CHAPTER 1
INTRODUCTORY

1.1. INTRODUCTION

Ever since the inception of human civilization the concept of contract has been known to man. As the civilization progressed, thought process of man developed very drastically. Man became conscious of his belongings and started to exercise his authority over his belongings. With this, there was change in mindset and the element of profit and gain occupied its place in everyday activities. The transactions, which were once appeared to be normal and routine, took the shape of profit or gain oriented. As days passed by, man became more and more conscious about his authority over his belongings. Whenever he indulged in trade he exchanged his goods for considered equivalent value of other goods of his choice from other person. This system is commonly referred to as barter system. This system was followed for trade of commodities, goods and even for services.

Further development in society brought in different classification amongst persons based on their class. With this, there was change in perception of one’s rights and such rights varied from person to person based on their class or status. Most of the times, transactions between persons were mainly based on trust, faith and goodwill. The society was very simple and people carried on their transaction orally with absolute belief in other person.

Performance of one’s role was considered as highest moral conduct and society always appreciated such high moral conduct. On the other hand, non-performance of one’s role was considered as out of low morality.
People believed in high moral conduct and any person not showing such high moral conduct was looked down upon by other members.

As there was increase in trade and commerce, man became more adventurous and started to look out for new avenues for carrying on his trade. The further development in society slowly changed the pattern of transactions. Oral transactions were slowly replaced by written documents.

Sir Henry Maine in his classic work Ancient Law developed a thesis on concept of contract. According to Maine, in early societies, both static and progressive, the legal condition of the individual is determined by status and the march of progressive societies witnesses the disintegration of status and determination of the legal condition of the individual by free negotiation on his part. This was expressed by him in the dictum:

The movement of progressive societies has hitherto been a movement from status to contract.

According to Maine, the unit of ancient society was family but ‘individual’ is unit of the present society. This led to disintegration of the family system, end of the dependency on the pater familia and emergence of contractual relations among individuals. Now the individual became the best judge of his own good. Law accordingly recognized the individual as the sole subject matter of rights and duties in place of pater familia which was previously the sole repository of power.

With the growth of commercial and industrial culture, law of contract acquired significance during 18th and 19th centuries. Hence the theory of free contract came to extensive use in trading and commercial world. The social contract theories founded on the notion of free contract of agreement between people and the rulers. The concept of liberty, equality
and fraternity of the French revolution, doctrine of inalienable natural rights of man of the American declaration of independence; philosophy of laissez faire in economic, political and legal theories; relationship between master and servant; employer and workmen, wife and husband, parents and children etc. are the examples to support the dictum ‘movement from status to contract. Gradually society recognized individual rights and the concept of right attained some prominence.

During European renaissance every right arose from a title. The term ‘title’ is derived from the term Titulus of Roman law and Titre of French law. So also legal protection, of an interest without its legal recognition cannot make it a legal right. It is commonly agreed that right exists upon the base of obligations.

Obligation is synonymous with duty and it includes perfect and imperfect obligation. Where person obligated to God alone then such obligations are called imperfect obligations and such obligations are not accountable to any individuals. On the other hand, perfect obligations – which are also called as performance obligations – give right to demand of performance of such obligations.

Effect of such perfect obligations are 1. Contracts, 2. Quasi contracts (engagements in nature of contracts), 3. Injuries (delits) and 4. Acts in the nature of injuries (quasi-delits).

Now coming to contracts, it is treated as ‘right in personam’. Generally, a contract is a promise or a set of promises for the breach of which the law

3 Ibid
gives a remedy, or the performance of which the law in some way recognizes as a duty. The correlation between contracts and title has been described by Salmond as ‘acts in the law’ and whereas Paton described such relation as ‘juristic act’. According to Paton, by juristic acts, legal persons create, modify, or destroy rights and duties and thereby affect legal persons.4

There are two categories of contracts viz. unilateral and bilateral. Unilateral acts are those where will or consent of one of the parties is essential whereas in bilateral acts it is will or consent of both parties is essential. These bilateral acts are called as agreements. These bilateral acts between persons play very significant role in day to day life.

Swift changes in information and communication technologies (ICT), influenced every walk of life and contract law was not an exception. These developments in information and communication technologies were used for commercial activities. Thus, law of contract is the base for electronic transactions without there being any specific law to deal with e-contracts. The basic principles of law of contract govern these electronic transactions. The pace of development in information and communication technologies can aptly be described by the following stated by Cosmos the villain in the movie Sneaker.5

The world is not run by weapons any more, or energy or money. It is run by ones and zeroes—little bits of data. It is all electrons. There is a war out—a world war. It is not about who has the most bullets. It is about who controls the information. What we see and hear, how we work, what we think. It is all about information.

