CHAPTER V

LEGAL VALIDITY OF E-CONTRACTS: A STUDY WITH SPECIAL REFERENCE TO CONSUMER CONTRACTS IN ONLINE SHOPPING

5.1 Introduction

One of the very important factors in the growth of e-Commerce is e-Contract and its legal validity. Faithfulness and sincerity is the first and fundamental principle of commercial law. However in the era of e-Commerce the definition of trust is being diluted; as ample of customers are being exposed to the alluring advertisements made by e-vendors and some innocent customers are being betrayed due to the fake promises made by these e-vendors. e-Contract forms a very thin line between trust and being deceived as trust is something which cannot be partial. Today’s world is the ‘e-world’ or ‘the virtual world’ powered by e-speed, digital innovation and borderless expanse, where money replaces time. The manmade superhighway of Information and Communication Technology has provided a fertile ground of ‘e-age information society’ wherein traditional principles need to be reframed.\(^1\) Therefore, this chapter portrays the essential elements of a legal contract in physical commerce and its application on contractual transactions in e-Commerce. An analysis of technical intricacies and plausible principles that govern online contract in the Indian Contract Act, 1872 and the Information Technology Act, 2000 (2008) is made. This chapter sketches out the position of consumers in e-Contract at the time of online shopping.

Information technology governs different facets of our daily lives. Information technology has been instrumental in strengthening legal and law enforcement systems, promoting the service sectors and revolutionizing the marketing.\(^2\) Most people think that a contract is a formal written document which has been signed by the parties in the presence of independent witnesses. If all contracts took this form there would be little room for argument about whether the parties had entered into a legally binding

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agreement, the obligations they had undertaken or the consequences of failing to carry out the terms of the agreement. In practice, however, few contracts are like this. The vast majority of contracts are entered into without formalities.³

“Man is born free, but everywhere he is in chains” Jean Jacques Rousseau

In day-to-day life parties may be unaware of the legal significance of their actions like: buying a newspaper, taking the bus or train, agreeing to complete an assignment by a particular date and getting a cup of tea at break time etc., etc. Can we term all these transactions as ‘Contracts”? It is probably felt that some of them were never intended to have legal consequences. So, what then is a Contract? When is a Contact formed? What are the obligations of the parties to a Contract? What happens if either party breaks the agreement? The answers to these questions are provided by the Law of Contract.⁴

The foundation of the present-day law of Contract was laid in the 19th century. This period in our history has seen the rapid expansion of trade and industry, and inevitably, an increase in the volume of commercial disputes. One of the most effective innovation in the commercial world has been launched under the shadow of e-Commerce-that is ‘online shopping’. Nature of formation of contract in an online business environment has undergone a drastic transformation. The validity of an ‘online contract’ determines the recognition and protection to the rights of consumers in an online shopping. The legal recognition of ‘online contract’ is based on the existence of two major foundations, namely (1) Freedom of Contract and (2) Equality of Bargaining power.

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⁴ Law of Contract: Contract is considered as the foundation of any commercial law. In the case of dispute, businessmen can turn to the courts for a solution. Gradually, the judges developed a body of settled rules which reflected both the commercial background of the dispute from which they arose and the prevailing beliefs of the time. The dominant economic philosophy of the 19th century was laissez-faire individualism-the view that the State should not meddle in the affairs of business and that individuals should be free to determine their own destiny. This philosophy was mirrored in the law of Contract by two assumptions: (1) Freedom of contract (2) Equality of Bargaining Power. The judges assumed that everyone was free to choose which contract they entered into and the terms on which they did so. If negotiations could not produce an acceptable basis for agreement, the parties were, in theory, free to take their business elsewhere. The parties were deemed to be of equal bargaining strength. The judges’ assumptions produced an acceptable legal framework for the regulation of business transactions. Parliament played its part by codifying the common law of particular relevance to the businessman, e.g. the law relating to contract for the sale of goods became the Sale of Goods Act, 1893, now, the Sale of Goods Act (1930) 1979 and The Indian Contract Act, 1872. See: Denis Keenan and Sarah Riches, 1995, p. 205.
an online contract, everyone is free to choose contracts they entered into and the terms on which they do so. However, the parties are not on equal bargaining platform.\textsuperscript{5}

Generally, contracts may be divided into two broad categories (1) Special Contracts\textsuperscript{6} and (2) Simple Contracts.\textsuperscript{7} The ease and flexibility of communicating across electronic networks allows users to enter into agreements with each other with little difficulty.\textsuperscript{8} In cyberspace, the formation of a contract is indeed an unsettled issue while the rules on formation of contracts are well established in theoffline or physical world.\textsuperscript{9} There are significant issues that call for enunciation of legal position in the electronic world. This chapter is focused on practical differences between contracting offline and contracting in online world. An emphasis has also lain down on the weak position of consumers in an online contracts that they make in online shopping.

\textbf{5.2 Formation of Contract in Physical World or Offline Contracts}

In the field of trade and commerce, Law of Contract is the first commercial law to develop. This is the very foundation of business law. Law of Contract is universal because the contemporary human society is based on exchange of goods and services. Law of Contract is founded on the principle that individuals are the bearer of rights. Individuals bargain with each other to get into agreements for exchange of goods and services. If abiding these agreements became a matter of individual discretion, the entire social and economic order founded on contracts would collapse. Thus, the State has recognized the agreements, enforced it and given remedy to an aggrieved party. In all systems of law, contracts are founded on this principle.\textsuperscript{10}


\textsuperscript{6} Special Contract: Special contracts are formal contracts. These are also known as ‘Deeds’. Formerly, these contracts had to be in writing and ‘signed, sealed and delivered.’ The formalities now are that the signature of the person making the deed must be witnessed and attested.

\textsuperscript{7} Simple Contracts: Contracts which are not deeds are known as simple contracts. They are informal contracts and may be made in any way-orally, writing or they may be implied from conduct.


\textsuperscript{9} Karnika Seth, 2009, p. 75.

The Law of Contract does not lay down a number of rights and duties which the law will enforce; it consists of rather a number of limiting principles subject to which the parties may create rights and duties for themselves which the law will uphold. The law shall not lay down absolute rights and liabilities of the contracting parties; rather it shall lay down only the essentials of a valid contract.

Sir William Anson

A contract has been defined in a variety of ways. Essentially it is an agreement that is enforceable in the court of law.\(^1\) A contract is a legally binding exchange of promises or agreement between parties that the law will enforce. Law of Contact is based on the Latin phrase *pacta sunt Servanda*.\(^2\) The essential requirements for creating a valid contract are as follows:

5.2.1 Offer

5.2.2 Acceptance

5.2.3 Lawful Consideration

5.2.4 Intention to create legal relations

5.2.5 Capacity of Parties

5.2.6 Meeting of the minds of Parties: Consensus-ad-idem

5.2.1 Offer

In the formation of a valid contract, offer is one of the very important requirements. An offer is an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the

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\(^{1}\) According to the Indian Contract Act 1872: Section 2(h) defines “Contract” as agreement enforceable by law.

\(^{2}\) Pacta Sunt Servanda means: Pacta Sunt Servanda is a Latin that means “agreements must be kept”. It is a basic principle of civil law and of international law. In its most common sense, this principle refers to private contracts, stressing that contained clauses are law between the parties, and implies that non-fulfilment of respective obligations is a breach of the pact. The general principle of correct behaviour in commercial praxis is a requirement for the efficacy of the whole system, so the eventual disorder is sometimes punished by the law of some systems even without any direct penalty incurred by any of the parties. With reference to international agreements, “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Thus, Pacta Sunt servanda is based on good faith. The only limit to pacta sunt servanda is the peremptory norms of general international law, called *jus cogens* (compelling law). See: Retrieved from <http://www.sccs.swarthmore.edu/users/08/ajb/tmve/wiki100k/docs/Pacta_sunt_servanda.html> visited on 6 August, 2012.
person to whom it is addressed, ‘the offeree’. An invitation to treat is not an offer, but an indication of a person’s willingness to negotiate a contract. Essentials elements of a valid offer are: (1) There must be two or more than two parties, (2) The offer must be communicated to the offeree, (3) The offer must represent the willingness of offeror. Mere telling the plan is not an offer, (4) The offer must be made with a view to obtaining the assent of the offeree, (5) A statement made in joke does not amount to an offer, (6) An offer may involve a positive act or abstinence by the offeree, (7) Mere expression of willingness does not constitute an offer, (8) Offer must be certain, definite, vague, unambiguous and uncertain, (9) Offer must be capable of creating legal relation. A social invitation does not create legal relation, (10) Offer may be expressed and implied, (11) Offer must not thrust the burden of acceptance on the offeree and (12) Offer must be distinguished from invitation to offer.

The ‘Mailbox Rule’ or the ‘Postal Acceptance Rule’ is a term which determines the timing of acceptance of an offer when mail is contemplated as the medium of acceptance. The general principle is that a contract is formed when acceptance is actually communicated to the offeror. However, the mailbox rule is an exception. It provides that the contract is formed when the letter of acceptance is placed in the mailbox. An offeror may revoke an offer before it has been accepted, but the revocation must be communicated to the offeree, although not necessarily by the offeror. If the offer was made to the entire world, such as in Carlill v. Carbolic Smoke Ball Company case, the revocation must take a form that is similar to the offer.

Section 2(a) of the Indian Contract Act 1872 defines ‘Proposal’.
Fisher v. Bell (1961) 1 QB 394, (1960) 3 All ER 73. It is an English law case concerning the requirements of offer and acceptance in the formation of a contact. The case established that, where goods are displayed in a shop together with a price label, such display is treated as an invitation to treat by the seller, and not on offer. See: Karnika Seth, 2009, p.76.
Carlill v. Carbolic Smoke Ball Company case, (1893) 1QB 256. If the offer is one that leads to a unilateral contract, then unless there was an ancilliary contract entered into that guaranteed that the main contract would not be withdrawn, the contract may be revoked at any time. See: Karnika Seth, 2009, p.77.
5.2.2 Acceptance

Acceptance is a final and unqualified expression of assent to the terms of an offer. Signing of a contract is one way in which a party may show its assent. The essential element is that there must be evidence that the parties have an objective perspective engaged in conduct manifesting their assent.\(^{18}\) There are some rules dealing with the communication of acceptance. These rules are as follows: (1) Acceptance must be absolute and unqualified, (2) Acceptance must be communicated, (3) Offer must be made by offeror, (4) An offer can only be accepted by the offeree, (5) An offeree is not bound if another person accepts the offer on his behalf without his authorization, (6) If the offer specifies a method of acceptance (by post or fax) it must be accepted in that specified method and (7) Silence cannot be construed as acceptance.\(^{19}\) The ‘Mirror Image Rule’ states that if one has to accept an offer, one must accept that offer exactly without modifications. Counter offer kills the original offer.\(^{20}\) Therefore, acceptance must be a volition act, performed freely, deliberately, and with the intent to enter a contract on the terms of the offer.\(^{21}\) General rule says that it must be as per the manner prescribed by offeror. If no mode is prescribed in which it can be accepted, then it must be in some usual and reasonable manner. If there is deviation in communication of acceptance of offer, offeror may reject such acceptance by sending notice within reasonable time. If the offeror doesn’t send notice or rejection, it is presumed that he has accepted acceptance of offer. If the offer prescribes the time limit, it must be accepted within specified time. If the offer does not prescribe the time limit, it must be accepted within reasonable time.

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\(^{19}\) Felthouse vs. Bindley (1862) 142 ER 1037.

\(^{20}\) Section 7(2) of the Indian Contract Act, 1872 explains Counter Offer as an acceptance with a variation i.e. introduction of new terms is no acceptance. It is simply a counter proposal; which must be accepted by the original promisor before a contract is made. A counter offer puts on end to the original offer and it cannot be revived by subsequent acceptance by the acceptor unless it is renewed. See: U.P. Rajkiya Nirman Nigam Ltd. vs. Indure Pvt. Ltd., AIR 1996 SC 1373.

\(^{21}\) Section 7 of the Indian Contract Act, 1872 states that Acceptance must be absolute.
5.2.3 Lawful Consideration

Consideration constitutes the very foundation of the contract. An agreement not supported by consideration is void. Consideration is the cause of the promise and its absence would make the promise a gratuitous or bare promise (*nudum pactum*). Pollock defines consideration as, “the price for which the promise of the other is bought and the promise, thus, given for value is enforceable.” Consideration for a particular promise exists where some right, interest, profit or benefit accrues to the promisor as a direct result of some forbearance, detriment, loss or responsibility that has been given, suffered or undertaken by the promisee. There are some rules regarding consideration as: (1) Consideration must be referred to the promise, (2) Consideration must move at the desire of the promisor, (2) Consideration may move from the promisee or any other person who is not a party to the contract, (3) Consideration may be past, present and future, (4) Consideration should be real and not illusory, (5) Consideration must not be unlawful, immoral or opposed to public policy, (6) Consideration need not be adequate, (7) Performance of public law duty is not consideration for a promise, (7) Performance of an existing obligation under a contract owed to the promisor is not consideration for a promise.

