UNIT -12

CYBER CONTRACT AND IT ACT 2000

STRUCTURE

12.1 INTRODUCTION

In simple term a cyber-contract is a legal contract made between parties using the cyber medium, which includes e-commerce, e-services, and e-governance, and so forth, to operate in an online mode. Not much attention is given in India towards drafting of a proper contract framework, which is appropriate to the transaction. From time to time various attempt

has been made by many researchers to make a globally enforceable cyber contract,considering the creation and enforceability of electronic contracts, coupled with electronic commerce legislative direction. This has resulted in the identification of certain steps and measures that drafters of electronic and online agreements can do or avoid in order to achieve greater certainty that such electronic agreements will stand as enforceable contractual instruments. It is challenging for the Governments, fundamental legal concepts such as contracts, to develop flexible frameworks to protect traditional contract law while recognizing and expanding it to include technology's borderless capabilities and maintain integrity for all legal performers like judges, lawyers, legislators, and business people. In the current situation, the business and legal limitation spin around paper technology, which pose a challenge to conducting business in today's information economy. The electronic contracts with their uniqueness, create tremendous uncertainty in international legal and business environments because the law is slow to respond to new technology. In the previous unit we throw light on the issues related with the cyber contract. Now we discuss the relevant law to the cyber contract.

12.2 OBJECTIVES

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

- Concluding the contract

- Validity of cyber contract and related definitions

- Legal recognition of electronic records

- Digital Signature
- Communication in electronic form
- Relevant provisions of IT Act

- Determination of place of business

- About IT Act 2000

12.3 SUBJECT

12.3.1 CYBER CONTRACT OR E-CONTRACT

An e-contract can also be called "Click to Agree" contract, which is commonly used with downloaded software. The user or acceptor clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed. According to the IT Act, 2000 in India, 'it is the provision of legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce," or e-commerce which involve the use of alternatives to traditional paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the government agencies. Accordingly there were amendment be done in the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act,

1891, and the Reserve Bank of India Act, 1934, and for matters connected therewith or incidental thereto.[1]'

"Click-Wrap," "Click-Through," or "Web-Wrap" contacts are electronic contacts that require the user to scroll through terms and conditions (or multiple Web pages on a Web site) and to expressly confirm the user's agreement to the terms and conditions by clicking on a button, such as,stating "I Accept" or "I Agree" or some similar statement, prior to being able to complete the transaction. Click-Through contracts are often found in software products or on Web sites. "Browse-Wrap" contracts are terms and conditions of use that to do not require the express agreement of a user. They are often located in software or are posted on a Web site and may make some statement that indicates use of the software or Web site constitutes the user's agreement to the terms. Frequently such terms may not have been brought to the attention of the user.

"Electronic Mail (e-mail)," is a method of sending an electronic message from one person to another using the Internet, it is a convenient method of time-delayed direct communication. While an e-mail may be a singular message, it also possesses the ability to form contracts. Consequently, e-mail is viewed as both a formal and informal communications medium. People often regard informal e-mail arrangements and business correspondence as non-contractual events. However, courts have found telegrams "with typed signatures, letterhead and/or logos [to] provide the 'signature' necessary for a binding contract"[2]

12.3.2 THE INFORMATION TECHNOLOGY ACT, 2000 – SOME PERSPECTIVE IN THE LIGHT OF ELECTRONIC CONTRACT

The Parliament of India has passed its first Cyber-law, the Information Technology Act, 2000 which provides the legal infrastructure for E-commerce in India. The said Act has received the assent of the President of India on the 9th June, 2000.

The object of The Information Technology Act,2000 as defined therein is as under:-
"An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto"
The said Act aims to provide for the legal framework so that legal sanctity is accorded to all electronic records and other activities carried out by electronic means. The said Act further states that unless otherwise agreed, an acceptance of contract may be expressed by electronic means of communication and the same shall have legal validity and enforceability. The said Act purports to facilitate electronic intercourse in trade and commerce, eliminate barriers and

[1]The Information Technology Act of 2000 Ministry Of Law, Justice And Company Affairs, Legislative Department, India;
[2] http://www.irma-international.org/viewtitle/7499/

obstacles coming in the way of electronic commerce resulting from the glorious uncertainties relating to writing and signature requirements over the Internet.

