CHAPTER-IV

A COMPARATIVE STUDY OF LAW OF CONTRACT IN INDIA, U.K. AND U.S.
CHAPTER-III

CONCEPT OF CONTRACT:
CHANGES IN PRESENT SCENARIO

3.1 Introduction

Concept of Contract is changing since 1991 due to public private -partnership, industrialization, globalization etc. Many new terms have come in contract act for example e-contract, I.T. act escrow agreement joint venture agreement, contract farming, outsourcing contracts etc. The present research has sought to highlight on the all above mentioned new contract terms. In earlier society exchange and barter prevailed and these were the foundations of modern contract law. By the third quarter of the nineteenth century, the world had experienced accelerating industrialization, generated by scientific innovation, economic entrepreneurship and increasing access to both labor and capital. This gave rise to an unprecedented boom in trade. This boom has been accompanied by a similar massive development of those areas of law that were designed to regulate business relationships i.e. Contract, commercial and company law. At the time when the classical model emerged, it was more accurate than it is today to refer to a general law of contracts. There were special rules for certain types of contracts but the tendencies to develop special rules has increased with the time. In broad terms, the general principles of contract law today, called ‘residue’ are those rules that remain untouched by, or are merely amended by statutes or judge made law. In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. The study has found at the outset that bare words of promise do not so operate. The problem then becomes determining what facts must accompany promissory words in order to create a legal duty.

One must know what these facts are in order that one can properly predict the enforcement of reparation, either specific or compensatory, in case of non performance. Consumers are looking for a sufficient cause for the legal enforcement of a promise. This problem was found in all system of law. With us it is called the problem of consideration. The courts will generally enforce consequences logically implied in the language of contracts, wills, statutes, and other legal documents and transactions, the point now to be noticed is that the legal doctrine of implied terms goes much farther than the judges are accustomed to read into and many terms are not logically implied in them. The classical

model was heavily influenced by then prevailing notions which treated contracting parties as economic units assumed to have equal bargaining strength. This idea was called ‘freedom of contract’. The premise behind this was that when the parties are allowed to determine the basis on which the exchange goods, services and money and if the suppliers are ready to consumer demand, then in the long run the market will supply consumers with what they want at a price they are willing to pay. It can be seen from this that the notion of ‘freedom of contract’ is closely associated with a belief in the free market. If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. However, much of the history of contract law since these words were spoken by Sir George Jessel in 1875, concerns the decline of the idea of ‘freedom of contract’. This is the result of social change. Almost 130 years on, it is no longer the individual entrepreneur but the government which is primarily concerned with the allocation of resources. In India, Andhra Sugars Ltd v. State of Andhra Pradesh is a case on this point. In this case, a cane grower had the freedom to offer came to the factory of his area or not, but if he made an offer, the factory was bound under an act to accept. The Court pointed out that in such a case the consent, though not compulsory, is not caused by undue influence, fraud or misrepresentation or mistake. The compulsion of law is not coercion. Another notion that has evolved at par with the ‘market-individualism’ as discussed earlier, is the theory of ‘Consumer Welfarism.’ The ‘Consumer Welfarism’ theory brings fairness and reasonableness in contract. It does not start with the ‘market-individualistic’ premise that all contracts should be minimally regulated. Rather it pre-supposes that consumer contracts are to be closely regulated, and that all commercial contracts are to be subject to more regulations than ‘market-individualism’ would allow.

Theories underpinning the law of contracts are in a state of flux. Criticisms of the Classical model focus on its emphasis on procedural justice at the expense of substantive justice, its privileging of rules over understanding and context, and its inability to reflect the day to day world of contracts. Welfare interventions on behalf of consumers have mitigated the more extreme injustices of a model based on the assumption that the parties to a contract exercise

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421 Allafrica.com assessed on 14.08.2014
422 ibid
423 Icmail.in assessed on 14.08.2014
424 Nwikipedia.org assessed on 14.08.2014
free will. These interventions remain exceptions to the general rules rather than a general platform on which discussions could be based\textsuperscript{425}.

\textsuperscript{425} Ibid
3.2 Changes in Contract Law
Modern contract law has developed itself into a specialized branch of law. Contract law is governing, foundational law in terms of regulation of all forms of contract; one must appreciate that business contracts have grown beyond the proposition of the century-old Contract Act. When contracts cross national boundaries, the national legal regime of any single country becomes inadequate to grapple with the situation. When the parties to the contract are located in different countries, at least two systems of law impinge upon the transaction and the rules of Private International Law come into play. The best way to ensure the application of a particular legal system to international contracts is to choose a particular law to govern this contract. This law is called the “Proper Law of the Contract." The courts have held that Proper Law is the law which the parties have expressly or impliedly chosen, or which is imputed to them by reason of its closest and most real connection.” Modern contract is largely involved in multinational, or transnational, jurisdiction, with International Conventions such as Convention on International Sale of Goods (CISG) or the clauses of International Arbitration governing formation of contracts in India. Issues of international taxation and multinational contractual jurisdiction are also areas which govern modern forms of contract. Largely, these complex issues are seen in e-contract which is a multinational personality in the chain of production, distribution, and consumerism. Further, one must seek the modern developments of contracts which have changed the meaning and facets of traditional contractual terms. Minors can enter into contracts in the field of entertainment and sports. No longer are the courts sticking to the notion that a contract with a minor is void ab initio. But freedom of contract rules dominates the decision of the courts in such cases. An attempt has been made to state the positions taken by judges on the various forms of contracts in a comparative analysis of decisions in India, the US, and the UK. The amendment of section 28 has brought about the change that all clauses which reduced the normal period of limitation would be void to that extent. It now prohibits clauses which seek to extinguish the right of any party thereto, or discharge any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights. The amendment gave effect to the 97th Report of the Law Commission of India. Tracing back to the history of the amendment, it is interesting that the Law Commission of India, in

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426 Ibid
427 www.ausib.org assessed on 14.06.2014
its 13th Report, had deliberated upon this section and had observed that such clauses hinged not on the interpretation of the section, but on the construction of the contract, and that ‘the principle itself is well recognized that an agreement providing for the relinquishment of rights and remedies is valid but an agreement for relinquishment of remedies only falls within the mischief of section.28’, and had concluded that no change was necessary in the section as it stood earlier428. Also429 today, most expositions of contract law do not go beyond the rules, or they tell us little or nothing of the social or economic significance of these rules. The result is a division between the study of formal law and evaluation of the needs of the wider community that it should be designed to serve. However, this aspect can be safely left at the hands of the Courts, for they are guided by the wisdom of the learned Judges. This study of the history of the law itself, gives a clear understanding of the framework upon which it was built. Indian law, on the assumption of jurisdiction in Internet disputes, though not enough case laws to prove the point, is theoretically similar to the position in the United States.430 Civil Procedure Code (CPC) deals with jurisdictional aspects and provides that a court may assume jurisdiction in a case, when the cause of action arises within its sphere. The section, though more relevant to domestic courts, can be interpreted to apply to transnational issues as well as private international law; although it has an international character, it is essentially the domestic law of a country. This provision for jurisdiction based on the cause of action is quite wide in its ambit, enabling the court to assume jurisdiction over a dispute regardless of where the principles are resident or the suits of the business, so long as a portion of the cause of action took place within the local jurisdiction, while still having an implied standard set, in a way similar to the US long-arm jurisdiction provisions. Further, the Indian procedural law also provides for the recognition and enforcement of such decisions of its own as well as the enforcement of foreign decisions since a mere assumption of jurisdiction, and passing a judgment without it being recognized and enforceable in another country would have no effect.431 The effect of foreign judgments on Indian courts, providing for their enforcement in all cases except under a few circumstances, in which case the courts would delve into the issues of jurisdiction of the court, the public policy, and morality of the decision to be enforced,

428 www.lawteacher.net assessed on 14.08.2014
429 www.asianlaws.org assessed on 14.08.2014
430 Section 20 Of the CPC
431 Section 13 of the CPC
keeping the merits of the case as off-limits. The decrees of the Indian courts are enforceable in countries which the central government has declared by notification under the section, and those which have entered into reciprocal agreements with the Government of India, in respect of the enforcement of their decrees in the Indian Courts. Such agreements and reciprocal relationships are of essence especially in internet contracts, where the parties have an international existence, needing a mutual cooperation between countries in effecting the valid judgments of each other. However, in case of a country that does not have a reciprocal agreement with India, any judgment that has to be enforced there can be done only by commencing a new action for enforcement in that court, which might often be complicated since the foreign court may wish to re-assess the merits of the case or re-assess the Indian court’s assumption of jurisdiction before giving effect to the decisions. This difficulty in the recognition and enforcement of judgments in other countries exists not only for the Indian courts, but for other jurisdictions as well, and mainly occurs because of the possibility of multiple jurisdictions hearing a particular matter arising over the Internet, and the wide range of laws that may govern the dispute. A Uniform Code, as it exists in the United States, dealing with interstate jurisdictions providing for the jurisdictional questions and choice of law if enacted for international jurisdiction in E-Contracts under section 37 similar to the CISG (Conventional International Sales of Goods) for the sale of goods would bring in a legal certainty, solving most of the controversies and confusion regarding jurisdictional matters.

Under traditional contracts, the governing law would be the law of the state where the transaction occurred, unless agreed otherwise by the parties to the contract, for which the rules of private international law were used in case of transnational contracts. However, moving over to e-contracts, where the parties belong to different countries, and where there is no specific factor to determine the place of consummation of the contract, there is no mention of what the proper law is, in the rules of most of the domestic legislations. This pushes the courts to apply the law of the country that has the closest connection to the country, with the courts again differing in the factors that they take to arrive at this decision. Nevertheless the most of the contracts are made online. This is simply because the issue of consumer protection is closely intertwined with public policy, and legislatures the world over have realized the unequal bargaining power of the consumers in determining the jurisdiction and

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432 Sec. 44A of the CPC Code, 1908
governing law of the contract, similar to the determination of the other relevant terms of the contract, giving a significant scope for forum shopping by the corporate.

The legislations of various countries and international conventions themselves provide for the consumer protection in such contracts of adhesion and prohibit the exclusion of their jurisdiction and consumer favourable laws by the contractual terms. For instance, Sec. 28 of the Indian Contract Act and Section 11(2) of the Consumer Protection Act provide for the protection of the rights and remedies that the Indian law provides to its consumers, and allows the court to disregard the agreement between the consumer and the vendor as far as the choice of forum and the governing law is concerned.

The Convention prohibits the choice of law made by the e-contracts from depriving the consumer of the protection afforded to him by the mandatory rules of the law of his country, including the consumer’s right to sue and to be sued in his or her domicile. There has been an ongoing effort to form new rules that would apply to the online environment reflecting a growing consensus to accord appropriate respect to the freedom of contract of the parties, while providing some protection to the consumers in terms of reasonability for facilitating the development of electronic commerce. However, there are no strong and pervasive laws as such for e-contracts at present at the international level, both for determining the governing law of the contract, as well as the establishment of the forum convenant, and the recognition and compulsory enforcement of such decisions in other jurisdictions. What could be done at best is to frame an international convention for the recognition, enforcement, and determination of the substantive laws of a contract that would solve various problems relating to e-contracts at a practical level.

A non-compete clause is well known under the contractual laws as the clause being made out into any agreement between two parties where one party is the employer and the other party is the employee. By virtue of this non-compete clause, the employee undertakes and gives his acceptance to the condition of the employer that during the course of the employment or even after the employee leaves the services/job of the employer, he will not be the competitor of the employer in the form and nature of the employment of the employer. The non-complete clause finds place under the agreements and contracts throughout the globe. When we see...
the Indian legal scenario about the non-compete clause, it is prohibited under the law of contracts.\footnote{Article 5. (Conventional International Sales of Goods)}

Indian Contract Act-1872 provides that “Every agreement by which anyone is restrained from exercising a lawful profession or trade or business of any kind, is to that extent void”. Exception: One who sells goodwill of a business with a buyer to refrain from carrying on a similar business within specified local limits so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein provided that such limits appear to the court reasonable, regard being had to the nature of business. Indian law is therefore very clear and strict on this point, any such non-compete agreement shall not be binding on the parties and the same shall be null and void. By using the term void ab initio, for such type of agreements it has shown that it has kept such non compete clause in the agreements beyond consideration. Indian courts have also consistently refused to enforce post termination non compete clauses in employment contracts as “restraint of trade” is impermissible under section 27 of the Indian Contract Act-1872, and have held them as void and against the public policy because of their potential to deprive an individual of his or her fundamental right to earn a living. However considering the developed social, legal, and corporate circumstances, and the required confidentiality and the integrity of the employments, the judiciary has inclined its view towards giving some regard to the non compete agreements. In the case of ‘Niranjan Shankar Golikari Vs the Century Spinning and Manufacturing Company Ltd.’, the Hon’ble Supreme Court observed that-“restraints or negative covenants in the appointment or contracts may be valid if they are reasonable”. Further in one case - V.F.S. Global Services Pvt. Ltd Vs Mr. Suprit Roy,\footnote{2008(2) Bom CR 446} the Bombay High court established the principle that a restraint on the use of trade secrets during or after the cessation of employment does not tantamount to a “restraint on trade” under section 27 of the Act and therefore can be enforceable under certain circumstances. In the case of Mr. Diljeet Titus, Adv Vs Mr. Alfred A Adebare & Ors\footnote{2006(32)PTC 609 (Del)} Delhi High court held that “The real test was the degree of employment control to determine whether it was a contract of service…” Like these there are several other judgments of various High courts which have laid down certain tests or guidelines to check the validity and legality of imposition of restrictions on such non competing agreements. It shows that Indian courts may in certain circumstances enforce confidentiality agreements intended to protect employer’s proprietary rights.
In foreign judiciary subject to certain limitations and reasonable boundness, the non-compete agreements are declared to be enforceable to the reasonable extent. In ‘HRX Holdings Pty Ltd Vs Pearson’ the Federal Court of Australia upheld a post employment restraint preventing a senior employee from competing with his former employer for two years. The court upheld the two years non-compete clause with consideration. The court held the restraint reasonable because the employee was the “human face” of the company and had intimate knowledge of the former employer’s client relationships, pricing arrangements and strategies, and the employee had received compensation for the restraint in the form of the remuneration and shares for all but three months of the restraint period. Keeping in view, the increase in cross border trade and an enhanced competitive climate in India, confidentiality, non-compete and non solicitation agreements are becoming increasingly popular, especially in the IT and technology sectors. A huge number of out sourcing and IT companies are including confidentiality, non-compete and non solicitation covenants in agreements with their employees, with terms ranging from a few months to several years after the employment relationship is terminated. The companies claim that such restrictions are necessary to protect their proprietary rights and their confidential information. In the same way, foreign companies doing business in India often seek to include confidentiality, non compete and non solicitation covenants in their agreements with senior management and employees, as is customarily done in certain abroad countries. Although Indian Contract Act states that all agreements in restraint of any profession, trade or business are void, the current trend as per various judicial pronouncements leads to the conclusion that reasonable restraint can be permitted to some extent and does not render the contract void ab initio. Reasonable of restraint depends upon various factors, and the restraint in order to prevent divulgence of trade secrets or business connections has to be reasonable in the interest of the parties to ensure adequate protection to the covenantee. On careful analysis of section 27 keeping in view the exception provided with it, it can be safely concluded that the section implies that, to be valid an agreement in restraint of trade must be reasonable between the parties and consistent with the interest of the public. So the question arises as to

