



Challenges faced by E-commerce a comparative study with traditional commerce relating to communication aspects

S DurgaLakshmi¹, M R Keerthana²

¹ Principal, Faculty of Law, Government Law College, Salem, Tamil Nadu, India

² Research Scholar, Faculty of Law, Tamilnadu Dr. Ambedkar Law University, Chennai, Tamil Nadu, India

Abstract

This paper brings to the forefront that development of commerce is an inevitable necessity irrespective of the generation to come. In the 21st century there is a considerable amount of shift from traditional mode of commerce to E-Commerce. The E-Commerce platform though they were of great support during the pandemic is still thriving only slowly to make a mark in the commercial sector. The e-commerce involves a number of other electronic services to flourish which includes internet services, e-commerce payment system, electronic data interchanges, etc, with the help of these services the consumers are able to place order for these services at the comfort of their home. Despite so many comforts the e-commerce sector still faces numerous challenges in comparison with their counterparts “brick and mortar” stores. In this paper the author brings about the various challenges of the e-commerce sector and the need for the amendments in the legislation. Being one such in nature, commerce and the law relating will have to come up with the changes taking place in this field commensurate with the scientific advancement and that the judiciary should definitely show its concern over the same and provide justice to the parties in dispute. Apart from it such laws also differ significantly from country to country. Besides, numerous legal challenges or issues have to be closely examined among various entities. The major contractual issues with respect to legal flexibility to recognize the new ways of entering into contracts like Click Wrap, Browse Wrap etc., have to be taken into account while legislating or amending in this field of law. The legal technicalities involved in entering into such contracts are also major issues of law which have to be judiciously verified.

Keywords: Communication, necessity, E-commerce

Introduction

This research paper is study of the enforceability e-commerce, which closely resemble traditional contracts but possess a multitude of special features which distinctly distinguishes it from the traditional contracts thereby conferring it an identity of its own, necessitating a plethora of special laws to deal with the special situations confronting and challenging the electronic world, internationally and nationally. Electronic commerce has dramatically revolutionized the way business is done and the standards of life style of people have undergone a sea change.

It has brought out remarkable changes in the way businesses of all sizes work internally and how they interact with their customers, suppliers and employees. As a consequence, electronic contracts have become a recognized part of our day to day business activities. The term commerce should be understood both traditionally as well as in tune with the current technological development.

Types of e-Commerce

The various types of e-commerce through which businesses takes place in the online platform are classified into the following types, Business-to-Business (B2B), Business-to-Consumer (B2C), Consumer-to-Consumer (C2C), Consumer-to-Business (C2B), Business-to-Administration (B2A), Consumer-to-Administration (C2A) ^[1]. The transaction of business happens through the above mode in the e-commerce mode, where in a huge target population can be reached with a limited investment which being one of the greatest advantages of online business.

Analysis of the various legislations involving e-commerce

It can be stated that commerce had, has and would have nexus with various legislations that may be enacted, concerning the same. Of the much legislation applicable to the business activity, on legislation that becomes directly applicable to online commercial activity is the application of law of contract. This is that branch of law which determines the circumstances in which a promise shall be legally binding on the person making it ^[2].

A contract is a promise or set of promises for the breach of which law gives a remedy or the performance of which the law somehow recognizes as a duty ^[3]. The essentials of a valid contract are highlighted in Section 10 of the Indian Contract Act 1872. A valid contract is capable of being formed only when six essentials are couched in an agreement they being a valid offer and acceptance, competent parties to contract, free consent, lawful consideration and a lawful object. These principles are so sacrosanct to the extent that even in the twenty first century when an online contract is being entered into, it should also create a binding agreement, even though the mode adopted for entering into an online contract may differ from the customary mode of entering into a contract.

Migration to e-contracts

A contract that takes place in the physical world is reduced to writing on a paper with the signature affixed on the same but with the proliferation of the Internet, the World Wide Web as a façade of the former has become a popular user friendly and easy to use Interface. This dispensed with the use of paper, and contracts started taking place through the

electronic media. These forms of contracts entered with the help of technology are referred to as online contract or electronic contract or paperless contract. With the advancement in science and technology there is a rapid shift towards paperless transactions which is evident through the circular issued by the Bharat Sanchar Nigam Limited, a Government of India Enterprise: stating that it would discontinue its 160 year old telegraph service from the 15th July 2013. In a press release it was stated that patronage has come down drastically in the recent years following the popularity of mobile phones, emails, chat and instant messaging and only very few telegrams are being sent ^[4].

