
A CRITICAL STUDY ON VARIOUS ASPECTS OF E- CONTRACTS IN INDIA

S. Tharani, Dr. Ambedkar Government Law College

ABSTRACT

An evolution and tremendous development in the computer system and information technology along with the increase in the innovations related to the internet services, the E-commerce flourishes since last decades. E-contract is an essential part of E-commerce. E-contract is legally recognized by Law, thus the trust of consumers on E-commerce increases day by day. The COVID-19 pandemic situation further helps to grow the E-commerce and E-contracts. In India, E-contract is governed by so many Laws. The provisions of the Indian Contract Act, 1872 are generally applicable to validate the E-contracts similar to the general contracts. The provisions of The Information Technology Act, 2000 (IT Act) gives statutory recognition to E-contracts. The provisions of the Indian Evidence Act, 1872 makes the E-contract enforceable. An E-contract crosses the jurisdictional boundaries as it can be created from any place in the globe. This raises the question of jurisdiction of the court in case of any dispute between the parties to E-contracts.

This paper has analyzes the E-contracts along with the traditional contracts in India. There are the issues arising in E-contracts regarding Legal Validity and Jurisdiction of E-contracts as it is created from anywhere and anytime in the World. So, this paper explains the legal validity of E-contract and describes the jurisdiction of E-contract in India. This paper also highlights the remedies available to the aggrieved party of the E-Contract.

KEY WORDS: Essentials - Jurisdiction – Validity – Evidentiary value - Remedies.

INTRODUCTION:

With the wave of industrialization in the country, deals in businesses have increased along with the monetary stakes. Thus, these deals need to be protected. Luckily, one of the oldest legislations, the law of contracts does the work. A contract is “*an agreement enforceable by law*”. Today for every minor business activity a contract is formed as it legally binds two or more parties in a relationship. In furtherance, when a party breaches to perform any work in the agreement, the other party seek damages through the court of law. The law of contracts is based on the idea that the parties by agreement create a legal obligation which is enforceable by other parties.

Now with the advancement in technologies, people are moving their business over the internet which involves a higher risk compared to the other business. To curtail such a risk e-contracts have come into force and also to relax the various dealings on the internet. An e-contract or electronic contract is a contract which is drafted and signed in an electronic form. Moreover, such contracts are executed through the internet.¹ E-contracts can be used as employment contracts, consultant contracts, distribution agreements, Licensing agreements and also Non-disclosure agreements. E-contracts are existing everywhere across the internet. E-contracts can be formed through e-mails, when parties who coming in a contract communicate the details of the contract via e-mail. In the case *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*,² the Supreme Court ignored the argument that communication and exchanges over emails does not constitute as a contract and said that “*once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initiated by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initiated*”. Furthermore, the EULA (End User License Agreements) is also used form valid contracts at the end of which users click on “I Accept” or “I Accept the Terms” icons to move further. These are most prominently used in various applications downloaded in phone and various online websites.³

E-contracts becomes a cost-effective way of to enter into an agreement as it saves the amount used for buying papers as it is paperless. It saves time also as sometimes the parties entering

¹ Kapil Raina, *Evidentiary Value of E-Contracts*, Legal Service India, accessed on 20.07.2021 at 8:45am.

² *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*, 2010 (1) SCALE 574.

³ Dr. S. Sethuram, Deepa C. Kumar, *E-Contracts in India: The Framework, Issues and Challenges*, International Journal of Emerging Innovation in science and Technology.

into a contract are not in front of each other. Thus, E-contracts negate all the difficulties and ensure faster running of the business.

OBJECTIVES:

1. To know about the essential conditions and types of E-Contracts in India.
2. To study about the legal framework of E-Contracts in India.
3. To analyze in detail about the Jurisdiction of E-Contracts.
4. To discuss about the Validity of the E-Contracts in India.
5. To highlight the remedies available to the parties in case of breach of E-Contract.

RESEARCH METHODOLOGY:

The present research paper, “A Critical Study on Various Aspects of E-Contracts in India” is based on both primary and secondary data collected from different sources. The primary data was collected from religious text and first-hand books. So far as secondary sources are concerned, they were accumulated from number of research papers of reputed journals, articles published in various blogs, books, newspapers and judgments delivered by Hon’ble Supreme Court and High Courts, books and newspapers. The research method used in the present study for exploration of data which amassed from different sources is descriptive/Ex post facto research method.

HYPOTHESIS:

Ho: There is significant law to deal with the issues arising in E-Contracts in India.

Ha: There is no significant law to deal with the issues arising in E-Contracts in India.

HISTORICAL BACKGROUND OF E-CONTRACTS:

E-contract is an essential part of E-commerce, so need to study the history of it before knowing about the E-contract. E-commerce simply related to the selling and purchasing of the goods and hiring of services over the internet. With the advancement in digital technology and networking increased the growth of E-commerce globally.

In the 1960s businesses were using Electronic Data Interchange (EDI) to conduct e-transactions⁴. In 1991,⁵ E-commerce was widely accepted when the Internet had used for commerce. With the invention of the World Wide Web in 1990, a large number of companies started to provide their services through the website. For example, Amazon and eBay which were among the earlier companies that transformed E-commerce.

In India, the concept of E-commerce was first introduced in the late 1990's through Rediff. An Indian Railway Catering & Tourism Corporation Limited (IRCTC) was the first company to generate E-commerce portal in India.

The United Nations Commission of International Trade Law (UNCITRAL) adopted the Model Law on E-commerce in 1996. The General Assembly of UN in January 1997 recommended that the countries should consider this model while enacting or revising their laws⁶.

Accordingly, the Indian Parliament enacted the Information Technology Act in 2000, to legalize the E-commerce transactions in India and to keep pace with the globalization of the trade and transactions with the development of computer technology.

