Chapter-1

INTRODUCTION

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Communication is one of the most vital tools for the edifice of a peaceful and well-ordered world. Communication and the need for improved communication have been creating and resulting in technological advancements. In the modern world, the telephone and the broadcast provided a better, speedier, and more convenient means of mass communication than the traditional newspaper or public print. But, technology does not stand still, and therefore, it has stepped into the arena of computers, the internet, and the cyberspace. Enormous technological developments have been made since the days when computers were huge pieces of equipment that were stored in big, air conditioned rooms, getting their information from punch cards. The computer, the internet, and the cyberspace have collectively brought revolution in the field of information technology (hereinafter referred to as ‘IT’). Cyber space is the sum total of all computer-based communications and data storage that is accessible through computer network. And IT, speaking generally, is concerned with all the aspects of managing and processing data to produce information. In addition to this, it also includes networking of computers and databases exchanging, and feeding information between one another. IT has radically changed the life styles of people. In the field of communication and IT, a revolution has been brought by the communication of information through the use of computers and the internet.

A few decades ago, the term ‘information technology’ (IT) was a little known phrase and was primarily used by those who worked in places like, banks and other financial institutions, to describe the processes they used to store information. In the midst of the paradigm shift to computing technology and ‘paperless’ workplaces, information technology has come to be a household phrase. It characterizes an industry that uses computers, networking, software programming, and other equipment and processes to store, process, retrieve, transmit, and protect information. As time passed and technology advanced, for instance, with the arrival of ‘personal computer’ in the 1980s and its everyday use in home and workplace, the world moved into a new information age. By the early 21st century, almost every child in the western world, and many in other parts of the world, knew how to use a personal computer. IT departments of business houses have gone from using storage tapes created by a single computer operator to interconnected networks of employee work-stations that
store information in a server farm, often somewhere away from the main business site. Communication has moved forward from physical postal mail to telephone, fax transmissions, and to nearly instantaneous digital communication through electronic mail (e-mail)\textsuperscript{,}.

1.1 IMPACT OF INFORMATION TECHNOLOGY ON BUSINESS AND COMMERCE

Advancements in the field of IT have a deep impact on the economy of a country and also on the quality of human life. The growing convergence of technologies and content has created tremendous opportunities as well as challenges for both—the developed and the developing countries.

One of the chief areas wherein the information technology has made a tremendous impact is—‘business and commerce’. Information technology has created novel ways in which businesses can relate to their customers, suppliers, partners and investors. The internet’s open style allows new relationships, channels and ways of doing business among manufacturers, distributors, wholesalers, service providers and end-users. These relationships have already started challenging the traditional distribution structure that dominated commerce of the preceding centuries (mainly the 18\textsuperscript{th}-19\textsuperscript{th} centuries), sometimes with great success and sometimes with no success. Equally significant, information developed by businesses engaged in electronic commerce (hereinafter referred to as ‘e-commerce’) is becoming as important as the products being sold, and in many cases, information has become ‘the product’. Contracts form the fundamental premise for any commercial or business activity. Law of Contracts is significant for attaining business processes interoperability and (for) enforcing their proper enactment. Business-to-business contracts have been central part of trading (business) relations for many centuries. Entering into a contract has become so ubiquitous in the day-to-day life that people do not even realize that they have entered into one. Technological advancements have necessitated the legal system to adapt to the changed situations so that order and harmony are preserved, and also that the commerce and industry are augmented with full legal endorsement. With the advent of information technology, companies and other business houses started using information technologies to prop up their trading
relations. Consequently, there has been a shift from ‘paper-based transactions’ to ‘electronic transactions’. Accordingly, in trading relations, supported by modern information technology, traditional paper-based contracts are not found to be very efficient and effective instrument in so far as time and expenditure (transactional costs, etc) are concerned; and hence, electronic contracts have become a necessity.

1.2 NEED FOR THE RESEARCH

Conventional concept of contract, developed over years, provides for the fundamental principles governing all the aspects (formation, discharge, remedies, etc) of different types of contracts (valid and enforceable agreements). The legal rules governing different aspects of a general/ conventional contract are quite clear. However, owing to the ways in which the electronic commerce differs from traditional commerce, it (electronic commerce) raises some novel and interesting technical and legal challenges.

