

FORMATION & VALIDITY OF E-CONTRACTS

(1) Historical background and sources of present law:

It is one of the theories of political science that the society and state is based on contract. If it is not true, then even the importance of contract cannot be denied at all. All groups, sects, associations etc are formed on the basis of like minded people on the basis of contract between two and more persons which subsequently establishes state or society. The law of contract is based on the natural principles of contract itself for contracting parties. In ancient India there was no specific law of contract as it appears today. All religious groups got their own law of contract. Hindu's were having Hindu law of Contract & Muslim's were governed by Muslim law of contract which was visible only after the advent of Mughal rule in India. The residuary parts of these laws are still available. The rule of Damdupat, among Hindu's is still applicable which prescribes that any money lender cannot recover amount of interest just double of the principle amount. When the British came & established their Kingdom in India, the principles of English Law of Contract, under the garb of doctrine of equity justice & good conscience, were incorporated as a law of contract for Indians. The First Law Commission made best efforts to chalk out a proper law of contract for India, consequently on the recommendation of the first law commission 'Contract Act 1872' was passed to avoid the conflicting law of contract for different communities in India. Later on two chapters regarding sale of goods & partnership were separated from the original contract act and separate sale of goods act and partnership act were formed. Presently Law of Contract is covered by contract act, sale of goods act, partnership act. Still these acts are working satisfactorily. The specific relief act is also a part of Law of Contract indirectly. Presently certain other acts have also been formed which are governing the law of contract today i.e. Forward Contract Regulation Act 1952, Hire Purchase Act 1972, Multi Modal Transportation of Goods Act 1993, Securities Contract Regulation Act 1956, Consumer Protection Act 1886, Recovery of Debt. due to Bank & Financial Institutions Act 1993 and various other claim tribunals such as railway claim tribunal, road transport tribunal etc.

Advancement of Science & Technology has changed the scenario of the world at large. It has affected every walk of life. The law of contract is exception to it. The present law of contract which is consisting roughly eleven enactments is proving insufficient, inefficient and traditional. It is unable to keep pace with time in society due to new technologies which are being used in the formation of contract. The Supreme Court although tried its all best to include every kind of technology in the present law of contract keeping in view the flexible language of the contract act. Although it is a fact that contract act has not contemplated such exigency but nowhere the contract has prohibited the use of such devices which was not feasible when the contract act was passed 135 years ago. Hidayatullah, C.J.I. convinced that through the law was framed at a time when telephones, wireless, Telstar and Early Bird were not contemplated, and the language of section 4 is flexible enough to cover telephonic communication. The courts should not completely ignore the language of the Act. When the word of acceptances is spoken into the telephone, they are put into the course of transmission to the offer or so as to be beyond the power of the acceptor. The acceptor cannot recall them.

The position deteriorated further. The present Law of Contract could not face the contracts based on new technologies such as email contracts and other contracts through electronic media & devices. The use of Computer & Internet is frequent now a days and present law has no provision to regulate the contracts based on these devices. The legislatures felt a strong need for a law regulating contract based on electronic devices. A survey was conducted which was headed by Justice Fazal Ali who strongly recommended for a separate law regulating contracts based on electronic devices. He refused to modify the present law of contract so as to include electronic devices into the preview of present law of contract. It was also noted that in future contracts and other commercial activities shall mostly be based on electronic devices due to its smoothness and fastness. Legislatures then decided to form a new law in this regard which was called 'Electronic Commerce Act 1998'. The act has overview of various foreign laws also. Maximum provisions of Singapore have been borrowed in the present act. Following Table will show us that how this act has borrowed provisions from foreign countries in this regard, it will also show how much references have been taken from foreign countries.