The Rules and Regulations governing the E-commerce and ultimately the E-contract are provided under following International Conventions and Conferences.

The Brussels Convention on Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters, 1968⁷; Convention On The Law Applicable To Contractual Obligations, 19 June 1980 (known as "the Rome Convention")⁸; the Hague Conference on Private International Law (HCPIL)⁹ 30 June 2005 has issued a Convention on Exclusive Choice of Court Agreements concluded in Civil and Commercial Matters; and United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)¹⁰.

⁴ money.howstuffworks.com/history-e-commerce.htm The History of E-commerce BY DAVE ROOS The History of E-commerce | HowStuffWorks, accessed on 20.07.2021 @ 3:50pm.

⁵ www.ukessays.com/essays/information-technology/a. A Brief History of E Commerce Information Technology Essay, accessed on 20.07.2021 @ 4:00pm.

⁶ Prof. G. C.V. SUBBA RAO, LAW OF CONTRACT I & II, 26-27(11th ed S. Gogia & Company).

⁷ eur-lex.europa.eu › legal-content › TXT › uri=CELEX: 1968 Brussels Convention - EUR-Lex.

⁸ eur-lex.europa.eu › legal-content › ALL Convention on the law applicable to contractual obligations.

⁹ www.hcch.net › instruments › conventions › full-text Convention of 30 June 2005 on Choice of Court Agreements.

¹⁰ uncitral.un.org United Nations Convention on the Use of Electronic.

ESSENTIAL CONDITIONS FOR E-CONTRACTS:

As in every other contract, an electronic contract also requires following necessary requirements:

1. **An offer requirements to be made:** In many contacts (whether online or conventional) the offer is not made directly one-on-one. The consumer 'browses' the available goods and services showed on the seller's website and then chooses what he would like to purchase. The offer is not made by website showing the items for sale at a particular price.

2. **The offer needs to be acknowledged:** As stated earlier, the acceptance is usually assumed by the business after the offer has been made by the consumer in relation with the invitation to offer. An offer is revocable at any time until the acceptance is made.

Processes available for forming electronic contracts include E-mail, web site forms and Online agreements or End User License Agreements.¹¹

3. **There has to be legal consideration:** Any contract to be enforceable by law must have legal consideration, i.e., when both parties give and receive something in return. Therefore, if an auction site eases a contract between two parties where one Ecommerce – Legal Issues such as a person provides a pornographic movie as consideration for purchasing an mp3 player, then such a contract is void.

4. **There has to be an intention to create lawful relations:** If there is no intention on the part of the parties to create lawful relationships, then no contract is possible between them. Usually, agreements of a domestic or social nature are not contracts and therefore are not enforceable, e.g., a website providing general health related data and instructions.

5. **The parties must be able to contract:** Contracts by minors, lunatics etc. are void. All the parties to the contract must be lawfully competent to enter into the contract.

6. **There must be free and unaffected consent:** Consent is said to be free when there is absence of coercion, misrepresentation, undue influence or fraud. Usually, in online contracts, especially when there is no active real-time communication between the contracting parties,

¹¹ Nagpal Rohas, Electronic Contracts and the Indian law, Asian School of Cyber Law.

e.g., between a website and the customer who buys through such a site, the click through process ensures free and genuine consent.

7. The object of the contract need to be lawful: A valid contract presumes a lawful object. Thus a contract for selling narcotic drugs or pornography online is void.

8. There must be conviction and possibility of performance: A contract, to be enforceable, must not be ambiguous or unclear and there must be possibility of performance. A contract, which is impossible to perform, cannot be enforced, e.g., where a website promises to sell land on the moon.

TYPES OF ELECTRONIC CONTRACTS:

Broadly, E-Contracts may be classified into following three types. While the shrink-wrap transaction has been around for some time and actually exists in a paper environment, the other two types of transactions (click-wrap and browse-wrap) are suitable to electronic commerce:

1. **Click-Wrap Agreements:** In click-wrap agreements, a party after going through the terms and conditions provided in the website or program has to, normally, indicate his assent to the same, by way of clicking on an 'I Agree' icon or decline the same by clicking 'I Disagree'. This type of acceptance is usually done before receiving the merchandise. These sorts of contracts are extensively used on the internet, whether it be granting of a permission to access a site or downloading of any software or selling something via a website. This may be called the creation of contracts by conduct.

By clicking on any of these choices, he accepts or declines the terms. If he does not agree, the process is terminated. Click-wrap agreements can further be of the following kinds:

- **Type and Click:** In this case, the user must type 'I accept' or other specified words in an on-screen box and then click a 'Submit' or similar button. This demonstrates acceptance of the terms of the contract. A user cannot proceed to download or view the target information without observing these steps.

- **Icon Clicking:** In this case, the user must click on an icon of 'I agree' button on a dialog box or pop-up window. A user may signify rejection by clicking 'Cancel' or closing the window.

2. **Shrink-Wrap Agreements:** The sale of software in stores, by mail and over the internet has resulted in quite a few specialized forms of licensing agreements. For instance, software

sold in stores is commonly packaged in a box or other container and then wrapped in the clear plastic wrap. Through the clear plastic wrap on the box, the purchaser can see the warning that states the use of the software is subject to the terms of a license agreement contained inside, an agreement that cannot be read before purchase of the software. The license agreement generally explains that if the buyer does not wish to enter into a contract by purchasing the software, he must return the product prior to opening the sealed package containing the CD on which the software resides. If the software is returned with the sealed package unopened, a refund will be obtained.¹²

