

UNIT- 9

CONSTRUCTION OF ELECTRONIC CONTRACT

STRUCTURE

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9.1 INTRODUCTION

Contract is the oldest and most common way for exchanging two things between two parties. Although bilateral contract is most common, with increasing consciousness among nations to protect their interests at regional level the multilateral contracts came into being. The advent of technology has provided a boost to the globalisation of trade and commerce the effort of which had begun in the early 1940s and achieved perfection with the establishment of World Trade Organisation (WTO).

E-Commerce has become a part of our daily life. One such justification for the popularization of E-Commerce would be immoderate technological advancement. E-Commerce, as the name

suggests, is the practice of buying and selling goods and services through online consumer services on the internet. Here 'e' is a shortened form of 'electronic'. The effectiveness of E-Commerce is based on electronically made contracts known as E-Contracts. Although E-Contracts are legalized by Information Technology Act but still majority feels insecure while dealing online. The reason being lack of transparency in the terms & conditions attached to the contract and the jurisdiction in case of a dispute that may arise during the pendency of a transaction with an offshore site.

9.2 OBJECTIVES

After reading this unit you will be able to understand the following:

- What is electronic contracts
- Essential elements of an electronic contract
- Related provisions in Information Technology Act
- Shrink wrap contracts
- Click wrap contracts
- Examples of e-contracts

9.3 SUBJECT

9.3.1 UNDERSTANDING ELECTRONIC CONTRACT

E-Contract is an aid to drafting and negotiating successful contracts for consumer and business e-commerce and related services. It is designed to assist people in formulating and implementing commercial contracts policies within e-businesses. It contains model contracts for the sale of products and supply of digital products and services to both consumers and businesses. An e-contract is a contract modelled, executed and enacted by a software system. Computer programs are used to automate business processes that govern e-contracts. E-contracts can be mapped to inter-related programs, which have to be specified carefully to satisfy the contract requirements. These programs do not have the capabilities to handle complex relationships between parties to an e-contract. An electronic or digital contract is an agreement "drafted" and "signed" in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted. For example, an agreement is drafted on your computer and was sent to a business associate via e-mail. The business associate, in turn, e-mails it back to you with an electronic signature indicating acceptance. An e-contract can also be in the form of a "Click to Agree" contract, commonly used with downloaded software: The user clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed. Since a traditional ink signature isn't possible on an electronic contract, people use several different ways to indicate their electronic signatures, like typing the signer's name into the signature area, pasting in a scanned version of the signer's signature or clicking an "I Accept" button and many more. E-Contracts can be categorized into two types i.e. web-wrap agreements and shrink-wrap

agreements. A person witnesses these e-contracts everyday but is unaware of the legal intricacies connected to it. Web-wrap agreements are basically web based agreements which requires assent of the party by way of clicking the “I agree” or “I accept” button e.g. E-bay user agreement, Citibank terms and conditions, etc. Whereas Shrink-wrap agreements are those which are accepted by a user when a software is installed from a CD-ROM e.g. Nokia pc-suite software¹.

9.3.2 FORMING ELECTRONIC CONTRACTS

Electronic contracts or online contracts enable transactions and agreements electronically without the parties meeting each other. In the other words traditional contract process of offer, acceptance and agreement to transact through electronic mode than physical mode of paper. E-Commerce to succeed such contracts need to be validated legally an alternate mode of transaction through online using the latest technological developments. The main aims are:

1. Creating a secure atmosphere of transacting online with alternate mode to paper and writing.
2. Creating an electronic documentation system which will safeguard the contracting parties on par with the traditional mode of contracts.
3. Creating statutory status and monitoring/verifying authorities for such electronic transaction.
4. Checking frauds intentional or unintentional transactions to promote and build confidence in genuine online transactions.
5. Creating necessary legal structures to oversee such transactions.
6. Establishing standard rules and regulation for smooth functioning of online transactions.
7. Making Digital signature legally valid and incorporating the same with the existing legal regime of contracts, sale of goods, evidence and consumer acts.

9.3.2.1 GENERAL LEGAL PRINCIPALS

Indian Contracts Act 2(h) states that ‘an agreement enforceable by law is a contract.