Under common law, consideration (money) is very important, however, civil law systems takes the approach that an exchange of promises alone is the correct basis.

5.2.4 Intention to create Legal Relations: Intention to be legally bound by Contract

In the Indian Contract Act, 1872 there is a provision requiring that an offer or its acceptance should be made with ‘the intention of creating legal relationship’. The intention of the parties is to be ascertained from the terms of the agreement and the surrounding circumstances. Consent of the parties must be genuine. Consent means

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23 Consideration is defined under Section 2(d) of the Indian Contract Act, 1872. Section 25 of the Indian Contract Act, 1872 deals with agreement without consideration.


25 Chinnaya’s vs. Ramayya (1882) I.L.R. 4 Madras 137.

both the parties must be agreed upon same thing in the same sense. Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.\textsuperscript{27} The test of contractual intention is objective not subjective. What matters is not what the parties had in mind, but what a reasonable man would think and do in the circumstances. Merely because the promisor contends that there was no intention to create legal obligations would not exempt him from liability. In commercial agreements there is a presumption that parties intend to be legally bound. However, there are many kinds of domestic and social agreements which are unenforceable on the basis of public policy. \textsuperscript{28}

\subsection*{5.2.5 Capacity of Parties}

Section 10 of the Contract Act requires that the parties must be competent to contract. Section 11 defines persons who are competent to contract. The parties to a contract must have capacity (legal ability) to make a valid contract. Section 11 of the Indian Contract Act specifies that every person is competent to contract provided: (i) He/ She is of the age of majority according to the law which he/she is subject, (ii) He/ She is of sound mind and (iii) He/ She is not disqualified from contracting by any law to which he is subject. Insolvents and convicts are not competent to contract.\textsuperscript{29} The minor,\textsuperscript{30} persons of unsound mind\textsuperscript{31} and persons disqualified by law are incompetent to contract.

\subsection*{5.2.6 Meeting of the Minds of Parties: Consensus ad idem}

The Latin term \textit{consensus ad idem}, an “agreement of the minds” is used to describe a situation where people fully understand all the terms of contract and their role in it. Consensus or agreement on a contract is considered as a necessary condition of a valid contract in many legal systems. In a written contract, the presence of clauses spelling out the specifics of the contract show that a \textit{consensus ad idem} is reached during the

\textsuperscript{29} Section 11 of the Indian Contract Act, 1872.
\textsuperscript{30} In Moharibibi vs. Dharmodas Case, (1903) 30 Calcutta 539. It is well settled that a minor’s agreement is absolutely void. A minor cannot make a premise enforceable in law held in Raj Rani vs. Prem Adib AIR 1949 Bombay 215.
\textsuperscript{31} Section 12 of the Indian Contract Act, 1872.
development of the contract, as anyone who signs the contract must have read and understood the terms. When people develop a contract, an offer is extended and accepted, and the terms of the offer are worked out. This is the stage where the consensus ad idem comes in, as the parties to the contract discusses the specifics, details, and focus on finalizing a contract on which all are satisfied. The final qualification needed for validity is legality of the contract itself because if the contract is for something illegal, it cannot stand up in court. To consummate a contract there must be mutuality as well as a meeting of the minds of parties. ‘Mutuality’ means equality of rights between the parties. Either party should have equal right to enforce the contract. ‘Meeting of minds’ means that the parties have by exchange of offer and acceptance are well aware with each other’s consent. A contract, like a tort, is not unilateral.

5.3 Formation of Contracts in Cyberspace or Online Contracts

In the lap of cyberspace, new communication methods have been evolved in society via Internet i.e. e-mail and commercial web-sites etc. Before the advent of Internet, business communities used to execute their contracts by Electronic Data Interchange (EDI). Electronic data interchange means the electronic transfer of information from computer to computer by using an agreed standard to structure the information. It facilitates direct electronic exchange of business information between computers in computer processable formats and is generally used by the parties for business relationship. These parties, before establishing any contractual relationship, generally exchange an agreement called as “trading partner agreement”. Trading partner agreement includes the details about the warranties, disclaimers, liabilities and the relevant rules that are applicable in case of dispute. EDI transmission may be simultaneous when principal trading partners are linked directly. EDI communication is

generally established through Value Added Networks (VAN)\textsuperscript{37} or service providers. Where parties are linked directly, it is argued that ‘receipt rule’ should apply and when they are connected by intermediaries then ‘postal rule’ should apply.\textsuperscript{38} In this present research the focus of the researcher is on Consumer Protection in online shopping. Therefore validity of online contract between Business–to–Business category is not discussed.

Under the traditional common law of contract there are four essential requirements to an offline contract namely; (i) Offer; (ii) Acceptance of the offer; (iii) Consideration (iv) Intention to create legal relations. In cyberspace, these terminologies are popularly known with a prefix ‘e’. In online valid contract, the four essential requirements are: (i) e-Offer, (ii) e-Acceptance (iii) e-Consideration; (iv) Intention to create legal relationship.\textsuperscript{39} On the path of e-Commerce contract formation, the first step is customer registration. This is adapted both in Business to Business and Business to Consumer environments. This enables both the vendor and customer to establish a formal relationship and the customer is deemed to have read and agreed to adhere to security warnings, payment conditions, terms of use and privacy policies of the e-Commerce website owner. It is important to read the terms and conditions determining the transaction. Generally user scrolls down the terms and conditions and confirms that he has read and accepted them by clicking on ‘I Agree’ button. In such cases the court normally holds the users to be bound by the agreed terms and conditions in e-Contacts. Parallel to the real world commercial practices, consumers enter into e-Commerce relations and arbitration agreements using mass market consumer contracts. Mass-market consumer contracts are better known as either standard form contracts or

\textsuperscript{37} Farooq Ahmed, \textit{Cyber Law in India (Law on Internet)}, New Era Law Publications, Delhi, 2008, p. 269. Definition of ‘Value-Added Network’ (VAN)-VAN is a private network used by a company primarily for routing, storing and delivering electronic data interchange (EDI) messages. A value-added network (VAN) also provides other services such as message encryption, retransmission and support. VANs may be operated by large companies for efficient supply chain management with their suppliers, or by industry consortiums and telecom providers. Retrieved from <http://www.investopedia.com/terms/v/value-added-network.asp#axzz22qvP17q> visited on 7 August, 2012.


contracts of adhesion. Mass-market consumer contracts are pervasive in e-commerce.\footnote{40} Prior to the formalization of the e-contract, the consumer is asked to confirm that he has read relevant terms and conditions and accepts them, it would clearly indicate his intentions to create legal relations. In case the consumer does not proceed the transaction normally through clicking the ‘I Accept’ or ‘I Agree’ button, the transaction stands cancelled or does not proceed ahead. Payment through net-banking or credit cards is common mode of effecting consideration online. The websites use PayPal, Ccavenue and other modes to effect payment online.\footnote{41} In online shopping, consumer enters into e-contracts with vendor through different modes like: e-Contracting through e-Mail, Contracts formed through World Wide Web (www.), Click Wrap Agreements and Shrink Wrap Agreements. These modes are explained as under:

5.3.1 e-Contracting through e-Mail

Electronic-communication is generally instantaneous. The text of an e-mail message is simply the digital equivalent of a letter. One may attach things to it, it needs to be addressed and it needs to be sent to the desired recipient. Anyone interested in communicating business details through e-mail needs to have e-mail address for which he has to register himself/herself with Internet Service Provider.\footnote{42} Once the registration is complete, by filling up the electronically made available form, an electronic mail box (inbox) along with the address is available to the user. The person wishing to send an offer to another, types the desired contents of the offer on his system with an e-mail


\footnote{41} Karnika Seth, 2009, pp. 81-82.

\footnote{42} Internet Service Provider: It refers to a company that provides Internet services, including personal and business access to the Internet. For a monthly fee, the service provider usually provides a software package, username, password and access phone number. Equipped with a modem, he/she can then log on to the Internet and browse the World Wide Web and use Internet to send and receive e-mail. For broadband access he/she typically receives the broadband modem hardware or pays monthly fee for this equipment that is added to his/her ISP account billing. In addition to serving individuals, ISPs also serve large companies, providing a direct connection from the company’s networks to the Internet. ISPs themselves are connected to one another through Network Access Points (NAPs). ISPs may also be called IAPs (Internet Access Providers). Retrieved from <http://www.webopedia.com/TERM/I/ISP.html> visited on 7 August, 2012.
address of the party to whom he/she intends to send the offer. The message is electronically transmitted by pressing “the send button” to the service provider of the sender, and, is then forwarded to the recipient’s provider who puts it in the recipient’s mailbox where it is saved. Placing e-mail in the recipient’s mailbox does not enable him to know the contents of the message. This is possible only when the recipient checks his/her mail box from his/her own ID (user name) and password-similarly the sender does not know whether the recipient has received the message.\textsuperscript{43}

e-Mail is capable of performing all the functions of normal mail. e-Mail can be used to send advertisements as well as offers and acceptances. However, there are some technicalities which complicate comparison between standard mail delivery systems and electronic mail delivery system. First, such e-mail message is split into ‘packets’ which take individual paths to the recipient’s computer. The message text is not sent as an uninterrupted whole. Second, e-Mail messages are generally instantaneous, while letters are not. This can be disputed, as it is quite possible for an e-mail to be lost for a host of reasons such as system crash.\textsuperscript{44}

The general postal rule would not be applicable to all e-communications.\textsuperscript{45} One of the pivotal issue of e-contracting is ‘when is a message considered sent or received when it is transmitted through e-mail? It is settled that for ‘dispatch’, it occurs when a message enters a system outside the control of the sender. For ‘receipt’ a system of designating specific electronic mail boxes are receiving points. A message is said to be received by such designated mail box when it enters the system. If there is no designation, it is also deemed received when the message enters the system of the recipient. If the message is sent to the mail box other than the designated, it is received when the receiver retrieves the message.\textsuperscript{46} In e-contracting though e-mail another issue to ponder upon is the place of dispatch and receipt of a message. It is settled that the place of dispatch and receipt would be the regular place of business or residence of the sender and the recipient.

\textsuperscript{43} Farooq Ahmed, 2008, p. 257.
\textsuperscript{44} Yee Fen Lim, Cyberspace Law; Commentaries and Materials, Oxford University press, New Delhi, 2007, p. 71.
\textsuperscript{46} Karnika Seth, 2009, p. 88.
respectively, regardless of actual place of receipt.\textsuperscript{47} Electronic communications by e-mail are not directly sent from the offeror to the offeree and contracting parties are not connected directly as it involves several mail servers and there is a strong element of “store and forward”.\textsuperscript{48} The recipient will be unaware of the message until he checks his/ her inbox at the provider’s server that is possible only sometime after delivery.\textsuperscript{49} It is not possible for the sender to know whether and when an e-Mail was received and whether it was received in an original form or was modified or entirely changed. The attributes of e-mail reflect that e-mail communications are more akin or closer to non-instantaneous means of communication. Therefore, e-mails are more suitable for the application of the ‘Postal Rule’.\textsuperscript{50}

\textbf{5.3.2 e-Contracts formed through World Wide Web (WWW)\textsuperscript{51}}

The World Wide Web (www) service allows a customer to place an order for goods or services in two ways: (1) The Supplier’s non-interactive commercial web page popularly known as “Digital Shop Window” carrying the details of the goods or services available that can be retrieved by the customer. After making choice, he can place an order by e-mail.\textsuperscript{52} (2) The suppliers maintain a website which along with the business detail displays online order form. The customer interested in making purchases has to fill up the form. The customer comes automatically in contact with the supplier’s web server.\textsuperscript{53} The communication of acceptance via a website represents a reverse scenario of e-mail. The parties are connected directly as no-mail server or intermediary is involved. The communication is almost simultaneous and parties know whether their message has been received or not. If there is a transmission error, a message reading “server not responding” will automatically appear on the sender’s system which will

\textsuperscript{47} UNCITRAL Model Law, Article 15 provides the principles that clarify when and at which place is the dispatch and receipt of data messages considered to take place.


