acceptance of the offer is important. Till the time the offer is accepted in the same sense or terms of the interpretation it is not a valid acceptance. Therefore, acceptance has to be absolute and unqualified. In fact any improvement or addition or deletion in the offer by other party is a counter offer. Click wrap or Browse wrap contracts are one sided and therefore is no issue of alteration of the conditions. However, where the contract is created through emails or text or any mode which is not one sided contract, there might be alteration relating to price, payment, quality and quantity of products. The originator of the information has to accept it according to the last shot rule.

Acknowledgement of receipt is important for certainty. Section 12 of the Act requires that where the originator has not given any particular form or method of acknowledgment, the addressee may give the acknowledgement in any method of communication or automated form or by any conduct sufficient to indicate the originator that the electronic record has been received. The terms of the contract is made flexible enough to incorporate flexibility. The section stipulates two different situations:

1. In case the originator clearly provides that the acknowledge receipt of the electronic record is required then in the absence of it, it will be considered as if the originator have never sent any electronic record.
2. Where the originator does not provide that the electronic record shall be binding on receipt of such acknowledgment and therefore no acknowledgment has been received by the originator within the time specified or agreed or in case no time specified or agreed to within a reasonable time, then the originator may give notice to the addressee that the acknowledge has not been received by her and give the time within which it has to be received otherwise the it will treated as if no electronic records send by originator.²⁰

v) Communication of offer and acceptance

For the contract to be formed the acceptance must be received by the originator. The traditional contract law adopt the mail box system to ascertain the completion of acceptance. As per the contract law, the contract is complete when the acceptance is put in the course of transmission so as to be out of control of acceptor. The rule was adopted in Section 4 of ICA. The rule of instantaneous mode of communication such as telephone was laid down by the Supreme Court in the case of **Bhagwandass**

²⁰ Section 12.



Goverdhandas Kedia v. Girdharilal Parshottamdas and Co.²¹, the court held that Section 4 is for the postal communication and in case of instantaneous communication the contract is concluded where the acceptance is received.

However, internet does not fall in either the postal order or instantaneous communication as the information pass through various servers and go through the procedure of store and transmission to the delivery of information and above all the information is in the mail box of the recipient. Till the time he does not open it due to any reasons the information will not communicated to him. Realising this difference in operating e-contracting the MLEC has incorporated Article 15 to determine the time of receipt of electronic records. The provision has as it is adopted in Section 13 of IT Act. As per Section the fundamental rule is that;

1. In the absence of any agreement between the origin and addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.²²
2. In absence of any agreement in this regard if the addressee has designated a computer source for the purpose of receiving e records,
 - a. the receipt occurs at the time when the e records enters the designated computer resource²³
 - b. if sent to a computer resources other than the designated computer resource of addressee, the receipt occurs at the time when e records are retrieved by the addressee.²⁴
3. In case the addresses have not designated a computer resource, the receipt occurs when the electronic records enter the computer resource of the addressee.²⁵

3.5 E Signature

Generally there is three fold purpose of signature i.e., to identify the parties to the contract, provide certainty as to the personal involvement of the persons and to associate that person with the content of a document. The signature also reflects the intention of parties to be bound by terms agreed and provides certainty to the time and place of formation of contract. To make it more authentic various procedures are adopted around the world like stamping, perforation etc. Keeping the above functions of traditional signature and to authentic the communication MLEC has drafted Article 7. It focuses on the two basic functions of a signature, namely (a) to identify the author of a document and (b) to confirm that the author approved the content of that document. Paragraph (1)(a) establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by

²¹ Air 1966 SC 543

²² Section 13(1)

²³ Section 13(2)(a) (i)

²⁴ Section 13(2) (ii)

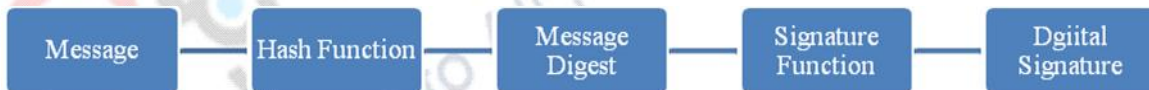
²⁵ Section 13 (2) (b)



way of a method that identifies the originator of a data message and confirms that the originator approve the content of that data message. Paragraph (1)(b) establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph (1)(a). The method used under paragraph (1)(a) should be as reliable as is appropriate for the purpose for which the data message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

Model Law of E Commerce 1996, Article 7 provide for the E signature. Realising the importance of E Signature and the need for uniformity on the issue, UNCITRAL in 2001 drafted the Model Law of E Signature. India has been party to both the Model Law and they have substantial effect on the Information Technology Act

The Information Technology Act 2000 has incorporated the provisions for both digital signature²⁶ and E-signature²⁷. Section 3 of the IT Act allows the authentication of the electronic records by affixing his digital signature²⁸. For authentication of the electronic records the use of asymmetric crypto system and hash function are used. The application of hash function²⁹ technically envelops it and transforms it to another electronic record. Digital signature is issued by the Certifying Authority under the IT Act. It requires the private key, public key and hash function to authenticate the electronic records. While sender apply the digital signature they have to follow the procedure as pictorially depicted.