5 Sneaker (Universal Studios, Sept. 11, 1992 US); as cited in Farooq Ahmad, Cyber Law In India, 2nd Ed, New Era Law Publications, Delhi, 2005, p. 4
Now-a-days, almost each and every home owns a personal computer or laptop. Technology is changing rapidly. In the developed world, the present generation cannot imagine life without computers and internet. Computers get associated with a person before his birth when CAT scanners detect birth or determine sex and they remain associated for sometimes even after the death till insurance issues are settled. Presently, large chunk of population is fastened to social networking sites, a future is about to come wherein a baby of a year old will own an account on social networking sites. Every departmental work is carried out online, either it may be procurement contracts or announcing of exam results. Computers have invaded every aspects of the human life and the impact has been so quick that it caught the institutions of law and justice unawares. The new developments in information and communication technologies are posing challenges to the fundamental principles of law, which worked well before the advent of this technology. The problems have been compounded by the introduction of internet. Before going to problem of internet one has to understand what this internet exactly and what is its genesis? How all this started.

It is specifically mentioned here that this introduction is going to be purely technical in nature. Internet owes its origin to ARPANET which was set up in September, 1969 as a joint venture of the Massachusetts’s institute of technology and the American Department of Defence Advance Research Project Administration as a source to establish continued communication between remote computer resources in the event of war. The Advance Research Projects Agency Network (ARPANET) connected 40 computers by a web of links and lines. This network slowly grew and the Internet

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6 Computerized Axial Tomography Scanner
was born. By 1981, over 200 computers were connected around the world, today the figure runs into millions.7

The real power of today’s internet is that it is available to anyone with a computer and a telephone line or even on mobile phone. Immense and invaluable power of information and communication has been placed on an individual’s hand by internet.

Internet usage has significantly increased over the past few years. The number of data packets, which flowed through the internet, has increased dramatically. If left to its own measure, it is highly unlikely that such a trend will reverse itself.

**Internet Functioning**

The administration of the internet is not in the hands if any individual, be it government, corporation, university, NGO, firm or a person. In literal terms it is like a net in which hundreds of thousands of separate operators of computers and computer networks use common data transfer protocol to exchange information with other computers. It goes like a chain in which one computer is connected with another. It is this series of linked networks each linking computers and computer networks that is commonly known today as ‘internet’. It has quality of rapidly transmitting data or communication with an automatic facility to change the route where transmission is not possible due to damage or non-availability of links. Internet uses a language (common communication protocol) called Internet Protocol (IP).

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The information available at any link means information available to all connected with that link as there is no control unit or central storage location and it is worthy to repeat here that any individual cannot control all the information available.

Internet and online services, sometimes called as ‘new media’ services is in many respects similar to the traditional media as it also includes production oriented material such as music, audio, video, graphics, text and games. It performs communication functions also like, messaging, conferencing, research and conduct of commerce. However, it differs from the traditional media in two respects:

Firstly, internet and online services are communicated through digits (commonly called digitized information). Digitization is the expression of the information in the computer known language called ‘binary’ language. Binary language has two characters, i.e., ‘0’ and ‘1’. The great advantage of binary language is its overwhelming simplicity. The characters of binary language known as ‘bits’ where initially expressed in combination and alteration of any two distinct conditions. The presence of light and absence of light, a positive electrical charge and negative electrical charge, the peak of a wave and trough of a wave, and many other observable states of matter suffice to record and transmit information in binary language. This binary language being only two characters makes it highly cumbersome medium of expression.\(^8\)

Secondly, there services are not one way but both ways i.e., they are interactive. The user has a choice of the contents and time. He can also share his own information with other users depending upon the service which may be one-on-one, chat or group conferencing or real time basis.

\(^8\) Farooq Ahmad, *Cyber Law In India*, 2nd Ed, New Era Law Publications, Delhi, 2005 p. 9
Generally three methods are available for a user to access to internet. These are:

- **Direct Access:** As the expression itself suggests, a user can be directly linked to internet without any intermediary. Generally government offices, educational institutions, research centres, libraries and even business establishments, corporations and companies maintain a computer network linked directly. These establishments then issue an account number with a secret key called ‘password’. The account number together with the ‘password’ enables a user to have an access directly to internet.

- **Internet Service Provider:** Service providers are generally commercial entities making commercial use of internet by making available internet facility to general public in lieu of the fee that an user has to pay. Service providers have direct access to internet and any personal computer holder can have access to internet via direct link holder. It works just like a home telephone without STD facility.

- **Commercial Online Service:** Commercial online service provides direct access to users without any fee. However, the commercial online service provides extensive content of the information within their proprietary networks. These services are commercial entities and provide their own content to the user of their service.

**Mode of Communication**

The exchange of communication and retrieving of information on internet is possible through many modes. However, these modes are constantly changing so an exhaustive list cannot be expected. The popular methods of communication are grouped as follows:
• One to one communication (such as e-mail)
• One to many communication (such as listserv)
• Sharing of information database (such as USENET newsgroups)
• Real time communication (such as internet relay chat)
• Real time remote computer utilization (such as telnet)
• Remote information retrieval (such as ftp, gopher and World Wide Web)

With the above background, moving further with discussion, it can be said that technology has over passed living style of man. Now-a-days persons are doing business sitting in home itself. Things have changed drastically, so much that people are shopping sitting at home, buying and selling goods using e-shopping. The tool internet has changed lives of people by bringing in comfort factor. Due to this technological innovation, e-commerce is growing at the speed of air. Electronic commerce refers generally to all forms of transactions relating to commercial activities involving both organizational and individuals that are based upon processing and transmission of digitized data, including text, sound and visual images. It also refers to the effects that the electronic exchange of commercial information may have on the institutions and processes that support and govern commercial activities.

