CHAPTER 2
E-CONTRACT – AN OVERVIEW

2.1. INTRODUCTORY

It is known to everyone that computer is amongst the greatest inventions of mankind. In addition to computer, the invention of internet has brought revolution in field of information technology. Internet is being used almost everything such as, electronic commerce, social networking, dispute resolution, sending mails, internet chat, blogs, etc… Out of these, electronic commerce is one of the significant features of internet.

The term ‘E-Commerce’ includes all the activities of a firm or business or an individual may perform such as buying and selling of products and services alike, by using computers and communication technologies. It can include a host of activities such as shopping, supply chain management, automation, electronic payment etc…. With the development e-commerce, a seller can reach any part of the globe and the buyer has unlimited choice to access any seller. Efficiency has been greatly increased, paper work is reduced, time lag shortened and expenses lessened.

It is worth to mention here that ‘e-contract’ forms a part parcel of e-commerce. So before dealing with e-contract, it is mandate on once part to discuss about e-commerce.

A. E-COMMERCE

The phrase ‘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’. In the European Initiative in Electronic Commerce E-commerce is defined as below:

Any form of business transaction in which the parties interact electronically rather than by physical exchanges. It covers mainly two types of activity; one is the electronic ordering of tangible goods, delivered physically using traditional channels such as postal services or commercial couriers; and the other is direct electronic commerce including the online ordering, payment and delivery of intangible goods and services such as computer software, entertainment content or information services on a global scale.

The key words in the definition above are: commercial transactions, organizations, individuals and electronic exchange. It reveals the scope of electronic commerce from a jurisdiction and functional perspective.

Electronic commerce, in private sense, is international and domestic commerce; trade and business for both non-personal and personal usage.

The types of electronic commerce can be based either on the kinds of parties involved viz., businesses, consumers, governments or administrations, on the other hand commercial activities may be the criterion for determining the kinds of business e.g. web advertisement, electronic delivery of digital goods, delivery of goods physically which have been ordered electronically, information services.

The parties to a contract, which has been concluded electronically, should first be able to establish the terms on which and the type of contract than

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they have entered into. Broadly speaking an electronic contract can be characterized as below:³

- Business-to-Business (B2B)
- Business-to-Consumer (B2C)
- Consumer-to-Business (C2B)
- Consumer-to-Consumer (C2C)
- A/G2A/G or B/C [popularly known as electronic governance it involves the interaction between administration/governments (local, regional or national) with other administrations or with businesses and consumers.]

**Business to Business (B2B)**

A B2B cycle involves electronic transactions among and between businesses. This is a technology which has been in practice for many years generally in the form of Electronic Data Interchange (EDI) or electronic transfer of funds. B2B transactions have seen a phenomenal growth due to sharp increase in the internet penetration and have become faster growing segment even within the e-commerce environment.

This kind of a business arrangement is seen in the case of various FMCG (Fast moving consumer goods) companies who are connected with their franchisees through the internet and a varied range of transactions including reports of stock, sales, purchase orders and other shipping details can be transacted through this form.

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Business-to-Consumer (B2C)

In a typical B2C e-commerce, businesses sell directly to consumers. Websites such as homeshop18.com, flipkart.com, ebay.com, are the most common examples of such B2C e-commerce cycle. In addition to these, even the traditional businesses have also established virtual stores in order to cater to ever growing demands.

The major advantages of such e-commerce sites and companies are the availability of physical space, availability of returns and availability of customer service in physical matters. The organization would directly be in touch with its customers. As middlemen are eliminated, price of goods will be less resulting in some benefit to customers.

Consumer-to-Business (C2B)

This generally involves individuals selling to business concerned and may be in the nature of selling of a particular service or product that the consumer intends to sell.

This may be in the form of catalogues, auctions, etc. very good examples of such trade are websites for travel arrangements.