From the standpoint of law, it is the most appropriate time to understand the structural changes that are possible in this new world of business relationships and the emerging legal issues governing them. Some novel and exceedingly challenging questions have been posed. These questions are in relation to: ‘formation/ conclusion of e-contracts’, ‘validity and enforceability of such contracts’, ‘applicability of established principles of contract law to e-contract’, ‘jurisdictional issues in relation to e-contracts’, ‘consumer protection and standard form contracting in the electronic age’, ‘resolution of disputes arising out of an e-contract’, so on and so forth. It is this aspect, which has induced the researcher to pursue this research, in order to find the answer to these questions. This enterprise would, of course, need a detailed exploratory, critical, comparative, analytical and explanatory study.

In response to recent developments and expected future growth in long-distance commerce using electronic media, such as the internet, some commentators have suggested that legal and economic institutions will have to change substantially in response to new technologies of trade, in the same way that they did in response to
the major technological and organizational innovations of the 18th and 19th centuries.\textsuperscript{1} Others have taken a more skeptical position, arguing that recent developments are better viewed as changes of degree rather than of kind, and that they can be accommodated by extending and modifying existing arrangements in a more evolutionary manner.\textsuperscript{2}

This research study takes an intermediate position in this debate, and will set out (in the end—‘Conclusion and Suggestions’) some of the main ways in which the existing doctrines and regulations of contract law might, if any, need a change in the electronic setting.

1.3 PRINCIPAL AIMS AND OBJECTIVES OF THE STUDY

The researcher has selected this topic for research because of his keenness for the Law of Contracts. It is a strong and tenacious belief of the researcher that in present scenario, a nation, especially any under-developing or a developing one, can look forward to a bright future, only if it appositely responds to the hurricane of information technology (IT) and its legal assimilation in different facets of life.

The principal aims and objectives of this study are as follows:

1. To accentuate the significance of the burgeoning dependence of the commercial activities on information technology in this era of information technology;

2. To study and understand the ways in which e-contracts may be concluded;

3. To find out answers to some significant questions in relation to the application of the offer and acceptance rules to the new means of communication;

4. To explore and examine the issues and implications pertaining to the legality, validity and the recognition of e-contracts;

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\textsuperscript{1} See, e.g., David R Johnson and David G Post, ‘Law and Borders—The Rise of Law in Cyberspace’, 48 Stan L Rev. 1367 (1996)

5. To discuss different types of e-contracts;

6. To ascertain time and place of conclusion of e-contracts;

7. To assess the Indian laws (the Indian Contract Act 1872, the Information Technology Act 2000, Indian Evidence Act 1872, etc) in a critical and analytical way, and also to compare it with the laws framed by the US, and some European and common law countries on the subject (e-contracts). In other words, to explore, identify and explain the merits and demerits/ weaknesses of the existing Indian legislation on the subject;

8. To identify and highlight the areas and issues which the present laws fail to address; to make out the issues which are not covered or partially covered by the existing laws, and to examine whether, and to what extent, a new law or modifications in the existing law/s would remedy the situation;

9. To investigate the consumer protection issues and standard form contracting in the electronic age; and

10. Finally, to put forth some suggestions/ recommendations to tackle the subject more effectively, thereby, making an original contribution to the field of knowledge.

In order to facilitate the aforesaid aims and objectives, this study has been articulated in seven chapters.

1.4 HYPOTHESIS

The general hypothesis of this research is:

*The existing laws of India are not sufficient to deal with and tackle all the diverse aspects of contracts which are concluded through electronic means; however, there have been some initiatives, though not enough, in view of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996, and other national and international developments.*
To test the above hypothesis, and to understand different aspects, such as, 'formation', 'recognition', 'enforcement', and 'discharge' of an e-contract, following important research-questions are needed to be considered and answered:

1. What is an e-contract, and what are the different modes by which electronic contracts are formed/ concluded?
2. Is the requirement of 'offer and acceptance' in contract formation with new modes of communication as much essential as it is (essential) in contract formation through postal communication?
3. Whether or not an e-contract is a 'valid'/ 'enforceable' contract?
4. Whether or not a supplier, making available details of goods and services with prices on a website, is deemed to have made an offer; or such act amounts to mere 'invitation to make offer'?
5. Whether or not an e-contract satisfies the legal requirements of reduction of agreements to signed documents?
6. How does an e-contract manage and coordinate the activities performed by different parties?
7. How is the jurisdiction of courts in relation to an e-contract determined? How are the disputes arising out of an e-contract settled in a court of law?
8. What are the statutes, regulations, etc in place regulating e-contract?