ABA Digital Signature Guidelines	<i>ABA Digital Signature Guidelines</i> (August 1, 1996), Information Security Committee, Electronic Commerce Division, Section of Science and Technology, American Bar Association, Chicago, Illinois, United States. Available online at http://www.abanet.org/scitech/ec/isc/dsgfree.html .
Florida Electronic Signature Act of 1996	Enacted 1996. Available online at http://www.leg.state.fl.us/session/1996/senate/bills/billtext/html/billtext/sb0942.html .
Illinois Electronic Commerce Security Act	Enacted 1998. Available online at http://www.ag.state.il.us/resource/cecc/ceccact.html .
Maine Criminal Code - Computer Crimes	Enacted 1989. Available online at http://janus.state.me.us/legis/statutes/17a/title119.htm
Malaysia Computer Crimes Act 1997	Enacted 1997. Available online at http://www.cert.org.my/crime.html .
Malaysia Digital Signature Act 1997	Enacted 1997. Available online at http://www.cert.org.my/digital.html .
Singapore Electronic Transactions Act	Enacted June 1998. Available online at http://www.ec.gov.sg/policy.html .
Texas Penal Code - Computer Crimes Statute	Enacted 1985 Available online at http://www.med.uth.tmc.edu/ecs/statelaw.html .
UCC Article 2B	National Conference of Commissioners on Uniform State Law, Uniform Commercial Code Draft Article 2B (August 1998 draft). Available online at http://www.law.upenn.edu/library/ulc/ucc2b/2b898.htm .
UNCITRAL Model Law	United Nations Commission on International Trade Law ("UNCITRAL"), Model Law on Electronic Commerce, adopted December 16, 1996. Available online at http://www.un.or.at/uncitral/english/texts/electcom/ml-ec.htm .

UNCITRAL Draft Rules	UNCITRAL Draft Uniform Rules on Electronic Signatures, July 10, 1998 draft. Available online at http://www.un.or.at/uncitral/english/sessions/wg_ec/index.htm .
Uniform Electronic Transactions Act	National Conference of Commissioners on Uniform State Laws, Uniform Electronic Transactions Act (September 1998 draft). Available online at http://www.law.upenn.edu/library/ulc/ulc.htm#ueccta
Utah Digital Signature Act	Utah Code Annotated, Title 46, Chapter 3 (originally enacted in 1995). Available online at http://www.le.state.ut.us/~code/TITLE46/46_03.htm .
United States Code	Available online at http://law.house.gov/usc.htm .

SOURCES OF THE VARIOUS PROVISIONS OF THE PRESENT ACT

Roughly, majority provisions of the present electronic commerce act have been borrowed from various foreign enactments in this regard. The provisions of Singapore Electronic Transactions Act and ABA Digital Signature Guidelines have been widely borrowed for the formation of the present act. The provisions of the various other foreign enactments have also been used to some extent. There are very few provisions which has either not been borrowed or which are original. The following table will show the real picture. I have firstly depicted the head note of the present legal provision and then, I have indicated the source of the present law, from where, it has been borrowed.

The following table will show the real picture:

SECTION 2 (a) "Asymmetric cryptosystem"

Source: ABA Digital Signature Guidelines 1.3.

SECTION 2 (b) "Authentication"

Source: ABA Digital Signature Guidelines 1.4.

SECTION 2 (c) "Authorized officer"

Source: Singapore Electronic Transactions Act 50.

SECTION 2 (d) "Certificate"

Source: ABA Digital Signature Guidelines 1.5.

SECTION 2(e) "Certification authority"

Source: ABA Digital Signature Guidelines 1.6.

SECTION 2 (f) "Certification practice statement"

Source: ABA Digital Signature Guidelines 1.8.

SECTION 2 (g) "Computer"

Source: Malaysia Computer Crimes Act 2(1); Uniform Electronic Transactions Act 102(12)

SECTION 2 (i) "Computer program"

Source: Uniform Electronic Transactions Act 102.

SECTION 2 (j) "Computer security system"

Source: Texas Penal Code 33.01.

SECTION 2 (k) "Computer virus"

Source: Maine Criminal Code 431(9).

SECTION 2 (l) "Controller"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (m) "Correspond"

Source: ABA Digital Signature Guidelines 1.10;

SECTION 2 (n) "Damage"

Source: United States Code, 18 U.S.C. 1030.