The act is not applicable on:
(a) a negotiable instrument as defined in section 13 of the Negotiable Instruments Act, 1881;
(b) a power-of-attorney as defined in section 1A of the Powers-of-Attorney Act, 1882;
(c) a trust as defined in section 3 of the Indian Trusts Act, 1882;
(d) a will as defined in clause (h) of section 2 of the Indian Succession Act, 1925 including any other testamentary disposition by whatever name called;
(e) any contract for the sale or conveyance of immovable property or any interest in such property;
(f) any such class of documents or transactions as may be notified by the Central Government in the Official Gazette.

12.3.2.1 DEFINITIONS

The ITA-2000 defines many important words used in common computer parlance like 'access', 'computer resource', 'computer system', 'communication device', 'data', 'information', 'security procedure' etc. The definition of the word 'computer' itself assumes significance here.

'Computer'[3] means any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related tothe computer in a computer system or computer network;

The word **'computer system'**[4] which means a device or a collection of devices with input, output and storage capabilities. Interestingly, the word 'computer' and 'computer system' have been so widely defined to mean any electronic device with data processing capability, performing computer functions like logical, arithmetic and memory functions with input, storage and output capabilities.

The word **'communication devices'** inserted in the Information Technology Amendment Act, 2008 has been given an inclusive definition, taking into its coverage cell phones, personal digital assistance or such other devices used to transmit any text, video etc. like what was later being marketed as iPad or other similar devices on Wi-Fi and cellular models.

12.3.2.2 LEGAL RECOGNITION OF ELECTRONIC RECORDS

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

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[3]Section 2(i) of IT Act, 2000
[4] Section 2(l) of IT Act, 2000

Section 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

According to the section 2(t) the "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

12.3.2.3 DIGITAL SIGNATURE

'Electronic signature' was defined in the ITAA -2008 whereas ITA -2000 covered in detail about digital signature, defining it and elaborating the procedure to obtain the digital signature certificate and giving it legal validity. Digital signature was defined in the ITA -2000 as "authentication of electronic record" as per procedure laid down in Section 3 and Section 3 discussed the use of asymmetric crypto system and the use of Public Key Infrastructure and hash function etc.

This was later criticized to be technology dependent i.e. relying on the specific technology of asymmetric crypto system and the hash function generating a pair of public and private key authentication etc.

Thus Section 3, in which originally "Digital Signature" was later renamed as "Digital Signature and Electronic Signature" in ITAA - 2008 thus introducing technological neutrality by adoption of electronic signatures as a legally valid mode of executing signatures. This includes digital signatures as one of the modes of signatures and is far broader in ambit covering biometrics and other new forms of creating electronic signatures not confining the recognition to digital signature process alone.

It is relevant to understand the meaning of digital signature (or electronic signature) here. It would be pertinent to note that electronic signature (or the earlier digital signature) as stipulated in the Act is NOT a digitized signature or a scanned signature. In fact, in electronic signature (or digital signature) there is no real signature by the person, in the conventional sense of the term. Electronic signature is not the process of storing ones signature or scanning ones signature and sending it in an electronic communication like email. It is a process of authentication of message using the procedure laid down in Section 3 of the Act.

Besides, duties of electronic signature certificate issuing authorities for bio-metric based authentication mechanisms have to be evolved and the necessary parameters have to be formulated to make it user-friendly and at the same time without compromising security.

12.3.2.4 VALIDITY AND FORMATION OF ELECTRONIC CONTRACT

While discussing the topic of "The Legislative Aspects of Electronic Contract in India", it is referred to Sec 10A of the Information Technology Act, 2000 (hereinafter referred to as IT Act) with an emphasis that the said section accorded legal validity to an electronic contract in India, though the Indian Contract Act 1872 does not exclude electronic contract. The Sec 10A

of IT Act provides the legislative authority to electronic contract. It was inserted through an amendment in 2008. It corresponds to the Sec 11 of the UNCTRAL Model Law on Electronic Commerce 1996. Section 10A of the IT Act States:

"*Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.*"

