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COVID 19: A PARADIGM SHIFT TOWARDS E-CONTRACTS

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ABSTRACT

The Covid-19 Pandemic has changed the working pattern of mostly every sector in the world. From work from home, to online classes being conducted, courts conducting hearings on video calls, board meetings happening over video calls and even gyms and work out sessions are being conducted via virtual and electronic means just to keep the system working and so have been the execution of Electronic Contracts.

India is not new to the concept of Electronic Contracts as most of the E-Commerce revolves around it. But due to state lockdown and increased need for social distancing much emphasis should be given to execution of E-Contracts. This papers highlights the legalities and the governing laws which form the backbone of E-Contracts. The paper seeks to explain the basics of a contract, essentials in a contract and how the same can be applied in execution of E-Contracts. Paper seeks to find out the positive impacts of E-Contracts, the contractual liabilities of parties and also its evolving need in the Cross border signing of Contracts.

In the last part of the paper certain technicalities like Stamp Duty and E-Notarisation in contracts and application of Force Majure clause on such contracts have been laid emphasis upon.

INTRODUCTION

In the last few months of lockdown and restrictions by the government on certain business has brought the entire world to a standstill. With business houses, Industries and start-ups changing their patterns of business to survive due to government policies, Courts bringing in the digital format to conduct important hearings, Online Business and E-Commerce companies taking extra precaution to ensure minimum contact while delivering products, the increasing usage of payment and settlement systems like Google Pay, Phone Pe and Paytm to maintain minimum touch with cash even the execution of contracts in electronic format has taken up a spike. The concept of electronic execution of contracts is not very new in the purview of the Indian legal scenarios but

surely has certain emphasis during the times of Covid-19 as the movement of parties has become regulated.

WHAT IS A CONTRACT?

In general terms it is a legally binding agreement which binds the parties with the terms of the agreement. It is like a promise between 2 parties to abide by the common agreement breach of which would amount to payment of compensation and even rise to civil action.

The Indian legislation¹ in **Section 2 (h)** defines Contract as “*An agreement enforceable by law is a contract*”. It simply means that the agreement made between the parties will be justified by law and any breach can be enforceable in the court of law. To make a contract enforceable such contracts should be valid. Section 10 of the act² lays down the essentials of a valid contract which are-

1. Parties must have capacity to enter into a contract
2. There must be free consent between parties
3. Parties must have entered into a contract with free consent
4. There should be lawful object
5. There should be consideration.

Hence, these form the backbone and the Pre- Requisites of E-contract but, the main foundation of Electronic Contracts was made in Section 10-A of Information Technology Act 2000.

LEGALITIES IN E-CONTRACTS

The legalities which form the bedrock of E-Contract are found in the Information Technology Act, 2000 and the Indian Evidence Act, 1872.

¹ The Indian Contract Act, 1872, No. 9, Act of Parliament, 1872 .

² Ibid.

Section 10-A³ of the **Information Technology Act, 2000⁴** states the Validity of Electronic Contracts. The section simply clarifies that when a contract has been formed and its formation, communication of proposals, revocation of proposal and acceptance of it has been done through electronic means such formation of contract will not be rendered unenforceable on the grounds that its formation was by electronic means. Hence such contracts will be justiciable. The only pre-requisite being the satisfaction of the Indian Contract Act.

This provision paved way to Electronic filings and facilitation for forward mechanism of Electronic transaction, Electronic generation of Bills and receipts etc.

The evidentiary value of such contracts and transactions are recognised under **The Indian Evidence Act, 1872**. Section 65-A⁵ recognises the Electronic Records whereas section 65-B⁶ lays down the procedure for Admissibility of Electronic Records. It states that any Information which is contained in an electronic record and produced by a computer and is in a printed, stored or copied form shall be treated as electronic evidence and shall be admissible. But the admissibility shall only be valid if-

1. The computer was under the lawful control and lawful use of the user
2. The document or e-mail shall be received during regular course of activities
3. The computer was in operating condition not affecting the accuracy of the data.
4. Information was fed into the system on a regular basis

Section 3 of the Information Technology Act,2000 provides for Digital Signatures by way of E-signatures & Adhaar-Signatures through which the E-Contracts can be executed. These legalities paved the way forward for digital transactions into legislations like Banker's book Evidence, Indian Penal Code, Indian Evidence Act, etc.