Consumer-to-Consumer (C2C)

The C2C e-commerce category involves business transactions among individuals using the Internet and web technologies. Here, the commercial activities take place between two individuals. One of the very classic examples is the bids that are registered with websites like bazee.com, olx.com for sale of products or possession of individual wanting to sell through the net.
Governmental and Non-Business

The e-commerce applications are also found in the Government and non-business sectors. The Revenue departments, the police enforcement, the Railways, the Defence departments, Universities and other non-profit, non-government voluntary organizations are some of the set ups using technology. And calling of tenders for assigning public work called e-procurement.

**2.2. BHAGWADAS KEDIA: OPENED UP DOOR FOR E-CONTRACTS**

Prior to judgment of Bhagwandas Kedia⁴ the Contract Act of 1872 was applicable to traditional mode of contracts, which means, contracts entered face to face between the competent parties. In order to understand Kedia Case, it is necessary to discuss Entores Ltd. v. Miles Far East Corporation.⁵ This is the case on which Kedia Case decision is based. The facts of the Entores case were that, an offer was made from London by telex to a party in Holland and it was duly accepted through the telex, the only question being as to whether the contract was made in Holland or in England. The Court of Appeal held that telex is a method of instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offerer; and the contract is made at the place where the acceptance is received. Denning LJ observed as follows:

> Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is

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⁴ Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co. AIR 1966 SC 543
⁵ (1955) 2 All ER 493
drowned by an aircraft flying overhead. There is no contract at that movement. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says.... Now take a case where two people make a contract by telephone. Suppose for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes ‘dead’ so that I do not hear his words of acceptance. There is no contract at that movement.

The principle of the Entores Case has been endorsed in Kedia Case. The rule above stated is called ‘acceptance rule’.

**Facts of the Kedia Case**

Plaintiffs brought an action against the defendants for a decree for Rs. 31,150/- on the plea that the defendants had failed to supply cotton seed cake which they had agreed to supply under an oral contract dated July 22, 1959 negotiated between the parties by conversation on long distance telephone. The plaintiffs submitted that the cause of action for the suit arose at Ahmadabad, because the defendants had offered to sell cotton seed cake which offer was accepted by the plaintiffs at Ahmadabad. Also because the defendants were under the contract bound to supply the goods at Ahmadabad and the defendants were to receive payment for the goods through a Bank at Ahmadabad. The defendants contended that the plaintiffs had by a message communicated by telephone offered to purchase cotton seed cake and they (the defendants) had accepted the offer at Khamgaon, that under the contract delivery of the goods contracted for was to be made at Khamgaon, price was also to be paid at Khamgaon and that no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil Court Ahmadabad.

On the issue of jurisdiction, the Trial Court found that the plaintiffs had made an offer from Ahmadabad by long distance telephone to the
defendants to purchase the goods and that the defendants had accepted
the offer at Khamgaon, that the goods were under the contract to be
delivered at Khamgaon and that payment was also to be made at
Khamgaon. The contract was in the view of the Court to be performed at
Khamgaon, and because of the offer made from Ahmadabad to purchase
goods the Court at Ahmadabad could not be invested with jurisdiction to
entertain the suit. But the Court held that when a contract is made by
correspondence on telephone, the place where acceptance of offer is
intimated to the offeror, is the place where the contract is made, and
therefore the Civil Court at Ahmadabad had jurisdiction to try the suit. A
revision application filed by the defendants (Kedia) against the order,
directing the suit to proceed on the merits, was rejected *in limine* by the
High Court. Aggrieved by the order of the High Court, defendants
preferred appeal to Supreme Court with special leave.

**Defence of Defendants**

The defendants (Kedia) contended that in the case of contract on telephone,
the place where the offer is accepted is the place where the contract is
made, and that Court alone has jurisdiction within the territorial
jurisdiction of which the offer is accepted and the acceptance is spoken
into the telephone instrument.

**Reasoning and Judgment**

Matter was decided by a three Judges Bench consisting of Justice J.C. Shah,
Justice K.N. Wanchoo and Justice Mohd. Hidayatullah. There was a split
verdict with 2:1. Shah (afterwards CJ) and Wanchoo JJ., gave majority
view whereas Hidayatullah M, J (afterwards CJ) gave dissenting opinion.
Shah J., gave judgment on behalf of himself and Wanchoo J. The Judges
constituting majority opinion, preferred to follow the English rule laid
down in the *Entores* Case and saw no reason for extending the post office rule to telephonic communication. Shah, J. observed:

Making of an offer at a place which has been accepted elsewhere does not form part of the cause of action in a suit for damages, for breach of contract. Ordinarily it is the acceptance of offer and intimation of that acceptance which result in a contract. The intimation must be by same external manifestation which the law regards as sufficient.