The 2008 amendment to the IT Act which introduced Sec 10A provides for a greater acceptance to the electronic contract, but the Article 11(2) has not been referred anywhere in the IT Act. The Guide to the Enactment of the Model Law stresses that the provisions of the Article 11(2) is a balancing act to balance the need of the Model Law with the requirement of the prevailing national laws on Contract. The only reason of not putting Article 11 (2) in IT Act is because the Indian Contract Act provides for no such restriction and maybe, also because the E-Governance policy of the Indian Governments supports electronic commerce and electronic contracts. But, even though there are no issues currently on this point but there may arise a situation where the Contract, owing to certain traditional practices required for a written contract but the Contract was executed in Electronic form. In such a scenario it would be interesting to note how Courts will interpret the provisions of the IT Act in case Electronic Contract in absence of a provision like that of Article 11(2) of the Model Law[5].

12.3.2.5 COMMUNICATION IN ELECTRONIC FORM

As noted in the previous units, the formation of an enforceable contract requires that clearly stated terms and conditions of the proposed bargain be presented by one party and that the other party unequivocally communicate its acceptance to the offering party.

As with the introduction of other traditional forms of communication there has been a period of time during the rise of the Internet as a mainstream form of communication during which the law has struggled. The Internet and ability to communicate electronically via means such as electronic mail has introduced numerous complications that often results in situations where it is not necessarily clear if an offer has been made or whether acceptance of an offer has been communicated. As between the originator and the addressee of the electronic record, a declaration of Will or other statement should be valid, effective and enforceable even though it is in the form of a data message. There are two main methods to forming cyber contract: click wrap and e-mail.

Click wrap contracts are most commonly found in the workings of the World Wide Web. The usual formation of such a contract begins with the web vendor placing information about a product on the web. This information could be in the form of an advertisement, an invitation

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[5]https://indiancontractlaw.wordpress.com/2014/02/10/validity-of-electronic-contract-in-india/

to offer, or an offer of a product or service for the due consideration. There is usually a hypertext order form within close electronic proximity which the consumer fills out and this form will contain a button labelled 'I Accept', 'Submit', 'Purchase' or some such phrase. When the computer clicks on this button, the order is sent to the vendor, who usually reserves the right to proceed or not to proceed with the transaction[6].

The text of email messages is the digital equivalent of a letter. E-mail without being in existence physically, is still capable of performing all the functions of a usual email. It can be used to send offers and acceptances. Due to some technical reasons e-mail delivery systems is different from standard mail delivery system and this creates complications for e-contracting. The e-mail's journey, while travelling through the internet, may involve travelling across the world even though the person receiving the message is in the next building. This journey takes a moment, sometimes minutes, until the recipient receives the email message. This fact does not differ even, if the internet service provider for the offeree (i.e. Originator) is the same as for the offeror (i.e.Addressee), as would be the case if they are members in the corporation or the university email network. This is because the transmission of email through the network depends entirely on the viability of the ISP for the offeree or the offeror. For example, if the offeree is in London and the offeror in New York, then the journey should start from London's internet service provider of the offeree and go to another network service provider in the Atlantic and perhaps it will then need two or more connections prior to it reaching the offeror's service provider in New York. The speed of email messages depends, in these cases, on whether one or more of these service providers are busy with millions of applications from other internet users. Considerable delays may occur in email communication between when a message is sent and when it is received by the recipient. These delays result from the complex path over which the email is sent. For example, if person An in London sends an email message to person B in Nigeria, usually there will be no direct link between the computer systems. This explains why, on occasion, an email takes a longer time than usual to reach the recipient. It can be said that email is not an instantaneous form of communication, because there can be gap in time between dispatch and deemed receipt. This conclusion was recently pointed out in a Singapore case, in the judgment of Rajah JC, in *Chwee Kin Keong v Digilandmall.com Pte Ltd*[7] "… unlike a fax or a telephone call, it is not instantaneous. Emails are processed through servers, routers and internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient accesses the email, but in this respect email does not really differ from mail that has not been opened."

In considering these and other related issues and concerns, it is important to understand that electronic communications are merely another form of communication – traditional contract principles and rules are not changed – rather the focus becomes how to achieve compliance with common law and statutory rules concerning contract formation.