³ The Information Technology (Amendment) Act, 2008, No.10, Act of Parliament, 2009, (India) .

⁴ The Information Technology Act, 2000, No. 21, Act of Parliament, 2000, (India) .

⁵ The Indian Evidence (Amendment) Act, 2000, No. 21, Act of Parliament, 2000 (India) .

⁶ Ibid.

Thus it is clear that when compliances of the above legal provisions will be met, offer, acceptance and communication will be made by electronic means such as fax, Internet or email and compliances of the Indian Stamp Act,1899 and The Registration Act,1908 are met with a valid contract is formed.

The electronic execution of contracts as per Section 1(4) of the Information Technology Act, 2000, however, does not apply to the following-

1. Negotiable Instruments
2. Power of Attorney
3. Trust Deeds
4. Wills
5. Contracts for sale or Transfer of Immovable Property

Emphasis can be laid on the judgement laid down by the Supreme Court of India 2010 in *Trimex International FZE Ltd's*⁷ case where the court held “Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want – an efficient, effective and potentially cheap resolution of their dispute. The *Autonomie de la Volonte* doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts’ directions should be to achieve the legislative intention.”

With the government norms, restrictions and regulation of movement of people, the rise in the “Work From Home” culture, the Courts listening to only urgent matters it is much more safe and fast to conduct business transactions through electronic mode of contracts. In the scenario it is advantageous and should be put more emphasis because it will remove the requirement of physical space, there would be no need of courier facilities and service boys⁸ and most importantly the

⁷ *Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., India* [2010 2 SCC 1] (India).

⁸ Puneet Gupta & Amit Wadhwa, *India Law Journal*, May 8th, 2020.
<https://www.vantageasia.com/e-contracts-sign-times/>

execution will be fast and swift thus mitigating the spread of the virus through contact by reducing mobility at all levels of the transaction.

CONTRACTUAL LIABILITY

There is no specific provision for contractual liability of parties for a breach of E-Contract given in the Information Technology Act, 2000 but since the backbone of validity of such contracts are derived from The Indian Contract Act, 1872 which form the basis of the Electronic Contracts the remedies for such breach will also be understood from The Indian Contract Act which are Damages and Quantum Merit. The Specific Relief Act also provides for remedies such as Specific Performance or Injunction seeking Restraint.

STAMP DUTY AND NOTARIZATION OF E CONTRACTS

Stamp Duty forms an essential part of the E-Contracts as it makes it valid and admissible in the court of law. This requirement is under the Indian Stamp Act, 1899 to make it admissible and enforceable. For E-Contracts as well as traditional Contracts the government provides for the Digital Interface for E-Stamping and E-Stamp paper where stamp duty can be paid online through Electronic Secure Bank and Treasury Receipts (E-STBR) Systems, E-Challan etc.

Many states do not have this system but due to rise in the process of E-contracts states are introducing it as the system is efficient and requires minimum time during the pandemic and the lockdown.

The management of this system is done by the Stockholding Corporation of India (SHCIL)⁹ which is a central government appointed agency and looks after the administration, record keeping and facilitation of stamp duty services. The transactions are safe, tamper proof and can be authenticated

⁹ Shoib Zaman, *Duly Stamped*, Money Today, January 14th, 2014, <https://www.businesstoday.in/moneytoday/financial-planning/electronic-stamping>

as a unique identity no. is generated. So far as E-Notarization is concerned, there is no such statute or provision which facilitates or gives clarity regarding E-Notarization of the E-Contracts.

IMPACT ON CROSS BORDER E-CONTRACTS

The Cross Border transactions and disputes are regulated under various bodies and legislations. The World Trade Organisation (WTO) governs the trade agreement amongst nations and Regulations like General Agreement on Trade and Tariffs (GATT), General Agreement on Trade and Services (GATS), UNCITRAL Model Law to name a few are also considered widely for further compliances.

