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Analysis of Section 10 of the Indian Contract Act in Relation to E-Contracts

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ABSTRACT

The advancement of technology in the recent years have resulted in wide usage of electronic medium to form electronic contracts. In India, these electronic contracts are primarily regulated by the traditional contract law. Electronic contracts are considered to be valid and enforceable if they fulfill the essential elements for forming a contract. However, electronic contracts are often dynamic and different in their very nature, so there are many electronic contracts that fail to accurately meet the standard set forth by the contract law, therefore technically not valid. But due to the limitations of the existing contract regulating law, these flawed contracts are overlooked and often passed as valid contracts. The existence of these flawed but validated electronic contracts could have not only given rise to many complications but also raised certain precarious legal issues. This paper will throw light on how the essential elements of a valid contract laid down by the Indian Contract Act are often not fulfilled by the contemporary electronic contracts, the inadequacy of the existing contract regulating law and the legal issues that could arise out of these erroneously validated electronic contracts.

I. INTRODUCTION

Globalization has resulted in a widespread growth and progress in technology, commerce, mode of communication and production, building close connections between cultural and economic activities. The advancement of technology has enabled a transition from ‘traditional paper-based transactions’ to ‘electronic transactions’ while carrying our business activities. Communication has shifted from snail mail to mobile phones, telephone, fax transmissions, and to instant digital communication through electronic mail (e-mail) and by using the World Wide Web. Global integration has gained prominence using these technological means which can be seen in online shopping platforms, social media and the explosion of paperless cash usage. Exchange of goods, services and monetary transactions are now done using electronic mediums. Even global stock markets are now operated under paperless transactions. Traders, investors and speculators in recent times buy shares and equity by accessing online trading

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platforms. In such manner, there is a dramatic transformation of our lifestyle globally through the use of digital and information technology.

India has enacted the Information Technology Act, 2000 to keep pace with this technological advancement. This Act is to be read in conjunction with other existing Indian laws in order to give effective operation and regulation of transactions made using electronic medium. In such scenarios, contracts formed using electronic means are governed by the existing contract law along with the Information Technology Act. The provisions in the Indian Contract Act are directed mainly towards traditional contracts and this law to be the primary legal regulatory mechanism for non-traditional contracts are not conclusive, or rather practicable due to their remarkably varying nature. This has therefore resulted in a number of issues and even put a question on the validity and enforceability of the e-contracts itself. In this paper, we will analyse the application of traditional contract laws to e-contracts and throw some light on the issues confronted by e-contracts under the existing Indian law.

II. MEANING OF E-CONTRACT

As a consequence of technological advancement, there is tremendous growth in the number of contracts formed using electronic medium, widely known as electronic contracts (e-contracts). According to the definition given by the US Legal, “*E-contract is a kind of contract formed by negotiation of two or more individuals through the use of electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract*”². E-contract does not have an exhaustive definition, as there is no statute defining the term under the Indian law, so it can be delineated as a contract making use of computers, through email, software or databases.

In theory, an e-contract is almost identical to traditional paper-based contracts except for the mode of communicating the contractual terms. In practice, e-contract has several advantages over traditional contracts. E-contract can significantly cut the time of forming contracts. It helps contracting parties to form faster contracting process by facilitating automation and digitization of contracts, which also reduced the process costs. It also assists businesses achieve competitive benefits by providing an upgraded contract management system. These contracts are now identified to be a part of our day to day activities and it is the aim of the parties to e-contracts to solve several complexity issues like time and cost that could come about in traditional paper contracts. E-contracts have also provided novel techniques and more extensive opportunities

² US Legal Definitions, (Dec.1, 2021, 10:00 AM) <http://definitions.uslegal.com/e/e-contract>.

for people pursuing newly surfacing business paradigms.

III. TYPES OF E-CONTRACTS

Generally, e-contracts can be entered in two ways: through electronic mail 'email' and 'websites'.

