Chapter 4

Recognition and Validity of Electronic Contracts

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New communication systems, digital technology, rapid development of e-commerce and transactions have made dramatic change in almost all walks of life. Information stored in electronic form is cheaper; is easier to store, retrieve; and is speedier to communicate. Despite these advantages, people were reluctant to conduct business or conclude any transaction in electronic form due to lack of apposite legal framework. The two principal obstacles which stood in the way of facilitating electronic commerce and electronic governance were: (i) the requirement as to writing, and (ii) signature for legal recognition.

Laws, Indian as well as international, were traditionally based upon paper based records and oral testimony. An urgent necessity had been felt for some changes in the legal provisions to facilitate e-commerce, for e-commerce eliminates the need of paper-based transactions. This became the top most priority with the fast growth in international trade through the medium of e-commerce in the past few years, and many countries have switched over from traditional paper based commerce to e-commerce. This chapter discusses the approach of the judiciary and the legislature, across world, towards legalizing e-contracts. This chapter examines the shrink-wrap, click-wrap and browse-wrap contracts, which have explored how contracts may be entered into and how conditions may be incorporated into the transaction.

4.1 JUDICIAL RECOGNITION AND VALIDITY

Online commerce, local and global, has become commonplace in the last two decades. Several traders have embraced the new opportunities by creating global meeting places and auction houses such as eBay and amazon, etc. The trade of software, cars, travel, books, music and videos are just some of the many commercial transactions carried out in cyberspace. More than a trillion dollars in trade is transacted online annually.1

Accepting terms and conditions by conduct, notice or click of the mouse has raised questions reminiscent of the contract cases called the ticket cases2. The typical ticket

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2 For example. Parker v The South Eastern Railway Co (1877) 2 CPO 416; Ollev v Marlborough Court [1949]1KB 532, Thornton v Shoe Lane Parking Station [1971] 2 QB 163
case scenario arises where a person is handed a ticket, for instance, for train travel, parking or dry cleaning. The ticket may state that the holder is subject to terms which the holder may have had little or no chance to read, negotiate or agree. The courts have been required to determine the point of time at which these contracts are formed and their terms and conditions. The initial point has been determining which terms are to be incorporated into the contract. In *Thornton v Shoe Lane Parking Station*\(^3\), Lord Denning, referring to an extremely onerous exclusion of liability clause on a parking ticket, stated:

> It [the exclusion clause] is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way...in order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it—or something equally startling.\(^4\)

Likewise, in *Interfoto picture Library Ltd v Stiletto Visual Programmes Ltd*\(^5\), the English Court of Appeal held that to incorporate onerous terms into a contract, reasonable notice must be given.

Such an approach is prophetic for contracts in cyberspace.\(^6\) The principles of the ticket cases, for instance, the opportunity to access terms and conditions and the extent to which such clauses will be binding, have been explored and paralleled progressively in the shrink-wrap, click-wrap and browse-wrap cases.

### 4.1.1 Shrink-Wrap Contracts

Shrink-wrap agreements derive their name from the clear plastic wrapping that encloses the goods (such as software packages). These software packages typically include a notice saying that by opening the shrink-wrap, the buyer agrees to the terms and conditions enclosed. Such contracts characteristically include provisions, such as, an arbitration clause, a choice of law and forum clause, disclaimers, limitations of warranties and limitations of remedies. The main criticism of such contracts is that the consumer/buyer will be bound by terms and conditions

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\(^3\) [1971] 2 QB 163  
\(^4\) Ibid., 163, 170  
\(^5\) [1989] 1 QB 433  
\(^6\) Alan Davidson, *supra*, n1, at 67.
unknown at the time the contract is entered into. In a Dilbert cartoon, Scott Adams parodied shrink-wrap contracts thus:7

_Dilbert:_ I didn't read all of the shrinkwrap license on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion.

_Dogbert:_ Call your lawyer

_Dilbert:_ Too late. He opened software yesterday. Now he's Bill's laundry boy.

The early response to shrink-wrap agreements was to limit the application of such clauses. In _Step-Saver-Data Sys Inc. v Wyse Tech_8, the Court held that the terms of the shrink-wrap licence were not enforceable for the reason that Step-Saver had not assented to them.

_In Vault Corp. v Quaid Software Ltd._9, which was decided nearly a decade before _ProCD_, the Court refused to enforce terms contained in a shrink-wrap license without directly analyzing the enforceability of these agreements. The particular license agreement in question was based on a state statute which the Court determined conflicted with federal copyright law. Since the state law upon which the license agreement was based was invalid, the license agreement was unenforceable.

### 4.1.1.1 Step-Saver-Data Sys Inc. v Wyse Tech—A Case Study

Step-Saver originally marketed single computer systems, based primarily on the IBM personal computer. On account of advances in micro-computer technology, Step-Saver developed and marketed a multi-user system. To ease this transition, Step-Saver purchased a multi-user operating system from Software Link, Inc (TSL) known as 'Multi-Link Advanced'. They also bought computer terminals from Wyse Technology that claimed to be compatible with the Multi-Link Advanced operating system. Combining these two components with computers provided by IBM, Step Saver started selling their new multi-user solution. Though, soon after Step-Saver began selling this product, complaints were received by customers claiming that the

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7 Scott Adams, Dilbert, United Feature Syndicate Inc., 14 January 1997. It is interesting that as early as 1997 the problem was presented to be broad enough to warrant public parody. Quoted in Alan Davidson, _The Law of Electronic Commerce_, (Cambridge University Press. Port Melbourne. 2009), p.67
8 939 F 2d 91 (3d Cir 1991)
9 847 F 2d 255 (5th Cir 1988)
system was not functioning properly. Step-Saver notified both TSL and Wyse of the complaints; though, after a large amount of effort, the customers' problems remained largely unresolved. After several preliminary attempts to address the problems, the three companies were unable to reach a satisfactory solution, and therefore, disputes developed among the three concerning responsibility for the problems. Consequently, the problems were never solved. Some (at least twelve) of Step-Saver's customers filed suit against Step-Saver because of the problems with the multi-user system.

Once it became obvious that the three companies would not be able to resolve their dispute amicably, Step-Saver filed suit for declaratory judgment, seeking indemnity from either Wyse or TSL, or both, for any costs incurred by Step-Saver in defending and resolving the customers' law suits. The district court, however, dismissed the complaint, finding that the issue was not ripe for judicial resolution, which was affirmed by the Court of Appeal. Step-Saver afterwards filed a second complaint alleging breach of warranties by both TSL and Wyse and intentional misrepresentations by TSL.

From August of 1986 through March 1987, Step-Saver purchased and resold 142 copies of the Multilink Advanced program. Step-Saver would typically purchase copies of the program in the following manner. First, Step-Saver would telephone TSL and place an order (Step-Saver would typically order twenty copies of the programme at a time.). TSL would accept the order and promise, while on the telephone, to ship the goods promptly. After the telephone order, Step-Saver would send a purchase order, detailing the items to be purchased, their price, and shipping and payment terms. TSL would ship the order promptly, along with an invoice. The invoice would contain terms essentially identical with those on Step-Saver's purchase order: price, quantity, and shipping and payment terms. No reference was made during the telephone calls, or on either the purchase orders or the invoices with regard to a disclaimer of any warranties. Printed on the package of each copy of the programme, however, would be a copy of the box-top license. The box-top license contained five terms relevant to the case:10

10 939 F. 2d 91, at 96-97 (3d Cir 1991)
(1) The box-top license provides that the customer has not purchased the software itself, but has merely obtained a personal, non-transferable license to use the program.

(2) The box-top license, in detail and at some length, disclaims all express and implied warranties except for a warranty that the disks contained in the box are free from defects.

(3) The box-top license provides that the sole remedy available to a purchaser of the programme is to return a defective disk for replacement; the license excludes any liability for damages, direct or consequential, caused by the use of the programme.

(4) The box-top license contains an integration clause, which provides that the box-top license is the final and complete expression of the terms of the parties’ agreement.

(5) The box-top license states: ‘Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it within fifteen days from date of purchase and your money will be refunded to you by that person.’

Step-Saver contended that the contract for each copy of the programme was formed when TSL agreed, on the telephone, to ship the copy at the agreed price. The box-top license, argued Step-Saver, was a material alteration to the parties’ contract which did not become a part of the contract under UCC § 2-207. Alternatively, Step-Saver argued that the undisputed evidence established that the parties did not intend the box-top license as a final and complete expression of the terms of their agreement (and, therefore, the parol evidence rule of UCC § 2-202 would not apply).

TSL argued that the contract between TSL and Step-Saver did not come into existence until Step-Saver received the programme, saw the terms of the license, and opened the programme packaging. TSL contended that too many material terms were omitted from the telephone discussion for that discussion to establish a contract for the software. Second, TSL contended that its acceptance of Step-Saver’s telephone offer was conditioned on Step-Saver’s acceptance of the terms of the box-top license. Therefore, TSL argued, it did not accept Step-Saver’s telephone offer, but made a counter-offer represented by the terms of the box-top license, which was accepted.
when Step-Saver opened each package. Third, TSL argued that the contract was formed; Step-Saver was aware of the warranty disclaimer, and that Step-Saver, by continuing to order and accepting the product with knowledge of the disclaimer, assented to the disclaimer.

Thus, the box-top license, in this case, was best seen as one more form in a battle of forms. The Court considered Step-Saver’s telephone calls to constitute offers, which the Software Link accepted by promising to send the software. Applying § 2-207 (Additional Terms in Acceptance or Confirmation), the Court held that the shrink-wrap license, like the last form sent between merchants, constituted a proposal for additional terms to the sales contract, which are deemed binding unless material. As the warranty disclaimer and remedy limitations set forth in the shrink-wrap license were material, the Court determined they were not part of the contract between Step-Saver and the Software Link. Although Step-Saver was aware of the terms of the shrink-wrap license after the first order was shipped, the Court wrote that ‘repeatedly sending a writing, whose terms would otherwise be excluded under UCC § 2-207, cannot establish a course of conduct . . . that adopted the terms of the writing.’

The Court of Appeals for the 3rd Circuit, therefore, accepted the plaintiff’s argument that the contract had been entered into 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 for the reason that Step-Saver had not assented to them. Therefore, the liability for the defective software was placed on its manufacturer, rather than a reseller.

*Arizona Retail Systems, Inc. v Software Link, Inc.*[^1] is a case substantially similar to Step-Saver, wherein the Court held that shrink-wrap terms that were on the packaging and were inconsistent with specific representations made by the seller were unenforceable. The Court came a conclusion that additional ‘terms and

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[^1]: Ibid, at 104 (3d Cir 1991)
conditions' disclosed after the shipment of the goods were invalid without the buyer's expressed specific assent.

4.1.1.2 ProCD, Inc. v Zeidenberg—A Case Study

In this case, the plaintiff was the seller of a software database that contained a compilation from 3,000 telephone directories. The plaintiff engaged in price discrimination, selling the software at a different price to the general public than it sold to commercial users. To make the price discrimination effective, the plaintiff enclosed a license agreement restricting 'consumer-users' of the ProCD product to non-commercial use of the product. The license agreement was encoded on the CR-ROM disks and was also printed in the manual. The license appeared on the user's screen every time the software was in operation. When the defendant, the owner of an internet service, purchased the non-commercial copy of the ProCD software and resold the database information on the internet, the plaintiff sued for breach of contract among other claims. The Seventh Circuit, reversed the district Court's dismissal of ProCD's claim, finding that the 'shrink-wrap' software license agreement was valid and not preempted by the Copyright Act.

In reaching its conclusion, the Court considered transactions where the consumer purchases prior to getting the detailed terms of the contract. The Court noted that an insurance buyer remits the premium prior to getting the policy. Likewise, a traveler pays for airplane ticket before he receives it and is bound by the terms of the ticket. The Court pointed out that 'to use the ticket is to accept the terms, even terms that in retrospect are disadvantageous.' Similarly, where a person goes to attend a concert and purchases a ticket that states that the patron agrees not to record the concert; to attend is to agree. Although it could be arranged so that every patron must sign this promise before purchasing the ticket, it would raise the prices, lengthen the ticket lines and prevent purchase of tickets by phone or internet.

In sum, in ProCD, to the question—are shrink-wrap licenses enforceable upon software buyers—it was held that shrink-wrap licenses were just as enforceable as

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13 86 F 3d 1447 (7th Cir 1996)
14 Ibid, at 1455
15 Ibid, at 1450
contracts in general. The Court started with the proposition that licenses are covered by the UCC and common law just like ordinary contracts. The Court found that the terms that the consumer agreed to upon purchase of the software was his assent to a license. Some of the terms of that license might be inside the package. The Court end up finding more or less that it could not be the case that only the outside box could have the full license. The contract between ProCD and Zeidenberg was not formed when he paid for the CD-ROM, but rather when he read and accepted the enclosed license terms. He had an opportunity to reject the terms when he had read them, but he failed to do so. That, in effect, means he accepted the terms.

4.1.1.3 Other Important Judgments

Hill v Gateway 2000, Inc.\(^6\) follows the ruling of ProCD, upholding the validity of an ‘approve or return’ trigger for setting the terms of a shrink-wrap license, even though the consumer claimed not to have read the statement of terms with regard to the specific clause at issue. In this case, the Court adopted the analysis of ProCD in an action by purchasers of a computer against the computer manufacturer. The issue was the enforceability of an arbitration agreement between the parties where the arbitration clause was included in a set of terms sent to the buyer in the box in which computer was shipped which also stated that the buyer agreed to accept the terms unless the customer returned the computer within 30 days. The plaintiffs argued that they had not read the statement of terms closely enough to discover the agreement to arbitrate before the 30 days expired, but the Court rejected this, noting that ‘a contract need not be read to be effective.’ Along the lines of ProCD, the Court approved the enforceability of the ‘approve or return’ device for setting terms, again relying on the fact that there are ‘many commercial transactions in which people pay for products with terms to follow’. The customers must have anticipated that additional significant terms would be included with the product and, by keeping the product more than 30 days, accepted the manufacturer’s offer and terms.

In M A Mortenson Company, Inc. v Timberline Software Corp.\(^7\), the Court followed the reasoning of ProCD and Hill, and held that software license terms shipped with

\(^6\) 105 F 3d 1147 (7th Cir. 1997).
\(^7\) 970 P.2d 803 (Wash. App 1999).
the software were part of the parties' contract, and thus, limited the plaintiff's remedies, despite the defendants' failure to mention the license terms when negotiating the sale.

In *Brower v Gateway 2000, Inc.*\(^{18}\), following *ProCD* and *Hill*, the Court here found that a shrink-wrap contract was formed when the plaintiffs retained the software for longer than the 30-day 'approve or return' period. Though, the Court further held that certain contract terms relating to the arbitration provision at issue were not enforceable. This case is akin to *Hill* and also involves the validity of Gateway's arbitration clause and the 'accept or return' policy contained in a 'terms and conditions' agreement included in the packaging of a mail or telephone ordered computer. The customers sued for deceptive trade practices and breach of warranty and contract, contending, among other things, that the arbitration clause was a material alteration of the contract and therefore invalid under UCC § 2-207, unconscionable under UCC § 2-302 and an unenforceable contract of adhesion. The Court, however, rejected these arguments, holding, as in *ProCD*, that the parties' contract was not formed when the order was placed but at the later date after the plaintiffs retained the merchandise beyond the 30 days specified in the agreement, within which time the consumer had presumably read the agreement. The Court did, nevertheless, find that the agreement's designation of certain arbitration specific procedures was not enforceable as the expense and inconvenience of that portion of the agreement would deter the consumer from seeking relief.

