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DEVELOPMENT OF E-CONTRACT VIS-A-VIS ONLINE DISPUTE RESOLUTION

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ABSTRACT

The Internet has provided consumers with a powerful tool for searching for and buying goods and services. It is the world's fastest growing commercial market place. E-commerce is an important empowerment tools for the economies of the developing countries. In simple words, an e-contract means a contract made electronically. Theoretically, an e-contract is very similar to traditional (paper-based) contract. The expressions 'e-contracts' and 'online contracts' are synonymously used; however, it must be noted that e-contract is a broader expression which includes within its ambit 'online contract'. The fundamental principles of contract law apply to all contracts notwithstanding whether they are formed electronically, orally or through paper based communications. Online dispute resolution is a branch of dispute resolution which uses technology to facilitate the resolution of dispute between the parties. ODR methods can be used to deal with both offline and online disputes. Online Dispute Resolution (ODR) is also a kind of Alternative Dispute Resolution, which uses technology to facilitate amicable resolution of disputes between parties. In this research paper I have confined my research work to study latest trends of e-commerce in India with redressal of dispute through online dispute redressal mechanism.

Keywords : E-Contract, Essentials of an E-Contract, E-commerce, *Online Transaction, Online Dispute Resolution Mechanisms*

INTRODUCTION :

Since ages the basic structure of society runs on the concept of give and take according to the necessities, comfort and enjoyment of life. Understanding of a person with other or others for certain rights or to incur certain obligations, when recognized by law, is called as a contract.[1] A contract is an agreement enforceable by law which offers personal rights and imposes personal obligations; which the law protects and enforces against the parties to an agreement. Contracts have become so ordinary in daily life that most of the time we do not even realize that we have entered into one. The most fantastic invention of mankind is the phenomenon of internet as the course of feature of the world is going to be decided by this new invention. In the 20th century, standard forms emerged in the form of railroad tickets, insurance contracts, lottery tickets and mail order sales contracts.[2] Some scholars describe them as imposing a "new feudal order of their own making upon a host of vast vassals,"[3] and others state

[1] S.S. Srivastava, Law of Contracts - I & II, 3rd edn., Central Law Publication, Allahabad, 2008. p. 1.

[2] J.A. John Bruke, Standard Form Contracts, available at http://www.lex2k.org/sfc/discussion.html.

[3] Friedrich Kessler, Contracts of Adhesion - Some thoughts about freedom to Contract, (1943) 43 Column. L. Rev. 629, available at http://www.jstor.org/stable/1117230.

"that they facilitate business transactions."[4] The Internet has provided consumers with a powerful tool for searching for and buying goods and services. It is the world's fastest growing commercial market place. Estimates of its growth show unprecedented development. E-commerce is an important empowerment tools for the economies of the developing countries.[5] E-contracting (electronic contracting) aims at the automation of contract establishment and enactment. E-contracting can be applied to solve cost, time, and complexity problems that occur in paper contracting. Furthermore, e-contracting provides new opportunities to the contracting parties, which can be used for the support of the emerging new business paradigms.[6]

With the rapid development of computer technology, the rapid expansion of web services and the fast integration of global logistics, e-commerce, as one of important strategic emerging industries, has become the vanguard of reform and opening up to play a significant role in the process of innovation and transformational development in growing world. The advanced stage of e-commerce is the realization of electronic processing in the whole business process. If the electronic contract negotiation could not be researched and used effectively, it would definitely restrict the high-speed development of e-commerce. Technological advancement has had a great influence over societal life.

In legal scenario an agreement between parties is legally valid, if it satisfies the requirements of the law governing its formation and enforcement. This is evidenced by its (agreement's) compliance to the requirements of the Contract law. Section 10 of the Indian Contract Act, 1872 provides that all agreements are contracts, if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and which are not expressly declared to be void. The Indian Contract Act, 1872 governs the ways in which contracts are made and executed in India. Electronic contracts (e-contracts) are born out of the need for speed, convenience and effectiveness. The law has already recognised contract- formation using facsimile, telex and other similar technologies.