In a contract entered into by emails, the parties to the contracts exchange and negotiate their contracting terms and enter into contracts through electronic mails. Although the Indian Contract Act do not lay down any provision regarding e-mail contracts, the fact that it is similar to other forms of contracts, other than the medium of communication, has been taken into account and is therefore governed by the Indian Contract Act. This form of contract has been validated and considered to have the same function and effect as that of traditional paper contracts³.

Alternative methods of forming online contracts through websites can be done in three ways: Click wrap, Browse wrap, and Shrink wrap.

A 'click wrap' agreement is a type of e-contract formed between two parties in which an online user agrees to the terms specified in the website and clicks "I accept" or "I agree" icon to denote the acceptance of the offered terms. This kind of e-contracts usually have predetermined terms in which the online user does not have negotiating power, but rather a take it or leave it kind of agreement in which users are made aware of the terms late in the contractual transaction⁴.

Similarly, in a 'browse wrap' agreement, the terms of the contract are predetermined and user's specific express consent is not required. A hyperlink is provided in the website at the bottom of the page, directing users to the page containing the terms and conditions when clicking it. The act of simply browsing a website or downloading a software is presumed as a consent to the terms given in a hyperlink provided in the website⁵.

A 'shrink wrap' agreement is a prior license agreement and the terms of the agreement can be read and accepted by users only after purchasing and opening the product or software. The users' consent to the contract is concluded from opening the wrap of the product. This type of contract also does not give negotiating power to the users and the terms can be accepted by

³ Megha Nagpal, *Analysis of the Legal Issues Involved in Electronic Contracts Under Indian Law with Reference to Business-To-Consumer Model of E-Commerce*, International Journal of Law and Legal Jurisprudence Studies, Vol.3 Issue 4, (Nov. 2016).

⁴ Mark A. Lemley et al., *Software and Internet Law*, Aspean Law and Business, 363, (3rd Edition, 2006).

⁵ S. P. Ambika, *Legal Regulation of E-Contract in India: An Indian Perspective*, Shodhganga, (Nov.28, 2021, 01:00 PM), <https://shodhganga.inflibnet.ac.in/handle/10603/38507>.

opening the wrap or returning the product in case of rejection⁶.

IV. FORMATION OF E-CONTRACTS UNDER THE INDIAN LAW

There are several statutes that are to be read in conjunction to infer the validity and enforceability of e-contracts in India. However, e-contracts are primarily governed by the provisions of the Indian Contract Act, 1872, as applicable to traditional contracts. As per the provisions of this Act, a contract can be held to be legally valid if it fulfils all the essential elements of a valid contract stated in Section 10 of the Indian Contract Act. Therefore, if a contract is formed over electronic communications in which all the stated essential elements of a valid contract are fulfilled, the e-contract will be held to be legally valid and proper maintenance of the electronic records and communications should be kept as evidence of the contractual arrangement made by the parties. In the case of *Trimex International FZE v. Vedanta Aluminium Ltd. India*⁷, the Hon'ble Supreme Court established that contracts whose terms and conditions are communicated and discussed through emails between the contracting parties is valid in the eyes of law even if no formal traditional contracts were formed or signed. Furthermore, e-contracts are statutorily recognised under the Information Technology Act, 2000. Section 10A of the said Act specifically lays down that a contract shall not be deemed unenforceable solely on the ground that electronic medium were used for communication of proposals, acceptance of proposals, revocation of proposals or acceptance, as the case may be⁸. The Information Technology Act also recognizes “digital signatures” and validates the authentication of electronic records by using digital signatures.⁹ The Information Technology Act, 2000 lays down the provisions for various aspects of electronic records. Section 11 lays down the provision regarding attribution to the originator, Section 12 provides a provision for the acknowledgment of receipt and the provision dealing with the time and place of dispatch and receipt of electronic records is in Section 13.