\textsuperscript{51} Farooq Ahmed, 2008, pp. 257-258.


enable him to know that the message has not been received. Due to instantaneous nature of the web-communications applications the ‘Receipt Rule’ is applicable.54

5.3.3 e-Contract by Click-Wrap Agreements

Click-Wrap agreements are terms set out on a web page on something similar in which the other party is requested to indicate acceptance of the terms set out by clicking on a box on the screen.55 Click-Wrap agreements present the consumer with a choice. The consumer is free to read the terms of the license and decide whether she/he wants to abide by its terms. Because ‘Click -Wrap’ agreements are interactive and demand a response from the consumer, they are enforced.56

Click-Wrap license must meet the criteria for enforceability of a unilateral form of contract. The first case in which a court upheld the validity of Click- Wrap agreements was *Hotmail Corporation vs. Van $ Money Pie Inc*.57 In this case Hotmail brought suit in federal court against customers who were sending spam messages and falsifying e-mails to make it appear that the spam originated from Hotmail account. Hotmail alleged that these actions were a violation of the terms of service agreement that each customer must assent to when opening on email account. The court held that the Hotmail was likely to succeed on its breach of contract claims. It is landmark case because it held that terms of service contract in click-Wrap format could be enforceable in court. Another court was more explicit in its reasoning relating to the validity of Click-Wrap agreements in *i. LAN Systems, Inc. vs. Netscout Service Legal Corporation*.58 In this case, i. LAN provided a network monitoring services to customers and purchased software from Netscout. Netscout and i. LAN signed an

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55 Click Wrap agreements are often included in software downloads and are present on many websites. They contain proprietary rights provisions which state that the information contained in the licensed software cannot be copied or disclosed without the licensor’s permission and prevent the licensee from selling or otherwise disposing of his/her copy of the software.


agreement allowing i. LAN to resell Netscout’s software to customers. However, i. LAN wanted to rent the software to customers. This practice Netscout claimed was not allowed under the Click-Wrap license contained in the software itself. The law point was whether Click-Wrap licenses as a rule were enforceable? The court held that they were and enforceable by clicking on ‘I agree’ and i. LAN had consented to the terms. The Court held that the ‘Click-Wrap’ acceptances of offers or agreement were not invalidated by the earlier purchase order agreement between the parties. Click-Wrap Contracts are enforceable under the Uniform Computer Information Transactions Act (UCITA). The UNCITRAL Model Law on Electronic Commerce (1996) in Section 11 gives statutory recognition to Click-Wrap license where it says that an offer and acceptance can be expressed by data messages which include information generated, sent, stored or received by electronic, optical or similar means, but limited to Electronic Data Interchange (EDI), e-mail telegram, telex or telecopy.

5.3.4 e-Contract by Shrink Wrap Agreements

“Shrink-Wrap License Agreements” have been an integral part of software transactions. It is generally known that Shrink-Wrap licenses became a feature of the computer market by the early 1980’s and their increased usage paralleled the software industry’s movement from primarily customized software packages and agreements to a mass-

59 Anunya Singsangob, “A Validity of Shrink-Wrap and Click-Wrap License Agreements in the USA: Should we follow UCITA?, p. 25. Retrieved from <http://legalaid.bu.ac.th/files/articles/A_VALID_OF_SWL.pdf> visited on 7 August, 2012. Click-Wrap Contracts are enforceable under the Uniform Computer Information Transactions Act (UCITA) if three requirements are satisfied: (1) The licensee must have reason to know that additional contact terms will be proposed after the initial agreement; (2) the licensee must be given the right to return the product at the licensor’s cost; (3) The licensee must be compensated for reasonable costs of restoring the system if it is altered by the installation of license terms for review.

60 The UNCITRAL Model Law on Electronic Commerce (1996) in Article 11 states the Formation and validity of contracts: 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. Retrieved from <http://www.uncitral.org/pdf/english/texts/electcom/pdf/05-89450_Ebook.pdf> visited on 7 August, 2012.

market mode of software delivery. The word “Shrink-Wrap” refers to the clear plastic wrapping that seals the software box and through which buyers can read the license agreement. The typical “Shrink-Wrap License Agreement” is a single piece of paper containing the license terms wrapped in cellophane or transparent plastic along with the computer software installation diskettes or the owner’s manual. Sometimes the license is simply put in the box along with the software and the owner’s manuals. End users will be bound and will be considered to have agreed with the license if they have tear open the package or they have used the software. If end users do not agree with the terms of the licensing agreement, they can return the unopened package for a full refund to the retail store from which they obtained the software.

Thus, the Shrink-Wrap Agreements are typically agreements printed on a box in which software is sold and the opening of the box mean the use of the software. The validity of Shrink-Wrap Agreements is in doubt. Shrink-Wrap license has met with varying reactions by the courts. Such contracts can be regarded as contracts of adhesion. In principle, there is nothing wrong with such contracts. However, the courts have a tendency to look at such contracts more strictly because free bargaining is not applicable in these contracts.

5.4 Legal Validity of Online Contracts in India: An Overview of Incidental Problems

In general, contracts provide the basic premise for any commercial or trading activity. Unless an enforceable contract is concluded, no commercial transaction can take place either in the brick world or in the click world. The technical intricacies and the dynamic processes involved in electronic commerce call for an analysis of the plausible principles that govern online contracts. An analysis of online contracts addresses the incidental problems that arise out of e-Commerce and its various processes.

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64 Under the Uniform Civil Code, Article 2 (i): Creation of Contract by Conduct is Recognized: “A Contract for the sale of goods may be made in any manner sufficient to show agreements, including conduct by the parties, which recognizes the existence of such a Contract”.
65 Karnika Seth, 2009, p. 82.
5.4.1 e-Offer and e-Acceptance in Online Contract

In order to ascertain whether a valid online contract is feasible or not, the first focus of this study is on ascertaining how an offer is originated and how it is communicated. The distinction of contracts in the click world as compared to contracts in the brick world is that in an online contract, it is very likely that parties may be separated by distance when the contract is concluded and the communication of offer and acceptance may also not happen contemporaneously. At the same time the very nature of Internet contract is that the communication is almost instantaneous.\(^{67}\) In physical world, the classic rule of the law of contract that normally applies in a situation where the parties are at a distance is popularly known as the ‘Mailbox Rule’ or the ‘Postal Rule’.\(^{68}\) However, the mailbox rule cannot have blanket application to all situations of online contract.\(^{69}\)

As a general rule acceptance must be actually received by the offeror. This rule commonly called as ‘Receipt Rule’ was modified in the 19\(^{th}\) century. The new rule called ‘Postal Rule’ or ‘Mail Box Rule’ was formulated in response to the delay that occurred when parties attempted to conclude contract at a distance in the early industrial period.\(^{70}\) By virtue of the ‘Postal Rule’, a complete contract comes into existence when the properly stamped and addressed letter is put in the course of transmission so as to be out of the power of the acceptor and it is immaterial whether that letter reaches the offeror or not. This rule has an obvious advantage for offeree as he/she will not be responsible for delay, instead the burden of uncertainty of waiting lies on the offeror.\(^{71}\)

When the instantaneous means of communication came into existence, it was initially


\(^{68}\) Section 4 of the Indian Contract Act, 1872: The communication of a proposal is complete when it comes to the knowledge of a person to whom it is made. The communication of an acceptance is complete -as against the proposer, when it is put in a course of transmission to him so it is out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. The communication of a revocation is complete -as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

\(^{69}\) Raghavendra S. Srivatsa and Sukruta R., 2004, p. 70.


\(^{71}\) Farooq Ahmad, 2008, p. 266.
thought that the ‘mailbox rule’ or ‘postal rule’ is applicable to such communication also. However, in *Entores vs. Miles for East Corporation Ltd.*,\(^{72}\) it was decided by Lord Denning that telex is a “virtual instantaneous” form of communication which when used makes ‘mailbox rule’ inapplicable. It was further elaborated that in instantaneous means of communication “receipt rule” applies and contract comes into existence where acceptance is received. The rationale behind this rule is that the offeree will always know whether his acceptance has been received and can react immediately to any faults or misunderstanding.\(^{73}\) This rule was confirmed by the House of Lords in *Brinkibon Ltd. vs. Stahag Stahl and StahlwarenhandelsgesellschafmbH*\(^{74}\). It is observed by the court that although it is a sound rule, it is not a universal rule.\(^{75}\) It was further observed that in many situations this rule may not apply and while, making any decision regard shall be on the intention of the parties and sound business practice. In *Bhagwandas Goverdhandas Kedia vs. Girdharila Parshottomdas and Co.*,\(^{76}\) the rule of instantaneous means of communication laid down in *Entores case* was followed by Supreme Court. The Apex court confined the operation of Section 4 to the postal communication and held that in case of instantaneous means of communication, the contract is concluded where acceptance is received. The paradox is that all electronic communications may not be as instantaneous as popularly believed. Depending on the given situation, these communications may or may not be instantaneous. Thus, they occupy a functional position somewhere between the traditional letter and telephone communications.\(^{77}\)

Communication in Cyber-world has several dimensions.

On the basis of nature of these communications in cyberspace, the conclusion of contract and its validity varies. These are discussed in detail as follows:

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\(^{72}\) 1955 2 Q.B. 327.

\(^{73}\) Even after the Entores decision, Justice Hidayatuallah of Indian Supreme Court held that Section 4 of the Indian Contract Act, 1872 is flexible enough to cover instantaneous means of communication. See: Farooq Ahmed, 2008, p. 267.

\(^{74}\) (1983) 2 AC 34 House of Lords.


\(^{76}\) AIR 1966 SC 543.

\(^{77}\) Farooq Ahmed, 2008, p. 269
5.4.1.1 Simple Communication between two Computers

When two computers are connected with each other and the form of communication is
direct communication between two computers, it does not attract the mailbox rule. The
sole reason is that no third party intervenes for such communication. A message is sent
from one computer to another on the same network. This is similar to standard
telephonic communication where users control the actual communication between
themselves. The application of the mailbox rule is ruled out in this case as the
eventuality of the acceptance leaving the offeree and being entrusted to a third party
does not exist. This is the simplest form of online communication that does not pose
much of a problem as the offer and the acceptance are generated and communicated
between the companies which are located in the same place and in the same jurisdiction.
In such case the contract is concluded at a place where both the offer and the acceptance
is originated and communicated.78

5.4.1.2 Communication through Common Server or Servers

The second situation that could be visualized is communication that happens between
computers that are connected through a common server. This situation falls within the
framework of the traditional principle of the ‘Postal Rule’ as any communication that is
generated and communicated between these computers inter-se has to pass via the
common server. The server is the electronic equivalent of the postman and the moment
a message, either offer or acceptance, is generated and communicated through a
computer it has to pass through the server in order to reach the destination. In such a
case, the ‘Mailbox Rule’ applies and the acceptance is deemed to have been
communicated the offeree the moment it leaves his computer.79 The fact that the
acceptance may not have been instantaneously communicated but only has reached the
offeror’s computer or computer system does not alter the binding nature of the contract.
The acceptance is deemed to have been communicated to the offeror the moment the
acceptance leaves beyond the control of the offeree although it may exist on the server
before it is actually delivered to the computer system of the offeror.80

80 Retrieved from <http://www2.jura.uni-freiburg.de/institute/izpr1/pdf/Gastprof.%202012/
5.4.1.3 Communication through Multiple Servers

In this form of communication, messages are exchanged among computers which are connected to different servers. In this situation, once a message is generated and communicated from a computer connected to a particular server, the message is beyond the control of the person from whom it originated. This does not necessarily mean that it is instantaneously communicated to the destination. In a situation where computers are connected to different servers, the application of the mailbox rule may not be appropriate. The blanket application of the mailbox rule to such a situation would be unfair and would not serve the purpose underlying the classical doctrine of the ‘Mailbox Rule’. The intricacies involved in the communication of a message over a chain of servers make it almost impossible to form any definite legal principles to ascertain the point of conclusion of contract because it is not clear that whether the offeror has read the message. It is difficult to lay down strict rules in order to ascertain whether a contract in fact comes into being irrespective of whether the offeror has read the message. The determination of consensus ad idem is rather difficult in such situations. The problem is further compounded by the fact that electronic messages communicated by one computer to another, over a web of different servers, may actually get lost in transit. In such situations, evidentiary issues arise and they call for a comprehensive mechanism to enable proof of dispatch. In such an event, it would be unjust to hold it against the offeree that the moment the acceptance has left his computer system, irrespective of whether it has actually reached the computer system or the server of the offeror, it is binding against him. There is also a possibility that an electronic message can also get altered or damaged while in transit. Such an alteration or damage may result in mistake which may lead to the avoidance of contract. The solution of such problems lies in the adoption of Uniform System of Communication over the computer networks.