3. **Browse-wrap/ Web-wrap Contracts:** In browse-wrap contracts, the internet users will find the terms or conditions hyperlink somewhere on web pages that proposes to sell goods and services. According to these terms and conditions, using the site for buying the goods or services offered itself constitutes acceptance of the conditions contained therein. These are the agreements which can be seen on the internet on daily basis. These agreements are intended to bind two parties in a contract through the use of a website. For the continuous use of the website the terms of the website need to be accepted by the user. The terms include the 'user policies' and the 'terms of service' of the website and are in the form of a "terms of use" or "terms of service".¹³

E-CONTRACT AND STANDARD FORMS OF CONTRACTS

The concept of contract as a freely negotiated bargain has received severe strains in the modern age of mass production, mass marketing and mass consumerism and transportation. One must admit that the consumer has very little economic strength to dictate the terms and conditions favorable to him in a contract. On the other hand, the manufacturer, whole seller, producer, a carrier and other big companies having giant economic strength are in a favorable position to dictate terms and conditions and the other party contracting with the are quiet unable to insist their terms. Consequently these companies or producers etc. have drawn up standardized forms of contracts which are also known as adhesion. E-Contracts are standard forms of contracts. Instead of using a printed paper they are entered into a by electronic mode. A standard form of contract is a contract prepared by one party to it; otherwise, than by a process of negotiation drafted by one party it enables the other party, to sign on dotted lines. The terms are prepared

¹² David G Post & Dawn C, Nunziato, 'Shrink-wrap Licenses and the licensing on the Internet', Technology Licensing and Litigation (1997), at p- 519.

¹³ *The Law of Contracts & Tenders with a Special Chapter on E-Contracts*, T.S. VenatesaIyer's&, ed.10th, S. Gogia& Company, at p.106.

beforehand by the former and the latter party is made to or deemed to agree to the terms where under the latter does not have much say. The terms are put in a standardized form.¹⁴

CHALLENGES OF E-CONTRACTS IN INDIA

E-contracts have been a recent development in the legal field. Its implementation faces a lot of issues and challenges.

1. Capacity to Contract: It is a very essential element to ensure that the parties who come under a contract have the capacity to do so. If a person does not have legal competence then the contract stands void. Problem of capacity to contract arises because often there are nameless individuals who enter into contracts and there is a possibility that these individuals who agree to the terms and conditions of an e-contract might be minors.

2. Free Consent: Free consent is an essential element to form a valid contract. E-contracts do not provide any party to negotiate with the existing offer as the parties are not aware of each other. Further, the user cannot use any system or software without accepting the terms and conditions. Thus, an e-contract only provides a “take it or leave it” offer. In such a scenario, the user will only have two options either to accept the terms and conditions which he is unwilling to or to forego the service which he requires. On account of *LIC of India Vs Consumer Education and Research Center*, the Hon’ble SC gave judgment that, “In spotted line contracts there would be no event for a more fragile gathering to deal as to accept to have equivalent bartering power”. He has either to acknowledge or leave the administration or merchandise as far as the dotted line contract. The only possible choice he would be having is either to accept the preposterous or till the time ends, renounce the administration”. Hence it tends to be inferred that the client should be judicious while giving his agree to stay away from inconveniences.

3. Non-repudiation of Contracts: When one accepts the terms and conditions of an online contract, he cannot change the terms of the contract. This puts the person accepting such terms in an unfair condition as he has no means to change or alter any part of the contract as the parties present in such contracts do not know each other. Moreover, these contracts bind

¹⁴ Sneha J. Joshi, *A Study of Challenges and Benefits of Electronic Commerce*, *IMPACT: International Journal of Research in Humanities, Arts and Literature (IMPACT: IJRHAL)*, Volume 6, Issue 8, August 2018, pp. 25-32

them legally for a long period of time and they cannot alter the terms of the contract to benefit themselves.

4. Court Jurisdiction: E-contracts have a very wide course of action and takes place in wide geographical areas, which will lead to filing of cases in different and faraway places. Defending suits at such faraway places increases expenditure and time wastage. Service providers limit the exposure to the jurisdiction which is near them. The user has no option in such agreements to select the jurisdiction and is exposed to whatever jurisdiction the service provider limits themselves to. This puts the user in an unfavorable position.

LEGAL FRAMEWORK FOR E-CONTRACTS IN INDIA

Indian Contract Act, 1872: The Indian Contract Act, 1872 governs the manner in which contracts are made and performed in India, so every contract made should necessarily comply with the provisions of the Act to make it legally enforceable. The provisions of the Indian Contract Act are wide enough to cover such transactions. In the context of contract formation unless otherwise agreed with by the parties an offer and acceptance of an offer or either of them, may be expressed by means of data messages or electronic record. Where electronic record is used in the formation of contract that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose. As between the originator and the addressee of the electronic record, a declaration of will or other statements should be valid, effective or enforceable even though it is in the form of database.

Information Technology Act, 2000: The electronic contracts would be considered absolutely valid under the Information Technology Act, 2000. As per Section 4 of the Information Technology Act, 2000 legal recognition of electronic records, where any Information is in writing, typewritten or printed form is made available to a user in the electronic form for subsequent reference shall be deemed to have satisfied the requirement of law. In a layman's language, this means that any document which is in the written or printed version would be treated same and will have the equal validity in the electronic form also. As per the newly introduced Section 10A of the Information Technology Amendment Act, 2008" clearly states that the "Validity of contracts through electronic means, that "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.”The Act also lays down the instruments to which the Information Technology Act, 2000 does not apply, it includes negotiable instruments, power of attorney, a trust deed, a will, and contracts for sale or transfer of Immovable Property.

Indian Evidence Act, 1872: It is pertinent to contextualize at this juncture that evidence recorded or stored by availing the electronic gadgets is given the evidentiary status. For instance: the voice recorded with the help of a tape recorder. Now-a-days, the digital voice recorder, digital cameras, digital video cameras, video conferencing are adding a new dimension to the evidentiary regime. The emergence of information and communication witnessed a sea change by elevating the status of the evidence recorded, generated or stored electronically from the secondary to primary evidential status. The evidentiary value of e-contracts can be well understood in the light of the various sections of Indian Evidence Act. Sections 85A, 85B, 88A, 90A and 85C deal with the presumptions as to electronic records, whereas, Section 65B relates to the admissibility of the electronic record.