Once it reaches to the addressee, he applies the hash function and public key to verify the authenticity of the information as follow;

²⁶ Section 2

²⁷ Section 2

²⁸ The Controller of the Certifying Authority appointed under Section 17 of the IT Act is the appropriate authority to issue the Digital Signature and Electronic Signature. Section 18 of the Act prescribes the functions to be performed by Controller.

²⁹ Section 3(2) explanation - Hash function means an algorithm mapping or translation of one sequence of bits into another, generally smaller, set known as “hash result” such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally feasible – (a) to derive or reconstruct the original electronic record from the hash result produced by the algorithm; (b) that two electronic records can produce the same hash result using the algorithm.



Section 3A allows authentication of electronic records by the use of e-signature, if it is reliable. The reliability test prescribed by the Section is as follows;

1. Signature should link to the signatory and no other person;
2. Signature creation data at the time of signing under the control of the signatory only;
3. Any alteration to the e signature made after affixing it should be detectable;
4. Any alteration to the information authenticated by signature should be detectable;
5. Any other condition which may be prescribed by appropriate authority.

E signature is a generic and technology neutral term that can take many forms created through the use of different technologies. Digital signature is one technology-specific e signature. It involves the public and private key cryptography along with the application of hash function.

The IT Act provides that information in the form of e-records which are authenticated by affixing the e-signature will be recognized under the Act.³⁰ Section 6 promotes the use of e signature in government and its agencies. Therefore, where the law requires the filing, issue, grant, receipt or payment has to be done, it can be done with the use of e-signature. The application of E-signature is required in case of email contracting but not in case of Click Wrap or Browse Wrap contract.

3.6 Issues of Concern in Electronic Contract

3.6.1 Jurisdiction

Jurisdiction is the power of the specific courts to adjudicate cases before them and provide relief to the parties. It becomes more important in case of e-contracting due to the ubiquitous nature of the internet. Parties are free to form a contract at the internet from any place at all times. This flexibility sometimes proves a nightmare for the other parties at the time of disputes. In case of e-contracting at the time of formation of a contract, both parties can decide the jurisdiction of the court for future disputes relating to contractual obligations. This forum selection has to be with the mutual consent of both the parties. Where mutual consent is not achieved or the jurisdiction clause is absent, the jurisdiction rules of the States will be applicable. In case of cross-border nature of a contract, the private international principles will finalize the jurisdiction rules.

3.6.2 Indian jurisdiction rules

³⁰ Section 5.



The jurisdiction rules are placed in the Civil Procedure Code (CPC). Section 19³¹ and 20³² reflect the defendant centric approach of jurisdiction. As per it, the court have jurisdiction where the defendant resides, defendant carry the business, or place of cause of action. However, the court has adopted the new approach of jurisdiction in case of **India TV Independent News Service Pvt. Limited v. India Broadcast Live Ltd. & Ors.**³³ and **Banyan Tea Holding (P) Ltd. v. A. Murali Krishna Reddy**³⁴. Court influenced by the USA jurisprudence on the cyber jurisdiction rules reflected its mirror image in Indian jurisdiction rules. Court categorised the website into three categories as passive, interactive and active websites and held that the mere fact that a website is accessible in a particular place may not itself be sufficient for the courts of that place to exercise jurisdiction on the website. Where the website is not merely 'passive' but is interactive permitting the browsers to not only access the contents but also subscribe to the services provided by the owners/operators, the level of interactivity has to be analysed for allowing jurisdiction. Therefore, limited interactivity is not sufficient for a court to exercise jurisdiction.³⁵ Under Section 20(c) of CPC cause of action can be a ground of jurisdiction if some part of the cause of action has arisen in the forum State by the use of internet by the defendant. Plaintiff can always show that some commercial transactions using the website was entered into by the defendant with the use of the website within the forum State resulting in an injury or harm to the plaintiff within the forum State.³⁶ In case of contract the cause of action arise in the places (a) where the contract was entered, (b) the place of performance of the contract, (c) the place where consideration paid.³⁷ In contract cases the parties can also select the forum for contractual matters. The Court in the case of **Hakam Singh v. Gammo (India) Ltd.**³⁸ laid down the two conditions for a valid forum selection. First condition requires that the court selected should have inherent

³¹ Section 19. Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said court.