The Indian Contract Act 1872-s10 states: S 10. What agreements are contracts: All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Interpreting the section 10 of the Act the positive aspects can be enlisted as²:

1. **Free and conscious consent of the parties to the contract:** In other words there should not be any coercion, undue influence, fraud, misrepresentation or mistake which will not be considered as free consent and will be considered as void.
2. **Persons entering to the contract should be competent:** In other words persons who are minors by law, persons with unsound mind are not competent and any contract entered with them is non-enforceable.
3. **Lawful Consideration:** In other words any contract which is violative of any other law or considerations which not legal will not be valid and will be void.
4. **Lawful Object:** The purpose of any such contract has to be lawful in its object or else will be rendered as void.

¹“Evidentiary Value of E-Contracts” an article by Kapil Raina D. E. S. Law College, Pune

²For detail see unit 8

These basic principles of contract law have been developed over the years through the judicial decisions of the courts. The current judicial trends indicate that these principles will apply to all contracts regardless of whether they are formed electronically, orally or through paper based communications. Many of the issues that arise for consideration relate to how these traditional contract law principles will apply to modern forms of technology.

9.3.2.2 DIFFERENT INFORMATION COMMUNICATION TECHNOLOGY (ICT) SYSTEM FOR E-CONTRACTING

There are several different ICT systems that can be used to conduct e-contracting. The type of system used to carry out an e-contracting process depends on factors such as the business needs of the organisation, the size of the organisation, the annual turnover of the organisation and the timeframe in which the project must be completed.

1. E-contracting using email- E-contracts can be formed by the exchange of text documents using electronic communications such as email. Unless digital signatures are used, e-contracts formed in this way are open to challenge in relation to the identity of the parties and the integrity of the documents. The use of email communications also presents difficulties for contract administration and the archiving of electronic records relating to the contract:

- Email communication does not provide a comprehensive system of logging and auditing electronic records and communications.
- An email can be read and altered when in transit even before it reaches its destination.
- Email communication does not facilitate collaboration on tasks relating to the administration of a construction project such as architectural designs and drawings.

2. Parties may enter into an e-contract using a ‘click to agree’ button on a website

The terms and conditions of the contract are displayed on a website operated by one of the contracting parties and the other party agrees to the contract by completing a form and clicking an ‘I agree’ button indicating acceptance of the relevant terms and conditions. When the ‘I agree’ button is clicked, the details of the consenting party are recorded on the web server maintained by the first party.

3. Forming contracts using XML

The text documents that form the basis of an e-contract may be written in XML, a mark-up language for documents containing structured information (Walsh 1998). XML is an abbreviation for extensible mark-up language. Structured information contains both content and some indication of what role that content plays. The World Wide Web consortium (W3C) has developed XML-compliant guidelines for digital signatures. Using XML, the content of the contract can be represented in a semi structured format by classifying the contract into the following four groups:

Who: Information about the parties involved in the contract can be represented with XML.

What: The product or service, which is the object of the contract, can be described in XML using industry specific XML vocabularies.

How: The performance of the contract and the business process can be described using XML.

Legal: Terms and conditions of a contract can be represented in a semi-structured format. XML documents can be communicated by one party to the other using email or as part of an online collaboration system.

4. E-contracting using web-based collaboration systems

The limitations of the use of email and ‘click to agree’ for e-contracting suggest that a centralised e-contracting system, through which various activities such as tendering, contract formation, project management and archiving can be conducted, should be adopted in the construction industry.

9.3.2.3 RELATED PROVISIONS IN INFORMATION TECHNOLOGY ACT, 2000

Electronic transactions will depend on the appropriate legal framework, which recognizes ‘electronic records’ or ‘writings’ or ‘digital signatures’. It should facilitate for a secure system of such transactions and should create evidentiary value of such records. Section 2 of the Indian IT Act, 2000 deals with various definitions involved in internet transaction and Chapter II and section 3 deals with the definition of digital signature and its authentication for legal purposes. According to sections of the IT Act 2000:

4. Legal recognition of electronic records. -Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is—

- (a) Rendered or made available in an electronic form; and
- (b) Accessible so as to be usable for a subsequent reference

5. Legal recognition of digital signatures. -Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document should be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

Explanation. - For the purposes of this section, “signed”, with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression “signature” shall be construed accordingly.

