

## **DIGITAL INK- EMERGING TREND OF CONTRACTS**

### **Enforceability and Validity of Online Contracts and Electronic Signatures**

*by*

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#### **ABSTRACT**

*The Covid-19 pandemic has created chaos worldwide, with all major economies under strict lockdown for months. Due to such issues, the execution of contracts has posed a challenge. This raises the question of the enforceability of electronic agreements and the validity of electronic signatures. It must be noted that technology has grown tremendously over the past decades and has paved the way for the development of technology in the field of contracts. With limited laws in place to regulate electronic contract, it is difficult to remain at par with other countries, especially during the pandemic. It is imperative to understand the essential requirements of online contracts in order to fill the gap in law.*

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## • RESEARCH QUESTIONS

*During the course of this study we will ascertain:*

- 1. The enforceability of electronic contracts under Indian laws,*
- 2. Electronic agreements validity and recognition under the Indian Evidence Act,*
- 3. Electronic signatures recognized in India,*
- 4. The validity of electronic signatures under such contracts*
- 5. Fallacies in law.*

## • E- CONTRACTS AND GOVERNING LAWS

An agreement enforceable under the law is a contract.<sup>1</sup> It is a deed of reciprocal promises between the parties. Thus, due to contract, parties are bound by their promises made to each other and are required to discharge their obligations. Such agreement is founded upon an offer for consideration and the acceptance of the same by the other party. With the advent of technological development in the information era, i.e., increased use of the internet and e-commerce, online contracts have assumed importance mainly in terms of reach and diversity.

Online agreements are just like conventional agreements. Agreements executed through electronic methods, such as e-mail, SMS, or WhatsApp, are valid and binding in India, as long as such contracts fulfil the requirements under the Indian Contract Act, 1872 (Act 9 of 1872) ('Contract Act'). Under the Contract Act, a valid and legally binding contract must have an offer, acceptance of such offer for legal consideration, and be made with free will and accord.<sup>2</sup> Thus an electronic contract refers to an agreement that is made and signed electronically. It does not involve the use of paper or hard copy. As for instance, a person creates an offer on a computer device and sends it to a business associate via e-mail, further, the business associate sends it back to the former with an electronic signature which indicates acceptance of such an offer and, henceforth, forming a binding contract. An online contract and a traditional paper-based physical contract are very similar in concept, substance and drafting.

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<sup>1</sup> Indian Contract Act, 1872, S. 2(h), Act of Parliament (9 of 1872), (India)

<sup>2</sup> Indian Contract Act, 1872, S. 4 and 7, Act of Parliament (9 of 1872), (India)

The validity of such electronic agreements is further enforced through Section 10A<sup>3</sup> of the Information Technology Act, 2000 (Act 21 of 2000) ('IT Act') and Section 85A<sup>4</sup> of the Indian Evidence Act, 1872 (Act 1 of 1872) ('Evidence Act'). There is no mandatory requirement for a physical copy of the agreement to be executed unless such a term has been incorporated in the agreement as mandatory compliance to attain validity. Nevertheless, there are certain caveats on the validity of such transactions as stipulated under the First Schedule of the IT Act:<sup>5</sup>

- (i) "A negotiable instrument (other than a cheque) as defined under Section 13 of the Negotiable Instruments Act, 1881.
- (ii) A power-of-attorney as defined under Section 1A of the Powers-of-Attorney Act, 1882
- (iii) A trust as defined under section 3 of the Indian Trust Act, 1882
- (iv) A will as defined under Clause (h) of Section 2 of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called."

E- Contracts are recognized under the IT Act. Section 4<sup>6</sup> of the Act provides that where any law requires the information in writing or printed format, then such mandatory requirement shall be deemed to be satisfied, where such information has been made available in electronic form and is accessible for future reference.

Under Section 2(r) of the IT Act, electronic form means "any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated micro fiche or similar device" and an electronic record is defined under Section 2(t) of the IT Act as "data, record, or data generated, image, sound stored, received or sent in an electronic form or microfilm or computer generated microfiche."

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<sup>3</sup> Information Technology Act, 2000, s. 10A, Act of Parliament (21 of 2000), (India); "Validity of contracts formed through electronic means. -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 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."

