UNIT- 11

LEGAL ISSUES IN CYBER CONTRACTS

STRUCTURE

11.1 INTRODUCTION

Traditional concept of contract provides the foundations to all types of valid and enforceable contract, keeping in view the meanings of definition of contract as, ‘all agreements are contracts if they are made by the free assent of parties competent to contract, for a lawful consideration and with a lawful object and are not thereby expressly declared to be void' the term contract would include invitation to tender and instruction to renderers, ‘tender, and acceptance thereof. An electronic contract is an agreement created and "signed" in electronic form -- in other words, no paper or other hard copies are used. For example, you write a contract on your computer and email it to a business associate, and the business associate emails it back 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. Computer systems are now emerging that can operate not just in an automatic way but autonomously as well. The processes of Artificial Intelligence includes forming intentions, making choices and giving and withholding consent which means humans can give substantial autonomy in decision making which permits computer systems to complete highly complex tasks involving precise judgements. Now the question which arises in our minds is that whether a computer system can replicate the processes that are regarded as free will of the humans and what would be the legal consequences of it. These are the questions which make people apprehensive while entering into a commercial contracts with the aid of a computer system. Contractual rights must be determined with reference to individuals, the need of the hour is to ascertain the whether the existing contract law doctrine can cope with the new laws of technology.

11.2 OBJECTIVES

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

- Issues Regarding Formation of an Online Contract
- Issues Regarding Language in international contract
- Legal Requirement of a Writing and Signature in cyber contract
- The Mailbox Rule
- Special Issues Regarding Handling Money over the Internet

- What is Force Majeure
- Remedies in e-contracts
- Proper Law and Jurisdictional issues in cyber contracts

11.3 SUBJECT

11.3.1 ISSUES REGARDING FORMATION OF AN ONLINE CONTRACT

On the Internet, as in the off-line world, a contract is formed when there is a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. Various forms of online conduct can constitute an offer or acceptance, and black letter contract law states that the maker of an offer has the right to define how the offer may be accepted. Thus, on the Internet, one may post an offer and define any other reasonably appropriate online conduct ("click here to accept offer") as the only permissible way to accept the offer. This necessitates effective and clear drafting of the terms of contract where the drafting language has to be clear, transparent, to place across the business proposition or offer without jeopardizing the interest of the business where the language could lead to multiple interpretations and running the risk in a court battle. Such drafting requires the drafter to understand the fundamentals of,

1. The relevant law in operation;

2. The practical implications of such law

3. The purpose and goal of the firm intends to achieve by such offer

4. How to use the relevant law and its implications to the maximum advantage

5. How to minimize the liability risks in unforeseen circumstances

The rule that the offeror is the "master of the offer" means, among other things, that an offer may dictate that it can only be accepted by a limited class of persons. The ability to define the class of persons who may accept an offer takes on additional significance online due to the cross-jurisdictional nature of Internet communications. Online offers which may be accessed by the entire world may be illegal when made to persons in certain jurisdictions, or when directed toward certain classes of person such as minors. Securities brokers, insurance companies, and others, whose ability to solicit business in regions where they are not licensed or registered is strictly circumscribed, use such disclaimers in an attempt to avoid regulatory difficulties in those jurisdictions. The good news is that regulators seem to be giving substantial weight to such disclaimers in determining whether web pages accessible in their jurisdiction constitute violations of local law.

As in the off-line world, an offer must be distinguished from a mere advertisement or display of goods as to which inquiries of interest are invited. But if an advertisement meets the requirement of an offer, that is if it manifests an intent by one party to be bound upon the

acceptance by another party, the offer is good until withdrawn and can be accepted by anyone to whom it is directed. Any ambiguities on this score are relatively easy to avoid online, perhaps easier than in the off-line world, given the formalities that necessarily accompany an invitation to enter into an online contract (exchange of identity information, credit card information and the like).

It is a general principle of contract law that a party can be bound by the acts of agents endowed with apparent authority to act on its behalf. An agent has apparent authority if a party acts in such a way so as to make it reasonable for a third person to believe that the agent is acting on its behalf. In the online world, a computer program may act as an online agent, and a party will presumably be bound by offers and acceptances performed by a computer or program acting on a party's behalf.[1]

11.3.2 DESCRIPTION OF THE PARTIES

In all but the shortest of documents it is obviously more convenient and clearer to refer to the various parties by such descriptive terms as vendor purchaser, guarantor, franchisee, etc. These terms are so basic to the agreement that they are invariably set out at the head of the document as part of the descriptions of its registered office or (particularly in the case of foreign companies
which may not have a registered office) its principal place of business. Although it is not strictly necessary to cite the company's registration number, it is sometimes useful to do this, as it may facilitate any search which has to be carried out and may avoid confusion where companies in a group with similar names are involved in the transaction.[2]

11.3.3 LANGUAGE OF THE AGREEMENT

In International contracts particularly, specifying the language of the agreement can have a number of advantages, including:

(a) If the agreement has been drawn up in versions in different languages, it will be desirable to state which is the authoritative versions in different languages.

(b) It may also be desirable to state that any amendments to the agreement should be in the same language as the original. In some jurisdictions the language of the agreement may influence the court when deciding under which country laws the agreement is made, and which country's courts should have jurisdiction. Ideally the agreement should state these matters specifically.[3]

11.3.4 DEFINITIONS AND INTERPRETATION

[1] http://corporate.findlaw.com/business-operations/legal-issues-in-contracting-on-the-internet.html#sthash.Vv0ekhv3.dpufIt
[2] http://www.nalsarpro.org/CL/Modules/Module%201/Chapter5.pdf
[3] Ibid

