

Has the Internet changed the way of forming contractsⁱ?

The topic for the essay is one of the latest in the areas of law & its applications in our country. I shall begin with the basic description of each area covered in this subject and then I shall try to integrate all the issues in a coherent manner. I will start with the Internet.

The Internet, sometimes called simply "the Net," is a worldwide system of computer networks - a network of networks in which users at any one computer can, if they have permission, get information from any other computer (and sometimes talk directly to users at other computers). It was conceived by the Advanced Research Projects Agency (ARPA) of the U.S. government in 1969 and was first known as the Advanced Research Projects Agency Network (Arpanet). The original aim was to create a network that would allow users of a research computer at one university to be able to "talk to" research computers at other universities. Today, the Internet is a public, cooperative, and self-sustaining facility accessible to hundreds of millions of people worldwide. For many Internet users, electronic mail (e-mail) has practically replaced the Postal Service for short written transactions. Electronic mail is the most widely used application on the Net. The most widely used part of the Internet is the World Wide Web (often-abbreviated "WWW" or called "the Web").

Let me now move on to discuss a "contract". Sec. 2(h) of the Indian Contract Act, 1872, defines a contract as "an agreement enforceable by law". To understand this definition we shall start with what is a "proposal". When one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal {Sec 2(a)}. Here it is clear that the offer can be to do a certain act or to not do an act. A proposal may be made by the proposer to a specific person or to the public at large. The making of the proposal by a person to another is the first step in the formation of a contract. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Such acceptance must be unqualified & absolute {In Re. Neele v/s Merrit [1930 W.N. 189]}. Mere mental acceptance of the offer by the offeree is not sufficient. Such an acceptance must be manifested in some usual form of act or words to such effect. An offer made

to the public at large need not be specifically acknowledged (In re. Carlill v/s Carbolic Smoke Ball Co.)

A proposal when accepted, becomes a promise {Sec. 2(b)}. Proposal & acceptance together constitute an "agreement". Every contract in order to be valid should begin with a person willing to do something. This is the "consideration" involved in the contract. His offer must sufficiently be communicated to the person for whom he intends to do / abstain from doing an act. An agreement, the object of which is to create an obligation is a contract. It is to be noted that only an agreement for doing an act which is legal & in return for which the consideration is also legally valid can be enforced in a court of law. A contract in short is a combination of agreement & its legal enforceability; i.e. it must not be unlawful, illegal, immoral or opposed to public policy. The Consideration may move from the promisee or any other person (this position is not there under the English Law). Also the Indian Contract Act recognizes that consideration may be past {Sindha v/s Abraham 1895-2- Bom. 755}, present or future; whereas the English law does not recognize past consideration. Also it is to be noted that consideration need not be adequate. What is more important is that there must be some consideration.

Now that I have defined the main aspects, let me now move on to the convergence of the two. Much ink & paper (not to say anything about the thousand's of WebPages on the WWW) has been used on how the Internet will change our lives in a radical way & that our lifestyle & businesses will never be the same again. The impact of Internet on Indian businesses will be more especially now that the Information Technology Act, 2000 has been passed. The Act has one very important Chapter (V). This deals with 'digital signature'. This chapter says that a person can now attach his digital signature^[1] to a document to attest it in his own name. The digital signature is the person's equivalent of his handwritten signature. What it effectively means is that contracts can now be accepted in the electronic format over the Internet. This single piece of legislation can mean a whole world of difference to the legal implications of contracts over the Internet.