SECTION 2 (o) "Data"

Source: Malaysia Computer Crimes Act 2.

SECTION 2 (p) "Digital signature"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (q) "Electronic."

Source: Illinois Electronic Commerce Security Act §5-105;

SECTION 2 (r) "Electronic device"

Source: Uniform Electronic Transactions Act 102(6)(September 1998 draft); UCC Article 2B 2B-102(19)(August 1998 draft).

SECTION 2 (s) "Electronic record"

Source: UNCITRAL Model Law, Article 2(a).

SECTION 2 (t) "Electronic signature"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (u) "Hash function"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (v) "Information"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (w) "Information system" Source: Uniform Electronic Transactions Act 102(12).

SECTION 2 (y) "Key pair"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (z) "Network service provider"

Source: United States Code, 47 U.S.C. 230(e).

SECTION 2 (aa) "Operational period of a certificate"

Source: Singapore Electronic Transactions Act.

SECTION 2 (bb) "Private key" means the key of a key pair used to create a digital signature. Source: Singapore Electronic Transactions Act 2.

SECTION 2 (dd) "Provide access"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (ee) "Public key"

Source: Singapore Electronic Transactions Act §2;

SECTION 2 (ff) "Record"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (gg) "Repository"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (hh) "Revoke a certificate"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (jj) "Security procedure"

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (kk) "Signed" or "signature".

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (ll) "Subscriber"

Source: Singapore Electronic Transactions Act 2.

SECTION 2(nn) "Third party"

Source: Singapore Electronic Transactions Act 10(3).

SECTION 2 (oo) "Trustworthy system or manner"

Source: Illinois Electronic Commerce Security Act 5-105; See ABA Digital Signature Guidelines 1.35.

SECTION 2 (pp) "Valid certificate.

Source: Singapore Electronic Transactions Act 2.

SECTION 2 (qq) "Verify a digital signature"

Source: Singapore Electronic Transactions Act 2.

SECTION 3. Purpose and Construction.

Source: Florida Electronic Signature Act of 1996 2;

SECTION 4. Application.

SECTION 5. Variation by Agreement

Source: UNCITRAL Model Law, Article 4; UCC Article 2B 2B-107(b); ABA Digital Signature Guidelines 2.2.

PART II - ELECTRONIC RECORDS AND SIGNATURES GENERALLY

SECTION 6. Legal Recognition.

Source: UNCITRAL Model Law, Article 5.

SECTION 7. Requirements of Writing.

Source: UNCITRAL Model Law, Article 6.

SECTION 8. Electronic Signatures. Except as provided in Section 4

Source: UNCITRAL Model Law, Article 7. :

SECTION 9. Original Record.

Source: UNCITRAL Model Law, Article 8.

SECTION 10. Admissibility and Evidentiary Weight of Electronic Records and Electronic Signatures.

Source: UNCITRAL Model Law, Article 9.

SECTION 11. Retention of Electronic Records.

Source: UNCITRAL Model Law, Article 10; Illinois Electronic Commerce Security Act, Section 5-135.

PART III -- SECURE ELECTRONIC RECORDS AND SIGNATURES

SECTION 12. Secure Electronic Record.

Source: Singapore Electronic Transactions Act §16; Illinois Electronic Commerce Security Act §10-115; UCC Article 2B 115(b) (November 1, 1997 draft); ABA Digital Signature Guidelines 5.4.

SECTION 13. Secure Electronic Signature.

Source: Singapore Electronic Transactions Act 17.

SECTION 14. Presumptions Relating to Secure Electronic Records and Signatures.

Source: Singapore Electronic Transactions Act 18.

PART IV -- ELECTRONIC CONTRACTS

SECTION 15. Formation and Validity.

Source: UNCITRAL Model Law, Article 11; UCC Article 2B §2B-204.

SECTION 16. Effectiveness Between Parties.

Source: UNCITRAL Model Law, Article 12; Singapore Electronic Transactions Act 12.

SECTION 17. Attribution.

