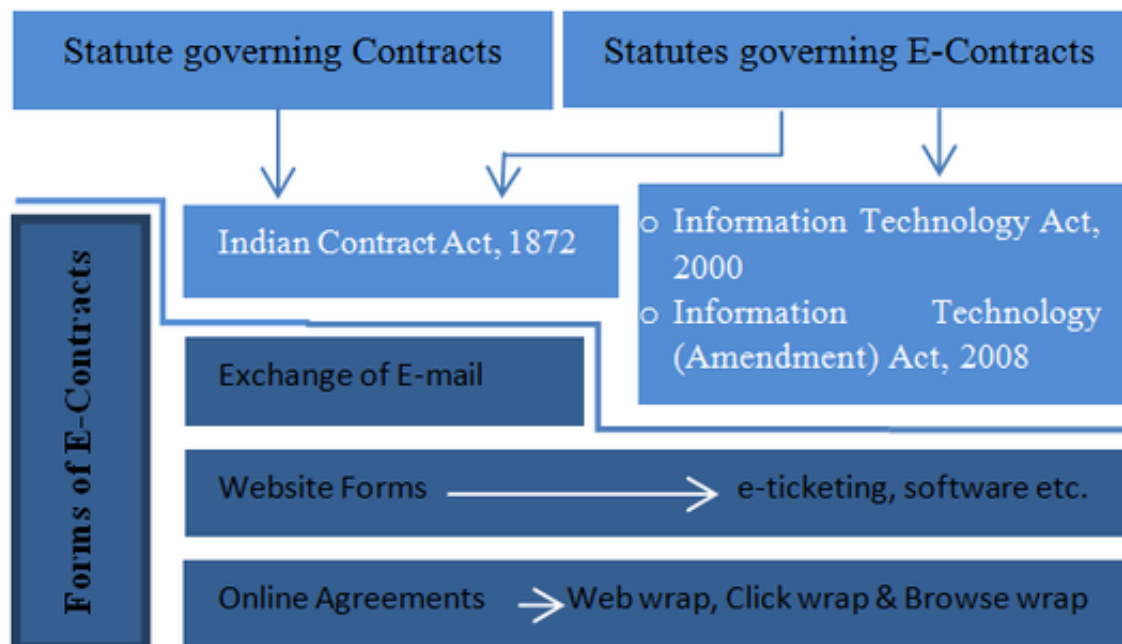


Enforceability of E-Contracts in India

'Any technology that does not appear magical is insufficiently advanced.' In view of the saying, it may be concluded that the technology of internet is one of the most sufficiently advanced technologies of mankind, thereby offering us this digitally revolutionized era. Besides being a modern platform for entertainment, education and social networking, internet today is also the backbone for most of the commercial activities across the globe. This magical technology is gradually transforming the concepts like commerce into e-commerce and contracts into e-contracts. An electronic contract (or more popularly recognized as an e-contract) is a contract modelled, executed and enacted by a software system. To put it simply, it is an agreement 'drafted' and 'signed' in electronic form.



Like any other form of contract, an e-contract is also primarily governed by the codified provisions of Indian Contract Act, 1872 ("Contract Act"). Therefore, an e-contract cannot be validly executed unless it satisfies all the essentials of a valid contract, as prescribed under the Contract Act. All other statutes applicable to an e-contract are to be read in conjunction with and not in substitution with the Contract Act.

Recognition under Information Technology Act, 2000 ("IT Act, 2000") & Information Technology (Amendment) Act, 2008 ("Amendment Act") **[Hereinafter together referred to as the "IT Act"]**

Though one of the objectives of the IT Act, 2000, as provided in its statement of objects and reasons was to legalize e-commerce, there was no express provision therein providing legal sanctity to e-contracts. However, statutory recognition was

accorded to electronic contracts under the Amendment Act. In this regard, Section 10A of the IT Act specifically states that, "the contract formation, communication of proposals, acceptance of proposals and the revocation of the same shall not be deemed to be unenforceable solely on the ground that they are expressed in electronic form or by means of an electronic record".

The term 'Digital Signature' is defined under section 2 (p) of the IT Act, 2000 to mean authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3.

The term 'Electronic Signature' is defined under section 2 (ta) of the IT Act to mean authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.