1.5 SCOPE AND LIMITATION

This study focuses on the principles governing diverse aspects of e-contracts, such as, formation, nature, validity, enforceability, and discharge. These principles have been evolved through 'judicial pronouncements', through the process of 'legislative developments', and also through 'international instruments'. Following are some of the limitations of this study:

1. The object of this study is not to provide precedents for legal drafting. The overall goal of this research is not to provide a complete survey of all the aspects of electronic contracting and different problems that might arise in this area; but, rather to identify the distinctive transactional features of this new medium and to set an agenda for further research. In particular, the main focus is on the formation of and recognition and validity of e-contracts. However, for better appreciation of these aspects,
other relevant aspects are also examined and discussed, though not in great detail.

2. Another limitation on the scope of this research is that the researcher considers mainly those transactional activities which are effected through communication between computers. The focus is, accordingly, on contract formation by e-mails and through websites. Contracts concluded via electronic data interchange and instant messaging do not appear to raise any distinct and discrete issues with regard to offer and acceptance, and so the researcher has not given these forms of communication comprehensive consideration, although some of the discussions pertaining to e-mails and websites will apply to them by analogy.

3. In this study, the key attention of the researcher is paid to substantive issues rather than procedural or jurisdictional ones—that is, whether and how should contracts be regulated or are being regulated; rather than which public legal institution/s should be responsible for regulating them. Thus, the study does not examine issues of choice of law, etc, except insofar as these issues pose risks that can be allocated by the parties' contract. However, of necessity, there is a chapter on 'jurisdictional issues' discussing, in brief, some jurisdictional issues as provided for and determined under the UNCITRAL Model Law of E-Commerce 1996, Information Technology Act 2000, and some judicial decisions.

4. Insofar as statutes, statutory provisions, rules and regulations are concerned, the study mainly focuses on the laws, rules and regulation enacted/made in India. However, a comparison is made with the laws enacted in the United States, the European Union, and some other common law jurisdictions, wherever necessary. Nonetheless, this study does not provide a survey of all the laws enacted in these countries governing e-contracts. Only relevant provisions have been referred to (mentioned)/discussed.
Similarly, as regards the case laws, the study primarily cracks down on the Indian cases; however, of necessity, the researcher has also cited some leading judgments delivered by foreign courts in foreign jurisdictions (mainly in the US and the UK), carrying persuasive value.

1.6 METHODOLOGY
Research is a careful, diligent, concerted, and systematized investigation or experimentation for the acquisition of knowledge. Method is the way in which something is done, and methodology is the science and philosophy of the whole research process. In simpler words, the method or procedure a researcher follows in pursuing a research, and thereby describes, explains and predicts phenomenon/phenomena is what is called the ‘research methodology’. Since the nature of legal issues and the subject-matter of law is radically different from other sciences, therefore, the methodology of legal studies involves special rules, interpretations, criteria for admissible explanations as well as the research design, data collecting techniques (wherever applicable) and data-process routines.

The main approach of the researcher to pursue the present legal research is ‘Doctrinal’ (often referred to as theoretical, or pure-legal, or academic, or traditional/conventional) research. Within the main approach of doctrinal research, the methodology adopted for this study is analytical one, in so far as dealing with the existing laws on different aspects of e-contracts is concerned. It also has some characteristics of critical research method, since the researcher has studied the current laws and the present needs of the society, and found out the defects in the existing laws. The researcher has offered his suggestions to cure the existing defects. It also has some semblance of comparative approach, for the researcher has collated, examined, and has made a comparison between the notions, doctrines, statutes, rules and institutions which are found in India, the US, and some other common law countries. Thus, within the main approach of doctrinal research, the methodology adopted for this study essentially involves the use of several approaches (descriptive or exploratory, explanatory, critical, analytical, and comparative and functional) combined together.
1.6.1 Sources of Data/ Materials
The researcher has primarily relied and dependent upon primary source materials in the forms of different statutes, regulations, international instruments, and case laws; and has also relied upon secondary (external) sources including published work, such as Law Commission Reports, books, journals (including online journals), encyclopedias, research papers, research articles, websites, news-paper articles, etc.