³² Section 20. Subject to the limitation aforesaid, every suit shall be instituted in court within the local limits of whose jurisdiction

- a) The defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- b) Any of the defendants, where there are more than one, at the time of commencement of suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such cases either the leave of the court is given, or the defendant who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- c) The cause of action wholly or in part arises.

Explanation:- where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of cause of action arising at the place where he has such temporary residence."

³³ 2007(35) PTC 177 (Del.)

³⁴ CS(OS) 894/2008 (High Court of Delhi, 23th November 2009) available at <http://lobis.nic.in/dhs/SMD/judgement/23-11-2009/SMD23112009S8942008.pdf> accessed on 15.08.2014.

³⁵ Supra note 33.

³⁶ Supra note 34.

³⁷ B.C. Paul and Sons v. Union of India AIR 1978 Cal. 423.

³⁸ AIR 1971 SC 740



jurisdiction; Second condition requires that the choice of forum agreement can only exercised where more than one court has jurisdiction. Common consent of the parties is required in this regard.

3.6.3 Jurisdiction issue in e contracting

In case of e- contracting of the nature of click wrap and browse wrap contract, the jurisdiction clause are created by one party and therefore it is not the output of mutual consent. The one sided jurisdiction rules are beneficial for the originator and not the consumer or other party. The validity of this kind of jurisdiction rule cannot be questioned in click wrap contract.³⁹ Majority of such contracts refers to the arbitration clause to resolve the issue. Such arbitration may be reasonable and conscionable for purchaser if it gives equal treatment to both the parties. In the case of **Brower v. Gateway 2000**⁴⁰, a New York Court upheld a click wrap agreement that required the issue to be resolved by arbitration. However in case of Browse Wrap contract the validity of jurisdiction can be questioned if it is not properly notified by the originator or deliberately kept out of the notice of the consumer at the time of formation of contract. The rigidity of one sided forum selection is torturous on the consumers. If forum selection is unreasonable then it is difficult for the parties to participate and plead their cases.

3.6.4 Choice of law

The fundamentals of contract law provide autonomy to both the parties to decide the governing law or applicable law in case of future disputes. The applicable law respects the autonomy of the parties and provide the certainties to the obligation issues. The autonomy has to be applied with the mutual consent of all parties. The contracting parties have right to select the choice of law provisions. However, In case of Click Wrap and Browse Wrap contracts the nature of the contract is different from the traditional contract. The above nature of E-Contracts are one sided as the terms and conditions are set by one party. In case of Click Wrap contract till the time recipient does not click on I Accept button, the software will not be downloaded. It is presumed that the party has read the choice of law provisions. In case of Browse Wrap contract the nature of transactions requires the party to scroll and download the software without going in detail to the issue of accepting the condition of choice of law. The validity of the Browse Wrap contract depends on the way notice of terms and conditions are reflected on websites. In case of email contracting parties can decide the choice of law mutually. In case where the choice of law is not finalised by the parties beforehand, the applicable law will be decided on the basis of private international principles of the State. The Indian Court in the absence of any selection, have taken various approaches to finalise applicable law. The choice of law can be inferred from the terms and circumstances of the contract as to what the common intention of the contracting parties would have been at the time of execution of contract. In case of **National**

³⁹ Steven J. Caspi, et al. v. The Microsoft Network, LLC, et al. 1999 WL 462175

⁴⁰ 676 N.Y.S. 2d. 569 (N.Y. App. Div. 1998)



Thermal Power Corporation v. Singer Company,⁴¹ the Apex court held that the court would infer intention by identifying the legal system with which the transactions has its closest and more real connection. Court has taken various local factors to finalise the applicable law like – the place of formation of contract, place of performance of contract, place of domicile, place of residence, place of business of the parties, national character of corporation, subject matter of contract etc.. It has to be seen how this applies in case of click wrap and browse wrap contract as they frame the applicable law which suits them causing inconvenience to the weaker party in the contract.