5.4.2 Invitation to Offer in e-Contracts

The Common Law courts have maintained a distinction between offer and invitation to offer which arose first in the law of auctions. However, it is not easy to distinguish between an offer and an invitation to offer. A statement may actually be an invitation to

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83 Raghavendra S. Srivatsa and Sukruta R. 2004, p. 75.
treat although it contains the word offer, while a statement may be an offer, although it is expressed as an acceptance. This issue is relevant in the case of web-site carrying a statement of the various products with huge discounts and gifts by the supplier. Is this statement an offer or simply information for a prospective customer (invitation to treat) who may wish to place an order? The rationale behind this dichotomy of offer and invitation to offer may not hold true in the case of web-sites used for executing commercial transactions because commercial websites can be constructed in such a way that once acceptances received are not equal to the goods in stock, offer can be automatically withdrawn. The precise test to determine whether a statement is an offer or an invitation to offer is the intention of the parties. In a cyber commercial world there cannot be any rule of thumb applicable to all situations universally. By virtue of the inbuilt flexibility, commercial web sites serve both ‘shop displays’ and ‘shop sellers’. They fuse the advertising and the selling which makes application of any general principles, in all situations, infeasible. Each statement has to be judged by the language used and usage of trade. A statement on a website may be treated an offer where the person making it intends to be bound as soon as the offeree accepts its terms, but where it can be read from the language used in the statement that the seller is simply making known to others the terms on which he is willing to negotiate, he cannot be said to have made an offer but only invitation to treat.

The judgment in *Thornton vs. Shoe Lane Parking Ltd.* provides some indication in respect of the “Invitation to Offer” and conclusion of online contract. In this case Lord Denning held:

> The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the consumer puts his money into the slot.

The principle enunciated by Lord Denning in *Thornton case* confers a definite perspective to online contracts, say, for the purchase of goods or services. Most web –

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based sellers or selling agents or web-market providers provide a standard format for such sales. By filling in the necessary particulars and by authenticating the transaction, the buyer binds himself by the terms of the contract. Analyzing such a scenario from the perspective provided by *Thornton case*, it would appear that the offer originated from the seller, intending that a buyer who intends to buy should accept such offer by filling in the format and thereby manifesting his acceptance. The conclusion of contracts with the aid of electronic agents\(^88\) is also well addressed by this legal formula. It is perhaps to get over this legal fiction that web-based sellers specify in the web site user agreement that the representation on the web-site is only an invitation to offer and that the offer originates from the buyer who places an order. They further specify that they reserve the right to accept or reject any order. A specification in the website user agreement that all representations made on the web site are only invitation to offer would safeguard the interests of the seller. Such clauses are valid in India as there is no prohibition on the incorporation of such terms. Although the Sale of Goods Act, 1930 provides for implied conditions, warranties and also the right and duties of the buyer and the seller, Section 62 gives a carte blanche to the parties to exclude implied terms and conditions. Also, the sweep of section 36-A of the Monopolies and Restrictive Trade Practices Act, 1969 which has defined the term “Unfair Trade Practice” is not wide enough to annul a contractual term that specifies that an online seller has the right to accept or reject an order. The term “Unfair Trade Practice” has been defined in similar terms in the Consumer Protection Act, 1986.\(^89\) It is, therefore, open to parties to agree upon their respective obligations, by specifying who makes the offer.

### 5.4.3 Consideration in e-Contracts

A valid contract also requires that the parties bargain for consideration. Consideration may consist of either actual performance such as delivery of goods or services or payment for them or a return promise. Although electronic commerce may involve

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\(^88\) Section 2 (6) of the Uniform Electronic Transaction Act (UETA) 1999 of the U.S.A. defines Electronic Agent as follows: “Electronic Agents” means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.” See: Raghavendra S. Srivatsa and Sukrata R. 2004, p. 73.

\(^89\) Section 2 (r) of the Consumer Protection Act, 1986 (Subs. by Act 50 of 1993, sec. 2 (w.e.f. 18-6-1993) defines “unfair trade practice”.

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novel methods of payment and delivery, as long as, a transaction includes a bargaining for exchange of adequately commensurate promises or performances, agreement will comply with the consideration requirement.\(^90\) In an online contract, the valid consideration is payment of the goods purchased. Consideration must be something of value in the eyes of the law. This excludes promises of love and affection, gaming and betting etc. A one sided promise which is not supported by consideration is a gift. The law does not enforce gifts unless they are made by deed.\(^91\) It is observed that for the fulfillment of this ‘payment of consideration’ a new revolution has come in the Indian financial economy and that is e-Banking.

5.4.4 Capacity of Parties in e-Contract

In online contract, the difficulty is that the competence of one party entering into a contract is almost unknown to the other party. The complex nature of online contracts makes it impossible for the person entering into a contract to know if the other contracting party is competent or not.\(^92\) In this situation parties to a contract being at a distance and the absence of face to face interaction makes it almost impossible for one party to ascertain the competencies of the other. The problem posed by this complexity of the communication is that of minors ordering goods or minors masquerading as adults.

In this condition, law ought to raise a presumption that once an online contract is concluded, both the parties are presumed to be competent to do so. Neither party should be allowed to raise an objection at a later stage that the contract is unenforceable for want of competence on the part of one of the parties. The doctrine of *Uberrimae Fidei*\(^93\) must be strictly adhered to in case of online contracts and one party acting to his

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\(^92\) Raghavendra S. Srivatsa and Sukruta R. 2004, p. 78.

\(^93\) Doctrine of *Uberrimae Fidei* : *Uberrimae Fidei* is a Latin expression, which literally means ‘the utmost good faith’. A minimum standard that requires both the buyer and seller in a transaction to act honestly toward each other and to not mislead or withhold critical information from one another. The doctrine of utmost good faith applies to many common financial transactions. Retrieved from <http://jurisonline.in/2010/03/contract-uberrimae-fidei-an-analysis-of-the-relationship-between-law-of-contract-and-law-of-insurance/> visited on 7 August, 2012.
detriment on the representation to the other that he is competent to enter into a contract should not be put to any prejudice. E-Commerce players have adopted the practice of requiring a user to register with them and have a username and password, before any transaction is entered into. Usually, if an order is to be placed online, the user will have to authenticate the transaction using a valid credit card or a similar mechanism. The system will continue with processing the order only on such authentication. Such age verification mechanism should raise a presumption as to the competence of both the parties notwithstanding the fact that information about age is true or not. In order to deal with the requirement of ascertainment of unsoundness mind, e-Commerce experts have created a new technique. The technical feasibility for an online contract to be concluded between electronic-customers provides a helping hand to law. It is commonplace to find web-based service providers like e-mail providers to require the user to type a word that appears in a box on the frame, at the time of registration. This is so because only a human being of sound mind can read the word and type it in the particular field. However, in an online contract, it is very difficult to ascertain that whether a person is disqualified in the eyes of law or not. These lacunas can make a valid contract a void contract.

5.4.5 Flaw in Consent of Parties in e-Contract

One of the essentials of a valid contract is that the parties should enter into the contract with their free consent. Two or more persons are said to consent when they agree upon the same thing in the same sense i.e. *consensus ad idem*. A Contract is unenforceable on the ground of flaw in consent. Flaw in consent takes place in five ways- (1) Coercion (2) Under Influence (3) Fraud (4) Misrepresentation (5) Mistake. In online contract, the consent is said not free when it is dominated by three factors, namely: (1) Fraud (2) Misrepresentation and (3) Mistake.

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94 Raghavendra S. Srivatsa and Sukruta R., 2004, p. 79.
96 Section 13 of the Indian Contract Act, 1872: “Consent” defined - Two or more person are said to consent when they agree upon the same thing in the same sense.
97 Section 14 of the Indian Contract Act, 1872 defines Free consent.
100 Section 17 of the Indian Contract Act, 1872 defines Fraud.
5.4.5.1 Fraud in e-Contract

An agreement to which the consent is caused by fraud is voidable at the option of the party whose consent is so caused. In an online contract it is very difficult to circumscribe all different acts of fraud with a simple and precise definition of ‘online-fraud’. Human mind is very fertile and new forms of deceit can be devised which are incapable of being defined. The essentials of online fraud are that there is “false statement of fact” by a person who himself/herself does not believe the statement to be true. There must be “wrongful intention” to deceive and induce the other party to enter into the contract. Internet has provided a haven for such kind of frauds in e-market.\(^{102}\)

The offences of ‘Spamming’ and ‘Spoofing’ have been originated to cheat innocent customers and contract concluded under the cover of spamming and spoofing can never be considered as a legal contract. Spamming is very common criminal offence. Spam is the use of electronic messaging systems to send unsolicited bulk messages, especially advertising, indiscriminately. While the most widely recognized form of spam is e-mail spam, the term is applied to similar abuses in other media like: instant messaging spam, usenet newsgroup spam, web search engine spam, spam in blogs, wiki spam, online classified ads spam, mobile phone messaging spam, Internet forum spam, junk fax transmissions, social networking spam, social spam, television advertising and file sharing network spam. Spamming remains economically viable because advertisers have no operating costs beyond the management of their mailing lists, and it is difficult to hold senders accountable for their mass mailings.\(^{103}\) Spam is flooding the Internet with many copies of the same message, in an attempt to force the message on people who would not otherwise choose to receive it. Most spam is commercial advertising, often for dubious products, get-rich-quick schemes, quasi-legal services.\(^{104}\)

The word “spoof” means to hoax, trick or deceive. Therefore, in the IT world, spoofing refers tricking or deceiving computer systems or other computer users. This is typically done by hiding one’s identity or faking the identity of another user on the Internet. Spoofing can take place on the Internet in several different ways. One common method...


is through e-Mail. e-Mail spoofing involves sending messages from a bogus e-mail address or faking the e-mail address of another user. Fortunately, most e-mail servers have security features that prevent unauthorized users from sending messages. However, spoofers often send spoofed messages from fake e-mail addresses. Therefore, it is possible to receive e-mail from an address that is not the actual address of the person sending the message. Another way of spoofing takes place on the Internet is via IP spoofing. This involves masking the IP address of a certain computer system. By hiding or faking a computer’s IP address, it is difficult for other systems to determine from where the computer is transmitting data. Because IP spoofing makes it difficult to track the source of a transmission, it is often used in denial-of-service attacks that overload a server. This may cause the server to either crash or become unresponsive to legitimate requests. Fortunately, software security systems have been developed that can identify denial-of-service attacks and block their transmissions. Finally, spoofing can be done by simply faking an identity, such as an online username. For example, when posting on a web discussion board, a user may pretend he/she is the representative for a certain company, when he/she actually has no association with the organization. In online chat rooms, users may fake their age, gender, and location. Several other types of online frauds are: Phishing, Pharming, Fraudulent e-mails, Virus or Malware Attacks and Internet Auctions.

5.4.5.2 Misrepresentation in e-Contracts

Misrepresentation means misstatement of a fact relevant to the consent. A contract the consent to which is induced by misrepresentation is voidable at the option of the deceived party. Misrepresentation can be either innocent or fraudulent. The consequence flowing out of the two are different. However, the distinction appears to be operative in an online sale. In a brick and mortar showroom the buyer has the option of examining the product he/she buys and assuring himself/ herself of the quality of the product by touch and hence chances of being misled by the seller are few. The

107 Caveat Emptor: Caveat Emptor is a Latin term which means “let the buyer beware”. In the law of commercial transactions, principle is that the buyer purchases at his own risk in the absence of an express warranty in the contract.
The principle of ‘Caveat Emptor’ is strictly applicable in brick and mortar world. However, in the case of online transaction where a purchaser is at a disadvantage and is not in a position to actually verify the quality of the product he/she is buying, it is next to impossible to strictly apply the principle of ‘Caveat Emptor’. Therefore, the newly emerged doctrine in the era of Human Rights of consumers ‘Caveat Venditor’ must strictly adhere to in online transactions. A thin line of distinction between innocent misrepresentation and fraudulent misrepresentation is obliterated in an online transaction. Therefore, in an online shopping misrepresentation is the trend. The evidence of ‘motive’ behind any form of misrepresentation is profit. The need for effective protection of consumer interests in the light of the predicaments of a consumer in an online transaction is gaining currency.