On the general rule that a contract is concluded when an offer is accepted and acceptance is intimated to the offerer, is engrained an exception based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decision. The exception may be summarized as follows: When by agreement, course of contract or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission the offeree by posting a letter or dispatching a telegram.

The rule that applies to acceptance by post of telegram does not however apply to contracts made by telephone. The rule which applies to contracts by telephone is the ordinary rule which regards a contract as complete only when acceptance is intimated to the purchaser. In the case of a telephonic conversation in a sense the parties are in the presence of each other, each party is able to hear the voice of the other. 'Mere is an instantaneous communication of speech intimating offer and acceptance, rejection and counter-offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by Telegram.

It is true that the Posts and Telegraphs Department has general control over communication by telephone and especially over long distance Telephones, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective
intervention of that third agency, letters or messages cannot be transmitted. In the case of a conversation by telephone, once connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other; they are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously and communication does not depend on external agency.

....that the draftsman of the Indian Contract Act could not have envisaged use of telephone because it had not been invented and, therefore, the words of the provision should be confined to communication by post.

On the other hand in his dissenting opinion Hidayatullah J., observed:

In the Entores Case Lord Denning no doubt held that acceptance given by telephone was governed by the principles applicable to oral acceptance where the parties were in the presence of each other and that the analogy of letters sent by post could not be applied. But the Court of Appeal was not called upon to construe a written law which brings in the inflexibility of its own language. It was not required to construe the words found in Section 4 of the Indian Contract Act, namely, “The communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor.”

The law under consideration was framed at a time when telephone, wireless, Telstar and Early Bird were not contemplated. If time has marched and inventions have made it easy to communicate instantaneously over long distance and the language of our law does not fit the new conditions it can be modified to reject the old principles. But it is not possible to go against the language by accepting an interpretation given without considering the language of our Act.

The language of Section 4 of the Indian Contract Act, covers a case of communication over the telephone. Our Act does not provide separately for post, telegraph, telephone, or
wireless. Some of these were unknown in 1872 and no attempt has been made to modify the law. It may be presumed that the language has been considered adequate to, cover cases of these new inventions. It is possible today not only to speak on the telephone but to record the spoken words on a tape and it is easy to prove that a particular conversation took place. Telephones now have television added to them. The rule about lost letters of acceptance was made out of expediency because it was easier in commercial circles to prove the dispatch of letters but very difficult to disprove a statement that the letter was not received. If the rule suggested on behalf of the plaintiffs is accepted it would put a very powerful defence in the hands of the proposer if his denial that he heard the speech could take awry the implications of our law that acceptance is complete as soon as it is put in course of transmission to the proposer.

Where the acceptance on telephone is not heard on account of mechanical defects there may be difficulty in determining whether at all a contract results. But where the speech is fully heard and understood there is it binding contract, and in such a case the only question is to the place where the contract can be said to have taken peace.

In the present case both sides admitted that the acceptance was clearly heard in Ahmadabad. The acceptor was in a position to say that the communication of the acceptance in so far as he was concerned was complete when he (the acceptor) put his acceptance in transmission to him (the proposer) as to be out of his (the acceptor’....) power of recall in terms of s. 4 of the Contract Act. It was obvious that the word of acceptance was spoken at Khamgaon and the moment the acceptor spoke his acceptance he put it in course of transmission to the proposer beyond his recall. He could not revoke acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new inventions into the frame of our statutory law we are bound to say that the acceptor by speaking into the telephone put his acceptance in the resource of transmission to the proposer.