The Indian Evidence Act, 1872 in Section 65A and Section 65B provide provisions that an evidence given from the contents of electronic records in electronic forms shall be deemed to be acceptable in a court of law. The Code of Civil Procedure, 1908 shall be read in the determination of jurisdiction of court in case of disputes arising out of e-contracts. Other laws

⁶ Ayushi Singh & Sukhwinder Singh, *E-Contracts in India: Issues and Challenges*, International Journal of Interdisciplinary Research and Innovation, Vol.7 Issue 1, 597-602, (Jan.-Mar. 2019).

⁷ *Trimex International FZE v. Vedanta Aluminium Ltd. India*, 2010 (1) SCALE 574.

⁸ Section 10A, The Information Technology (Amendment) Act, 2008, No.10 of 2009, Acts of Parliament (India).

⁹ Harsh Arora & Raj Nandini, *India: Understanding E-Contracts*, *MONDAQ*, (Dec.4, 2021, 05:00 PM) <https://www.mondaq.com/india/contracts-and-commercial-law/993976/understanding-e-contracts>.

such as Indian Penal Code, 1860, Consumer Protection Act, 1986, The RBI Act, 1934, The Banker's Books Evidence Act, 1872 and 1891, and the Indian Copyright Act, 1957 also provide various regulating provisions for the compliance and monitoring of contractual terms formed using electronic means.

V. APPLICATION OF SECTION 10 OF THE INDIAN CONTRACT ACT TO E-CONTRACT AND ITS ENFORCEABILITY

“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. Nothing herein contained shall effect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents¹⁰.”

The above-stated provision, Section 10 of the Indian Contract Act enumerates certain elements that must be fulfilled in order to form a valid contract, and a contrary to this would be considered as a void or voidable agreement depending on the facts and circumstances. Corresponding to traditional contracts, the quintessential elements for forming valid contracts are also made applicable for e-contracts.

The first essential element is that there has to be a lawful offer made by one party and an acceptance of such offer by another party. So in order to perform an electronic contractual transaction through an online shopping website, a customer can make an offer to purchase while browsing through websites that host goods and services by selecting the options given by the seller. The acceptance is usually made through sending emails or filling up online forms on the website¹¹. Other prerequisites include intention to create legal relationship i.e. when both the parties know that if any of the parties fails to fulfill his part of the promise, he would be held liable for such failure; lawful consideration and object i.e. when the considerations and the objects are not forbidden by law, fraudulent, damages somebody's property, immoral in the opinion of court or against public policy; competent parties i.e. the parties entering into a contract have attained the age of majority, is of sound mind and not disqualified to make a contract under a law to which he is subject; free consent i.e. when the contract is not formed due to coercion, undue influence, fraud, misrepresentation or mistake; agreement not declared void, certainty and possibility of performance. These conditions apply in the same way for

¹⁰ Section 10, The Indian Contract Act, 1872, No.9, Imperial Legislative Council, (1872).

¹¹ S. Z. Amani, *E-Contract in CyberSpace: Does It Really Warrant the Acceptance of 'Entores' Case?*, India Quarterly, Vol. 63, No. 4, 2007, 1–13. JSTOR, (Dec.4, 2021, 05:00 PM), www.jstor.org/stable/45073187.

traditional and electronic transactions. The precision of the essential elements in a contract formed using electronic medium is maintained through a close analysis of the terms associated with the electronic platforms.

It would be safe to say that the present contract law in India and application of the essential elements to e-contracts has been considered to suffice for their enforceability and effective operations. However, the validity and enforceability of click wrap, shrink wrap and browse wrap agreements have been repeatedly questioned in various foreign courts¹². Indian judiciary has not yet acknowledged this question of enforceability as there is lack of precedent till today to provide ground rules over the validity of these contracts. As mentioned earlier, the Information Technology Act, 2000 provides several procedural guidelines regarding computer data protection, authentication of documents using digital signature with respect to all kinds of electronic transaction. Even though legitimate validation has been given to e-contracts, along with the principles established in the Indian Contract Act, a large number of population still fear contracting through this method in the absence of judicial precedents which establish a definite mechanism for their enforceability in India.