JURISDICTION IN E-CONTRACTS:

Jurisdiction is an extent of the power of the court to hear a case i.e. to take cognizance of the case and to make legal decisions and judgments. It is the legal authority of the court to resolve the dispute. E-contract involves instant communication of offer and acceptance. Wherein the contract is complete at the end of originator where acceptance is received. The Supreme Court of India in case of *Bhagwandas Goverdhandas Kedia vs. Girdhari Lal Parshottamdas & Co*¹⁵ held that “at the place of proposer where the acceptance is received shall have the jurisdiction for enforcement of contracts entered into by means of computer internet.”

Jurisdictional Issues in E- Contracts are bound to arise since the positive limits of classic statutes do not fit in the eternity of the internet. The boundlessness of the net and the instantaneous transaction provides a tough opportunity for the courts to ascertain their jurisdiction upon the disputes concerning e-contracts.

A contract which is not formed on a piece of paper but is put to effect through clicks. Electronic Contracts are those creations of the modern times which have simplified as well as complicated

¹⁵ Bhagwandas Goverdhandas Kedia vs. Girdhari Lal Parshottamdas & Co., AIR 1966 SC 543 : 1966 (1) SCR 666.

the situation. Simplification is through the convenience of entering into an agreement irrespective of space constraints. But, this leads to complication. The nature of the agreement makes it difficult to put it as a subject matter of dispute.

When the matter would go to the court, one asks the question, as to how and according to what provision will the court admit the suit? This leads to the lacuna in the legal positioning of the electronic agreements. The formation was not difficult. The complexity arises due to the involvement of none other than the INTERNET! Internet is that communications system that has no connection with the physical location of its component parts. Legal scholar Wendy Adams summarises the issue as under- *“This fundamental incompatibility between legal governance as a function of geopolitical territory, and network governance as a function of IP addressing, makes it difficult (although not impossible) to impose local limitations on the global dissemination of information”*

Thus, the classic legal principles would not fit into the breakthrough sphere of the internet. For this changed aspect of reality, some call for an entirely new paradigm of law. Till the new regime kicks in, we will have to deal with the existing state of law.

Jurisdiction by Courts: There is no statutory meaning attached to the term jurisdiction. It is the authority to decide¹⁶. One may attach narrow or even wider meaning. Generally, it can be termed as the authority to embark upon an enquiry¹⁷. It is also called the legal shelter under which the court takes up a decision which will be binding though it can be incorrect.¹⁸

Hon'ble Supreme Court in the case of *Delhi Special Police Establishment v. S.K. Loraiya*¹⁹, has explained the significance and usage of the term. It has been associated with that initial stage where the proceedings are instituted in a court. It is not that stage where the court goes on to decide the case on merits. There are three types of jurisdiction comprehended in law-

1. Territorial
2. Pecuniary

¹⁶ Ujjam Bai v. the State of U.P., AIR 1962 SC 1621.

¹⁷ Union of India v. Tarachand Gupta and Bros., (1971) 1 SCC 486.

¹⁸ A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602: 1988 SCC (Cri) 372.

¹⁹ Delhi Special Police Establishment v. S.K. Loraiya, (1972) 2 SCC 692.

3. Subject Matter²⁰

The purpose of the jurisdiction is, like, to provide a gateway through which a matter goes to the court. It empowers the court to hear the matter through the authority of law²¹. Thus, in the case of e-contracts, the problem arises, how to hear a matter where the law is silent and the parties are geographically distant? It is said that the “notion of the jurisdiction is rooted in the territoriality from the point of view of both the court as well as the law²².”

Jurisdiction in the United States: The common law jurisdiction as the United States is following general principles applicable to the law of contracts as Indian jurisprudence. The courts exercise jurisdiction over those subject matters which are present in the State where the action is being pursued. But this limit being placed by the due process of law should not be strictly applied in case of transactions effected virtually.

With changing times, the law is to also grapple with innovative mechanisms. US jurisprudence has up kept that principle straight. There was a time when the automobiles were newly invented. How to take the jurisdiction? The law was silent. The courts interfered and applied the jurisdiction to the invention of automobiles.²³

Similarly, in the case of such contracts, the innovative approach that can be applied is the Minimum Contacts Test. The landmark judgment of *International Shoe Co. v. Washington*²⁴, marked the beginning of this era. The test is of two parts and is applicable where the defendant is not residing within the forum state. The court would have to be satisfied with two prime requirements-

- a) The party should have minimum contacts with the forum state. It implies that the party has purposefully diverted its activities towards that particular state.
- b) If the court exercises its jurisdiction, the traditional notions of fair play and substantial justice would not be hurt.

²⁰ Church of South India Trust Assn. v. Telugu Church Council, (1996) 2 SCC 520.

²¹ CIT v. Pearl Mech. Engg. & Foundry Works (P) Ltd., (2004) 4 SCC 597.

²² Justice S. Muralidhar, Jurisdictional Issues in Cyberspace, 6 IJLT (2010) 1, Page 2.

²³ Hess v. Pawloski, 274 US 352 (1927).

²⁴ International Shoe Co. v. Washington, 326 US 310 (1945).

The purpose of the test is also clear and explicit. Firstly, the defendant has to be relieved of the burden of visiting and litigating in a foreign jurisdiction. Secondly, the states are to be prohibited from transgressing their boundaries²⁵.