Electronic commerce is part of an evolving approach to business and administration that could eventually involve the application of information and communication technologies to an enormous range of production and distribution processes on a global scale.

Electronic contract is an integral part of electronic commerce. This is a new concept. It is not same as paper or traditional contract. The validity of e-contract is similar that to paper contract. There was time wherein contracts
were entered through exchanges of letters. Now the situation is changed, contracts are being entered through electronic communication. It was \textit{Entores Ltd. v. Miles Far East Corporation},\textsuperscript{9} which recognised contracts made through instantaneous mode of communication. The principle of the \textit{Entores} case has been endorsed by the Supreme Court in \textit{Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.},\textsuperscript{10} E-contract are attributed in Sections 11, 12 and 13 of Information Technology Act, 2000. These sections state about attribution of electronic records, acknowledgement of receipt and time & place of despatch and receipt of electronic record. Here it can be mentioned that provisions of the Information Technology Act, 2000 do not specifically speak about e-contracts. Rather they merely lay down provisions for transfer of electronic records. This absence of provisions relating to e-contracts in the Information Technology Act, 2000 has prompted for this research.

\subsection*{1.2. STATEMENT OF THE PROBLEM}

After advent of information and communication technologies, an avenue was created for commerce and trade. Thus, electronic commerce (e-commerce) was developed. This e-commerce picked up momentum in America and Europe by 1990s. At the international level, an attempt was made to recognize and to bring this e-commerce within legal framework so that it can be regulated. Accordingly, in 1996 a step was taken by the United Nations to draft a Model Law.

While discussing in Indian context, late 1990s and early 2000s witnessed exponential growth of internet in India. The simultaneous development in technology brought new dimension to usage of internet and it became

\textsuperscript{9} (1955) 2 All ER 493
\textsuperscript{10} AIR 1966 SC 543
accessible even through mobile phones. Within span of some 4-5 years, e-commerce gained pace in India and it would not be wrong to say that it is still in developing process. Realizing its potential growth, Indian government enacted Information Technology Act, 2000 for regulating e-commerce. Speaking purely from a customer’s perspective, as of now, some websites are offering sale of goods and offering services. Apart from that, even major corporate houses have created their presence in virtual world for trading. Banking and insurance sectors have gone a sea change after development of internet.

Slowly, e-commerce is dominating Indian scenario and it has been benefitting customers by offering different range of products at competitive price. Thus, there is e-contract between individual and individual, organization and individual and organization and organization. Therefore, a legal relation is created between parties using electronic medium. As long as their respective roles and parts of legal relationship are performed there would be no dispute. But once there is some variance, certainly, there will be dispute between parties and they need judicial forum to adjudicate their dispute.

With this backdrop, these e-contracts have posed some challenges have been posed to the existing legal system in India. Therefore, following points are the statement of problems in this study:

- Whether the Information Technology Act, 2000 and Indian Contact Act, 1872 have cover and regulate e-contracts in Indian conditions?
- Whether Indian judicial system is fully equipped to adjudicate disputes arising out of e-commerce as it being techno-legal in nature?
- What are the issues likely to cause impediments in judicial process?
• What is the effect of judgment of Hon’ble Supreme Court of India in Bhagwandas Kedia’s case (AIR 1966 SC 543) on e-contracts?

1.3. OBJECTIVES OF STUDY

Electronic contract is a contract which is formed through electronic communication. These can be entered either through e-mail or click wrap or browse wrap agreements. At present there is an increase in e-commerce consequently there is also an increase in e-contract.

The law concerning this subject is still developing. Rapid developments in information and communication technologies brought in some new issues and judiciary is not so well equipped to handle these techno-legal issues. Therefore, research in this area is necessary to understand the legal regulation in Indian context. There are many issues which have to be addressed. The Information Technology Act, 2000 is good for cybercrimes but it has addressed little about e-contract and only three sections of the statute speak about e-contracts.

Hence this study has following objectives:

• To understand how principles of traditional contract evolved in Indian context and can be made applicable to e-contracts

• To understand adequacy of Information Technology Act, 2000 and Indian Contract Act, 1872 to deal with e-contracts in India

• To understand overall legal framework and issues likely to arise before Indian judiciary while deciding disputes relating to e-contracts
- To understand whether same principle of law is applicable to e-contracts executed using different mode of electronic communication
- To understand international developments concerning e-contracts

1.4. REVIEW OF LITERATURE

However, there is no much literature is available on e-contract, the research topic is relying more on the policies of the Government and theories expounded by the renowned jurists, the method adopted for the research is substantially doctrinal one. The research in question is to derive its materials for its investigation from both Primary and Secondary resources. For the analysis of law relating to e-contract primary resources such as, Information Technology Act, 2000, Indian Contract Act, 1972, Sale of Goods Act, 1930 have been considered. In addition to these laws, the Model Law on Electronic Commerce, the United Nations Convention on the Use of Electronic Communications in International Contracts, the United Nations Convention on Contracts for the International Sale of Goods & UNCITRAL Model Law on Electronic Signatures have been considered.