### 4.1.2 Click-Wrap Contracts

As the internet commerce began to grow, scholars started writing about the enforceability of click-wrap agreements. Soon enough, though, courts confirmed that if a click-wrap agreement satisfied the traditional principles of contract formation, it would be enforceable. Reference may be made to *CompuServe, Inc. v Patterson*\(^{19}\), wherein a click-wrap agreement was held enforceable. In this case, the plaintiff-appellant CompuServe, Inc. ('CompuServe'), a nationwide provider of both electronic network and information services, had its headquarters in Ohio. Among

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19 89 F. 3d 1257 Court of Appeals, 6th Circuit 1996
the services provided by CompuServe was the opportunity for subscribers to post and sell software in the form of ‘shareware’. Shareware, provided to the end user initially free of charge, allowed the user to test the software for a specified length of time, after which he had to decide whether to pay the software’s author for continued use, or terminate the use of the software. CompuServe accepted payment for the shareware from purchasers and paid that payment, less a commission, to the authors of the software.

Richard S Patterson (‘Patterson’), a resident of Texas, subscribed to CompuServe, and took advantage of CompuServe’s shareware service by posting internet navigation software that he developed; although, marketed via his own corporation, Flashpoint Development. Prior to use of the shareware service, Patterson entered into a ‘Shareware Registration Agreement’ (‘SRA’) that provided that Ohio law governed the parties’ relationship.

Following the posting of Patterson’s navigation software, CompuServe itself began to market its own navigation software. Patterson assumed that CompuServe’s software was confusingly similar to his own trademarked software and notified CompuServe.

Seeking a declaration that it had not infringed Patterson’s trademarks, CompuServe filed a declaratory judgment action in the District Court for the Southern District of Ohio. Patterson filed a motion to dismiss for not having personal jurisdiction. However, when the District Court granted Patterson’s motion, CompuServe filed an appeal arguing that Patterson’s recurring availment of the shareware sales procedures constituted minimum contacts with the forum state. CompuServe also argued that the existence of the Shareware Registration Agreement clearly stipulating that Ohio law governed disputes regarding the agreement meant that the exercise of personal jurisdiction comported with traditional notions of fair play and substantial justice.

In the end, to the question—whether an internet service provider’s home state can exercise jurisdiction over an out-of-state author of software who subscribes to the internet service provider and receives commissions for software sold via the internet
service provider—the Court, in CompuServe, answered in affirmative stating that a forum state can exercise jurisdiction over an author of software who sells his software via internet service provider based in the forum state because (a) the author purposefully avails himself of the forum's laws by acting in the forum, (b) the cause of action arises from that availment, and (c) the burden on the defendant author is less than that on the forum state's interests in determining its laws concerning trademarks and trade names.

*Hotmail Corporation v Van§ Money Pie Inc.*\(^{20}\) is one of the early cases implicitly holding that a click-wrap contract, specifically a ‘terms of service’ e-mail agreement, is valid. While this case does not contain any real debate of the enforceability of ‘click-wrap agreements, it is one of the first decisions which implicitly upheld the validity of these agreements by finding that the plaintiff was likely to prevail on its claim that the defendant breached a contract—here, the ‘Terms of Service’ to which every user of the plaintiff’s e-mail services agreed. The plaintiff, a provider of e-mail services on the internet, required that subscribers to its service agree to abide by its ‘Terms of Service’ which proscribed using a Hotmail account for the purposes of sending spam and/or pornography. In granting the plaintiff’s request for a preliminary injunction, the Court held that the evidence supported a finding that the plaintiff would likely prevail on its breach of contract claim by revealing that the defendants obtained a number of Hotmail mailboxes and access to Hotmail’s services, that ‘in doing so defendants agreed to abide by Hotmail’s Terms of Service, and that they breached that agreement by using Hotmail’s services to facilitate sending spam and/or pornography.’

**4.1.2.1 Caspi v The Microsoft Network\(^{21}\)—A Case Study**

In *Caspi v The Microsoft Network*, the Court was called upon to determine the validity and enforceability of a forum selection clause contained in an on-line subscriber agreement of the Microsoft Network (MSN), an on-line computer service. The background of the matter was depicted as under:\(^{22}\)

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\(^{20}\) 47 USPQ 2d 1020, 1998 WL 388389 (April 1998, ND Cal.)

\(^{21}\) Superior Court of New Jersey, Appellate Division 323 NJ Super. 118, 732 A 2d 528 (1999)

\(^{22}\) 732 A.2d 528, at 530 (1999)
Before becoming an MSN member, a prospective subscriber is prompted by MSN software to view multiple computer screens of information, including a membership agreement which contains the above clause. MSN’s membership agreement appears on the computer screen in a scrollable window next to blocks providing the choices “I Agree” and “I Don’t Agree”. Prospective members assent to the terms of the agreement by clicking on “I Agree” using a computer mouse. Prospective members have the option to click “I Agree” or “I Don’t Agree” at any point while scrolling through the agreement. Registration may proceed only after the potential subscriber has had the opportunity to view and has assented to the membership agreement, including MSN’s forum selection clause. No charges are incurred until after the membership agreement review is completed and a subscriber has clicked on “I Agree”.

The trial Court granted defendants’ motion to dismiss the complaint on the ground that the forum selection clause in the parties’ contracts called for plaintiffs’ claims to be litigated in the State of Washington. The trial Court observed:23

Generally, forum selection clauses are prima facie valid and enforceable in New Jersey. New Jersey courts will decline to enforce a clause only if it fits into one of three exceptions to the general rule: (1) the clause is a result of fraud or “overweening” bargaining power; (2) enforcement would violate the strong public policy of New Jersey; or (3) enforcement would seriously inconvenience trial.

The trial Court opined that plaintiffs’ consent to MSN’s clause did not appear to be the result of fraud or overweening bargaining power, as they had not shown that MSN’s forum selection clause constituted fraud. The clause was reasonable, clear and contains no material misrepresentation. Further, plaintiffs were not subjected to overweening bargaining power in dealing with Microsoft and MSN. A corporate vendor’s inclusion of a forum selection clause in a consumer contract does not of itself constitute overweening bargaining power. So as to invalidate a forum selection clause, something more than merely size difference must be shown. A Court’s focal point must be whether such an imbalance in size resulted in an inequality of bargaining power that was unfairly exploited by the more powerful party. The Court

23 Ibid
while finding it impossible to perceive an overwhelming bargaining situation in the case, observed: 24

The on-line computer service industry is not one without competition, and therefore consumers are left with choices as to which service they select for Internet access, e-mail and other information services. Plaintiffs were not forced into a situation where MSN was the only available server. Additionally, plaintiffs and the class which they purport to represent were given ample opportunity to affirmatively assent to the forum selection clause.

In the end, Judge Fitzpatrick held that enforcement of the forum selection clause would not inconvenience a trial. Given the fact that the named plaintiffs reside in several jurisdictions and that, if the class were to be certified, many different domestic and international domiciles would also be involved, 'the inconvenience to all parties is no greater in Washington than anywhere else in the country.'

The Superior Court of New Jersey agreed with the reasons for decision articulated by Judge Fitzpatrick, and rejected as meritless plaintiffs’ arguments on appeal that the terms of the forum selection clause did not prevent plaintiffs from suing Microsoft outside Washington or, alternatively, that the forum selection clause lacks adequate clarity, and observed the following: 25

The meaning of the clause is plain and its effect as a limiting provision is clear. Furthermore, New Jersey’s interest in assuring consumer fraud protection will not be frustrated by requiring plaintiffs to proceed with a lawsuit in Washington as prescribed by the plain language of the forum selection clause. As a general matter, none of the inherent characteristics of forum selection clauses implicate consumer fraud concepts in any special way. If a forum selection clause is clear in its purport and has been presented to the party to be bound in a fair and forthright fashion, no consumer fraud policies or principles have been violated. Moreover, as a matter of policy interest and apart from considerations bearing upon the choice-of-law provision in the forum selection clause, plaintiffs have given us no reason to apprehend that the nature and scope of consumer fraud protections afforded by the State of Washington are materially different or less broad in scope than those available in this State.

24 Ibid, at 531
The Court also agreed with the trial Court that, in the absence of a better showing than had been made, plaintiffs must be seen to have had adequate notice of the forum selection clause.

4.1.2.2 Other Important Judgments

Recent cases further coagulate the enforceability of click-wrap agreements even when the terms of the agreement are not conspicuous. *DeJohn v The TV Corporation, Register.com et al.*

involved a click-wrap agreement which DeJohn entered into by following a link on Register.com. Upon arriving at the agreement, DeJohn clicked on an ‘I Agree’ box signifying that he had read, understood, and agreed to the terms. A dispute arose and, in the legal action, DeJohn argued that Register.com’s click-wrap agreement was not enforceable because, among other things, the text of that agreement was only visible after following the link. The Court rebuffed this argument, finding that DeJohn was indeed able to review the terms by clicking on the link. The Court also opined that DeJohn’s claim that he had not read those terms was irrelevant because there was no fraud, and ‘failure to read a contract is not a get out of jail free card.’

In *Forrest v Verizon Comm., Inc.*, the Court held a forum selection clause in a click-wrap agreement enforceable. Forrest’s argument was that he was not provided with adequate notice of the forum selection provision because the scroll box on the defendant’s website contained only a small portion of the text, which did not include the forum selection provision. While rejecting Forrest’s argument, the Court relied on the traditional notion of contract law that ‘one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not.’ Modernizing this principle, the Court stated that “the use of a ‘scroll box’ in the electronic version that displays only part of the agreement at any one time [is not] inimical to the provision of adequate notice.” The Court held that while the text of the forum selection clause was below the scroll window, if Forrest had read the

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26 245 F Supp 2d 913 (CD Ill. 2003).
27 Ibid, at 919
28 805 A 2d 1007, 1014 (DC 2002).
29 Ibid, at 1011

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agreement, he would ‘have inevitably discovered the forum selection clause’. The Court also suggested that Forrest could have printed the terms of the agreement, which would have made the text easier to review.

In *I Lan Systems, Inc. v Netscout Service Level Corp.*, the Court dealt with the issue of whether the buyer of software was subject to the terms of a click-wrap license agreement which did not appear on the website until after the purchase was made. In this case, I. Lan Systems had paid for the software and was required either to accept or reject a license agreement within the software before proceeding further. I.Lan Systems clicked on the ‘I Agree’ box; however, it argued that the terms were not known to it at the time of the purchase, and therefore, were not part of the bargain. The Court rejected this argument and held that I.Lan Systems explicitly accepted the click-wrap license agreement when it clicked on ‘I Agree.’ The Court held that plaintiff was bound by the terms of a license agreement that appeared on its computer screen when it loaded defendant’s software, for the plaintiff indicated its assent to be bound thereby by clicking on an ‘I agree’ icon at the foot of the license agreement. The Court arrived at this conclusion despite the fact that the plaintiff had ordered the software in a purchase order it sent to defendant before clicking on the ‘I agree’ icon, which purchase order did not contain the limitation of damage clause found in the license agreement. The Court held such a result was correct under UCC Section 2-204, which states that ‘a contract for sale of goods may be made in any manner sufficient to show agreement, *including conduct* by both parties which recognizes the existence of such a contract.’ (Emphasis added). The Court also held that such a result was appropriate under UCC Section 2-207, which permits the addition of additional terms to a contract (here the purchase order) either on explicit or implicit consent. The Court found the requisite overt consent present in plaintiff’s act of clicking on the ‘I agree’ icon. The essential implicit consent was also present because the additional terms in the license agreement came as no surprise to, and caused no hardship for, the plaintiff.

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In *Moore v Microsoft Corp.*,\(^\text{31}\) it was held that the user clicking on the ‘I agree’ icon before proceeding with the download of the software was sufficient evidence of assent.

The leading case in Canada is *Rudder v Microsoft*\(^\text{32}\), where the Court found that the forum selection clause and the whole click wrap agreement containing this provision, was enforceable. The Court rejected the plaintiff’s claim that since only a portion of the agreement was on the screen at any one time, the defendant had a duty to bring such a clause to the attention of the user, and held: ‘...[T]his is not materially different from a multi-page written document which requires a party to turn the page.’ Here, the agreement had a provision that even if the applicants did not read the agreement before clicking the ‘I agree’ button, they would still be bound to all the terms. The Court also ruled that such a click wrap agreement ‘must be afforded the sanctity that must be given to any agreement in writing.’

In *AV et al. v iParadigms LLC*,\(^\text{33}\) a US court applied the principles of click-wrap agreements to minor high school students:\(^\text{34}\)

The Court finds that the parties entered into a valid contractual agreement when plaintiffs clicked ‘I Agree’ to acknowledge their acceptance of the terms of the Clickwrap Agreement. The first line of the Clickwrap Agreement, which appears directly above the ‘I Agree’ link, states: ‘Turnitin and its services ... are offered to you, the user, conditioned on your acceptance without modification of the terms, conditions and notices contained herein.’ Also the Clickwrap Agreement provides that iParadigms will not be liable for any damages ‘arising out of the use of this web site.’ By clicking, ‘I Agree’ to create a Turnitin profile and enter the Turnitin website, Plaintiffs accepted iParadigm’s offer and a contract was formed based on the terms of the Clickwrap Agreement.\(^\text{35}\)

\(^{31}\) 293 AD 2d 587, 587, 741 NYS 2d 91 (NYAD 2 Dept 2002)

\(^{32}\) (1999), 2 CPR 4(th) 474 (Ont. SCJ)

\(^{33}\) Company Civ Act  No 07-0293(ED Va 2008)

\(^{34}\) As regards the applicability to minors, the Court quoted from *Williamson on Contracts*, Section 9 14, 4th edn 2007: ‘If an Infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations.’ The Court concluded. ‘Plaintiffs received benefits from entering into the agreement with iParadigms They received a grade from their teachers allowing them the opportunity to maintain good standing in the classes in which they were enrolled . Plaintiffs cannot use the infancy defense to void their contractual obligations while retaining the benefits of the contract. Thus plaintiffs’ infancy defense fails (p 10)

\(^{35}\) Company Civ Act  No 07-0293 (ED Va 2008) at 8, emphasis in original
These cases show that courts are inclined to continue to find click-wrap agreements enforceable based upon traditional principles of contract formation.

### 4.1.3 Web-Browse Contracts

Browse-wrap agreements are commonly used on websites and do not appear on the screen until a user accesses the terms by clicking on a hyperlink. The enforceability of web-wrap or web-browse agreements is, however, much less clear. These agreements are susceptible to dispute for lack of notice and assent to terms. There are a few noteworthy aspects that define browse-wrap agreements; unlike click-wrap agreements, there is, in most of the cases, no actual or constructive notice, and a product can be used without ever viewing the terms of the agreement, and users may not even realize that an agreement is being entered into.