E-CONTRACT:-

Traditionally, contracts were paper based, but with the introduction of internet businesses are departing from the traditional notion of paper based contracts and are going online. This shift from paper based contract to online contract has led to the emergence of a new species of contracts i.e. 'E-Contracts'. E-Contract simply means a contract formed electronically. A contract is a statement of intent that regulates behaviour among organisations and individuals. An e-contract is computerized facilitation or mechanization of a contract in a cross-organizational business progression. It is the most recent electronic mechanism to facilitate trading relationships between business parties, and is modelled, specified, executed, controlled, monitored and deployed (fully or partially) by an electronic system. In simple words, an e-contract means a contract made electronically. Theoretically, an e-contract is very similar to traditional (paper-based) contract. For instance, vendors present their products/services, prices and terms to

[4] J.A. John Bruke, Standard Form Contracts, available at http://www.lex2k.org/sfc/discussion.html.

[5] P. Bagheri and K. H. Hassan, "Electronic Commerce, Law and Consumer Protection," in Proc. IPEDR, vol. 10, 2011, pp. 379-383.

[6] D. M. Andrew, Entering into contracts electronically: the real W.W.W, Oxford, UK: Hart Publishing, 2000, pp. 17-36.

prospective buyers; the vendees (buyers) mull over their options, negotiate prices and terms (wherever possible), place orders and make payments. Subsequently, the vendors deliver (either immediately or subsequently) the purchased products/ services. Therefore, as the name suggests, an e-contract means a contract formed in electronic form, fully or partially.

An E-Contract is a contract modelled, executed and enacted by a software system. Computer programs are used to automate business processes that govern e-contracts. E-contracts can be mapped to interrelated programs which have to be specified carefully to satisfy the contractual requirements. An e-contract is, thus, a species of an enforceable agreement created, fully or partly, in electronic form. It is not a paper-based contract, but a contract in the electronic form. For example, 'X' makes (writes) an offer on his computer and emails it to 'Y' ; and later, 'Y' e-mails it back with an electronic signature indicating acceptance; these e-mails (exchange of communication), thereby, give rise to a contract. Similarly, an e-contract can also be in the form of a 'Click to Agree' contract, generally used while downloading software: The user clicks an 'I Agree' button on a page containing the terms of the software license before the transaction can be completed.

The expressions 'e-contracts' and 'online contracts' are synonymously used; however, it must be noted that e-contract is a broader expression which includes within its ambit 'online contract'. This is because e-contracts may be concluded by exchange of any type of electronic record,[7] like MP3 audio file, Short Message Service (SMS), Multimedia Message Service (MMS), e-mails, etc. by means of a mobile phone or similar devices. They are, generally, used to connote contracts (including all their implications) that emerge on account of transactions involving computer networks,[8] and more particularly, real time transactions. The said expressions do not necessarily restrict themselves to transactions over the internet. Besides the internet, they include transactions involving any form of a computer network.

In an e-contract, all or some of the activities are carried out by electronic means. It is, thus, not necessary that all the process (negotiation, proposal, acceptance, so on) should have been carried out electronically. One of the advantages of an e-contract is that it overcomes the delays involved in the manual system and personal biases. This is one reason why most of the web services technologies support the coordination of activities between parties and, thus, shore up the e-contracts.

It must, however, be borne in mind that an e-contract is not a special kind of contract,

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7 As per section 2 (1)(t) of the Information Technology Act 2000, '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. And as per section 2 (1)(r) of the Information Technology Act 2000, 'electronic form' with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.