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[6] http://rostrumlegal.com/blog/e-contracts-mail-box-rule-and-legal-impact-of-the-information-technology-act-2000-by-atul-kumar-pandey/

[7] (2005)SGCA 2

12.3.3 RELEVANT PROVISIONS OF IT ACT

The IT Act provision relevant in the context of cyber contract, giving them legality are as follows:

Section 11. An electronic record shall be attributed to theoriginator—

(a) if it was sent by the originator himself;
(b) by a person who had the authority to act on behalf ofthe 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 sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;

The term originator **does not include an intermediary**. Section 2(w) clear the meaning of term 'intermediary':

"intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes tele-com service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.[8]

Usually, an acceptance is considered as having been sent at the time the acceptance went out of the possession of the offeree and into the possession of the third party allowed to receive it. The third party, of course, is neither an agent of the offeree nor of the offeror, but in the situation of email, it is the ISP. Even though the offeree's server is not under the offeree's control, it is considered a provider for the internet service to the offeree and likewise, it is not agent to the offeree. And now it is clear from above provision that in the case of e-contracting ISP does not included in the term 'originator' i.e. offeree. Rather it is an independent entity, such as a company server or a university service provider.

Illustration

This section can best be understood with the help of following illustrations.
Illustration 1 Neha uses her gmail.com email account to send an email to Ramesh. Neha is the originator of the email.

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[8]Substituted by Information Technology (Amendment) Act, 2008 (10 of 2009), s.4 for cl. (w) (w.e.f. 27-10-2009). Prior to its substitution cl (w) read as under : "(w) "intermediary" with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;"

Illustration 2 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 3 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 vacationfor a week and will reply to your email assoon 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 addresseethat the acknowledgment of receipt of electronic record begiven in a particular form or by a particular method, anacknowledgment may be given by—

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

(b) any conduct of the addressee, sufficient to indicate tothe 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 sub-section 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 vacationfor a week and will reply to your email assoon 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 electronicrecord shall be binding only on receipt of an acknowledgment of such electronic record by him, the nunless acknowledgment has been so received, the electronic record shall be deemed to have been nevers ent 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 electronicrecord shall be binding only on receipt of suchacknowledgment, and the acknowledgment has not beenreceived by the originator within the time specified oragreed or, if no time has been specified or agreed towithin a reasonable time, then the originator may givenotice to the addressee stating that no acknowledgmenthas 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 theaforesaid time limit he may after giving notice to theaddressee, treat the electronic record as though it hasnever been sent.

Illustration: Rakesh sends the following email to Ramesh: Further to our discussion, I am ready topay Rs 20 lakh for the source code forthe XYZ software developed by you. Letme know as soon as you receive thisemail. Ramesh does not acknowledge receipt of this email. Rakesh sends him another email as follows: I am resending you my earlier email inwhich I had offered to pay Rs 20 lakh forthe source code for the XYZ softwaredeveloped by you. Please acknowledgereceipt 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.

12.3.4 CONCLUDING THE CONTRACT

The final step to understand e-contracting is the issue of when and where the contract is formally made or concluded. The general rule is that contract is made when acceptance is communicated from the offeree to the proposer/offeror. Accordingly, there is no contract where the acceptance is not communicated to the proposer, the reason being that it would be unfair to hold proposer by an acceptance of which he has no knowledge. The location of the formation is decided according to where the offeror receives notification of the acceptance.

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.

The conclusion of distance contracts has been one of the controversial issues in the law of contract formation. It raises some question marks, especially with regard to the type of rules that should govern the timing of contract formation.

Applying the provision of section 13(1), if 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.

The general rule application will create uncertainty in what is the definitive time of considering the email formed. If A sends his email acceptance late Friday afternoon and the recipient B, left his office at lunchtime not to return until the following Monday, at what time can we consider the time of receipt? Is it on Monday morning when B returns to work or at any time when the B opens his email account and accesses the particular email, even if it was out of the working hours?

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 bythe addressee;

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

Thus according to the provision of 13(2) the time of receipt of email acceptance shall be the time when it enters the designated computer resource of B, viz. in the office computer.