Source: UNCITRAL Model Law, Article 13; Uniform Electronic Transactions Act §202; Illinois Electronic Commerce Security Act §306.

SECTION 18. Acknowledgment of Receipt.

Source: UNCITRAL Model Law, Article 14.

SECTION 19. Time and Place of Dispatch and Receipt

Source: UNCITRAL Model Law, Article 15.

SECTION 20 .Applicable Law.

laws as reflected in Section 28 of the Arbitration and Conciliation Act, 1996.

PART V -- EFFECT OF DIGITAL SIGNATURES

SECTION 21. Secure Electronic Record with Digital Signature.

Source: Singapore Electronic Transactions Act 19.

SECTION 22. Digital Signature as a Secure Electronic Signature.

Source: Singapore Electronic Transactions Act 20.

SECTION 23. Unreliable Digital Signatures.

Source: Singapore Electronic Transactions Act 22.

PART VI -- GENERAL DUTIES RELATING TO DIGITAL SIGNATURES

SECTION 24. Foresee ability of Reliance on Certificates.

Source: Singapore Electronic Transactions Act 23.

SECTION 25. Prerequisites to Disclosure of Certificate.

Source: Singapore Electronic Transactions Act 24.

SECTION 26. Publication for Fraudulent Purpose.

Source: Singapore Electronic Transactions Act 25.

SECTION 27. False or Unauthorized Request.

Source: Singapore Electronic Transactions Act 26.

(2) Summary of present law: On the basis of perusal of aforesaid provisions 'Electronic Commerce Act 1998' was passed to govern the electronic commercial activities. It was kept in view that all kinds of electronic activities which create contract, liabilities and rights should be covered by it. Email contract is also a most important electronic activity. These Email contracts are based on electronic devices i.e. internet & computers etc. Roughly I hope that these kinds of contracts are on rampant increase. As per an estimate today 70% of electronic activities regarding commercial transactions are covered by email contracts. It shall grow up further in future.

The rapid development of information and communication technologies over the past decade has revolutionized business practices. Transactions accomplished through electronic means - collectively "electronic commerce" - have created new legal issues. The shift from paper-based to electronic transactions has raised questions concerning the recognition, authenticity and enforceability of electronic documents and signatures. The challenge for lawmakers has been to balance the sometimes conflicting goals of safeguarding electronic commerce and encouraging technological development.

The Electronic Commerce Act of 1998 (the "Act") aims to facilitate the development of a secure regulatory environment for electronic commerce by providing a legal infrastructure governing electronic contracting, security and integrity of electronic transactions, the use of digital signatures and other issues related to electronic commerce.

The Act is divided into thirteen parts, which can be summarized as follows:

Part I of the Act outlines the general purpose of the Act, provides definitions for terminology used within the Act and defines the scope of the application of the Act.

Part II of the Act addresses *electronic records* and *electronic signatures* generally. It provides that, with limited exceptions, electronic records and signatures should be accorded the same treatment as paper records and signatures for purposes of complying with statutory writing, signature, evidentiary and record-keeping requirements.

Part III of Act addresses the integrity and authentication of *secure electronic records* and *secure electronic signatures*. Secure electronic records and signatures define specific categories of records and signatures that are afforded greater evidentiary presumptions because of their enhanced reliability and trustworthiness. The concept of a secure electronic record or a secure electronic signature will foster the growth of electronic commerce by providing businesses with assurances that records and signatures which meet the statutory definitions of "secure" records or signatures will be accorded the heightened evidentiary presumptions necessary to make business transactions effectively non-reputable.

Part IV of the Act addresses issues of *electronic contracting*. This Part deals with the form in which an offer and an acceptance may be expressed and legal recognition of contracts formed in an electronic medium. This Part aims to provide increased legal certainty as to the conclusion of contracts by electronic means.

Parts V, VI, VII, VIII and IX of Act address the legal issues related to the use of *digital signatures*. Digital signature technology, which utilizes asymmetric cryptography technology, has been developed to facilitate secure transactions over the Internet and other computer networks. Although the electronic contracting sections of the Act have been drafted to be technologically neutral, Parts V-IX has been included to establish rules for the use of the most prominent current technology. Thus, a digital signature issued in accordance with Part V will be presumed to be a secure electronic signature.