In long or complex agreements it is good practice to group all defined terms, together with their definitions, in a separate 'Definitions' clause, and to indicate elsewhere in the test of a document that a term has been so defined by starting the word or words defined with a capital letter. This will signal to anyone reading a clause in the body of the agreement that particular term has a special defined meaning in that agreement. It is essential using this method, for all defined terms to be capitalized on every occasion they are used, and that any term which is used in a wider sense than the one which is defined should not be capitalized. Whichever style is used, care must be taken when preparing a document to distinguish defined terms from terms of nonspecific application. It is convenient to list the defined terms in alphabetical order, in a clear, easily assimilated layout. Where the meaning of a term will involve a lengthy description or list, the details can be assigned to a schedule or exhibit. In drafting practice, interpretation provisions are often combined with the definitions of terms used in the agreement under the heading Definitions and Interpretation'. The usual interpretation provisions deal with the following[4]:

1. Amendment/replacement of statutes;
2. Persons/singular/plural: For the sake of brevity and to avoid any confusion;
3. Reference to clauses: To ensure a clear economical style of drafting; Headings

11.3.5 REQUIREMENT OF WRITING ON PAPER AND PROVIDING A SIGNATURE

As anyone who has dealt with complex contracts knows, when an agreement is spread over multiple, potentially inconsistent documents at different times it sometimes becomes difficult to determine exactly what the parties agreed upon. As a result, parties strive to reduce a contract to a single written document, or at least a limited number of separate writings which can be collected and preserved for future reference. Courts may consider the "four corners" of the contract as embodying all the necessary and agreed upon contract terms, and may disregard terms and representations contained in documents, or made orally, which are not reflected within those four corners. Many contracts contain an "integration clause" further stating the parties intent that the contract itself embodies all relevant terms.

Given the fast moving, interactive nature of the Internet environment, thought must be given in electronic contracting as to what will constitute the "four corners" of the electronic contract, how that understanding will be manifested, and how the contract terms will be preserved for future reference. Where computers communicate with one another and enter into contracts through agent software, the "contract" may be wholly unreadable by a human being without the assistance of a computer. Moreover, one cannot necessarily have the same confidence that an electronic file has been preserved unaltered since contract inception in the way that one can analyze a piece of paper for tampering.

[4] Ibid

Similarly, a signature serves certain practical functions, including (1) an evidentiary function (proving what the contact was), and (2) a cautionary and symbolic function, which makes the participant aware that his or her actions will be interpreted as having legally binding consequences. Persons engaged in electronic contracting need to consider how their contracting procedures online meet these same needs in electronic form.

11.3.6 LEGAL REQUIREMENT OF A WRITING AND SIGNATURE

The Uniform Commercial Code ("UCC") has been adopted as a matter of state law with slight variations in the various states. It contains a provision referred to as the "statute of frauds" which requires that contracts for the sale of goods over $500 be in writing: "A contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. “The UCC defines a "writing" to include, "printing, typewriting, or any other intentional reduction to tangible form." It defines "signed" to mean the use of, "Any symbol executed or adopted by a party with present intention to authenticate a writing."

In paper communications these requirements are met in various, flexible ways. Courts have accepted telegraph communications as a writing, even though the written piece of paper generated at the receiving end of the telegraph line was not the same piece of paper handed to the operator by the sender. Telecopied communications have also been accepted on the same principle. Little authority exists regarding whether electronic files can be regarded as writing within the meaning of the UCC or other laws. Parties that trade together frequently may eliminate some of the ambiguity that continues to surround the requirement of a writing or a signature by entering into a trading agreement that specifies that electronic communications satisfying certain criteria are deemed by the parties to constitute a signed writing. The American Bar Association Model Electronic Trading Party Agreement is available as a model. In such an agreement the parties may specify, for example, that any document received electronically with adequate identifying characteristics and which is subsequently maintained in a form which allows it to be reduced to a paper copy will be effective between the parties as a signed writing.

The uncertainties of enforcing electronic writings or signatures in court are irrelevant to most online merchants. Such concerns are material only when the size of individual transactions is significant, payment is not obtained prior to delivery of the good in question (i.e., where no credit card number is obtained), and where there is no other ongoing relationship of trust, leverage or agreement between the parties. As a result, the legal uncertainties surrounding writing and signature requirements are not substantial impediments to most parties desiring to transact electronically.

11.3.7 DIGITAL SIGNATURE LEGISLATION

Digital Signature legislation typically aims to achieve one or both of the following goals: (1) requiring courts and governments to accept electronic signatures as meeting the writing and signature requirements already present in other laws, and (2) setting up protocols and

procedures for the use of a special category of secure electronic documents which will presumptively be considered valid and accurate. It is an attempt to put electronic documents and signatures on an equal footing with paper documents and ink signatures.

11.3.8 THE MAILBOX RULE

Web-based contracting may also help eliminate uncertainty and unfairness inherent in application of the so-called "mailbox rule." Where the method for making an offer and acceptance inevitably requires a time delay of some magnitude, such as where the mail is used, courts apply the so-called mailbox rule. That rule provides that where an offer can be accepted by mail, the mere mailing of the acceptance is deemed to seal the contract regardless of any delays that may result in the receipt of the acceptance by the offeror, or even the failure of the offeror ever to receive it.[5] However, attempts by the offeror to revoke an offer are not effective until received by the offeree. The one-sidedness of the so called "mailbox rule" in favoring offerees means the burden is on the offeror to specify the method by which the offer can be accepted in a way that eliminates any unacceptable risk due to delay in communicating an acceptance.

It is notable that the mailbox rule applies only in circumstances in which the delivery of the offer and acceptance are necessarily delayed -- it does not apply to contracts negotiated over the telephone, or telex, or in person, or perhaps by fax. The question therefore is whether the courts will consider E-mail and other forms of Internet-based communication to be essentially instantaneous, in which case the mailbox rule will not apply, or to be more analogous to the mail or telegraph, where the rule does apply.

A Web page can be set up so as to eliminate any ambiguity as to when or how a contract is entered into, thereby eliminating concern over application of the mailbox rule. E-mail is not so simple. Sometimes E-mail messages are essentially instantaneous, and sometimes they can be delayed for hours. Where non-instantaneous forms of electronic acceptance are contemplated, the careful offeror will consider this issue and structure the offer in a way to avoid ambiguity. In general, however, the Internet is a favorable environment to avoid contracting ambiguities such as those presented by the mailbox rule.