<sup>4</sup> Indian Evidence Act, 1872, s. 85A, Act of Parliament (1 of 1872), (India); "Presumption as to electronic agreements.— The Court shall presume that every electronic record purporting to be an agreement containing the [electronic signature] of the parties was so concluded by affixing the [electronic signature] of the parties.]"

<sup>5</sup> Information Technology Act, 2000, Schedule I, Act of Parliament (21 of 2000), (India), "Documents or Transactions to Which the Act Shall Not Apply"

<sup>6</sup> Information Technology Act, 2000, s. 4, Act of Parliament (21 of 2000), (India); "Legal recognition of electronic records.-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"

The Evidence Act considers electronic records and recognizes them as documentary evidence. Thus, with simple understanding of Section 4 of the IT Act and the definitions of the terms; electronic form and electronic data, we may understand that electronic records are treated at par with the physical records.

#### • TYPES OF ONLINE CONTRACTS

There are various kinds of electronic contracts, like "click to agree" contracts or click-wrap agreements. Commonly found in download software and online web stores. It requires the users to click the "I Agree" button on the page that contains the software license terms and conditions, and the transaction gets completed once the user clicks on such button. Unless properly accepted, it is not valid and enforceable under law. Users who disagree with the terms and conditions will not be able to use or buy the product upon cancellation or rejection. The users are exposed to terms and conditions for usage before acceptance. A person witnesses web-wrap agreements almost regularly.

The extended form of click-wrap agreements is the browse-wrap agreements where a regular user of the website is deemed to have accepted all the amendments to the terms made by the organization subsequent to initial acceptance given by the user. Typically, in such contracts, one party has no power to negotiate, and the Courts in India have often viewed them as unconscionable.<sup>7</sup> Even though such contracts can satisfy the requirements of a valid contract under the Contract Act, their enforceability is a question as they are not considered at par with electronic signatures under the IT Act.

The legality and validity of click-wrap agreements was considered in the Courts of the northern district of California where it had upheld in a landmark case of Hotmail Corporation v. Van \$ Money Pie Inc<sup>8</sup> that "as the defendant clicked on the box containing 'I agree' thereby assenting to be bound by the terms of the license and is thus bound by the same".

The Appellate Division of Superior Court of New Jersey also held that by clicking the "I Agree" option given on the screen the plaintiff has thereby affirmed and entered into a valid and binding contract and can be made liable for the terms and conditions laid down in the contract.

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<sup>7</sup>Panda Kumar, "Electronic execution of contracts in the time of pandemic COVID-19" (May 13, 2020) Lakshmikumaran and Sridharan (last accessed on January 4, 2021), available at; <<https://www.lakshmisri.com/insights/articles/electronic-execution-of-contracts-in-the-time-of-pandemic-covid-19/#>>

<sup>8</sup> Hotmail Corporation v. Van \$ Money Pie Inc, 1998 WL 388389 (N.D.Cal.)

Thus such agreements are valid in the USA as long as these are accompanied with the offer and acceptance rule.

Income Tax Appellate Tribunal, Mumbai in *Mumbai v. Gujrat Pipavav Port Ltd.*, Mumbai,<sup>9</sup> discussed the validity of shrink-wrap agreements;

*"Suppose, in case of a company a product is purchased by the staff of the company, for its use in regular course of work or business of the company and an employee of the company while installing the software on the computer in the office of the company clicks the button or the icon 'I agree' and thereafter such an employee or any other employee of the company violates any condition of the license agreement, can such license agreement be enforced against the company or the Directors of the company can be held liable for any such infringement, especially when they are not signatories to such an agreement and nor they have authorized any employee of the company to sign any agreement on behalf of the company and even no name of the company is even written in such type of agreement and even it is also not known as to who actually clicked the button 'I agree'. Under these circumstances, the enforceability of such a license is highly doubtful."*<sup>10</sup>

Therefore, it can be inferred that there still exists a significant issue regarding the validity or enforceability of such Shrink-wrap, Browse-wrap, or Click-wrap Agreements before the Courts in India.