The researcher has provided a list of important primary and secondary sources, he relied upon for the purposes of pursuing this study, in the bibliography.

1.7 CONCEPTUALIZATION
The results of this study have been stated in the form of concepts and conclusions, and are stated in the final chapter, i.e. Chapter-7 (Conclusion and Suggestions).

1.8 CITATION STYLE
A uniform style of citation has been followed throughout the work.

1.9 SURVEY OF LITERATURE
This research inevitably involves use of various statutes, case-laws, international instruments, books, treaties, journal articles, periodical articles, encyclopedias, dictionaries, other documentary materials in libraries and on the internet, etc. The researcher honestly and frankly admits the fact that he has not come across a great number of books and treaties on the topic, as the subject is relatively new. However, over here, he would wish to present a brief survey of some important literature, particularly some important books and treaties, and a few research papers/ articles on the subject. Statutory provisions and case-laws have been referred to and discussed/ analyzed at relevant places in different chapters. Although he has gone through other books and research papers/ articles as well on the topic of research also, yet survey is being presented only of a few of them.

Prof S V Joga Rao in his treatise Computer Contracts and Information Technology (Nagpur: Wadhwa & Company, 2005) examines, explains and provides comprehensive information relating to pertinent legislations across the globe.
Through first two chapters of this treatise, he introduces the reader to the meaning, premise and scope of information technology, and also to information laws and the fundamentals of information technology and information technology laws. The third and the fourth chapters provide a sneak preview into some of the existing legislations in relation to information technology in different parts of the world, including India. From chapter five to chapter nine, he has highlighted the significance of contracts in context of information technology, and has described the legal benchmarks that are required to be complied with while conducting business transactions through electronic medium. The last chapter lays emphasis on the need to protect personal information, and discusses the various legal issues and practices involved with the protection of data, and also explains diverse approaches adopted by different countries in this regard and also available models of legal or otherwise control.

Rodney D Ryder, besides writing a commentary on the Information Technology Act 2000, deals with the internet related legal issues in his book, Guide to Cyber Laws (New Delhi: Wadhwa & Company, 2003). He makes the reader understand certain basic legal and practical problems while a nascent business is still in the exploratory and planning stage; deals with the tax aspects of electronic commerce transactions; analyzes the legal aspects of B2B and B2C methods in Europe and their impact on Indian trading; points out the need for an insurance policy catering for losses arising from commerce conducted over the internet; and discusses various views regarding protection of personal data and privacy.

Justice Yatindra Singh in his book entitled, Cyber Laws (New Delhi: Universal Law Publishing, 2010) has judiciously dealt with e-commerce (digital signature and electronic governance). Through some important cases, he points out conflict of laws in connection with the jurisdiction, and says that we have to wait and watch, for the future holds the answer to these questions/problems. He also shows his concern regarding security and admissibility of electronic records, digital signature, and the computer print out in the court of law. He broadly discusses the position regarding reverse engineering, and what would be the position in case reverse engineering is specifically barred under contract even for the purposes permitted under section 52 of the Copyright Act. The chapters 'Intellectual Property Rights in Cyber Space'
and 'E-Commerce and Taxation' provide opportunity to the reader to get acquainted with certain practical problems which the world might face in future, and in fact, the world is facing some of them at present as well. Lastly, he deals with the right to privacy in the light of information technology. Overall, the book aptly discusses how some persons have been misusing the phenomenon of the internet to proliferate criminal activities in cyberspace, how such activities can be curbed through suitable law, and how a pressing challenge faces the cyber law regime in India. The book provides tangible suggestions regarding the manner in which the flaws, loopholes and ambiguities observed in certain provisions of cyber law can be tackled; and encourages the reader to engage with the length and breadth of the entire subject.