According to section 11 of the IT Act, 2000,

Section 11. An electronic record shall be attributed to the originator—

- (a) if it was sent by the originator himself;
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
- (c) by an information system programmed by or on behalf of the originator to operate automatically.

According to section 2(1) (za) of the IT Act, **originator** is a person who:

1. sends, generates, stores or transmits any electronic message or
2. causes any electronic message to be sent, generated, stored or transmitted to any other person.

The term originator **does not include an intermediary.**

Illustration

Neha uses her gmail.com email account to send an email to Ramesh. Neha is the originator of the email. This section can best be understood with the help of following illustrations.

Illustration 1 Neha logs in to her web-based gmail.com email account. She composes an email and presses the “Send” button, thereby sending the email to Ramesh. The electronic record (email in this case) will be attributed to Neha (the originator in this case) as Neha herself has sent it.

Illustration 2 Neha instructs her assistant Samar to send the above-mentioned email. In this case also, the email will be attributed to Neha (and not her assistant Samar). The email has been sent by a person (Samar) who had the authority to act on behalf of the originator (Neha) of the electronic record (email).

Illustration 3 Neha goes on vacation for a week. In the meanwhile, she does not want people to think that she is ignoring their emails. She configures her gmail.com account to automatically reply to all incoming email messages with the following message: “Thanks for your email. I am on vacation for a week and will reply to your email as soon as I get back”. Now every time that gmail.com replies to an incoming email on behalf of Neha, the automatically generated email will be attributed to Neha as it has been sent by an information system programmed on behalf of the originator (i.e. Neha) to operate automatically.

Acknowledgment of Receipt: section 12(1) of the IT Act said that, ‘Where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by—

(a) any communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.’

According to section 2(1) (b) of the IT Act, **Addressee** means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

Illustration- Neha uses her gmail.com email account to send an email to Ramesh. Neha is the originator of the email. Gmail.com is the intermediary. Ramesh is the addressee. This subsection provides for methods in which the acknowledgment of receipt of an electronic record may be given, provided no particular method has been agreed upon between the originator and the recipient. One method for giving such acknowledgement is any communication (automated or otherwise) made by the addressee in this regard.

Illustration: in the earlier example of Neha going on vacation for a week. She has configured her email account to automatically reply to all incoming email messages with the following message “Thanks for your email. I am on vacation for a week and will reply to your email as soon as I get back”. The incoming message is also affixed at the bottom of the above-mentioned message. Now when Ramesh sends an electronic record to by email, he will receive Neha’s pre-set message as well as a copy of his own message. This automated communication will serve as an acknowledgement that Neha has received Ramesh’s message. Another method is any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received. We take now another illustration.

Illustration: Rakesh sends an email to Neha informing her that he would like to purchase a car from her and would like to know the prices of the cars available for sale. Neha subsequently sends Rakesh a catalogue of prices of the cars available for sale. It can now be concluded that Neha has received Rakesh’s electronic record. This is because such a conduct on the part of

Neha (i.e. sending the catalogue) is sufficient to indicate to Rakesh (the originator) that his email (i.e. the electronic record) has been received by the addressee (i.e. Neha).

According to section 12(2) of the IT Act, Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, the unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator.

Illustration: Neha wants to sell a car to Rakesh. She sends him an offer to buy the car. In her email, she asked Rakesh to send her an acknowledgement that he has received her email. Rakesh does not send her an acknowledgement. In such a situation it shall be assumed that the email sent by Neha was never sent. **According to section 12(3) of the IT Act, 2000,** Where the originator has not stipulated that the electronic record shall be binding only on receipt of such

acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed 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 acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received

by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

Illustration: Rakesh sends the following email to Ramesh: Further to our discussion, I am ready to pay Rs 20 lakh for the source code for the XYZ software developed by you. Let me know as soon as you receive this email. Ramesh does not acknowledge receipt of this email. Rakesh sends him another email as follows: I am resending you my earlier email in which I had offered to pay Rs 20 lakh for the source code for the XYZ software developed by you. Please acknowledge receipt of my email latest by next week. Ramesh does not acknowledge the email even after a week. The initial email sent by Rakesh will be treated to have never been sent.