Another example is as follows:

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. 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.

12.3.5 DETERMINATION OF PLACE OF BUSINESS

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.

In relation to click wrap a different method is involved. The communication between the web client and the server is instantaneous. If the communication between the parties is broken for whatever reasons, the other party will be immediately notified. This is due to the built in self-checking mechanism known as 'checksum'. Therefore, when dealing with click wrap contracts, the above rule is not applicable as compared to e-mail contracting because the line of communication in click wrap is continually verified, which implies that a communication once sent will be instantly received.

12.3.6 CASE LAW ON ELECTRONIC CONTRACT

The issues relating to electronic contract's place and time were addressed by the Allahabad High Court in *P.R. Transport Agency vs. Union of India & others*[9].

The defendant, 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

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[9] AIR2006All23, 2006(1)AWC504

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. Bharat Coking Coal Ltd. objected to the "territorial jurisdiction" of the Allahabad High Court on the grounds that no part of the cause of action had arisen within U.P. The court held that contracts made by telephone, telex or fax, are 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. 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. 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." 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, the place of business is located in U.P. and hence Allahabad High Court was held to have jurisdiction[10].

The making of a contract is part of the cause of action and a suit on contract can always be filed at the place where it was made. Ordinarily, acceptance of an offer and its imitation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is a part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed.

12.3.7 ABOUT IT ACT 2000

The IT Act 2000 attempts to change outdated laws and provides ways to deal with cyber-crimes. It gave the way so that people can perform purchase transactions over the Net through credit cards without fear of misuse. The Act offers the much-needed legal framework so that information is not denied legal effect, validity or enforceability, solely on the ground that it is in the form of electronic records. In view of the growth in transactions and communications carried out through electronic records, the Act seeks to empower government departments to accept filing, creating and retention of official documents in the digital format. The Act has also proposed a legal framework for the authentication and origin of electronic records/communications through digital signature. From the perspective of e-commerce in India, the IT Act 2000 and its provisions contain many positive aspects. Firstly, the implications

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[10] rostrumlegal.com/blog/e-contracts-mail-box-rule-and-legal-impact-of-the-information-technology-act-2000-by-atul-kumar-pandey/

of these provisions for the e-businesses would be that email would now be a valid and legal form of communication in our country that can be duly produced and approved in a court of law. Companies shall now be able to carry out electronic commerce using the legal infrastructure provided by the Act. Digital signatures have been given legal validity and sanction in the Act. The Act open the doors for the entry of corporate companies in the business of being Certifying Authorities for issuing Digital Signatures Certificates. The IT Act also addresses the important issues of security, which are so critical to the success of electronic transactions. The Act has given a legal definition to the concept of secure digital signatures that would be required to have been passed through a system of a security procedure. Under the IT Act, 2000, it shall now be possible for corporates to have a statutory remedy in case if anyone breaks into their computer systems or network and causes damages or copies data. The remedy provided by the Act is in the form of monetary damages, not exceeding Rs. 1 crore.[11]

12.13.8 SECURITY LAPSE IN ONLINE TRANSACTION AND INFORMATION TECHNOLOGY ACT

Today plastic money is the convenient, easy and fashionable alternative to wads of paper money. With one swipe, credit cards have changed the way we live. Credit card fraud involves withdrawal of funds and obtaining of goods and services by using an unauthorized account. Otherwise inaccessible personal information stored on computers is stolen in order to use a card. Due to the virtual explosion of credit card business throughout the world, security has become critical in the entire process. In India, credit card companies make a provision in their contract with the client that they, the company, would not be liable for the fraudulent transaction unless the client loses his/her card and reports the loss immediately. Sometimes the banks and credit card companies try to save their skin by inserting a clause in the relevant contract. This is purported to absolve the company in case a fraud occurs on the stolen card and the client fails to notify the loss in time. This unilateral provision however has not stood the test of legal scrutiny. The courts have placed the burden of loss on the issuers. Fraud through fake cards is not as rampant in India as in the USA. Techniques have been developed whereby the number and other information on the magnetic strip is erased and a new number is embossed. When the card does not work on the swiping machine, the merchant manually processes the details of the card to complete the sale. This procedure is called skimming of the cards. In the USA, identity theft is also quite prevalent and is supposed to be one of the fastest growing offences in America. The fraudsters adopt another person's identity to gain access to their monetary sources. In the case of online transactions, 'site cloning' is resorted to where the site clone created is made to look like the original site in order to obtain the credit card details of unsuspecting customers. Similarly, false merchant sites are also created where cheap goods lure customers into giving their card details. Visa has devised a Payer Authentication System based on PIN similar to the system used on ATM cards. This is a channel between the bank and the customer used to authorize online transactions. With the increase in cross border