Part X of the Act addresses the *acceptance and use of electronic records and electronic signatures by governmental entities*. This section authorizes any department or ministry to accept electronic filing of documents and to issue permits, licenses or approvals electronically. This section also empowers any department or ministry of the Government to specify the conditions and procedures for electronic filing or retention of documents. However, this section does not compel any department or ministry of the Government to accept or issue any document in electronic form if it does not wish to do so.

Part XI of the Act deals with issues relating to the *liability of network service providers*.

Part XII of the Act provides *criminal penalties* for intentional damage or destruction of information systems or data, intentional "trespass" into a system and intentional theft of computer services, tampering with data, interrupting network services and intentionally introducing viruses into computers or computer networks.

Part XIII of the Act contains *general provisions* relating to the use of electronic records.

(3)Formation of e-contracts:

The formation of e-contracts are governed by chapter IV of the Electronic Commerce act,1998. Section 15 to 20 of the present act is covered by this chapter. These sections are as follows:

SECTION 15

(a) In the context of the formation of contracts, unless otherwise agreed by the parties involved, an offer and the acceptance of an offer may be expressed by means of electronic records.

(b) Where an electronic record is used in the formation of a **contract**, that **contract** shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

(c) A **contract** may be formed by the interaction of electronic agents. A **contract** is formed if the interaction results in the electronic agents' engaging in operations that confirm or indicate the existence of a **contract**.

(d) A **contract** may be formed by the interaction of an electronic agent and an individual. A **contract** is formed if the individual has reason to know that the individual is dealing with an electronic agent and the individual takes actions or makes a statement that the individual has reason to know will cause the electronic agent to perform the subject of the **contract**, or instruct a person or electronic agent to do so.

Comment: This section adopts the basic rule that offer and acceptance may be accomplished through the use of electronic exchange. There are a number of additional contractual issues that may arise, including acceptance that varies from the terms of an offer, and cases where an offer is made electronically and accepted in writing (or vice versa). The Act adopts a more general approach, simply giving recognition to electronic records as a means of forming a **contract**. This section also includes provisions governing the formation of contracts through the use of electronic agents, providing that enforceable agreements may be formed through the use of electronic agents.

SECTION 16:

Effectiveness Between Parties. As between the originator and the addressee of an electronic record, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.

Comments: This provision is included in order to establish the principle that in electronic contracts, the use of electronic communication should not be discriminated against. Expressions of will or intent issued in electronic form should be equally valid as written statements of this kind.

SECTION 17:

(a) An electronic record is that of the originator if it was sent by the originator himself.

(b) As between the originator and the addressee, an electronic record is deemed to be that of the originator if it was sent:

(i) by a person who had the authority (pursuant to a document in a non-electronic form) to act on behalf of the originator in respect of that electronic record; or

(ii) by an information system programmed by or on behalf of the originator to operate automatically.

(c) As between the originator and the addressee, an addressee is entitled to regard an electronic record as being that of the originator and to act on that assumption if:

(i) in order to ascertain whether the electronic record was that of the originator, the addressee properly and in good faith applied a procedure previously agreed to by the originator for that purpose; or

(ii) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify electronic records as its own.

(d) Section 17(c) shall not apply:

(i) from the time when the addressee has both received notice from the originator that the electronic record is not that of the originator, and had reasonable time to act accordingly;

(ii) at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the electronic record was not that of the originator; or

(iii) if in all the circumstances of the case, it is unconscionable for the addressee to regard the electronic record as that of the originator or to act on that assumption.

(e) Where an electronic record is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the electronic record received

as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the electronic record as received.

(f) The addressee is entitled to regard each electronic record received as a separate electronic record and to act on that assumption, except to the extent that the addressee duplicates the electronic record or the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that an electronic record received from the originator was a duplicate.

(g) Nothing in this section shall affect the law of agency or the law on the formation of contracts.