Canadian and the US courts have been somewhat less consistent in their enforcement of browse wrap agreements. The same is true to the courts of most of the other countries as well. The primary issue in these cases is whether the requisite consent can be implied by the conduct of the browser. In general, the courts have looked at the sufficiency of notice and whether consent is reasonable to imply on the basis of conduct.

*Kanitz v Rogers Cable Inc.* is a Canadian case in connection with a unilateral amendment of an online service agreement. The customers of the telecommunication company (Rogers) had agreed to a click-wrap agreement which contained a term allowing Rogers to change or amend the agreement at any time, providing that any such amendment would be posted on the Rogers website. Rogers afterwards amended the agreement to include the provision that all disputes would be settled by arbitration. The Court concluded that the notice of the amendment was made consistent with the terms of the agreement, and that the effect of the amending provision was to place an obligation on the user to check the website from time to time. The Court accepted the proposition that the service subscribers’ continued use

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37 (2002), 58 OR (3d) 299 (Ont. Sup Ct)
of the service after the posting of the notice and the amendments constituted the necessary consent and acceptance of the unilateral amendment.

In 2005, however, a Quebec court in Aspencer1.com Inc. v Paysystems Corporation\textsuperscript{38} came to the differing conclusion where the home page of Paysystems Corporation included a statement that: ‘Your continued use of MyPaysystems Services is subject to the current version of the MyPaysystems Agreement. This Agreement was last updated December 18 2003. Please click here to review’. The Court found that the plaintiff’s continued use of the website could not be interpreted as acceptance of the amendment to the agreement requiring arbitration.

In the United States, in Register.com, Inc. v Verio, Inc.\textsuperscript{39}, the Court enforced a web-wrap agreement (the terms and conditions of a ‘WHOIS’ database search web service, which stated ‘by submitting this query, you agree to abide by these terms’). Register.com alleged Verio’s practice of accessing customer information on Register.com and compiling that information for mass marketing purposes was prohibited by Register.com’s web-wrap agreement. The concluding paragraph of Register.com’s agreement stated ‘submitting this query is your agreement to abide by these terms’. Register.com argued that by submitting the query, Verio assented to the terms of the web-wrap agreement. Agreeing with Register.com, the Court noted: ‘Nor can Verio argue that it has not assented to Register.com’s terms of use. Register.com’s terms of use are clearly posted on its website. The conclusion of the terms paragraph states '[B]y submitting this query, you agree to abide by these terms.' Verio does not argue that it was unaware of these terms, only that it was not asked to click on an icon indicating that it accepted the terms. However, in light of this sentence at the end of Register.com’s terms of use, there can be no question that by proceeding to submit a WHOIS query, Verio manifested its assent to be bound by Register.com’s terms of use, and a contract was formed and subsequently breached.’

The Court, thus, in the above case, noted that the terms of use were plainly posted on Register.com’s website, and that the defendant’s conduct in performing a search inquiry constituted agreement to the terms.

\textsuperscript{38} [2005], JQ no 1573
\textsuperscript{39} 126 F Supp 2d 238 (SDNY 2000)
In *Pollstar v Gigmania, Ltd.*\(^40\), Pollstar (plaintiff), a website, publishes concert information on a daily basis. Pollstar's employees spend time and money amassing and compiling the information in order to keep the information up to date. Gigmania (defendant) has a similar website and is a competitor of the plaintiff. The defendant copied concert information from plaintiff's page and published it to its own webpage. Plaintiff, therefore, files a suit in federal court asserting three claims: (1) common law misappropriation; (2) unfair competition; and (3) breach of contract of the license agreement.

The defendant contends that the breach of contract claim fails as a matter of law because the plaintiff cannot allege the required contract element of mutual consent. After seeing the web site, the Court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement was provided by small gray text on a gray background.

The plaintiff alleges that users of the concert information are bound by the license agreement. The license agreement is not presented on the homepage, but is on a different web page that is linked to the homepage. Nonetheless, the visitor is alerted to the fact that 'use is subject to license agreement'. However, since the notice is in a small gray print on gray background and the text is not underlined (a common internet practice to show an active link), therefore, many users in all probability are not aware that the license agreement is linked to the homepage. Additionally, the homepage also has small blue text which when clicked on, does not link to another page. This may puzzle visitors who may then think that all coloured small texts, regardless of colour, do not link the homepage to a different web page.

Furthermore, unlike the shrink-wrap license as held enforceable in *ProCD v Zeidenberg*\(^41\), the license agreement in this case is a browse-wrap license. A shrink-wrap license appears on the screen as soon as the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance. On the other hand, a

\(^{40}\) 170 F Supp 2d 974 (ED Cal. 2000).
\(^{41}\) 86 F 3d 1447 (7th Cir. 1996)
browse-wrap license is a part of the web site and the user assents to the contract when the user visits the web site.

While the Court agrees with the defendant that the user is not immediately confronted with the notice of the license agreement, this does not dispose of the plaintiff’s breach of contract claim. The Court hesitates to declare the invalidity and unenforceability of the browse-wrap license agreement in this case. Deciding the issue of breach of contract, the Court held, ‘Taking into consideration the examples provided by the Seventh Circuit—showing that people sometimes enter into a contract by using a service without first seeing the terms—the browser wrap license agreement may be arguably valid and enforceable.’

4.1.3.1 Specht v Netscape Communications Corp—A Case Study

In *Specht v Netscape Communications Corp.*, Netscape Communications Corp. (Netscape) provides two distinct software programmes known as ‘Communicator’ and ‘SmartDownload’. When internet users download these programmes, the programmes track the users’ internet usage and display advertisements related to such usage. Before downloading Communicator, all users are required to view and accept a license stating the terms of use. The license automatically displays on the computer screens of everyone who goes to download Communicator. But, a similar license does not appear on the screens of those who attempt to download SmartDownload. Rather, users only see a button which says ‘download’ and invites them to click to download the programme. A link to the license agreement for SmartDownload can be seen by users who scrolled down their screens below the ‘download’ button. Nonetheless, this link is not automatically visible to users who do not scroll down. Both license agreements for Communicator and SmartDownload include arbitration clauses. Specht (plaintiff) and five other plaintiffs downloaded both the software programmes (Communicator and SmartDownload). They did agree to the license agreement for Communicator, but were unaware of, and thus, did not agree to the license agreement for SmartDownload. If they had clicked on the license link for SmartDownload, the plaintiffs would have been presented with a screen telling them that by downloading the product, they were agreeing to be bound by the

42 150 F. Supp. 2d 585 (SDNY 2001)
terms of the license agreement. The plaintiffs brought suit against Netscape in federal district court on the ground that the Communicator and SmartDownload software was a violation of privacy and electronic 'eavesdropping' statutes. Netscape sought to enforce the terms of its license agreements for both Communicator and SmartDownload against all plaintiffs. The plaintiffs argued that they should not be bound by the arbitration clause for the SmartDownload contract because the license for that product was not visible to a reasonable internet user. The District Court agreed and held that the plaintiffs were not bound by the license agreements for either Communicator or SmartDownload. The Court, therefore, held 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 put up with the consequences of failing to use it. This case stands for the proposition that online contracts should be held to the same standards as other written documents and terms therein must also be noticeable and conspicuous.

4.1.3.2 Other Important Judgments

Actual or presumptive knowledge of the browse-wrap terms and conditions, for instance, by prior access, will suffice. The reasoning in *Ticketmaster Corp. v Tickets.com Inc.*43 was in agreement with *Specht’s case*, but without deciding the point the court left open the possibility that prior use of a website, together with knowledge of the terms and conditions, could create a subsequent binding contract. The plaintiff presented tickets to entertainment events for sale online. The website incorporated terms and conditions purporting to govern use of the site, and were located at the bottom of the website’s front page. Users were not required to confirm assent to the terms and conditions or to signify whether or not the terms and conditions had been read. The defendant sold similar tickets online, although also provided information for other sites which included deep links to the plaintiff’s site. These deep links bypassed the plaintiff’s front page, yet included the statement: ‘These tickets are sold by another ticketing company. Although we can’t sell them to you, the link above will take you directly to the other company’s website where you can purchase them.’ The plaintiffs sued for the breach of contract, infringement of copyright, unfair competition, unjust enrichment and interference with business

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43 54 USPQ 2d 1344 (CD Cal 2000).
advantage. The Court left open the possibility that use of a website together with knowledge of the terms and conditions could create a binding contract, but stated:

[The terms and conditions provide] that anyone going beyond the home page agrees to the terms and conditions set forth, which include that the information is for personal use only, may not be used for commercial purposes, and no deep linking to the site is permitted. In defending this claim, Ticketmaster makes reference to the ‘shrink-wrap license’ cases, where the packing on the outside of the CD stated that opening the package constitutes adherence to the license agreement (restricting republication) contained therein. This has been held to be enforceable. That is not the same as this case because the ‘shrink-wrap license agreement’ is open and obvious and in fact hard to miss. Many web sites make you click on ‘agree’ to the terms and conditions before going on, but Ticketmaster does not. Further, the terms and conditions are set forth so that the customer needs to scroll down the home page to find and read them. Many Customers instead are likely to proceed to the event page of interest rather than reading the ‘small print’. It cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with anyone using the web site.

Apropos the deep linking, the Court added that:

...[Hyperlinking does not itself involve a violation of the Copyright Act ... since no copying is involved ... the customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently ... deep linking by itself (i.e. without confusion of source) does not necessarily involve unfair competition.

In Net2Phone Inc. v Los Angeles Superior Court, the Court stated that knowledge or even presumptive knowledge of the existence of the terms may be enough to form a contract. The Court preferred a firm assent by a ‘clickthrough’ process, but noted that cases involving cruise tickets and parking tickets have established that such assent is not compulsory for formation.

44 54 USPO 2d 1344 (CD Cal 2000)
46 109 Cal App 4th 583 (Cal Ct App 2003)
47 See also, Comb v PayPal Inc. 218 F Supp 2d 1165 (ND Cal 2002).
4.2 LEGISLATIVE LANDSCAPE

4.2.1 At The United Nations Level

The United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL'), which was established in 1966\(^{48}\), is the core legal body of the United Nations system in the field of international trade law. In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. It is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade.\(^{49}\) UNCITRAL has, since its inception, prepared a wide range of conventions, model laws and other instruments dealing with the substantive laws that govern trade transactions or other aspects of business law which have an impact on international trade.

‘Harmonization’ may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions.\(^{50}\) ‘Unification’ may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions.\(^{51}\) A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. UNCITRAL is not a part of the World Trade Organization (WTO).\(^{52}\)

\(^{48}\) Resolution 2205(XXI) of 17 December 1966

\(^{49}\) ‘Harmonization’ and ‘unification’ of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.

\(^{50}\) Available at <http://www.uncitral.org/uncitral/en/about/origin_faq.html> (accessed 31 May 2012)

\(^{51}\) Ibid

\(^{52}\) UNCITRAL is a subsidiary body of the General Assembly of the United Nations. The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat. In contrast, the World Trade Organization (WTO) is an intergovernmental organization independent from the United Nations. The issues dealt with by the WTO and UNCITRAL are different. The WTO deals with trade policy issues, such as trade liberalization, abolition of trade barriers, unfair trade practices or other similar
Following are the important texts resulting from the work of UNCITRAL:

- 2007: Promoting Confidence in Electronic Commerce: legal issues on international use of electronic authentication and signature methods;
- 1996: UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998; and
- 1985: Recommendation on the Legal Value of Computer Records

4.2.1.1 The UNCITRAL Model Law on Electronic Commerce 1996

The UNCITRAL adopted the Model Law on Electronic Commerce in 1996. By Resolution No: 51/162, dated 30th January 1997, the General Assembly of the United Nations recommended that all States should give favourable considerations to the said Model Law when they enact or revise their laws. This Model Law provides for equal legal treatment of users of electronic communications and paper based communication. The Model Law was drafted and adopted with an object and purpose to offer national legislators a set of internationally acceptable rules as to how a number of legal obstacles in the way of development of electronic commerce may be removed, and how a more secure legal environment may be created for electronic commerce. Work on the Model Law was undertaken in recognition of the fact that in most situations, national legislation is either ‘outdated’ or ‘inadequate’ on the negative basis that it does not contemplate electronic commerce, or on the basis that it positively restricts the use of electronic commerce by including requirements that do not easily translate into an electronic environment, for example by requiring ‘writing’, ‘signature’ or ‘originals’.53

In summary, the Model Law was the first legislative text to adopt the fundamental principles of non-discrimination, technological neutrality and functional equivalence

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that are widely regarded as the founding elements of modern electronic commerce law. The principle of non-discrimination makes sure that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to technology used. In light of the rapid technological advances, neutral rules aim at accommodating any future development without further legislative work. The functional equivalence principle lays out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements that electronic communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system—for example, ‘writing’, ‘original’, ‘signed’, and ‘record’—seek to achieve.54

The Model Law may also help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may contribute to limiting the extent to which businesses may get into international markets.

Furthermore, at an international level, the Model Law may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form.55 As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.56

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55 Ibid

56 Ibid
The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing alike treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would create a media-neutral environment.\(^57\)

The Model Law establishes rules for the formation and validity of contracts concluded by electronic means, for the attribution of data messages, for the acknowledgement of receipt and for determining the time and place of dispatch and receipt of data messages. It should be noted that certain provisions of the Model Law were amended by the Electronic Communications Convention in light of recent electronic commerce practice. Moreover, Part II of the Model Law, dealing with electronic commerce in connection with carriage of goods, has been complemented by other legislative texts, including the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the 'Rotterdam Rules') and may be the object of additional work of UNCITRAL in the future.\(^58\)

The Model Law is accompanied by a Guide to Enactment, which provides backdrop and explanatory information to assist States in preparing the necessary legislative provisions and may guide other users of the text.

### 4.2.1.2 UNCITRAL Model Law on Electronic Signatures 2001

The purpose of the Model Law on Electronic Signatures (MLES) is to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and handwritten signatures. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures suggested the need for a specific legal framework to trim down uncertainty as to the legal effect that may result from the use of electronic means. In response to such needs, the MLES builds

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\(^{57}\) Ibid
\(^{58}\) Ibid.
on the fundamental principle underlying article 7 of the UNCITRAL Model Law on Electronic Commerce with respect to the fulfilment of the signature function in an electronic environment by following a technology-neutral approach, which avoids favouring the use of any specific technology or process. This, in reality, means that legislation based on this Model Law may recognize both digital signatures based on cryptography (such as public key infrastructure—PKI) and electronic signatures using other technologies.

The MLES is based on the basic principles common to all UNCITRAL texts relating to electronic commerce, namely non-discrimination, technological neutrality and functional equivalence. It establishes criteria of technical reliability for the equivalence between electronic and hand-written signatures as well as basic rules of conduct that may serve as guidelines for assessing duties and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process. The MLES also contains provisions favouring the recognition of foreign certificates and electronic signatures based on a principle of substantive equivalence that disregards the place of origin of the foreign signature.

Hence, the MLES may assist States in establishing a modern, harmonized and fair legislative framework to address effectively the legal treatment of electronic signatures and give certainty to their status.