Electronic transactions are contractual and are legally binding. These are conceptually very similar to the traditional paper based commercial transactions except that there is a difference in the mode of transacting. From a legal perspective the issue that is drawn in, is whether such contract ensures that a digital transaction is not only enforceable but is also as valid as a traditional paper based transaction. Besides, the issues relating to formation of contract in cyberspace are very intriguing. The rules and laws regarding the formation of contracts are clear in the physical world or the traditional form of contract but there are significant ambiguities in the electronic world. The internet, along with its advantages has also exposed us to various security risks that come with connecting to a large network.

Challenge in enforcing online contracts

The introduction of internet and electronic contracting has revolutionized the way business is happening around the world. The significant legal issues have arisen as a result of applying traditional legal principles to the borderless and paperless electronic environment. The difficulties raised and the legislative landscape for the same, have been taken into consideration. In order to consider the contract enforceable, the court has to establish, additional safeguard measures to ensure the legitimacy of e-contracts. An essential part is establishing the validity of online contracts along with the authenticity and credibility of the contracting parties affixing their signature digitally, which is very challenging because of lack of face to face contact but many recent developments have given a remedy to this issue. To avoid repudiation of the facts surrounding a contract, companies should look for a robust online process that provides a strong audit trail detailing the contents of the document and irrefutable evidence linking the contract to the electronic signature of the parties and enforceability of the contracts online.

In certain instances it has been proven that online contracts help in curbing intermediary leaks and corruptions by making sure that the entire consideration reaches the hand of the beneficiary and is not siphoned off partially by those in charge. This is seen in action in the issue of Aadhar Cards where the bio metric details of the individual is recorded and made “damage proof”, the bank account of the individual is interlinked and direct cash transfer is made especially in the case of “Minimum Employment Guarantee Scheme”, “Gas Cylinders Subsidies” and so on. Unfortunately this too is not a safe option as the census department has acknowledged the existence of over twenty thousand fake cards by masquerading offenders who by availing of laptops, web cameras and bio metric finger print scanners have freely indulged in creating and issuing fake cards ^[5].

Enactment of Laws to govern the e-commerce transactions

Though electronic commerce offers many conveniences to attract consumers, its properties facilitate fraud, cybercrimes and make prosecution difficult. It thus requires novel protection and redressal mechanisms. It is inevitable that suitable laws should be enacted to govern these transactions. This was recognized by the United Nations Organizations wherein the resolution was passed to adopt a model law on electronic commerce. The Indian Government imbibed the spirit of the model law of UNICITRAL to legislate the Information Technology Act 2000. The Consumer Protection Act 2019, was enacted replacing Consumer Protection Act 1986 to offer protection to online consumers ^[6].

Significance of communication in contracts

It is evident that the binding force of a contract depends on the communication of offer and acceptance. This principle applies to both English law and Indian law with slight exceptions. In English law “a contract is an agreement which gives rise to legally enforceable obligations ^[7]”. Under Indian Law too an agreement enforceable by law is a contract ^[8]. The salient features of a contract under both Indian & English Law is offer by one party and acceptance by another, free consent of the parties who are competent to the contract for a lawful consideration and a lawful object. The most critical issue is the communication of offer and acceptance. The communication of a proposal is complete only when it comes to the knowledge of the person to whom it is made ^[9]. As rightly stated by Anson, Acceptance is to offer what a lighted match stick is to a train of gun powder. The moment acceptance is given, a valid and a binding contract comes into force. Different timings are destined for communication of acceptance as against the proposer and acceptor ^[10].