It is worth to mention that at the time of enactment of Contract Act of 1872 there were no telephones, telex or computers. Therefore, the draftsmen
never imagined about scientific inventions. So, the Contract Act of 1872
did not envision about communication using different technologies.
Further, the Supreme Court of India, through Hidayatullah J., stated that
law can be modified to suit present day’s requirements. At this point it can
be stressed that, circumstances have changed and new inventions are
coming up. Under this situation, it appears that, the majority opinion in
Kedia’s standstill and would virtually be overtaken by the fast changing
technological innovations and circumstances. Further, these changes have
made the dissenting opinion, expressed by Justice Hidayatullah, more
relevant today than the majority opinion. In addition to this, India is
signatory party to the Model Law on Electronic Commerce, 1996. On that
basis India has enacted Information Technology Act, 2000. Signing of such
a convention and enacting law makes the binding majority opinion in
Kedia’s case redundant.

Having discussed about e-commerce and an important case, while moving
ahead, now e-contracts are discussed here.

2.3. WHAT IS E-CONTRACT?

After looking at bird’s view of e-commerce, now it is time for
understanding what is the meaning of e-contract? There is no hard and
fast definition of e-contract. The traditional definition of ‘contract’ cannot
be applied to ‘e-contract’, because realm of e-contract is much bigger than
the realm of traditional mode of contract. To put it simply, e-contract is any
agreement which is entered on internet by competent parties, with lawful
consideration, free consent, without any mala fide intention and to create
legal relationship.
E-contract can be defined in following words:\textsuperscript{6}

E-contract is a kind of contract formed by negotiation of two or more individuals through the use 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.

As it is already stated that there is no exhaustive definition as to e-contract and most of times only generic definitions are available. E-contracts are also referred as ‘cyber-contract’ or ‘digital contract’ or ‘online contracts’.

Etymologically one can give as many as definitions for e-contract, but there is no border line for it meaning. In broader sense, it can be summed up as contracts made using computers, either via e-mail or the Internet, or that involve computer related products, such as databases and software.\textsuperscript{7}

The International Chamber of Commerce refers to ‘electronic contracting’ as ‘the automated process of entering into contracts via the parties’ computers, whether networked or through electronic messaging.\textsuperscript{8} This definition is an amalgamation of two separate explanations, one contained in the UN Convention on the Use of Electronic Communications in International Contracts and the other taken from the US Uniform Electronic Transaction Act and Uniform Computer Information Transactions Act providing for ‘automated transactions’. ‘Electronic Communication’ means ‘any communication that parties make by means of data message’, whereas ‘automated transaction’ means ‘any transaction


\textsuperscript{7} Available at, http://highered.mcgraw-hill.com/sites/0073524948/student_view0/glossary.html last visited on 28 November, 2012

conducted or performed, in whole or in part, by electronic means or electronic records’.

### 2.3.1.KINDS OF E-CONTRACT

There are two ways through which commercial contracts can be entered electronically. A common and popular method is through the exchange of electronic mail ‘e-mail’. The other method of contracting is using the World Wide Web or ‘website’. Further the website based is divided into following kinds:

- Click Wrap
- Browse Wrap and
- Shrink Wrap

### 2.3.1.1.E-MAIL CONTRACT

A contract can be entered into and concluded following the exchange of a number of e-mails between the parties. Here the e-mails serve the same purpose as normal letters, do had a contract been negotiated through letters written by both parties. The fact that a contract has been negotiated electronically will not raise any specific legal or contractual consideration *sui generis* to the type although there may be evidential considerations raised dependant on the existing legislation and if there are any formal requirements for a written signed contract.

### 2.3.1.2.CONTRACT THROUGH WEBSITES

Normally, a vendor would provide a display of products on his website and indicates cost of such product. A customer can scroll through the website previewing the items or products on offer, click on the item for further information and if interested in the purchase, can place an order by
filling in an order form and clicking ‘Submit’ or ‘I Agree’ or ‘I Accept’ or something similar button. Shrink wrap,^9 click wrap and browse wrap are common types of agreements used in electronic commerce.