3. What is public policy and

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441 Section 27 of the Indian Contract Act.
4. What is reasonable

Regarding the public policy, it is illusive, varying and uncertain. It is difficult to give precise definition of the term public policy. Concept of public policy is capable of expansion and modification. It is the province of the judiciary to expound the term “public policy”. There are several guidelines given by the judiciary to determine as to what public policy is and what is not. Some of these can be expressed as – any agreement tending to injure the public interest or public welfare is against the public policy. Further it can include as to whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal rights, whatever tends to the obstruction of injustice or violation of statutes and whatever is against good morals can be said to be against Public Policy. What agreements are actually against the public policy and what are not, is totally the discretion of the courts.442

So far as the term “Reasonable” is concerned in general understanding it means– “according to reason”. Whatever a reasonable man would do using common sense and knowledge, under the given circumstances, will account as reasonable. Therefore the test of reasonability depends on the facts and circumstances of each case. Whether an agreement containing non compete clause is valid and suitable to restrain, or not, is also a total discretion of the courts and which is varying based on the facts of the case. To validate such non compete clauses certain reasonable restrictions may be imposed like:

(vi) Distance: Suitable restrictions on employee prohibiting them to practice same profession within a stipulated distance, the stipulation being reasonable.

(vii) Time limit: If there is a reasonable time provided in the clause then it will fall under reasonable restrictions.

(viii) Trade secrets: the employer can put reasonable restrictions on the letting out of trade secrets.

(ix) Goodwill: Article 27 of the Indian contract Act provides an exception on the distribution of goodwill.

In addition to this the Judiciary uses the tool of ‘Injunction’ to prevent a third party from releasing confidential information, using trade secrets etc. and compensation.443

442 singhassociates.in assessed on 14.08.2014
443 Singhassociates.in assessed on 14.08.2014
3.3 Concept of Electronic Contract

3.3.1 Introduction of E-Contract

Internet\textsuperscript{444} has unfolded a new market for businesses to explore and exploit. The enormous flexibility and speed of Internet makes it the most modern platform for businesses as well as consumers to execute business transactions. The goods and services of diverse nature are being offered to the businesses inter se or to the consumers globally. The whole world has been converted in to the market to be available on the click of a mouse on the laptop or palmtop. To provide security and legal recognition to the transactions executed electronically, the Indian Parliament enacted the Information Technology Act, 2000 modeled on Uncitral’s Model Law, though it departs in many respects from the spirit of the Model Law. Immediately after the enactment of the IT Act, it was found that certain significant provisions are missing in this enactment; its provisions lack harmony and above all many legal issues have not been properly spelt out. The IT Act was amended in the year 2008\textsuperscript{445} which contains the objectives. (1) To harmonize protection of personal data and information and implementation of information technology enabled services such an e- governance, e-commerce and e-transactions with the provisions of the IT Act. (2) to add new penal provision in the IT Act, IPC, Indian Evidence Act and the Code of Criminal Procedure to provide provisions for new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data personation commonly known as phishing, identity theft and offensive messages through communication services.(3) to provide\textsuperscript{446} alternative technology of electronic signatures for bringing harmonization with the Model Law on Electronic Signatures adopted by the Uncitral’s and to fall in line with the resolution No.56/80, dated 12th December,2001 recommending that all states accord favourable consideration to the said Model law on Electronic Signatures. (4) To authorize service providers to set up, maintain and upgrade the computerized facilities and also collect, retain and appropriate service charges for providing such services at such scale as may be provided by the central Government or the

\textsuperscript{444} For history of Internet: See ACLU v. Reno 929 F. Supp. 824 (E.D.Pii. 1996). See also Leiner et al, A Brief History of the. Internet, The Internet Society (available at www.isoc.org/Internet-history/brief.html. The term Internet is defined as a set of computer networks - possibly dissimilar - joined together by means of gateways that handle data transfer and the conversion of messages from the sending network to the protocols used by receiving network. See Microsoft Press Computer Dictionary 220 (2d ed. 1994)

\textsuperscript{445} Sprouts.aisnet.org assessed on 14.08.2014

\textsuperscript{446} sprouts.aisnet.org
State Government. Interestingly, the draftsmen have admitted that the digital signatures prescribed for authentication of electronic records in the original IT Act are linked with specific technology, it has become necessary to provide for alternative technology of electronic signatures, nevertheless the original provision for digital signatures has been retained which has compounded the confusion. The Indian courts have not yet found any opportunity to appraise the impact of the provisions of the IT Act on substantive principles of contract formation codified in the Indian Contract Act, 1872. An analytical evaluation is therefore, needed to identify the issues raised by the information technology relating to contract formation, impact of the IT Act on the principles relating to contract formation provided in the Contract Act, and impact of non inclusion of the principles governing e-commerce, provided in the Model Law but not reflected in the IT Act\textsuperscript{447}. Over a relatively short period of time, e-contracts have risen to ubiquity and the average computer user enters into several binding E-contracts during numerous transactions, sometimes unwittingly\textsuperscript{448}. Main aspects of e-contracting are\textsuperscript{449}:

3.3.2 Kinds of E-Contracts and Their Enforceability

(i) Kinds of E-Contracts\textsuperscript{450}

Shrink wrap and click wrap contracts: - Shrink wrap and click wrap are common types of agreements used in electronic commerce. 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\textsuperscript{451}. The term describes the shrink wrap plastic wrapping used to coat software boxes, though these contracts are not limited to the software industry. 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.

Click-wrap agreements can be of the following types:

3. 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

\textsuperscript{447} www.bandy.info assessed on 14.08.2014
\textsuperscript{448} www.ausib.org assessed on 14.08.2014
\textsuperscript{450} www.ausib.org assessed on 14.08.2014
the terms of the contract. A user cannot proceed to download or view the target information without following these steps.

4. Icon Clicking where the user must click on an "OK" or "I agree" button on a dialog box or pop-up window.\footnote{www.asianlaws.org assessed on 14.08.2014} A user indicates rejection by clicking “Cancel” or closing the window name servers.\footnote{Jurisonline.in › Cyber & Internet laws assessed on 23.11.2013}

A software program is essentially a series of command issued to a computer, or to be specific, to the hardware of the computer, that enables the computer to perform in a particular manner, so as to achieve a desired result. In today’s digital world, the breadth of software applications is broader than one’s imagination could reach. Far beyond the traditional applications, such as word processors and spreadsheets, software components have become critical parts of various applications and day-to-day activities in numerous industries and businesses.

In such a scenario, the mode of supply of the software to the consumers and the contract between the software manufacturer/owner and the enduser assumes great significance. This is so not only because of the academic value attached to it, but also the practical implications of the same in determining the rights and liabilities of the parties to the contract, and for the purposes of resolution of any dispute that might arise subsequent to the contract. Also, the rapidly changing needs and preferences of both the inventors/owners of the software and the end-users as reflected in the contract necessitates a good understanding of the features of the software contracts, and the nature of software per se.

**Understanding Software and Software Contracts:**

Computer programs, comprising a set of instructions, are generally stored and transferred as compact/floppy disks, purchased off the shelf, over the counter, or directly from the owner of the program as downloads from the Internet. Whatever be the mode of purchase, the end-user’s primary interest lies in the software and its legitimate use, for which he pays the consideration, with the medium of transaction being merely incidental. The same has also been the view taken by the Indian courts while dealing with cases concerning the value of software per se, and software as stored in hard drives.

**(ii) Growth of E-Commerce** in:-

Shrink-wrap licenses are so called because of the clear plastic wrapping that encloses many software packages. They contain a notice that by tearing open the shrink-wrap, the user
assents to the software terms enclosed within. In the context of software applications, the
typical shrink-wrap agreement is a software license that dictates a seller’s terms to a buyer,
and includes a conspicuous notice of agreement, title retention in the seller, restrictions on
transfer and modification, prohibition of reverse engineering, and limited copying
provisions. The case of Step-Saver Data Sys., Inc. v. Wyse Tech was the first time that a
shrink-wrap agreement was contested. The Step-Saver had purchased a software program
from the defendants by placing an order for 20 copies over the telephone, and had resold it to
dealers. These customers brought a suit against the plaintiffs for the software’s defects and
they in turn sued the defendants in this case. Wyse Tech raised the disclaimer and limitation
of remedies contained in the shrink-wrap license as its defense. The Court of Appeals for the
3rd Circuit accepted the plaintiff’s argument that the contract had been formed during the
telephone conversation in which an offer to purchase had been made, and was accepted. The
additional terms of the shrink-wrap license were construed as proposals for addition to the
contract, and were not enforceable because Step-Saver had not assented to them. Hence, the
liability for the defective software was placed on its manufacturer, rather than a reseller. Inc. v. Zeidenberg was a watershed for the enforceability of shrink wrap contracts. ProCD had
compiled data from 3,000 telephone directories into a searchable database at considerable
expense. They sold this database to consumers on CD-ROM disks, and on the outside of the
box stated that use of the software was restricted to the terms of the enclosed license.
However, the user’s manual contained the license and the license appeared on the user’s
screen every time the program was run. Zeidenberg purchased this package and uploaded the
database onto the Internet in contravention of the license. In the action brought by ProCD, the
district court relied on Step-Saver, and concluded that the shrink-wrap license was not part of
the contract between ProCD and Zeidenberg. On appeal, the 7th Circuit Court noted that it
would be impossible to print the entire license terms on the exterior of the box to be viewed
before sale, and that having a notice on the outside with a right to return the software if the
terms are unacceptable may be a means of doing business. The court held the shrink-wrap
license enforceable, and Zeidenberg liable for having violated the license terms. Cases
subsequent to Pro CD have uniformly upheld the validity of shrink-wrap agreements when
there is a notice and a right to return, since it was open to consumers to request a copy of the


454 ibid
455 86 F.3d 1447 (7th Cir. 1996).
456 Ibid.
This is only subject to the standard rules that govern contracts of adhesion, such as contra proferentem. Click-wrap agreements are an electronic form of contracting that are deployed when a product is distributed by means other than disks, such as when software is downloaded over the Internet. On installation or first use, a window containing the terms of the license opens for the user to read. The user is presented with a choice of clicking on either “I agree” or “I do not agree” which accepts or declines the terms. If the user does not agree, the process is terminated. Unlike shrink-wraps, these agreements do not require a court to consider whether the user had adequate notice of the terms since they are displayed at the very start of the contract formation process (although the user may have to scroll down the window to read all of the terms).

In Caspi v. Microsoft Network, the plaintiff, a subscriber to Microsoft’s MSN network, assented to MSN’s membership agreement which appeared in a scrollable window. It was alleged that Microsoft engaged in “unilateral negative option billing” by making subscribers agree to more expensive plans without their actual consent. The court ruled that customers had adequate notice of the clause because they were free to scroll through the terms before agreeing. The agreement also contained a forum selection clause which the court enforced by ruling that there was no fraud or unfair bargaining power, it did not violate public policy, and that it did not seriously inconvenience trial. Another notable case on click-wrap agreements is Forrest v. Verizon Communications, Inc., in which the plaintiff argued that the forum selection clause affected only contractual rights, and not consumer protection claims. The court rejected the plea and ruled that the forum selection clause that was broad enough to encompass all claims related to the service. However, click-wrap agreements cannot operate in respect of damage caused before the contract was entered into. Browse-wrap agreements are frequently used on websites and do not appear on the screen until a user accesses the terms by clicking on a hyperlink. These agreements are susceptible to challenge for lack of notice and assent to terms. There are a few significant aspects that define browse-wrap agreements—unlike click-wraps there is no actual or constructive notice, a product can be used without ever viewing the terms of the agreement, and users may not even realize that a contract is being formed.