5.4.5.3 Mistake in e-Contracts

Mistake means an erroneous belief about something. It has not been defined in the Indian Contract Act. Mistake or error makes the contract void i.e., it is not enforceable at the option of either party. Mistake may operate upon a contract in two ways: It may defeat the consent altogether or it may mislead the parties as to the purpose which they contemplated. Brodly speaking, certain facts are essential to the agreement, viz. identification of parties, subject matter of contract and nature of promise. Fundamental

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108 Raghavendra S. Srivatsa and Sukruta R., 2004, p. 82.
109 The European Community has recognized its need and has adopted a Directive for protection of consumers in distance contracts. The Directive on e-Commerce (2000/31/EC) adopted by the European Union provides significant ground rules for balancing the interests of the consumer and the seller in an Internet transactions. The Directive requires member states to make necessary legislative provision in order to meet the needs for protecting the interests of consumers, and particularly the rights of the consumer to insist that the goods supplied meet the description and to withdraw from the contract. (It is mentioned in para 14 of the Preamble). The information supplied by the seller in the electronic medium should be provided in the written form. In case of a dispute, the burden of proof should be on the seller. The Directive embodies the implied conditions provided by the Indian Sales of Goods Act, 1930. The measures suggested by the Directive provide a pointer for policy makers to promote consumer protection. The European Community has adopted the Directive on e-Commerce. This directive is a comprehensive guide to strike a balance between the interests of the consumer and those of a seller on e-Commerce. See: Raghavendra S. Srivatsa and Sukruta R., 2001, p. 83.
110 This case falls under Section 13 of the Indian Contract Act, 1872: If the mistake prevents the consent itself, then there is no Consensus ad idem and thus no contract.
111 This case falls under Section 20: Mistake as to a matter of fact essential to the agreement. The mistake in cause for the contract i.e., “error in cause” (on account of one party's fraud) makes the contract voidable only. Section 20 will come into operation: (i) When both the parties to an agreement are mistaken; (ii) Their mistake is as to a matter of fact; and (iii) that fact is essential to the agreement.
error does not prevent a contract from coming into existence unless there is mistake as to the identity of other party—as opposed to this attribute, as to the substance of the subject-matter—as opposed to its qualities, or as to the nature of transaction as opposed to its terms.\textsuperscript{112}

Mistake could be a mistake of law or a mistake of fact. The general principle of contract clearly states that a mistake of law is no excuse to avoid contractual obligations. The only exception to this principle would be a mistake of foreign law. A mistake of foreign law would render the contract void.\textsuperscript{113} A mistake of fact can take place in three ways—common mistake, mutual mistake and unilateral mistake. The plea of \textit{non est factum} i.e., absence of consent, is available for all such mistakes. Considering the complexities involved in online transaction where the likelihood of the occurrence of mistakes is very high, the plea of \textit{non est factum} can be made available as provided in general principles of contract. A common mistake of fact may take place in various ways, one of them being, a mistake as to the nature of contract. A party to an online contract may not be permitted to avoid the contract on the plea of mistake because an omission to look into the terms and conditions will not bail a party out of his contractual obligations. A presumption in law that the parties to an online contract consented to bind themselves by the terms and conditions is desirable. Application of such presumption in law can defeat the undue advantage that one can derive in an online transaction under the guise of mistake.\textsuperscript{114}

Another facet of mistake of fact can be regarding mistake as to a person. In online contracts, chances of misrepresentation are very high. Identity of parties is never certain. An online contract concluded under the mistake of identity would be void. With the growth of e-Commerce, such commercial transactions occur frequently and the likelihood of the occurrence of such mistakes is very high. The result would be that an innocent purchaser of goods would be put to prejudice in the absence of an equipped legal regime laying down the rules for online sale of goods. It is imperative that

\textsuperscript{112} J. Beatson, 2002, pp. 70-71.
\textsuperscript{113} Raghavendra S. Srivatsa and Sukruta R., 2004, p. 79.
\textsuperscript{114} ibid., p. 80.
adequate protection must be afforded to the purchaser against undue exploitation of the new medium of sale by unscrupulous commercial entities.  

5.4.6 Degree of Uncertainty

One of the main requirements of contract law from a commercial point of view is that it should provide for some degree of certainty as to the relationship and obligations that lie between the contracting parties. The degree of certainty may not, and indeed need not, be absolute in online contracts. What is required is sufficient certainty so that risks and obligations are ascertainable and thus the parties can engage in a risk/benefit analysis and decide whether or not to proceed with their agreements. In any contract the parties need to determine several factors, like (1) Rules of contract formation, (2) Choice of law, (3) Choice of jurisdiction, (4) Terms or conditions, (5) Enforceability of the agreement, (6) Performance of Contract (7) Identities of parties and (8) Whether or not a contract has actually been formed. A number of communications have been made between the parties for business transaction and all electronic transaction or communications cannot result in the formation of a contract. For this research only that communication is taken into consideration that involves e-Contract. In e-Contract the degree of certainty of above mentioned elements is very less.

5.4.7 Identity of Parties

In the world of e-Commerce one of the most important threat is embedded in its very inherit nature that is ‘faceless and borderless’. In the online shopping scenario, neither sending an e-mail message (offer) require disclosure of the identity of the sender nor can recipient ordinarily be able to know the sender. Furthermore, e-mail message is like an open postcard which can be intercepted at any place, modified, altered, changed

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115 id.
117 Good and Bergsten identity five types of communication: (a) Communications having no legal significance; (b) Communications having legal significance; (c) Communications operative to transfer ownership, control or contract rights; (d) Communications required by law; (e) Communications requiring legal authority or license. See: Thomson and Wheble, “Legal Questions and Problems to be Overcome”, in Goode and Bergsten, Trading with EDI: The Legal Issues, IBC, London, 1989, pp. 131-133.
and even made to appear to have come from a person other than the actual sender. Moreover, recipient cannot detect it. Similarly businesses can set up its own website over which goods or services can be offered without revealing true identity.\footnote{Cherlirr Kaufman, Radia Perlmen and M. Speciner, \textit{Network Security: Private Communication in Public World}, IEE Press, New York, 1995, pp. 48-56. Retrieved from <http://books.google.co.in/books?id> visited on 8 August, 2012.} This reflects a grim picture of e-Commerce. If this situation is analyzed on the touchstone of fundamental principles of law of contract, it is observed that if the disclosure of the identity of the contracting parties over the Internet is not possible, then many of the fundamental principles of the Common Law for contract formation will be either inapplicable or simply irrelevant.\footnote{Farooq Ahmad, 2008, p. 293.} In a physical environment where parties are at a distance or in cyberspace, before executing a contract, the contracting parties must be sure about: (1) the party sending or receiving the communication, as the case may be, (2) communication itself and (3) time of communication. If A and B communicate offer and acceptance for executing a contract over Internet, B must be sure that the: (1) offer received by him is the offer sent by A; (2) offer received by him is the same sent to him by A (offer has not been corrupted in transit), (3) time of dispatch of offer and (4) offer received is meant for him. Similarly, A must have the same surety when he receives acceptance from B. The technology which produces many risks for the parties interested in making contract over Internet provides solution also. This risk of technology has been solved by ‘Asymmetrical Crypto System’\footnote{The Asymmetric Cryptosystem is explained under Section 3(2) of the Information Technology (IT) Act 2000. The asymmetric cryptosystem has two different and mathematically related keys called the Private Key and the Public Key. The private key is also known as secret key and must be known only to the person holding the key pair. The public key is meant for public use. This key pair works in two ways. A message encrypted by the private key can be decrypted by the public key and the message encrypted by the public key can be decrypted by the private key. This key pair is unique to the person holding it. So a person using public key for decrypting a message will be sure that the message is of the person having its related private key because mathematically related keys can decrypt a message. If a person knows the private key holder, he will be sure that the message has come from that person. See: John T. Soma, “Encryption, Key Recovery and Commercial Trade Secret Assets: A Proposed Legislative Model”, \textit{Reutgers Computer and Technology Law Journal}, No. 125, 1999, p. 97.}. However, the Information Technology (IT) Act, 2000 provides no alternative for the parties except to adopt Asymmetrical Crypto System and Hash function. This Asymmetrical Crypto System is
also called public key function and is based on algorithm known as RSA.\textsuperscript{122} This technology ensures integrity of the message. The IT Act has assigned this matter to certifying authorities who must be licensed.\textsuperscript{123} These certifying authorities are supervised by the controller\textsuperscript{124} who is appointed by the Central Government.\textsuperscript{125} The certifying authority is empowered to issue a digital (electronic) signature certificate in favor of a person who makes application to the effect and satisfies conditions laid down in the IT Act. The person in whose favor the digital signature certificate is issued is called subscriber. The subscriber may publish his digital signature certificate on his own or through any other person or may be made available in the repository of the certifying authority so that anyone interested in establishing legal relationship with the subscriber can confirm his credentials.\textsuperscript{126}

5.5 Authentication of e-Contracts by Consumers in an Online Shopping under UNCITRAL Model Law 1996, the Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872: An Analysis

5.5.1 Jural Relationship between the UNCITRAL Model Law 1996 and the Information Technology (IT) Act, 2000 (2008)

In India, the Information Technology (IT) Act, 2000 has adopted the UNCITRAL Model Law 1996 which provides roots of e-Commerce law in India. The United Nations Commission on International Trade Law (UNCITRAL) adopted in June 1996, a Model Law on Electronic Commerce is intended to give State a legislative framework to remove legal barriers for electronic commerce. The objective of the Model Law includes enabling or facilitating the use of electronic commerce and providing equal

\textsuperscript{122} In 1977, RSA was invented by Ron Rivest, Adi Shamir and Leonard Adeleman on the ideas of White Field Diffie and Martim. RSA technology is 1000 times slower in hardware and 100 times slower in software as compared to DES used in Symmetric Cryptosystem. Asymmetric Public Cryptosystem based on RSA is slow and is seldom used alone. To save time, RSA is used in combination with another cryptographic algorithm such as hash function. See: R.L. Rivest et. al., \textit{A Method for Obtaining Digital Signatures and Public Key Cryptosystems}, COMMS, February, 1978, pp. 120-126.

\textsuperscript{123} Section 35 of the Information Technology Act, 2000 defines Power of Certifying Authority to issue Digital Signature Certificate.

\textsuperscript{124} Section 18 of the Information Technology Act, 2000 states the Functions of Controller.

\textsuperscript{125} Section 17 of the Information Technology Act, 2000 provides provisions of Appointment of Controller and other officers.

\textsuperscript{126} Section 14 of the Information Technology Act, 2000 states meaning of Secure electronic record.
treatment to users of paper-based documentation and users of computer-based information that is the most essential for fostering economy and efficiency in international trade. The Model law provides that where the law requires a signature, that requirement can be met electronically. It means an offer and the acceptance of the offer may be expressed by means of ‘Data Message’. In India under the IT Act, 2000, instead of ‘Data Message’ the word ‘Electronic Records’ is used. The UNCITRAL Model Law defines ‘Data Messages’ under Article 2 (a) to mean information generated, sent, received or stored by electronic, optical or similar means including but limited to electronic data interchange, electronic mail, telegram, telex or telecopy. In the context of contract formation, Article 11 (1) of UNCITRAL Model Law 1996 has recognized the use of ‘Data Message’ in making a valid contract formation. Under the Information Technology Act (IT), 2000 ‘Electronic Records’ are defined under Section 2 (1) (t) as “The electronic records which 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.” Chapter III A entitled ‘Electronic Contracts’ has been added with the amendment of 2008 in the Information Technology Act, 2000 by adding Section 10 A under the caption of ‘Formation and Validity of Contracts’ that recognizes the use of electronic records in online contract formation. In this heading, researcher has focused on UNCITRAL Model Law 1996, The Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872 for in-depth analysis of legal validity of e-contracts as the India has adopted IT law from UNCITRAL Model Law and the UNCITRAL Model Law is preferred for its universality and harmonious approach.

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129 The UNCITRAL Model Law defines ‘Data Message’ under Article 2 (a) : “Data message” means 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.
130 Article 11 (1) of the UNCITRAL Model Law 1996: 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.
131 The Information Technology Act, 2000 defines ‘Electronic Record’ under Section 2 (1) (t). The Information Technology (Amendment) Act, 2008 does not make any change in this definition.
Moreover, in India, the basic law on the contract is the Indian Contract Act, 1872. Two Acts (The IT Act, 2000 (2008) and The Contract Act, 1872) are supplementary to each other. Thus, an analysis of legal validity of e-contract has been made keeping in view the three major laws namely UNCITRAL Model Law 1996, The Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872.

5.5.2 Offer under the UNCITRAL Model Law 1996, the Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872

Article 15 (1) of the UNCITRAL Model Law, 1996 deals with the formation and validity of contracts. It states that unless otherwise agreed between the offer and the offeree, the offer will be made at the time when the data message enters any information system designated by the offeree for the purpose or if no system is designated for the purpose, when the data message enters the information system of the offeree or if any information is designated and the data is sent to other information system when the offeree retrieves such data message.\(^{132}\)

Under Section 13 (1) (2)\(^{133}\) of the Information Technology Act, 2000 the offer is made, unless otherwise agreed between the generator and the addressee, the dispatch of an electronic record occurs at the time when the electronic record enters a computer system designated for the purpose by the addressee or 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. This mirrors the provisions of the Model Law.