With the World Health Organisation declaring the Covid-19 as a pandemic consequently, there has been travelling restrictions everywhere. As the infection spread rapidly the states imposed nationwide lockdown everywhere impacting cross border transaction and bringing it down to its knees resulting in non-delivery of consignments and delay in services and giving rise to non-performance of the contractual obligations. Although contracts can still be executed between parties for a cross border transaction but the loophole lies in the performance of physical obligations to the contract and enforceability of the E-Contracts during the pandemic.

IMPACT OF FORCE MAJEURE ON E-CONTRACTS

Force majeure refers to events which are uncertain and unforeseeable such as Calamities, disasters, Hurricanes, Epidemic diseases i.e. Act of God and such events which are beyond the control. A *force majeure* clause is inserted in contracts of Joint Venture Transactions, M&A Transactions, Erecting, Procurement & Construction (EPC) Contracts, Finance agreements and Real estate contracts.

A *Force majeure* clause is put in a contract so that party to the contract can be relieved from performing a liability and obligation to the contract provided the event which has occurred is unforeseen,

beyond the control of the parties and parties have taken steps to mitigate the damage from the risk occurred. The clause acts as a temporary relief to the parties.

The Indian Contract Act, 1872 does not specify anything on *Force majeure*, however Section 32 of provides for *Contingent Contracts*. The provision states that a contract cannot be enforced if the uncertain event happens and the event becomes impossible to avoid.

In the scenario of the Covid-19 pandemic and total state lockdown the execution of the E-Contract may be possible and feasible but performance of the contract may not be possible depending upon the business specially the *non-essential* category.

The application of the *force majeure* clause on the performance of the E-Contract will depend upon the following factors-¹⁰

1. Presence of the *force majeure* clause in the contract
2. Establishing a relationship with the current scenario and hindrance to perform the contract.
3. Steps taken to ensure the performance of contract and to prevent the damage.
4. Compliance of provisions

RELATIONSHIP WITH DOCTRINE OF FRUSTRATION

Unlike a Contingent contract or *Force Majeure* Doctrine of Frustration applies to impossibility to perform the obligations of a contract. A contract will be rendered frustrated when certain acts or events occur which are lawful and subsequently become unlawful or it is impossible to perform certain act making the enforceability of the contract void. The impossibility to perform might be by way of facts or by way of law. Section 56 of the Indian Contract Act, 1872 clarifies about the doctrine of frustration. A contract maybe frustrated on the grounds like death of a party,

¹⁰ Tarun Dua & Mitali Sethi, *Force Majeure In Times Of COVID-19: Challenges And The Road Ahead*, Mondaq, May 11th, 2020

intervention of a legislative regulation, or any action by the executive authority i.e. any act beyond the scope of the contract.

In relation to Electronic Contracts the same provisions would apply if the compliances are met. To constitute an act as *force majeure* or as a ground for frustration will depend upon the clause in the E-Contract itself. There have been however few government notifications regarding the same.

The **Ministry of Finance** on 19th February had issued a notice¹¹ stating that the disruption of supply chain in the lieu of the Covid-19 pandemic will be considered as an act of disaster and a *force majeure* clause may be invoked.

The interpretation of it is now left on the judiciary since the enforcement of the E-Contracts are enforceable as traditional contracts. The applicability of such principle will depend upon the presence of the clause, nature and size of the business and state of lockdown.

CONCLUSION

From careful analysis of various laws, judgements, model laws it can be concluded that E-Contracts are as valid and justiciable as traditional contracts and are definitely the way forward for national and International Business transactions. E-Contracts are acting as catalysts for business transactions as long as the compliances and pre-requisites with other laws are met. However certain facilitations like E-Notarization framework are still need to be looked upon to facilitate smoother execution and enforceability of E-Contracts.

¹¹ <https://doe.gov.in/sites> Memo No. F. 18/4/2020/PPD