Comments: This section sets forth the basic rules that apply in cases where there is a question about the origin of an electronic record and the recipient's ability to rely upon that record. In an electronic environment, it can be difficult to ascertain who is the originator of an electronic record and if, in fact, the originator is the person that the recipient believes him to be. This section provides a framework for attributing electronic records to specific persons.

In general, a person is bound by any electronic record he or she sends or by any transmission sent by an agent on behalf of that person. Additionally, under certain circumstances specified in this section, a recipient may lawfully regard an electronic record as originating from another specific individual, regardless of whether that specific individual actually is the originator, unless doing so would be unreasonable or unconscionable or the recipient knew or should have known that the electronic record did not come from the specified individual. However, an originator can disavow an electronic record once it has been sent, and not be held responsible for any reliance on such a record by the recipient, as of the time that the disavowal is received by the addressee and the recipient has had reasonable time to act accordingly.

SECTION 18:

(a) Sections 18(b), (c) and (d) shall apply where, on or before sending an electronic record, or by means of that electronic record, the originator has requested or has agreed with the addressee that receipt of the electronic record be acknowledged.

(b) Where the originator has not agreed with the addressee that the acknowledgment be given in a particular form or by a particular method, an acknowledgment may be given by:

(i) any communication by the addressee, automated or otherwise; or

(ii) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(c) Where the originator has stated that the electronic record is conditional on receipt of the acknowledgment, the electronic record is treated as though it had never been sent until the acknowledgment is received.

(d) Where the originator has not stated that the electronic record is conditional on receipt of the 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 within a reasonable time, the originator:

(i) may give notice to the addressee stating that no acknowledgment has been received and specifying a reasonable time by which the acknowledgment must be received; and

(ii) if the acknowledgment is not received within the time specified in Section 18(a), may, upon notice to the addressee, treat the electronic record as though it has never been sent, or exercise any other rights it may have.

(e) Where the originator receives the addressee's acknowledgment of receipt, it is presumed, unless evidence to the contrary is adduced, that the related electronic record was received by the addressee, but that presumption does not imply that the content of the electronic record corresponds to the content of the record received.

(f) Where the received acknowledgment states that the related electronic record met technical requirements, either agreed upon or set forth in applicable standards, it is presumed, unless evidence to the contrary is adduced, that those requirements have been met.

(g) Except as it relates to the sending or receipt of the electronic record, this section is not intended to address the legal consequences that may flow either from that electronic record or from the acknowledgment of its receipt.

Comments: Many electronic transactions require acknowledgements of the receipt of electronic records. This section is intended to set forth procedures for originators of electronic records to use in assessing whether the intended recipient has acknowledged receipt of electronic records sent. In particular, if the method of acknowledgment has not been agreed to by the parties involved, any method of acknowledgement can be used so long as it suffices to indicate to the originator that the electronic record sent has been received. This section also sets forth the rule that if an electronic record is conditional on receipt of acknowledgement, the transmission will be treated as if it were never sent if no acknowledgement is received.

In cases where the electronic record was not stated to be conditional on receipt of acknowledgement, an originator may subsequently impose this condition and specify a time frame in which acknowledgement must be received, and if not received in that time frame, treat the original transmission as never having been sent. Of course, if an acknowledgement is received, a presumption can be made that the electronic record was received. Significantly, this section is not intended to address the legal consequences of the transmission or receipt of electronic records. For example, where an originator sends an offer to a recipient, the acknowledgment of receipt simply is evidence of receipt of the offer. Issues related to whether the offer is valid or has been accepted are left to general principles of **contract** law.

SECTION 19:

(a) Unless otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters an information system outside the control of the originator or the person who sent the electronic record on behalf of the originator.

(b) Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic record is determined as follows:

(i) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs:

(A) at the time when the electronic record enters the designated information system; or

(B) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record is retrieved by the addressee.

(ii) if the addressee has not designated an information system, receipt occurs when the electronic record enters an information system of the addressee.