Apart from above primary resources the research is much relied on secondary resources. The secondary resources like books including e-books, journals and study reports, seminar papers have been used in this research. Even some Indian and foreign case laws have been examined for this research. However, the laws concerned with e-commerce and allied laws of contract have largely facilitated to understand crux of e-contract.
1.4.1. BOOKS

Prof. S.V. Joga Rao\textsuperscript{11} in his book titled \textit{Computer Contracts & Information Technology Law}, is the only work which speaks about e-contracts. This book is being divided into two parts. It contains impact of information technology and analysis of Information Technology Act, 2000. In addition to this, a special chapter has been dedicated to fundamental principles of contract law. Along with that, the book has enunciated how to draft e-contracts and enclosed select forms and precedents of e-contracts.

Bookscaters to the needs of both legal and non-legal like finance, marketing and technical in information technology law field. Keeping that in view, it is attempted to present the subject matter in a simple and lucid style. The chapter on Electronic Contracts: Select Forms and Precedents offer several model contracts covering hardware, software, webware, service contracts, human resource and computer system. Chapter on Online Contracts: Legal Principles and Practice describes the legal benchmarks that are required to be complied with while conducting business transaction electronic medium. The astounding growth of global e-commerce transactions and web advertising in a global commercial environment has resulted in parties constantly entering into different types of transactions in the electronic medium. Title of the chapter speaks for itself that it deals with legal principles of online transactions.

Part 2 of the treaties deals with appendices, this part accounts list foreign statutes, international documents and Indian laws covering contract and information technology.

\textsuperscript{11} S.V. Joga Rao, \textit{Computer Contracts & Information Technology Law}, 2\textsuperscript{nd} Ed., Wadhwa and Company, Nagpur, 2005
Cyber Law-The Indian Perspective written by Pavan Duggal12 is hefty book provides a comprehensive overview of the cyber law scenario in India. It also provides recommendations for upgrading the current cyber law statutes and contextualizes these developments with respect to actual reported cases of cyber law in India. Duggal analyses the issue of jurisdiction from all angles, never failing to cite cases of other countries where the argument so demands. It is exciting and stimulating to the legal mind to see how judiciary in other parts of the world is tackling these problems.

There are totally three chapters which are dedicated to e-contract. Chapter 22 speaks about validity of online contract without digital signatures. Chapter 4 of the book analyses sections 11, 12 and 13 of Information Technology Act, 2000. In Chapter 1, part dealing with ‘jurisdiction’ answers the issues relating to cyber law and e-contract with the help of foreign cases.

Dr. Gupta and Agrawal13 have authored a book entitled Cyber Laws, describes fundamentals of computer contracts in Chapter 30. This chapter concentrates on UK’s Unfair Contract Terms Act, 1977. And it gives account of types of e-contracts. Also speaks about drafting of e-contract. There is nothing much about issues relating to e-contract including jurisdiction, choice of law and many more.

Book titled Cyber Law in India authored by Dr. Farooq Ahmed14, is a very helpful book to understand cyber law. A chapter named ‘Electronic

12 Pavan Duggal, Cyber Law-The Indian Perspective, 2nd Ed., Saakshar Law Publication, New Delhi, 2004
14 Farooq Ahmad, Cyber Law In India, 2nd Ed., New Era Law Publications, Delhi, 2005
Commerce’ discusses some issues relating to e-contracts. This chapter deals issues from fundamentals of e-contract to the issue of identity of parties.

**Faye Fangfei Wang** dealing with contemporary issues in the European Union, United States and China authored a book titled *Law of Electronic Commercial Transactions*. This book is an extensive work on issue relating to online contracts. Book starts with introduction to electronic commerce and ends at future of electronic commerce. Part II of the book discusses about electronic contracts. In that part, following questions are discussed:

- What is an electronic contract?
- When is an electronic contract made?
- Where is the contract made?
- Contemporary issue: Electronic battle of forms

In the course of discussion various issues of electronic contract are described by the author. Further, all conventions and treaties on electronic commerce are analyzed. Wang’s discussion on Error in electronic communication is brilliant.

Apart from books on cyber law and electronic commerce, books on contract law are used for writing this research. Books written by Chitty, Anson, Atiyah, Treitel, Pollack & Mulla and Avatar Singh have been referred. Various fundamentals of contract law are taken from these books.

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Shmuel I. Becher & Tal Z. Zarsky\textsuperscript{16} authored an article on *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, speaks about B2C contracts. This article, reframes the analysis of online consumer contracts while taking into account this new flow of information. The article also accounts for the major challenges to the success of such information flow: the motivations of both information providers and receivers, and the accreditation of the data which might be compromised both unintentionally and maliciously.