11.3.9 DETERMINING THE TERMS OF A CONTRACT

One of the ways in which the Internet is an ideal environment for contracting is in its potential to eliminate confusion over the terms of a contract when offer and acceptance terms differ.

When a party receiving an offer responds with a conditional acceptance, or an acceptance that attempts to vary the terms of the contract, ambiguities result which can result in uncertainty as to the contract terms, or even as to whether there is a contract at all. For example, under the UCC, the rule as between merchants is that if a party accepts an offer to contract but at the same time states additional or varying terms, a contract is still deemed to have been formed. The new or varying terms are considered part of that contract if the acceptance explicitly states

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[5]**For detail see unit 8, 'The Indian contract law'**

that the acceptance is conditional on agreement to the new terms. But those new terms will not be considered binding if the offer stated expressly that acceptance would be limited to the terms of the offer, nor will the new terms apply if they materially change the contract, or if notification of objection to the new terms is sent in a reasonable time.

The problem often occurs when parties exchange pre-prepared form contracts, purchase orders and the like, with conflicting terms, resulting in the so-called "battle of the forms." As long as there is agreement on key terms such as number, price, timing, etc., the parties may not even notice that conflicts exist as to some of the more obscure terms such as choice of law and choice of forum clauses, arbitration clauses and the like.

The UCC handles this issue by providing, first of all, that despite lack of perfect agreement on contract terms, if the parties proceed to act as if a contract is in place (i.e., by actually exchanging goods or money) a contract will be held to exist. The terms of the contract will be the terms on which the parties specifically agreed, although other terms may also be made part of the contract by the UCC. The Internet is an ideal environment to avoid these sorts of uncertainties. On the Internet, the offering party can restrict the other party to a limited range of options for making an acceptance. Offering a choice of one or more boxes where the other party must click or type "I accept," and leaving no possibility for the other party to modify the terms, makes it clear that the offer is being made and accepted on the terms specified in the offer, without modification. Similarly, many parties using EDI (electronic data interchange), a non-Internet form of E-commerce, provide that free text which cannot be read by the other party's computer is deemed ineffective. A similar condition could be placed on an E-commerce Web page as well to avoid the battle of the forms. In addition, web pages can readily be structured to document that the responding party has indicated its awareness and acceptance of important terms such as limited warranties.

Some of the above ambiguities can be eliminated between contract parties by entering into an agreement that specifies how the parties will handle issues such as the form of an acceptance, varying acceptance terms and the like. Section 13(3) of The Information Technology Act, 2000, provides that an acceptance is valid when received by the recipient at a location held out by that person as a place for receipt of such messages (e.g., a company E-mail system). Under this provision the acceptance is valid even if the message is not read (like the mailbox rule), but it does have to be "received." Provisions also exist for acknowledging receipt of messages to further reduce ambiguity.[6]

Sometimes electronic contracting takes place in much abbreviated form, through the exchange of basic terms such as model number, price, quantity and the like. In those circumstances, legal "boilerplates," such as warranties, payment terms and conditions, delivery terms, how nonconforming goods will be handled, etc., may be omitted from the contract terms altogether. In that case the missing terms may be inferred from prior course of dealing between the parties, trade usage or the like. Parties to electronic commerce may wish to avoid these ambiguities by specifying how these matters will be handled in their master electronic trading partner

[6]Section 12 of IT Act, 2000

agreement or in the master vendor agreement which covers all transactions, whether electronic or on paper.

11.3.10 CONDITION AND ASSURANCES

(1) Commencement

Unless it is otherwise provided, an agreement takes effect immediately it has been signed by all parties or, in the case of an agreement executed as a deed, upon delivery of the deed. Sometimes parties will wish to provide for a different commencement date. This should be done by including a clause and not by misstating the date of the agreement (i.e. the date of the last signature) as this can amount to a forgery.

(2) Conditions precedent

Sometimes an agreement is stated not to come into effect until the happening of an event (this might refer, e.g., to finance being raised or government approvals being obtained or facilitating of base materials by the concerned contracting party). Such terms are known as conditions precedent. The clause does not need to use the phrase condition precedent' but theconsequences of the condition not being met should be clearly stated. In particular, does the agreement as a whole automatically come to an end or do certain provisions continue? Is there a time limit for conditions to be met? All these details should be specified in the agreement to avoid confusion.

(3) Further action required after completion

In contracts of the single transaction type, in particular sale agreements, mortgages, intellectual property assignments and licenses etc., it is likely that after completion of the transaction further action will be required by one or both parties to perfect title or conform to statutory rules or in some other way to finish off the transaction satisfactorily. In order to avoid argument or delay in respect of such matters it is usual to provide exp of attorney must be expressly stated to be irrevocable[7].

11.3.11 SPECIAL ISSUES REGARDING HANDLING MONEY OVER THE INTERNET

Persons unfamiliar with contracting on the Internet frequently ask what facilities exist for making and obtaining payment over the Internet, and whether such facilities are sufficiently safe. The answer is that such facilities do exist in the form of online credit card transactions, which are in wide use today. Electronic transfers of funds are governed by a series of statutes and regulations. Those same statutes and regulations would generally apply to instructions to transfer funds or change a credit card account made over the Internet.Consumers have the responsibility to not disclose their pin to others, for example. If a transaction is challenged, the burden of proof lies with the financial institution seeking to establish that the transaction was authorized by the consumer. As a practical matter, any merchant desiring to set up an electronic contracting scheme, including online credit card payment capability, can do so readily. Most

[7]http://www.nalsarpro.org/CL/Modules/Module%201/Chapter5.pdf

of the large Internet device providers will set up the electronic payment system as part of their service. Payments are usually made by credit card through a system called "secure server technology" whereby a special server (perhaps operated by ISP) is used for the transmission of credit card information. This is all unobtrusive "back office" technology, such that the person purchasing goods from a Web page need not even be aware of it.