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[11]http://www.cyberlawsindia.net/Information-technology-act-of-india.html

ecommerce the issuers in India will have to update their arsenal to combat the forgers on the same lines as their Western counterparts.

The Information Technology Act and Rules, passed in 2000, provide penalties for the tampering of computer source documents and hacking of computer systems. No specific mention has, however, been made of Credit cards or financial transactions. The RBI has formed the Credit Information Bureau of India (CIBIL) in collaboration with Dun and Bradstreet who will maintain the records of all individuals who want to avail of finance from banks and credit card companies in India.

So far as Indian legal position is concerned, any offence pertaining to online payment through credit cards will come within the purview of Information Technology Act, 2000 read with relevant provisions of Indian Penal Code, 1860. Section 378 of the Code defines the term "theft" as follows: "Whoever intends to take dishonestly, any property, out of the possession of any person without the consent of that person moves the property in order to such taking, is said to commit theft." In order to commit theft following elements are required to be satisfied:

(a) The intention must be dishonest.

(b) Such property must be movable in nature.

(c) Such property must be taken out of the possession of its owner.

(d) Such property must be taken without the consent of the owner.

(e) Such property must be removed from its original place to another.

This definition, if interpreted in strict sense, does not include the online theft of credit card information. But, if a merchant dishonestly obtains the blank purchase slip and forges the signature of the cardholder's signatures on it and thereafter obtains the payment from bank, he can be booked under the offence of forgery.

Hacking has become an important tool in the hand of cyber criminals to take away the confidential information relating to credit cards and use it illegally for their personal advantage i.e. purchasing goods or online transaction of money etc.

It is relevant here to mention the following penal provisions of the Information Technology Act, 2000:

Section 66- This section provides the following penalties for hacking with computer systems.

(1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack.

(2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

The offence under this Section is cognizable and non-bailable.

Section 43- Clauses (a), (b) and (g) of Section 43 state that if a person has unauthorized access or secures access to computer, computer system, computer network or downloads copies or extracts any data from such computer, computer system, computer network or even assists another person to facilitate access in the aforesaid manner respectively, he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

It is quite apparent from the above that besides legal protection it is necessary to carefully examine the technological and contractual protection existing within the system because law is not an alternative to other security measures required to be taken by the cardholder while making online payment.[12]

12.4 SUMMARY

The Parliament of India has passed its first Cyber-law, the Information Technology Act, 2000 which provides the legal infrastructure for E-commerce in India. The said Act aims to provide for the legal framework so that legal sanctity is accorded to all electronic records and other activities carried out by electronic means. The said Act further states that unless otherwise agreed, an acceptance of contract may be expressed by electronic means of communication and the same shall have legal validity and enforceability. The said Act purports to facilitate electronic intercourse in trade and commerce, eliminate barriers and obstacles coming in the way of electronic commerce resulting from the glorious uncertainties relating to writing and signature requirements over the Internet.

The ITA-2000 defines many important words used in common computer parlance like 'access', 'computer resource', 'computer system', 'communication device', 'data', 'information', 'security procedure' etc. 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 electronic signature (or the earlier digital signature) as stipulated in the Act is NOT a digitized signature or a scanned signature. It is a process of authentication of message using the procedure laid down in Section 3 of the Act.

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[12]An article by KinshukJha, Symbiosis Law School, Pune: available at http://www.articlesbase.com/security-articles/credit-card-fraud-and-relevant-legal-provisions-in-india-539838.html?en

Besides, duties of electronic signature certificate issuing authorities for bio-metric based authentication mechanisms have to be evolved and the necessary parameters have to be formulated to make it user-friendly and at the same time without compromising security.