#### • THE VALIDITY OF ONLINE CONTRACTS

Though these modern forms of contracts have become part of our daily lives, they still lack proper legislation regarding their validity and justifiability. As such courts in the USA have held that as long as general principles of the contract are followed and hence not violated, all such contracts will be deemed to be valid.<sup>11</sup> The IT Act, provides various procedures, guidelines and regulations for regulating online or electronic transactions, including data protection and using extra safeguards for electronic signatures commonly known as 'Digital Signature Certificates' or 'DSC'. Further, e-mail records are also admissible as evidence in courts under section 85A of the Evidence Act. Hence, the issue of an offer or acceptance via e-

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<sup>9</sup>*Mumbai v. Gujrat Pipavav Port Ltd*, Mumbai, DDDIT (IT) 3(1)

<sup>10</sup> *Ibid*

<sup>11</sup> Information Technology Act, 2000, s. 10A, Act of Parliament (21 of 2000), (India), has established that in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances if expressed in electronic form or by means of electronic record, then such contracts shall be enforceable.

mails can give rise to binding contracts and these electronic records can be used as evidence in courts to enforce the contracts.

The Indian Contract Act, 1872 has acknowledged that conventional agreements entered into by parties competent to contract, with free will and consent and for a lawful object and consideration, are not illegal or void. Hence no provision under the Contract Act forbids e-mail or online contracts as long as all the essentials of a valid contract are vehemently satisfied.

Even though there lacks proper or a direct incorporation of such laws in our legislative system, such contracts are deemed valid as long as they satisfy the provisions of the Contract Act. Formation of contracts via e-mails have been recognized and given validity in the case of Trimex International FZE Limited, Dubai v. Vendata Aluminum Ltd.<sup>12</sup> The parties thoroughly agreed to the terms of the contract via e-mails. The Supreme Court was of the opinion that even if there was no formal document or was to be initiated later, but there was an exchange of e-mails in respect of offer and acceptance of the contract, then it shall be considered to be a valid contract.

Further, the court also explained that in the absence of a signed agreement, the inference of the validity of the terms of the contract could be drawn from the form of exchange of e-mails, letters, telegrams, and other means of telecommunication. The Madras High Court while dealing with the of the validity of e-auction sale process under the SARFAESI Act<sup>13</sup> in Tamil Nadu Organic Private Ltd v. State Bank of India<sup>14</sup>, noted that "contractual liabilities could arise by way of electronic means and that such contracts could be enforced through law."

Similarly, in the recent case of Ambalal Sarabhai Enterprise Limited v. K.S Infraspace LLP Limited<sup>15</sup>, no objection was made by the court on the validity of the contract through E-mail.

However, contracts entered into online through mails are not considered secured electronic records, and hence, parties can deny their existence at the time of the dispute. Thus, it is preferable to reduce such electronic contracts into a printed format, whenever possible.

- **Electronic Signatures and their validity**

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<sup>12</sup> Trimex International FZE Limited, Dubai v. Vendata Aluminum Ltd , MANU/SC/0057/2010

<sup>13</sup> The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Act of Parliament (54 of 2002), (India)

<sup>14</sup> Tamil Nadu Organic Private Ltd v. State Bank of India, AIR 2014 Mad 103

<sup>15</sup> Ambalal Sarabhai Enterprise Limited V. K.S Infraspace LLP Limited, MANU/SC/0003/2020

To enhance the ease of doing business and modernising India into Digital India, the IT Act has recognised the validity of the electronic signatures.<sup>16</sup> The electronic signatures are considered to be at par with physical paper pen signatures, subject to certain conditions.

For fluent enforcement of e-signatures, the IT Act has provided the following two methods:<sup>17</sup>

- 1) The e-Sign Online Signature Service provides for linkage of Aadhar Number with e-KYC (Electronic Know Your Customer) method, much like a one-time password.
- 2) The more common and profession e-signature is the "asymmetric crypto and hash system". It is usually issued for a longer period (like 1-2 years) in a certificate-based digital ID stored on a USB device, which is used, along with a personal PIN, to sign a document.

Such asymmetric crypto and hash system signatures are most commonly used by the Ministry of Corporate Affairs, Department of Revenue and Ministry of Finance. Digital signatures are preferred mode of execution in the case of e-filing of Income Tax and GST returns. The RBI has also allowed payments bank to accept the electronic authentication for confirmation and acceptance of terms and conditions of the banking relationship. Even the private banks now are using digital authentication to confirm their terms for usage of their online banking services.