11.3.12 FORCE MAJEURE[8]

Where a contract becomes impossible to perform, or is capable of performance only in a manner substantially different from that originally envisaged, then in the absence of express provision by the parties further performance is excused under the common law doctrine of frustration. This doctrine only operates where the frustrating circumstances are not due to the fault of either party[9] but it does not follow that in all contracts any act of negligence will deprive a party of the defence of frustration. In the case of*Joseph Constantine SS Line Ltd. v Imperial smelting Corn Ltd*[10]the facts are as follows:In August 1936, the appellants, who were the owners of a steamship the *Kingswood*, chartered the ship to the respondents for a voyage with a cargo of ores and concentrates from Port Pirie in South Australia to Europe. On January 3, 1937 while she was anchored in the roads at Port Pirie, and before she became 'an arrived ship', there was an explosion of extreme violence in the neighbourhood of her auxiliary boiler, which caused significant damage to the steamer. Following this accident the appellants gave notice to the respondents to the effect that she could not perform the charterparty. The respondents claim damages from the appellants under allegation that the latter have broken the charterparty by failing to load a cargo. The appellants sought the defence in that the contract was 'frustrated' by the destructive consequences of the explosion on the *Kingswood*.

The respondents, contended in reply, that this frustration does not suffice to excuse the appellants from having to pay damages for non- performance unless the appellants establish affirmatively that the explosion occurred without any fault on their part. The appellants, on the other hand, contend that, once the frustrating event is proved, the onus is on the respondents to establish such default on the part of the appellants as would deprive the latter of their right to rely upon it. The learned arbitrator has made an interim award in the form of a special case. He concluded that he was not satisfied that any of the servants of the appellants were guilty of negligence nor was he satisfied that negligence on the part of the servants of the appellants did not cause or contribute to the disaster. In the High Court Atkinson J. decided that the present appellants succeeded but the Court of Appeal reversed Atkinson J.'s decision. Scott L.J. delivered the first judgment, with which the Master of the Rolls and Goddard L.J. agreed[11].

To avoid bringing the contract to an end under the law of frustration, a 'force majeure' clause is frequently incorporated into Indian law contracts, under which the parties expressly agree to exempt each other from performance of the contract or liability for breach of contract where

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[8] Act of God, inevitable event

[9]See *Denmark productions Ltd. v Boscobel Productions Ltd. (1969) QB 699 at 725. (1968) 3 All ER 513, 533 CA*

[10](1942) AC 154 at 166, 179,195, 205 (1941)) All ER 165 at0173, 182,193,199,200 HL

[11]www.lawandsea.net/**List_of_Cases/J/Joseph_Constantine_v_Imperial**

the failure to perform is due to factors beyond that party's control. Thus where force majeure or an event of force majeure is deferred to in the agreement, it should be clearly defined.

11.3.13 WARRANTIES AND INDEMNITIES/GUARANTEES

Many commercial contracts contain warranties by one or both parties. These may include warranties as to matters which are central to due performance of the contracts but which cannot easily be verified by the other party. The exact nature of these warranties will depend on the transaction being entered into. Whereas some types of warranties are specific to the individual transaction, others are found in many types of commercial agreement. Warranties as to a party's ability to enter into an agreement of the type in question, and as to the good standing of each party, are sometimes inserted in commercial agreement. In the longer type of agreement, it is frequent for the numerous detailed warranties to be given by, say, a vendor to be set out in a schedule to the agreement and for that party to give in the agreement an overall warranty as to the truth and accuracy of the scheduled warranties. A party giving warranties will commonly seek to limit the warranties to matters, which are within its knowledge. An indemnity clause, often of a general and all-embracing nature, is frequently included in agreements and contracts for services and the documents. Such a clause, whereby one party undertakes a separate and independent obligation to make good on request any loss or damage suffered by the other party as a result of breach of a contract term, is wide in effect. Where an indemnity clause extends to cover losses suffered by the indemnifying party as well as third parties, it is in effect a kind of exclusion clause. Typically, contracting party where the other party is a subsidiary company within a group, and where the first party is concerned that the subsidiary might not be able to meet its contractual commitments or might be liquidated by the parent if problems were to arise under the contract will demand a parent company guarantee. Alternatively, the first party may have entered into thecontract on the basis that the other party is part of a large and reputable group and may wish to avoid the risk of the other party being sold, e.g., to its management. The price of the goods may be fixed by the contract, (If the price is to be fixed by an agreement, and no such agreement is in fact come to, the contract will be void. In the case of May and *Butcher Ltd. v R*[12]it was held '…..in a commercial contract where price is left to be agreed, a reasonable price cannot be fixed and that, even where there is an arbitration clause, that clause cannot be used to determine the price because "unless the price has been fixed, the agreement is not there"[13]. The price of the goods may be determined by the course of dealing between the parties. If the price is not determined, the buyer must pay a reasonable price, and what is a reasonable price is a question of fact dependent on the circumstances of each particular case. Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and that third party cannot or does not make such valuation, the agreement is avoided, provided that, if the goods, or any part of them have been delivered to and appropriated by the buyer, he must pay a reasonable price for them. Even in the absence of bad faith, a valuer brought in to fix a term in a contract is liable to be sued damages, as in *Arenson v Casson Beckman Rutley & Co.*[14], where it was held that anauditor of a private

[12](1934) 2 KB 17n HL)
[13] Ibid, (p 20)
[14](1977) AC 405 (1975) 3 All ER 901, HL

company who on request had valued shares in the knowledge that his valuation would determine the price to be paid for them under a contractor sale was liable to be sued by the buyer or the seller if his valuation was carried out negligently.[15] As in *Burgess v Purchase & Sons (Farms) Ltd*[16], andwhere such third party is prevented from making the valuation by the faultof the seller or buyer, the party not in fault may maintain an action for damages against the party in fault. Where the contract is for the manufacture of particular goods, or for the supply of goods over a period of time, the price is commonly made subject to variation by reference to increases in the cost, for example, of raw materials and labour. Sometimes contracts will state a price or rate for the undertaking of the contractual obligations, but will fail to state when or how that price is to be paid. Whilst the court may be prepared to interpret such a contract as requiring payment within a reasonable period, it is generally better to state specifically what the payment terms are to be.[17]