8 Section 2 (1)(j) of the Information Technology Act 2000 defines 'computer network' as, 'the inter- connection of one or more computers or computer systems or communication device through—
(i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and
(ii) terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the inter-connection is continuously maintained.

like 'contract of partnership, 'contract of agency' , 'contract of sale of goods' , etc. It is because an e-contract is not that type of contract which is entered into for some specific purpose (as in case of contract of partnership or guarantee) or the subject matter of which is very specific (as in -case of contract of sale of goods), so on and so forth. An e-contract is, in fact, a contract which is formed electronically, i.e. which is entered into using electronic mode, either fully or partly.

ESSENTIALS OF AN E-CONTRACT:-

The fundamental principles of contract law apply to all contracts notwithstanding whether they are formed electronically, orally or through paper based communications. Many of the issues that arise for consideration relate to how these conventional contract law principles will apply to modem forms of technology. As in every other contract, an e-contract also requires the following necessary elements:

(1) **Offer:** Like every other case, an offer is to be made to form an e-contract. In several transactions (whether online or conventional), however, the offer is not made directly one-to-one. The buyer 'browses' the available goods and services displayed on the vendor's website and then 'chooses' what he would like to purchase.

(2) **Acceptance:** The offer needs to be accepted. The acceptance is more often than not undertaken by the business/vendor after the offer has been made by the consumer in response to the invitation to treat. The offer may be revoked at any point of time before the acceptance is made.

(3) **Competency of the parties:** All the parties to the contract must be lawfully competent to enter into contract. Agreements entered into by incompetent persons, such as, minors, lunatics, insolvents, etc. are void.

(4) **Free consent:** There must be free and genuine consent. Consent is said to be free when it is not caused by coercion, misrepresentation, undue influence or fraud. To be precise, there must not be any vitiating factor by which the consent of the other party is obtained. Generally, in online contracts, especially when there is no active real-time interaction between the contracting parties, e.g. between a website and the customer who buys through such a site, the 'click through procedure' ensures free and genuine consent.

(5) **Lawful consideration:** There has to be some lawful consideration. Just like any other contract, any agreement formed electronically, to be enforceable by law, must have lawful consideration. For instance, if an auction site facilitates a contract between two parties where one person provides some prohibited drugs as consideration for purchasing a video camera, then such an agreement is void.

(6) **Lawful object:** The object of the contract must be lawful. A contract presupposes lawfulness of the object of contract. For that reason, an agreement for selling sedative drugs or pornography films online is void.

(7) **Intention to create legal relations:** There has to be an intention to create legal relations. If there is no intention on the part of the parties to create legal relationships, then no contract is likely to take effect between them. By and large, agreements of a domestic or social nature are not contracts and are, therefore, not enforceable.

(8) **Certainty and possibility of legal performance:** A contract, to be enforceable, should not be vague or uncertain or ambiguous; and there must be certainty and possibility of its performance. A contract, which is impossible to perform, is void, e.g. where a website promises to discover treasure by magic. Similarly, an agreement, the meaning of which is not certain or capable of being made certain is void.

Types of Online Transaction:-

(i) Business to Customer (B2C)

It is the transaction where a business entity on one side and an individual customer on the other hand conduct business. The expression B2C has been commonly used to refer to a sale by a business enterprise or retailer to a person or 'consumer' conducted through the internet. For instance, www.rediff.com which provides facilities for customers to buy goods from the website—is an example of a B2C e-business. In this situation, the website itself serves the purpose of a shop. The B2C transactions can be in relation to both—tangible and intangible products. The focal point of this e-commerce application is on the consumer's use of a merchant's web storefront or website. Consumers from any place can browse and order for goods and services online at any time. B2C is an electronic equivalent of the conventional mail-order or telephone-based ordering system.

(ii) Business to Business (B2B)

It is the type of e-commerce where there is an exchange of products, services, or information between businesses using the internet, rather than between businesses and consumers.

(iii) Customer to Business (C2B)

Customer to Business (C2B), also known as Consumer to Business, is the most recent e-commerce business model, where individual customers offer to sell products and services to companies that are prepared to purchase them. It is the opposite of the traditional B2C model. Example of this model is blogs or internet forums where the author offers a link back to an online business facilitating the purchase of some product (like a book on Amazon.com), and the author might receive affiliate revenue from a successful sale.