The leading case on browse-wrap agreements is Specht v. Netscape Communications users, presenting privacy concerns. The browse-wrap terms included an arbitration clause. Upon installation, users were merely told to “please review and agree to the terms of the Netscape

459 District of Columbia Court of Appeals, (CA-405-01, decided August 29, 2002).
Smart Download software license agreement before downloading and using the software.” The court ruled that this was an invitation and not a condition, and could not constitute assent. Providers of online services and software have the option of click-wrap agreements, and have to bear with the consequences of failing to use it. However, it appears that terms on a browse-wrap agreement would bind competing businesses. Based on the foregoing cases, businesses would do well to keep some best practices in mind while deploying e-contracts:

5. Online agreements should be as conspicuous as possible.
6. Whenever possible, use click-wrap rather than browse-wrap and the viewing of the terms should be mandatory. This could be accomplished by graying out Accept until the user has scrolled to the bottom on the agreement.
7. A notice should be included near the Accept button to make the user grasp the significance of his actions, such as “By clicking Accept, you are entering into a legally binding agreement.”
8. Keep a record of the moment that the user clicked Accept\(^{461}\).

(iii) Electronic Contracts and the Indian Law

Electronic Contracts: - Contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. Right from morning to evening we make many contracts. The Indian Contract Act, 1872 governs the manner in which contracts are made and executed in India. It lay down the conditions for making contract and breach of contracts. Parties are free to contract on any terms they choose. India Contract Act consists of limiting factors subject which contract may be entered into, executed and breach enforced. It only provides a framework of rules and regulations which govern formation and performance of contract. The rights and duties of parties and terms of agreement are decided by the contracting parties themselves. The court of law enforce the contract in case of non performance or breach\(^{462}\). Electronic contracts (contracts that are not paper based but rather in electronic form) are born out of the need for speed, convenience and efficiency. Imagine a contract that an Indian exporter and an American importer wish to enter into. One option would be that one party first draws up two copies of the contract, signs them and couriers them to the other, who in turn signs both copies and couriers one copy back. The other option is that the two parties meet somewhere and sign the contract. In the electronic

\(^{461}\) www.ausib.org assessed on 14.08.2014
\(^{462}\) 72 - © 2008 Rohtas Nagpal assessed on 23.11.2013.
age\textsuperscript{463}, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a scenario. There was initially an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. the issues that arise in electronic contracts\textsuperscript{464}. The Information Technology Act (IT Act) solves some of the peculiar issues that arise in the formation and authentication of electronic contracts\textsuperscript{465}.

\textbf{(iv) Essential Ingredients of an Electronic Contract}

As in every other contract, an electronic contract also requires the following necessary ingredients:

3. Offer: - In many transactions (whether online or conventional) the offer is not made directly one-on-one. The consumer ‘browses’ the available goods and services displayed on the merchant’s website and then chooses what he would like to purchase. The offer is not made by website displaying the items for sale at a particular price. This is actually an invitation to offer and hence is revocable at any time up to the time of acceptance. The offer is made by the customer on placing the products in the virtual ‘basket’ or ‘shopping cart’ for payment.

4. Acceptance: - As stated earlier, the acceptance is usually undertaken by the business after the offer has been made by the consumer in relation with the invitation to offer. An offer is revocable at any time until the acceptance is made.

Procedures available for forming electronic contracts include:

10. E-mail: Offers and acceptances can be exchanged entirely by e-mail, or can be combined with paper documents, faxes, telephonic discussions etc.

11. Web Site Forms: The seller can offer goods or services (e.g. air tickets, software etc) through his website. The customer places an order by completing and transmitting the order form provided on the website. The goods may be physically delivered later (e.g. in case of clothes, music CDs etc) or be immediately delivered electronically (e.g. e-tickets, software, mp\textsuperscript{3}\textsuperscript{466} etc).

\begin{footnotesize}
\textsuperscript{463} dict.mizoram.gov.in assessed on 14.08.2014
\textsuperscript{464} www.asianlaws.org assessed on 14.08.2014
\textsuperscript{465} \texttt{Info@asianlaws.org}. Website : www.asianlaws.org. assessed on 23.11.2013
\textsuperscript{466} Supra note 45
\end{footnotesize}
12. Online Agreements: Users may need to accept an online agreement in order to be able to avail of the services e.g. clicking on “Accept” while installing software or clicking on” I agree” while signing up for an email account.

13. Lawful consideration: any contract to be enforceable by law must have lawful consideration, i.e., when both parties give and receive something in return. Therefore, if an auction site facilitates a contract between two parties where one person provides a pornographic movie as consideration for purchasing an mp3 player, then such a contract is void.

14. Intention to create legal relationship: if there is no intention on the part of the parties to create legal relationships, then no contract is possible between them. Usually, agreements of a domestic or social nature are not contracts and therefore are not enforceable, e.g., a website providing general health related information and tips.

15. Competent parties: Contracts by minors, lunatics etc are void. All the parties to the contract must be legally competent to enter into the contract.

16. Free and genuine consent. Consent is said to be free when there is absence of coercion, misrepresentation, undue influence or fraud. In other words, there must not be any subversion of the will of any party to the contract to enter such contract. Usually, in online contracts, especially when there is no active real-time interaction between the contracting parties, e.g., between a website and the customer who buys through such a site, the click through procedure ensures free and genuine consent.

17. Lawful object: A valid contract presupposes a lawful object. Thus a contract for selling narcotic drugs or pornography online is void.

18. There must be certainty and possibility of performance. A contract, to be enforceable, must not be vague or uncertain and there must be possibility of performance. A contract, which is impossible to perform, cannot be enforced, e.g., where a website promises to sell land on the moon.

(v) Relevant IT Act Provisions

Indian law provides for the authentication of electronic records by affixing a digital signature. The law provides for use of an asymmetric crypto system and hash function and also recommends standards to be adhered. Chapter IV of the Information Technology Act,
2000 contains sections 11, 12 and 13 and is titled Attribution, Acknowledgment and Dispatch of Electronic Records. Attribution of Electronic Records. An electronic record shall be attributed to the originator—(a) if it was sent by the originator himself; (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or (c) by an information system programmed by or on behalf of the originator to operate automatically. According to section 2 (1) (za) of the IT Act, 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. The term originator does not include an intermediary. Pooja goes on vacation for a week. In the meanwhile, she does not want people to think that she is ignoring their emails. She configures her gmail.com account to automatically reply to all incoming email messages with the following message: “Thanks for your email. I am on vacation for a week and will reply to your email as soon as I get back”. Now every time that gmail.com replies to an incoming email on behalf of Pooja, the automatically generated email behalf of the originator (i.e. Pooja) to operate automatically.

Acknowledgment of Receipt:

According where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by (a) any communication by the addressee, automated or otherwise; or (b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received. Addressee means a person who is intended by the originator to receive the electronic record but does not include any intermediary. This sub-section provides for methods in which the acknowledgment of receipt of an electronic record may be given, provided no particular method has been agreed upon between the originator and the recipient. One method for giving such acknowledgement is any communication (automated or otherwise) made by the addressee in this regard. Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then electronic record shall be deemed to have been never sent by the originator. Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the

470 www.asianlaws.org assessed on 14.08.2014
471 www.jeywin.com assessed on 14.08.2014
472 www.wipo.int assessed on 14.08.2014
473 Section 11 of the IT Act
474 Section 12(1) of the IT Act
475 Section 11 of the IT Act
476 Section 12(2) of the IT Act
acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent. Sameer does not acknowledge the email even after a week. The initial email sent by Rohit will be treated to have never been sent.

**Time and place of dispatch and receipt:**

Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. According to section 13(2) of the IT Act Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely: (a) if the addressee has designated a computer resource for the purpose of receiving electronic records, (i) receipt occurs at the time when the electronic record enters the designated computer resource; or(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee; (b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

According Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business. A landmark judgment was given by the Allahabad High Court with respect to the formation of electronic contracts. *P.R. Transport Agency vs. Union of India & others.* Decision of the court. The acceptance was received by PRTA at Chandauli / Varanasi. The contract became complete by receipt of such acceptance. 2. Both these places were within the
territorial jurisdiction of the High Court of Allahabad. Therefore, a part of the cause of action had arisen in U.P. and the court had territorial jurisdiction\textsuperscript{486}.  

(x) Growth of E-Commerce in India

During the year 2000-2001, two major Industry Associations produced separate reports on e-commerce in India. One was prepared by the National Committee on Ecommerce set up the Confederation of Indian Industry (CII), while the other was commissioned by the NASSCOM and prepared by the Boston Consulting Group. Both the reports are optimistic about the growth of e-commerce in India. The Confederation of Indian Industry (CII) report estimates the volume of e-commerce to grow to Rs 500 billion (US$ 10.6 billion) in the year 2003. The NASSCOM-BCG Report, on the other hand, estimates for the same year that the total volume of ecommerce will be Rs 1,950 billion (US$ 41.5 billion).

Amul, a milk cooperative, is successfully using ecommerce to deepen its brand loyalty. Likewise, corporate in the automotive sector are improving their customer relations through this medium. Some of the new names that are rediscovering e-commerce through new portals at relatively low capital cost, without venture capital funding include: Key 2 crorepati, Music Absolute, Gate 2 Biz. The low cost of the PC and the growing use of the Internet has shown the tremendous growth\textsuperscript{487} of Ecommerce in India, in the recent year\textsuperscript{488}s. According to the Indian Ecommerce Report released by Internet and Mobile Association of India (IAMAI) and\textsuperscript{489} today with the recent advancement in the areas of computer technology, telecommunications technology, software and information technology have resulted in changing the standard of living of people in an unimaginable way. The communication is no more restricted due to the constraints of geography and time. Information is transmitted and received widely and more rapidly than ever before. And this is where the electronic commerce offers the flexibility to business environment in terms of place, time, space, distance, and payment. This e-commerce is associated with the buying and selling of information, products and services via computer networks. It is a means of transacting business electronically, usually, over the Internet. It is the tool that leads to ‘enterprise integration’. With the growth of e-commerce, there is a rapid advancement in the use of e-contracts. But deployment of electronic contracts poses a lot of challenges at three levels, namely conceptual, logical and implementation. In our article we have discussed the scope,

\textsuperscript{486} Supra note 43  
\textsuperscript{487} www.cci.org assessed on 14.08.2014  
\textsuperscript{488} Cci.gov.in assessed on 14.08.2014  
\textsuperscript{489} www.euroasiapub.org assessed on 14.08.2014
nature and legality and various other issues related to e-contracts. E-contract is a contract modeled, specified, executed and deployed by a software system. E-contracts are conceptually very similar to traditional (paper based) commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms (where possible), place orders and make payments. Then, the vendors deliver the purchased products. Nevertheless, because of the ways in which it differs from traditional commerce, electronic commerce raises some new and interesting technical and legal challenges. For recognition of e-contracts following questions are needed to be considered:

(vii) Recognition E-Contracts

Offer: The law already recognizes contracts formed using facsimile, telex and other similar technology. An agreement between parties is legally valid if it satisfies the requirements of the law regarding its formation, i.e. that the parties intended to create a contract primarily. This intention is evidenced by their compliance with 3 classical cornerstones i.e. offer, acceptance and consideration. One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance. Advertisement on website may or may not constitute an offer as offer and invitation to treat are two distinct concepts. Being an offer to unspecified person, it is probably an invitation to treat, unless a contrary intention is clearly expressed. The test is of intention whether by supplying the information, the person intends to be legally bound or not. When consumers respond through an e-mail or by filling in an online form, built into the web page, they make an offer. The seller can accept this offer either by express confirmation or by conduct. Acceptance: Unequivocal unconditional communication of acceptance is required to be made in terms of the offer, to create a valid e-contract. The critical issue is when acceptance takes effect, to determine where and when the contract comes into existence. The general receipt rule is that acceptance is effective when received. For contracting no conclusive rule is settled. The applicable rule of communication depends upon reasonable certainty of the message being received. When parties connect directly, without a server, they will be aware of failure or partial receipt of a message. Such party realizing the fault must request re-transmission, as acceptance is only effective when

491 ibid
492 www.moga.mo.gov/statutes/C400-499/4320000230.HTM assessed on 23.11.2013
received. When there is a common server, the actual point of receipt of the acceptance is crucial in deciding the jurisdiction in which the e-contract is concluded. If the server is trusted, the postal rule may apply, if however, the server is not trusted or there is uncertainty concerning the e-mail’s route, it is best not to apply the postal rule. When arrival at the server is presumed insufficient, the ‘receipt at the mail box’ rule is preferred. Consideration and Performance: Contracts result only when one promise is made in exchange for something in return. This something in return is called ‘consideration’. The present rules of consideration apply to e-contracts. There is concern among consumers regarding Transitional Security over the Internet. The e-directive on Distance Selling tries to generate confidence by minimizing abuse by purchasers and suppliers. It specifies-

8. A list of key points must be supplied to the consumer in ‘a clear and comprehensible manner.’

9. Written confirmation, or confirmation in another durable medium available and accessible to the consumer, of the principle points.

10. The right of withdrawal enabling consumers to avoid deals entered into inadvertently or without sufficient knowledge, providing for seven-day cooling-off period free from penalty or reason to return the goods or reimburse the cost of services.

11. Performance should be delivered within thirty days of order unless otherwise expressly agreed.

12. Reimbursement of sums lost to fraudulent use of credit cards. It places the risk of fraud on the credit card Company, requiring them to take steps to protect their position.

13. On the other hand, there is also need to protect sellers from rogue purchasers. For this, the provision of ‘charge-back clauses’ and encouragement of pre-payment by buyers is recommended.