11.3.14 RETENTION OF TITLE

The question of retention of title on of has been the subject of much discussion. In a leading case- Aluminium Industries *Vassen BV v. Romalpa Aluminium Ltd*[18] the facts are as follows: Aluminium Industrie Vaasen BV was a Dutch supplier of aluminum foil. Romalpa Aluminium Ltd processed it in their factory. In the contract of sale, it said that ownership of the foil would only be transferred to Romalpa when the purchase price had been paid in full and products made from the foil should be kept by the buyers as bailees (the contract referring to the Dutch expression 'fiduciary owners') separately from other stock on AIV's behalf as 'surety' for the rest of the price. But it also said Romalpa had the power to sell the manufactured articles in the course of business. When such sales took place, this would be deemed to be as an agent for AIV. Romalpa went insolvent, and the receiver and manager of Romalpa's bank, Hume Corporation Ltd, wanted the aluminum to be caught by its floating charge. AlV contended that its contract was effective to retain title to the goods, and so it did not need to share them with other creditors in the liquidation. High Court. Mocatta J held the retention of title clause was effective. AluminumIndustre Vaasen was still the owner of the aluminum foil, and could trace the price due to them into the proceeds of sale of the finished goods, ahead of Romalpa's unsecured and secured creditors. He said the following:

"The preservation of ownership clause contains unusual and fairly elaborate provisions departing substantially from the debtor/creditor relationship and shows, in my view, the intention to create a fiduciary relationship to which the principle stated in *In re Hallett's Estate*, applies. A further point made by Mr Pickering was that if the plaintiffs were to succeed in their tracing claim this would, in effect, be a method available against a liquidator to a creditor of avoiding the provisions establishing the need to register charges on book debts: see section 95(1)(2)(e) of the Companies Act 1948 [now CA 2006 section 860(7)(g)]. He used this only as an argument against the effect of clause 13 contended for by Mr. Lincoln As to this, I think Mr

[15]chambers.co.nz/documents/David%20Goddard%20QC%20-%20Law%20of…
[16](1983) Ch 216 (1983) 2 All ER 4
[17] http://www.nalsarpro.org/CL/Modules/Module%201/Chapter5.pdf
[18](1976) 2 All ER 552, (1976) 1 WLR 676, CA (the Romalpa case) and R. Bradgate Commercial Law (2nd Edn) para 18.4

Lincoln's answer was well founded, namely, that if property in the foil never passed to the defendants with the result that the proceeds of sub-sales belonged in equity to the plaintiffs, section 95(1) [now CA 2006 section 860] had no application."

In Court of Rppeal, Roskill LJ, Golf LJ and Megaw LJ upheld the decision, and that Aluminium Industrie Vaassrn retained title to the unused Aluminium foil[19].

The limit on the efficacy of such provisions may need to be carefully explained to the seller, proceeding from basic principles. Firstly, what is retention of title and what is its significance? It is the right of the seller to retain ownership of the goods sold until payment, notwithstanding that he has parted with possession of the goods to the buyer. It is vital to bear in mind that, as a general rule, where a contract for the sale of foods has been entered into between the parties for goods in a deliverable state then, under the Sale of goods Act ownership of the goods will pass to the buyer at the time the contract is made, irrespective of whether the goods have been paid for or delivered. It will therefore be obvious that retaining ownership in goods delivered to the buyer but not paid for will be an extremely important right in the event of the buyer becoming bankrupt or going into liquidation. In the event of an insolvency practitioner disposing of the goods or interfering with them, the seller could bring legal proceedings against the practitioner for wrongful interferencewith the goods and claim damages for their market value. There are, however, a number of practical problems. In particular, mantelpiece of retention of title clause creates a charge over the goods and (in the case of a corporate buyer) that charge will be void unless registered at the Registrar of Companies. Registration is often considered not practical. So far as the effectiveness of the retention of title, a typical clause will provide further extension on the rights of the seller.

11.3.15 INTELLECTUAL PROPERTY

A significant asset of most businesses is the value of various intellectual property rights, which it owns. These can range from patents to copyright and design rights to protection through registered designs and trademarks to the existence of know-how (both technological and commercial) and other confidential information. If the business is in the high technology market or in a research based industry, these rights are likely to be of substantial value, e.g. if what is being acquired is a pharmaceutical business, patent protection may be vital to the profitability of the business. If the business is a computer software company, the copyright position will be relevant in that it will be important to ensure that the company does in fact have the right to license, use, exploit, etc., the software that it produces. If the business is based substantially on a franchise operation, trademarks and brand names will be fundamental.[20]

11.3.16 CONFIDENTIALITY

[19]http://en.wikipedia.org/wiki/Aluminium_Industrie_Vaassen_BV_v_Romalpa_Aluminium_Ltdrights of the seller

[20] http://www.nalsarpro.org/CL/Modules/Module%201/Chapter5.pdf

The need for and the scope of, a clause imposing an obligation on one or both parties to keep all matters connected with their agreement confidential will depend on the subject matter and the relationship between the parties. In many cases a short general clause will suffice. Where, however, as part of the agreement sensitive information is supplied by one party to the other (e.g. in a software license, or a company takeover or merger), then more detailed provision is called for. The need for secrecy may, for commercial reasons, be so strong that a party, e.g. a vendor of a business, may be advised to insist that the other give a separate detailed confidentiality undertaking before negotiations over the deal are commenced. Usually, the recipient of confidential information is required by the agreement to take certain steps to prevent it becoming public knowledge, for example, to keep in it a secure place when it is not in use, to take all reasonably practicable measures to prevent the information falling into the hands of unauthorized their parties and to limit access to the information to those of his employees who need to know or use it (and who sign a written undertaking to maintain it in confidence). The interests of the recipient are often safeguarded by a proviso that the confidentiality obligation does not extend to such information as it is already a part of the domain of public knowledge when it is disclosed to him or as afterwards may become a part of the same through its publication by the discloser of a third party Parties sometimes forget to include restrictions on use of the confidential information. Such a restriction may be just as important as an obligation of nondisclosure. The duration of the confidentiality obligations, and in particular whether they survive termination of the agreement, should be stated.[21]

11.3.17 ANNOUNCEMENTS

Companies may often wish to control the issue of public announcements about agreements they have made or are negotiating. Sometimes public statements are required, e.g., if a contracting party is listed on a Stock exchange and is required to notify significant transactions to the Exchange. The wording of the announcement may have an effect on the share price. Contracting parties sometimes agree to the text of a joint press release in the course of the contractual negotiations and attach the final form as a schedule to the contract.