Time and place of despatch and receipt-

According to section 13(1) of the IT Act, 2000, Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

Illustration: Neha composes a message for Rakesh at 10.58 a.m. At exactly 12.00 noon she presses the “Submit” or “Send” button. When she does that the message leaves her computer and begins its journey across the Internet. It is now no longer in Neha’s control. The time of despatch of this message will be 12.00 noon. **According to section 13(2) of the IT Act, 2000,** Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:—

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,—

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt to occurs when the electronic record enters the computer resource of the addressee.

Illustration: The marketing department of a company claims that it would make the delivery of any order within 48 hours of receipt of the order. For this purpose they have created an order form on their website. The customer only has to fill in the form and press submit and the message reaches the designated email address of the marketing department. Now Mahesh, a customer, fills in this order form and presses submit. The moment the message reaches the company's server, the order is deemed to have been received. Kunal, on the other hand, emails his order to the information division of the company. One Mr Sharma, who is out on vacation, checks this account once a week. Mr Sharma comes back two weeks later and logs in to the account at 11.30 a.m. This is the time of receipt of the message although it was sent two weeks earlier. Now suppose the company had not specified any address to which orders can be sent by email. Had Karan then sent the order to the information division, the time of receipt of the message would have been the time when it reached the server of the company.

According to section 13(3) of the IT Act, 2000, 'Save as otherwise agreed to between the originator and the addressee, 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.'

Illustration Samar is a businessman operating from his home in Mumbai, India. Sameer sent an order by email to a company having its head office in New York, USA. The place of despatch of the order would be Samar's home and the place of receipt of the order would be the company's office.

According to section 13(4) of the IT Act, 2000, 'The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

Illustration

If in the illustration mentioned above, the company has its mail server located physically at Canada, the place of receipt of the order would be the company's office in New York USA.

According to section 13(5) of the IT Act, 2000, 'for the purposes of this section,—

(a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) "usual place of residence", in relation to a body corporate, means the place where it is registered.

Illustration

Samar sent an order by email to a company having its head office in New York, USA. The company has offices in 12 countries. The place of business will be the principal place of business (New York in this case) Samar is a businessman operating from his home in Mumbai, India. He does not have a separate place of business. Sameer's residence will be deemed to be the place of business.

A landmark judgement was given by the Allahabad High Court with respect to the formation of electronic contracts in *P.R. Transport Agency vs. Union of India & others*³. The facts of the case are as, Bharat Coking Coal Ltd (BCC) held an e-auction for coal in different lots. P.R. Transport Agency's (PRTA) bid was accepted for 4000 metric tons of coal from Dobari Colliery. The acceptance letter was issued on 19th July 2005 by e-mail to PRTA's e-mail address. Acting upon this acceptance, PRTA deposited the full amount of Rs. 81.12 lakh through a cheque in favour of BCC. This cheque was accepted and encashed by BCC. BCC did not deliver the coal to PRTA. Instead it e-mailed PRTA saying that the sale as well as the e-auction in favour of PRTA stood cancelled "due to some technical and unavoidable reasons". The only reason for this cancellation was that there was some other person whose bid for the same coal was slightly higher than that of PRTA. Due to some flaw in the computer or its programme or feeding of data the higher bid had not been considered earlier. This communication was challenged by PRTA in the High Court of Allahabad (UP). BCC objected to the "territorial jurisdiction" of the Court on the grounds that no part of the cause of action had arisen within U.P.

The Issue raised by BCC is that, the High Court at Allahabad (in U.P.) had no jurisdiction as no part of the cause of action had arisen within U.P. On the other hand the issues raised by PRTA is: 1. The communication of the acceptance of the tender was received by the petitioner by e-mail at Chandauli (U.P.). Hence, the contract (from which the dispute arose) was completed at Chandauli (U.P.). The completion of the contract is a part of the "cause of action". 2. The place where the contract was completed by receipt of communication of acceptance is a place where 'part of cause of action' arises.