**A. CLICK WRAP**

A click wrap agreement is mostly found as part of the installation process of software packages. It is also called a ‘click through’ agreement or click wrap license. The name ‘click wrap’ comes from the use of ‘shrink wrap contracts’ in boxed software purchases. In a Click Wrap Agreement, the party after going through the terms and conditions provided in the website or programme has to typically indicate his assent by clicking “I Agree/I Accept” icon or decline the same by clicking the icon “I disagree”. These types of contracts are extensively used on internet for granting permission to access the site or downloading the software or selling some product. Click-wrap agreements can be of the following types:

i. **Type and Click** where the user must type ‘I accept’ or other specified words in an on-screen box and then click a ‘Submit’ or similar button. This displays acceptance of the terms of the contract. A user cannot proceed to download or view the target information without following these steps.

ii. **Icon Clicking** where the user must click on an ‘OK’ or ‘I agree’ button on a dialog box or pop-up window. A user indicates rejection by clicking “Cancel” or closing the window.

Software Developers generally rely on the use of contracts in the form of click wrap license agreements as a means to protect software from unauthorized use, modification and copying. By granting a license to the

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^9 The clinging transparent plastic film that is used to shrink-wrap the Compact Disks.
purchaser to use the software rather than selling the program outright, the Software Developer is able to retain and have control over his product. Most of click wrap license agreements are non-exclusive licenses which mean that the licensor reserves the right to license the same software to other licensees.¹⁰

Click wrap agreements usually include provisions such as a ‘Notice of Agreement Clause’ stating that the using of the software/ product constitutes agreement to the license’s terms, a ‘Title Retention Clause’ which, in effect, states the user does not own the copy of the program he/she has contracted for, but takes possession subject to a perpetual license, an ‘Exclusive Use Clause’, a clause preventing the user from creating unauthorized copies of the software/ product for use or otherwise, an ‘Anti-refuse Clause’ prohibiting the user from lending, renting, or transferring the software to others, in case of softwares, a clause prohibiting usage in more than one computer specified for that parties, an ‘Anti-reverse Engineering Clause’, prohibiting the user from reassembling the product from the already available version, a provision protecting the copyright over the software/ product design, a usual limitation or disclaimer of warranties and liabilities, a clause limiting the liability of the vendor, a purchaser’s right to decline the terms of the agreement by returning the software program or the product, as the case may be, and miscellaneous provisions such as a governing law clause, jurisdiction clause, force majeure clause etc….¹¹

Thus, click wrap agreements are adhesion contracts which do not involve the concept of mutual assents and bargains as provided in the contract


¹¹ Ibid
theory. Actually they are “take it or leave it” agreements in which the user is not made aware of the terms until late in the transaction (just before the use of the product) which is different from traditional written contracts.12

In click wrap agreements, the meeting amongst the parties is virtual i.e. they do not meet physically. The contract could be for the sale of any kind of product, physical or otherwise. Following are some of the issues that may arise out of click wrap contracting, which will be dealt at later juncture:

- Identity of Parties
- Jurisdiction and
- Legal Recognition of Transaction

The validity and enforceability of click wrap agreements will be dealt in later chapter.

B. SHRINK WRAP

Shrink wrap contracts 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.

A shrink wrap contract is the prior license agreement enforced upon the buyer when he buys software. Before he or she tears the pack to use it, he or she is made aware by tearing the cover or the wrap that they are bound by the license agreement of the manufacture.

This is done to protect the interests of the manufacturer where the consumer cannot reproduce the package, copy it or sell it or donate it to others affecting the sale of the software. The license, which is shrunk and wrapped in the product, same becomes enforceable and taken as consent before the buyer tears the package. The usual clauses that are part of the shrink-wrap license are that of:

- prohibiting unauthorised creation of copies
- prohibiting rentals of the software
- prohibition of reverse engineering, de-compilation or modification
- prohibition of usage in more than one computer specified for that purpose
- disclaimer of warranties in respect of the product sold
- limitations of liability

The logic and business sense is that to protect the manufacturer of the package, as it is easy to copy, manipulates and duplicate under other brand name.