11.3.18 TAXATION

An international sale will attract any applicable exchange controls or customs duties. A sale of goods will constitute a disposal of assets for the purposes of tax on capital gains. It goes without saying that any business transaction must be made to work satisfactorily from a tax point of view, and this will be a major consideration in devising a suitable structure.

11.3.19 INSURANCE

Parties to commercial contracts sometimes misconstrue an obligation on a party to insure against a risk as a statement that party is liable for any losses associated with that risk. Insurance clauses should not be used as a substitute for statements as to which of the contracting parties bears the risk of a particular event happening. The ability of a party to insure against a risk is a

[21] Ibid

factor to be taken into account by the court when assessing whether an exemption clause is reasonable.

11.3.20 TERMINATION

Sometimes agreements are stated to have a fixed term. In such cases the parties will often intend that the agreement will terminate automatically by expiry at the end of that period and it is better to state this rather than assume that this is implicit from the fixed term. If the agreement may terminate earlier, e.g., under another clause allowing for termination in the event of breach or insolvency, the clause providing for the fixed term should be stated to be subject to earlier termination as provided elsewhere in the agreement. Sometimes agreements allow a party to terminate the agreement on notice to the other party (i.e. without specifying a cause, such as for breach or insolvency). If the agreement is silent as to its term, it may (in some situations) be interpreted as being terminable by either party on giving reasonable notice. To avoid such uncertainties it is desirable to specify the term of the contract.

11.3.21 REMEDIES

Rescission for misrepresentation: Wherever a party is induced to enter into a contract by a material misrepresentation, whether innocent or fraudulent, he has a prima facie right to rescind ab inito, although the contract will normally continue to force unless he so elects. Where aperson has entered into contract after a misrepresentation has been made to him, notwithstanding that the misrepresentation has become a term of the contract or the contract has been performed, then, if that person would otherwise be entitled to rescind the contract without alleging fraud, he is entitled to rescind the contract. This right is subject, however, to the power of a court or arbitrator to award damages in lieu of rescission if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresenting and the loss that would be caused if the contract were upheld as well as to the loss to the other party if rescission was permitted.

Repudiation: Any unequivocal refusal by a contracting party to perform his contractual obligation (including self-induced frustration. As to frustration including self-induced frustration) may amount to a repudiation. But repudiation is a serious matter and not to be lightly inferred[22]. The repudiation may be express, or it may be implied, the implication may be made by statute, or in law, as where a party incapacitates himself from performing his contractual obligations, (As by a supplier wrongfully reselling goods) or completely fails to perform his side of the bargain. If he elects to keep the contract alive, each must perform his own side of the contract, but the innocent party may claim damages by reason of the breach. However, if he elects to rescind, the effect is to discharge both parties from any duty of further performance of the primary promises made under the contract but, whilst the guilty party remains liable for damages for past and future breaches, the innocent party is liable for damages only for past breaches.

[22]*Ross T Smyth & Co Ltd. v T.D. Bailey, Son & Co. (1940) 3 All ER 60 at 71 HL per Lord Wright*

11.3.22 DAMAGES

An action for damages may lie at the suit of the buyer for breach of contract, tort of misrepresentation.

1. Specific enforcement: Two equitable and discretionary remedies may be available. First, in an action for breach of contract to deliver unique, specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. Second, the buyer may obtain an injunction preventing the supplier disposing of those goods to a third party.

2. Damages for breach: This paragraph deals with the situation where a buyer has an action in damages for breach of the sale contract against his seller. The rules here will differ according to whether or not the breach by the seller amounts in law to a failure to deliver the goods.

3. Damages for non-deliver: This category covers not only the situation where no goods are delivered at all, but also where the goods tendered by the seller are lawfully rejected and the contract discharged on the grounds that they do not conform to the contract in quantity or quality. The Sale of Goods Act provides that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Subject to the ordinary rule of remoteness, the Act lays down a prima facie rule for measuring damages where there is an available market in which the buyer may obtain a replacement.

4. Damages for other breaches: This category covers not only the situation where the seller is only in breach of warranty, but also that where the buyer elects, or is completed, to treat a breach of condition as a breach of warranty. The measure of damages is subject to the ordinary rules of remoteness.

11.3.23 PROPER LAW AND JURISDICTION

In the case of foreign element in the contract, it may become necessary, in the event of a dispute between the parties, for a court or arbitrator to decide whether the contract is governed by the Indian law or by some foreign law. There may also be uncertainty as to which courts have jurisdiction to hear the case, e.g., if either the offer or acceptance of the contract took place outside India, or if any services are to be performed under the contract or goods are to be delivered outside India. In The absence of a binding agreement between the contracting parties in relation to the law and jurisdiction to be applied, it will be necessary to fall back on rules on conflicts of laws and jurisdiction. Applying such rules may lead to an undesired outcome for one of more parties (i.e. being required to litigate in a foreign country and / or have the contract interpreted under foreign laws). To avoid such an outcome it is important to specify which law shall govern the contract and which courts shall have jurisdiction.