The Indian Contract Act makes it clear vide Sec: 4 of the Act that “The communication of acceptance is complete as against the proposer, when it is put in course of transmission so as to be out of the power of the acceptor, as against the acceptor when it comes to the knowledge of the proposer.” Hence it is evident that already in the physical world, the laws relating to completion of contract is crucial especially when it comes to making of contract by post. The given rule is clear when it relates to acceptance letter sent through post, because Section 4 states that once the letter is posted communication of acceptance is complete as against the proposer because it has gone out of the control of the acceptor and he cannot take it back. As far as the acceptor is concerned communication is complete only when it comes to the knowledge of the proposer or offeror. The only difference between the Indian and English law is the position of the acceptor. In England when the letter of acceptance is posted the offeror and the acceptor become irrevocably bound but in India the acceptor does not become bound by mere posting of the acceptance, it is binding on him only when it comes to the knowledge of the proposer. The gap of time between the posting and delivery of the acceptance can be utilized by the acceptor for revoking his acceptance by a speedier communication which will overtake the acceptance.

In 1872 when the Indian Contract Act was enacted “Post” was the only medium of communication. In the advent of Telephone and Telex questions arose regarding the

completion of proposal and acceptance through this medium. In *Entores Ltd Vs Miles East Corp* ^[11] Lord Denning ruled out that postal rule shall not apply to cases where the parties are face to face though at some distance like on phone; in such a case “no contract will arise until the offeror receives the notification of the acceptance ^[12].” Telex is virtually instantaneous form of communication which when used makes mail box rule inapplicable. The same has been applied by the Indian Supreme Court in a landmark judgment ^[13]. Though the essentials for a valid offer and acceptance remain the same for traditional form of contract and online contract the mode of execution differs. In online contracts the communications takes place through the global medium. The legal challenge here is to adopt the provisions which currently regulate physical world transactions so as to provide adequate solutions to the new disputes which arise when they are carried out in the electronic form ^[14]. The words of Hidayatullah J are indicative of the problem which jurists faced at that time and which we face today with the birth of internet. He says “the law was framed at a time when telephones, wireless, Telstar and early bird were not contemplated.” These words were expressed when there was no concept of the internet. Had it been, even in the offing, the learned judge would have made a reference to it thereby solving the present problem to some extent. In the traditional form of contract, we have the postal rule and receipt rule. An electronic contract may be made in any sufficient mode to show the formation of an agreement, where there is an offer and acceptance and the conduct of the parties recognizes the existence of a contract.

In offline contracts, offer may be made orally or in writing or by the conduct of the parties but when it comes to electronic commerce offer will be electronically transmitted. Similarly an offer may be accepted in any manner, by any medium reasonable, depending on the circumstances. In the same way in online contracts acceptance may be by an e-mail or other form of electronic message or by conduct of parties such as Click Wrap or Shrink Wrap agreements. In the year 2000 Information Technology Act was passed by the Indian Government to provide for transactions carried out by means of electronic data interchange and other means of Electronic communications referred to as “Electronic commerce”. This alternative to paper based method of communication and storage of information was encouraged to facilitate electronic filing of documents with the Government Agencies. Sections 11, 12 and 13 of the IT Act 2000 deals with the legal aspects of electronic contract. This Act does not form a complete code to settle issues relating to electronic contracts. Though the Act amended certain provisions of the Indian Contract Act it is not sufficient to meet the requirements. The issues that has arisen need judicial interpretation and legislators immediate attention is sought to enact an exclusive Act relating to electronic contracts. It should be borne in mind that both traditional form of contract and the online contract should be dealt with the same sanctity.

Conclusion

Information Technology has established new standards of speed, efficiency and accuracy in communication. Electronic commerce and communications cutting across territorial boundaries have created a new realm of human activity undermining the feasibility of applying laws based

on geographical boundaries. This new boundary less space is made up of the screens and passwords, separating the “cyber world” from the real world. Territory based law making and law enforcing authorities find this new environment both complex and challenging. The reasons which necessitate the enactment of a separate law to govern online transactions are the absence of a centralized regulating agency, uncontrolled growth of the internet with easy accessibility, improper conduct of the users on the internet and absence of suitable legal framework to arrest frauds and various activities. The increasing use of IT has led to the growth of new forms of transactional issues virtually borderless and may affect any country across the world. Thus, there is a need for awareness and a need for enactment of necessary legislation not only for India but also for other countries for the proper functioning of electronic commerce. Thus there is a need for formulation of new laws and amendment of the existing laws, regulating the communication aspects of contracts, which are in operation.

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