Points considered by the court 1. With reference to contracts made by telephone, telex or fax, the contract is complete when and where the acceptance is received. However, this principle can apply only where the transmitting terminal and the receiving terminal are at fixed points. 2. In case of e-mail, the data (in this case acceptance) can be transmitted from anywhere by the e-mail account holder. It goes to the memory of a 'server' which may be located anywhere and can be retrieved by the addressee account holder from anywhere in the world. Therefore, there is no fixed point either of transmission or of receipt. 3. Section 13(3) of the Information Technology Act has covered this difficulty of "no fixed point either of transmission or of receipt". According to this section "...an electronic record is deemed to be received at the place where the addressee has his place of business." 4. The acceptance of the tender will be deemed to be received by PRTA at the places where it has place of business. In this case it is Varanasi and Chandauli (both in U.P.)

³AIR2006All23, 2006(1)AWC504

Decision of the court 1. The acceptance was received by PRTA at Chandauli / Varanasi. The contract became complete by receipt of such acceptance. 2. Both these places were within the territorial jurisdiction of the High Court of Allahabad. Therefore, a part of the cause of action had arisen in U.P. and the court had territorial jurisdiction.⁴

9.3.3 SHRINK WRAP CONTRACTS

Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product. The term describes the shrink wrap plastic wrapping used to coat software boxes, though these contracts are not limited to the software industry.

9.3.4 CLICK WRAP CONTRACTS

A click wrap agreement is mostly found as part of the installation process of software packages. It is also called a "click through" agreement or click wrap license. The name "click wrap" comes from the use of "shrink wrap contracts" in boxed software purchases.

Click-wrap agreements can be of the following types:

1. **Type and Click**-where the user must type "I accept" or other specified words in an on-screen box and then click a "Submit" or similar button. This displays acceptance of the terms of the contract. A user cannot proceed to download or view the target information without following these steps.

2. **Icon Clicking**-where the user must click on an "OK" or "I agree" button on a dialog box or pop-up window. A user indicates rejection by clicking "Cancel" or closing the window.

Upon rejection, the user can no longer use or purchase the product or service. A click wrap contract is a "take-it-or-leave-it" type of contract that lacks bargaining power. The terms of service or license may not always appear on the same webpage or window, but they must always be accessible before acceptance. **Example-Sample click wrap contract**⁵

9.3.5 MOZILLA FIREFOX END-USER SOFTWARE LICENSE AGREEMENT, VERSION 2.0

The accompanying executable code version of Mozilla Firefox and related documentation (the "Product") is made available to you under the terms of this MOZILLA FIREFOX END-USER SOFTWARE LICENSE AGREEMENT (THE "AGREEMENT"). BY CLICKING THE "ACCEPT" BUTTON, OR BY INSTALLING OR USING THE MOZILLA FIREFOX BROWSER, YOU ARE CONSENTING TO BE BOUND BY THE AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT, DO NOT CLICK THE "ACCEPT" BUTTON, AND DO NOT INSTALL OR USE ANY PART OF THE MOZILLA FIREFOX BROWSER DURING THE MOZILLA FIREFOX INSTALLATION PROCESS, AND AT LATER TIMES, YOU MAY BE GIVEN THE OPTION OF INSTALLING ADDITIONAL COMPONENTS FROM THIRD-PARTY SOFTWARE PROVIDERS. THE INSTALLATION AND USE OF

⁴ 'Ecommerce - Legal Issues' by Rohas Nagpal.

⁵ 'Ecommerce - Legal Issues' by Rohas Nagpal.

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9.3.6 EMAIL SERVICE AGREEMENT⁶

X Ltd. offer email services to its customers. It would need to enter into a contract with all its potential customers "before" they create a new email account with it. This contract must serve the following purposes:

1. Outline the scope of services provided by X Ltd.
2. Restrict X's liabilities in case there is any defect in the X email services.
3. Outline the duties and obligations of the customer.

⁶<http://www.google.com/intl/en/policies/terms/>

4. Obtain suitable licence from the customer in respect of his content.
5. Grant suitable licence to the customer to use the X email services software.
6. Restrict X's liabilities in case of loss or damage suffered by the customers a direct or indirect result of the X email services.
7. Restrict X's liabilities for acts of advertisers who use the X email services to promote their goods and services.
7. Restrict X's liabilities for acts of advertisers who use the X email services to promote their goods and services.