The litmus test is, in a nutshell, reasonableness under the situation of the court asserting the jurisdiction. To test accordingly, Michael Geist explained that the eventualities in the foreign courts have to be foreseen. This test is ideal for long scale commercial transactions. This test is verified and approved by recent judicial decisions in the US as well.²⁶

The crucial test in the earlier test, in its first part, was the purpose in the connection with the forum test. This gives rise to the Purposeful Availment test. This harps on the need for a strong purpose behind the action of a party instead of a mere act of the party. The US Supreme Court ruling is significant on this issue.

In the landmark case of *Hanson v. N.R. Denckla*²⁷, the assertion of the jurisdiction by the Florida court over a company situated outside its jurisdiction (Delaware) was rejected. The reason was that the connection of the company with the forum state was not purposeful. The only connection was that the other party sifted unilaterally to the State of Florida.

This test also does away with the physical presence of the parties. The actions should be purposefully directed towards the residents of a state²⁸. The burden of proving the purpose is also quite high. Some significant activity would have to be shown to be qualified as a purposeful availment, for example, the continuing obligation from the forum state.

The only problem that arises is the application of these creative tests over objective situations. Subjectivity, when interplayed with the dynamics of jurisdiction, can lead to unfairness also. And, the pillars upon which the stack of jurisdiction rests is reasonableness and fairness.

Jurisdiction in India: In India, the Code of Civil Procedure, 1908 provides the manner of determining the jurisdiction of Civil Courts, which is based on the place of residence and the

²⁵ World-Wide Volkswagen Corpn. v. S. Woodson, 1980 SCC OnLine US SC 7 : 62 L Ed 2d 490 : 444 US 286, 291-92 (1980).

²⁶ Boschetto v. Hansing [539 F 3d 1011 (9th Cir. 2008).

²⁷ Hanson v. N.R. Denckla, 1958 SCC OnLine US SC 128 : 2 L Ed 2d 1283 : 357 US 235 (1958).

²⁸ Burger King Corpn. v. Rudzewicz, 1985 SCC OnLine US SC 126 : 85 L Ed 2d 528 : 471 US 462 (1985).

place where the cause of action arises. Generally, the contracts insert a specific clause to determine the territorial jurisdiction to resolve the dispute arising under such contracts.

An E-contract crosses the jurisdictional boundaries as it can be created from any place in the globe. This raises the question of jurisdiction of the court in case of any dispute between the parties to E-contracts.

If there is any dispute among the parties belong to the same jurisdiction related to E-contract, then such dispute can be resolved similar to the traditional contract disputes. However, the challenges would arise when the parties to E-contract are belong to the different countries. Jurisdictional problem in E-contract has been resolved under IT Act in India. Specifically Section 13 of the IT Act deals with the time and place of despatch and receipt of an electronic record and electronic contracts. This section stated that “*the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*” It provided the time of despatch of the digital record.

But when it comes to the world of internet, the powers become ever- broadened. Even a portion of the cause of action may arise within the concerned territory. There can be a different standard set as in the US long-arm jurisdiction provisions.

Foreign judgments are anyways recognised under the law. Decrees of Indian Courts are applicable in the foreign territories as well (so declared by Central Government through notification).

In some of the crucial cases, the courts have delved into the aspects of the jurisdiction governing the e-contracts.

Operation of Website: One of such cases is **Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd.**²⁹ Primarily a passing off action, it throws a lot of light on the issue of jurisdiction. For a domain name of <www.casioindia.com> of the defendant, the plaintiff contested with this domain name of “CasioIndia.org”, “CasioIndia.net”, etc. To determine the jurisdiction, the court grappled with the fact whether the deception took place at Delhi or not, since the case was being tried on the Delhi High Court. Ultimately, it was held that once a web site is accessed from Delhi, it is enough to invoke the territorial jurisdiction of the Court. For reaching the said

²⁹ Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd., 2003 27 PTC 265 Delhi.

conclusion, the court relied upon the decisions of *Rediff Communication Ltd. v. Cyber booth*³⁰ and *Dow Jones & Co. Inc. v. Gutnick*³¹.

Substantial Connection Test: Later in the case of *India TV Independent News Service Pvt. Ltd. v. India Broadcast Live LLC*³², the court went one step ahead from mere accessibility of the website. The well known Hindi News Channel of India TV filed an action for passing off in the Delhi High Court against the defendant for using India TV logo on their website *indiatvlive.com*. The defendants after initiating their action in Arizona claimed that they do not do business in India, hence cannot be made liable.

Thus, the courts considered the substantial connection and the effects test. It was found that it was held that the website of the defendant was not merely passive but was interactive permitting the browsers to not only access the contents thereof but also to subscribe to the services provided by the owners. Thus, the courts found a substantial presence of the defendant company in India. Hence, the Court exercised its jurisdiction.

Purposeful Availment Test finally Applied: Both these were Single Judge views. In *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy*³³, the court held that for ascertaining jurisdiction the plaintiff would have to show that the defendant ‘purposefully availed’ itself of the jurisdiction of the forum court.

This was majorly in the context of passing off actions and trademark infringement actions. But the inference for resolving the jurisdictional issues in e-contracts can definitely be borrowed. The court further held that the nature of the activity must be *prima facie* concluding in India with such in the mind of the maker.

In case of *PR Transport Agency vs. Union of India*³⁴, the above provision applied. In this case, the Allahabad High Court had to decide the question of jurisdiction. The respondent had sent the letter of acceptance by an e-mail to the petitioner’s e-mail address. After that, the respondent sent another e-mail cancelling the e-auction due to some unavoidable reasons. The petitioner challenged this communication in the Allahabad High Court, objection was raised by the

³⁰ *Rediff Communication Ltd. v. Cyber booth*, 1999 SCC OnLine Bom 275 : AIR 2000 Bom 27.