14. Thus, this Directive adequately protects rights of consumers against unknown sellers and sellers against unknown buyers.493

Liability and Damages: A party that commits breach of an agreement may face various types of liability under contract law. Due to the nature of the systems and the networks that business employ to conduct e-commerce, parties may find themselves liable for contracts which technically originated with them but, due to programming error, employee mistake or

493 www.legalserviceindia.com/articles/ecta.htm assessed on 23.11.2013
deliberate misconduct were executed, released without the actual intent or authority of the party. Sound policies dictate that parties receiving messages be able to rely on the legal expressions of the authority from the sender’s computer and this legally be able to attribute these messages to the sender. In addition to employing information security mechanisms and other controls, techniques for limiting exposure to liability include:

10. Compliance with recognized procedures, guidelines and practices.
11. Audit and control programmers and reviews.
12. Technical competence and accreditation.
13. Proper human resource management.
15. Enhance notice and disclosure mechanisms.
16. Legislation and regulation addressing relevant secure electronic commerce issuing.

**Digital Signatures:** Section 2(p) of The Information Technology Act, 2000 defines digital signatures as authentication of any electronic record by a subscriber by means of an electronic method or procedure. A digital signature functions for electronic documents like a handwritten signature does for printed documents. The signature is an unforgivable piece of data that asserts that a named person wrote or otherwise agreed to the document to which the signature is attached. A digital signature actually provides a greater degree of security than a handwritten signature. The recipient of a digitally signed message can verify both that the message originated from the person whose signature is attached and that the message has not been altered either intentionally or accidentally since it was signed. Furthermore, secure digital signatures cannot be repudiated; the signer of a document cannot later disown it by claiming the signature was forged. In other words, digital signatures enable “authentication” of digital messages, assuring the recipient of a digital message of both the identity of the sender and the integrity of the message.

The fundamental drawback of online contracts is that if there is no alternate means of identifying a person on the other side than digital signatures or a public key, it is possible to misrepresent one’s identity and try to pass of as somebody e-contracts are well suited to facilitate the re-engineering of business processes occurring at many firms involving a composite of technologies, processes, and business strategies that aids the instant exchange of information. The e-contracts have their own merits and demerits. On the one hand they

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reduce costs; saves time, fasten customer response and improve service quality by reducing paper work, thus increasing automation. With this, e-commerce is expected to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an on-line global market place with millions of customers and thousands of products and services. On the other hand, since in electronic contract, the proposal focuses not on humans who make decisions on specific transactions, but on how risk should be structured in an automated environment. Therefore the object is to create default rules for attributing a message to a party so as to avoid any fraud and discrepancy in the contract. Internet is one component which has recently become the key ingredient of quick and rapid lifestyle. Be it for communication or explorations, connecting with people or for official purposes, ‘internet’ has become the central-hub for all. Resultantly, Internet growth has led to a host of new developments, such as decreased margins for companies as consumers turn more and more to the internet to buy goods and demand the best prices, as observed by C.K Prahalad, Professor, Business School, and University of Michigan. The internet means that traditional businesses will change because ‘incumbents (in markets) and large firms do not have the advantage ‘ just by virtue of being there first or by being of big, he said. The implication of perfectly competitive market as the world will observe is those markets will produce an efficient allocation of resources. Internet has truly been an effective agent in changing the fundamental ways of doing business.

(viii) Law Reform

For transactions caught by the International Sale of Goods Act, the "mailbox rule" does not apply. Instead, the Act sets out that the acceptance of an offer becomes effective at the offeror. In the U.S., reformers have proposed changes to the U.C.C. to deal with the formation issue specifically for electronic transactions. The proposal differs from the International Sale of Goods Act by acknowledging the offeror's role in the delivery process. While the proposal states the contract is created when the acceptance is received by the initiating party, it goes on to provide rules for determining when an electronic message is received. When the message reaches the electronic mail system used by the recipient, it is valid.
Meeting of the Minds and Human less Contracting: While much of the contract formation discussion revolves around the use of computer technology as a means of communication by contracting parties, a far more difficult issue is beginning to emerge with the automation of the contracting process itself. Traditional contract doctrine centres on the requirement of a `meeting of the minds'. The involvement of two or more people, negotiating either face-to-face or through some means of communication is an underlying assumption. However, modern technology is evolving with a goal of eliminating human involvement in transactions. How traditional contract doctrine will accommodate situations where the only `minds' that meet are programmed computer systems is uncertain. Interactive EDI is already beginning to emerge in business transactions. The following describes a possible interaction: a sending computer, on its own initiative, will make an offer to a recipient computer for the purchase of goods based on the sender's inventory needs. The recipient computer will accept the offer if the recipient has the quantity of product in stock. This two-way conversation between computers will further culminate in negotiations. One computer will make an offer to buy 100 widgets, and the other will respond with a counter offer of 50 widgets due to a shortage in stock. The computer that made the original offer will thereafter decide on its own whether to accept the 50 widgets or reject the counter offer and search for another vendor. Automated transactions will not be limited to business-to-business transactions. According to Colin Crook, head of technology at Citibank, in the future “You're going to hand off your personal affairs in cyber space to automatic agents who represent you.” In a fully automated system, human decisions are involved in creating the system and making it accessible; humans assent to the system, not specific transactions. Traditional contract doctrine looks at the intention of the parties surrounding the offer and acceptance of the specific agreement in dispute. As such, it is not clear whether people can be bound by offers or acceptances made by their computer on their behalf. They may have had no knowledge of, let alone intention to enter, a given transaction. The main issue is one of attribution -- when do the actions of an agent become attributed to the principal. While agency law plays a role in attribution when using human agents, human judgements, such as voluntary assent and reliance, are major

Ibid
themes in this area of law. Therefore, the existing law of agency may not be very helpful in determining attribution with automated agents\(^\text{501}\).

With automated transactions, another challenge for the courts is determining where the communication system ends and the legal agent begins. The challenge is separating responses that are part of the functional communication process, such as those acknowledging receipt of a message, from responses that are part of the contract formation process, such as an acceptance of an offer\(^\text{502}\).

E-commerce and E-contract Electronic commerce (or e-commerce) encompasses all business conducted by means of computer networks. Advances in telecommunications and computer technologies in recent years have made computer networks an integral part of the economic infrastructure. More and more companies are facilitating transactions over web. There has been tremendous competition to target each and every computer owner who is connected to the Web.\(^\text{503}\)

(ix) E-Commerce in India

For developing countries like India, e-commerce offers considerable opportunity. E-commerce in India is still in nascent stage, but even the most-pessimistic projections indicate a boom. It is believed that low cost of personal computers, a growing installed base for Internet use, and an increasingly competitive Internet Service Provider (ISP) market will help fuel e-commerce growth in Asia’s second most populous nation. Indian middle class of 288 million people is equal to the entire U.S. consumer base. This makes India a real attructive market for e-commerce.\(^\text{504}\) To make a successful e-commerce transaction both the payment and delivery services must be made efficient. There has been a rise in the number of companies' taking up e-commerce in the recent past. Major Indian portal sites have also shifted towards e-commerce instead of depending on advertising revenue. Many sites are now selling a diverse range of products and services from flowers, greeting cards, and movie tickets to groceries, electronic gadgets, and computers. With stock exchanges coming online the time for true e-commerce in India has finally arrived. On the negative side there are many challenges faced by e-commerce sites in India. The relatively small credit card population and lack of uniform credit agencies create a variety of payment challenges unknown in India. Delivery of goods to consumer by couriers and postal services is not very


\(^{502}\) Supra note 82

\(^{503}\) Ibid

reliable in smaller cities, towns and rural areas. However, many Indian Banks have put the Internet banking facilities. The speed post and courier system has also improved tremendously in recent years. Modern computer technology like secured socket layer (SSL) helps to protect against payment fraud, and to share information with suppliers and business partners. With further improvement in payment and delivery system it is expected that India will soon become a major player in the e-commerce market.

While many companies, organizations, and communities in India are beginning to take advantage of the potential of e-commerce, critical challenges remain to be overcome before e-commerce would become an asset for common people.\(^{505}\)

India’s e-commerce industry is on the growth curve and experiencing a spurt in growth. The Online Travel Industry is the biggest segment in ecommerce and is booming due largely to the internet-savvy urban population. The other segments, categorized under online non-travel industry, include e-tailing (online retail), online classifieds and digital downloads (still in a nascent stage). The online travel industry has some private players such as Makemytrip, Cleartrip and Yatra as well as a strong government presence in terms of IRCTC, which is a successful Indian Railways initiative. The online classifieds segment is broadly divided into three sectors; Jobs, Matrimonial and Real Estate. Mobile commerce is also growing rapidly and proving to be a stable and secure supplement to e-commerce due to the record growth in mobile user base in India, in recent years. Growth drivers and barriers are present in equal measures for new e-commerce ventures. A report by the internet and mobile association of India has revealed that India’s e-commerce market is growing at an average rate of 70 percent annually and has grown over 500 percent since 2007. The current estimate of US$ 6.79 billion for year 2010 is way ahead of the market size in the year 2007 at $1.75 billion. The following chart depicts the growth of E-commerce in India in the last couple of years.\(^{506}\)

According to the EBay Census Guide 2009 for Indian e-commerce scenario, it has been found that India has over 2,471 E Commerce Hubs. These hubs are the cities, towns, villages and smaller towns covering the entire length and breadth of the country. Technology or technology related products dominate India’s domestic E Commerce. Whereas, lifestyle product category dominates in the global trade. Technology, being India’s favorite traded vertical category contributes 44% of totals E Commerce transactions according to the latest

\(^{505}\) www.businessinsider.in/E-commerce-In-India-Has.../37085387.cms assessed on 23.11.2013

\(^{506}\) Ibid supra note 56.
eBay Census. Lifestyle category at 35% comes second in popularity for online Indians. For Global Trade, lifestyle is the clear winner at 64% of all transactions followed by Media & Collectibles at 15% each. Elaborating India’s domestic online shopping scenario, South India has the most active buyers at 41% of all transactions, followed by West India at 27%. However, West India has the most active sellers at 46%, followed by North India at 28%. Delhi entrepreneurs sold the most technology gadgets at 46% of all transactions to buyers in India. Lifestyle scored on the exports front at 67% of all transactions Delhi sells the most musical instruments – percussion, brass, synthesizers, and guitars - in the country. In addition to this, Delhi buyers bought the most sunglasses in the country according to the eBay census. Delhi buyers have also bought the most number of high end digital cameras in the country. India is showing tremendous growth in the Ecommerce. Rival tradeindia.com has 700,000 registered buyers and it has the growth rate of 35% every year which is likely to double in the year 2010. Indiamart.com claims revenues of Rs. 38 crores and has a growing rate of 50 every year. It receives around 500,000 enquiries per month. Undoubtedly, with the middle class of 288 million people, online shopping shows unlimited potential in India. The real estate costs are touching the sky. The travel portals’ share in the online business contributed to 50% of Rs 4800 crores online market in 2007-08. The travel portal Make My Trip.com has attained Rs 1000 crores of turnovers which are around 20% of total e-commerce market in India. Further an annual growth of 65% has been anticipated annually in the travel portals alone\textsuperscript{507}.

(x) Facilitators of E-Commerce in India

Information directories:

The products and services a relisted with appropriate sub-headings to make it easy for a serious information-seeker to find what he wants. Allied services provided by them: Message boards, chat rooms, forums, etc.

Banks:

Net banking/phone banking: This is an online banking facility available for savings account holders as well as current account holders. Some of the special Net banking services are: Demat accounts for sale/purchase of stocks and shares, Foreign Exchange services, Direct/Instant payment of bills on the account-holder’s behalf, Financial Planning.

Credit/Debit Cards- Banks facilitate E-commerce by providing the most vital trade instrument, namely the Credit or Debit Card, without which E-commerce would be

\textsuperscript{507} www.ausib.org assessed on 14.08.2014
impossible.\textsuperscript{508}

(xii) E-Commerce and Competition

The changes brought about by E-commerce have the potential to significantly increase competition by increasing consumers’ choice of products and traders. They also enable business to achieve significant efficiencies in their commercial operations as they move from high cost paper-based transactions to faster, lower cost electronic transactions. At the same time, care must be taken to ensure that the opportunities for competition in the dynamic new area of economic activity are not stifled by anti-competitive issues. While it is true that in rapidly changing high technology markets competition may be fierce but in some instance businesses may achieve significant market power, and use their position to stifle further competition. From a consumer protection prospective, there has also been a no. of international cases where unscrupulous traders have taken advantage of the internet as a medium to propagate old-fashioned scams. A theme which emerges in this area of competition policy is whether new technology alters the way in which market power issues should be analyzed.\textsuperscript{509} The purpose of this paper is to analyze the type of potential issues that can emerge in e-commerce in developing country like India under the competition Act and role that Competition Commission of India can have in dealing with these issues.\textsuperscript{510} Generally, e-commerce has the potential to increase competition by enabling the development of new services, new distribution channels, and greater efficiency in business activities. Competition policy issues may arise in relation to joint ventures to develop B2B electronic marketplaces (e hubs), particularly when they are developed by existing market participants with a significant combined market share (as buyers and sellers) in underlying wholesale markets. Competition policy issues may arise in relation to e-hubs on an ongoing basis if they appear to have developed sustainable market power resulting from network effects and other factors, and/or engage in strategic acts to preserve or maintain their market power. Potential issues would include evidence of price fixing or tacit collusion, or anti-competitive discrimination against, or refusal of access to third parties. Issues will not arise in all cases, and this will depend on the details in each case. In many situations there will be pro-competitive and other public benefit issues that should be taken into account. A recent Federal Trade Commission report identified a range of potential efficiency gains that may accrue from the use of hubs. They include reductions in administrative costs, reductions in

\textsuperscript{508} Ibid
\textsuperscript{509} Ibid.
\textsuperscript{510} Cci.gov.in assessed on 14.08.2014
search costs when accessing appropriate trading partners, creating new markets (e.g. markets for surplus stock), economies of scale in joint purchasing, and more effective supply chain management\textsuperscript{511}.