The Ministry of Communication and Information Technology under the introduction paragraph of version 1 of 'Guidelines for Usage of Digital Signatures in e-Governance' issued by it observed that "The purpose of a digital signature is the same as that of a handwritten signature", thereby equating this authentication tool at par with a handwritten signature. Further, in terms of Section 5 of the IT Act, where any law requires that information or any other matter be authenticated by affixing a signature or any document be signed or bear the signature of any person, then such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of an electronic signature.

Admissibility of electronic contracts/documents

The Delhi High Court in *Societe Des Products Nestle S.A. And Anr. vs. Essar Industries And Ors.*¹ noted that "*Rapid rise in the field of information and technology in the last decade of 20th Century and the increasing reliance placed upon electronic record by the world at large necessitated the laying down of a law relating to admissibility and proof of electronic record. The legislature responded to the crying need of the day by inserting into the Evidence Act Sections 65A and 65B, relating to admissibility of computer generated evidence in the only practical way it could so as to eliminate the challenge to electronic evidence. By virtue of the provisions of Section 65A, the contents of electronic records may be proved in evidence by the parties in accordance with the provisions of Section 65B.*"

Section 65B of the Indian Evidence Act, 1872 ("**Evidence Act**"), provides for the admissibility of electronic records. 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. Further, such document is admissible as evidence in any proceeding without further proof of the original, if the conditions laid down under the Evidence Act are satisfied. The observations of the Supreme Court in the case of *State (N.C.T. of Delhi) vs. Navjot*

Sandhu @ Afsan Guru ² may be relevant in this regard. Further, while analyzing evidentiary value of electronic records including electronic signatures, the Delhi High Court in *State of Delhi v. Mohd. Afzal & Others* ³ held that *“Electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it must prove the same beyond reasonable doubt.”*

Also, the Supreme Court in *State Of Punjab & Ors. vs. M/S. Amritsar Beverages Ltd. & Ors* while referring to the recent amendments on account of internet and other information technologies observed that *“Section 464 of the Indian Penal Code deals with the inclusion of the digital signatures. Sections 29, 167, 172, 192 and 463 of the Indian Penal Code have been amended to include electronics documents within the definition of ‘documents’. Section 63 of the Evidence Act has been amended to include admissibility of computer outputs in the media, paper, optical or magnetic form. Section 73A prescribes procedures for verification of digital signatures. Sections 85A and 85B of the Evidence Act raise a presumption as regards electronic contracts, electronic records, digital signature certificates and electronic messages.”*

As also appreciated by the Supreme Court of India, certain statutory amendments have been carried out in order to keep pace with technologies and further to align the existing set of laws with the IT Act, thereby opening the doors of the judicial system for admission of such electronic records.

Further in addition meeting the pre-requisites of a valid contract under the Contract Act, courts around the world have opined that for electronic contracts to be valid, the following additional requirements are to be satisfied:

- Clear notice to the customer that the transaction is governed by the terms of a contract;
- An opportunity to review the terms of the standard form contract before agreeing to them; and
- A clear and unambiguous statement of what constitutes acceptance of the terms of the contract.

These requirements are in addition to the standard contract requirement for a signature or other act of assent (e.g., clicking on an “I Accept” button or by checking the box provided in the website).

Applicability of stamp duty on documents executed electronically / digitally

There is no specific provision in the Indian Stamp Act, 1899 (“Stamp Act”) that specifically deals with electronic records. We understand that amendments are being proposed in this regard, though these are yet to be notified. Thus, we have

discussed below the Bombay Stamp Act which makes specific mention of electronic records.

An 'instrument' has been defined under the Bombay Stamp Act, 1958 ("**Bombay Stamp Act**") as any document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Pursuant to an amendment in 2005⁴ ("Amendment"), an explanation was added to the definition of 'instrument' clarifying that the term document shall also include electronic records. Further, the Amendment also added an explanation to the definition of 'execution', which states that the term signature/signed shall also include attribution of electronic records as provided under Section 11 of the IT Act. Therefore, it can be concluded that a contract in electronic form is also required to be stamped if it is chargeable to stamp duty as per Schedule I of the Bombay Stamp Act.

The law does not lay down a procedure for stamping of click wrap and browse wrap contracts. However, such agreements are forms of electronic contracts and are also admissible under section 65B of the Evidence Act, when printed out on paper. Thus, it may be interpreted that, click wrap and browse wrap contracts would also be required to be duly stamped.