Gokulesh Sharma\textsuperscript{17} wrote an article on *The Crisis of Standard Form Contracts* which briefly introduced standard forms of contract. In addition to this article, the article gives knowledge about standard forms of e-contracts. It also gives outline about various essentials of standard forms of contract.

C.M. Abhilash\textsuperscript{18} writing an article on *E-Commerce Law in Developing Countries: An Indian Perspective*, analyses UNCITRAL Model Law on Information Technology. This article is divided into three parts. The first part gives a brief introduction to the Model law and an overview of the Information Technology Act, 2000. The second part points out the main differences in the Model law and the Information Technology Act, 2000 regarding the provisions relating to Electronic signatures and E-contracts. The final part addresses the difficulties that might arise while


\textsuperscript{17} Dr. Gokulesh Sharma, *The Crisis of Standard Form Contracts*, available at http://drgokuleshsharma.com/pdf/STANDARD%20FORM%20CONTRACTS.pdf, last visited on 12 December 2012

\textsuperscript{18} C.M. Abhilash, *E-Commerce Law in Developing Countries: An Indian Perspective*, Vol.11, No.3 Information and Communication Technology Law, 2002 p. 269
implementing the said Act in a social and economic context and it stresses the need to promote electronic governance.

An article on *E-Contracting Challenges* written by **Lai Xu and Paul de Vrieze**,\(^{19}\) describes history and background of e-contract. In addition to this article also defines meaning of e-contract. This article explains technical issues of e-contract. The issue of multi-party e-contract is dealt in diagrammatical manner.

**Farooq Ahmed**\(^ {20}\) authored an article entitled *Electronic Commerce: An Indian Perspective*, in this paper he dealt almost all issues relating to e-contracts. This article deals with fundamentals of e-contract and issues various issues relating to online contracts. Issue of jurisdiction is thoroughly dealt with the help of case laws. Idea about *Kedia Case* is dealt exhaustively.

**Mark Allen Chen**\(^ {21}\) has dealt about new type of e-contract which is formed on social networking sites. In his paper on *Interactive Contracting in Social Networks*, the author explains about emerging regime in cyber contracts. In this article Mark argues that there is new trend is emerging wherein contracts are formed on facebook, orkut, myspace, mocospace, etc…

There are other journals which are taken into consideration for writing this research.


1.4.3. PRECEDENTS

In this research various precedents are used. These precedents form crux of this research. Here all precedents are not discussed in detail but only a list of those precedents is provided. They are:


*Entores Ltd. v. Miles Far East Corporation,* (1955) 2 All ER 493


*Step-Saver Data Sys. v. Wyse Technology,* 939 F.2d 91 (1991)


*Yahoo!, Inc. v. La Ligue Contre Le Racism et L’Antisemitisme,* 2001 US Dist. LEXIS 18378 (ND Cal. 2001)

Asian School of Cyber Laws has provided study material for students of cyber law authored by Rohas Nagpal, it is entitled as *Electronic Contracts & the Indian Law*. This study material has extensively described about fundamentals of contract law and e-contract. Law relating to e-contract is explained through the use of illustrations. Provisions of Information Technology Act, 2000 regulating e-contract have also been analysed. A landmark judgment of Allahabad High Court\(^{22}\) has also been described. In this case court has followed judgment of *Kedia Case*.\(^{23}\) In addition to this, the material gives samples of click wrap, e-mail service agreement, domain purchase agreement, online share trading agreement and online shopping agreements.

NALSAR University has also provided study material for diploma course in cyber law. The book on electronic contract is divided into five chapters. First chapter gives overview of cyber space. Second chapter speaks about jurisdictional issue. Third chapter describes fundamentals of e-contract. Fourth chapter explains various types of e-contracts. Final chapter delineates Indian legal position with regard to cyber contracts. In this chapter various legal issues have been dealt.

Not all books or journals have dealt elaborately about various issues involved in e-contract. There are only few literatures wherein one or two issues are dealt. Looking into literature on online contract the researcher has felt that there is need for research in this area.

\(^{22}\)P.R. Transport Agency *v.* Union of India & others, AIR 2006 All 23
\(^{23}\) AIR 1966 SC 543
1.5. SCOPE OF THE STUDY

The concept of e-contract has brought new challenges to legal system. The present day Indian legal framework is not in position to deal with these emerging issues. Hence, this research is undertaken to study the possible issues concerning e-contracts in India. This research focuses on the Indian laws mainly the Information Technology Act, 2000 and Indian Contract Act, 1872 for the regularization of electronic contract. Further, the scope of this research is limited to studying the basic principles of Indian Contract Law focusing on electronic contract.

This study is limited to fundamental principles of contract law. The study will examine important international convention and treaties. It will also examine Information Technology Act, 2000 and its adequacy or inadequacy to deal with e-contracts. Other related Indian legislations are analyzed only from perspective of e-contract. Further, the study would also examine issues likely to counter Indian legal framework and possible challenges before it.