Under the Indian Contract Act, 1872, Section 4 states that the communication of a proposal is complete when it comes of the knowledge of the person to whom it is made.

After an analysis of legal provisions on ‘Offer’, it is observed that offer in e-Commerce fulfills all the requirements of a valid offer.

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\(^{132}\) Article 15 (1) of the UNCITRAL Model Law 1996: 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.

\(^{133}\) Section 13 (1) (2) of the Information Technology Act, 2000 explains provisions on Time and Place of Dispatch and Receipt of Electronic Record. No amendment has been made in this provision with IT Amendment Act, 2008.
5.5.3 Acceptance under the UNCITRAL Model Law 1996, the Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872

Article 14 of the UNCITRAL Model Law states Acknowledgement of receipt as under:
(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.

Section 12 of the Information Technology Act, 2000 explains acknowledgment of receipt of electronic record. According to it: (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, and (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.

Section 4 of the Indian Contract Act, 1872 states that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete -as against the proposer, when it is put in a course of transmission to him so at to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

It is observed that the position of acceptance in e-Commerce differs from acceptance in physical world. In e-Commerce transactions there are mainly four possible ways to convey acceptance: (a) by sending an e-mail message of acceptance, (b) by delivery online of an electronic or digital product, (c) by delivery of the physical product and (d) by any of the act or conduct indicating acceptance of the offer. The difference is that the UNCITRAL Model Law 1996 and the IT Act, 2000 provides for a default acknowledgement process if the originator and the addressee have not agreed upon a particular method of acknowledgment; that is not provided under the Indian Contract Act, 1872.
5.5.4 Revocation of e-Offer under the UNCITRAL Model Law 1996, the Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872

Section 5 of the Indian Contract Act, 1872 states the revocation of proposals and acceptance. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. Under the UNCITRAL Model Law 1996 and the Information Technology Act, 2000 (2008) there are not specific provisions relating to rules for revocation of offer. However, after reading statutory provisions it is observed that the position is similar under the UNCITRAL Model Law 1996 and the IT Act, 2000 that states that the offeror is bound by an acceptance when he is in receipt of it. Therefore, if revocation of an offer enters the information system of the offeree before the offeror is in receipt of an acceptance, the revocation is binding on the offeree and no valid acceptance is considered to be made.

5.5.5 Revocation of e-Acceptance under the UNCITRAL Model Law 1996, the Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872

Section 5 of the Indian Contract Act, 1872 states the revocation of proposals and acceptance. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. Under the UNCITRAL Model Law 1996 and the Information Technology Act, 2000 (2008) there are no specific provisions relating to rules for revocation of e-acceptance. However, after reading statutory provisions it is observed that the position is similar under the UNCITRAL Model Law 1996 and the IT Act, 2000 that states that an acceptance becomes binding on the offeree the moment the acceptance enters an information system outside the offeree’s control.

5.5.6 Consideration under the UNCITRAL Model Law 1996, the Information Technology Act, 2000 (2008) and the Indian Contract Act, 1872

Consideration is known as backbone of any contract. Consideration is a quid pro quo i.e. something in return. It may be - (i) some benefit, right, interest, loss or profit that may accrue to one party or, (ii) some forbearance, detriment, loss or responsibility suffered on undertaken by the other party. According to Sir Frederick Pollock,
“Consideration is the price for which the promise of the other is bought and the promise thus given for value is enforceable.\textsuperscript{134} As per the Indian Contract Act, 1872 the consideration is meant in terms of money.

Article 5 of the UNCITRAL Model Law on International Credit Transfers defines the consideration as obligations of the sender of a payment order.

In the context of e-Commerce, the condition of consideration is fulfilled only through online mode. In the lack of payment or consideration an agreement cannot become a contract. Therefore, need of e-payment has been realized wherein lie the seeds of origin of e-Banking. Under the IT Act, 2000 there is hardly any reference of online modes of payment and protection to consumers; if they are cheated during e-transactions frauds.

\textit{5.5.7 Observation and Analytical Remarks}

The Information Technology (IT) Act, 2000 (The Information Technology (Amendment) Act, 2008) is not a complete code for electronic transactions. The Indian Contract Act, 1872 is still the basic law governing contract formation including contracts formed electronically. However, these two Acts are supplementary to each other. The IT Act not only acts as a “gap filler” to provide solution to the issues generated by the introduction of electronic means of communication which are not covered by the Contract Act but in certain cases fundamental principles laid down in Contract Act have been modified. One of such modification has taken place in case of communication and revocation of offer and acceptance. Although, the IT Act does not expressly provide rules for such modification, by reading Section 4 and 5 of the Contract Act and Sections 13 and 12 of the IT Act together, one could conclude that some modifications have taken place by implications.\textsuperscript{135} Section 4 of the Contract Act provides that the communication of offer is complete when it comes into the knowledge of the offeree. \textit{The question is: When does the communication of an offer made by electronic means complete? Is it when the offer enters into the computer resource as}

\textsuperscript{134} Definition [Sec 2(d)] of the Indian Contract Act, 1872:- when at the desire of the Promisor, the promise or any other person. (a) has done or abstained from doing , or [Past consideration] (b) does or abstains from doing, or [Present consideration] (c) promises to do or abstain from doing something [Future consideration] such act or abstinence or promise is called a consideration for the promise.

\textsuperscript{135} Farooq Ahmad, 2008, p. 273.
provided under Section 13 of the IT Act or when the offeror receives acknowledgement as mentioned in Section 12 of the IT Act? On the close examination of Section 12 and 13 of the IT Act, it becomes clear that the test of knowledge on the part of offeree as provided under Section 4 of the Contract Act for finding whether communication of an offer is complete is inapplicable to electronic communication. It is quite possible that the electronic record (offer) may enter the computer resource of the addressee (offeree) without his knowledge because Section 13 provides that the receipt of the electronic record occurs at the time when it enters the computer resource designated by the addressee (offeree) or, where no computer resource has been designated then to the computer resource of the addressee. It is only where a computer resource has been designated by the addressee but the electronic record is sent to the computer resource other than the designated one, it can be said that the addressee has knowledge of the electronic record because Section 13 provides that in that case the receipt of the electronic record occurs, at the time, in such situation, when it is retrieved by the addressee.\textsuperscript{136}

The second alternative is to treat the communication of an electronically made offer as complete when the offeror receives acknowledgement of the receipt of the offer. It is argued that acknowledgement of receipt sent by the offeree implies knowledge on his part, however, it may not be always so for two reasons: (a) Section 12\textsuperscript{137} provides that where the originator (offeror) has not agreed with the addressee (offeree) that the acknowledgement be sent in particular form or method, then the addressee, inter alia, may use an automated process for sending acknowledgement which means, in a given situation, the addressee may not be aware of the electronic record of which acknowledgement of receipt has been sent; (b) receipt of electronic record may occur at the time when the message enters the computer resource, irrespective of whether the message is intelligible to or usable by the addressee. It can be concluded that the knowledge element necessary for determining the time for communication of offer in postal communications is irrelevant in electronic communications. It is observed that the communication of offer is complete at the time when it enters into the computer

\textsuperscript{136} id.
\textsuperscript{137} Section 12 of the Information Technology Act, 2000 explains the meaning of Acknowledgment of receipt.
resource within the meaning of Section 13 of the Information Technology Act, 2000 and not when the acknowledgement has been sent.\textsuperscript{138}

The rules relating to revocation of offer provided in Section 5 of the Contract Act applies \textit{mutatis mutandis} to offers made electronically. The offeror will be free to revoke his offer at any time before its communication of acceptance is complete against the offeror and this legal position provided in Section 5 of the Contract Act has not been changed by the IT Act. Section 5 of the Contract Act is also applicable in those cases where acceptance has not yet entered into the computer resource for one reason or another. This includes the possibility like where dispatch of acceptance has taken place within the meaning of Section 13 of the IT Act, i.e., acceptance has entered into the computer resource outside the control of the acceptor but is still on the system of intermediary and is yet to enter the designated computer resource or the addressee’s computer resource where no computer resource has been designated. Another possibility where acceptance does not enter into computer resource is due to malfunctioning of the computer resource.\textsuperscript{139}

The rule provided in Section 4 of the Contract Act for communication of acceptance have been rendered inapplicable by implication in case where acceptance is communicated electronically and it can now be said that the communication of acceptance is complete at the time when it enters into the computer resource as defined in Section 13 of the IT Act and quite naturally, the time when communication of acceptance is complete will vary depending upon the given situation, but not in the sense as provided in Section 4 of the Contract Act. The communication of acceptance is complete as against the acceptor as well as offeror at the time when acceptance enters into the designated computer resource or where no computer resource has been designated, the computer resource of the addressee. There will be no time-lag, in these cases, between dispatch and receipt of the acceptance. Both dispatch and receipt will be simultaneous and complete contract arises when acceptance enters in the computer resource as mentioned above. This means that there will be no scope for revocation of acceptance in these situations. Section 5 of the Contract Act, which provides provisions

\textsuperscript{138} Farooq Ahmad, 2008, p. 274.
\textsuperscript{139} ibid., p. 275.
for revocation of acceptance, will be inapplicable. Different rules will apply where acceptance has been sent to a computer resource which is not the same as that designated by the addressee. In this case, communication of acceptance is complete as against the offeror when acceptor has dispatched the acceptance within the meaning of Section 13 of the IT Act and against the acceptor when it is retrieved by the offeror. This interpretation is possible because dispatch and receipt is not simultaneous as is the case in the above two situations. Thus, here at this point, there is scope for revocation of acceptance which is possible at any time before acceptance is retrieved by the offeror and Section 5 of the Contract Act will be applicable. In this situation, it is quite possible that an acceptance message could be retrieved at the same time as a message revoking that acceptance where acceptor chooses the same method for communicating acceptance. But unlike Section 4 of the Contract Act, complete contract will come into existence only when acceptance is retrieved and not when the acceptance is dispatched. This interpretation is based on the rationale of Section 13 of the IT Act.  

It is clear that there is no uniform rule applicable in all situations to determine the time for formation of contract electronically. This uncertainty cannot be resolved by applying the provisions of the Indian Contract Act, 1872 alone. The IT Act has adopted in verbatim rules of the UNCITRAL Mode Law, 1996 to determine the time for receipt of electronic records. These rules are a half way house between the ‘Postal Rule’ and ‘Actual Receipt Rule’.  

A new provision entitled ‘Electronic Contracts’ has been added with the amendment of 2008 in the Information Technology Act, 2000 by adding Section 10-A under the caption of ‘Formation and Validity of Contracts’. According to this section in the context of contract formation, an offer and the acceptance of an offer may be expressed

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140 Section 5 of the Contract Act, 1872 defines Revocation of Proposals and Acceptance.
141 Farooq Ahmad, 2008, p. 275.
142 Article 15 of the UNCITRAL Model Law: The Rules Incorporated are: Dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator, and Receipt of an electronic record occurs at the time when: (a) it enters the computer resource designated by the addressee; It is retrieved by the addresses where on electronic record is sent to a computer resource which is not the one designated by the addressee; It enters the computer resource of the addressee where no computer resource has been designated. See: Section 13 of the Information Technology Act, 2000 that states Time and place of dispatch and receipt of electronic record.
by means of an electronic record and the enforceability and validity of contract shall not be denied on the ground that electronic record was used for that purpose. However, it is submitted by the researcher that this section merely recognizes the use of electronic record in e-contracts. The Act is silent on some technicalities that may arise in e-Commerce transactions which are mentioned above.

5.5.8 Evidentiary Value of e-Contracts under Indian Evidence Act, 1872

The emergence of Information and Communication tendency in society witnessed sea change by elevating the status of the evidence recorded, generated or stored electronically from the secondary to primary evidential status. The shift in the paradigm owes to the efforts of the UNCITRAL Model Law, 1996 on electronic commerce and assigning of the legal recognition to e-record or data message. The evidentiary value of e-Contracts can be explained in the light of the following sections of Indian Evidence Act, 1872. Sections 85 A\textsuperscript{143}, 85 B\textsuperscript{144}, 88 A\textsuperscript{145}, 90 A\textsuperscript{146} and 85 C\textsuperscript{147} deals with the

\textsuperscript{143} Section 85-A of the Indian Evidence Act, 1872 states that every electronic record of the nature of an agreement is concluded as soon as a digital signature (electronic signature) is affixed to the record. Section 85-A has been added in order to ensure the validity of e-contracts. But there are some restrictions as regards the presumptive value. The presumption is only valid to electronic records that are five years old and electronic messages that fall within the ambit of Section 85-B, Section 88-A and Section 90-A of Indian Evidence Act.