³¹ *Dow Jones & Co. Inc. v. Gutnick*, (2002) HCA 56 (Austl.).

³² *India TV Independent News Service Pvt. Ltd. v. India Broadcast Live LLC*, 2007 35 PTC 177 Delhi.

³³ *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy*, 2008 38 PTC 288 Delhi.

³⁴ *PR Transport Agency vs. Union of India*, AIR 2006 All 23: 2006 (1) AWC 504.

respondent about the territorial jurisdiction of the Court on the basis of cause of action had not arisen within Uttar Pradesh. In this case, the Principal place of business of the petitioner was in the Chandauli district of U.P. and his other place of business was in Varanasi of U.P. The Court, on the basis of Section 13(3) of the IT Act, held that “the acceptance of tender by e-mail would be deemed to have been received by the petitioner at Varanasi or Chandauli, which are the only two places where the petitioner has his place of business. As both these places fell within the territorial jurisdiction of the Allahabad High Court, the Court assumed the jurisdiction to try the dispute.” Thus, it is observed that principal place of business of the originator and the addressee become the criteria to decide the jurisdiction of the Court. However, the contracting parties particularly in E-contract must insert a specific clause on jurisdiction to avoid further complications.

The electronic acts as have got pace and recognition, lead to binding legal effects. But, for the sake of certainty, a uniform commercial code can be implemented in India. One exists in the US already. Along the lines of Convention on International Sales of Goods, uniformity in the sphere of e-contracts and their jurisdictional aspect would be cherished by all.

The strict definition of jurisdiction cannot be applied when it comes to transactions concurred virtually. To the extent of jurisprudential clarity, courts have done enough labour to carve out creative doctrines. But from the side of the legislature, some key reforms and amendments in the Civil Procedure Code, the Information Technology Act and the Indian Contract Act are required. If happened, it will provide guided wisdom to the courts in adjudging the disputes related to e-contracts in future.

VALIDITY OF E-CONTRACTS:

The Indian Contract 1872 has recognized the traditional agreements which include the oral contracts made by the free consent of the contracting parties who are competent to contract for the lawful consideration with a lawful object and are not expressly declared to be void. Hence, there is no provision in this Act which prohibits the enforceability of electronic agreements provided that the essential elements of the valid contract must be present in such agreements.

There are various cases where the Indian Courts have dealt with validity of the e-contracts such as negotiation of the terms of the Contract. In the case of **LIC India v. Consumer Education and Research Centre**, the Supreme Court held that, *“In dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power. He*

has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or to forgo the service forever."

~~Electronic Contract 187 Dispute Resolution 197 Electronic Contract 2006 Electronic Contract 187 Dispute Resolution 197~~

The provisions of the Information Technology Act, 2000 (**IT Act**) give legal recognition to an electronic (**E -Contract**) particularly section 10-A of the IT Act which states:

"Section 10-A: 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."

The above provision was introduced by the Information Technology (Amendment Act), 2008 after recognizing the growing dependence on electronic means to reach commercial agreements. This applies where contract formation, communication of the proposal and acceptance is carried out electronically.

Electronic Signature

A digital signature is a mathematical technique to validate the authenticity of message, software or electronic documents. An electronic contract can be created by digital signatures is recognized by the laws in India. In E-contract, it is imperative to know that the authenticity of such contract, which is proved by 'electronic signature'³⁵ recognized under IT (Amendment) Act, 2008.

In J.Pereira Fernandes SA vs. Mehata,³⁶ the defendant a Director of the company sent an unsigned E-mail to the claimant to stop the process of company. In this case the Court of Chancery held that offer sent through an unsigned E-mail is not sufficient.

That means to authenticate any E-contracts, it is necessary to have an electronic signature of the originator and addressee. The IT Act provides legal recognition to electronic signature under the Sec.5 of the Act. Wherein it is provided that any matter or document shall be

³⁵ Refer Sec.2 (ta) and 3- A inserted by the Information Technology (Amendment) Act, 2008(Bare Act).

³⁶ J. Pereira Fernandes SA vs. Mehata, (2006) 2AB ER 891 (Ch D).

authenticated by affixing the handwritten signature or any mark on it is recognised as an electronic signature.

An E-contract subsequent to its execution is recorded with the executing parties in electronic form, i.e. in electronic record. The IT Act defines the term “electronic record” under sec.2(t) as “data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche”. The IT Act also provides an authentication and legal recognition of electronic records under the Sec.3 and 4 of this Act.

The Indian Evidence Act, 1872 has provided legal recognition to the E-contract. Section 3 of this Act provides that the term “electronic signature”, “electronic signature certificate”, “electronic record”, “secure electronic record”, “secure electronic signature” shall have the same meaning as provided under the IT Act respectively. Sec 3 defines “Evidence”³⁷ that “all documents including electronic records produced for the inspection of the court are called as documentary evidence.”

The Indian Evidence Act, provides admissibility of electronic record under section 65-B, any information contained in an electronic record, if printed or stored in CD is admissible in the court as evidence without the further proof or production of original in any proceedings.

In *Anvar P.V. vs. P.K. Basheer & Ors.*,³⁸ the nature and manner of an admission of electronic records is under consideration before the Supreme Court of India. The Supreme Court held that an electronic record by way of secondary evidence shall not be admissible as evidence unless the requirements of Section 65-B are satisfied.

*Hotmail Corporation vs. Van \$ Money Pie Inc.*³⁹, this is the first case where U.S. District Court, California decided the validity of a Click-wrap contract’s term of service through e-mail agreement.

In *Rudder v. Microsoft Corporation*,⁴⁰ Ontario Superior Court of Justice, Canada, the issue was discussed about a clause which binds an individual to be upheld even if that clause is not seen and whether the Click-wrap licenses are valid or not. In this case, Rudder argued that the particular clause was not valid as it was not adequately brought to the attention of the user. The

³⁷ Substituted by Act 21 of 2000 and sch. II, for “all documents produced for the inspection of the court”.