1.6. METHODOLOGY

Methodology

The method of study will be purely doctrinal or non-empirical. The study will take note of the latest developments and trends in the field of study through different literary sources available. The nature of the topic is such that the best suited methodology of carrying out this research will be the pure doctrinal method further, due to several constraints and the nature and the complexity of the topic carrying out an empirical study does not seems to be a viable option. So the best suited methodology is pure doctrinal in nature.
Tools

The present study will be carried out with the help of different books, including e-books, written by Indian and foreign authors, legal and information technology journals national as well as international. For carrying out this study different web resources will also be used including legal data bases such as www.archive.org, www.lexisnexis.com, www.westlaw.com, www.heinonline.com, www.jstor.com, Wilson etc… further the journals written by professors of different universities and different resource persons such as research scholars on the relevant topic will also be used.

The Sources Relied Upon for the Research

- **Primary Sources:** Statutes/Enactments, judicial decisions (Reporters on Judicial Decisions), International Conventions and other sources of binding legal authority.
- **Secondary Sources:** Textbooks, Books of renowned authorities, magazine articles, histories, criticisms, commentaries, encyclopaedias, Journals, News Papers (Editorials and Articles) and other Publications.

The study is taken out only to discuss legal regime of e-contract in India. A primary concern of the study will revolve around the Information Technology Act, 2000 and Indian Contract Act, 1872.

1.7. HYPOTHESIS TESTED

In the background of aforesaid problems and objectives set forth, the hypothesis that has been formulated and tested:
• Information Technology Act, 2000 deals with only some aspects related to e-contracts while still some more area remains untouched by it.

• Legal regulation in India needs a rapid change to handle disputes arising out of e-contracts.

• Ratio laid down by the three Judge Bench of the Supreme Court in *Bhagawandas Kedia* case (AIR 1966 SC 543) still dominates the realm of e-contracts despite tremendous developments in technology

### 1.8. RESEARCH DESIGN

This study is designed to cover the aims and objectives of the research topic. The research includes nine chapters to justify the theme of the work. It is in the following manner:

**CHAPTER 1**
**INTRODUCTORY**

This chapter deals with introductory part and other incidental parts. This part explains objectives and problems examined by this study. This part deals with basic jurisprudential aspects of contract. Then development of internet and its functioning. The different modes of internet communication is also dealt here.

**CHAPTER 2**
**E-CONTRACT—AN OVERVIEW**

In first part of this section a brief introduction about e-commerce is put forth. After this *Kedia Case* has been discussed in detail. In this part meaning and kinds of e-contracts have been explained. At last a part e-procurement is been highlighted.

2.1. Introductory
2.2. Bhagwadas Kedia: Opened Up Door for e-contracts

2.3. What is E-Contract?

2.3.1. Kinds of E-Contract

2.3.1.1. E-Mail Contract

2.3.1.2. Contract through Websites
  - Click Wrap
  - Shrink Wrap
  - Browse Wrap
  - Online Shopping Agreement

2.4. e-Governance

2.5. e-Contract in public procurement

CHAPTER 3
JURISPRUDENTIAL ASPECTS OF LAW OF CONTRACT

This section conceptually examines contract law. At first a summary of jurisprudence and its meaning has been discussed. This chapter shows that the contract law is a concept of jurisprudence. Further in this section much of concentration is given to jurisprudential aspects.

3.1. Introductory
3.2. Definition
3.3. Rights and Duties
3.4. Titles
3.5. Objective Theory of Contract
3.6. Kinds of Agreements
  - 3.6.1. Validity of Agreement
3.7. Obligation
CHAPTER 4
GENESIS OF CONTRACT LAW

It is in this section an attempt has been made to give outline of historical background of contract law. This chapter is divided on the basis of east and west philosophy. At first western history of contract law is dealt. The western history starts from Babylon times to till modern times. The eastern history, which has been confined to Indian context, is divided on the basis of religion i.e. Hindu and Muslim. Lastly a bird’s eye view of history of e-contract is focused.

4.1. Introductory
4.2. English Law
   4.2.1. Babylonian Law
   4.2.2. Roman Law
   4.2.3. Common Law
      4.2.3.1. Common Law Action of Account
      4.2.3.2. Common Law Action of Surety
      4.2.3.3. Common Law Action of Debt
      4.2.3.4. Common Law Action of Covenant
      4.2.3.5. Common Law Action of Assumpsit
   4.2.4. Modern Law
4.3. Indian Law
   4.3.1. Hindu Law
      General Principles of Contracts
   4.3.2. Muslim Law
      General principles of Contract
4.4. Comparison of Laws
CHAPTER 5
FUNDAMENTALS OF INDIAN CONTRACT LAW

This chapter highlights essentials of contract and allied aspects of contract law. Much of concentration is given on Indian Contract Act, 1872.

