

EMERGING LEGAL ISSUES OF E-COMMERCE IN INDIA

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ABSTRACT

The Internet has unfolded a new market for businesses to explore and exploit. To provide security and legal recognition to the transactions executed electronically, the Indian Parliament enacted the Information Technology Act, 2000 (Original Act) modeled on UNCITRAL's Model Law, although it departs in many respects from the spirit of the Model Law. Immediately after the enactment of the IT Act, it was found that certain significant provisions were missing in this enactment; its provisions lacked harmony and above all many legal issues had not been properly spelled out. This Act was amended in the year 2008 with many objectives. An attempt is made in this paper to analyze the legal provisions relating to e-commerce in the IT Act, together with the provisions of the Indian Contract Act (Contract Act), which continues to be the fundamental law on the subject.

Keywords: Electronic Contracts, Electronic Signatures, Authentication

1. LEGAL VALIDITY OF ELECTRONIC CONTRACTS

One of the objectives of the Original IT Act spelled out in the statement of objects and reasons is to legalize e-commerce. This objective is reiterated in the objectives of the 2008 amendment to the IT Act, also. Surprisingly, there was no express provision in the Original IT Act validating contracts executed electronically. This lapse was in spite of the fact that there was an express provision to this effect in the Model Law which formed the basis of the IT Act as claimed in its statement of objects and reasons.

The IT Act as amended now in Section 10-A provides 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 grounds that such electronic form or means was used for that purpose.

The above provision makes a plain statement to the effect that electronic contracts are legally valid without further spelling out attendant principles of contract formation which raise many more questions than are answered by this amendment. The questions to be answered are: Are electronic contracts now exclusively dealt with under the IT Act? Has the IT Act in any way changed or modified substantive provisions relating to contract formation? Has the IT Act provided additional requirements for the formation of electronic contracts? These issues are discussed in the following section.

2. ARE ELECTRONIC CONTRACTS NOW EXCLUSIVELY DEALT WITH UNDER THE IT ACT?

Section 10-A of the 2008 Amendment Act validates electronic contracts but does not state that such contracts are now exclusively dealt with under the IT Act. However, by reading Sections 10-A and 81 together, it can be inferred that such contracts now come under the authority of the IT Act. Section 81 provides that the provisions of the IT Act shall have effect notwithstanding anything inconsistent therewith contained in any other law currently in force. Thus, all those principles that are provided in the Contract Act are still applicable provided they are not inconsistent with the rules governing electronic contracts under the IT Act. It is to be understood that the Contract Act is a fundamental law governing contracts and the IT Act covers only those aspects of electronic contracts that are not covered under the Contract Act.

3. FORMATION OF CONTRACT

There is no uniform rule applicable in all situations to determine the time for the formation of contracts electronically^{1, 2}, and this uncertainty cannot be resolved by applying the Contract Act's provisions alone.

The IT Act in Section 13 has adopted *verbatim* the rules of the UNCITRAL Model Law incorporated in Article 15 to determine the time for receipt of electronic records. The rules incorporated are:

1. Dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator, and

2. Receipt of an electronic record occurs at the time when:
 - a. It enters the computer resource designated by the addressee;
 - b. It is retrieved by the addressee where an electronic record is sent to a computer resource which is not the one designated by the addressee.
 - c. It enters the computer resource of the addressee where no computer resource has been designated.

Unless otherwise agreed to between the parties, an electronic record is deemed to be dispatched 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.

The time of the receipt of an electronic record shall remain the same notwithstanding that the place of business may be different from the place where the computer resource is located.

The above rules have modified the substantive law relating to the communication of offer and acceptance where electronic means of communications have been used. These rules are a half-way point between the postal rule and actual receipt rule. However, these rules will not govern the electronic communications in all situations, as the relevant section does not use the common expression 'notwithstanding anything contained contrary in any Act;' instead, the parties are free to agree on different timings of receipt of electronic record.

The expression 'dispatch of electronic record' indicates commencement of the transmission of the electronic record and takes effect when it enters the information system outside the control of the originator, which may not necessarily be that of the addressee; it may be that of the intermediary.

The word 'enters' into a computer resource, used for both dispatch and receipt of the electronic record, is crucial for determining the actual timing of the dispatch and receipt. An electronic record should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it due to the malfunctioning of the information system. It can be also argued here that the dispatch of an electronic record has taken place, but not its receipt within the provisions of the IT Act.

An electronic record enters a computer resource when it becomes available for processing within that computer resource. Whether that

electronic record should be intelligible or usable by the addressee is not clear.