Electronic contracts may be stamped either by taking the print of the document on stamp paper or by getting the printed document franked or by procuring a stamp duty certificate by the process of e-stamping.

Challenges / Issues concerning E-Contracts

By way of the IT Act and subsequent amendments to other enactments, there has been an attempt to bring e-contracts and other forms of contract under a common umbrella. However, certain concerns and challenges specific to the nature of e-commerce continue to prevail. A few of the important issues faced by the parties in course of execution of e-contracts have been discussed below.

- Section 4 of the Contracts Act, when read with Section 13 of the IT Act, implies that a binding e-contract would take place once the acceptor of the contract dispatches the electronic record such that it enters a computer resource outside the control of the acceptor. The Supreme Court in *Bhagwandas Goverdhandas Kedia vs. M/S. Girdharilal Parshottamdas*⁵ held that Section 4 of the Contract Act is only applicable in cases of non-instantaneous forms of communication and would not apply when instantaneous forms of communication (like telephone, telex etc.) are used. As internet communication does not consist of a direct line of communication between the sender and receiver of e-mail, e-mail messages would come under the category of non-instantaneous form of communication, hence attracting the provisions of Section 4 of the Contract Act. In view of the said statutory provisions and the view taken by the Supreme Court, it may be inferred that once the acceptance message is put in the course of transmission

by way of an e-mail, a binding contract comes into existence, irrespective of the fact that whether such acceptance message reaches the mailbox of the offerer or not and if successfully transmitted, whether the other party has the knowledge of such receipt or not.

- The Civil Procedure Code, 1908 (“CPC”) allows a party to choose the jurisdiction either on the basis of the cause of action or the place of business of the defendant. However, as per Section 13 of the IT Act an electronic record is deemed to be despatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business. Hence, notwithstanding the place from where an electronic record is dispatched or received, the place of contract (in case of an e-contract), is always deemed to be the place of business of the offeror or the acceptor. In the event, the jurisdictional option available to party on the basis of cause of action relates to the place of dispatch or receipt of the electronic record, the only jurisdictional avenue left out for such a party may be the place of business of the other party. Therefore, the rights granted for an aggrieved party under the CPC may be substantially curtailed by virtue of Section 13 of the IT Act.
- Though the IT Act ensures that the judicial system in India recognize digital signature as a valid legal tool for authenticating an e-contract. However, such an authentication under the IT Act has also been subjected to asymmetric crypto system and hash function, thereby substantially restricting the scope of the said authentication tool. Further, different nations have validated different standards of electronic signature, which may act as a hurdle with respect to enforcement of cross border contracts.
- The probability of loss of data/records on account of technical errors cannot be ruled out in case of e-commerce. However, unlike the Uniform Computer Information Transactions Act in the United States, the IT Act does not capture provisions for such situations.

Conclusion

The models of e-commerce and e-contracts have introduced revolutionary innovations to businesses, management, inter-regional and international trade. At the same time it also appears that the legal framework governing the cyberspace in India is still at a nascent stage and there exist a few grey areas which need to be answered.

The advancement of technologies in India or elsewhere is bound to bring in new challenges for the legislators and the enforcement agencies. Also, in view of the global nature of cyberspace, there needs to be uniformity and standardization of the legal framework amongst various nations. The legislative angles provided to such ever evolving technologies needs to be updated and upgraded intelligently from time to time and same does not seem to be possible unless the legislators diligently examine the existing and prospective challenges surrounding the cyberspace.

2. (2005) 11 SCC 600
 3. 107 (2003) DLT 385
 4. Bombay Stamp (Amendment) Act, 2005
 5. 1966 AIR 543, 1966 SCR (1) 656
-

Supreme Court lays down criteria for admission of writ petitions challenging the vires of any provision of law

In *PGF Ltd. vs Union of India*, Civil Appeal No 6572 of 2004, the Supreme Court, considering the fact that on many occasions a challenge to a provision of law, as to its constitutionality is raised with a view to thwart the applicability and rigour of those provisions and as an escape route from the applicability of those provisions of law and thereby create an impediment for the concerned authorities, laid down certain criteria for the Writ Courts to adopt while considering the admission of any Writ Petition. The Writ Courts are required to:

- examine whether there is a prima facie strong ground made out in order to examine the vires of the provisions raised in the writ petition
 - consider as to whether such challenge is made at the earliest point of time when the statute came to be introduced or any provision was brought into the statute book or any long time gap exist as between the date of the enactment and the date when the challenge is made
 - consider as to whether the grounds of challenge based on the facts pleaded and the implication of provision really has any nexus apart from the grounds of challenge made.
 - examine the extent of financial implications by virtue of the operation of the provision vis-a-vis the State and alleged extent of sufferance by the person who seeks to challenge based on the alleged invalidity of the provision with particular reference to the vires made.
-

Delhi High Court: *Star India (P) Ltd. v. Piyush Agarwal*, CS (OS) No. 2722/2012 Decided on March 13, 2013

Delhi High Court has barred telecom operators and mobile value-added service (MVAS) companies from providing live cricket match updates unless they have taken prior permission from the broadcaster channel which got paramount rights over all information emanating from a cricketing event by virtue of organising and promoting the sport of cricket in India. The court was hearing a set of three petitions filed by Star India Pvt. Ltd. against Piyush Agarwal (Cricbuzz), Idea Cellular and On Mobile Global Ltd. for sending short message service (SMS) alerts updating cricket scores on real time basis. Star India Pvt. Ltd. had alleged that vide an agreement dated 10.08.2012, Board of Cricket Control in India (BCCI) has assigned exclusive media rights to cricket matches organised by the BCCI exclusively to STAR which includes “mobile Rights” and “Mobile Activation Rights” and the defendants have violated those rights. “While recognizing the right of the general public to have

score updates/match alerts at their convenience on mobile phones via SMS/MAS and in view of the conflicting rights of the contesting parties, it would be just and reasonable for the defendants to either obtain a license and gain equal rights to their subscribers, or make them wait for some time, in order to not prejudice the right of the plaintiff to earn revenue from the match information”, the court said. Further holding that there is a difference between contemporaneous dissemination of match information in the form of ball-by-ball or minute-by-minute score updates/match alerts and reporting noteworthy information or news, Justice ML Mehta allowed the claim of Star India Pvt. Ltd. and granted a limited interim injunction restraining the defendants from disseminating contemporaneous match information in the form of ball-by-ball or minute-by-minute score updates/match alerts for a premium, without obtaining a license from the plaintiff. The court also held that there shall be no requirement for the license if the defendants do it gratuitously or after a time lag of 15 minutes.

**National Consumer Disputes Redressal Commission (NCDRC):
(Indian Airlines v. K. Balachandran Thampi, Revision Petition No.
4469 of 2012, decided on March 6, 2013):**

While upholding the enhancement of the quantum of compensation awarded to two passengers by a Kerala consumer forum from Rs 29,000 to Rs 50,000, NCDRC dismissed a revision petition filed by Indian Airlines challenging the orders of Kerala State Consumer Disputes Redressal Commission vide which the commission held the Airlines guilty of deficiency in service in handling the information regarding the delay and eventual cancellation of flight and dismissed the appeal filed by Indian Airlines. Earlier, two passengers of the Airlines have approached the consumer forum for lack of information on the part of Airlines regarding the delay and eventual cancellation of the flight, due to which one of the passenger was unable to arrange for alternative arrangement to reach her destination and to attend her examination on time. Commenting upon the contention of the Airlines that the take-off was delayed due to a technical problem in the aircraft and in the interests of passenger safety, the flight was cancelled by the Airlines, the court held that, “Indian Airlines has expended considerable amount of effort in justifying the delay and eventual cancellation of the flight. Their focus on the manner in which the delay and cancellation were handled vis-à-vis the passengers, has been much less than required as the complaint is about the deficiency of service to the passengers resulting from the manner of handling of the delay and cancellation. It is not whether delay was technically justifiable or not”.

News 10 @ a glance

**Latest edition of Consolidated
FDI policy released**

The Department of Industrial Policy and Promotion (DIPP) has released the latest edition of consolidated FDI policy incorporating the changes made in the regulations over the past one year. This is the sixth edition of consolidated FDI policy and effective from April 5. Check the document [here](#).