1. Customer's relationship with X

The contract should specify that by using X email services, the customer becomes subject to the terms of a legal agreement between the customer and X. Customers must be informed that they must be of legal age to enter into the contract

2. Acceptance of the terms of the contract

The contract should clearly lay down that a customer cannot use the X email services unless he agrees with the terms of the contract. The customer can usually indicate his acceptance by clicking on an "I Accept" link or checking an "I Accept" checkbox.

3. Provision of the services

Considering the nature of email services and the technological aspects the customer must be clearly informed and warned that:

1. The nature of the services may change without prior notice. (We are constantly changing and improving our Services. We may add or remove functionalities or features....)⁷
2. X may stop providing the services to all or selected customers at any time without prior notice. ("We may suspend or stop providing our Services to you if you do not comply with our terms or policies or if we are investigating suspected misconduct." And , and we may suspend or stop a Service altogether.)⁸
3. X can disable any customer's account. When that happens the customer will be unable to access his stored emails or receive and send new emails.
4. X can impose limitations on the numbers of emails that a customer can send, size and content of attachments etc.

4. Duties and obligations of customer

The contract should clearly lay down the duties and obligations of the customer. Amongst others, the customer must:

⁷ <http://www.google.com/intl/en/policies/terms/>

⁸ibid

1. provide accurate and updated personal information,
2. use the services only for allowed purposes, (You may use our Services only as permitted by law.....)⁹
3. not use the X email services for prohibited purposes such as transmitting pornography, pirated content, defamatory and seditious content etc.
4. access (or attempt to access) the services only through the **interface** provided by Noodle,
5. not access (or attempt to access) the services through any automated means not permitted by X,
6. follow the instructions contained in the **x. file** on the X web servers,
7. not engage (directly or indirectly) in any activity that interferes with or disrupts the services,
8. not reproduce, duplicate, copy, sell, trade or resell the services for any purpose,
9. maintain the confidentiality of passwords used to access the services,
10. intimate X of any unauthorized use of password,
11. be solely responsible for any content created, transmitted or displayed by the customer while using the services,
12. download and obtain content through the Noodle email services at his own discretion and risk.

5. Content licence from the customer

The user retains copyright and other rights over the content submitted, stored, posted or displayed by him through the X email services. (You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours.)¹⁰The user must be clearly informed that by transmitting, storing, submitting or posting the said content, he gives X a perpetual irrevocable, worldwide, royalty-free, and non-exclusive licence to reproduce, adapt, modify, translate, publish, publicly perform, publicly display and distribute the content.

6. License from X

The contract should specify that X is giving the customer a personal, worldwide, royalty-free, non-assignable and non-exclusive licence to use the software provided as part of the Noodle email services. The contract must clarify that this licence is for the sole purpose of enabling the customer to use the X email services. The contract must forbid the customer from the following acts in respect of the said software: 1. copying, 2. modifying, 3. creating a derivative work of, 4. reverse engineering, 5. decompiling or otherwise attempting to extract the source code.(You may not copy, modify, distribute, sell, or lease any part of our Services or included

⁹ Ibid

¹⁰ ibid

software, nor may you reverse engineer or attempt to extract the source code of that software, unless laws prohibit those restrictions or you have our written permission.)¹¹

7. Prohibitions

The contract should specifically prohibit the following: 1. Using "deep-link", "page-scrape", "robot", "spider" etc. to access, acquire, copy or monitor any portion of the service. 2. Reproducing the navigational structure or presentation of the service. 3. Circumventing the navigational structure or presentation of the service. 4. Attempting to gain unauthorized access to any portion or feature of the service. 5. Harvesting or collecting user names, email addresses or other member identification information. 6. Probing, scanning or testing the vulnerability of the service. 7. Tracing information relating to other users. 8. Agreeing not to use any device, software or routine to interfere or attempt to interfere with the proper working of the service or any transaction being conducted on the service, or with any other person's use of the service. 9. Using the service for any unlawful purpose. 10. Forging email headers. 11. Manipulating identifiers in order to disguise the origin of any email.