4.2.1.3 United Nations Convention on the Use of Electronic Communications in International Contracts 2005

The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assure that contracts formed and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. This Convention is built upon earlier instruments drafted by the Commission, and, in particular, the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

Certain formal requirements contained in widely adopted international trade law treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’) and the United Nations Convention on Contracts for the International Sale of Goods (CISG) may pose hindrance to the wide use of electronic communications. The Electronic Communications Convention aims at removing those formal obstacles by establishing equivalence between electronic and written form. Moreover, the Electronic Communications Convention is intended to strengthen the harmonization of the rules regarding electronic commerce and foster uniformity in the domestic enactment of UNCITRAL model laws relating to electronic commerce, as well as to update and complement certain provisions of those model laws in light of recent practice.

The Convention is applicable to all electronic communications exchanged between parties whose places of business are in different States when at least one party has its place of business in a Contracting State (Art. 1 of the Convention). It may also apply on account of the parties’ choice. Contracts concluded for personal, family or household purposes, such as those relating to family law and the law of succession, as well as certain financial transactions, negotiable instruments, and documents of title, are excluded from the Convention’s purview of application (Art. 2 of the Convention)

Whether the Convention applies to a given international commercial transaction is a matter to be determined by the choice of law rules of the State whose court is called upon to decide a dispute (lex fori). Thus, if the rules of private international law of that State require application of the substantive law of a Contracting State to the resolution of the dispute, the Convention will apply as law of that Contracting State, irrespective of the court’s location.60 The Convention is also applicable where the parties to the contract have validly chosen its provisions as the law applicable to the contract.

4.2.1.4 Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods 2007

This is a document (publication) published by the UNCITRAL which analyzes the major legal issues arising out of the use of electronic signatures and authentication methods in international transactions. Part one of this document provides an outline of methods used for electronic signature and authentication and their legal treatment in various jurisdictions, whereas part two considers the use of electronic signature and authentication methods in international transactions and identifies the main legal issues concerning cross-border recognition of such methods.

4.3 LEGISLATIVE ATTEMPTS TO GOVERN E-CONTRACTS: NATIONAL SCENARIO

Today, the UNCITRAL Model Law is a basic model document for the laws relating to IT in most of the countries of the world. Besides India, many other countries have framed the law under the umbrella of UNCITRAL Model Law.

4.3.1 The Information Technology Act 2000 (India) and its Provisions Relating to E-Contracts

Parliament of India passed the Information Technology Act 2000 (IT Act) in the year 2000 which came into force on 17 October 2000, vide GSR 788(E), dated 17 October 2000. The underlying objectives of the IT Act 2000, as stated in its preamble, are as follows:

1. To provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as ‘electronic commerce’, which involve the use of alternatives to paper based methods of communication;
2. To facilitate electronic storage of data;
3. To facilitate electronic filing of documents with the Government agencies;
4. To render legal recognition to electronic (including digital) signature for authentication of any information or matter which requires authentication under any law;
5. To facilitate and render legal sanction to electronic fund transfers between banks and financial institutions;
6. To provide legal recognition for keeping books of account by Bankers in electronic form;
7. To amend the Indian Penal Code 1860, the Indian Evidence Act 1872, the Banker's Books Evidence Act 1891, and the Reserve Bank of India Act 1934;
8. To give legal recognition to all other matters connected with EDI, e-communication, e-filing of documents with Government agencies, amendments in some statutes, and matters incidental thereto; and
9. To give effect to the Resolution No A/RES/51/162, dated 30 January 1997 which was adopted by the General Assembly of the United Nations and to promote efficient delivery of Government services by means of reliable electronic records.

The IT Act has made consequential amendments in a range of statutes such as Indian Penal Code 1860, Indian Evidence Act 1872, the RBI Act, 1934 and the Banker's Books Evidence Act 1891. Yet, no change has been made in the Indian Contract Act 1872 (ICA). There is no specific law on e-contracts. E-contracting is a technique of forming agreements, not a subset based upon any specialized subject matter. Consequently, the IT Act has not amended the law of contracts in any way, and (it) only clarifies several aspects of e-contracting that have already been alluded to. The IT Act, however, deals with e-contract in brief. Firstly, the IT Act identifies three parties to the electronic transmission process—the originator, the intermediary, and the addressee. These concepts are important in e-contracting.

The 'originator', as defined in S. 2(1) (za), refers to a person who sends, generates, stores, or transmits any electronic message; or causes any of these actions. However, this does not include an 'intermediary' (who, according to sec. 2(1)(w), with respect to any particular electronic records means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online
payment sites, online-auction sites, online market places and cyber cafes). The ‘addressee’, as defined in S. 2(1) (b), means a person who is intended by the originator to receive the electronic record, but does not include an intermediary. It should be understood that these categories are not the same as the ‘promisor’ and ‘promisee’ under the Indian Contract Act, and are only meant to give meaning to the parties involved in the communication process.

There are some provisions, in particular, Ss 10 A, 11, 12 and 13 which deal with ‘validity of contracts formed through electronic means’, ‘attribution of electronic records’, ‘acknowledgment of receipt’, and ‘time and place of dispatch and receipt of electronic record’ respectively.

4.3.1.1 Validity of Contracts Formed through Electronic Means

By way of the Information Technology (Amendment) Act, 2008, after S. 10 of the IT Act, the following section (S. 10 A) has been inserted, namely:

‘10A. Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.’

Thus, through this amendment, the law has in a very explicit manner recognized the ‘validity of contracts formed through electronic means’. It is pertinent to note that section 10A corresponds to Article 11 of the UNCTRAL Model Law on E-Commerce 1996. This section is not intended to interfere with the law on formation of contracts but, rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. The provision was needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can

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61 Art 11. Formation and validity of contracts
(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be deemed invalid or enforceability on the sole ground that a data message was used for that purpose.
validly be concluded by electronic means. Such uncertainties may stem from the fact that, in certain cases, the data messages expressing offer and acceptance are generated by computers without direct human intervention, thus raising doubts as to the expression of intent by the parties. A further reason for such uncertainties is inherent in the mode of communication and results from the absence of a paper document.

Thus, it is clearly provided under S. 10A that contract shall not be invalid only on the ground that, communication of proposal, acceptance and revocation of proposal and acceptance was in e-form, provided the contract is otherwise valid under law. Hence, validity of e-contract shall also be decided in accordance with S. 10 of the Contract Act read harmoniously with Ss. 10A-13 of the IT Act. Further, in case of any direct or indirect conflict between two statues, the IT Act would prevail because the IT Act is a specific statue, whereas the Contract Act is a general statute.

S. 10 A covers not merely the cases in which both the offer and the acceptance are communicated by electronic means, but also the cases in which only the offer or only the acceptance is communicated electronically.

### 4.3.1.2 Parties to E-Contract

In e-contract, e-proposal is sent by the proposer and e-acceptance is given by offeree or acceptor. E-proposal or e-acceptance may be called e-record. Different parties to e-record are ‘originator’, ‘addressee’ and ‘intermediary’.

- **Originator [Section 2(1)(za)]:** Originator means a person who sends, generates, stores or transmits any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary.

- **Addressee [Section 2(1)(b)]:** Addressee means a person who is intended by the originator to receive the electronic record, but does not include any intermediary.

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62 Guide to Enactment (Article by Article Remark), UNCITRAL Model Law 1996. Para 76, p 46
63 S. 2 (1)(i) states “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche
• **Intermediary** [Section 2(1)(w)]: Intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes the following:
  - Telecom service providers;
  - Network service providers;
  - Internet service providers;
  - Webhosting service providers;
  - Search engines;
  - Online payment sites;
  - Online-auction sites;
  - Online-market places; and
  - Cyber cafes

**Parties to E-proposal:** Having understood the parties to e-record, parties to e-proposal and e-acceptance may be decided. Parties to e-proposal are:
  - Proposer or offeror who is the originator of e-proposal; and
  - Proposee or offeree who is the addressee of the e-proposal or e-offer.

**Parties to E-acceptance:** Parties to e-acceptance are:
  - Acceptor, who is the originator of e-acceptance; and
  - Proposer, who is the addressee of the e-acceptance.

**Illustration:**

```
 X        e-proposal        Y
|Originator of e-proposal (proposer)|<---|Addressee of e-proposal (proposee)|
```

```
 X        e-acceptance        Y
|Addressee of e-acceptance (proposer)|<---|Originator of e-acceptance (acceptor)|
```

**4.3.1.3 Attribution of Electronic Records**

Section 11 of the IT Act reads as:

An electronic record shall be attributed to the originator—

(a) if it was sent by the originator himself;
S. 11, thus, lays down some conditions as to when an electronic record shall be attributed to the originator. The requirements are: the record be sent by the originator himself, or sent by an authorized person on behalf of the originator, or sent by an information system programmed by or on behalf of the originator to operate automatically. This addresses the fascinating issue of electronic agents—contract law requires a meeting of the minds, and the involvement of two parties negotiating is an underlying assumption. What would be the situations where the only minds that meet are programmed computer systems (such as an automated inventory system at an online store)? Be that as it may, the transaction can be attributed to the originator by virtue of S. 11.

S. 11 is intended to apply where there is a question as to whether a data message was really sent by the person who is indicated as being the originator. In the case of a paper-based communication the problem may arise on account of an alleged forged signature of the purported originator. In an electronic environment, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate. The purpose of S. 11 is not to assign responsibility. It deals, alternatively, with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.

Thus, any e-proposal will be attributed to the originator of e-proposal if it was sent by the originator (proposer) himself; or his authorized agent; or automatically sent by an information system programmed by or on behalf of the e-proposer to operate automatically. Similarly, an e-acceptance will be attributed to the originator of e-acceptance (acceptor) if it was sent by the originator (acceptor) himself; or by a person who had the authority to act on behalf of the originator in respect of that e-
acceptance; or by an information system programmed by or on behalf of the originator to operate automatically.

It is significant to note that S. 11 of IT Act corresponds to Article 13 of UNCITRAL Model Law.65

Illustration:

Situation-1

X logs in to his web-based e-mail account66 (say, gmail.com), and composes an e-mail and presses the ‘Send’ button, thereby sending the e-mail to Y. X is the originator of the e-mail, which is to be understood in the sense of an electronic record. This e-mail (electronic record) will be attributed to X (the originator in this case) as he (X) himself has sent it.

64 Art. 13 has its origin in article 5 of the UNCITRAL Model Law on International Credit Transfers, which defines the obligations of the sender of a payment order.
65 Art. 13: Attribution of data messages

(1) A data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

(a) by a person who had the authority to act on behalf of the originator in respect of that data message; or
(b) by an information system programmed by, or on behalf of, the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) does not apply.

(a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or
(b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.

(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

66 Web-based e-mail account is to be understood in the sense of ‘intermediary’
Situation-2
X instructs his assistant Z to send the afore-mentioned e-mail. In this situation also, the e-mail will be attributed to X (and not Z), for the e-mail has been sent by a person (Z) who had the authority to act on behalf of the originator (X) of the electronic record (e-mail).

Situation-3
X goes out of station for a couple of days. In the meanwhile, he does not want people to think that he is ignoring their e-mails. He configures his e-mail account to automatically reply to all incoming e-mail messages with the following message: 'Thank you for your e-mail. I am out of station for a couple of days, and will reply to your e-mail as soon as I get back.'

Now every time that mail account responds to an incoming e-mail on behalf of X, the automatically generated e-mail ('Thank you for your e-mail. I am out of station for a couple of days, and will reply to your e-mail as soon as I get back.') will be attributed to X as it has been sent by an information system programmed on behalf of the originator (i.e. X) to operate automatically.

4.3.1.4 Acknowledgment of Receipt
S. 12 of the IT Act reads as:

Acknowledgment of receipt.

(1) 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.

(2) 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 unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator
(3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the 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.

S. 12, which deals with legal issues arising from the use of acknowledgment of receipt (which is not to be confused with acceptance), is based upon Art. 14 of the UNCITRAL Model Law. The first clause speaks of a situation where the originator has not agreed with the addressee that the acknowledgment be given in a particular form or by a particular method. Here, the acknowledgment may be by any means

(1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.
(2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement 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 data message has been received.
(3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.
(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:
(a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
(b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.
(5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.
(6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.
(7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.
enough to indicate to the originator that the electronic record has been received. Nevertheless, if the originator has specified to the addressee that the electronic record shall be binding only on receipt of an acknowledgment, then, unless acknowledgment has been received, the electronic record shall be deemed to have been never sent by the originator (clause 2). Clause 3 provides for an optional procedure to be adopted by the originator in case of non-receipt of acknowledgment—the originator may give notice to the addressee and specify a reasonable time for acknowledgment.

The provisions of S. 12 are based on the assumption that acknowledgement procedures are to be used at the discretion of the originator. This section is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. For instance, where an originator sends an offer in a data message and requests acknowledgement of receipt, the acknowledgement of receipt simply evidences that the offer has been received. Whether or not sending that acknowledgement amounted to accepting the offer is not dealt with by the IT Act, but by general contract law.

Where an e-record (offer or acceptance) is sent by the originator, and the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record must be given in a particular form or by a particular method, then, the 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.

I llustration

Situation-1

Going back to the earlier illustration where X went out of station, and has configured his e-mail account to automatically reply to all incoming e-mail messages (with the message: ‘Thank you for your e-mail I am out of station for a couple of days, and will reply to your e-mail as soon as I get back ’). The incoming message is also affixed at the bottom of the afore-mentioned message. Now whenever any person (say, Y) sends any electronic record to X by e-mail, he will receive, X’s pre-set
message as well as a copy of his own message. This automated communication serves as an acknowledgement that X has received Y’s message.

Situation-2

Y sends an e-mail to X informing him that he would like to purchase a motor-bike from him and would like to know the prices of the motor-bikes available for sale. X then sends Y a catalogue of prices of the motor-bikes available for sale. It can then be concluded that X has received Y’s electronic record because such a conduct (sending the catalogue) on the part of X is sufficient to indicate to Y (the originator) that his e-mail (electronic record) has been received by the addressee (X).

Where X makes an e-proposal to Y, and Y sends acceptance to X, the e-proposal, e-acceptance, and the acknowledgement of receipt may be shown as follows:

When electronic record is binding?

1. Where the originator has stipulated that the electronic record shall be binding only on receipt of acknowledgement [Section 12(2)]:

Where the originator has stipulated that the electronic record shall be binding only on receipt of any acknowledgment of such electronic record by him, then, unless acknowledgment has been so received by the originator, the electronic record shall be deemed to have been never sent by the originator.

Illustration:

Where X wants to sell a motor-bike to Y and sends him an offer to buy the bike. In his e-mail, X asks Y to send him an acknowledgement that he has received his e-mail, and has also mentioned that the e-offer shall be binding only on the receipt of
an acknowledgement of such e-offer by him (X). Y does not send him an acknowledgement. In such a situation, it shall be assumed that the e-mail sent by X was never sent.

2. Where the originator has not stipulated that the electronic record shall be binding only on receipt [Section12 (3)]

Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment; and the acknowledgment has not been received by the originator within 'the time specified or agreed', or 'within a reasonable time if no time has been specified or agreed to'; 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 now also 'no acknowledgment is received within the such time limit mentioned in the notice', then, the electronic record shall be deemed to have been never sent by the originator.

Illustration:

Situation-1: X sends the following e-mail to Y: 'Further to our discussion, I am ready to pay Rs 25,000 for your laptop. Let me know once you receive this e-mail.'