N Stephan Kinsella and Andrew F Simpson (General Editors) in *Online Contract Formation* (New York: Oceana Publications, 2004) have aimed to bring together the knowledge and insights of legal professionals from Europe, Asia, America to provide practical guidance for those forming contracts by electronic means. The book is divided into four parts. Part-1 discusses country-specific chapters summarizing the online contract law of key jurisdictions around the world. Part-2 contains sample agreements and checklists pertinent to contracting online. These are illustrative of documents that are presently in use. Part-3 consists of four general commentaries that deal with dispute resolution, basic contractual issues, jurisdiction in the European Union, and personal jurisdiction in the United States. And, Part-4 includes primary source materials.

Susan Singleton (Editor), in *E-Contracts* (Tottel Publishing, 2009), provides a comprehensive collection of contracts, policies and notices for e-business, with a full practical commentary provided throughout, and covers both the client and supplier perspective. It updates us with the key legislative and legal developments. It is in a looseleaf format and CD-ROM service, written by leading experts in this rapidly changing field. The general commentary in this work aims to provide an overview of the principal legal issues which arise in e-contracts. This work covers areas, such as, contract-formation principles, electronic signatures, jurisdiction and termination of contracts. The work also provides a number of precedents, which are of immense relevance to the readers, especially the practitioners and business entities.
The Law of Electronic Commerce (Melbourne: Cambridge University Press, 2009), authored by Alan Davidson, is a first-rate introductory text to the developing field of ‘cyber-law’, which can be taken to include a wide range of subjects, including: national electronic surveillance; privacy; defamation; and cybercrime. Davidson points to a developing body of international and domestic jurisprudence which unifies, builds upon and refocuses traditional legal doctrines under the mantle of electronic commerce and cybercrime law. Despite Davidson’s insistence that a discrete legal regime is evolving in the electronic environment, the style of his book does illustrate that cyber-law is a new forum for old rules derived from almost every area of the legal arena. For instance, domain name, which is a concept entirely unique to the online environment, yet in resolving domain name disputes counsels have argued pre-existing doctrines including various proprietary interests and the tort of passing off. Rather than attempting to restate existing principles of law, Davidson chooses to focus on how the electronic age has created new and interesting legal problems and the international, legislative and judicial responses to them. The book’s case list is relatively short and features a high proportion of case law from non-Australian jurisdictions, including New Zealand, the US, the UK, and India. Given the trans-jurisdictional nature of the subject matter, such an international focus is important, both for a proper understanding of the law, and the ability of domestic practitioners to draw on international examples in the absence of local precedent. The book is well structured with many of its 19 chapters logically flowing from one to the next. Contractual issues are covered in chapters 3–5, and conflict of laws is addressed briefly in chapter 11, entitled ‘Jurisdiction’.

Andrew D Murray in his research paper entitled, ‘Regulating Electronic Contracts: Comparing the European and North American Approaches’ (Foro de Derecho Mercantil Revista Internacional 2 (2004): 75-97), asserts that the development of online retailing (or e-tailing) is an essential element of the commercial development of Cyberspace and has provided the foundation of a flourishing online business community. The ability to enter into and perform contracts online is at the heart of this development. Without the certainty offered by a legal obligation to supply goods or services consumers may feel exposed, leading to faltering consumer confidence in
electronic commerce with potentially harmful economic consequences. This paper compares how the two leading e-commerce trade blocs, the European Union and the United States have dealt with these challenges. It also highlights the advantages and disadvantages of each and makes recommendations which may benefit Latin American nations in developing an e-contracting regime.

Ruth Orpwood, in the article entitled, 'Electronic Contracts: Where We've Come From, Where We Are, and Where We Should Be Going' (International In-house Counsel Journal Vol. 1, No. 3, Spring 2008, 455-466), aims at digging through some of the rubble created as the traditional world of contracts and the new frontier of e-commerce have collided. Ruth, in this paper, begins with a short description of the essential elements of a contract and general contract law principles. For perspective on how the law of contracts has adapted in the face of modernization and technological advances, the author looks to historical milestones such as industrialization and the use of different communication methods and technologies.

Making our way to the present, the author provides a brief and selective survey of Canadian and the US case laws dealing primarily with online contracting. A review of international and regional efforts and accomplishments in the areas of legislative harmonization, functional equivalency, and consumer protection has also been discussed. Finally, there are some suggestions on what is needed to improve upon the practice of electronic contracting for the future.