(xii) **E-Commerce and Anti-Competitive Agreements**

E-commerce may have implications for the nature, prevalence, and monitoring of a variety of forms of anti-competitive agreements and conduct, including excessive pricing, collusion, price discrimination, predation, vertical restraints, and refusal to supply/essential facilities. Over the short term, excessive pricing is unlikely to be a major issue for e-commerce companies. Few e-commerce operations are currently making any profits, let alone excessive profits. Over the longer term, however, excessive pricing may become a serious concern for those e-commerce companies that develop dominant positions in their relevant markets.\textsuperscript{512}

(xiii) **Online Marketplaces co-owned by Market Participants**

Where online marketplaces are co-owned by market participants, these participants will naturally communicate about the running of the exchange. Indeed, even an informal conversation between board members about price levels can potentially communicate a collusive strategy. Moreover, where an online marketplace is owned jointly by a number of the main suppliers in a market, collusion may simply take a different form than it might have done traditionally. Collusion may be achieved by designing the dynamic pricing mechanism so as to favour the owners over other market participants. Alternatively, where the marketplace is owned by a number of sellers, collusive profits might be collected in the form of fees charged to buyers for using the marketplace. In all of these cases, collusion may be formal or tacit.

**Chat Rooms:**

There is some concern that ‘chat rooms’ may become the 21st century equivalent of smoke filled rooms. Many of the online marketplaces include chat rooms in which market participants can ‘get together’ for discussion, without any need to meet up in person and thus without any need for the diary entries, travel arrangements or records of phone calls, that often facilitate detection of such meetings. While some of these chat rooms are public, and thus would be relatively easy to monitor, others may be private, and reserved for particular market participants. They could even be carried out via an ‘Extranet’, rather than the\textsuperscript{511} \url{www.accc.gov.in} assessed on 14.08.2014\textsuperscript{512} \url{www.of.com.org.uk/static/archive/oftel/publications/.../ecom0400.htm} assessed on 23.11.2013
Internet, for improved secrecy. Such chat rooms would be very hard to monitor, and the
information would be easy to delete entirely from the chat room server (if saved in the first
place). Market transparency can play an important role in supporting collusion, since it
enables competitors both to co-ordinate their prices and to observe cheating on prices more
readily. Indeed, increased price transparency may facilitate ‘tacit’ collusion, whereby
competitors adjust to each others’ behavior without any form of explicit agreement. Non-
price information may also be useful in co-coordinating supply decisions. Knowledge of
input prices may be useful in determining whether price reductions by competitors are
related to cost changes or due to cheating. Knowledge of input volumes can provide
important information on competitors’ expected production levels (and thus sales). 513

Similarly, monitoring purchases of production equipment could provide information
on competitors’ capacity. There are a number of characteristics of e-commerce that may
have a significant impact on transparency in the market. Where all of the sales made in a
particular market are transacted via a single online marketplace, the marketplace will have
perfect information on sales made between market participants. Where the online
marketplace is co-owned by a number of market participants, there is a risk that detailed
transaction information of this sort could pass from the marketplace to the participants,
unless strict rules are put in place to ensure confidentiality of data. Even if competitors
cannot gain direct access to detailed transaction information, the marketplace will be in a
uniquely good position to put together summary market statistics of key information. In
some cases, such information will not be anti-competitive, but in other cases it could be,
especially if it is current and relatively disaggregated. Competition authorities may be
required to determine what sorts of statistics may and may not be published. Where online
marketplaces do not provide price and sales data to market participants directly, the fact that
all sales on such marketplaces are made electronically may mean that they are relatively
public and easy to monitor. Indeed, compared with the secret bilateral negotiations between
buyers and sellers that have previously characterized many B2B markets, this ability to
monitor sales may imply a dramatic increase in transparency Lower search costs.

The Internet is likely to bring about low search costs and high price transparency.
When competitors simply publish their prices on the Internet, it is possible to design search
engines that will monitor prices across different websites, and this will be further facilitated
by the growth of protocols such as XML. Such price transparency may facilitate collusion.

513 eu-secretdeals.info/.../CETA-E-Commerce-Competition-MSE-Chapters-D. assessed
on 23.11.2013
Internet technology could potentially offer an ideal micro-climate for collusion, due to increased communication and transparency in the market, as well as the potential for more frequent market interactions. In particular, collusion concerns may arise with respect to market design and ownership within both online marketplaces and joint Internet sales ventures. In order to improve the monitoring of collusion, it might also be useful for competition authorities to provide guidance as to the long-term storage of electronic data. They might also wish to develop their own market-monitoring search engine software, which might be used to track prices, sales and conversations in chat rooms, with the aim of detecting evidence of collusive behavior.\(^{514}\) Impact of e-commerce on the nature of vertical restraints. Vertical restraints are made between independent parties at different points in a supply chain. The extent to which vertical restraints are used may thus be affected by any changes to the nature and number of independent parties that make up each supply chain. E-commerce is likely to affect the supply chain in three relevant ways. Under traditional commerce, the costs of maintaining a network of retail outlets, and the attractiveness of having a relatively wide range of products within each outlet, may have deterred manufacturers from retailing their own products. The reduced search costs associated with the Internet mean that customers can more easily be served from a single website and there may be less need for that site to offer wide range of products. Thus, in an online environment, more manufacturers may opt to retail their own products. The creation of new intermediaries the Internet has given rise to a variety of new intermediaries, such as portals and online marketplaces, which may sign restrictive vertical agreements with online buyers and sellers. Much of the literature on vertical restraints emphasizes the ability of suppliers to impose restraints on powerless retailers. Over the last 50 years, such a view of retailers has become increasingly inappropriate. The growth of e-commerce may further strengthen the market position of downstream buyers relative to suppliers. Firstly, lower search and switching costs will increase the credibility of buyers’ threats to switch supplier, and thus increase their bargaining power. Secondly, buying clubs and careful market design may also improve their buying power. Thirdly, the widening of geographic retail markets may facilitate the development of global retailers. These will tend to have far greater bargaining power with suppliers than traditional local or national retailers. The main potential anti-competitive effects of vertical restraints are market foreclosure and rising of rivals’ costs, competition dampening, and facilitation of collusion. As e-commerce in India is at nascent stage but growing at a very high rate, these competition issues may arise.

in the near future. E-commerce may become a platform for the anti-competitive agreements between the companies. There are some international cases where anti-trust issues have come up with e-commerce as a platform. Credit cards being the facilitators of E-commerce, some international case studies are done where anti-competitive agreements and anti-trust issues between the credit cards companies have come up. Credit cards market in India is growing at a fast rate. These issues may come up in India in the near future. As stated in the last section; CCI must keep an eye on developing e-commerce market in India as well as the credit cards companies that might indulge in the anti-competitive practices to increase their own profits.\(^5\)

Automobiles: On these sites we can buy and sell four wheelers and two-wheelers, new as well as used vehicles, online. Some of the services they provide are: Car research and reviews, online evaluation, Technical specifications, Vehicle Insurance, Vehicle Finance.

2.18 Benefits of E-Commerce to Businesses.

The other reports available on India Reports are on retail, outsourcing, tourism, food and other emerging sectors in India.

5. Easy reach to a fast growing online community.
6. Unlimited shelf place for products and services.
7. Fuse the global geographical and time zone Boundaries.
8. Helps reach national and global markets at low operating costs.

Research studies have indicated several factors responsible for the sudden spurt in growth of Ecommerce in India such as:

3. Rapidly increasing Internet user base Technology advancements such as VOIP (Voiceover-IP) have bridged the gap between buyers and sellers online
4. The emergence of blogs as an avenue for information dissemination and two-way communication for online retailers and E Commerce vendors. Improved fraud prevention technologies that offer a safe and secure business.\(^6\)

(xiv) Future of E-Commerce in India

Today, one is talking about e-commerce progress level of India, the seventh-largest by geographical area, the second-most populous country, and the most populous democracy in the world. Indian ecommerce space percentage is getting higher as more and more online retailers enter the market. Although this level of entry in the e-commerce market is good from a long term perspective, the challenge is that most entrepreneurs don’t have the resources or

\(^5\) ibid
\(^6\) http://www.legalserviceindia.com/articles/ecta.htm assessed on 23.03.2013
capital to wait for years before they can get profits. The past 2 years have seen a rise in the number of companies' embracing e-commerce technologies and the Internet in India. Most e-commerce sites have been targeted towards the NRI's with Gift delivery services, books, Audio and videocassettes etc. Major Indian portal sites have also shifted towards e-commerce instead of depending on advertising revenue. The web communities built around these portal sites with content have been effectively targeted to sell everything from event and movie tickets the grocery and computers. This is not to say that the e-commerce scenario has been bad in India as highly successful e-business like baba bazaar and India mart have proved. Indian Banks too have been very successful in adapting EC and EDI Technologies to provide customers with real time account status, transfer of funds between current and checking accounts, stop payment facilities. ICICI Bank, Global Trust Bank and UTI-Bank also have put their electronic banking over the internet facilities in upcoming e-commerce market speed post also plan to clone the federal express story with online package status at any moment in time. The future does look very bright for e-commerce in India with even the stock exchanges coming online providing an online stock portfolio and status with a fifteen minutes delay in prices. The day cannot be far when with RBI regulations will able to see stock transfer and sale over the Net with specialized services. Environment and help prevent credit card frauds, identity thefts and phishing. Bigger web presence of SME’s and Corporate because of lower marketing and infrastructure costs

**Collusion:**

One of the most widely held competition concerns relating to e-commerce is that it may facilitate such collusive behavior. Much of the recent discussion of this issue has focused on the development of B2B online marketplaces that are co-owned by a number of significant market participants. More generally, there are a number of characteristics of ecommerce that might be expected to facilitate collusion, even in the absence of joint ventures and online marketplaces. A separate law on e-contracts would be redundant. Addressing the challenges presented by technology to contract law merely involves refashioning existing principles—a case of old wine in new bottles. First, all forms of E-Contracts ought to be made as conspicuous as possible to satisfy legal standards of notice of terms. Its binding legal nature ought to be impressed upon the end-user, and browse-wrap notices must ideally only be supplemental to a contract that the user has already manifested

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518 [www.ausib.org](http://www.ausib.org) assessed on 14.08.2014
his assent to. The instantaneous nature of electronic transactions also invites a re-conceptualization of the mailbox rule of contract formation, and this is reflected in both case-law as well as provisions of the IT Act, 2000[^19].

With respect to the status of software contracts, it has been noted that rights such as perpetual possession cannot be treated as dispositive. Given the fact that software tends to be heavily encumbered by restrictions that detracts from ownership as it is conventionally understood, software contracts ought to be treated as licenses. Finally, e-contracting greatly reduces geographical barriers and increases the probability of consumers entering into transnational contracts. This raises several issues of private international law, and the legal regime here is quite obscure[^20]. There is no clarity or uniformity since countries tend to apply their own domestic[^21]. E-contract is a contract modeled, specified, executed and deployed by a software system. E-contracts are conceptually very similar to traditional (paper based) commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms (where possible), place orders and make payments. Then, the vendors deliver the purchased products. Nevertheless, because of the ways in which it differs from traditional commerce, electronic commerce raises some new and interesting technical and legal challenges. For recognition of e-contracts following questions are needed to be considered: The law already recognizes contracts formed using facsimile, telex and other similar technology. An agreement between parties is legally valid if it satisfies the requirements of the law regarding its formation, i.e. that the parties intended to create a contract primarily. This intention is evidenced by their compliance with three classical cornerstones i.e. offer, acceptance and consideration. One of the early steps in the formation of a contract lies in arriving at an agreement between the contracting parties by means of an offer and acceptance. Advertisement on website may or may not constitute an offer as offer and invitation to treat are two distinct concepts. Being an offer to unspecified person, it is probably an invitation to treat, unless a contrary intention is clearly expressed[^22]. The test is of intention whether by supplying the information, the person intends to be legally bound or not. When consumers respond through an e-mail or by filling in an online form, built into the web page, they make

[^19]: ibid
[^20]: www.ausib.org assessed on 14.08.2014
[^21]: www.ausib.org assessed on 15-02-2013
an offer. The seller can accept this offer either by express confirmation or by conduct unequivocal unconditional communication of acceptance is required to be made in terms of the offer, to create a valid e-contract. The critical issue is when acceptance takes effect, to determine where and when the contract comes into existence. The general receipt rule is that acceptance is effective when received. For contracting no conclusive rule is settled. The applicable rule of communication depends upon reasonable certainty of the message being received. When parties connect directly, without a server, they will be aware of failure or partial receipt of a message. Such party realizing the fault must request re-transmission, as acceptance is only effective when received. When there is a common server, the actual point of receipt of the acceptance is crucial in deciding the jurisdiction in which the e-contract is concluded. If the server is trusted, the postal rule may apply, if however, the server is not trusted or there is uncertainty concerning the e-mail’s route, it is best not to apply the postal rule. When arrival at the server is presumed insufficient, the ‘receipt at the mail box’ rule is preferred. Contracts result only when one promise is made in exchange for something in return. This something in return is called ‘consideration’. The present rules of consideration apply to e-contracts. There is concern among consumers regarding Transitional Security over the Internet. The e-directive on distance selling tries to generate confidence by minimizing abuse by purchasers and suppliers. It specifies---

1. A list of key points must be supplied to the consumer in ‘a clear and comprehensible manner.’

2. The right of withdrawal enabling consumers to avoid deals entered into inadvertently or without sufficient knowledge, providing for seven-day cooling-off period free from penalty or reason to return the goods or reimburse the cost of services.