Despite government's keenness on developing Digital India and with the growing use of electronic signatures, even then there are certain areas where digital or electronic signature are still not acceptable, like:

1. Negotiable Instruments
2. Trust deeds
3. Power of attorney
4. Real estate contracts, such as rent and lease deeds
5. Wills or any other testamentary disposition

The transformation into a paperless economy will nonetheless take time, but we are on the right track for it. It is recommended to use only those modes of electronic signatures recognised by the IT Act, to avoid any risks, such as admissibility and enforceability of documents or contracts signed electronically, before the authorities.

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<sup>16</sup> Information Technology Act, 2000, s. 2(ta), Act of Parliament (21 of 2000), (India), defines 'electronic signature' as "Authentication of any electronic record by a subscriber by means of the electronic technique specified in the second schedule and includes digital signature."

<sup>17</sup> Adobe Sign; Electronic Signatures in India (January 2020) available at; <<https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/electronic-signatures-in-india-uk.pdf>> (Last accessed on January 4, 2021)

- **CRITICAL ANALYSIS**

The need for online systems has increased drastically due to months of lockdowns enforced all around the globe during the Covid-19 Pandemic. As such, we couldn't have expected to have online classes and exams before this pandemic hit the world. Advancement in the field of technology has been so unexpectedly quick that reliance on cloud computing and use of software for everyday purposes is at an all-time high. Technology has carved into our lives in an unexpected manner in 2020, much like 2020 itself. We couldn't have imagined virtual classes, wedding or Pooja's before this pandemic. It has forced us to depend upon technology. Such necessary and other applications have also misused this time for their own benefit. For instance, Zoom has undoubtedly been most common application for video conferencing worldwide. We all relied on zoom for our college work, office work, family chat, and every other use. Such reliance was inexorable. Despite of various directions issued by the Government of India against its usage, all of us had agreed to its terms of use, which in fact can easily be referred as 'Data Theft Contract'. Due to such inevitable reliance, we were forced to agree to the terms and conditions of Zoom App, even after knowing its malpractices. This is a classic example of online contracts. Such contracts are one-sided contracts with zero negotiation.

However, there have been positive impacts of this technological advancement as well. Various firms continued their business during the lockdown by entering into new contracts online, either via e-mail, or through other electronic means. This has given a lot of support to companies during such unexpected times. Various organisations can now execute documents remotely with most of their personnel and customer base transacting business from home. Using e-contract and electronic signatures can help streamline document execution by remote personnel and customers and provide business continuity where face-to-face business transactions are not viable. As such, companies should evaluate whether their current processes requiring wet ink may be replaced with electronic signatures. Moreover, it is unlikely for companies to return to old ways once the pandemic is over, so companies can adopt practices now for the long term.

- **CONCLUSION**

Electronic Contracts are not complete without acceptance, and acceptance is given usually through signatures. Even with the increasing use of digital signatures in government filings, digital signatures are still not so common in daily usage. Except as to deemed acceptance by or by way of clicking on 'I agree' box on the screen, the digital signature is still far from being



incorporated in daily practice. As such online contracts are leaning more towards verbal agreements, which are reduced to writing beforehand, rather than written form of agreements. As there is no signature given in oral or e-contracts, it's just simple communication of acceptance, as required under the Contract Act. In contrast, written agreements require affirmation of the parties by way of their signatures. Thus, written contracts or agreements are comparatively easier to enforce.

Thus, it can be said that the journey towards being Digital India is still in its first stretch and will require a lot more work. By ensuring an advance level of security in online signatures, this journey could become a lot faster than its current pace. In today's technologically advanced world, where tablets are readily available, the use of electronic pencils or pen to sign digital documents can be easily legalised, which is in a sense more of a physical-digital ink signature on a digital copy of an agreement. An encrypted page shall be made for every agreement which can be signed by relevant parties by using electronic pen/ pencils on their digital tablets. One major example can be of courier services using digital device and stylus for signature of the recipient of the package.

For better transparency of usage of various websites and applications, they shall provide a summary of their terms to their users at the time of acceptance. Such summary must be of key important issues which directly relate to taking personal data of the user. This will in turn help in creating awareness about data theft by various applications and hence, user can take an informed decision and thereby enter into an agreement with free will and mind.

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