Let us now take a case of how contracts are formed in real life. Before the Internet came, people would make an offer and others would respond by either sound/ signs {Auction Sales} or written

messages attested with their handwritten signatures {Tenders or other agreements etc}. This entire process was either contact based (as in auctions) or paper & signature based (as in property agreements etc.) Now, let us see the world of today. Here the offer (let us assume it is a tender for works) is posted on a web-site. This would be equivalent to it being placed in the newspapers & coming into public domain. It could alternatively be sent to the intended recipients via e-mail. This e-mail or web-site page could be encrypted / password protected so as to not allow unauthorized eyes to see vital information. This encrypted message can be opened only by people who have access to its password key. Thus complete secrecy at the time of making the offer can be ensured. Now let us see what happens at the recipient's end. Only an authorized person will open the offer e-mail. He will accept the offer, thus making it an agreement. At both times the offer & acceptance will be attested using the digital signature. Thus it will lead to a legally binding contract.

Prior to passing of the I.T. Act, an agreement made on the Internet was not binding, as there was the defense that the acceptance was a forgery. The digital signature is now an exact equivalent of the paper world "sign" of an individual or the seal of a corporate entity. The entire process of meeting, getting paper agreements signed etc. may now be redundant. Certain issues crop up as to the repercussions that will occur due to this technological progress. Let me enumerate some of them.

The first is of secrecy. The entire corporate sector is aware of the dangerous extent of hacking that is now possible wherein hackers sitting in one corner of the world logged on the Net can enter restricted areas & make unwanted changes on web pages / corporate data-bases. So how can the authenticity of a digital document be verified? There are certain answers coming up. One is that these documents carry a "digital watermark^[ii]" which will show up to the intended users. This digi-mark will cause the document to self-destruct in case any attempt to make changes on it is made. Alternatively e-documents will be sent over secure networks^[iii] or in encrypted form. The acceptance of the e-document^[iv] will be also in similar form. This acceptance will be accompanied by the digi-sign of the intended acceptor. In both cases, the "Certifying Agency"^[v] will be able to vouch for the identity of the message sender. This form of acceptance will be secure, clear & unambiguous.

The next is that of legal issues such as 'stamp-duty' & 'registration'. Stamp-duty is payable on certain agreements, usually those dealing in property. How will e-contracts be made stamp-duty paid is another important & as yet unanswered question. Also how will a person get an e-contract registered with a Registering Authority is a question that has been partially answered in the I.T. Act. In Chapter II (covering Sec 4, 5 & 6) titled 'Electronic Governance. It says that Government will accept documents from the public in electronic form if they are digi-sign attested; but goes on to say that the individual cannot force a Govt. agency to so accept it only in the electronic form.

Another issue is that of 'Jurisdiction'. How do two parties to the contract decide disputes that arise out of such contracts? Will the country which has the contract on it's server be the arbitrating agency? That will be like the Switzerland deciding a case merely because the papers to the contract are in it's safe deposit vaults. Or will it be the country that has authenticated the two parts of the documents? But then that too is not acceptable if the parties are from two different countries as now two Certifying Agencies from their respective countries will be involved.

This is just the beginning of this complex & intellectually stimulating field of legislation. India is the 12th country to have a cyber law in place. Even then as we have seen through this essay, technology is opening up a whole new means of doing business. This necessarily means applying the basic principles of law by lawyers & judiciary in the ever-changing circumstances brought about due to latest developments in technology. Internet law is by nature international in character. But one thing is certain. This is one field where the decisions made in one country will have more relevance even to other countries due to the inherent international nature of cyber law. Each country will try to work in harmony with other countries so as to form a global law on the subject. The developed world will not be a leader anymore in developing principles of jurisprudence but rather each country will have to look into the law applicable to both the disputing parties. I end my essay with a positive hope that this area of law brings in world harmony & better understanding among the nations of the Earth.

[i] "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure using a combination of random numbers generated by using a sophisticated computer software.

[ii] A software tag which contains a self-destruct program if any changes are made to the document.

[iii] A closed or open network to which access is available only to authorized personnel.

[iv] The entire document in the electronic format.

[v] "Certifying Authority" means a person who has been granted a license to issue a Digital Signature Certificate under section 24 of the Information Technology Act, 2000

ⁱ This Essay won the First Prize at the Government Law College, Mumbai – Annual Pithawala Essay Competition 2001.