(iv) Customer to Customer (C2C)

It is the transaction which involves two or more customers with business entity merely providing a web based interface to facilitate the consumer to consumer transactions (B2C). The expression C2C generally refers to the sale of a product pertaining to a consumer to another consumer either directly or through an intermediary exclusively dedicated for this activity. One best example of C2C website is www.ebay.com, which is an online auction site, where any person can buy and sell, and exchange goods and articles using this website. This website provides the web based interface (i.e. the website with its database and other functions) and users can transact freely with each other. Another example is Amazon, which in fact, acts as both a B2C and a C2C marketplace.

Formation of E-Contract:-

The advent of the internet as a means of facilitating contract formation does not, at first blush, present a situation different from that applicable to a facsimile or telex. An e-contract may be created either through an exchange of e-mails or by completion of a document on an internet website which is submitted to another party electronically. While it may be possible to view these methods as presenting a modem dimension to the accepted methods of contract formation rather than requiring any particular changes to the law, the electronic medium presents some particular issues arising from their electronic form. There are various ways in which e-contracts can be concluded. The important ones are as follows:

(1) Contract formation through electronic communications (such as, emails): The simplest e-contract is concluded by the exchange of text documents via electronic communications, such as, e-mail. Offers and acceptances can be exchanged totally by e-mails, or can be combined with paper documents, faxes, telephonic discussions, etc.

(2) By acceptance of orders entered) placed on e-commerce websites: The vendor/supplier can offer goods or services (such as, air tickets, software, etc.) through his website. The vendee, in such cases, places an order by completing and transmitting the order-form provided on the website. The merchandise may be physically delivered later (e.g., in case of outfits, CDs, books, etc) or be immediately delivered electronically (e.g., in case of e-tickets, software, etc).

(**3) Online agreements:** In some cases, users are required to accept an online agreement in order to be able to avail the services e.g. clicking on ‘I agree’ while installing software or clicking on ‘I agree’ while signing up for an e-mail account.

(4) The electronic data interchange (EDI): It is the inter-process of communication of business information in a standardised electronic form. That is, they are contracts used in trade transactions which enable the transfer of data from one computer to another in such a way that each transaction in the trading cycle (for example, commencing from the receipt of an order from an overseas buyer, through the preparation and lodgment of export and other official documents, leading eventually to the shipment of the goods) can be processed with virtually no paperwork.[9] In this case, the data is formatted by means of standard protocols, so that it can be implemented directly by the receiving computer. EDT is, frequently, used to transmit standard purchase orders, acceptances, invoices, and other records, and thus, reduces paperwork and the potential for human errors. In this type of contracts, in contrast to the above methods, there is an exchange of information and completion of contracts between two computers and not an individual and a computer.

(5) Through electronic agents: It is possible for computer users to instruct the computer to carry out transactions robotically. For instance, in today’s

9 http:lljurisonline.inl?p=2066> (accessed on 7 November, 2013).

supermarket, the computer updates its inventory as items are scanned for sale. When the stock of an item falls to a predetermined level, the computer is programmed, without human involvement, to contact the computer of the supplier and place an order for replacement stock. The supplier's computer, exclusive of human intervention, accepts the order and the next morning automatically prints out worksheets and delivery sheets for the supply and transport staff.