8. Exclusion of warranties

The contract should clearly mention that the customer expressly understands and agrees that his use of the services is at his sole risk and that the services are provided "as is" and "as available". The contract must expressly disclaim all warranties and conditions of any kind (express and implied). (OTHER THAN AS EXPRESSLY SET OUT IN THESE TERMS OR ADDITIONAL TERMS, NEITHER GOOGLE NOR ITS SUPPLIERS OR DISTRIBUTORS MAKE ANY SPECIFIC PROMISES ABOUT THE SERVICES. FOR EXAMPLE, WE DON'T MAKE ANY COMMITMENTS ABOUT THE CONTENT WITHIN THE SERVICES, THE SPECIFIC FUNCTIONS OF THE SERVICES, OR THEIR RELIABILITY, AVAILABILITY, OR ABILITY TO MEET YOUR NEEDS. WE PROVIDE THE SERVICES "AS IS")¹². It must also be mentioned clearly that X (its subsidiaries, affiliates, licensors etc.) do not represent that: 1. the X email services will meet the customer's requirements, 2. the X email services will be uninterrupted, timely, secure or free from error, 3. the information provided by or through the Noodle email services will be accurate or reliable, and 4. that defects in the operation or functionality of the X email services will be corrected.

9. Limitation of liability

The contract must clearly mention that X Ltd (and its subsidiaries, affiliates, licensors etc) will not be liable to the customer (WHEN PERMITTED BY LAW, GOOGLE, AND GOOGLE'S SUPPLIERS AND DISTRIBUTORS, WILL NOT BE RESPONSIBLE FOR LOST PROFITS, REVENUES, OR DATA, FINANCIAL LOSSES OR INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES. IN ALL CASES, GOOGLE, AND ITS SUPPLIERS AND DISTRIBUTORS, WILL NOT BE LIABLE FOR ANY LOSS OR DAMAGE THAT IS NOT REASONABLY FORESEEABLE.)¹³ For: 1. any direct, indirect, incidental, special consequential or exemplary damages incurred by the customer pursuant of his use of the X email services. 2. Any loss of profit, any loss of goodwill or business reputation, any loss of data suffered, cost of procurement of substitute goods or

¹¹ ibid

¹² ibid

¹³ ibid

services, or other intangible loss incurred by the customer pursuant to his use of the X email services. 3. Any loss or damage incurred by the customer as a result of relationship or transactions with advertisers using the X email services. 4. Changes in or cessation of the Noodle email services. 5. Deletion or corruption of content transmitted through or stored in X email services. 6. Customer's failure to keep his account information, passwords etc. secure and confidential.

10. Ending the relationship between X and the customer

The contract must lay down the customer can terminate the contract by closing his accounts with the X email service. X must retain the right to terminate the contract under the following circumstances: 1. The customer breaches any provision of the contract. 2. The customer acts in a manner that clearly shows his intention to breach a provision of the contract. 3. X is required by law to terminate the contract. 4. The provision of the services to the customer is no longer commercially viable.¹⁴ (You can stop using our Services at any time, although we'll be sorry to see you go. Google may also stop providing Services to you, or add or create new limits to our Services at any time.)¹⁵

9.4 SUMMARY

E-Commerce, as the name suggests, is the practice of buying and selling goods and services through online consumer services on the internet. Here 'e' is a shortened form of 'electronic'. The effectiveness of E-Commerce is based on electronically made contracts known as E-Contracts. Although E-Contracts are legalized by Information Technology Act but still majority feels insecure while dealing online. The reason being lack of transparency in the terms & conditions attached to the contract and the jurisdiction in case of a dispute that may arise during the pendency of a transaction with an offshore site.

E-Contracts can be categorized into two types i.e. web-wrap agreements and shrink-wrap agreements. Electronic contracts or online contracts enable transactions and agreements electronically without the parties meeting each other. The main aims are:

1. Creating a secure atmosphere of transacting online with alternate mode to paper and writing.
2. Creating an electronic documentation system which will safeguard the contracting parties on par with the traditional mode of contracts.
3. Creating statutory status and monitoring/verifying authorities for such electronic transaction.
4. Checking frauds intentional or unintentional transactions to promote and build confidence in genuine online transactions.
5. Creating necessary legal structures to oversee such transactions.
6. Establishing standard rules and regulation for smooth functioning of online transactions.
7. Making Digital signature legally valid and incorporating the same with the existing legal regime of contracts, sale of goods, evidence and consumer acts.