Avery Wiener Katz, in the essay entitled, 'Is Electronic Contracting Different? Contract Law in the Information Age' (<https://www.utexas.edu/law/academics/centers/clbe/wp/wp-content/uploads/centers/clbe/katz_is_electronic_contracting_different.pdf>), argues that the growth of electronic commerce reflects changes in the relative importance of various institutional transaction costs such as the costs of information and of searching for contractual partners. Accordingly, arrangements that were optimal or at least reasonably satisfactory under previous configurations of transaction costs may no longer be so under those configurations that will develop in the future. In this essay, Avery Katz sketches out some of the ways in which the doctrines and
regulations of contract law might need to change in an electronic setting, and offers an economic framework for evaluating such changes.

Amelia H. Boss, in the research paper entitled, 'Electronic Contracting: Legal Problem or Legal Solution?' (<http://www.unescap.org/tid/publication/tipub2348_part2iv.pdf>), says that questions about the legitimacy of electronic contracting have been satisfactorily resolved, to a great extent, both on a national and international basis. And, now electronic contracting is in the second phase, where newer, or some would say older, issues have surfaced. These issues are not necessarily unique to electronic commerce, but are critically important in the evolution of electronic market places. These issues concern a few key areas. The first issue is about assent, although it is clear that one can validly assent electronically. However, it is still not clear what substantive rules of assent govern. In particular, the question relates to what rules apply to the typical modes of contract formation in an electronic environment (shrink-wrap, click-wrap, and browse-wrap). In that context, an important issue is to what extent would there be policing of the terms of the resulting agreement. A second set of related issues concern what degree of consumer protection exists in an electronic environment. The third set of issues focus on the occurrence of error in the contracting process. The fourth set of issues are concerned with how does the law accommodate negotiable transfer documents that are paperless.

Andrew Murray, in his chapter 'Entering into contracts electronically: the real WWW' [in Edwards, Lilian and Waelde, Charlotte, (eds.) Law and the Internet: A Framework for Electronic Commerce (Oxford: Hart Publishing, 2000)], starts his discussion by outlining the significance of contract in general. While he says that the internet is the world's fastest growing commercial market place, he also states that at the heart of this development is the ability to contract electronically. According to him, the question how, when and where contracts are formed over the internet is no longer academic, it is an important commercial consideration, and therefore people will find in a few years that they enter into contracts over the internet as freely, and with as little thought, as they currently do in a bookshop or a café. As lawyers though we must ask the same questions of these new electronic contracts as we currently ask
of traditional contracts: when are they formed, were are they governed and what are the terms of the contract? These three questions have been revisited throughout this chapter, as the WWW of When, Where and What will prove to be increasingly important for the development of e-commerce.

Mark A Lemley, Mark A., in his article entitled, ‘Terms of Use’ (Minnesota Law Review, Vol. 91, 2006), tries to achieve three goals. First, to explain how courts came to enforce browse-wrap licenses, at least in some cases. Second, to suggest that if browse-wraps are to be enforceable at all, enforcement should be limited to the context in which it has so far occurred - against sophisticated commercial entities who are repeat players. Finally, the author argues that even in that context, the enforcement of browse-wraps creates problems for common practice that need to be solved. Business-to-business (b2b) terms of use are the modern equivalent of the battle of the forms. There is a need of a parallel solution to this battle of the terms. In the end, the author discusses some possible ways to solve this upcoming problem and some broader implications the problem may have for browse-wrap licenses generally.

Besides the afore-stated list of books and journal articles, the researcher has also heavily relied upon many other books and articles, a list of which is provided in the bibliography.

1.10 CHAPTERIZATION (Scheme of Chapters)
In order to accomplish the aims and objectives of this research endeavour, this study has been articulated in the following seven chapters:

1. Introduction
2. General Principles of Contract
3. Formation of Electronic Contracts: Contracts in the Context of Information Technology
4. Recognition and Validity of Electronic Contracts
5. Jurisdictional Issues in Electronic Contracts
6. Consumer Protection and Standard Form Contracting in Electronic Age

7. Conclusion and Suggestions