The legal status of shrink wrap is somewhat unclear. In the 1980s, the US courts tried to solve the problem of status. The first legal ruling to address the enforceability of a shrink wrap license grew out of a pair of decisions (a trial court decision and an appeal to the Fifth Circuit) from Louisiana. In case of Vault Corp. v. Quaid Software Ltd.\(^\text{13}\), the district court stated without explication that the shrinkwrap license at issue in that case was “a contract of adhesion which could only be enforceable” if the provisions of a Louisiana statute—which explicitly made such license agreements

enforceable—were a valid statute that was not preempted by federal law. It was held that the shrink wrap is unenforceable.

Further in Arizona Retail Sys. v. Software Link\(^\text{14}\) and Step-Saver Data Sys. v. Wyse Technology\(^\text{15}\) the courts did not discuss much about the shrink wrap agreements. It was in ProCD, Inc. v. Zeidenberg\(^\text{16}\) courts gave bit of relief to the software companies by enforcing shrink wrap agreement. Further it was held that shrink wrap agreements were enforceable.\(^\text{17}\)

ProCD was followed by Klocek v. Gateway, Inc.\(^\text{18}\), which found the contracts at hand unenforceable, but did not comment on shrink wrap contracts as a whole.

**C. BROWSE WRAP**

In a browse-wrap agreement, the terms and conditions of use for a website or other downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, where the user must manifest assent to the terms and conditions by clicking on an “I agree” box, a browse-wrap agreement does not require this type of express manifestation of assent. Rather, a web-site user purportedly gives his or her assent by simply using the product — such as by entering the website or downloading software. Browse-wrap agreements, like click wrap agreements, derive their name by analogy to

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‘shrink wrap’ used in the licensing of tangible forms of software sold in packages.

As in case shrink wrap agreements there is uncertainty of enforceability, same way the uncertainty continues with browse wrap agreements. But browse-wrap agreements present different issues because it is less clear that the person using the website has accepted the terms of the agreement. The courts have held that the validity of a browse wrap agreement primarily depended on whether a website user has had actual or constructive notice of the terms and conditions prior to using the website or other product.

In _Hubbert v. Dell Corp._, on appeal, an Illinois state appellate court reversed the trial court’s refusal to compel arbitration. The appeals court took note of how prominently Dell had warned the user that Dell’s terms and conditions would apply:

...The blue hyperlink entitled “Terms and Conditions of Sale” appeared on numerous Web pages the plaintiffs completed in the ordering process [...and] should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink’s contrasting blue type makes it conspicuous. Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.

Additionally, on three of the defendant’s Web pages that the plaintiffs completed to make their purchases, the following statement appeared: “All sales are subject to Dell’s Term[s]

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and Conditions of Sale.” This statement would place a reasonable person on notice that there were terms and conditions attached to the purchase and that it would be wise to find out what the terms and conditions were before making a purchase.

The statement that the sales were subject to the defendant’s “Terms and Conditions of Sale,” combined with making the “Terms and Conditions of Sale” accessible online by blue hyperlinks, was sufficient notice to the plaintiffs that purchasing the computers online would make the “Terms and Conditions of Sale” binding on them.

Because the “Terms and Conditions of Sale” were a part of the online contract and because the plaintiffs did not argue that their claims were not within the scope of the arbitration agreement, they were bound by the “Terms and Conditions of Sale,” including the arbitration clause.

Whereas in Specht v. Netscape,20 the influential Second Circuit court of appeals affirmed denial of a motion (or application) to compel arbitration; the court agreed that:

... a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants’ invitation to download the free software, ...defendants therefore did not provide reasonable notice of the license terms.

In Hoffman v. Supplements Togo Mgmt. LLC,21 and In re Zappos.com Inc., Customer Data Security Breach Litigation,22 the court held that “without direct evidence that Plaintiffs click [sic] on the Terms of Use, we cannot conclude that Plaintiffs ever viewed, let alone manifested assent to, the Terms of Use.

21 18 A.3d 210 (2011)
D. ONLINE SHOPPING AGREEMENT

This is another kind of e-contract, in this people can purchase goods, home appliances and many more things online. Very recently in India some websites are selling some products are services online. This type of sale is gaining more popularity. Therefore, this kind of agreement assumes importance.