Y does not acknowledge receipt of this e-mail. X sends him another e-mail (as a notice) as follows: 'I am resending you my earlier e-mail wherein I had offered to pay Rs 25,000 for the laptop. Kindly, acknowledge receipt of my e-mail latest by next week.' Y does not acknowledge the e-mail even after a week. The initial e-mail sent by X shall be treated to have never been sent.

If X remains silent and gives no such notice to the Y within a reasonable time, then it would mean that X has waived his right/option of receiving of acknowledgement of receipt of e-offer from Y. Therefore, e-offer, in such a situation, shall be binding on X.

Situation-2: X makes an e-proposal to Y to buy his laptop. Y gives e-acceptance, but does no mention that his acceptance (e-record) shall be binding only on receipt of acknowledgment by him. X receives acceptance, but sends no acknowledgement. Y
without sending notice within reasonable time asking X to send acknowledgement, transports the laptop to X. Here, Y has waived his right/option of receiving of acknowledgement from X, therefore subsequently, the question of raising the presumption that e-acceptance was never sent by Y does not arise and e-acceptance shall be binding on Y.

4.3.1.5 Time and Place of Despatch and Receipt of Electronic Record

S. 13 of the IT Act reads:

Time and place of despatch and receipt of electronic record.

(1) 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.

(2) 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.

(3) 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.

(4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

(5) For the purposes of this section,—
(a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;
(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
(c) "usual place of residence", in relation to a body corporate, means the place where it is registered.

S. 13 of the IT Act is based upon Article 15 of the Model Law. Art. 15 of the Model Law results from the recognition that, for the operation of many existing rules of law, it is significant to ascertain the time and place of receipt of information. The use of electronic communication techniques makes those difficult to determine. It is not unusual for users of electronic commerce to communicate from one State to another without knowing the location of computer resources (information systems) through which communication is operated. Additionally, the location of certain communication systems may change without either of the parties being aware of the change. The Model Law is, therefore, intended to reflect the fact that the location of

68 Art 15: Time and place of dispatch and receipt of data messages—
1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
   (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
      (i) at the time when the data message enters the designated information system; or
      (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
   (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.
3) Paragraph 2 applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 4.
4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph
   (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
   (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.
5) The provisions of this article do not apply to the following: [ . ]
69 The Model Law uses the expression 'information system' in Art 15, whereas the IT Act 2000 used the expression 'computer resource' in S. 13
information systems is irrelevant and sets forth a more objective criterion, namely, the place of business of the parties. In that connection, it should be noted that Art. 15 is not intended to establish a conflict-of-laws rule.\textsuperscript{70}

S. 13 of the IT Act, thus, addresses the issues of the time and place of dispatch and receipt of an electronic record, and clause (1) provides that the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. With regard to receipt of the record, the law distinguishes between whether the originator has sent the message to a computer resource designated by the recipient to receive communications or a non-designated computer resource. Receipt takes effect at the time the electronic record enters the designated computer resource unless the record was sent to a non-designated computer resource, in which case it occurs at the time when the electronic record is retrieved by the addressee. Hence, it would seem that when the acceptance of an offer is emailed to a computer system designated by the offeror, the mailbox rule would not apply. Ultimately, the location of the computer resource is irrelevant. S. 13(3) states that an electronic record is deemed to be dispatched from 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.

\textbf{Time of Dispatch of E-record [S. 13 (1)]:}

Paragraph (1) defines the time of despatch of a data message as the time when the data message enters a computer resource\textsuperscript{71} outside the control of the originator, which may be the computer resource of an intermediary or a computer resource of the addressee. The concept of ‘dispatch’ refers to the commencement of the electronic transmission of the data message. In virtual world, dispatch of e-record is similar to posting a letter in real world, which once posted or dropped into letterbox, then it becomes out of the power of sender.

\textsuperscript{70} Guide to Enactment (Article by Article Remark), UNCITRAL Model Law 1996, Para 100, p 55.
\textsuperscript{71} S. 2 (1) (k) of the IT Act 2000 defines \textit{computer resources} as “computer resource” means computer, computer system, computer network, data, computer data base or software
Illustration:
X composes an e-mail message for Y at 11.00 am. At exactly 11.30 am, he presses the ‘Submit’/ ‘Send’ button. When he does that, the e-mail message leaves his computer and begins its journey across the internet. It is now no longer in X’s control. The time of dispatch of this message will be 11.30 am.

Parties can, however, enter into agreement contrary to S. 13(1); and where such contrary agreement is entered into, then the agreement will prevail and S. 13 (1) will not apply. For instance, parties have agreed that time of dispatch of e-record shall be time when e-record enters the computer resource of addressee or when it is actually retrieved by addressee; in this situation, such agreement will prevail and time of dispatch will be time of entering the computer resource of addressee or actual retrieval of e-record by the addressee and, hence, S. 13(1) will not apply.

Time of Receipt of E-record [S. 13 (2)]:
Paragraph (2), the purpose of which is to define the time of receipt of a data message, addresses the situation where the addressee unilaterally designates a specific computer resource for the receipt of a message (in which case the designated computer resource may or may not be a computer resource of the addressee), and the data message reaches a computer resource of the addressee that is not the designated one. In such a situation, receipt is deemed to occur when the data message is retrieved by the addressee.

Attention must be drawn to the notion of ‘entry’ into a computer resource, which is used for both the definition of dispatch and that of receipt of a data message. A data message enters a computer resource at the time when it becomes available for processing within that computer resource.73

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72 By ‘designated information system’, the Model Law is intended to cover a system that has been specifically designated by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent. The mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems. See, Guide to Enactment (Article by Article Remark), UNCITRAL Model Law 1996, Para 102, p.55.

73 Whether a data message which enters an information system is intelligible or usable by the addressee is outside the purview of the Model Law. The Model Law does not intend to overrule provisions of national law under which receipt of a message may occur at the time when the message enters the sphere of the addressee, irrespective of whether the message is intelligible or usable by the addressee. Nor is the Model Law intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee.
**Designated Computer Resource**

Where a person has different e-mail IDs, and he has given one of those to another person, then, the given e-mail ID becomes the designated computer resource. For instance, X has following e-mail IDs: xyz@gmail.com, xyz@yahoo.com, xyz@hotmail.com; and he gives xyz@gmail.com to Y, another person, for receiving e-record, then xyz@gmail.com is designated computer resource. Therefore, if Y (originator) sends e-record on xyz@yahoo.com, then the time of receipt of e-record will be the time when the e-record is retrieved by X (addressee).

Thus, the time of receipt of an electronic record shall be ascertained in following manner:

*Situation-1:* Where the addressee has designated a computer resource for the purpose of receiving electronic records and the electronic record is received in—

i. a designated computer resource, then receipt occurs at the time when the e-record enters the designated computer resource; or

ii. a computer resource of the addressee which is not the designated computer resource, then receipt occurs at the time when the e-record is retrieved by the addressee.

*Situation-2:* Where the addressee has neither designated a computer resource nor specified any timings for receipt of the e-record—

then, the receipt occurs as soon as the electronic record enters the computer resource of the addressee.

---

It was felt that the Model Law should not create a more stringent requirement than currently exists in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (e.g., where encrypted data is transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection). See, Guide to Enactment (Article by Article Remark), UNCITRAL Model Law 1996, Para 103, p.56
This may be shown as follows:

### 4.1: Time of Receipt of an Electronic Record

<table>
<thead>
<tr>
<th>Whether addressee has designated a computer resource for the purpose of receiving e-record?</th>
<th>Type of computer resource of addressee where e-record is received</th>
<th>Time of receipt of e-record</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Designated computer resource</td>
<td>When the e-record enters the designated computer resource</td>
</tr>
<tr>
<td></td>
<td>Not the designated computer resource</td>
<td>When the e-record is retrieved by the addressee</td>
</tr>
<tr>
<td>No</td>
<td>Any</td>
<td>When the e-record enters the computer resource of the addressee</td>
</tr>
</tbody>
</table>

**Illustration:**

The marketing department of a company claims that it would make the delivery of any order within 24 hours of receipt of the order. For this purpose, it has created an order form on its website, i.e. the company has specified an address to which orders can be sent by e-mail. The customer just has to fill-in the form and press submit and the message reaches the designated e-mail address of the marketing department.

X, a customer, fills-in this order form and presses ‘submit’. As soon as the message reaches the company’s server, the order is deemed to have been received.

Y, another customer, on the other hand, e-mails his order to the HR department of the company. One Mr A, an official in the company, who is out on vacation, checks this account once a week. Mr A comes back two weeks later and logs in to the account at 10:30 a.m. This will be the time of receipt of the message, although it was sent two weeks earlier.

Assuming that the company has not specified any address to which orders can be sent by e-mail; and Z, a customer, sends the order to the HR Department, the time of receipt of the message would be the time when it reached the server of the company.
Meaning of Receipt of E-Record: A data message should not be considered to be dispatched if it merely reached the information system of the addressee, although failed to enter it. Although it is clearly provided under S. 13 of the IT Act that e-record shall be deemed to be received when it enters the designated computer resource or it is successfully received by addressee; however, a debatable question under S. 13(2) may arise as to what is the time of the receipt of e-record. Will it be—

i. when there is no successful communication of e-record? or

ii. when there is successful communication of e-record, but due to some reason it could not be received or retrieved?

In the first situation, where there is no successful communication of e-record, i.e. e-record has not entered the computer resource (designated or otherwise) of addressee, then the question of receipt of e-record does not arise at all. However, in the second situation, where there is successful communication of e-record but owing to some reason it could not be received or retrieved, i.e. either the e-record has not entered the computer resource (designated or otherwise) of addressee or it has been received but not retrieved; therefore, the question of receipt of e-record does not arise in this case as well.

Illustrations:

i. X sends an e-mail to Y with attached MSWord files. X had used Winzip software to compress the file for speedy communication. Y receives Winzip file but could not read, as he did not have Winzip software to unzip the compressed files.

n. X sends an electronic record by using latest licenced version of software to Y. Y receives that file but could not read that file, as he did not have that latest licenced version of software.

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74 It may be noted that the Model Law does not expressly address the question of possible malfunctioning of information systems as a basis for liability. In particular, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (e.g., in the case of a telecopier that is constantly occupied), dispatch under the Model Law does not occur. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision. See, Guide to Enactment (Article by Article Remark), UNCITRAL Model Law 1996, Para 104, p 56
Since in both the illustrations, electronic record could not be read by the addressee, therefore, the question of receipt e-contract does not arise. Therefore, for the receipt of e-record to be complete, there must be an agreement between the parties about the use of specific software in creation and dispatch of electronic record so that:

a. There must be successful communication of e-record; and
b. E-record must be successfully received and retrieved.

Contrary Agreement

Parties may enter into an agreement contrary to S. 13(2), and where such contrary agreement is entered into, then, the agreement will prevail and S. 13(2) will not. For example, where X (addressee) has designated computer resource for receiving e-record and parties (X and Y) have agreed that the time of receipt of e-record shall be the time when the e-record is actually retrieved by X (addressee), then, such agreement will prevail and the time of receipt will be the time of retrieval of the e-record, and hence default (general) rule of S. 13(2) will not apply.

Place of Receipt of E-record [Section 13(3)]

An e-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. The purpose of sub-section (3) of S. 13 is to deal with the place of receipt of a data message. The main reason for including a rule on the place of receipt of a data message is to address a circumstance characteristic of electronic commerce that might not be treated adequately under existing law, namely, that very often the computer resource of the addressee where the data message is received, or from which the data message is retrieved, is located in a jurisdiction other than that in which the addressee himself is located. Thus, the rationale behind the provision is to ensure that the location of a computer resource is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt, and that place can be readily ascertained by the originator.

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76 The Model Law does not contain specific provisions as to how the designation of an information system should be made, or whether a change could be made after such a designation by the addressee.
The effect of sub-section (3), read with sub-section (5) of S. 13, is to introduce a distinction between the deemed place of receipt and the place actually reached by a data message at the time of its receipt under sub-section (2). That distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of a data message between the time of its receipt under sub-section (2) and the time when it reached its place of receipt under sub-section (3). S. 13 (3) merely establishes an irrebuttable presumption regarding a legal fact, to be used where another body of law (e.g., on formation of contracts or conflict of laws) requires determination of the place of receipt of a data message.77

Illustration:
X, a businessman, operating from his home (not having any place of business) in Ahmedabad, India. He sends an order by e-mail to a company having its head office in London, UK. The place of dispatch of the order would be X's home and the place of receipt of the order would be the company's office.

Place of business [Section 13(5)]: According to S. 13 (5), the place of business is determined in the following manner —

i. where the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

ii. where the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

iii. ‘usual place of residence’, in relation to a body corporate, means the place where it is registered.

Illustration:

77 However, it was felt during the preparation of the Model Law that introducing a deemed place of receipt, as distinct from the place actually reached by that data message at the time of its receipt, would be inappropriate outside the context of computerized transmissions (e.g., in the context of telegram or telex). The provision was thus limited in scope to cover only computerized transmissions of data messages. A further limitation is contained in paragraph (5), which reproduces a provision already included in articles 6, 7, 8, 11 and 12 (of the Model Law) See, Guide to Enactment (Article by Article Remark). UNCITRAL Model Law 1996. Para 107. p.57.
X, a businessman, operating from his home (not having any place of business) in Ahmedabad, India. He sends an order by e-mail to a company having its head office in London, UK. The company, however, has offices in 10 different countries. The place of business of the company will be the principal place of business (London in this case). The place of dispatch of the order would be X’s home, i.e., X’s residence (Ahmedabad) will be deemed to be his place of business.

**Place where the computer resource is located not relevant [Section 13(4)]:** According to S. 13 (4), the provisions of sub-section (2) shall apply although the place where the computer resource is located may be different from the place where the e-record is deemed to have been received under sub-section (3).

*Illustration:*

X, a businessman, operating from his home (not having any place of business) in Ahmedabad, India. He sends an order by e-mail to a company having its head office in London, UK. The place of dispatch of the order would be X’s home and the place of receipt of the order would be the company’s office. Even if the company has its mail server located physically in France, the place of receipt of the order would be the company’s office in London, UK.

**Agreement Contrary to S. 13 (3):** Parties may enter into an agreement contrary to Se. 13(3); and where such contrary agreement is entered into, then, that agreement would prevail and S. 13(3) will not apply. Nevertheless, such an agreement must not be contrary to the provisions of the CPC 1908.

*Illustration:*

X has his place of business (principal place of business) at Ahmedabad and Y at Surat. Both are on international tour. On 01-01-2012, X was in New York and Y was in Melbourne. X sent e-record (e-proposal) from New York which was received by Y in Melbourne. If there is no contrary agreement between X and Y, then, the place of dispatch of e-record (e-proposal) will be Ahmedabad and place of receipt of e-record (e-proposal) will be Surat.
However, if there is an agreement between X and Y providing that no matter from where an e-record is sent or received by X or Y, it shall be deemed to be:

- Sent from or received in Delhi by X (a business place of X, though not the principal place of business); and
- Sent from or received in Kolkata by Y (a business place of Y, though not the principal place of business).

It is important to note that, in the above situation, the agreement between the parties is contrary to S. 13(3), therefore, the agreement will prevail over the general provision of S. 13(3).

