E-CO-NTRACTS IN INDIA: LEGAL CHALLENGES AND IMPLICATIONS

E-commerce has given a new dimension to the business practices that are no longer bound by any limitations of territorial boundaries and requirement of physical presence at the same place. E-commerce activities are a part of day-to-day lives of Internet users. Thanks to e-commerce, the electronic contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. Online purchases on Amazon or Flipkart, hiring cabs using ola or uber apps, booking cinema tickets on book my show or confirming airline tickets and hotel stays on ‘make my trip’ and similar portals, countless number of transactions in our day-to-day lives are governed by e-contracts. In the electronic age, the whole transaction can be completed in a matter of minutes and the need for delayed couriers and additional travelling costs is drastically reduced. E-contracts form the cornerstone of e-commerce and therefore, attention must be paid towards formation of valid e-contract before finalizing and going ahead with transactions. Once the legal requirements are complied with, e-contracts open up multifarious opportunities for business. On the lines similar to that of traditional/paper-based and oral contracts, the e-contracts in India are also governed within the framework of the Indian Contract Act. However, e-contracts are not free from implications and encumbrances on the legal front. There are a plethora of legal challenges faced by contracting parties when it comes to e-contracts. Some of the major issues pertaining to e-contracts are: Choice of law; Jurisdiction; Consent; Competence; Valid Acceptance and Non-Negotiable Terms and Conditions.

Generally, the law governing e-contracts is the law of the place having the most proximate nexus with the contract. The parties, however, have the freedom of choice of law by which the contract and the issues arising therefrom are to be governed. The choice of law available to the contracting parties is subject to grundnorm that the parties cannot contract in contravention to what is permitted by the national/municipal laws. Morality and public policy become the major considerations, more so, when the contracting parties belong to different countries or states governed by their own set of laws. For determining the jurisdiction, the place of formation of contract must be ascertained. The cause of action, in whole or in part, may arise in a particular place and
the contract may also have to be concluded at a particular place. The parties, while agreeing on the jurisdiction have to bear in mind the consent factor, i.e. whether the consent is free or flawed. Flawed consent is usually in the form of fraud, misrepresentation or mistake. Exception of mistake of foreign law does not apply to e-contracts because grant of such immunity is likely to be misused. Though the plea of non est factum, i.e., absence of consent, is available for mistake of fact, however, a party to e-contract cannot be permitted to avoid such contracts on this basis. Chances of misrepresentation in cases of online transactions are usually higher than traditional/paper based contracts. It is, therefore, vital to consider the doctrine of uberrimae fidei as the foundation of e-contracts in the wake of growing number of cases of misrepresentation, particularly in respect of insurance contracts.

Indian Contract Act prohibits and incapacitates a minor, a lunatic and a person of unsound mind from entering into contract. The major difficulty as to online transactions is that the competence of one party to contract is often not known to the other party. The complex nature of e-contracts makes it impossible for one party to figure out whether or not the other party behind the computer screen is competent to contract. The distance between the parties to contract and the total absence of face to face interaction makes it almost impossible to find out the competence (or the lack of it) of the other. Transactions on the Internet, particularly consumer-related transactions between parties who have no prior and pre-existing relationship often raise concerns of the person’s identity with respect to issues of the person’s capacity, authority and legitimacy to enter the contract. Even though digital signature is one of the methods used to determine the identity of the person, it is still not very commonly used.

Furthermore, numerous issues arise on whether a person is bound by the terms of contract without reading it or without being able to negotiate the terms, as is the case with standard form contracts where the customers are required to just sign on the dotted lines. These contracts are commonly known as click-wrap contracts which are legally enforceable, but lack clarity on the issue as to what would be the terms of the contract and whether the acceptance of the contract would, without even reading it be classified as deemed acceptance. Such contracts should be carefully drafted to protect
the website owners from liability, should clearly address the terms and conditions as to the provisions of goods or services and clearly establish the exact time and manner of acceptance of the contract. In the event of dispute or breach of contract, the liability of the owner of the website should be limited only to the extent of the terms of the contract and within the provisions of the Indian Contract Act. A contract is formed by three main ingredients- offer, acceptance and consideration. These ingredients are applicable to e-contracts just like traditional or paper based contracts. However, a question often arises- How do we know whether the person on the other side has accepted the offer? Also, Internet communication does not consist of direct line of communication between the sender and receiver of e-mail as in ordinary means of communication and therefore, the message is broken into chunks in the process of delivery. It raises issues of the exact time of communication of acceptance of the agreement and therefore, the time of acceptance is critical for determination of the rights of the parties. Even though, the Information Technology Act deals with contractual aspects of use of electronic records such as attribution, acknowledgement, time and place of dispatch and receipt and lays down certain methods for determining the exact time and place of dispatch and receipt of e-mail, the problems still remain given the complex nature of such agreements.

In cases of e-contracts, the minds that meet are minds of the programmed computer systems. Though the provisions of IT Act regarding attribution, acknowledgement, dispatch and receipt of electronic records read with the relevant provisions of the Contract Act, to a good extent try to take care of the requirements of e-contracts, yet some of the legal challenges are yet to be resolved and the law is yet to address and plug certain glaring loopholes pertaining to e-contracts, particularly the choice of law and jurisdiction. The law either by legislative amendment or judicial pronouncement raise a presumption that once the e-contract is concluded, both parties must be presumed to be competent to do so and then neither party must be allowed to raise objection at a later stage that the contract is unenforceable due to either of the parties not being competent to contract. The law should also provide for a presumption in favour of the offeree such that a mistake of fact committed should not place either of the contracting parties in unbargainable position.