¹⁴ 'Ecommerce - Legal Issues' by Rohtas Nagpal available at http://dict.mizoram.gov.in/uploads/attachments/cyber_crime/electronic-contracts.pdf

¹⁵ <http://www.google.com/intl/en/policies/terms/>

There are several different ICT systems that can be used to conduct e-contracting: 1. E-contracting using email

2. Parties may enter into an e-contract using a 'click to agree' button on a website

3. Forming contracts using XML

4. E-contracting using web-based collaboration systems

Electronic transactions will depend on the appropriate legal framework, which recognizes 'electronic records' or 'writings' or 'digital signatures'. It should facilitate for a secure system of such transactions and should create evidentiary value of such records. Section 2 of the Indian IT Act, 2000 deals with various definitions involved in internet transaction and Chapter II and section 3 deals with the definition of digital signature and its authentication for legal purposes. A landmark judgement was given by the Allahabad High Court with respect to the formation of electronic contracts in *P.R. Transport Agency vs. Union of India & others*¹⁶

Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product. The term describes the shrink wrap plastic wrapping used to coat software boxes, though these contracts are not limited to the software industry.

A click-wrap agreement is mostly found as part of the installation process of software packages. It is also called a "click through" agreement or click-wrap license. The name "click-wrap" comes from the use of "shrink wrap contracts" in boxed software purchases.

Click-wrap agreements can be of the following types:

1. **Type and Click-** where the user must type "I accept" or other specified words in an on-screen box and then click a "Submit" or similar button.

2. **Icon Clicking-** where the user must click on an "OK" or "I agree" button on a dialog box or pop-up window.

A click wrap contract is a "take-it-or-leave-it" type of contract that lacks bargaining power.

9.5 GLOSSARY

1. CD-ROM- compact disc- read only memory

2. XML- Extensible mark-up language that defines a set of rules for encoding documents in a format which is both human-readable and machine-readable.

9.6 SAQS

1. TICK THE RIGHT ANSWER:

¹⁶AIR2006All23, 2006(1)AWC504

- (i) An electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted.
- (a) True
 - (b) False
- (ii) E-Contracts may be of following types:
- (a) web-wrap agreements
 - (b) shrink-wrap agreements
 - (c) Click-wrap agreements
 - (d) All of above
- (iii) Parties may enter into an e-contract using a 'click to agree' button on a website.
- (a) True
 - (b) False
- (iv) Information technology Act gives legal recognition of electronic records.
- (a) True
 - (b) False
- (v) Originator is called offeror in the e-contract.
- (a) True
 - (b) False
- (vi) Addressee is another name for offeree in e-contract.
- (a) True
 - (b) False
- (vii) Neha composes a message for Rakesh at 10.58 a.m. At exactly 12.00 noon she presses the "Submit" or "Send" button. When she does that the message leaves her computer and begins its journey across the Internet. It is now no longer in Neha's control. The time of despatch of this message will be:
- (a) 12.00 noon.
 - (b) 10.58 a.m.
 - (c) The time when it reaches to the target computer
 - (d) None of above
- (viii) Consensus-ad-idem is necessary in making every contract.
- (a) True

- (b) False
- (ix) Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product.
- (a) True
- (b) False
- (x) With reference to contracts made by telephone, telex or fax, the contract is complete when and where the acceptance is received. This rule may apply to:
- (a) Every e-contract
- (b) Some of the e-contract
- (c) Can not apply to e-contract
- (d) Every contract, whether traditional or e-contract

9.7 REFERENCES

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6. <http://www.google.com/intl/en/policies/terms/>

9.9 TERMINAL QUESTIONS AND MODEL QUESTIONS

1. Define electronic contract.
2. Explain terms and conditions of e-mail service agreement.
3. Explain the essential elements of an electronic contract.
4. What do you understand by click-wrap contract?
5. Describe the related provision of IT Act, which gives legality to e-contract.

9.10 ANSWER SAQS

1. (i) (a); (ii) (d); (iii) (a); (iv) (a); (v) (a); (vi) (a); (vii) (a); (viii) (a); (ix) (a); (x) (b);