11.3.24 EXCLUSIVE AND NON-EXCLUSIVE JURISDICTION

If it is agreed that any proceedings between the parties in connection with the contract should be brought only in the Indian courts, the jurisdiction of those courts should be expressed to be exclusive. The effect of this will be that judgments given by a foreign court in proceedings brought contrary to an express agreement between the parties that another court should have jurisdiction will not be recognized or enforced. On the other hand, if non-exclusive Indian court jurisdiction is specified, it will be possible to bring proceedings in a foreign court on a matter over which that court has jurisdiction. Where cross border rights (e.g. intellectual property rights) are the subjects of the agreement, it may be in the owner's interest to insist on the inclusion of this term in order to reserve the right to take protective action abroad. If an urgent injunction might be needed (e.g. to prevent disclosure of confidential information), it may be desirable to reserve the right to bring interlocutory proceedings in the other party's home jurisdiction.

11.3.25 ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

Arbitration is a process by which disputes between two or more persons are determined with final and binding effect by impartial third person acting in a judicial manner, rather than by a court of law. The arbitrator's authority is derived from the agreement of the parties concerned. In contrast to proceedings in court, arbitration takes place in private (this may be an important reason for preferring arbitration to court proceedings), and the contracting parties may in general confer on the arbitrator such procedural powers as they think fit. Arbitration is sometimes thought to be speedier and less expensive than a court action. Arbitration is not the only alternative to court proceedings. Reference to an expert may be preferred, particularly if a technical, rather than a legal, issue needs to be decided. In recent years, mediation and other forms of non-binding ADR (Alternative Dispute Resolution) have become popular. In the majority of agreements, and where both parties are domiciled in India, the parties will agree to refer disputes to a sole arbitrator, leaving the choice of arbitrator to be agreed on by them. Where there may be practical difficulties in agreeing on in the more complex commercial agreements, it may be advisable to provide for the appointment of two or more arbitrators, presided over by an umpire. Usually the umpire is appointed by the arbitrators, and has no part in proceedings unless the arbitrators fail to agree, in; which case the umpire will enter the proceedings and make an award as if he were sole arbitrator. It may be thought advisable tomake the basic rules of procedure clear in the initial agreement. Arbitration clauses are usually to be found in agreements in which the parties are more or less on an equal footing, and which confirm and formalize their desire to cooperate in a project or transaction. Typical examples might be shareholders' agreements, joint ventures, research and technical aid agreements, partnership deeds and certain contracts for services. In this type of transaction the parties will often wish difference to be settled quickly inexpensively, and with a minimum of animosity or publicity. An arbitration clause may not be appropriate where one of the parties has, by the very nature of the transaction, the upper hand, as e.g. in an agency or franchise agreement or contract of employment, or financing and loan agreement. Each case must, of course, be treated on its merits.[23]

[23]http://www.nalsarpro.org/CL/Modules/Module%201/Chapter5.pdf

11.4 SUMMARY

An electronic contract is an agreement created and "signed" in electronic form -- in other words, no paper or other hard copies are used. The processes of Artificial Intelligence includes forming intentions, making choices and giving and withholding consent which means humans can give substantial autonomy in decision making which permits computer systems to complete highly complex tasks involving precise judgements. Now the question which arises in our minds is that whether a computer system can replicate the processes that are regarded as free will of the humans and what would be the legal consequences of it. These are the questions which make people apprehensive while entering into a commercial contracts with the aid of a computer system. Contractual rights must be determined with reference to individuals, the need of the hour is to ascertain the whether the existing contract law doctrine can cope with the new laws of technology.

An agent has apparent authority if a party acts in such a way so as to make it reasonable for a third person to believe that the agent is acting on its behalf. In the online world, a computer program may act as an online agent, and a party will presumably be bound by offers and acceptances performed by a computer or program acting on a party's behalf.

In long or complex agreements it is good practice to group all defined terms, together with their definitions, in a separate ‘Definitions’ clause, and to indicate elsewhere in the test of a document that a term has been so defined by starting the word or words defined with a capital letter. It is convenient to list the defined terms in alphabetical order, in a clear, easily assimilated layout. Digital Signature legislation is an attempt to put electronic documents and signatures on an equal footing with paper documents and ink signatures The question therefore is whether the courts will consider E-mail and other forms of Internet-based communication to be essentially instantaneous, in which case the mailbox rule will not apply, or to be more analogous to the mail or telegraph, where the rule does apply. A Web page can be set up so as to eliminate any ambiguity as to when or how a contract is entered into, thereby eliminating concern over application of the mailbox rule. The problem often occurs when parties exchange pre-prepared form contracts, purchase orders and the like, with conflicting terms, resulting in the so-called "battle of the forms." As long as there is agreement on key terms such as number, price, timing, etc., the parties may not even notice that conflicts exist as to some of the more obscure terms such as choice of law and choice of forum clauses, arbitration clauses and the like.

Sometimes electronic contracting takes place in much abbreviated form, through the exchange of basic terms such as model number, price, quantity and the like. In those circumstances, legal "boilerplates," such as warranties, payment terms and conditions, delivery terms, how nonconforming goods will be handled, etc., may be omitted from the contract terms altogether. In that case the missing terms may be inferred from prior course of dealing between the parties, trade usage or the like. Parties to electronic commerce may wish to avoid these ambiguities by specifying how these matters will be handled in their master electronic trading partner

agreement or in the master vendor agreement which covers all transactions, whether electronic or on paper.

Sometimes an agreement is stated not to come into effect until the happening of an event (this might refer, e.g., to finance being raised or government approvals being obtained or facilitating of base materials by the concerned contracting to use the phrase condition precedent' but the consequences of the condition not being met should be clearly stated. In particular, does the agreement as a whole automatically come to an end or do certain provisions continue? Is there a time limit for conditions to be met? All these details should be specified in the agreement to avoid confusion.

Persons unfamiliar with contracting on the Internet frequently ask what facilities exist for making and obtaining payment over the Internet, and whether such facilities are sufficiently safe. The answer is that such facilities do exist in the form of online credit card transactions, which are in wide use today. Electronic transfers of funds are governed by a series of statutes and regulations. Those same statutes and regulations would generally apply to instructions to transfer funds or change a credit card account made over the Internet.