The Internet and ability to communicate electronically via means such as electronic mail has introduced numerous complications that often results in situations where it is not necessarily clear if an offer has been made or whether acceptance of an offer has been communicated. As between the originator and the addressee of the electronic record, a declaration of Will or other statement should be valid, effective and enforceable even though it is in the form of a data message. There are two main methods to forming cyber contract: click wrap and e-mail. The text of email messages is the digital equivalent of a letter. Due to some technical reasons e-mail delivery systems is different from standard mail delivery system and this creates complications for e-contracting. The e-mail's journey, while travelling through the internet, may involve travelling across the world even though the person receiving the message is in the next building. In considering these and other related issues and concerns, it is important to understand that electronic communications are merely another form of communication – traditional contract principles and rules are not changed – rather the focus becomes how to achieve compliance with common law and statutory rules concerning contract formation.

The making of a contract is part of the cause of action and a suit on contract can always be filed at the place where it was made. Ordinarily, acceptance of an offer and its imitation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is a part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed.

The IT Act 2000 attempts to change outdated laws and provides ways to deal with cyber-crimes. It gave the way so that people can perform purchase transactions over the Net through credit cards without fear of misuse. The Act offers the much-needed legal framework so that information is not denied legal effect, validity or enforceability, solely on the ground that it is in the form of electronic records. In view of the growth in transactions and communications carried out through electronic records, the Act seeks to empower government departments to accept filing, creating and retention of official documents in the digital format. From the perspective of e-commerce in India, the IT Act 2000 and its provisions contain many positive aspects. The IT Act also addresses the important issues of security, which are so critical to the success of electronic transactions. Under the IT Act, 2000, it shall now be possible for corporates to have a statutory remedy in case if anyone breaks into their computer systems or network and causes damages or copies data.

Hacking has become an important tool in the hand of cyber criminals to take away the confidential information relating to credit cards and use it illegally for their personal advantage i.e. purchasing goods or online transaction of money etc. Section 66 provides the penalties for hacking with computer systems.

It is quite apparent from the above that besides legal protection it is necessary to carefully examine the technological and contractual protection existing within the system because law

is not an alternative to other security measures required to be taken by the parties and cardholder while making online contract and payment.

12.5 GLOSSARY

1. ISP – Internet Service Provider

2. PLASTIC MONEY- credit and debit cards used in place of (cash) money

3. W.E.F- With Effect From

12.6 SAQS

1. TICK THE RIGHT ANSWER:

(i)   An e-mail has also possesses the ability to form contracts.
   (a) True
   (b) False
(ii)   The IT Act is not applicable on:
   (a) a power-of-attorney
   (b) a trust
   (c) a will
   (d) all of above
(iii)   Any contract for the sale or conveyance of immovable property, making online is not enforceable in the court of law.
   (a) True
   (b) False
(iv)   A negotiable instrument must be made in traditional form, when negotiated online, it is no more a negotiable instrument.
   (a) True
   (b) False
(v)   Electronic signature or digital signature as stipulated in the Act is a digitized signature or a scanned signature.
   (a) True
   (b) False

(vi)   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 the automatically generated email. Who is the originator:
   (a) Neha
   (b) The system, which automatically generate email
   (c) gmail.com account
   (d) all of above

(vii) Samar is a businessman operating from his home in Mumbai, India. Sameer sent an order by email to a company having braches in 10 countries, with its head office in New York, USA. The place of receipt of the order would be:

(a) Any of the country having branch of the company

(b) New York, USA

(viii) The issues relating to electronic contract's place and time were addressed by the Allahabad High Court in *P.R. Transport Agency vs. Union of India & others*[13].
(a) True
(b) False

12.7 REFERENCES

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12.8 SUGGESTED READINGS

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12.9 TERMINAL QUESTIONS AND MODEL QUESTIONS

1. To what instant IT Act gives the legal recognition to the cyber contract?

2. 'The e-mail contracting rule is not applicable while dealing with click wrap contracts.' Comment.

3. Write the differences between a web-wrap contract and the contract concluding through e-mail.

12.10 ANSWER SAQS

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