5.1. Introductory
5.2. Formation of Contract
  5.2.1. Agreement
    5.2.1.1. Offer
    5.2.1.2. Acceptance
  5.2.2. Capacity
    5.2.2.1. Minors
    5.2.2.2. Unsound Mind
    5.2.2.3. Disqualified by Law
  5.2.3. Free Consent
    5.2.3.1. Coercion
    5.2.3.2. Undue Influence
    5.2.3.3. Fraud
    5.2.3.4. Misrepresentation
    5.2.3.5. Mistake
  5.2.4. Consideration
  5.2.5. Lawful Object
5.3. Discharge of Contract
  5.3.1. Performance of Contract
  5.3.2. Impossibility of Performance
  5.3.3. Performance by Agreement
  5.3.4. Remission of Performance
5.4. Breach of Contract
5.5. Remedies for Breach of Contract
5.5.1. Damages
5.5.2. Specific Relief Act
   5.5.2.1. Rescission
   5.5.2.2. Specific Performance
   5.5.2.3. Declaratory Degrees
   5.5.2.4. Preventive Reliefs

CHAPTER 6
CONCEPTUALISATION OF E-CONTRACTS

In this section, concepts related to e-contracts in light of Indian Contract Act, 1872 have been examined along with the issues concerning such e-contracts have also been analysed. Social and cultural impact of e-contracts has also been studied.

6.1 Introductory
6.2. Indian Contract Act, 1872 and Issues
   6.2.1. Pre-Contractual Consideration
   6.2.2. Formation of E-contracts
   6.2.3. Standard Form of E-Contracts
   6.2.4. Performance of E-contracts
   6.2.5. Discharge of E-Contracts and Remedies

6.3. Social and Cultural Impact

CHAPTER 7
LEGAL REGULATION OF E-CONTRACT IN INDIA

It this section wherein researcher put forth views about legal regime in India about electronic contracts. In this chapter various issues relating to online contract have been dealt.
7.1. Introductory

7.2. Information Technology Act, 2000
   7.2.1. Preamble
   7.2.2. Statement of Objects and Reasons
   7.2.3. Objectives
   7.2.4. Scheme
   7.2.5 Relevant Provisions Governing E-contracts
       7.2.5.1. Electronic Signatures
       7.2.5.2. E-Contract

7.3. Legal Issues
   7.3.1. Indian Evidence Act, 1872
   7.3.2. Online Contracting & Impediments to Judiciary
   7.3.3. Legislative Setbacks
   7.3.4. Miscellaneous Issues
       • Jurisdiction
       • Place of Formation
       • Choice of Law
       • Freedom of Contract *vis-à-vis* Standard Form of E-Contract
       • Identity of Parties
       • Social and Cultural Impact
       • Liability of Third Party

CHAPTER 8
INTERNATIONAL CONVENTIONS ON E-CONTRACTS
In this section, developments in the field of e-contracts and international conventions related to e-contracts and sale of goods have been discussed.

8.1. Introductory

8.2. Model Law on Electronic Commerce
   8.2.1. Aims and Objectives
8.2.2. Scope of MLEC
8.2.3. Structure of MLEC
8.2.4. Analysis of MLEC

8.3. United Nations Convention on the Use of Electronic Communications in International Contracts

8.3.1. Background information
8.3.2. The Aim of the Convention
8.3.3. Scope of the Convention
8.3.4. Analysis of Convention


8.4.1. Scope of Application
8.4.2. Formation of Contract
8.4.3. Sale of Goods
8.4.4. Final Clauses

8.5. UNCITRAL Model Law on Electronic Signatures

CHAPTER 9
CONCLUSIONS AND SUGGESTIONS

Here the conclusions drawn after the study and suggestions for the issues have been incorporated. The main emphasis of this chapter is for improving e-contracts and matters incidental to it
1.9. CONCEPTUAL FRAMEWORK

Here, different technical and legal terms, which are frequently used in this work, have been defined so as to remove any ambiguity and to bring clarity in expression.

**Contract** is an agreement enforceable by law\textsuperscript{24}

**Consideration** is when, at the desire of the promisor the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration \textsuperscript{25}

**Acceptance** means when a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted\textsuperscript{26}

**Access** with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system, computer network.\textsuperscript{27}

**Browser** is an application programme used to explore the Internet. A browser enables a surfer to wander from one node to another, without concern for the technical details of the links between the nodes or the specific methods used to access them, and present the information namely,

\textsuperscript{24} S.2(h) of Indian Contract Act, 1872
\textsuperscript{25} S.2(d) of Indian Contract Act, 1872
\textsuperscript{26} S.2(b) of Indian Contract Act, 1872
\textsuperscript{27} S.2(1)(a) of Information Technology Act, 2000
text, graphics, sound, or video, in the form of a document on the monitor.\(^{28}\)

**Computer** 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 to the computer in a computer system or computer network;\(^{29}\)

**Computer system** means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions;\(^{30}\)

**Connectivity**, the extent to which any given computer or application programme can co-operate with other network components, either hardware or software, purchased from other vendors.