³⁸ *Anvar P.V. vs. P.K. Basheer & Ors.*, (2014) 10 SCC 473.

³⁹ *Hotmail Corporation vs. Van \$ Money Pie Inc.*, 47 U.S.P.Q. 2d 1020, 1998 WL 388389.

⁴⁰ *Rudder v. Microsoft Corporation*, (1999), 2 CPR (4th) 474.

provision was important that it required special notice. The Court held that the Clause was enforceable and Click-wrap agreements “afforded the sanctity that must be given to any agreement in writing.”

The validity of E-contract is also recognized by the Indian courts in various cases.

In case of Trimex International FZE Ltd., Dubai vs. Vedanta Aluminium Ltd.,⁴¹ the Supreme Court of India held that “the contract between the parties was unconditionally accepted through e-mails was a valid contract which satisfied the requirements of the ICA.”

More recently in the case of *Ambalal Sarabhai Enterprise Limited v. KS Infraspac LLP Limited*⁴², the Supreme Court examined the validity of agreements entered into by parties using a combination of communications over email and Whats App. The key inference drawn was the nature and language of the correspondences, which did not directly equate to affirmation, and therefore the agreement was invalid. The means of communication was not a concern, however, the Court stated that, “*the WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its content (are) to be proved during trial by evidence-in-chief and cross examination.*”... “*The e-mails and WhatsApp messages will have to be read and understood cumulatively to decipher whether there was a concluded contract or not. The use of the word ‘final draft’ in the e-mail... cannot be determinative (of offer or acceptance) by itself*”.

Hence, the E-contract is valid and enforceable according to the provisions given under the Indian Contract Act; The Information Technology Act and The Indian Evidence Act like the traditional contracts.

EVIDENTIARY VALUE OF E-CONTRACTS IN INDIA:

In a country like India, where the literacy rate is not so high, the concept of ‘Digital India’ is a far reach. People still feel insecure to do online based transactions mainly because the terms and conditions of such contracts are not transparent. Documents are mainly registered for conservation of evidence, assurance of title and to protect oneself from fraud. The evidentiary value of electronic contracts has been given recognition and can be understood in the light of various sections of Indian Evidence Act.

⁴¹ Trimex International FZE Ltd., Dubai vs. Vedanta Aluminium Ltd, 2010 (1) SCALE 574.

⁴² (2020) SCC Online 1.

Sections 85A, 85B, 88A, 90A and 85C deal with the presumptions as to electronic records, whereas, Section 65B relates to the admissibility of electronic record. The above mentioned sections can be explained as follows:

Section 85A: As regards presumption to electronic agreements, this section is incorporated. It says that every electronic record of the nature of an agreement is concluded as soon as a digital signature is affixed to the record. Section 85A has been added in order to ensure the validity of e-contracts. But there are some restrictions as regards the presumptive value. The presumption is only valid to electronic records, electronic records that are five years old and electronic messages that fall within the ambit of Section 85B, Section 88A and Section 90A of Indian Evidence Act.

Section 85B: Section 85B provides that the court shall presume the fact that the record in question has not been put to any kind of alteration, in case contrary has not been proved. The secure status of the record may be demanded till a specific time. The digital signature should also be presumed to have been affixed with an intention of signing and approving the electronic record. Further it has been provided that the section should not be misread so as to create any presumption relating to the integrity or authenticity of the electronic record or digital signature in question.

Section 88A: “The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such message was sent”. This section is self-explanatory as it purports to follow the basic rules of a valid hard-copy agreement. The words “may presume” authorize the court to use its discretionary power as regards presumption. Sections 85A and 85B contained the words “shall presume” which expressly excluded this discretionary power of the court.

Section 90A: In case of an electronic record being five years old, if proved to be in proper custody, the court may presume that the digital signature was affixed so as to authenticate the validity of that agreement. The digital signature can also be affixed by any person authorized to do so. For the purpose of this section, electronic records are said to be in proper custody if they are in the custody of the person with whom they naturally be. An exception can be effected in case circumstances of a particular case render its origin probable.

Section 85C: As far as a digital signature certificate is concerned, the court shall presume that the information listed in the certificate is true and correct. Inclusion of the words “shall presume” again relates to the expressed exclusion of the discretionary power of the court.

Section 65B: Section 65B talks about admissibility of electronic records. It says that any information contained in an electronic record which is printed on a paper or stored/recorded/copied on optical/magnetic media produced by a computer shall be deemed to be a document and is admissible as evidence in any proceeding without further proof of the original, in case the following conditions are satisfied:

- a) The computer output was produced during the period over which the computer was used regularly to store or process information by a person having lawful control over the use of the computer. In case a combination of computers, different computers or different combinations of computers are used over that period, all the computers used are deemed to be one single computer.
- b) The information contained should have been regularly fed into the computer, during that period, in the ordinary course of activities. The computer was operating properly during that period and if not, it would not have affected the accuracy of data entered.

A certificate issued is also admissible if it contains a statement which:

1. Identifies the electronic record containing the statement.
2. Gives information about the particulars of the computer involved in the production of record.
3. The certificate issued should be signed by a person officially responsible for the use of that device in relation to the relevant activity.
4. The information fed into the computer should be in appropriate form as well as by appropriate device.

REMEDIES FOR BREACH OF E-CONTRACT

There is no specific rule in case of breach of online contract but the rules regarding remedies for breach of contract can be followed as provided in The Indian Contract Act. A valid contract gives rise to co- relative rights and obligations and they are enforceable in the court of law when infringed on breach of contract. The Contract Act mainly talks about two remedies for the breach of contract such as Damages and Quantum Merit. But few other remedies are also available as provided in the Specific Relief Act such as specific performance of contract and injunction restraining the other party from making a breach of contract. Sec 73 and Sec 74 of

the Indian Contract Act, 1872 deals with the rules regarding the remedy of damages on breach of contract.