3. Performance should be delivered within thirty days of order unless otherwise expressly agreed.

4. Reimbursement of sums lost to fraudulent use of credit cards. It places the risk of fraud on the credit card Company, requiring them to take steps to protect their position.\textsuperscript{523}

5. On the other hand, there is also need to protect sellers from rogue purchasers. For this, the provision of charge-back clauses’ and encouragement of pre-payment by buyers is recommended.

6. Thus, this Directive adequately protects rights of consumers against unknown sellers and sellers against unknown buyers.

\textsuperscript{523} ibid
A party that commits breach of an agreement may face various types of liability under contract law. Due to the nature of the systems and the networks that business employ to conduct e-commerce, parties may find themselves liable for contracts which technically originated with them but, due to programming error, employee mistake or deliberate misconduct were executed, released without the actual intent or authority of the party. Sound policies dictate that parties receiving messages be able to rely on the legal expressions of the authority from the sender’s computer and this legally be able to attribute these messages to the sender. In addition to employing information security mechanisms and other controls, techniques for limiting exposure to liability include:

3. Trading partner and legal technical arguments
4. Compliance with recognized procedures, guidelines and practices

Audit and control programmer sand reviews Technical competence and accreditation Proper human resource management Insurance Enhance notice and disclosure mechanisms and Legislation and regulation addressing relevant secure electronic commerce issuing. Digital signatures as authentication of any electronic record by a subscriber by means of an electronic method or procedure.\(^{524}\) A digital signature functions for electronic documents like a handwritten signature does for printed documents. The signature is an unforgivable piece of data that asserts that a named person wrote or otherwise agreed to the document to which the signature is attached. A digital signature actually provides a greater degree of security than a handwritten signature. The recipient of a digitally signed message can verify both that the message originated from the person whose signature is attached and that the message has not been altered either intentionally or accidentally since it was signed. Furthermore, secure digital signatures cannot be repudiated; the signer of a document cannot later disown it by claiming the signature was forged. In other words, digital signatures enable "authentication" of digital messages, assuring the recipient of a digital message of both the identity of the sender and the integrity of the message. The fundamental drawback of online contracts is that if there is no alternate means of identifying a person on the other side than digital signatures or a public key, it is possible to misrepresent one’s identity and try to pass of as somebody else. e-contracts are well suited to facilitate the re-engineering of business processes occurring at many firms involving a composite of technologies, processes, and business strategies that aids the instant exchange of information. The e-contracts have their own merits and demerits. On the one hand they reduce costs; saves time, fasten

\(^{524}\) Section 2(p) of The Information Technology Act, 2000
customer response and improve service quality by reducing paperwork, thus increasing automation. With this, e-commerce is expected to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an online global market place with millions of customers and thousands of products and services. On the other hand, since in electronic contract, the proposal focuses not on humans who make decisions on specific transactions, but on how risk should be structured in an automated environment. Therefore the object is to create default rules for attributing a message to a party so as to avoid any fraud and discrepancy in the contract. Consequently, in my view as respondent/defendant company has unlawfully and by way of an unethical procedure taken forcible possession of petitioner/plaintiff's vehicle, they are liable to pay him a compensation of Rs. 16,000/- with simple interest at the rate of 6% per annum from the date of repossession of said vehicle i.e. from 26th November, 1985 till the date of payment. Respondent/defendant is directed to make payment of aforesaid amount within a period of six weeks from today. With the aforesaid directions, present petition and pending application are disposed of lower court record be sent back immediately.

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525 www.legalserviceindia.com assessed on 14.08.2014
526 Indiakanoon.org assessed on 14.08.2014
3.4 Contract Farming

3.4.1 Reasons for Contract Farming in India
It is a new term in India. It came in an age of market liberalization, globalization and expanding agri business, there is a danger that small-scale will find difficulty in fully participating in the market economy. The era of globalization, the concept of ‘Contract Farming’ is an effective way to co-ordinate and promote production and marketing in agriculture. Contract farming is essentially an agreement between unequal parties, companies, Government bodies or individual entrepreneurs on the one hand and economically weaker farmers on the other. The main feature of contract farming is that the buyer/contractor supplies all the material inputs and technical advice required for cultivation to the cultivator. This approach is widely used, not only for tree and cash crops but also, increasingly for fruits and vegetables, poultry, pigs, dairy products and even prawn and fish. Indeed, contract farming is characterized by its “enormous diversity” not only with regard to the products contracted but also in relation to many different ways in which it can carry out. The advantages, disadvantages and problems arising from contract farming will vary according to the physical, social and market environments. More specifically, the distribution of risks will depend on such factors as the nature of markets for both the raw material and the processed product, the availability of alternative earning opportunities for farmers, and the extent to which relevant technical information is provided to the contracted farmers. These factors are likely to change over time, as will the distribution of risks. History of contract farming contract farming can be traced back to colonial period when commodities like Collin Indigo were produced by the Indian farmers for English factories. Seed production has been carried out through contract farming by the seed companies quite successfully for more than four decades in the country. The new agricultural policy of 2000 sought to promote growth of private sector participation in agribusiness through contract farming and land bearing arrangements to accelerate technology transfers, capital inflows and assured market for crops. The colonial period saw the introduction of cash crops such as tea, coffee, and rubber, poppy and indigo in various parts of the country, mostly through a central expatriate-owned

528 dspace.iimk.ac.in/bitstream/2259/520/1/637-647+.pdf .assessed on 22.03.2011
estate surrounded by small out grower's model. ITC introduced cultivation of Virginia tobacco in Coastal Andhra Pradesh in the 1920’s incorporating most elements of a fair contract farming system and met with good farmer response. This was replaced by auctions in 1984. Organized public and private seed companies, which emerged in the 1960’s. The Pepsico introduced tomato cultivation in Punjab in the 1990’s under farming to obtain inputs for its paste-manufacturing facility established as a pre-condition to its entry in to India. This was sold to Hindustan Lever in 2000, which had earlier acquired the kissan Karnataka. Contract farming was the strategy of choice for almost all food processing projects contemplated in the 1980’s and 1990’s. Contract Farming is again vogue, and even tried for bulk production of subsistence crops, such as paddy-rice, maize and wheat. Commodity co-operatives, which emerged in the 1950,s, provided most services envisaged under ideal contract farming to their members and bought back the supplies offered at contracted prices, although these were not strictly contract arrangements. The succeeded enormously, leading to their replication and compelling private companies also to adopt similar approaches. Contract Farming is now considered to be a corrective to market imperfections and serving a Contract Farming has been promoted in the recent three decades as an institutional innovation to improve agricultural performance in less developed countries\textsuperscript{529}. This system was accepted and used as one of the promising institutional frameworks for the delivery of price incentives, technology and other agricultural inputs.\textsuperscript{530} Local Governments, private local firms, Multinational companies, some international aid and lending agencies etc have been involved in these contract farming schemes (Glover 1994).\textsuperscript{531}

\subsection*{3.4.2 Definition of Contract Farming}

\textsuperscript{529} Ibid
\textsuperscript{530} Dspaceiimk.ac.in
\textsuperscript{531} Shoji Rani BN, Globalization and Contract Farming in India, available at www.dspace.iimk.ac.in/bitstream/2259/520/1/637-647+.pdf assessed on 11.04.2012

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The dictionary meaning of the term contract farming can be aptly described as a contract for managing or working on an area of land, used for growing crops and/or keeping animals.532

3.4.3 Advantages for Farmers

The prime advantage of a contractual agreement for farmers is that the sponsor will normally undertake to purchase all produce grown, within specified quality and quantity parameters. Contracts can also provide farmers with access to a wide range of managerial, technical and extension services that otherwise may be unobtainable. Farmers can use the contract agreement as collateral to arrange credit with a commercial bank in order to fund inputs. Thus, the main potential advantages for farmers are:

1. Provision of inputs a
2. Access to credit;
3. Introduction of appropriate technology;
4. Skill transfer;
5. Guaranteed and fixed pricing structures; and
6. Access to reliable markets.

Provision of inputs and production services -

Many contractual arrangements involve considerable production support in addition to the supply of basic inputs such as seed and fertilizer. Sponsors may also provide land preparation; field cultivation and harvesting as well practices are followed in order to achieve projected yields and required qualities. There is, however, a danger that such arrangements may lead to the farmer being little more than a laborer on his or her own land. It is often difficult for small-scale farmers outside the contract-farming context to gain access to inputs. In Africa, in particular, fertilizer distribution arrangements have been disrupted by structural adjustment measures, with the private sector having yet to fill adequately the void created by the closure of parasitical agencies. In many countries a vicious circle has developed whereby the low demand for inputs provides no incentive for the development of commercial dist adversely affects input availability and use533. Contract farming can help to overcome many of these problems through bulk ordering by management. Access to credit the majority of smallholder producers experience difficulties in obtaining credit for production inputs534.

532 www.ausib.org assessed on 14.08.2014
533 Dspaceiiimk.ac.in assessed on 14.06.2014
534 www.fao.org
With the collapse or restructuring of many agricultural development banks and the closure of many export crop marketing boards (particularly in Africa), which in the past supplied farmers with inputs on credit, difficulties have increased rather than decreased. Contract farming usually allows farmers access to some form of credit to finance production inputs. In most cases it is the sponsors who advance credit through their managers. However, arrangements can be made with commercial banks or government agencies through crop liens that are guaranteed by the sponsor, i.e. the contract serves as collateral. When substantial investments are required of farmers, such as packing or grading sheds, tobacco barns or heavy machinery, banks will not normally advance credit without guarantees from the sponsor. The tendency of certain farmers to abuse credit arrangements by selling crops to buyers other than the sponsor (extra-contractual marketing), or by diverting inputs supplied by management to other purposes, has caused some sponsors to reconsider supplying most inputs, opting instead to provide only seeds and essential agrochemicals. The policies and conditions that control advances are normally described in attachments to contract.\

3.5 Joint Venture Agreements

3.5.1 Meaning and Definition of Joint Venture

It is also a new term in contract law. Joint Venture may be defined as a contractual agreement or a business relationship between two or more people for the purpose of executing a particular business undertaking. All parties agree to share in the profits and losses of the enterprise.\

3.5.2 Types of Joint Venture

From legal and organizational standpoint, joint ventures can be of two different forms i.e. equity joint ventures and contractual joint ventures. In equity joint ventures, two or more partners participate to create a new corporate entity wherein each one of them owns a given share of the equity capital. However such a thing is absent in contractual joint ventures wherein the only internal legal relations between the parties as well those parties, on one hand, and third parties on the other restructured and regulated on a contractual basis. Equity type joint ventures may include passive financial investments by portfolio investors. There are again inter-firm co-operative agreements, which are non-equity type joint ventures, which may include functional co-operation between company’s byway of agreements providing

535 www.fao.org assessed on 14.08.2014
536 Ibid
537 Available at Kamil@ VinodKothari.com assessed on 23.06.2013.
intellectual property rights, know-how, etc. as well as other non-equity agreements. In India, Joint Venture companies are the most preferred form of corporate entities. There are no separate laws for joint ventures in India. The companies incorporated in India, even with up to 100% foreign equity, are treated the same as domestic companies. A joint venture may be any of the business entities available in India. The term “joint venture” has not been defined under any Act or legislation for the time being in force in India. However, the Hon’ble Supreme Court of India, in the case of Faqir Chand Gulati vs. Uppal Agencies Pvt. Ltd. and Anr. dealt with the issue of whether an agreement under which the builder agreed to make housing construction for the land owner was a “collaboration agreement or a joint venture”, or the activity of the builder squarely fell within the trappings of the definition of “service”. It was observed by the Hon’ble Supreme of India that the title or caption or the nomenclature of the instrument/document is not the determining factor as regard the nature and character of the instrument/document and the true purpose of a document has to be ascertained with reference to the terms of the document, which express the intention of the parties. As such, the Apex Court made an attempt to define the term “joint venture” and held that the expression “joint venture” connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. Therefore, the use of the words ‘joint venture’ or ‘collaboration’ in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses. In New Horizons Ltd vs Union Of India538 dealing with the question whether a particular company is a joint venture or not, the Hon’ble Supreme Court of India, rejecting the view of the High Court that a company cannot be called as joint venture when there is only a certain amount of equity participation by a foreign company, held that when apart from having equity participation, the Indian group of companies and the foreign based company have pooled together their resources and all the constituents of the company have thus contributed to its resources which shows that the Indian Company and the foreign based company is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest, is a joint venture company. The SC held: “This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share

538 1995 SCC (1) 478.
risks and have a community of interest. We are, therefore, of the view that the Singapore-based company and it would not be correct to say that IIPL which has a substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL”. As evident, in this ruling, sharing of risks, community of interests, contribution to assets and the intent to jointly run and undertaking were taken as indicators of a joint venture. In *Gyprel-Mee (J.V.), vs Government of Andhra Pradesh*\(^{539}\), the Andhra Pradesh High Court lamented the lack of clarity on the concept of joint venture. The court stated: “no law on the Statute book of India or the State defines a joint venture, though under Section 8 of the Partnership Act, 1932, a person may become a partner with another person in particular adventures or undertakings. In case of such "particular partnership" it has its existence only till the purpose for which said partnership or adventure or undertaking came into being. It gets dissolved the moment the purpose for which the partners joined is accomplished and liabilities of persons joining in a particular partnership for the purpose of particular adventure would only last till such undertaking completes the purpose for which it is formed. Such particular partnerships are restricted to a single project in which the members of the group act jointly both at the stage of tendering and at the stage of awarding. Being unincorporated associations, common but with the passage of time, the judicial decisions recognized what is known as "joint venture" of 'two or more persons/ undertakings to combine their property or labour in conduct of particular line of trade or a general business for joint profits\(^{540}\). In *New Horizons Ltd vs Union Of India*\(^{541}\) the Supreme Court had the following to see about the meaning of joint ventures: The expression joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.\(^{542}\) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit.\(^{543}\) A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a