Illustration:
X and Y are having place of business at Ahmedabad and Surat respectively. While on a business tour, X sends e-proposal from Kanpur (01.1.2012) to sell some electronic products. Y accesses his e-mail while in Mumbai (01.01.2012). Y places orders for purchasing the products (signifies his acceptance) from different places, i.e. Srinagar (J&K on 10.01.2012), Allahabad (UP on 11.01.2012) and Ranchi (Jharkhand on 12.01.2012). X accesses these e-mails in Surat on 12.01.2012. Further, X executes these orders at different places i.e., Surat, Lucknow, and Jaipur.

The time and place of dispatch and receipt of e-proposal, and the time and place of dispatch and receipt of e-acceptance may be shown in the following manner:
4.2: Time and Place of Dispatch and Receipt of E-proposal and E-acceptance

<table>
<thead>
<tr>
<th>Situations</th>
<th>Proposal/ Acceptance</th>
<th>Time of Dispatch</th>
<th>Place of Dispatch</th>
<th>Time of Receipt</th>
<th>Place of Receipt</th>
</tr>
</thead>
<tbody>
<tr>
<td>When there is no contrary</td>
<td>Proposal</td>
<td>01 01 2012</td>
<td>Ahmedabad</td>
<td>01 01 2012</td>
<td>Surat</td>
</tr>
<tr>
<td>agreement</td>
<td>Acceptance</td>
<td>1 10 01 2012</td>
<td>Surat</td>
<td>1 10 01 2012</td>
<td>Surat</td>
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<tr>
<td>When there is a contrary</td>
<td>Proposal</td>
<td>01 01 2012</td>
<td>Kanpur</td>
<td>01 01 2012</td>
<td>Mumbai</td>
</tr>
<tr>
<td>agreement, providing the</td>
<td>Acceptance</td>
<td>1 10 01 2012</td>
<td>Surat</td>
<td>1 10 01 2012</td>
<td>Surat</td>
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<tr>
<td>following.</td>
<td></td>
<td>2 11 01 2012</td>
<td>Allahabad</td>
<td>2 12 01 2012</td>
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<td>A Electronic record is</td>
<td></td>
<td>3 12 01 2012</td>
<td>Ranchi</td>
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<td>deemed to be dispatched at</td>
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<td>the place from where it is</td>
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<td>actually dispatched AND</td>
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<td>B Electronic record is</td>
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<td>retrieved and at the place</td>
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<td>where it is retrieved.</td>
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<td></td>
</tr>
</tbody>
</table>

Therefore, time and place of dispatch and receipt of e-record will be decided in accordance with S. 13 (3) unless a contrary agreement is there between the parties. Accordingly, cause of action and eventually the place of jurisdiction will be decided. It is imperative to note that Ss. 10A-13 are for the convenience of netizens. These provisions are more about the procedural law rather than substantive law, and these have effect of modifying the law of cause of action which determines the jurisdiction of courts under the CPC 1908.78

4.3.1.6 Time and Place of formation of E-Contract

It is significant to note that the time of formation of e-contract depends upon whether or not the acknowledgement was a part of the contract formation process. However, the ICA 1872 does not specifically deal with the concept of acknowledgement, but in case of e-contract, as per the provisions of the IT Act 2000, acknowledgement of receipt of electronic record may be essential for the formation of contract, and therefore, there are two possibilities:

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78 Jyoti Rattan, supra, n 75, at 93.
a. **When acknowledgement is a part of the contract formation:** Where acknowledgment is an integral part of the contract formation process, then the acceptance shall be binding upon the acceptor only when he receives an acknowledgment and that becomes the time of formation of contract and the place of business of the acceptor shall become the place of contract.

*Illustration:*

X, who has his place of business at Ahmedabad makes an e-offer to sell 10 laptops to Y (having place of business at Surat) on 01.02.2012. Acknowledgement of receipt of e-offer was received by X on the same day. Y accepts the e-offer on 04.02.2012 and mentions that acknowledgement of receipt of his e-record (acceptance) must be received by Y within seven days; otherwise acceptance shall not be binding on him. Acknowledgement was received by Y on 08.02.2012.

In the above situation, the time of formation of e-contract is 08.02.2012 and place is Surat. This is irrespective of places from where X and Y are actually communicating, for there is no contrary agreement between the parties.

b. **When acknowledgement is not part of contract formation process:** Where acknowledgment is not a part of the contract formation process, then the time when acceptance is received by the proposer will be the time of formation of contract and the place of business of the proposer will be the place of contract.

*Illustration:*

X, who has his place of business at Ahmedabad makes an e-offer to sell 10 laptops to Y (having place of business at Surat) on 01.02.2012. Acknowledgement of receipt of e-offer was received by X on the same day. Y accepts the e-offer on 04.02.2012, but does not mention that acknowledgement of receipt of his e-record (acceptance) must be received by him (Y). No acknowledgement of receipt of e-acceptance was received by Y; nor did he serve any notice on X to send an acknowledgment of the receipt of the e-acceptance.
In this situation, since acknowledgment was not a part of the contract formation process, the time of formation of e-contract is 04.02.2012 (the day when e-acceptance was sent to X), and the place of contract would be Ahmedabad where the e-acceptance was made by Y on 04.02.2012 and was received by X on same day. This is irrespective of the places from where X and Y were actually communicating from, as there was no contrary agreement between the parties.

4.3.1.7 PR Transport Agency v Union of India\textsuperscript{79}—A Case Study

Bharat Coking Coal Ltd (BCC) held an e-auction in respect of coal in diverse lots. The petitioner’s [PR Transport Agency’s (PRTA)] bid got accepted for 4000 metric tons of coal from Dobari Colliery. The letter of acceptance was issued on 19 July 2005 by an e-mail to PRTA’s e-mail address. In pursuance of this, PRTA deposited the full amount (of Rs. 81.12 lakh) through a cheque in favour of BCC, which the BCC accepted and encashed. BCC, however, did not deliver the coal to PRTA; further, it e-mailed PRTA stating that the sale as well as the e-auction in favour of PRTA stood cancelled ‘due to some technical and unavoidable reasons’. The solitary ground for this cancellation was that there was some other person whose bid for the same coal was slightly higher than that of PRTA. On account of some flaw in the computer or its programme or feeding of data, the higher bid had not been considered earlier.

The PRTA challenged this communication by way of a writ petition in the High Court of Allahabad. The BCC raised objection to the ‘territorial jurisdiction’ of the Court on the ground that no part of the cause of action had arisen within Uttar Pradesh (UP), therefore the High Court at Allahabad (UP) had no jurisdiction. The PRTA, on the other hand, put forth following arguments:

i. The communication of the acceptance of the tender was received by the petitioner through e-mail at Chandauli (UP). As a result, the contract (from which the dispute arose) was completed at Chandauli (UP). The formation of the contract is a part of the ‘cause of action’.

\textsuperscript{79} AIR 2006 All 23; 2006 (1) AWC 504.
ii. The place where the contract is concluded by receipt of communication of acceptance is the place where 'part of cause of action' arises.

**Decision of the Court:** The Court held that since the acceptance was received by the PRTA at Chandauli / Varanasi, therefore, the contract became complete by receipt of such acceptance. And, as 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 UP and the High Court had territorial jurisdiction. The Court considered following points for its decision:

i. With regards to contracts made through telephone, telex or fax, the contract is complete 'when the acceptance is received' and at the place 'where the acceptance is received'. However, this principle can apply only where the transmitting terminal and the receiving terminal are at fixed points.

ii. In case of an e-mail, the data (in this case, 'acceptance') can be transmitted from anywhere by the e-mail account holder. It goes to the memory of a 'server' which can be located anywhere and can be retrieved by the addressee account holder from anyplace in the world. Accordingly, there is no fixed point either of transmission or of receipt.

iii. Section 13(3) of the IT Act has addressed this intricacy of 'no fixed point either of transmission or of receipt'. In accordance with this section, '...an electronic record is deemed to be received at the place where the addressee has his place of business.'

iv. The acceptance of the tender shall be deemed to be received by the PRTA at the place where it has place of business. In the instant case, it is Varanasi/ Chandauli (both in UP)

4.3.1.8 Documents or Transaction to Which the IT Act Does Not Apply
It is worth-mentioning that the IT Act explicitly excludes its applicability with regard to the following documents and transactions:⁸⁰

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⁸⁰ See, First Schedule to the IT Act 2000 (as amended in 2008)
1. A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act 1881.

2. A power-of-attorney as defined in section 1A the Powers-of-Attorney Act 1882.

3. A trust as defined in section 3 of the Indian Trusts Act 1882.

4. A will as defined in clause (h) of section 2 of the Indian Succession Act 1925, including any other testamentary disposition by whatever named called.

5. Any contract for the sale or conveyance of immovable property or any interest in such property.

### 4.3.2 Indian Evidence Act 1872

**E-contract as Evidence:** Evidence recorded or stored by availing the electronic devices has been granted the evidentiary status. For example, the voice recorded with the help of a tape recorder, the digital voice recorder, digital cameras, digital video cameras, video conferencing have been added to new evidentiary assets. The position of video conferencing, call records relating to cellular phones and e-documents in the form of SMS, MMS and e-mail in India is well demonstrated under the law and the interpretation provided in various cases. In *State of Delhi v Mohd Afzaal*, it was held that electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it has to prove the same beyond reasonable doubt. The Court made an observation that mere theoretical and general apprehensions cannot make clear evidence defective and inadmissible. This case has very well demonstrated the admissibility of electronic evidence in various forms in Indian courts.

The information technology era and the IT Act have brought with them some changes in some statutes, including the Indian Evidence Act 1872. These amendments were necessary in view of the evidentiary value of electronic record,

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81 *State of Maharashtra v Profil B Desai* AIR 2003 SC 2053: 2003 (2) ALT (Cri) 118 (SC), where examination of witnesses, in criminal cases, through video conferencing was approved.

82 Call records relating to cellular phones are admissible and reliable—*State v Nijjot Sandhu* AIR 2005 SC 3820: 2005 Cr LJ 3950

83 2003(3) 11 JCC 1669
electronic signature, and, of course, electronic contracts. The evidentiary value of e-contracts can be well appreciated in the light of the following provisions (discussed below) of the Indian Evidence Act. Ss 85A, 85B, 85C, 88A, and 90A deal with the presumptions as to electronic records, while Ss 65A and 65B are related to the admissibility of electronic record.

Section 85A \(^{84}\): With regard to presumption to electronic agreements, this section has been incorporated. It provides that every electronic record of the nature of an agreement is concluded as soon as electronic signature is affixed to the record. This section has been added in order to ensure the validity of e-contracts. However, there are some restrictions as regards the presumptive value.

Section 85B \(^{85}\): S. 85B provides that the court shall presume the fact that the record under consideration has not been put to any kind of alteration, in case contrary has not been proved. The secure status of the record can be demanded till a specific time. The electronic signature should also be presumed to have been affixed with an intention of signing and approving the electronic record. In addition, it has been provided that the section should not be misread so as to create any presumption relating to the integrity or authenticity of the electronic record or electronic signature in question.

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\(^{84}\) S. 85A reads as:

Presumption as to electronic agreements: The Court shall presume that every electronic record purporting to be an agreement containing the electronic signature of the parties was so concluded by affixing the electronic signature of the parties. *Ins. by Act 21 of 2000, sec. 92 and Sch. II (w.e.f. 17-10-2000)*

\(^{85}\) S 85B reads as:

Presumption as to electronic records and electronic signatures.- (1) In any proceedings involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates

(2) In any proceedings, involving secure electronic signature, the Court shall presume unless the contrary is proved that—

(a) the secure electronic signature is affixed by subscriber with the intention of signing or approving the electronic record,

(b) except in the case of a secure electronic record or a secure electronic signature, nothing in this section shall create any presumption, relating to authenticity and integrity of the electronic record or any electronic signature

*Ins by Act 21 of 2000, sec. 92 and Sch. II (w.e.f. 17-10-2000).*
Section 85C8: As far as electronic signature certificate is concerned, the court shall presume that the information listed in the certificate is true and accurate. Inclusion of the words 'shall presume' again suggests the express exclusion of the discretionary power of the court.

Section 88: S. 88 deals with the presumption of telegraphic message, whereas Section 88A deals with presumption as to electronic messages. Accordingly, the court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such message was sent. This section (88A) is self-explanatory, since it purports to follow the basic rules of a valid hard-copy agreement. The words 'may presume' authorize the court to use its discretionary power with regard to presumption. Ss. 85A and 85B contain the words 'shall presume' which expressly excludes this discretionary power of the court.

Section 90A: Where an electronic record being 5 years old, if proved to be in proper custody, the court may presume that the electronic signature was affixed so as

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86 S. 85C reads as:
Presumption as to Electronic Signature Certificates.- The Court shall presume, unless contrary is proved, that the information listed in a Electronic Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber Ins by Act 21 of 2000, sec 92 and Sch II (w.e.f 17-10-2000).

87 S.88 reads as:
The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

88 S. 88A reads as:
Presumption as to electronic messages- The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.
Explanation: For the purposes of this section, the expressions “addressee” and “originator” shall have the same meanings respectively assigned to them in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000
Ins by Act 21 of 2000, sec 92 and Sch II (w.e.f 17-10-2000).

89 90A reads as
to authenticate the validity of that agreement. The electronic signature can also be affixed by any person authorized to do so. For the purpose of this section, electronic records are said to be in proper custody provided they are in the custody of the person with whom they naturally be. An exception can be effected where circumstances of a particular case render its origin probable.

**Sections 65A** and **65B** deal with evidence relating to electronic records and admissibility of electronic records. The evidentiary value of electronic records is extensively discussed under Ss 65A and 65B of the Evidence Act 1872. S. 65B says that any information contained in an electronic record which is printed on a paper or stored/recorded/copied on optical/magnetic media produced by a computer shall be deemed to be a document and is admissible as evidence in any proceeding without further proof or production of the original, if the following conditions are satisfied:

- The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for the purpose of any activity regularly carried on during that period by the person having lawful control over the use of the computer;
- During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities;
- Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents; and

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Presumption as to electronic records five years old.—Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorised by him in this behalf.

Explanation: Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

This Explanation applies also to section 81A

**Ins by Act 21 of 2000, sec 92 and Sch II (w.e.f 17-10-2000).**

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90 S. 65A reads as:

**Special provisions as to evidence relating to electronic record.—** The contents of electronic records may be proved in accordance with the provisions of section 65B

**Ins by Act 21 of 2000, sec 92 and Sch II (w.e.f 17-10-2000).**

91 For the full provision, refer to the Appendix-3.
• The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

It is further provided that where in any proceedings, evidence of an electronic record is to be given, a certificate containing the particulars prescribed by 65B of the Evidence Act, and signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities will be sufficient evidence of the matters stated in the certificate.

The Supreme Court in State v Navjot Sandhu, while examining the provisions of newly added section 65B, held that in a given case, it might be that the certificate containing the details in sub-section 4 of S. 65B was not filed, but that did not mean that secondary evidence could not be given. It was held by the Court that the law permits such evidence to be adduced in the circumstances mentioned in the relevant provisions, namely, Ss. 63 and 65 of the Indian Evidence Act. As per S. 63, secondary evidence means and includes, among other things, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.

S. 65 permits secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. Therefore, printouts taken from the computers/ servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Despite the compliance with the requirements of S. 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Indian Evidence Act, namely, sections 63 and 65.