Where a contract becomes impossible to perform, or is capable of performance only in a manner substantially different from that originally envisaged, then in the absence of express provision by the parties further performance is excused under the common law doctrine of frustration. This doctrine only operates where the frustrating circumstances are not due to the fault of either party but it does not follow that in all contracts any act of negligence will deprive a party of the defence of frustration. To avoid bringing the contract to an end under the law of frustration, a 'force majeure' clause is frequently incorporated into Indian law contracts, under which the parties expressly agree to exempt each other from performance of the contract or liability for breach of contract where the failure to perform is due to factors beyond that party's control.

The question of retention of title on of has been the subject of much discussion. It is the right of the seller to retain ownership of the goods sold until payment, notwithstanding that he has parted with possession of the goods to the buyer.

The need for and the scope of, a clause imposing an obligation on one or both parties to keep all matters connected with their agreement confidential will depend on the subject matter and the relationship between the parties The need for secrecy may, for commercial reasons, be so strong that a party, e.g. a vendor of a business, may be advised to insist that the other give a separate detailed confidentiality undertaking before negotiations over the deal are commenced.

Sometimes agreements are stated to have a fixed term. In such cases the parties will often intend that the agreement will terminate automatically by expiry at the end of that period and it is better to state this rather than assume that this is implicit from the fixed term. Sometimes agreements allow a party to terminate the agreement on notice to the other party (i.e. without specifying a cause, such as for breach or insolvency).). If the agreement is silent as to its term, it may (in some situations) be interpreted as being terminable by either party on giving reasonable notice. To avoid such uncertainties it is desirable to specify the term of the contract.

Wherever a party is induced to enter into a contract by a material misrepresentation, whether innocent or fraudulent, he has a prima facie right to rescind ab inito, although the contract will normally continue to force unless he so elects.
Any unequivocal refusal by a contracting party to perform his contractual obligation (including self-induced frustration. As to frustration including self-induced frustration) may amount to a repudiation.
An action for damages may lie at the suit of the buyer for breach of contract, tort of misrepresentation.

In the case of foreign element in the contract, it may become necessary, in the event of a dispute between the parties, for a court or arbitrator to decide whether the contract is governed by the Indian law or by some foreign law. There may also be uncertainty as to which courts have jurisdiction to hear the case, e.g., if either the offer or acceptance of the contract took place outside India, or if any services are to be performed under the contract or goods are to be delivered outside India. If it is agreed that any proceedings between the parties in connection with the contract should be brought only in the Indian courts, the jurisdiction of those courts should be expressed to be exclusive. On the other hand, if non-exclusive Indian court jurisdiction is specified, it will be possible to bring proceedings in a foreign court on a matter over which that court has jurisdiction.

Arbitration is a process by which disputes between two or more persons are determined with final and binding effect by impartial third person acting in a judicial manner, rather than by a court of law. The arbitrator's authority is derived from the agreement of the parties concerned. Arbitration is not the only alternative to court proceedings. Reference to an expert may be preferred, particularly if a technical, rather than a legal, issue needs to be decided. In recent years, mediation and other forms of non-binding ADR (Alternative Dispute Resolution) have become popular. Arbitration clauses are usually to be found in agreements in which the parties are more or less on an equal footing, and which confirm and formalize their desire to cooperate in a project or transaction.

11.5 GLOSSARY

1. FORCE MAJEURE- a natural and unavoidable catastrophe that interrupts the expected course of events; Act of god.

2. *AB INITO*- It is a Latin word, meaning 'from the beginning'

3. CHARTERPARTY: A deed between the ship owner and trader for the hire of a ship and the delivery of cargo.

11.6 SAQS

1. TICK THE RIGHT ANSWER:

(i) If the agreement has been drawn up in versions in different languages, it is mandatory to state which is the authoritative versions in different languages.

(a) true

(b) false

(ii) Under the provision of Section 13(3) of The Information Technology Act, 2000, the acceptance is valid even if the message is not read.

(a) True

(b) False

(iii) "…in a commercial contract where price is left to be agreed, a reasonable price cannot be fixed and that, even where there is an arbitration clause, that clause cannot be used to determine the price because "unless the price has been fixed, the agreement is not there"- this is held in the case of:

(a) May and Butcher Ltd. v R

(b) Arenson v Casson Beckman Rutley & Co

(c) Burgess v Purchase & Sons (Farms) Ltd

(d) None of above

(iv) The case of Joseph Constantine SS Line Ltd. v Imperial smelting Corn Ltd is related with,

(a) Force Majeure

(b) conditions precedent

(c) both of above

(d) none of above

(v) If there is no fixed term in an agreement' it may be interpreted as being terminable by either party on giving reasonable notice. It is true:

(a) in some situations

(b) in every situation

(vi) 'The Sale of Goods Act provides that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.' This is also applicable in the case of e-contract.

(a) True

(b) False

(vii) Jurisdiction is always a major issue in the case of foreign element in the contract.

(a) True

(b) False

(viii) Arbitration is sometimes thought to be speedier and less expensive than a court action.

(a) True

(b) False

11.7 REFERENCES

1.http://corpor ate.findlaw.com/business-operations/legal-issues-in-contracting-on-the-internet.html#sthash.Vv0ekhv3.dpufIt

2. http://www.nalsarpro.org/CL/Modules/Module%201/Chapter5.pdf
3. http://www.articlesbase.com/cyber-law-articles/econtracts-in-cyber-space-502731.html?en
4.http://www.legalserviceindia.com/article/l350-E-contracts-&-issues-involved-in-its-formation.html
5. Cyber and E-Commerce laws, P. M. Bakshi and R. K. Suri
6. Gupta & Agarwal, Cyber Law; Ist edition, Premiere Publishing Company

11.8 SUGGESTED READINGS

1. Cyber and E-Commerce laws, P. M. Bakshi and R. K. Suri
2. Gupta & Agarwal, Cyber Law; Ist edition, Premiere Publishing Company

11.9 TERMINAL QUESTIONS AND MODEL QUESTIONS

1. Write an essay on the legal issues arising in cyber contract.

2. Can mail-box rule apply on the e-contracts?

3. Can one apply traditional rule regarding an agent on a computer program, which may act as an online agent?

11.10 ANSWER SAQS

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