These electronic agents are programmed by and with the authority of the purchaser and supplier. The legal status of electronic agents has not been clarified by the courts, but the most common view is that like any other piece of equipment under the control of the owner, the owner accepts responsibility.[10] The computer is a tool programmed by or with a person's authority to put into operation their intention to make or accept contractual offers.[11]

DISPUTE RESOLUTION AND INFORMATION TECHNOLOGY:-

Along with the growth of E-contract, businessmen worldwide are rapidly integrating information technology and telecommunication to do speedy and safely business. Disputes may arise in a commercial transaction at any time between the parties so is the case with e commerce. The efficiency of the system lies in its ability to resolve these disputes amicably by protecting the interests of all the parties. In the real space commerce there are various judicial and non judicial forums through which these disputes are resolved. These forums also can assume jurisdiction in disputes that arises in e commerce. Online dispute resolution is a branch of dispute resolution which uses technology to facilitate the resolution of dispute between the parties. ODR methods can be used to deal with both offline and online disputes.

Online Dispute Resolution mechanisms

Online Dispute Resolution (ODR) is also a kind of Alternative Dispute Resolution, which uses technology to facilitate amicable resolution of disputes between parties. Like ADR this also involves the techniques like negotiation, mediation or arbitration or a combination of these techniques. The technology used for ODR is usually Internet, even though it need not be always so.

ODR can be looked at in two perspectives. It can be viewed as the resolution of online disputes, ie., solving of disputes which arises out of an online transaction. This can be solved by online mechanisms or offline mechanisms. Another approach to analyse ODR is by viewing it as a method of solving disputes online, be the disputes are the results of online transactions or offline transactions.

Types of Online Dispute Resolution (ODR)

The following are the important types of ODR used in the modern E -Commerce:

a. **Automated Negotiation:** In this type of ODR the technology replaces human involvement. A good example for automated negotiation would be the instances of 'blind-bidding' services. "Blind bidding" is an auction mechanism where some or all

[10] Alan Davidson, The Law of Electronic Commerce, Cambridge University Press, (2009) p.73.

[11] For an example of a legislative provision, see Uniform Electronic Transactions Act (US), S. 14.

information about the parties are hidden from each other. The parties are asked to financially bid an amount for which they would agree to resolve the dispute. If the bids of parties come within a predetermined range, the dispute is settled. An example for this kind of ODR is Cybersettle.com.

b. Assisted Negotiation: In this kind of ODR, technology assists a human negotiator in the negotiation process between the parties. Here the parties are given an atmosphere through online efforts through which the disputes can be settled amicably. Here the parties are given an opportunity to negotiate through online face-to-face meetings, conference calls etc to reach a settlement. The human negotiator with the help of technology help parties to reach a solution. An example for this type of ODR is Smart Settle.

c. Online Negotiation-cum-Mediation: In this kind of ODR a dual process of negotiation and mediation is adopted and the parties can initiate ODR process by opting online negotiation and make an attempt to negotiate their differences and reach a settlement. If this attempt fails, a mediator is appointed for conducting an online mediation. An example for this type of ODR is Square trade.com.

d. Document/email arbitration: In this method of ODR, the whole process of arbitration is carried out through emails like filing of arbitration agreemnt, filing of disputes, filing of documentary evidence, written submissions, written hearing, closing statements etc are all done through email. An example for this is Cyber Arbitration .Com.

e. Peer Jury: This is another type of ODR where the volunteer jurors select disputes they would like to decide, review them, seek clarifications and give their decisions. Similarly many jurors would decide a single dispute and the parties are given a summary of the decisions which contains the number of jurors decided in favour of and against each party. An appropriate example for this would be i.courthouse.com.

CONCLUSION:-

Thus we can say that E-contract and ODR have changed the scenario of business model in the growing world. This is really time and money saver in growing world. The technology of E-Contract and ODR are milestone journey in business and legal sector. These are cumulative progress which will be adopted by the society very soon; whereas in India, after *Notebandi* most of the people have adopted the e-contract. These will be necessity of every one in the next decade.

E-Contract and ODR is a new phenomenon to this world, digital advancement and technology is growing and changing very rapidly that is a very tuff task to make a concrete framework to regulate all this. Although all governments are concerned about this but unless and until an universal framework is not set up that fits to need of all till then smooth functioning of e-contract and ODR is not possible.

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