The evidentiary value of an electronic record entirely depends upon its quality. The Indian Evidence Act extensively deals with the evidentiary value of the electronic

records. As per S. 3 of the Evidence Act, evidence means and includes all documents including electronic records produced for the inspection of the court and such documents are called documentary evidence. As a result, the section clarifies that documentary evidence can be in the form of electronic record and stands at par with conventional form of documents.

As per the IT (Amendment) Act 2008, Section 79A of the IT Act empowers the Central Government to appoint any department, body or agency as Examiner of Electronic Evidence for providing expert opinion on electronic form evidence before any court or authority. For the purpose of S 79A, ‘electronic form evidence’ means any information or probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones and digital fax machines.

In conclusion, it can be said that electronic contracts are almost same as other hard copy contracts in so far as its evidentiary value is concerned. All electronic contracts are valid contracts as they are legalized by the IT Act along with the amendment (effected in the year 2008), and, therefore, one could be made liable if there is any infringement with the terms and conditions.

4.4 SECURITY AND AUTHENTICATION IN E-COMMERCE

The information communication technology has drastically altered the ways in which people communicate. Along with the speed, efficiency, and economy of digital revolution, this technology has brought new challenges to the security and privacy of communications and information passing through the global communications infrastructure. The World Wide Web (WWW) is an open trading environment, so one of the primary concerns of the costumers and traders is—the security in e-commerce. One solution that has been acquiring popular support is the electronic signature. Electronic signature means authentication of any electronic record by a subscriber by means of electronic technique specified m the Second Schedule and includes digital signature.

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94 Whereas as per S 2 (1) (p) “digital signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3
subscriber\textsuperscript{95} by means of an electronic technique specified in the Second Schedule and includes digital signature.

There are several methods to sign documents electronically. These electronic signatures range from very simple methods (for example, inserting a scanned image of handwritten signature in a word processing document) to very advanced methods (for example, using cryptography\textsuperscript{96}). Akin to the signature used on written documents, digital signatures\textsuperscript{97} are now being used to identify authors of e-mail or other information objects of electronic data.

The IT Act has moved away from exclusive reliance on digital signatures created through asymmetric cryptography, otherwise known as the ‘hash-system’ to a more technology-neutral and probably technology-forcing approach. The IT Act has introduced the concept of ‘electronic signature’ while retaining the concept of ‘digital signature’.

In America, most of the States have laws governing E-signatures. However, these laws are not uniform. In an effort to create more uniformity among the states, the

\textsuperscript{94} S.2 (1) (t) of the IT Act provides: ‘electronic record’ means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche; Further, S. 2(1) (o) defines data as: ‘data’ means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer. \textsuperscript{95} S. 2(1) (zg) of the IT Act provides that ‘subscriber’ means a person m whose name the Digital Signature Certificate is issued. Further S. 2 (1) (q) defines Digital Signature Certificate as ‘Digital Signature Certificate’ means a Digital Signature Certificate issued under sub-section (4) of section 35. \textsuperscript{96} Cryptography is an extremely important instrument for achieving secure electronic commerce. There are a number of methods in which this instrument can work in the electronic environment. The most popular of all the methods is the system where the encoding and the decoding of the message is performed by using two keys – (i) a public key which is publicly known and (ii) a secret key which is only known by the sender or the recipient or both. This cryptography technique is, commonly, known as ‘public key encryption’. \textsuperscript{97} Whosoever wants to make use of digital signature should have an Internet explorer or Netscape communicator installed in his computer These machinations can handle the security certificates issued by the certifying authority. At the time of sending an electronic message, the sender has to forward the security certificate as an attachment to the message. The private key of the sender will convert the security certificate as a code. The browser will automatically send public key together with the message. The receiver has to press the security button in the Netscape’s tool bar and he can read the decoded digital signature. If the receiver uses Internet explorer, he has to click the tools Internet options and then has to click the content tab, thereafter, he will be able to view the security certificate.
National Conference of Commissioners on Uniform State Laws promulgated the Uniform Electronic Transactions Act (UETA) in 1999.

In the USA, in 2000, the Congress enacted the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) to provide that no contract, record, or signature may be ‘denied legal effect’ merely because it is in electronic form. For an electronic signature to be enforceable, the parties to the contract must have agreed to use electronic signatures. Contracts and documents that are excluded from this Act include court papers, divorce decrees, evictions, foreclosures, health-insurance terminations, prenuptial agreements, and wills.

4.5 SOME LEGISLATIVE ATTEMPTS TO GOVERN E-CONTRACTS: INTERNATIONAL SCENARIO

The UNCITRAL Model Law on E-Commerce has influenced several states with respect to legislative drafting and proposals. Recent enactments and uniform laws now circulating in Canada and the United States were heavily influenced by the Model Law, and drafting committees from the two countries are exchanging ideas on the subjects. In the European Union, the Electronic Commerce Directive and the Electronic Signatures Directive were also influenced greatly by the Model Law and

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The Uniform Law Conference of Canada produced its own model law based on the UNCITRAL Model Approved for adoption by Provinces in 1999, the Uniform Electronic Commerce Act (UECA) relies on the functional equivalence approach without requiring authentication from a specified technological source. Saskatchewan’s Electronic Documents and Information Act, S.S. 2000, c. E-7.22, for example, contains similar and in some cases identical provisions to the UECA. Nova Scotia’s Electronic Commerce Act, S.N.S. 2000, c. 26, received Royal Assent November 30, 2000, and also mirrors the UECA approach to writing and signatures, as does Ontario’s Electronic Commerce Act, S.O. 2000, c. 17. Several other provinces have Bills before their legislatures with common approaches along the lines of the UECA (See Michael Geist, Internet Law in Canada, (York University: Captus Press, 2000) at 493-499). This approach is not necessarily dependent on a common law system of interpretation as evidenced by Bill 161 now before the Quebec National Assembly, entitled An Act to Establish a Legal Framework for Information Technology, introduced first as a draft in June of 2000 and later as a full-fledged bill on November 14, 2000. The object of the Draft Bill is stated in s 1(3) as including the ‘functional equivalence of documents and the recognition of their legal value, regardless of the medium used, and the interchangeability of media and technologies’. Therefore, the civil law is also able to contemplate the UNCITRAL Model basic principles. (The text of Quebec Bill 161 can be found online at http://www.assnat.qc.ca/archives-36leg1se/eng/Publications/Projets-loi/publics/00a161.htm.)
Draft Rules. Furthermore, drafting committees for the implementation of these proposed laws appear to be directly influenced by each other’s work, thereby reducing diverging interpretations. Despite this influence, however, harmonization lags well behind technology. This is a product of differing legal systems and a tendency towards comprehensive, detailed law reform in some EU nations contrasted by the less hands-on approach in the US.

4.5.1 Position in the US and EU

In the US, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has come up with two uniform state Acts designed to bring legal certainty to electronic transactions. They are: the Uniform Computer Information Transaction Act (UCITA) and the Uniform Electronic Transaction Act (UETA). The UCITA is a statute which deals with contracts or transactions in ‘computer information’. A contract involving computer information (for instance, a software license) may be formed electronically or may be concluded in person or by any other means. Thus, the UCITA deals with information technology, and does not exclusively deal with electronic contracting. On the other hand, the UETA is a statute with broader reach—focusing on all types of electronic transactions.

These uniform statutes are not binding law in a particular State until the State chooses to adopt the Act through its respective legislative process. Nonetheless, these

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99 Ibid.
100 Ibid.
102 Founded in 1892, NCCUSL is a non-profit unincorporated association comprised of state commissions. Uniform law commissioners, appointed in a manner determined by each state or territory, review and evaluate the law of states to ‘determine which areas of law should be uniform.’ Over 250 uniform acts have been proposed by NCCUSL. Many have been adopted by most states nationwide, the most notable of which is the Uniform Commercial Code. For more information on NCCUSL, see Introduction to the Organization, The National Conference of Commissioners on Uniform State Laws, available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>
103 See, Comment 2 to UCITA Section 103. The scope of this Act turns initially on the definition of computer information transaction. Section 102(11). Computer information transactions are agreements that deal with the creation, modification, access to, license, or distribution of computer information. S. 102(a) (11). Computer information is information in a form directly capable of being processed by, or obtained from, a computer and any copy, associated documentation, or packaging S. 102(a) (10). As stated in subsections (b) and (c), if a transaction is a computer information transaction but also involves other subject matter, this Act ordinarily applies only to the aspects of the transaction that involve computer information

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Acts developed by NCCUSL have been adopted by all or many States and are generally representative of current and future trends. For example, 48 States have adopted the UETA.\textsuperscript{104} In contrast, only two States have adopted the UCITA. This may be because of the fact that the uniform Act being amended twice (in 2000 and 2002) since it was first introduced in 1999.\textsuperscript{105} Maryland and Virginia however have adopted the UCITA—two States where software and internet related businesses are located.\textsuperscript{106} Companies with establishments in those States may opt to have their software license contracts governed by the UCITA. In this way, it may still have a noteworthy effect on software licensing and electronic contracting.

The US Congress has also entered the scrimmage of electronic contracting when it passed the Electronic Signatures in Global and National Commerce Act ('E-Sign) in 2000. On the whole, E-Sign adopts the most significant UETA provisions. E-Sign is a federal statute, and only preempts State law if a jurisdiction has not adopted the UETA in an unrevised form.\textsuperscript{107} In case a State has enacted UETA, then, the UETA may serve as the governing law for a contract between parties (even if it involves parties from different States). To the extent that a State has not legislated/ ratified UETA, E-Sign would apply.

Both the E-sign Act and the UETA avert a rule of law from denying the legal effect of certain transactions in inter-State or foreign commerce on the ground that the signature, contract, or record of such transaction is in electronic form, or if an electronic signature or electronic record was used in the conclusion of a particular contract. Both the statutes say that if a law requires a record to be in writing or retained in its original form, then an electronic record satisfies the law. Similarly, both provide that if a law requires a signature, then an electronic signature satisfies that law. E-Sign does not, however, prevent States from altering or superseding this general rule of validity provided it is based on the enactment of the UETA and so


\textsuperscript{107} \textit{Ibid}, Para 7
long as the State law does not contain an exception to the scope of the UETA that would be inconsistent with E-Sign. 108

In Canada, the Uniform Law Conference of Canada adopted the Uniform Electronic Commerce Act (UECA), which provinces then used as a model for their own e-commerce statutes. 109

One must remember that the goal of the European Union (EU) is not to create a uniform legal order as such, but to facilitate trade, investment and the mobility of citizens. 110 Therefore, although harmonization of laws is present in some cases, it is merely one of several means to achieving the overall goal, and therefore is not itself a goal. 111 In spite of this, common approaches are necessary at times to facilitate community goals. The most important legislative tools used by the EU to give effect to its decisions are regulations or directives. 112 Regulations are binding on States when adopted with no internal legislative action needed. They right away become part of the member States’ laws and may not be amended by domestic legislation. The total surrender of sovereignty required for regulations tends to limit their use, so the more common method is the directive. 113 This sets out a binding result that must be achieved within a set time period through member State domestic legislation, but leaves the form and method up to the individual States. 114 Use of the directive, therefore, is a far more enviable solution in a union of States containing some very different legal traditions. Harmonization amongst member States appears inevitable given the tools available; however, since the choice of how to implement directives is left to each member, it is minimum harmonization of underlying principles and not specific technical rules. 115 Therefore, transaction costs may not be optimized by the

111 Ibid.
112 Ibid, at 307-310, for a summary of EU methods of unifying and harmonizing laws through the use of regulations and directives.
114 Noreen Burrows, supra, n 110, at 308.
115 W. Harry Thurlow, supra, n 113.
electronic commerce community because they still have to respond to different criteria for contract validity in different countries. The recognition of electronic contracts as a general principle after all, does not prevent differing opinions on implementation questions such as whether to use specific rules tied to existing technologies, or if Statute-of-Frauds-type legislation need be rewritten or merely reinterpreted to allow for a functional equivalence exception.\textsuperscript{116}

The EU has also fashioned a rational and cogent regulatory framework for electronic commerce. This framework comprises the following Directives: Electronic Commerce Directive ('E-Commerce Directive'), the 'Distance Contracts Directives',\textsuperscript{117} Unfair Terms in Consumer Contracts Directive ('Unfair Contract Terms Directive'),\textsuperscript{118} and the Community Framework for Electronic Signatures ('E-Signature Directive').\textsuperscript{119} Besides these, a number of horizontal directives have been adopted, such as Privacy\textsuperscript{120} and Intellectual Property Rights in Cyberspace.\textsuperscript{121} A horizontal directive is that EU legislation which is designed to cover all sorts of sectors. It is not intended to meet all the requirements of a particular sector. A horizontal directive complements particular vertical sectoral legislation or a ‘vertical’ directive. Some sectoral directives which have been adopted include the following:

\textsuperscript{116} Ibid.


the Directives on Consumer Credit\textsuperscript{122}, the Directive on Package Travel, Package Holidays and Package Tours ("Travel Packages Directive")\textsuperscript{123}, and the Timeshare Directive\textsuperscript{124}.

The Uniform Computer Information Transactions Act:
The UCITA establishes a wide-ranging set of rules covering contracts involving computer information. Computer information is the information in electronic form obtained from or through use of a computer. The Act deals with:

- Contacts to license or purchase software.
- Contracts to create a computer programme.
- Contracts for computer games.
- Contracts for online access to databases.
- Contracts to distribute information on the internet.
- Contracts for diskettes that contain computer programmes.
- Contracts for online books, and other similar contracts.

The UCITA, usually, does not apply to the sale of goods even if software is embedded in the goods or used in their production (except computers). The UCITA stresses the agreement entered into between the parties. But in the absence of an agreement, the Act's provisions, called default rules, apply.

The Uniform Electronic Transactions Act

The object of the UETA is not to create rules for electronic transactions such as digital signatures, but to support the enforcement of e-contracts. Under the UETA,


contracts entered into online, as well as other electronic documents, are accepted as valid and enforceable. The UETA does not affect transactions governed by the UCC or the UCITA, or to wills or testamentary trusts.

S. 5 (d) of the UETA provides that except as provided in the Act, the effect of any of the provisions of the Act may be varied by agreement. Therefore, while it is possible to have certain basic rules and fundamental principles to govern e-contracts, it would be within the autonomy of the parties to be in agreement on the exact modalities.

The UETA and the UCITA are similar in the following ways\textsuperscript{125}:

i. The equivalency of records and writings.

ii. The validity of e-signatures.

iii. The formation of contracts by e-agents.

iv. The formation of contracts between an e-agent and a natural person.

v. The attribution of an electronic act to a person if it can be proved that the act was performed by the person or her or his agent.

vi. A provision that parties do not need to participate in e-commerce to make binding contracts.

The differences between the two include\textsuperscript{126}:

i. UCITA addresses e-commerce that is not covered by the UETA.

ii. The UETA supports all electronic transactions, but it does not create rules for them. The UCITA concerns only contracts that involve computer information, but it does impose rules for those contracts.

iii. The UETA does not apply unless contracting parties agree to use e-commerce in their transactions. The UCITA applies to any agreement that falls within its scope.