\textsuperscript{144} Section 85-B of the Indian Evidence Act, 1872 provides that the court shall presume the fact that the record in question has not been put to any kind of alteration, in case contrary has not been proved. The digital (electronic) signature should also be presumed to have been affixed with an intention of signing and approving the electronic record. Further 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 digital signature in question.

\textsuperscript{145} According to Section 88-A of the Indian Evidence Act, 1872 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 feed into his computer for transmission, but the court shall not make any presumption as to the person by whom such message was sent”.

\textsuperscript{146} Section 90-A of the Indian Evidence Act, 1872: In case of an electronic record being five years old, if proved to be in proper custody, the court may presume that the digital signature was affixed so as to authenticate the validity of that agreement. The digital 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 if they are in the custody of the person with whom they naturally be.

\textsuperscript{147} Section 85-C of the Indian Evidence Act, 1872: As far as a digital signature certificate is concerned, the court shall presume that the information listed in the certificate is true and correct. Inclusion of the words “shall presume” again relates to the expressed exclusion of the discretionary power of the court.
presumptions as to electronic records whereas Section 65 B\textsuperscript{148} relates to the admissibility of electronic record. The above mentioned sections have been inserted with the amendment in the Indian Evidence (Amendment) Act, 2003; under the influence of enactment of the Information Technology Act, 2000.\textsuperscript{149} Therefore, it is observed that electronic contracts are almost same as other hard copy contracts as far as its evidentiary value is concerned and in case of any discrepancy there are certain prerequisites that fill the lacunae. All electronic contracts are valid contracts as they are legalized by the Information Technology Act, 2000 and one could be made liable if there is any infringement with the terms and conditions. Subsequently many amendments have been made in order to attain conceptual clarity.\textsuperscript{150}

The Indian Evidence Act, 1872 has provided judicial recognition to ‘Electronic Documents’. Consequent to passing of the Information Technology Act, 2000, electronic documents have come to be recognized at par with the written documents for the purpose of evidence in law. All electronic documents either in the electronic form itself or as certified print-outs thereof are admissible under the Indian Evidence Act, 1872. Sections 65-A and 65-B lay down special provisions with regard to electronic records to be treated as admissible piece of evidence. Section 56-A of the Evidence Act mandates that the contents of electronic records may be proved in accordance with the provisions of Section 65-B. The recognition of electronic documents as a valid evidence admissible under the law of evidence has facilitated the prosecution of the cyber criminals and establishing their guilt on the basis of such evidence. It has also facilitated judicial sentencing of cyber criminals who could easily escape conviction due to non-

\textsuperscript{148} Section 65-B of the Indian Evidence Act, 1872: Section 65B talks about admissibility of electronic records. It 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 of the original, in case the following conditions are satisfied: The computer output was produced during the period over which the computer was used regularly to store or process information by a person having lawful control over the use of the computer. In case a combination of computers, different computers or different combinations of computers are used over that period, all the computers used are deemed to be one single computer. The information contained should have been regularly fed into the computer, during that period, in the ordinary course of activities. The computer was operating properly during that period and if not, it would not have affected the accuracy of data entered.


admissibility of electronic documents/record as valid evidence prior to the enactment of the Information Technology Act, 2000. Having referred to the legal provisions relating to the judicial recognition of the electronic record/document as a valid piece of evidence, it would be pertinent to refer to some of the judicial decisions where evidence was produced before the court in one or the other electronic form.\(^{151}\)

In the case of *Public Citizen vs. John Carlin*,\(^{152}\) the Court has expressed its displeasure at the Government policy of destroying electronic documents/records after taking-out its print-outs and termed it to be ‘arbitrary and capricious’. It was held that electronic documents are ‘unique and distinct from printed versions of the same’ and had far more utility than their paper print-outs. As such, they must be well preserved as evidence.

In yet another case, namely in *Armstrong v. Executive Office of the U.S. President*\(^{153}\), the Federal Court has expressed a view that government e-mail record is a record as defined by the Federal Records Act and therefore, it is not only sufficient for the Government to preserve the paper print-outs of such messages but also its data on computer tape should also be preserved.

Highlighting the importance and need for the preservation of evidence in electronic form, the U.S. Court in *National Union Electric Corporation vs. Matsushita Electronic Industries Co.*\(^{154}\) held that with the advanced computer technology, all data will be stored in some form of the computer memory. Therefore, all data has to be stored in computer disks are admissible in the form of evidence as and when required. In *Adams vs. Dan River Mills Inc.*,\(^{155}\) stressing on the need for the preservation of electronic record, the U.S. Court held that discovery of information stored in new and different media including punched data cards, computer labs, floppy, hard disks and computer memories is necessary even though they are not easily accessible like the traditional tangible form of information storage such as paper print-outs. The Court ruled that computer files must be produced in addition to its print-outs.\(^{156}\)


\(^{156}\) These cases are quoted from Vishwanath Paranjape, 2010, pp. 124-127.
As regards judicial trend as to the admissibility and evidentiary value of electronic record in the Indian evidence law, the High Court of Allahabad in *State Bank of India vs. Rizvi Exports Ltd.*\(^\text{157}\) has observed that Section 65B of the Indian Evidence Act relates to admissibility of electronic records as evidence in a court of law. The computer holding the original evidence is not required to be produced before the court of evidence. A print-out of the record or a copy of a CD-ROM, hard disk floppy etc., can be produced in court in the form of evidence. However, an authenticated certificate has to be attached to the printouts as required by Section 65B of the I.T. Act, 2000. In the instant case, the State Bank of India has filed a debt recovery suit to recover money from some persons who had taken loan from it. As a part of the evidence, the State Bank of India submitted print-outs of statement of accounts maintained in its computer system. Since the bank had not attached the relevant authenticated certificates as mandated by the Bankers Books of the Evidence Act (as amended by Section 65B of the IT Act, 2000) with the print-outs, the Court held that these documents were not admissible in evidence.

### 5.6 Jurisdiction in e-Contracts

The effectiveness of a judicial system rests on bedrock of regulations. Regulations define every aspect of a system’s functioning and principally, its jurisdiction. Jurisdiction is the power of a court to hear and determine a case. Without jurisdiction, a court’s judgment is ineffective and impotent.\(^\text{158}\) Such jurisdiction is essentially of two types, namely Subject-Matter Jurisdiction\(^\text{159}\) and Personal Jurisdiction\(^\text{160}\) and these two must be conjunctively satisfied for a judgment to take effect.\(^\text{161}\) The law governing online contracts is law of the place which has the most proximate nexus with the contract. However, the parties have the freedom of choosing the law by which the contract and the issues arising there from are to be governed. The Choice of Law is

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\(^{159}\) Subject Matter Jurisdiction is defined as the competence of the court to hear and determine a particular category of cases. It requires a determination of whether a claim is actionable in the court where case is filed.

\(^{160}\) Personal Jurisdiction is simply the competence of the court to determine a case against a particular category of persons. It requires a determination of whether the person is subject to the court in which the case is filed.

available to the parties’ need to confirm to the *grund norm* that the parties cannot contract contrary to what is permissible by the National laws. The provisions of the Information Technology Act, (IT) 2000 have provided provisions relating to ascertainment of place and time for conclusion of contract.\(^{162}\) The freedom of parties is subject to the limits contained in the basic substantive and procedural laws. The provisions of the Code of Civil Procedure contain limitation on this freedom of parties. The cause of action arises in a particular place determines the jurisdiction of court.\(^{163}\) Section 20 of the Civil Procedure Code 1908 provides that every suit shall be instituted in a court within the local limits of whose jurisdiction defendant or defendants’ carries on business or where cause of action wholly or partially arises. It means in case of breach of contract, suit can be instituted either in a place where contract is concluded or where defendant carries on business and the place of performance of contract may be the place for instituting the suit.\(^{164}\)

For determining the jurisdiction of the court in a dispute arising between the contracting parties, it is necessary to know where the contract in question was concluded. The place of formation of the contract determines the jurisdiction of the court where breach of contract gives rise to a cause of action. It is now well settled that contract is concluded at a place: (a) where letter of acceptance is posted in case of postal communication and (b) where the acceptance is received in case of instantaneous means of communication has been used. IT Act lays down rules for dispatch and receipt of e-record which may not be necessarily the actual places of dispatch or receipt of the electronic record. It is quite possible that a contract may be actually conducted at a place different from the place where electronic record is deemed to be received. The IT Act, 2000 has laid down an objective test which is the place of business of the originator or that of the addressee

\(^{162}\) Section 13 of the Information Technology Act, 2000 defines rules relating to Time and place of dispatch and receipt of Electronic record.

\(^{163}\) According to the Code of Civil Procedure 1908: Pecuniary Jurisdiction limits the power of court to hear cases up to a pecuniary limits only (Section 6), Jurisdiction also depends on where subject matter is situated (Section 16), where suit is for compensation for wrong done to the person or to movable property (Section 19) or where defendants reside or cause of action arises (Section 20). In Rajasthan High Court Advocates Association v. Union of India (2001) 2 SCC 294, the Supreme Court elucidated the meaning of ‘cause of action’ as every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to prove, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in ‘Cause of Action’. See: Mohammad Khalil Khan vs. Mehbub Ali Mian, AIR 1949 PC 78, S.S. Mittal v. Bar Council of India, AIR 1974, H.P. 32.

\(^{164}\) Ramco Textiles vs. U.O.I, AIR 1960 Kerala 257.
where an electronic record is deemed to have been dispatched or received as the case may be. The location of the computer resource is not a determining factor. The computer resource of the originator or addressee used for the dispatch or receipt of the electronic record may be located in a jurisdiction other than in which the originator or addressee has a place of business. To deal with this uncertainty, a precise test has been laid down which takes into account place of business regardless of the location of the computer resource. However, contracting parties are free to agree on different rules. The place of business has been used in a generic sense. Where the originator or the addressee has more than one place of the business, the principal place of business shall be the place of business and where either of them does not have place of business, his usual place of business of residence shall be deemed to be the place of business. In case of body corporate, its usual place of residence shall be the place where it is registered.

Cyberspace communication and transactions know no national or international boundaries. The e-Commerce applications of Internet are limitless and the jurisdictional issues spawned by it are many and diverse. Jurisdictional issues in India are determined either by (i) the place of residence or place of business test or by (ii) the cause of action test. The first test is an objective test and easy to determine. It does not pose any serious issue in e-Commerce disputes. The second test, namely the course

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165 Farooq Ahmad, 2008, p. 281.
166 Farooq Ahmad, 2008, p. 280. See: Section 13 (5) of the Information Technology Act, 2000: (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.
168 Section 20 of the Civil Procedure Code, 1908: Other suits to be instituted where defendants reside or cause of action arises: Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises. 2[Explanation].-A corporation shall be deemed to carry on business at its sole or principal office in [India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.
of action test is a subjective test and is most likely to be debated in e-Commerce cases. It is observed that Section 13 of the IT Act, 2000 is not in harmony which section 11 of the Consumer Protection Act, 1986. Section 13 of IT Act, 2000 provides that where the originator (offeror) or the addressee (offeree) has more than one place of business, then principal place of business shall be deemed as the place where the electronic record has been dispatched or received as the case may be. In case there is dispute between the parties involving contract formed electronically, then the suit shall be in the court within the local limits of whose jurisdiction principal place of business of the opposite party is situated.

Against this, the Consumer Protection Act, 1986 states that a consumer can file a complaint against the opposite party in a District forum within the local limits of whose jurisdiction the opposite party has a branch office. There is an apparent conflict between the two provisions and the rule incorporated in section 13 is likely to cause inconvenience to the consumers especially where the opposite party has principal office outside India. This inconvenience has been removed by incorporating amendment in the Consumer Protection (Amendment) Act, 1993. The above mentioned possible conflict could have been avoided if the expression, “the place of business is that which has the closest relationship to the underlying transactions” incorporated in the Model Law, had been adopted in the IT Act along with expression “principal place of business” presently provided.

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169 The place of business will determine the jurisdiction of the court and in case there is a dispute between the parties involving contract formed electronically, then the suit shall be in the court within local limits of whose jurisdiction, principal place of business of the opposite party is situated.