VI. ISSUES IN FULFILMENT OF SECTION 10 OF THE INDIAN CONTRACT ACT IN E-CONTRACTS

i. Intention to create legal relationship issue: In order to form a valid contract, the contracting parties must have an intention and a clear motive to constitute an agreement that is attached with legal consequences and legal obligations. However, e-contracts are typically lengthy, often containing several thousand words, and expressed with hardly any regard for the principles of simple English language or concern for discernment by a lay audience. Online vendors often take advantage of this Internet standard-form of contracts as there are only few customers who actually read through the terms of their contract before completing a transaction, mostly due to difficulty in understanding the terms used in these contracts and also due to sheer gullibility. So this kind of conduct has often resulted in one-sided contractual terms written in favour of the vendors¹³ and many users are not aware of the binding force, the legal obligations, unfair transaction costs and default terms in their contracts, thereby unintentionally exposing themselves to legal consequences of their own actions¹⁴. For these reasons, the parties

¹² Dale Clapperton & Stephen Corones, *Unfair Terms in 'Clickwrap' and other Electronic Contracts*. Australian Business Law Review, 152-180, Vol. 35 Issue 3, (June 2007).

¹³ Robert A. Hillman, *Consumer Internet Standard Form Contracts in India: A Proposal*, Vol. 29 (1) National Law School of India Review (2017), (Nov.28, 2021, 09:00 PM), SSRN: <https://ssrn.com/abstract=3117915>.

¹⁴ Tabrez Ahmad, *Limits of Consent in Electronic Contract Law & Cybertort*, December 2012, (Dec.3, 2021, 09:00 PM), SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191406.

to online contracts may not always be aware or have the intention to create legal relationships as demanded by the law.

ii. Free consent issue: A setback has surfaced out of the contemporary large scale and prevalent practice of settling e-contracts in standardized form. A standard-form contract is otherwise known as standardized contract. Standard-form contract is usually a predetermined contract comprising set clauses. Such contract is mostly used to perform business transactions or employer-employee contracts by making slight additions or modifications in order to meet the specific situation. These standard-form contracts usually favour the drafting party and deprive the other party from any bargaining power. This mode of contracting amount to adhesion contracts as unequal bargaining power avert the contracting parties from choosing their contractual terms.

People upon whom such exemption clauses or standard form contracts are imposed hardly have any choice or alternative but to adhere and denial of such predetermined contractual terms deny access to the products or services. This gives a matchless chance to the giant company to exploit the weakness of the individual by imposing upon him terms, which may go to the extent of exempting the company from all liability under contract. According to Section 16 of the Indian Contract Act, a contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. In such helpless situations, the vulnerable parties often have to accept unfair terms to avail the goods and services, which could be seen as an exercise of undue influence by contract drafters¹⁵, thereby leading to formation of contracts without obtaining free consent in its truest sense.

iii. Competent parties issue: Many commercial transactions in e-contracts are between strangers who have never met. This poses threat to both the contracting parties. To make a valid contract as per the provision of the Indian Contract Act, it is mandatory that the parties to a contract are not minor, lunatic or disqualified by the law. However, minors can easily enter into contracts through click-wrap or browse wrap agreements. The legal liability is on the owner of websites to ensure that the contracting parties are competent under the Indian Contract Act. To ensure the competency of the parties, many websites have introduced various verification methods like signing up, in which users enter their personal details, including their date of birth to prove that they have the capacity to enter into a contract. This competency

¹⁵ Megha Nagpal, *Analysis of Legal Issues Involved in Electronic Contracts under Indian Law with Reference to Business-to-Consumer Model of E-Commerce*, *International Journal of Law and Legal Jurisprudence Studies*, Vol.3 Issue 4, (Nov. 2016).

verification process is sometimes conducted with a dialogue box containing pictures, and users are obligated to identify certain items in order to ensure their lunacy.