Ipsos predicts dissatisfaction among the investors in SEZs

A survey by Ipsos, a market researcher, says there is widespread dissatisfaction among investors regarding the minimum alternate tax (MAT) imposed by the Government on the companies in Special Economic Zones (SEZs). The investments in companies in SEZs were reduced to 12% in 2011 from 38% in 2010 after the Government asked the companies in SEZs to pay MAT from 1st April 2011. As per the survey, 63% of the investors say the tax will impact future investment decisions but the remaining 37% will continue to invest in these zones.

Sterlite Industries fined heavily for polluting the environment

Supreme Court has imposed a fine of Rs. 100 crore (\$18.40 million) on Sterlite Industries for flouting green norms at its plant in Tamil Nadu. This was after the company was ordered by the Madras High Court, in September 2010 to halt the operations at the plant for violating pollution-control and environment

norms.

Banks free to sell the pledged shares of United Spirits Limited

Bombay High Court refused the Ad-interim relief to restrain banks from selling shares of United Spirits Ltd (USL) pledged as security against loans to Kingfisher Airlines. The court has freed the consortium of 17 banks to sell shares of the subsidiary companies of the UB Group which had been pledged with the lenders under an agreement in 2010.

Website cannot constitute a PE in India thus advertisement charges not taxable

A Calcutta Income-Tax Appellate Tribunal in the case of Income-tax officer v. Right Florist (P.) Ltd. (IT Appeal No. 1336 (Kol.) of 2011) held that the payment to websites such as Google, Yahoo etc. for online advertisement are not liable to tax in India and that the websites presence in a location cannot be construed as fixed place constituting a Permanent Establishment (PE) and that the web server located in the tax jurisdiction can be construed as PE, but in this case the servers are outside India and therefore the tax claim based on having a PE in India could not be made.

SC's Novartis verdict

The Supreme Court has rejected the plea for a patent on cancer drug

Glivec by the Swiss firm Novartis, ending a seven-year legal battle by Novartis to have exclusive right for manufacturing Glivec and to restrain Indian firms from making generic medicine. The apex court while dismissing its plea held that there was no new invention and no new substance used in the drug prescribed for treating blood, skin and other types of cancer.

The US Chamber of Commerce has expressed disappointment over this verdict by the Indian Supreme Court stating that over 40 countries including China, Russia, Mexico and the US have granted Novartis with patent rights to the breakthrough cancer treatment.

Facebook legal tangle over 'timeline'

A Chicago-based social media company called Timelines Inc. can sue Facebook Inc. over allegations that it violated the smaller firm's trademark on the word 'timeline', a federal judge ruled. Timelines had launched a website called Timelines.com in 2009 that enables users to track historical events and their personal lives online and in 2011 Facebook Inc. launched a major new feature called 'timeline', which similarly allows users to highlight their lives online in chronological order. The Chicago Company filed its lawsuit weeks after Facebook introduced its "timeline" feature. Facebook had asked a federal judge in Chicago to

throw out Timeline's suit, arguing, among other things, that the word "timeline" is too generic to be trademarked.

Establishment of NIMZs under National Manufacturing Policy

The Department of Industrial Policy and Promotion (DIPP) has recently issued the Guidelines for establishment of National Investment & Manufacturing Zones (NIMZs) under the National Manufacturing Policy, 2011. The National Manufacturing Policy was introduced by the Government for the growth of MSMEs in India. The guidelines are available [here](#).

Quality of Service Regulations released by TRAI

The framework for audit of the metering and billing system of service providers provided in the Quality of Service (Code of Practice for Metering and Billing Accuracy) Regulations, 2006, was amended in order to protect the interest of consumers and hence, the Telecom Regulatory Authority of India (TRAI) has issued the "Quality of Service (Code of Practice for Metering and Billing Accuracy) (Amendment) Regulations, 2013". The document is available [here](#).

JP Morgan Chase Penalized for violating Risk-Management norms

The Reserve Bank of India imposed

a penalty of Rs.5 lakhs on the US banking Major JP Morgan Chase for violation of various norms including risk-management guidelines. The penalty on the bank is for "contraventions of various directions and instructions issued by the Reserve Bank in respect of Risk Management and Inter Bank Dealings and Compliance Functions". RBI had issued a show-cause notice to JP Morgan Chase and in response to it the bank had submitted its written reply and the Reserve Bank found that the violations were conclusively established.