170 Farooq Ahmad, 2008, p. 283.


172 Farooq Ahmad, 2008, p. 283. See Article 15(4) (a) of UNCITRAL Mode Law: Time and place of dispatch and receipt of data messages: (4) Unless otherwise agreed between the originator and the addressee, 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.
A landmark judgment was given by the Allahabad High Court with respect to the formation of electronic contracts is *P.R. Transport Agency vs. Union of India & others.*[^173] Background of the case is: Bharat Coking Coal Ltd. (BCC) held an e-auction for coal in different lots. P.R. Transport Agency’s (PRTA) bid was accepted for 4000 metric tons of coal from Dobari Colliery. The acceptance letter was issued on 19th July 2005 by e-mail to PRTA’s e-mail address. Acting upon this acceptance, PRTA deposited the full amount of ₹81.12 lakh through a cheque in favour of BCC. This cheque was accepted and encashed by BCC. BCC did not deliver the coal to PRTA. Instead it e-mailed PRTA saying that the sale as well as the e-auction in favour of PRTA stood cancelled “due to some technical and unavoidable reasons”. The only reason for this cancellation was that there was some other person whose bid for the same coal was slightly higher than that of PRTA. Due to some flaw in the computer or its programme or feeding of data the higher bid had not been considered earlier. This communication was challenged by PRTA in the High Court of Allahabad. BCC objected to the “territorial jurisdiction” of the Court on the grounds that no part of the cause of action had arisen within U.P. Issue raised by BCC were: The High Court at Allahabad (U.P.) had no jurisdiction as no part of the cause of action had arisen within U.P. Issues raised by PRTA: (a) The communication of the acceptance of the tender was received by the petitioner by e-mail at Chandauli (U.P.). Hence, the contract (from which the dispute arose) was completed at Chandauli (U.P.). The completion of the contract is a part of the “cause of action”. (b) The place where the contract was completed by receipt of communication of acceptance is a place where ‘part of cause of action’ arises. Points considered by the court were: (1) With reference to contract made by telephone, telex or fax, the contract is complete when and where the acceptance is received. However, this principle can apply only where the transmitting terminal and the receiving terminal are at fixed points. (2) In case of e-mail, the data (in this case acceptance) can be transmitted from anywhere by the e-mail account holder. It goes to

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[^173]: P.R. Transport Agency vs. Union of India & others, AIR 2006 All. 23, 2006 (1) AWC 504. In The High Court of Allahabad, Civil Misc. Writ Petition No. 58468 of 2005, Decided On: 24.09.2005. Appellants: P.R. Transport Agency through its partner Sri Prabhakar Singh vs. Respondent: Union of India (UOI) through Secretary, Ministry of Coal, Bharat Coking Coal Ltd. through its Chairman, Chief Sales Manager Road Sales, Bharat Coking Coal Ltd. and Metal and Scrap Trading Corporation Ltd. (MSTC Ltd.) through its Chairman cum Managing Director.
the memory of a ‘server’ which may be located anywhere and can be retrieved by the
addressee account holder from anywhere in the world. Therefore, there is no fixed point
either of transmission or of receipt. (3) Section 13(3) of the Information Technology
Act has covered this difficulty of “no fixed point either of transmission or of receipt”.
According to this section: “…an electronic record is deemed to be received at the place
where the addressee has his place of business.” (4) The acceptance of the tender will be
deemed to be received by PRTA at the places where it has place of business. In this case
it is Varanasi and Chaudauli (both in U.P.) were places of business. Decision of the
court was: (1) The acceptance was received by PRTA at Chaudauli / Varanasi. The
contract became complete by receipt of such acceptance. (2) Both these places were
within the territorial jurisdiction of the High Court of Allahabad. Therefore, a part of the
cause of action had arisen in U.P. and the court had territorial jurisdiction.¹⁷⁴

In another case, taking a serious view as regards cases of online drug trafficking, the
Supreme Court in Sanjay Kumar Kedia vs. Union of India¹⁷⁵ case rejected his bail
application for his company’s involvement in online orders of prohibited drugs. Mr.
Sanjeev Kumar Kedia was chief in Business Processing Outsourcing (BPO) of the
Information Technology Company. The Apex Court noted that Mr. Kedia though a
highly technologist heading two I.T. companies, namely Xpone Technologies and
Xpone I.T. Services was fully accountable for one of his company booking online
orders of prohibited drug outside India for supply to customers abroad. He was arrested
by the Narcotics Control Bureau (NCB) in February 2007. According to the Court,
‘appellant Kedia and his associates were not innocent intermediaries or network service
providers as defined in Section 79 of the IT Act, but the said business was only a façade
and camouflage for more sinister activities’. The appellant had filed a bail application in
the Supreme Court after the trial Court and the High Court had rejected his bail
application in April and June, 2007 respectively on the ground that sufficient time
should be given to NCB to study the case as the alleged offence had “widespread
ramification for society” since it involved misuse of the cyber technology. The Apex

¹⁷⁵ A Bench of the Supreme Court comprising H.B. Sinha and H.S. Bedi, JJ. dismissed the bail
petition of Kedia on December 4, 2007.

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Court upheld the bail rejection orders passed by the trial Court and the High Court disallowed Kedia’s bail petition on December 4, 2007. This case makes it abundantly clear that operation of global networks and the concept of quasi-physical territory associated with cyberspace; call upon the need for a new legal perspective and pragmatic approach in handling cyber related crimes by the judiciary. With the tremendous growth of e-Commerce, e-Banking and e-service regime, the law applicable and administered to cyberspace crimes should be in tune with legal requirements for avoiding the vagaries and discrepancies of national administration of justice system, be it criminal or civil. The Information Technology Act, 2000 specifies the illegal acts which have been made punishable as offences under the Act. The amendments made in the Indian Penal Code, law of Evidence and Criminal Procedure, Banker’s Books Evidence Act, 1891 and the Negotiable Instruments Act, 1881 also enable the law enforcement agencies and the judiciary to nab cyber criminals promptly and punish them.

In the context of e-Contracts, a very relevant point to ponder upon is that can access to websites give rise to the cause of action and consequent jurisdiction to the court within the local limits of whose jurisdiction website has been accessed? The answer to this issue lies in the clear distinction between ‘offer’ and ‘an invitation to offer’. There is clear consensus to regard information available on the Internet as an invitation to treat unless contrary intention may be inferred. The cause of action means every fact that would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. The formation of contract is a part of the cause of action. Invitation to offer is much lesser in degree than the offer. If offer does not give rise to the cause of action, the question of invitation to offer forming part of the cause of action does not arise. Therefore, it is clear that information on website cannot give rise to the cause of action. However, where information displayed on website is misleading, false and fraudulent, it gives rise to the cause of action.\(^{176}\)

5.7 **Consumers in e-Contracts: An Actual Situation (Weak Position)**

It is observed by the researcher that there are various legal provisions to protect consumers from exploitation in marketing, however, consumers face severe challenges

from the revolution brought by the Internet with regard to commercial communications and contracts concluded at a distance. The ways of exploitation have become more sophisticated, latent, unidentifiable and difficult to trace. The applicability and effectiveness of traditional rules of consumer protection in the online environment is limited. Traditionally, consumers were within the national borders in physical market over which the State and its policy were well framed. But in Cyber marketing traditional policies are not easily applied to everyday consumers who are players of e-Commerce. With the development of an invisible world, in which consumers from all corners of the globe do business, difficulties in implementing traditional law are exacerbated. Electronic commerce has modified the way consumers transact. Consumers in e-Commerce confront lots of difficulties and unfair treatment in transactions.

Businesses have long acknowledged that information distribution is very important to their survival because without relevant knowledge at hand, consumers may choose not to spend money on particular products or services. In consequence, they make their products known to consumers by using all available forms of communication like radio, television, newspapers, magazines and billboards. However, the relatively high cost of advertising through the media mentioned above has largely limited the scope of information presented. Most of the time, only a small amount of information can be conveyed. But with Internet businessmen can advertise their products all over the world with fewer expenses. Often when products are exchanged, a formal contract stipulates the rights and duties of each party. The general practice is that a standard contract is deemed to have been agreed upon by both parties once consumers accept the product. There is rare opportunity to negotiate the detailed provisions in the final contract because most of such online contacts are pre-prepared or standardized (clicks-wrap agreements and shrink wrap agreements). Various scholars debate the appropriateness of standard contracts but the fact is that these contracts are widely used


in modern commerce and the burden of risk is undertaken by consumers no matter how unfair doing so may appear. When disputes arise, courts give preference to terms and conditions of online agreement and how well consumers are protected before disputes and during dispute resolution. ¹⁷⁹

To a certain extent, Justice depends on early disclosure of all the terms of online contract. Consumers are expected to thoroughly read and live up to contractual provisions, except in exceptional cases when the wording of the provision is regarded as incomprehensible. Ignorance of law is no defense and before purchase, it is presumed that customer has read all the terms and conditions. Practically, the technical cum legal wording of standardized online contracts (click-wrap agreements as well as shrink wrap agreements) is difficult for laymen to understand. Another common behavior of online shoppers is that during online transactions they hardly give any attention to these terms and conditions. Most importantly, consumers still do not have effective methods for asserting their rights and resolving disputes. Consumers would expect to see their interests being protected on the Internet, but the increasing cross border nature of electronic commerce makes it difficult to protect consumers from fraud and other damaging activities. ¹⁸⁰ It reveals the fact that consumer is weaker party in electronic contracts as the terms of contracts are dictated by one party (seller) and these are accepted by the other (consumer). It is suggested that (a) it must be made mandatory for all online business web sites to communicate contract information lucidly on the home page of their web site, (b) the web sites must have authentication from Trust Pay and such other authenticated systems and (c) businesses must take active role in communicating all the terms and conditions of online contract whether by phone, fax, e-mail and verbal communication.

With the help of the Internet, business is piercing borders and offering consumers greater access to goods and services at lower prices. Consumer protection policy is needed in the world of electronic commerce for main reasons: (a) to facilitate consumer


transactions, (b) to respond to the increased ambiguity and risk in online transactions, (c) to deal with market fluctuations and (d) to protect consumer interests in the formulation of legislation regarding Internet transactions. The current legal system protects consumers in a variety of ways. Generally speaking, there are two categories of guarantees for consumers namely: (1) Legal Guarantees, which create remedies for consumer goods or services that do not conform to the contract; and (2) Commercial Guarantees, which create remedies for consumer goods or services that do not conform to the seller’s express promises about the transaction. The Information Technology Act of India has been passed to regulate e-Commercial transactions but it does not sufficiently provide one-for-all protection to online consumers. Consumer protection policy is indispensable in building consumer confidence and establishing a balanced relationship between businesses and consumer in online transactions.

5.8 Conclusion

_You cannot see faith, but you can see the footprints of the faithfulness._
_We must leave behind “faithful footprints” for others to follow._

_Dennis Anderson_

It is submitted that the trust, reliability and security is very important weapon in order to make any contract a valid contract. Mistrust makes life difficult and trust makes it risky; specifically in e-Marketing. Relationships of trust depend on one’s willingness to look not only for one’s own interests, but also the interests of others. The consumers demand only and only trust in their day to day transactions in market. Since 1970’s the notion of consumer protection has entered into the legal lexicon. The unrestricted operation of cyberspace and Internet produces a platform where consumers are unable, either by reason of technical expertise or bargaining power, to negotiate in any meaningful fashion concerning the terms under which goods or services are supplied.

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To sum up the findings of this chapter, it would suffice to say that the essential ingredients of a valid contract have a distinct connotation in the context of online contract and if all the requirements of law are satisfied, a valid contract can be formed in all e-Commerce transactions. e-Contracts are well suited to facilitate the re-engineering of business processes occurring at many firms involving a composite of technologies, processes and business strategies that aids the instant exchange of information. After the analysis of nature of e-contract, it is realized that position of consumer is weaker in online shopping contract because customer has to abide by the conditions postulated by the seller. Sometimes, e-shopping becomes optional for the customers either to accept or to quit the idea of shopping because of requirements of standardized online form and particular mode of acceptance of payment. The Information Technology Act, 2000 (2008) is silent on the validity of e-Contract entered under the situation of mistake, misrepresentation and fraud.

As the formation of a valid contract forms the corner-stone of e-Commerce, it is essential that sufficient attention must be paid to the formation of a valid online contract before finalizing transaction in the click-world. Some lacunas or grey areas have been highlighted in this chapter which vitiates the validity of online contract. Once the requirements of the law are complied with, online contracts will open up the multifarious opportunities for business. In cyberspace commercial entities should realize the significance of a valid online contract and take serious concern of the ticklish issues involved therein, because online contracts hold the key to the bright future in the sphere of e-Commerce.

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