Section 13 of the IT Act, providing rules for determining the time of dispatch and receipt of electronic record, cannot be read in isolation but has to conjoin with Section 12, which provides for the acknowledgement of receipt. In other words, Section 13 will take effect only when Section 12 has been satisfied.

Section 12 provides that where the originator has stipulated that the electronic record is binding only on receipt of an acknowledgement of such electronic record by him, then unless acknowledgement has been so received, the electronic record shall be deemed not to have been sent by the originator. Where an electronic record has not been made binding on the condition of receipt of acknowledgement and the acknowledgement has not been received by the originator within the specified or agreed time or, if no time has been specified or agreed to, within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgement has been received by him and specifying a reasonable time by which the acknowledgement must be received by him, and if no acknowledgement is received within the mentioned time limit, he may after giving notice to the addressee treat the electronic record as though it had never been sent.

Where the originator has not agreed with the addressee on a particular mode or method by which the acknowledgement should be sent, then Section 12(1) provides that the addressee may acknowledge the receipt by (a) any communication, automated or otherwise; or (b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

The receipt of acknowledgement should not be confused with acceptance. It simply evidences that an electronic record has been received and can be equated with a sender's instruction like 'return receipt requested' in postal communications. It is always a question of fact whether an acknowledgement of receipt amounts to an acceptance in a given case. It depends upon a number of factors, including the language used in the receipt, the intention of the party sending the receipt, and any usage of trade.

4. STANDARD FORM CONTRACTS AND INCORPORATION OF TERMS BY REFERENCE

The enormous growth in business has resulted in an impersonal approach to marketing methods facilitated by newer communication methods and necessitated by business convenience. The nineteenth century saw the emergence of standard form contracts, which have been positively received by the courts as a valid means of executing a contractual relationship. It was, however, observed that at times these standard form contracts cause hardship to the weaker party by imposing onerous terms and conditions and thus placing them in a position where they have no choice but to accept them or leave them. These exemption clauses have been regarded as a part of the main contract even if they are not actually mentioned in the main contract, provided they satisfy certain tests evolved by the courts³. Various rules have been evolved with the passage of time to mitigate the rigor of terms that were considered either harsh to the opposite party or of which the opposite party could not be assumed to have had reasonable notice. Website contracts present a scenario that can be equated to some extent with the challenges posed by the standard form contracts at their early stages. A website may have the main contract at one place but its other terms and conditions, including exemption clauses, may be at other place(s). These terms and conditions are connected with the main contract with the help of a hyperlink, which is called incorporation of terms by reference.

The expression 'incorporation by reference' is used as a concise means of describing a situation where a document refers generically to provisions which are detailed elsewhere, rather than reproducing them in full⁴. Electronic communications are structured in such a way that large numbers of messages are exchanged, with each message containing brief information and relying much more frequently than paper documents on reference to information accessible elsewhere. The question is: Are the terms incorporated by reference a part of the main contract, and if so under what circumstances?

The IT Act does not contain any express provision affording legal status to terms that are not in the main message but are only referred to in that message. There was also no provision in the original UNCITRAL Model Law dealing with this situation. However, the United Nation's Commission on Trade Law, while realizing that by virtue of hyperlinks parties quite frequently provide detailed information not only in the main contents but somewhere else, made an express provision in the Model Law

by incorporating Article 5 bis. A similar provision is missing in the IT Act, which is to be provided by way of amendment.

The courts in India can rely on the rules established for determining the validity of the exemption clauses in standard terms. However, it is to be borne in mind that due to the significant difference in the modes of operation between traditional and electronic commerce, the traditional tests evolved by the courts in paper-based standard form contracts might be ineffective when applied to corresponding electronic commerce terms.

It is a long established rule that the terms and conditions that will govern a contract must be brought to the notice of the opposite party. However, when it comes to contracts made electronically, views differ on the best way of achieving this^{4, 5}. Thanks to the technology, the options available to bring terms incorporated by reference to the attention of the opposite party are many and varied. It is now possible to design a web page requiring the user to scroll through the terms and conditions incorporated by reference and to confirm that he has not only read those terms but has also accepted them. The courts may consider this as a reasonable mode to bring incorporated terms to the attention of the other party.