Generally a typical B2C e-commerce cycle involves the following five major activities:\(^\text{23}\)

- **Information Sharing:** The general practice in information sharing is that the Company uses the following application/methodology to share information with its prospective customer. This information could be in the form of the Company’s website, online catalogs, email alerts, online advertising, bulletin boards, message Board systems, news groups and discussion groups.

- **Order:** Once a customer is familiarized with his needs the customer may use the electronic forms which are available on the Company’s website and order for the necessary goods.

- **Payment Channels:** The website gives the customer various options for payment for the goods or services selected, all of which are listed with the website. The most popular modes of payment are credit and debit cards cheques and cash on delivery or charge cards.

  The web company to ensure security and confidentiality with respect to each of these electronic transactions incorporates various security measures. These measures in the form of digital signature, authentication, public key

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\(^{23}\text{Supra Ref. 3, pp.1246-1247}\)
cryptography, certificate authorities, SSI, secure HTTP
digital signatures and public and private key transactions.

- **Performance of Order**: The function of performance of the order,
depending on the nature of the transaction and the directions of the
customer might be either simple or complex. The mode of
fulfillment will also depend on how the e-business handles its own
fulfillment operations or outsources this function to third parties.

- **Support and Services**: In any e-business service plays a very vital
role by virtue of the fact there is a lack of physical presence and
other innovative methods are required to maintain current
customers. The general ways of applications of technology for
providing such service and support are having; periodic follow up
by e-mails, email confirmation/alerts, Online surveys, Help Desk
and Guarantee of secure transaction.

### 2.4. E-GOVERNANCE

The e-governance predominantly deals with delivery of government
services to its citizens, exchange of information and integration of various
systems and services using information and communication
technologies. This e-governance has different parameters. It could be
government to government (G2G) or government to citizens (G2C) or
government to business (G2B) or government to employees (G2E).

The basic purpose of e-governance is to enhance efficiency in
administration and transparency in operations. This e-governance has two
way communications. In Indian context, a recent conference on e-
governance, Indian government has conceptualized “open government”

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25 *Ibid*
for its citizens\textsuperscript{26}. This theme of “open government” consisted of three components viz. accessibility, participation and transparency. As mentioned earlier chapters, e-governance gives level playing field to all interested participants in allotment of government contracts. Thus, e-governance removes arbitrariness from the administrative set-up. Further, it strengthens the core concept of our Constitution that is welfare state by giving an easy opportunity to people to participate in administrative proceedings\textsuperscript{27}. The Second Administrative Reforms Committee set up by Government of India has submitted a report that by 2017 there should be paperless offices in this country\textsuperscript{28}.

Government of India started e-governance under National e-Governance Plan (NeGP) initiated by Department of Administrative Reforms & Public Grievances and Department of Electronics and Information Technology in 2006 with objective of making services accessible to citizens and promoting efficiency and transparency\textsuperscript{29}.

\textbf{Advantages of e-governance}\textsuperscript{30}

The advantages of e-governance is discussed with reference to three important parameters as under –

1. \textbf{Governance}: it empowers citizens by creating awareness of their rights and encourages participation. It further strives for promotion of democratic society. The other common ground is it encourages transparency, efficiency, reduction in corruption and improvement in accountability.

\textsuperscript{26} http://www.nceg.gov.in/16_nceg_proceedings.pdf (as last visited on 08-09-2013)  
\textsuperscript{27}Ibid  
\textsuperscript{28}Ibid  
\textsuperscript{29}Ibid  
\textsuperscript{30}Ibid
2. **Public Services**: it provides citizens with access to information and knowledge. Further, it enhances speed of communication.

3. **Management**: It encourages balanced regional development with special emphasis on rural areas. It smoothens operation and management of voluminous data. It provides decision support system to administrative staff. It reduces cost.

**Challenges to e-governance especially in Indian context**[^31]

Though e-governance has so many advantages, it has few challenges which overshadow its efficiency. The first and foremost challenge is that e-governance has not reached the desirable number of citizens in an Information Technology advanced nation like India. Further, citizens, in some cases, have been given only limited access to information. In India – where most of the population still in rural areas and still uneducated – the concept of e-governance suffers due to lack of awareness amongst citizens. Different authorities use different standards, terminology and methodology. This acts as one the biggest impediments in effective implementation of e-governance. Further, administrative staff poses resistance to change. This acts as one more impediment in effective operation of e-governance. On different note, cost of information, reliability of information and privacy are other sets of issues which always hinder effective implantation of e-governance.