3.6.5 Capacity of contract

Capacity of the parties at the time of formation of contract is important for formation and validity of an online or offline contract. The fundamental principle of contract requires the consent of both capable parties at the time of formation of contract. The capacity of parties is required regarding the understanding and appreciating the nature and importance of contract entered. The ICA makes the capacity of contract an important issue of contract. Section 11 lay down;

Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

The above fundamental rule is under constant threat in case of Click Wrap and Browse Wrap contracts as there are no ways to ascertain the capacity of parties. The very nature of these contracts does not allow any space for bargaining and has the characteristics of take it or leave it. Therefore, any person whether having capacity or not, with the click of mouse can be part of a void contract. However, in case of email contracting the parties have time and option to ascertain the capacity of parties to the contract through various modes such as e-signature or digital signature. E-signature or the digital signatures are regulated by States and therefore parties can ascertain the capacity of parties.

3.6.6 Lawful Object

One of the essential conditions for a valid contract is its lawful object. The object and the consideration of the contract should be lawful. This principle is applicable in online contract also. It is important at the time of formation of contract for the both parties to confirm that the object of the contract should not be unlawful. The ICA deals with this aspect of the contract in Section 10 as follows;

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

⁴¹ AIR 1993 SC 998.



The nature of the internet provides anonymity, spontaneity and easy access of information to the parties. It exposes the parties to different socio economic and political culture resulting into various ethical and social conflicting issues at the time of cross border interactions in any form. For example, an object or consideration which may be legal in one jurisdiction, may turn out to be unlawful object or consideration in other jurisdiction. Section 23 of the Act declares what considerations and objects are lawful as follows;

The consideration or object of an agreement is lawful, unless –
-it is forbidden by law; or
-is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or
-involves or implies, injury to the person or property of another; or
-the court regards it as immoral, or opposed to the public policy.
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The above Section guides the parties as to the lawfulness of consideration or object of an agreement. If any consideration or object of the contract is forbidden by law; fraudulent; injure person or property of another; immoral or against the public policy, then it can be considered as unlawful. Though the concept of public policy is not defined in the Act, but certain acts are prohibited under various laws. For example in case of public display of the pornographic materials through websites on subscription fees are common and legal in USA after attaining certain age, but against law in India for any age group. However, the IT Act⁴² and the Indecent Representation of Women (Prohibition) Act, 1986⁴³, makes it an offence under law. Therefore, the object and consideration is lawful for US jurisdiction but unlawful in India. Therefore, giving validity to contract in India is not possible but valid according to the legal system in US jurisdiction. This conflicting opinion regarding the validity of contract on the basis of lawful object creates a genuine doubt and uncertainty.

4. Summary

1. E-Contract is basically a contract formed during the course of electronic commerce between two or more parties through electronic form or means of communication in transmitting electronic records.
2. UNCITRAL Model Law of E-Commerce, 1996 framed the guidelines for regulating e-commerce. The Model Law lays down the fundamental principles of e-contracting. It

⁴² Section 67A deals with the publishing or transmitting of material containing sexually explicit act, and Section 67B deals with the publishing or transmitting of material depicting children in sexually explicit act in electronic form.

⁴³ The Act prohibits indecent representation of women through advertisements, books, writings, paintings, figures or in any other manner. Section 4 prohibits the production, sale, hire, distribution, circulation, sending by post any books, pamphlets, slide, film, writing, drawing, painting etc., which contain indecent representation of women in any form.



incorporates the principle of non discrimination, technology neutrality and functional equivalence.

3. Various forms of e-contracts are available like Electronic Data Interchange (EDI), Click wrap, Browse Wrap and E-Contracting. The EDI and email contracts are similar nature of e-contract.
4. Inspired by Model Law of E-Commerce 1996, the Information Technology Act, 2000 as amended by the Information Technology (Amendment) Act, 2008 incorporated the fundamental principles of e-contracting in India like digital signature, e-signature, originator, addressee, retention of data, attribution to contract and rules relating to intermediaries etc..
5. To authenticate the e-contract, the IT Act incorporates e-signature and digital signature. The Information Technology (Amendment) Act 2008 introduced the e-signature for verification and authenticates the parties to contract.
6. Jurisdiction is a major issue in e-contract as parties form contract from various jurisdictions and cause of action may start anywhere. The problem of jurisdiction is prominent in cases of cross border contracts. The jurisdiction rules allow parties to go for forum selection with mutual consent.
7. Choice of law is helpful in resolving future contractual disputes arising out of contract between parties. Ascertainment of law applicable in future disputes is important as it provides certainty.
8. Capacity of parties to form contract is important for the validity of contract. Capacity requirement is not only in terms of age but soundness of mind of parties to the contract.