5. AUTHENTICATION OF ELECTRONIC RECORDS

The Original IT Act was technologically specific. Section 3(2) provides that the authentication of the electronic record shall be effected by the use of an asymmetric cryptosystem and hash function which envelopes and transforms the initial electronic record into another electronic record. This provision was not in harmony with Sections 14, 15 and 16. Sections 14 and 15 define secure electronic record and secure digital signature (now electronic signature) respectively, and Section 16 gives power to the Central Government to prescribe security procedures. A plain reading of these sections makes it clear that the parties to any electronic transactions are free to apply any security procedure that may or may not be the one that is prescribed under Section 3 of the IT Act, and Central Government is empowered to prescribe any security procedure for the purposes of authentication.

Sections 14 and 15 were taken verbatim from Sections 16 and 17 of the Singapore Electronic Transactions Act, 1998, but this legislation operates with a different scheme.⁵ This legislation is technologically neutral. Unlike the IT Act, it does not prescribe any particular technology for authentication of electronic records and quite logically provides that if any security procedure with requisite features has been applied to any electronic record, that record will be presumed to be a secured electronic record. In contrast,

the IT Act prior to the Amendments in 2008 was technologically specific and prescribed a particular technology for authentication of electronic records, which when applied would make the electronic record per se a secured one. There was no need for separate provisions for secured electronic records and secured digital signatures.

The Amendment Act of 2008 has retained Section 3. It has also incorporated a new Section 3-A. This Section makes a provision for Electronic Signatures and provides that notwithstanding anything contained in Section 3, but subject to the provisions of sub-Section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which

- a. is considered reliable; and
- b. may be specified in the second scheduled.

It appears that proper fine tuning has not gone into the drafting of above Section 3-A so as to make it compatible with other provisions of the IT Act. This Section starts with a common expression, “notwithstanding anything contained in Section 3,” which means that it is not now mandatory to authenticate electronic records by affixing a digital signature as provided in Section 3. This would have been a logical interpretation to Section 3-A, but surprisingly this Section is subject to sub Section (2) of Section 3. Sub Section (2) provides that the authentication of the electronic record shall be effected by the use of an asymmetric cryptosystem and hash function which envelopes and transforms the initial electronic record into another electronic record. Does this mean that Section 3-A is governed by Section 3? If it is, then why was Section 3-A incorporated, because this interpretation would not change the legal position that stands before the amendment. This interpretation, though legally correct, goes against the avowed purpose of making the IT Act technologically neutral as outlined in the statement of objects and reasons for the Amendment Act. Furthermore, Section 3-A makes affixing of electronic signature optional as it uses the word “may” as against Section 3 which uses the word “shall” and thus makes the use of an asymmetric cryptosystem and hash function mandatory. The best option before the legislature was (a) to delete Section 3; (b) to make authentication mandatory; and (c) to make the IT Act technology neutral by omitting the expression “subject to the provisions of sub-Section(2)” in Section 3-A.

6. NEED FOR TIME STAMPING SERVICE

Taking a cue from the Model Law, the IT Act gives legal recognition to electronic records and electronic signatures that are functional equivalents of paper-based documents and handwritten signatures respectively. The electronic signature ensures authenticity, confidentiality, and non-repudiation of the electronic record. These attributes of electronic records are *sin quo non* for electronic commerce but in addition to these attributes it would be at times crucial to know exactly at what time an offer or acceptance or revocation of an offer or acceptance has been dispatched or received, because the Indian contract Act provides for revocation of offer and acceptance, unlike the English law that makes acceptance irrevocable. These provisions of the Contract Act are still applicable to the electronic contracts as they are not inconsistent with the express provisions of the IT Act.

The electronic signatures cannot help in knowing the time of dispatch or receipt of the electronic record. Furthermore, there is a technique called date spoofing that helps in changing the date of receipt or dispatch of electronic records in all those servers through which an electronic record would travel. A party to any electronic contract can change the time of receipt or dispatch of an electronic record to his convenience with the help of the date spoofing technique, and it may be difficult to find out the exact date⁶. The solution lies in making the use of time stamping service along with electronic signatures mandatory.

7. CONCLUSION

Electronic commerce is gaining acceptability throughout the globe because of its ease, flexibility, and speed. It is to be borne in mind that the Internet is essentially global in character and the legal issues raised by its use have global ramifications. Furthermore, e-commerce will not flourish in an uncertain legal environment. Legal principles have to be well formulated.

The Amendment Act of 2008 has brought major changes in the IT Act. However, there are still many gray areas that have to be addressed. The impact of the IT Act on the provisions of the Contract Act has to be appraised. It is to be remembered that the IT Act does not form a complete code for electronic contracts. The Contract Act is still the fundamental law for contract formation. However, where the provisions of the Contract Act are inconsistent with the provisions of the IT Act or

where express provision has been provided in the IT Act, then only the IT Act will apply.

8. REFERENCES

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