Strictly speaking, provision for e-governance may not amount to a contract between State and individuals or organizations. Omission to provide e-governance cannot be questioned in courts of law. As government is striving for enhancing transparency in administration and

[^31]: Ibid
minimizing corrupt practices, e-governance is used as a handy tool for achieving these objectives. One of the greatest advantages of using e-governance is e-procurements.

2.5. E-CONTRACT IN PUBLIC PROCUREMENT

E-procurement, as a part of e-contracts, has changed entire approach towards public procurement. Thus, the concept of equality as enshrined under the Article 14 of the Constitution of India, 1950 has been fulfilled to a great extent. Prior introduction of e-procurement platform, there were certain anomalies in the system. These shortcomings always paved way for interference of courts mainly on ground of lack of transparency and arbitrariness.

In matter of Ramana Dayaram Shetty v. International Airport Authority of India32 while dealing with duties of the Government and manner of performance in light of the Article 14 of the Constitution of India, 1950, the Supreme Court was pleased to observe as under –

“Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, there is substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary

32 AIR 1979 SC 1628
exercise of power, wherever it is found. It is unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.”

Further it was observed that “….. Today the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds: leases, licences, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure.”

“The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess formerly regarded as privileges have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will.”

“Therefore, where the Government is dealing with the public, whether by way of giving jobs or entering into
contracts or issuing quotas or licences or granting other forms of largess. The Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down. Unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was non-irrational, unreasonable or discriminatory.”

“The Government which represents the executive authority of the State may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. With the advent of the welfare state the civil service, which traditionally carried out functions of Government through natural persons, was found inadequate to handle the new tasks of specialized and highly technical character. To fill the gap it became necessary to forge a new instrumentality or administrative device for handling these new problems and that is done by public corporations which has become the third arm of the Government. They are regarded as agencies of the Government. In pursuance of the industrial policy resolution of the Government of India corporations were created by the Government for setting up and management of public enterprises and carrying out public function. The corporations so created, acting as instrumentality or agency of Government, would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself though in the eye of law they would be distinct and independent legal entities. It Government acting, through its officers is subject to certain constitutional and public law. Limitations, it must follow a fortiori that Government, though the instrumentality or agency of corporations should equally be subject to the same limitations. But the question is how to determine whether a corporation is acting as instrumentality or agency of Government.”
“It is well established that Art. 14 requires that action must not be arbitrary and must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by extraneous or irrelevant considerations. The State cannot act arbitrarily in enter into relationship, contractual or otherwise, with a third party. Its action must conform to some standard or norm which is rational and non-discriminatory.”

The above stated observation makes it amply clear that the State has to exercise its discretion in such manner so as to promote transparency and to eliminate discrimination. This sort of governance can safely be achieved by the e-procurement.

In nutshell it can be said that e-procurement as part of e-Contracts has minimized discrimination and has led to the enhancement of transparency. It is pertinent to mention here that in State of Karnataka a special law has been enacted as “The Karnataka Transparency in Public Procurements Act, 1999”. Further, under this Act, Karnataka Transparency in Public Procurement Rules, 2000 were enacted. These Rules provide for procedure as to how the authorities should proceed so as to enter into agreements. Further, all public contracts up to Rs. 10,00,000.00 can be awarded without following e-procurement. Whereas any contract involving amount more than Rs. 10,00,000.00 has to be awarded only by way of e-procurement. This change in policy has given level playing field to all the participants. Thus, it has contributed in cause of upholding values enshrined under Art. 14, Art.19 and Art. 21 of Constitution of India, 1950.

Thus, so far we discussed about e-contracts and other allied topics. As this work is related to e-contracts, it is essential to understand evolution of contracts. Therefore, in coming chapter we are discussing about evolution of contracts from jurisprudential perspective.