\textsuperscript{125} Taken from and available at \texttt{<http://www.jdcc.edu/includes/download.php?action=2100&download_file_id=2725&action=2100&table_num=>} accessed 13 December 2008.

\textsuperscript{126} \textit{Ibid.}
4.5.2 Recognition/ Validity/ Legality of Online Contracts

The 'intention to enter into a legal relationship' and the 'meeting of minds' are two very important bases for any contract. But, as it is known that in most of the e-contracts, a party assenting to the terms does it without knowing or sometimes without having any intention to enter into any contract and in some cases though he is acquainted with the terms but has no considerable choice but to adhere to certain standard clauses laid down by the other party. It can be argued that these things frustrate the very concept of 'consensus ad idem'.

One of the moot questions which is commonly posed in case of an e-contract is: Can there be a valid and enforceable e-contract? The simple answer to this question is—'yes', provided it satisfies all the essentials of a contract. Different types of e-contracts have been held valid and enforceable in a catena of judgments.

Art 11 of the UNCITRAL Model Law on Electronic Commerce sets about the formation and validity of e-contracts. It provides that 'in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages; and where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.' This has been duly accepted by India in form of S. 10 A of the IT Act (already discussed in this chapter).

Article 11 of the UNCITRAL Model Law is not planned with a view to interfere with the law on formation of contracts. Rather, on the other hand, it has been modeled with a view to promote international trade by providing augmented legal certainty as to the conclusion of contracts by electronic means. During the preparation of Art 11, it was felt that the provision might have the destructive effect of overruling otherwise applicable provisions of national law, which might prescribe specific formalities for the formation of certain contracts. Such forms embrace notarization, registration and other requirements for writings and might respond consideration of public policy, such as the need to protect certain parties or to warn them against specific risks. In view of that, Art 12 provides that an enacting State can exclude the applicability of
provisions of Article 11 in certain instances to be specified in the regulation enacting the Model Law.\textsuperscript{127}

Arts 9, 10 and 11 of the E-Commerce Directive\textsuperscript{128} deal with e-contracts in business-to-consumer (‘B2C’) transactions. The E-Commerce Directive requires a service provider\textsuperscript{129} to set out all the necessary steps so that consumers can have no doubt as to the point at which they are committed to an electronic contract.\textsuperscript{130}

Art 9 of the E-Commerce Directive requires Member States to ensure that electronic contracts are rendered valid and to remove any prohibition or restriction on the use of electronic contracts, with certain permitted exceptions. Acceptable derogations from the E-Commerce Directive include the following:

- Contracts that create or transfer real estate property rights, except rental rights;
- Contracts requiring, in order to be valid, registration with public authority;
- Contracts of suretyship; and
- Contracts falling within the scope of the law of succession and family law.

Similarly, in the US, the UETA plays analogous role in that it seeks to ‘remove barriers to electronic commerce’. But, unlike the E-Commerce Directive, the UETA is ‘not a general contracting statute’, and it does not require the recognition of electronic contracts. Rather, it approaches its goal ‘by validating and effectuating

\textsuperscript{127} The Information Technology Act 2000 (India) provides that the IT Act shall not apply to the following:
1. A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act 1881.
2. A power-of-attorney as defined in section 8 of the Powers-of-Attorney Act 1882.
3. A trust as defined in section 3 of the Indian Trusts Act 1882.
4. A will as defined in clause (h) of section 2 of the Indian Succession Act 1925, including any other testamentary disposition by whatever name called.
5. Any contract for the sale or conveyance of immovable property or any interest in such property.

\textsuperscript{128} E-Commerce Directive, 2000/31
\textsuperscript{129} Art. 2(b) of the Directive defines a service provider as ‘any natural or legal person providing an information service’
\textsuperscript{130} Art. 10 (‘Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: (a) the different technical steps to follow to conclude the contract.’)
electronic records and signatures' on which contracts may be based. The UETA provides\textsuperscript{\textsuperscript{131}}:

\begin{itemize}
  \item[a.] A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
  \item[b.] A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
\end{itemize}

Like the E-Commerce Directive, the UETA also provides exemptions from the recognition requirements. Nevertheless, the exceptions under the UETA are broader than the E-Commerce Directive. For example, the UETA also exempts laws governing the execution of wills, codicils or testamentary trusts. More so, the UETA does not cover those transactions which are, to the extent, governed by the Uniform Commercial Code (‘UCC’), unless the electronic records or signatures relate to transactions governed by Ss.1-107, 1-206, Art 2 (Sale of Goods) and Art 2A (Leases).\textsuperscript{\textsuperscript{132}} Besides, the UETA also does not apply to transactions to the extent they are governed by the UCITA and other laws identified by a State.

Just as the UETA, the Electronic Signatures in Global and National Commerce Act 2000 (E-Sign Act) legalizes most types of electronic contracts and transactions by allowing the signatures, records, and notices associated with these contracts to be maintained in a digital form. Yet, the E-Sign Act differs from the UETA in the way it deals with consumer transactions. The UETA does not exempt any class of consumer notices while the E-Sign Act provides for strong consumer protections. The E-Sign necessitates a specific and electronic consent process, before an electronic notice may replace a legally required written notice. The UETA simply requires that the parties agree to conduct transactions by electronic means (such as oral agreements) without providing any specific requirement of how consent can be verified or established. The E-Sign’s consent rule is provided in S.101 (c). Before consenting, the consumer must be provided with a clear and conspicuous statement of the following information:

\textsuperscript{\textsuperscript{131}} UETA § 7(b)
\textsuperscript{\textsuperscript{132}} Sylvia Mercado Kierkegaard, supra, n 106, at para 14

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• Any right or option of the consumer to have the record provided or made available on paper or in non-electronic form;
• Right of the consumer to withdraw the consent and of any conditions, consequences, or fees in the event of such withdrawal;
• Procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically;
• How the consumer may, upon request, obtain a paper copy of an electronic record, and whether any fee will be charged for such copy; and
• A statement of the hardware and software requirements for access to and retention of the electronic records.

In so far as the consumer’s consent is concerned, it must be obtained electronically and has to be expressed in a way that ‘reasonably demonstrates’ that the consumer is able to access the information in the electronic form, which will be used to provide the information that he is the subject of the consent. If there is any change in the hardware or software requirements needed to access or retain electronic records or if the change will create a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the consumer’s consent must be re-obtained.133

Like the UETA and the E-Commerce Directive, the E-Sign also provides for several exceptions from the general rule that documents required to be in writing may also be recorded electronically. The exceptions embrace the following documents governed by statutes: wills, codicils, testamentary trust, divorce, matters of family law, court orders and notices, recall of product, notice of cancellation or termination of utility services and any document required to accompany any transportation or handling of hazardous materials, etc.

4.5.3 Statutory Recognition of Click-wrap, Shrink-Wrap or Web Wrap Agreements

From a series of judgments, it is clear that click-wrap, shrink-wrap or browse-wrap contracts are valid and legally enforceable. Legislators have been gradually

133 Ibid, at para 16
recognizing the legality of mass market licenses like click-wrap and shrink-wrap, a proof of which is the proposed Art 2 B of the Universal Commercial Code ('UCC') which is now replaced by the National Conference of Commissioners on Uniform State Laws ('NCCUSL') with the Uniform Computer Information Transaction Act (UCITA) which was passed by the majority of the States of America on the 29th of July 1999.

The UNCITRAL, as already discussed, in S. 11, gives statutory recognition to click-wrap licenses and other forms of e-contracts, where it says that an offer and acceptance can be validly expressed by data messages which include information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

India has also accepted this by way of the IT Act. S. 11 of the IT Act accepts the offer by way of data message either by the person or by any electronic system programmed for that specific purpose (which would include offer in case of click-wrap).

It has already been seen from the discussion of Ss. 112 and 209 of the UCITA that mass market licenses like click-wrap can be assented to by way of conduct. From this, an inference can be drawn that the very conduct of the purchaser of software (which has shrink-wrap licenses on it), by which he tears the wrap and uses the CD after reading the terms and condition, conveys his assent to the terms.

134 S. 209 of the UCITA provides that the terms and conditions of the mass-market licenses can only be effectively adopted if the other party agrees to the license by manifesting his or her assent before or during the party's initial performance or use and access of the information.
S. 112 of the aforesaid Act deals with the question as to how assent can be manifested. It plainly lays down that a person can manifest assent to a record or a term by his/her conduct if s/he intentionally engages in such conduct with reasons to know that such behavior will be construed by the other party or his/her electronic agent to be a form of assent. However, all this will only hold good if the terms and condition are within the knowledge of the party assenting and that s/he has the chance to review the same. Thus in a Click-wrap license if a person reads the terms and clicks 'I agree', s/he assents to the same by way of Ss. 209&112
In the illustration-1 appended to S. 112, the example of the NY online registration is provided whereby a party can either chose to accept the terms by clicking the 'I agree' button or decline the same by resorting to 'I decline'. It is made clear that any person who clicks 'I agree', assents to the license and adopts its terms.
Sometimes additional terms might be displayed on the screen when the purchaser downloads the CD on to the computer after tearing the shrink-wrap, which had the initial terms of the license. The question is: Are these terms enforceable? It is apparent from Sec 208 (2) of the UCITA that in a mass-market license, if the parties had reason to know that some terms would be proposed later for assent and, if later, those terms are agreed on, then, there is a contract including those terms; however, if later, those terms are rejected, there will not be any contract under Section 209 2 (b) of the UCITA.

From the above discussion, it is clear that click-wrap, or shrink-wrap or browse-wrap agreements are valid, and are enforceable contracts.

### 4.5.4 Electronic Data Interchange EDI and its Statutory Recognition

The UCITA takes contract validity liberalization ahead by supporting the ability of electronic agents to make binding contracts for their human masters. This includes, for example, electronic data interchange (EDI), networks which allow computer-to-computer exchanges of information in order to create contracts without human involvement during the formation process. Acceptance and validity are satisfied if the medium is 'reasonable in the circumstances'. It is quite obvious that UCITA is intended to operate in a similar fashion to UNCITRAL's Model Law on E-Commerce through reliance on functional equivalency and avoiding specific technological requirements. A plain and simple comprehension of S. 206 of the UCITA reveals that legislators have recognized the fact that a contract can be concluded by the interaction of two electronic agents. But for that, there has to be offer by one electronic agent and acceptance of the same by the other agent.

S. 112 of the same Act says that an electronic agent can manifest its assent to a term if, after reading the terms, it engages in operations that in the circumstances indicate acceptance of the term. For example, when a computer-A sends an order for the

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136 UCITA § 203 (1)
supply of ten laptops to another computer-B (of the supplier) in accordance with their EDI agreement beforehand entered into between the said parties; and if computer-B starts sending a receipt of the bill for such order to computer-A, then, according to S. 112, it will amount to acceptance of the offer made by computer-A.

Thus, a valid and binding contract can be concluded by EDI under the UCITA. Similarly, Art 11 of the UNCITRAL\textsuperscript{137} also recognizes the validity of contracts concluded by EDI.

The recent years have witnessed across-the-board adoption and acceptance of e-mail, internet, electronic data interchange (EDI) in business and trade. While these modes of electronic communication do offer an easy and expeditious way of negotiating commercial transactions in harnessing their advantages for business, precautions need to be taken in concluding commercial contracts, with foreign parties in particular, as the process is fraught with risks.\textsuperscript{138}

A few decades ago, in the early stages when electronic data interchange and electronic commerce were not very common, there were questions about the authenticity of electronic contracting. In the business and legal world, people asked ‘whether electronic contracts were genuine’, and ‘could transactions formed by electronic messages in an electronic or internet environment be enforceable’. In matters of law, people enquired whether these paperless contracts could be introduced into evidence in the event of dispute. Those questions have been satisfactorily resolved, to a great extent, both on a national and international plane. There was, in the beginning, an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. A key factor in this regard is the work of the United Nations Commission on International Trade Law (UNCITRAL) and the adoption of the UNCITRAL Model Law on Electronic Commerce in 1996.

\textsuperscript{137} Article 11 of UNCITRAL reads as, ‘Formation and validity of contracts (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose

\textsuperscript{138} TD Purohit, ‘Contracts Via E-mail—A Note of Caution’, Corporate Law Cases, Vol 9, Part-11, 2008 (November), p 488.
In case of negotiations of deals through exchange of e-mails, for instance, it is possible that one may bind oneself to a contract inadvertently: if an e-mail or chain of e-mails clearly meets the requirements of the applicable law of contract, a contract may materialize, even though no signatures may have been exchanged, for, under the law (both Indian and foreign), a contract is not generally required to take a particular form, and may be oral, except in a very few cases where there exists specific statutory requirement for the contract to be in writing, for example, transfer of immovable property, promise to pay a time barred debt, bill of exchange or promissory note, etc.

Therefore, while negotiating any deal through any electronic medium, it must be clarified at the outset to the party concerned, that no contract shall be deemed to materialize until it is formally so agreed; and once the negotiations are over and consensus is reached, the same may be reduced into writing, incorporating all relevant clauses, and duly signed, either in traditional manner on paper, or in electronic form, leading to an enforceable contract. Alternatively, the use of the system may be made for negotiation and performance of contracts preferably under an overarching agreement between the parties providing for issues such as the effective time of contract formation, the law governing the resultant contract, among others.\(^{139}\)

Hence, it is now possible to safely sign contracts in electronic form with a party sitting at distance, just as signing a contract in black and white, sitting face to face with the party. Laws have developed all over the world in recent years to give recognition to electronic contracts. The United Nations General Assembly passed a resolution on 30th January, 1997, recommending that all States give favourable consideration to the ‘Model Law on Electronic Commerce’ adopted by the United Nations Commission on International Trade Law.

**4.6 CONCLUSION**

In this chapter, the researcher has dealt with those laws, rules and regulations, along with relevant amendments which have been made by India for governing e-contracts.

\(^{139}\) Ibid

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And, of course, comparison has also been made with those found in the US, and the EU, and other common law countries. From the foregoing discussion, it is quite evident that e-contracts (with all the different types) are valid and enforceable. This proposition is duly backed by both, the judicial approach and the legislative actions. The enforceability of click-wrap, shrink-wrap and web-wrap agreements is a developing and growing matter. Practitioners should strictly monitor developments in this area and periodically review their clients’ practices.

The rationale behind the e-commerce legislations of the EU and the US is analogous in that they create legal certainty by validating electronic contracts. Yet, the US laws are broader in scope. UETA swathes all types of contracts, not just electronic contracts, and UCITA covers all types of computer information contracts. In contrast, the EU directives characteristically deal only with consumer contracts by exempting B2B transactions. The E-Commerce Directive contains wide-ranging information requirements prior to the conclusion of the contract and the mandatory requirement of 3-steps procedures for the formation of contract. UETA defers to the other laws in providing the answer on what information must be provided and does not require ‘confirmation’ as a requisite to contract formation. UETA and UCITA offer more extensive guidelines on the issue of mistakes, contracts through electronic agents, and they elucidate the exact moment when a contract is concluded.

Following the UNCITRAL Model Law on E-Commerce, India has also enacted its IT Law which validates the formation of contracts electronically. Further, in tune with the change brought about by the IT era, India has also amended its existing laws, such as Evidence Act, IPC, etc.

140 Sylvia Mercado Kierkegaard, supra, n 106, at para 47