**Cyber Law**, encompasses the legal, statutory and constitutional provisions that affect computers and computer networks. It concerns individuals, corporate bodies ad institutions which (a) are instrumental for entry into cyberspace, (b) provide access to cyberspace, (c) create the hardware and software which enable people to access cyberspace and (d) use their own computers to go online and enter cyberspace. Major litigants in cyber

\(^{28}\) *Supra Note 5*

\(^{29}\) Available at [http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.33.htm](http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.33.htm) visited on 01.01.2014

\(^{30}\) *Ibid*
disputes are internet service providing companies, regulatory agencies, personal computer companies, software companies, internet service providers, school, colleges, universities and finally, those individuals, firms and companies that have established a presence on the internet.\textsuperscript{31} In Indian context, Information Technology Act, 2000 is commonly referred to as cyber law.

**Cyber security**, means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosure, disruption, modification or destruction;\textsuperscript{32}

**Data**, means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer. Etymologically, ‘data’ is derived from the Latin word ‘*datum*’ meaning an item of information.\textsuperscript{33}

**Download**, is the transfer of a file or files from one computer to another through a network or by using a modem. The requesting personal computer initiates the download, stores the downloaded file on it diskfor


\textsuperscript{32}Ibid

further processing. Sending of information/data from a computer to a printer is also sometimes referred to as downloading.  

**Electronic Signature** means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3 of 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;  

**Hardware**, is a physical electronic components of a computer system, including peripherals, printed circuits boards, printers, etc.  

**Information** includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche;  

**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 the record and includes telecom 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;  

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34 Peter Day’s Glossary of Computer Terms, available at [www.math.utah.edu/~wisnia/glossary.html](http://www.math.utah.edu/~wisnia/glossary.html) visited on 08.01.2014  
35 S.2(1)(t) of Information Technology Act, 2000  
36 *Supra Note 33*  
37 S.2(1)(v) of Information Technology Act, 2000  
38 S.2(1)(w) of Information Technology Act, 2000
**Key Pair**, in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify an electronic signature created by the private key;\(^{39}\)

**Originator** means 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;\(^{40}\)

**Addressee** means a person who is intended by the originator to receive the electronic record but does not include any intermediary;\(^ {41}\)

**Internet** is a global system of interconnected computer networks that use the standard Internet Protocol Suite (TCP/IP) to serve billions of users worldwide. It is a network of networks that consists of millions of private, public, academic, business, and government networks, of local to global scope, that are linked by a broad array of electronic, wireless and optical networking technologies. The internet carries an extensive range of information resources and services, such as the inter-linked hypertext documents of the World Wide Web and the infrastructure to support e-mail.

**Internet Protocol Suite** (IP) is the set of communications protocols used for the internet and similar networks, and generally the most popular protocol stack for wide area networks. It is commonly known as TCP/IP because of its most important protocols; Transmission Control Protocol and Internet Protocol, which were the first networking protocols defined

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\(^{39}\) S.2(1)(x) of Information Technology Act, 2000
\(^{40}\) S.2(1)(za) of Information Technology Act, 2000
\(^ {41}\) S.2(1)(b) of Information Technology Act, 2000
in this standard. It is occasionally known as the DoD model due to the foundational influence of the ARPANET in the 1970s.\textsuperscript{42}

**HTTP** (Hyper Text Transport Protocol), is a protocol used to link one hypertext document to another. HTTP is the mechanism that opens the related document when a hypertext link is click, no matter where the related document happens to be in the Internet.\textsuperscript{43}

**Offer** defined as, when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.\textsuperscript{44}

**E-commerce** can be defined as ‘commerce conducted in a digital form or on an electronic platform’, or ‘selling or buying goods and services on the Internet’.

**E-contract** is a kind of contract formed by interaction of two or more individuals or organization using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.

**Online** is a facility or capability available directly on a computer. A peripheral such as a printer or modem when it is directly connected to computer and ready to operate. A computer connected to another remote computer in a network through a modem link.\textsuperscript{45}

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\textsuperscript{42} Available at https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Internet_Protocol_Suite.html visited on 12.01.2014
\textsuperscript{43}Supra Note 33
\textsuperscript{44}S.2(a) of Indian Contract Act, 1872
\textsuperscript{45}Supra Note 33
Click Wrap agreement is a type of contract that is widely used with software licences and online transactions in which a user must agree to terms and conditions prior to using the product or service.

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

Browse Wrap is contract or license agreement covering access to or use of materials on a website or downloadable product.

Communication Device means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image;

URL (Uniform Resource Locator) is a method of accessing internet resources. URLs contain information about the resources and also the method of access to be used. Web browsers use URL to connect directly to a specific document or page in the Web, and the user does not have to know where the resources are located physically. A sample of URL might look like this:- http://www.yebhi.com

World Wide Web abbreviated as WWW or W3, commonly known as the Web, is a system of interlinked hypertext documents accused via the Internet. With a web browser, one can view web pages that may contain text, images, videos, and other multimedia, and navigate between them via hyperlinks.

\[46^\text{Supra Note 33}\]
\[47^\text{Ibid}\]
Having thus discussed about some basic idea about this work, and the basic concepts of information technology, we now move to next leg of discussion that is about ‘E-contracts’.