The person whose rights are infringed by the breach of contract may bring an action for damages or compensation in terms of monetary value for the loss suffered by the party. Sec 73 to 75 provides rules regarding the assessment of damages based on the famous case Hadley vs. Baxendale. According to the rules laid down in this case, there can be damages which naturally arose on the usual course of things from such breach of contract and can be called ordinary damages and secondly, damages for loss arose from special circumstances i.e. special damages.

REMEDY CLAUSE

These clauses state what rights the non-breaching party has if the other party breaches the contract. In contracts for the sale of goods, remedy clauses are usually designed to limit the seller's liability for damages.

Arbitration Clauses: An arbitration clause states that disputes arising under the contract must be

settled through arbitration rather than through court litigation. Such clauses generally include the

name of the organization that will conduct the arbitration, the city in which the arbitration will be held, and the method for selecting arbitrators.

Merger Clauses: Merger clauses state that the written document contains the entire understanding of the parties. The purpose of merger clauses is to ensure that evidence outside the written document will not be admissible in court to contradict or supplement the terms of the written agreement.

Breach of Contract: The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Act, or any other law. Promises bind the representatives of the promisor in the case of death of such promisor before performance, unless a contrary intention appears from a contract.

In a contract the agreement being enforceable by law, each party to the contract is legally bound

to perform his part of the obligation. Non-performance of the duty undertaken by a party in a contract amounts to breach of contract, for which he can be made liable.

REMEDIES FOR BREACH OF CONTRACT

The legal remedies for breach of contract are: (a) damages; (b) specific performance of the contract; and (c) injunction.

Damages: In practice damages constitute the main remedy. When a contract has been breached, the party who suffers by such breach is entitled to receive, from the party who has breached the contract, compensation for any loss or damage caused to him thereby, being loss or damages which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. A person who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through non-fulfillment of the contract.

Liquidated damages and penal stipulations: If a sum is named in the contract as the amount to be paid in case of breach of contract, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive, from the party who has broken the contract, reasonable compensation, not exceeding the amount so named or the penalty stipulated for. A stipulation for increased interest from the date of default may be regarded as a stipulation by “way of penalty”. The court is empowered to reduce it to an amount which is reasonable in the circumstances.

Specific performance: In certain special cases (dealt with in the Specific Relief Act, 1963), the court may direct against the party in default “specific performance” of the contract, that is to say, the party may be directed to perform the very obligation which he has undertaken, by the contract. This remedy is discretionary and granted in exceptional cases. Specific performance means actual execution of the contract as agreed between the parties. Specific Performance of any contract may, in the discretion of the court be enforced in the following situations.

- ☐ When there exists no standard for ascertaining the actual damage caused by the nonperformance of the act agreed to be done; or
- ☐ When the act agreed to be done is such that monetary compensation for its nonperformance would not afford adequate relief.

Exceptions: A contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, cannot be specifically enforced. Another situation when a contract cannot be specifically enforced is where “the contract is in its nature determinable”. A contract is said to be determinable, when a party to the contract can put it to an end. A contract the performance of which involves the performance of a continuous duty, which the Court cannot supervise, cannot be specifically enforced.

Persons who cannot obtain specific performance: The specific performance of a contract cannot be obtained in favor of a person who could not be entitled to recover compensation for the breach of contract. Specific performance of a contract cannot be enforced in favor of a person who has become incapable of performing the contract that on his part remains to be performed, or who violates any essential term of the contract that on his part remains to be performed, or who acts fraudulently despite the contract, or who willfully acts at variance with, or in subversion, of the relation intended to be established by the contract.

SUGGESTIONS & CONCLUSION:

E-contracts are appropriate to encourage the re-building of business forms happening at numerous organizations including a composite of advances, procedures, and business systems that guides the moment trade of data. The e-contracts have their benefits and bad marks. From one perspective they reduce costs, spares time, affix client reaction and improve administration quality by diminishing desk work, in this way expanding automation.

COVID-19 will also serve as a mechanism for pushing India Inc. towards paperless and quicker forms of document execution. Nevertheless, as the IT Act specifically only accepts digital signatures and e-signs from Aadhaar, international signatories who do not possess digital signatures or e-signs from Aadhaar would not be allowed to e-sign. Throughout that situation, the global signatories can depend on the signing technique at their disposal and prove their

legitimacy through proof such as email correspondence or the parties' actions to determine the purpose.

E-contract in India has definitely come a long way from the days of bazee.com which was underway as the first large online retail website. At present, with the increase in number of internet users, e-contract is organized to grow further. The growing trend of internet banking and credit or debit cards along with the rise in the number of educated and computer literate persons will further support this growth. The need of the hour is law which covers all the aspects of e-contract extending from payment mechanism and maintaining minimum standards in the delivery of services. Such legislation will help to restrain the growth of websites which rise within a few days and then stop functioning in the absence of suitable funds for sustenance. As all business through e-contract sites is ended through the internet without any direct physical interfaces, the main basis of connections is the trust of the customers which should be engaged at any cost. A law in this field will detect the criminals who have used the internet as a source for making quick money. This will also act as a defense for the genuine e-contract websites and help in further growing of business. There is also a need for the creation of an authority in the consumer court to look into the grievances arising out of e-contract transactions. Such an authority should have experts in areas such as payment security. This will embolden speedy redressal of disputes and promote e-contract transactions. E-contract which is a developing segment in the commercial arenas is scheduled to grow and it is the accountability of the prevailing players to ensure that growth is not hindered by their acts and policies.