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539 2005 (5) ALD 450, 2005(5) ALT 25, 2005 (2) CTLJ 307 AP
540 icmail.in assessed on 14.08.2014
541 1995 SCC (1) 478.
542 (Black's Law Dictionary, 6th Edn., p. 839)
543 (p. 117, Vol. 23)
corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields.\textsuperscript{544} In \textit{Asia Foundations & Constructions Ltd. v. State of Gujarat}\textsuperscript{545} a division Bench of the Gujarat High court has dealt with the nature of joint venture and rights and liabilities of the joint venture partners at length. The relevant passage of the judgment may be reproduced hereunder: The common law did not recognize the relationship of co adventures, but with the passage of time, the judicial decisions recognized what is known as 'joint adventure' of two or more persons undertaking to combine their property or labour in conduct of particular line of trade or a general business for joint profits. The Courts do not treat a joint adventure as identical with a partnership though it is so similar in nature, and in the contractual relationship created by such adventurer that the rights as between them are governed practically by the same rules that govern the partnership. It is generally agreed that in order to constitute a joint venture, there must be community of interest and right to joint control. It is an 'adventure' of two or more persons undertaking to combine their property or labour in conduct of particular line of trade or a general business for joint profits. The courts do not treat a joint adventure as identical with a partnership\textsuperscript{546} though it is so similar in nature, and in the contractual relationship created by such adventurer that the rights as between them are governed practically by the same rules that govern the partnership. This relationship has been defined to be a special combination of persons undertaking jointly some specific adventure for profit without any actual partnership. It is also described as a commercial or a maritime enterprise undertaking by several persons jointly; a limited partnership not limited in the statutory sense as to the liabilities of partners but as to its scope and duration. Generally speaking the distinction between a joint adventure and partnership is that former relates to a single transaction 'though it may comprehend a business to be to be continued over several years' while the later relates to a joint business of a particular kind.\textsuperscript{547}

It is generally agreed that in order to constitute a joint venture, there must be community of interest and right to joint control. It is recognized on authority that each of the parties must have an equal voice in the matter of its performance and control over the agencies used therein, though one authority may entrust the performance to another. There is also an authority to the effect that a joint venture may exist although the parties have unequal control.

\textsuperscript{544} Black's Law Dictionary, 6th Edn. p.342.
\textsuperscript{545} AIR 1986 Guj 185.
\textsuperscript{546} Article on joint Venture in India: by Vinod Kothari and Company.
\textsuperscript{547} (see 48 American Law Reports at p. 1055 under the caption "what amounts to a joint adventure" at pages 1056-57 and 1060).
of operations. The rights, duties and liabilities of joint ventures are similar or analogous to those which govern the corresponding rights, duties and liabilities of the partners. As in the case of partners, joint ventures may be jointly and severally liable to third parties for the debts of the venture.\textsuperscript{548} Joint Venture groups are internationally recognized in form of cooperation in the joint fulfillment of the construction contract obligations. Joint venture groups in the construction industry come about through agreements for combination of legally independent contractors for the joint rendering of construction services limited in both time and content. Typically they are restricted to a single project in which case the members of the group act jointly at both the tendering and award stages. Joint venture groups are generally unincorporated associations. The legal systems in general have not kept pace with the growing economic means of joint venture groups and there is no special legal form for this type of cooperation which has come to stay in construction industry. The services to be rendered by the group are to be allocated amongst the members of the same by internal agreement, and consequently the rights and duties of the members inter se are also regulated by the group agreement. These internal agreements are not effective vis-à-vis the third parties and they operate amongst the members inter se. Thus, all the members are jointly and severally liable for performance of the construction work jointly undertaken irrespective of internal division of the work. If one member of the joint venture group does not fulfill his commitments, the others are under joint and several obligations to carry out such obligations vis-à-vis the customer. Such a situation may arise when a member of a joint venture group drops out prematurely because of the liquidation or insolvency. When a contract is concluded with a joint venture group all members are made jointly and severally liable even if only one is capable of rendering the service in question. The joint and several liabilities of the members of a joint venture group may cover the marginal areas of the contract performance such as late performance, faults, deficiency of goods and services etc. In \textit{Chahal Engg. and Construction Co. (P) Ltd. v. State of Gujarat}\textsuperscript{549}, a Division Bench of Gujarat High Court was dealing with a case of joint venture where at the stage of consideration of pre-qualification to tender, one of the members of eight participants of joint venture consortium, withdrew from the group. The Gujarat High Court considered JV agreement and subsequent pistils to it came to the conclusion that even if one of the joint venture partners withdrew from the joint venture, still the joint venture continued to function. The relevant passage from the judgment delivered by Justice B.K. Mehta is reproduced follows. The case, therefore, is not of


\textsuperscript{549} (1987) 1 Comp. LJ 1 (Guj.) (D.B.)
termination of the joint venture agreement or it ceasing to be in effect on the expiry of 12 months, but is virtually a case of withdrawal by one of the co-ventures. The question which, therefore, arises is whether a co-venturer is entitled to withdraw before the purpose of the venture is accomplished or has failed; and if he does not do so, what is its effect? Whether a party has a right to withdraw and what is the effect of such withdrawal upon the Joint venture depends upon the terms of the agreement and/or upon the circumstances. Generally, no co-venturer has a right to withdraw from or abandon it without the consent of his co-ventures where the venture has not fulfilled its purpose. In absence of a decree of a Court or on an agreement fixing the time of termination or voluntary abandonment of the enterprise by one of the co-ventures, the joint venture agreement remains in force until its purpose is accomplished or becomes impossible for fulfillment and while it is in force, ordinarily, one joint venturer has no right to withdraw himself from the arrangement. It is only where the joint venture agreement is silent about this duration or termination, that a co-venturer has right to withdraw, since it is virtually a limited partnership at will. Even the abandonment of a joint venture by one of the participants, and his active opposition to its operation by his co-ventures will not forfeit his interest in the enterprise or deprive him of his right to share in the profits. Thus on going through the aforesaid decision of the Hon’ble Supreme Court of India and two judgments of Gujarat High Court, it may be summarized that an informal partnership between two or more persons to take up a common enterprise on one time basis is a 'joint venture'. The 'joint venture' involves the factors, like (i) contribution by the parties of money, effort, knowledge and other assets to common undertaking; (ii) joint property interests in the subject matter of the venture; (iii) right of mutual control of management of the enterprise; (iv) expectation of profit; (v) right to participate in the profits; and (vi) limitation of the objective to a single undertaking. On the issue of whether a tender granted on the basis of joint venture remains valid has been discussed in an Andhra Pradesh High Court’s ruling in Gvprl-Mee (J.V.), vs Government of Andhra Pradesh. The Hon’ble Court held that on a withdrawal of a Joint Venture partner, the joint venture gets dissolved while observing: “Therefore, this submission of the learned counsel that even after the withdrawal of MEE, Joint Venture continued to exist cannot be accepted. It must be remembered that the company incorporated in the nature of joint venture may not lose its juristic personality. Similarly a registered partnership firm under Partnership Act may still have certain obligations, rights and liabilities, even after dissolution, by reason of Sections 45, 46 and 47 of Partnership Act.

1932. The same is not the position in the case of Joint Ventures which came into existence by reason of agreement between two or more Joint Venture partners. When there are only two partners in the Joint Venture, and one of them goes out, it is very difficult to accept such entity as a continuing Joint Venture especially when it only draws its sustenance under a mutual agreement between the two partners. Distinguishing the case from one before the Gujarat High court DB ruling above, the court drew analogy of a vehicle – a bicycle having 2 wheels falls if one wheel is taken out – however, that is not the case in case of a 6 wheeler vehicle. A Joint Venture may be formed between two companies, either with or without equity participations; both the situations may be briefly discussed as under.

3.5.3 Ventures without Equity Participation

If a joint venture between two companies is formed without equity participation, then in reality, partnerships are formed in which company’s pool resources and maintain their respective identities. Ownership remains in the hands of each partner. One of the main advantages of engaging in non-equity venture is that they give new or foreign markets that may not otherwise be effectively accessible because of governmental barriers to foreign firms and a network of domestic enterprises that do not welcome newcomer\(^{551}\)’s.

3.5.4 Ventures with Equity Participation

In the joint venture with equity participation, each company has an invested equity stake in the joint venture. This is in contrast to the other venture, in which companies contribute machinery, technical know-how or even money but do not contribute in a joint ownership venture.

3.5.5 Rights of Joint Ventures

Parties in a joint venture have certain rights. Such rights include: - Equal control-Equal power, control and influence over the joint venture projector transaction. However, the contract can give one party complete control.

3.5.6 Duties of Joint Ventures

Parties in a joint venture have duties to one another. Such duties include: Fiduciary duty - A fiduciary duty basically means that each party to the joint venture is duty bound to act in the best interests of all involved. Acting for your own best interests is a breach of fiduciary duty and the same may also constitute a breach of contract if the joint venture was formed by a contract. In a widely cited case of Meinhard v. Salmon\(^{552}\), it was held by the New York Court of Appeals that partners in a business have a fiduciary duty to inform one

\(^{551}\) ibid

\(^{552}\) 164 N.E. 545 (N.Y. 1928).
another of business opportunities that arise. Joint Liability - If a third party is affected by the
joint venture, all parties involved are equally liable. A joint venture is formed for the purpose
of constructing a building. During the course of construction, a brick falls and injures a
pedestrian then all joint ventures would be liable for the pedestrian’s injury.
Disclosure - All information pertaining to the joint venture shall be disclosed to the parties
involved. It should be made sure that the contract clearly specifies what information each
party is required to disclose. Under the Federal securities laws, even preliminary discussions
between parties to a potential joint venture may be subject to disclosure by one or both the
parties. However the Supreme Court of the United States, in Basic Inc. Vs. Levinson553, held
that disclosures of fundamental corporate transactions will depend at any time on the
balancing of both the indicated probability that the ‘event will occur’ and the ‘anticipated
magnitude of the event’ in light of the totality of company activity entering into a joint
venture agreement.

The key to the success of any joint venture lies in the selection of a good local partner.
Once a partner is selected generally a memorandum of understanding or a letter of intent is
signed by the parties. A memorandum of understanding and a joint venture agreement is to be
signed after going through wide ranging consultations with legal professionals well versed in
international laws and multi-jurisdictional laws and procedures. In case of those joint
ventures where a new corporate entity. A company is created; the typical agreement in such a
case is the shareholders’ agreement. Ideally a shareholders’ agreement should contain the
following clauses554:

i. The parties involved
ii. A brief recital
iii. Definition and Interpretation clause
iv. The effective date of the Agreement
v. Capital Structure
vi. The object, purpose and scope of the joint venture
vii. Management and the Board of Directors
viii. Composition of Board of Directors
ix. Shareholders’ Rights and Obligation
x. Representations and Warranties
xi. Termination of the Agreement

553 485 U.S. 224, 231-232.
554 www.india-financing.com
xii. Confidentiality

xiii. Miscellaneous Clauses; which include

6. Notices
7. Force Majeure
8. Specific Performance & Obligations
   Governing Law and Consent to Jurisdiction; Arbitration\(^{555}\) etc
9. The Deed of Adherence also forms part of the Shareholders’ Agreement as an Annexure to it.
10. Escrow Agreement\(^{556}\)

### 3.6 Introduction of Escrow Agreement

Agreements came into vogue in India in 1991, post the privatization escrow of power sector. Escrow agreements have become standard operational practice to militate against the risk of a State Electricity Board not paying dues under the agreed tariff structure. The Information Technology industry boom also led to the frequent application of escrow agreement\(^{557}\), mostly called software agreements. Most businesses that rely on third party’s software for their functioning seek to ensure business continuity by providing for software escrow agreements which require owners of the software to place source code of the software with an escrow agent.\(^{558}\) Escrow agreements are also used in joint development agreements to ensure that the escrow agent steps in to decide the rights of either party in case of default by the other.\(^{559}\)

Three parties are essential for escrow agreement

4. Supplier
5. Escrow agent
6. End user\(^{560}\)

### 3.6.1 Laws Governing Escrow Agreement

Escrow is a contractual arrangement between the parties. However, it is\(^{561}\) governed and regulated by specific laws in United States. In India, this legal instrument is still in a

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\(^{555}\) www.Indiafinancing.com assessed on 14.05.2014

\(^{556}\) ibid


\(^{558}\) Ibid

\(^{559}\) www.ausib.org assessed on 14.09.2014

\(^{560}\) restaurantlaw.co.uk assessed on 14.09.2014
nascent stage and is mostly self-regulated, that is, governed by the terms of the contract. However, the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 apply to different kinds of escrows in India. Further, the Securities Escrow is partly governed by Reserve Bank of India, which has issued a notification permitting non-residents, subject to Title and Trust Co., 76 Ariz. 116, 120, 259 P.2d 554, 557 (1953); Escrow agreements came into vogue in India in 1991, post the privatization of power sector. Escrow agreements have become standard operational practice to militate against the risk of a State Electricity Board not paying dues under the agreed tariff structure. The Information Technology industry boom also led to the frequent application of escrow agreement, mostly called software agreements. Most businesses that rely on third party’s software for their functioning seek to ensure business continuity by providing for software escrow agreements which require owners of the software to place source code of the software with an escrow agent. Escrow agreements are also used in joint development agreements to ensure that the Escrow agent steps in to decide the rights of either party in case of default by the other.