However, according to a survey conducted by the Internet and Mobile Association of India (IAMAI) in collaboration with Nielsen Holdings, there are 451 million active Internet users at the end of financial year 2019, out of which, 66 million are in the bracket of five to eleven years of age, suggesting that a significant number of India's demographic on Internet are actually school children¹⁶. This report indicates that many e-contracts, most commonly through social media and online shopping websites, are made with minors who are incompetent to contracting as per the Indian Contract Act. Furthermore, multiple reports have been made by the parents of children using credit cards without their authority to buy in-app purchases, clearly suggesting active presence of minors in the digital world and the actuality of e-contracts made by these incompetent parties¹⁷. Also, as there is no statutory provision mandating effective identity verification and mechanisms for determining the identity of contracting parties, there is widespread and common practice of fraud and identity misrepresentation while forming contracts¹⁸.

iv. Lawful objects issue: In terms of forming contracts with lawful objects, the conditions in e-contracts in many cases are immoral and against public policies as many websites are not closely and strictly monitored. Minors also appear to have easy access to cigarettes, alcohol and other banned products for their age group via the Internet because many Internet vendors have weak or non-existent age verification procedures¹⁹, thereby easily avoiding age verification requirements. This matter has been taken into account and a petition has been recently filed at the Delhi High Court challenging Rule 66(6) of the Delhi Excise (Amendment) Rules of 2021 that allows ordering liquor via mobile app and home delivery of liquor, even at public places. They have challenged this new policy as there is no formal procedure for age surveillance and this can lead to handing over of liquor to an underage person and also at public places. However, this petition is still pending before the Court, unresolved.²⁰

¹⁶ India Internet 2019 Report, Internet and Mobile Association of India, (Dec.1, 2021, 04:00 PM), <https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf>.

¹⁷ Abhijit Ahaskar, *Why Instagram and social media needs stronger measures for age verification*, Live Mint, 5th Dec. 2019, (Dec.1, 2021, 04:00 PM), <https://www.livemint.com/technology/tech-news/why-instagram-and-social-media-needs-stronger-measures-for-age-verification-11575533841467.html>.

¹⁸ Farooq Ahmad, *Cyber Laws in India*, New Era Publication, Allahabad Law Agency, (2017).

¹⁹ Kurt M Ribisl et al., *Internet sales of cigarettes to minors*, *JAMA*. 2003;290(10):1356-1359. doi:10.1001/jama.290.10.1356.

²⁰ *How to ensure liquor not given to underage persons in home delivery: HC to Delhi Government*, TOI, 27th October, 2021, at pg. no. 5.

VII. CONCLUSION

E-contracts definitely simplify the many transactions and paper works we need to carry out in our daily lives. However, the nature and scope of e-contract has a much broader realm as compared to traditional contracts, and while progressive steps have been taken to bring the legal framework in pace with the ever advancing technology and transactions made through e-contracts, it would be safe to say that the legal framework regarding e-contracts is still in the budding stage in India. Governing contracts having different nature with the same law may give rise to many issues and even put a question on the enforceability of many e-contracts itself.

In the case of *L.I.C India v. Consumer Education and Research Centre*²¹, the Hon'ble Court has tried defining e-contracts and observed that where the weaker parties do not have a bargaining power, such types of contracts were referred to as 'dotted contracts'. Thus, it can be said that the Indian courts have recognized the concepts of these contracts though no guidelines for its regulation have been laid down. The reliance can be placed on the foreign judgments based on the facts and circumstances of the case, yet a strong necessity for proper legislative structure for its implementation has aroused as the Indian economy is moving to paperless transactions.

The pressing need of the hour therefore is a separate and efficient legislation which specifically recognizes all kinds of e-contracts and which would remove ambiguities and blind spots that are faced by parties while they enter into contractual relationships through electronic medium

²¹ L.I.C India v. Consumer Education and Research Centre, 1995 AIR 1811 (India).