3.6.2 Terms and Conditions of an Escrow Agreement

Agreement:

The foundation of any escrow service is the agreement. A typical escrow is a tripartite one signed between the seller, purchaser, and the escrow agent, thereby enmeshing the parties into the framework created under the agreement. The depositor is required to entrust money with the escrow agent. The escrow agent holds the escrow deposit until it can be released to the beneficiary upon the happening of some future event, or the performance of certain contractual conditions. If any or both the parties withdraw their obligations under the agreement, the escrow agent is required to return the down payment to the purchaser.

The main clauses of an escrow agent are the following:

1. It would specify who the escrow agent is
2. It would describe the asset or thing that is to be put in escrow
3. It would detail the events which would trigger the release of the “thing”
4. It will contain a clause indemnifying the escrow agent
5. It will contain a confidentiality clause; and

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563 In the context of software escrow agreements, many escrow agents are now offering bipartite escrow services which are structured to ensure that the benefits of using an escrow would flow to all licenses/uses of a software.
6. It will specify the governing law\textsuperscript{564}

Escrow working:- Once the parties to the transaction (buyer/seller/lender and/or borrower) have reached an agreement, the signed contract or purchase agreement, along with the buyer’s earnest money deposit, is submitted to the escrow holder. At that point, an escrow is opened. The escrow holder will now follow the mutual written instructions of the buyer and seller, maintaining a neutral stance to facilitate the successful exchange of money and property between the parties. The escrow holder will also follow the instructions of the lender in meeting their conditions.

The duties of an escrow holder include, but are not limited to-

8. The processing and coordination of the flow of documents and funds.
9. Ordering the title search which will indicate the record of ownership and status of the subject property.
10. Responding to lender’s requirements.
11. Responding to authorized requests from parties to the transaction.
12. Preparation of a final statement for each party (often referred to as the HUD-1 or Settlement Statement), that shows the costs and charges associated with the transaction.
14. Closing of the escrow, only when all conditions are met and funds are in place in accordance with instructions.\textsuperscript{566}

3.7 Outsourcing Contracts

3.7.1 Introduction

Outsourcing involves the conducting of one or more organizational activities, traditionally “in house,” by external agents. The primary motivation behind outsourcing, especially offshore outsourcing, is cost reduction which is made possible by the significantly lower per capita costs of labor in most offshore destinations. Taking up such practices also allows companies to improve their own operations and compete better with other firms in

\textsuperscript{564} \url{www.ausib.org} assessed on 14.08.2014

\textsuperscript{565} \url{www.fatc.com} assessed on 14.08.2014

\textsuperscript{566} \url{http://www.firtam.com.../understanding-escrow-and-its-importance-to-you.htm.} assessed on 23.06.2013.
terms of having better logistics, more rationalized inventories, quicker time market, etc. The present wave of outsourcing transactions has transformed the way many corporations look at business. Companies that have multiple operations are often found struggling against smaller, more agile companies that have cut their costs and are pricing products and/or services lower. In a sense, the concept of growth itself has been redefined, since the new mantra for companies situated in developed economies is to focus on their “core competencies” and allow other processes to be outsourced to India and China, essentially reducing the size of their operations! technology, and capital.

3.7.2 Reasons for Outsourcing Contract

Companies primarily outsource to avoid certain costs - such as peripheral or "non-core" business expenses, high taxes, high energy costs, excessive government regulation/mandates, production and /or labor costs. The incentive to outsource may be greater for U.S. companies due to unusually high corporate taxes and mandated benefits, like social security, Medicare, and safety protection (OSHA regulations). At the same time, it appears U.S. companies do not outsource to reduce executive or managerial costs. For instance, executive pay in the United States in 2007 was more than 400 times more than average workers a gap 20 times bigger than it was in 1965. In 2011, twenty-six of the largest US corporations paid more to CEO's than they paid in federal taxes. Such statistics imply that the reason companies outsource is not to avoid costs in general but to avoid specific types of costs.

3.7.3 Digital Outsourcing

One strong reason for outsourcing is the lack of available resources locally. This is particularly true for IT outsourcing, where the US has a lack of available resources. This knowledge gap can be felt more outside major cities. The digital workforce of countries like India and China are only paid a fraction of what would be minimum wage in the US. On average, software engineers are getting paid between 120,000 to 800,000 rupees ($4,000 to $23,000) in India as opposed to the $40,000-$100,000

www.ausib.org assessed on 14.08.2014


in countries like US and Canada. However, unlike typical sweatshops and manufacturing plants, most of the digital workforce in developing countries have the flexibility to choose their working hours and which companies to work for. With many individuals working remotely from home, the companies that require this type of work do not need to allocate additional funds for setting up of office space, management salary, and employee benefits as these individuals are contracted workers. Another method of outsourcing is using a microwork service for repetitive tasks that would otherwise have to be performed by employees.

Greater physical distance between higher management and the production-floor employees often requires a change in management methodologies, as inspection and feedback may not be as direct and frequent as in internal processes. This often requires the assimilation of new communication methods such as voice over IP, instant messaging, and Issue tracking systems, new time management methods such as time tracking software, and new cost- and schedule-assessment tools such as software. In the area of call centres end-user-experience is deemed to be of lower quality when a service is outsourced. This is exacerbated when outsourcing is combined with off shoring to regions where the first language and culture are different. Foreign call centre agents may speak with different linguistic features such as accents, word use and phraseology, which may impede comprehension. The visual cues that are missing in a telephone call may lead to misunderstandings and difficulties. When these same people are transferred to an outsourcer, they may not even change desks. But their legal status changes. They are no longer directly employed by (and responsible to) the organization. This creates legal, security and compliance issues that are often addressed through the contract between the client and the suppliers. This is one of the most complex areas of outsourcing and sometimes involves a specialist third-party adviser. Fraud is a specific security issue as well as criminal activity, whether it is by employees or the supplier.

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572 www.en.wikipedia.org
574 en.wikipedia.org
576 Car.pc.wallpapers.biz
staff. However, it can be disputed that fraud is more likely when outsourcers are involved; credit-card theft when there is the opportunity for fraud by credit-card cloning. In April 2005, a high-profile case involving the theft of $350,000 from four Citibank customers occurred when call centre workers acquired the passwords to customer accounts and transferred the money to their own accounts opened under fictitious names. Citibank did not find out about the problem until the American customers noticed discrepancies with their accounts and notified the bank.  

Outsourcing has gone through many iterations and reinventions. Some outsourcing contracts have been partially or fully reversed, citing an inability to execute strategy, lost transparency & control, onerous contractual models, a lack of competition, recurring costs, hidden costs, and so on. Many companies are now moving to more tailored models where along with outsource vendor diversification, key parts of what was previously outsourced has been in sourced. Insourcing has been identified as a means to ensure control, compliance and to gain competitive differentiation through vertical integration or the development of shared services [commonly called a ‘centre of excellence’]. Insourcing at some level also tends to be leveraged to enable organizations to undergo significant transformational change.

Further, the label outsourcing has been found to be used for too many different kinds of exchange in confusing ways. Global software development, which often involves people working in different countries, cannot simply be called outsourcing. The outsourcing-based market model fails to explain why these development projects are jointly developed, and not simply bought and sold in the marketplace. Recently, a study has identified an additional system of governance, termed algocracy that appears to govern global software projects alongside bureaucratic and market-based mechanisms. The study distinguishes code-based governance system from bureaucracy and the market, and underscores the prominent features of each organizational form in terms of its ruling mechanism: bureaucracy (legal-rational), the market (price), and algocracy (programming or algorithm). So, global software development projects, though not in sourced, are not outsourced either. They are in-between, in a process that is sometimes termed Remote In-Sourcing. Projects are developed together

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where a common software platform allows different teams around the world to work on the same project together.\textsuperscript{579}

### 3.7.4 Growth of Outsourcing Contracts

Outsourcing first gained popularity as a business method in the late 1980s when Kodak outsourced the management of its information technology systems. This led to a trend where managers re-conceptualized their businesses and concentrated on developing strategic partnerships, outsourcing certain aspects of their business. Today, outsourcing is increasingly coupled with offshoring, where services are outsourced overseas, to countries like India, China, and other countries in Eastern Europe, since costs are much.\textsuperscript{580}

### 3.8 Public–Private Partnership (PPP)

#### 3.8.1 Introduction

Lack of cash has virtually led every state in the nation to explore innovative finance techniques that allow important improvements in infrastructure projects, in public–private partnership (PPP) model to move forward while keeping taxes and fees low.\textsuperscript{581} Private sector involvement in infrastructure has required regulatory reform, implying not only a new set of rules but an in-depth review of the way governments traditionally think about regulation.\textsuperscript{582} Unfortunately, over the years, the public sector started becoming active in areas other than infrastructure. This left a huge gap between demand and supply, which was impossible for the government alone to make good. Ideas of involving the private sector more actively began to be mooted in the late 1980s, but not with much force, and nothing worthwhile was achieved in this regard. It is in this context that the government, in 1991, emphasized the creation of infrastructure, both by stepping up investment by the government itself and by providing fiscal to the private sector. Two main reasons provided for last of infrastructure development in the country have been identified as inadequate user charges and regulatory uncertainty.\textsuperscript{583} States are increasingly turning to toll finance and PPPs to begin to fill the funding gap, instead of financing infrastructure projects on their own. Long-term concession

\textsuperscript{579} http://www.en Wikipedia.org/wiki outsourcing. assessed on 23.06.2013.
\textsuperscript{580} www.computerweekly.com \(\ldots\) assessed on 14.08.2014
\textsuperscript{581} Available at http://www.usc.edu/schools/sppd/keston
\textsuperscript{582} Evamaria Uribe, “Building Regulatory Institutions in Latin America: From Penalties to Incentives,” Inter-American Development Bank (1999), http://www.iadb.org/sds/IFM/ publication/gen_154_666_e.htm,
\textsuperscript{583} Anupama Rastogi, “Infrastructure Sector in the Report of the PM’s Economic Advisory Council,” available online at http://www.iimahd.ernet.in/~morris/iir02/chap%203(1).pdf
agreements with equity participation by the private sector are one form of what are generically called “public private partnerships” also known as PPPs or P3. Over the last year or so, PPP has been typically referred to these concessions, but PPP refers to any contractual agreements between the public sector and a private entity that allow for private sector participation in the delivery of infrastructure projects. PPPs range from the simplest form, design-build, more complex transactions, including design-build-finance-operate (DBFO) or long-term leases/concession agreements which are based on build-own-operate and transfer (BOOT). PPPs are now being developed on Greenfield projects, which are start-up infrastructure projects.

3.8.2 Constitutionality of PPP: Historical Origin

The economic crisis faced by India in 1990–91 provided an opportunity for unshackling the economy by de-licensing a number of sectors. This led to the opening up of the infrastructure sectors, including power and telecommunication, to enhance private participation. Sectoral policies as those governing foreign investment were liberalized. Sector-specific developments were aimed at improving the policy climate for private investment. The power sector has witnessed various phases of policy developments. The earliest phase, which began in the early 1990s, was aimed to improve the policy climate for private investment. In 1991, the Government of India amended the Electricity Supply Act (1948) to allow the entry of private investors in power generation and distribution.

3.8.3 Basis of for Privatization

17. Memorandum of Understanding.
20. NICE (Nandi Infrastructure Corridor Enterprise)–KIADB (Karnataka Industrial Area Development Board) Agreement.
21. NICE–BWSSB (Bangalore Water Supply and Sewerage Board) Agreement.
22. NICE–KEB (Karnataka Electricity Board) Agreement.
24. 1999 October Supplementary Agreement\textsuperscript{584}.

\textbf{3.9 Conclusion}

Contract is changing due to privatization, industrialization. New terms has come in the contract e.g. e-contract, escrow agreement, joint venture agreement contract farming, outsourcing contracts. All forms of e-contracts ought to be made as conspicuous as possible to satisfy legal standards of notice of terms. Its binding legal nature ought to be impressed upon the end-user, and browse-wrap notices must ideally only be supplemental to a contract that the user has already manifested his assent to. The instantaneous nature of electronic transactions also invites a re-conceptualization of the mailbox rule of contract formation, and this is reflected in both case-law as well as provisions of the IT Act, 2000. With respect to the status of software contracts, it has been noted that rights such as perpetual possession cannot be treated as dispositive. Given the fact that software tends to be heavily encumbered by restrictions that detracts from ownership as it is conventionally understood, software contracts geographical barriers and increases the probability of consumers entering into transnational contracts. This raises several issues of private international law, and the legal regime here is quite obscure. There is no clarity or uniformity since countries tend to apply their own domestic laws on jurisdiction, recognition and enforcement, and determination of the applicable law. The need of the hour is an International Convention that would provide a holistic basis for the development of substantive and procedural aspects of e-contracts.\textsuperscript{585}

Escrow agreement plays an important role in today’s life but in India there is no law regarding escrow agreement. Successful joint ventures require utmost harmony, understanding, and confidence between parties. On the basis of our study, we have arrived at the following conclusions, some of which relate to legal aspects of outsourcing contracts and some of which apply to the outsourcing industry in general, offshore outsourcing has grown at a hectic pace over the past decade and more, mostly due to the fact that properly executed outsourcing transactions can lead to cost savings which is increasingly important in a globalize world but also partly due to the quality of outsourcing services offered, especially in destinations like India.\textsuperscript{586}

\textsuperscript{584} www.ausib.org assessed on 14.08.2014

\textsuperscript{585} Id at p. no. 215