(c) Section 19(b) shall apply notwithstanding that the place where the information system is located may be different from the place where the electronic record is deemed to be received under Section 19(d).

(d) Unless otherwise agreed between the originator and the addressee, an electronic record 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.

(e) For the purposes of this section:

(i) 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;

(ii) if the originator or the addressee does not have a place of business, reference is to be made to the usual place of residence; and

(iii) "usual place of residence" in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

(f) This section shall not apply to such circumstances as may be prescribed.

SECTION 20:

Where a **contract** to which this Act applies is a transnational **contract**, and a dispute arises out of or in connection with, such **contract**, the following provisions shall apply:

(a) The dispute shall be decided in accordance with the rule of law designated by the parties as applicable to the substance of the dispute;

(b) Any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to substantive law of that country and not to its conflict of laws rules;

(c) Failing any such designation of the law under subsection (a) by the parties the court or arbitral tribunal shall apply the rules of law which it considers to be appropriate given all the circumstances surrounding the dispute;

(d) In all cases the court or tribunal shall decide in accordance with the terms of the **contract** and shall take into account the usage of the trade applicable to the transaction;

Explanation: In this section "transnational **contract**" means a **contract** in which at least one of the parties is (i) an individual who is a national of or habitually resident in any country other than India; (ii) a body corporate which is incorporated in any country other than India; (iii) a company or an association or a body of individuals whose central management and control is situated in any country other than India; or (iv) the Government of a foreign country.

Comments: This section addresses the issue of which laws apply in cases of dispute related to electronic contracts. Generally, this section incorporates the provisions regarding the applicability of laws as reflected in Section 28 of the Arbitration and Conciliation Act, 1996.

(4) VALIDITY OF E-CONTRACTS: The validity of the e-contracts and limitation of the present law are determined by section III, IV & V of the present act. These sections define the purpose, applicability and scope of the present law. These sections are as under:

SECTION 3:

This Act shall be construed consistently with what is commercially reasonable under the circumstances and to effectuate the following purposes:

(a) To facilitate electronic communications by means of reliable electronic records;

- (b) To facilitate and promote electronic commerce, to eliminate barriers to electronic commerce resulting from uncertainties over writing and signature requirements, and to promote the development of the legal and business infrastructure necessary to implement secure electronic commerce;
- (c) To facilitate the electronic filing of documents with government agencies and statutory corporations, and to promote efficient delivery of government services by means of electronic records;
- (d) To minimize the incidence of forged electronic records, intentional and unintentional alterations of records, and fraud in electronic commerce and other electronic transactions;
- (e) To promote public confidence in the integrity and reliability of electronic records, electronic signatures and electronic commerce;
- (f) To establish uniform rules and standards regarding the authentication and integrity of electronic records; and
- (g) To create a legal infrastructure for the use of digital signatures.

Comments: This Act aims to remove actual and perceived barriers to electronic commerce and to set forth a legal framework to promote and facilitate the development of electronic commerce. It seeks to remove barriers by clarifying existing uncertainty over whether electronic records are "writings" or "signatures" or "records" for legal purposes. To promote electronic commerce, this Act provides for recognition of a class of electronic records known as "secure" electronic records and signatures. Secure electronic records and signatures are afforded higher evidentiary presumptions to provide parties engaged in electronic commerce assurance that their transactions are enforceable. In addition, this Act addresses evidentiary concerns as to the admissibility of electronic records. The Act presents a logical and coherent approach to resolving issues raised by electronic commerce and, where possible, seeks to preserve uniformity among the approaches to electronic commerce legislation taken by various countries.

SECTION 4:

- (a) Parts II or IV of this Act shall not apply to any law requiring writing or signatures in any of the following circumstances:
 - (1) the creation or execution of a will;
 - (2) the execution of negotiable instruments;
 - (3) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney with the exception of constructive and resulting trusts;
 - (4) any **contract** for the sale or other disposition of immovable property, or any interest in such property;
 - (5) the conveyance of immovable property or the transfer of any interest in immovable property;
 - (6) documents of title for movable or immovable property; or
 - (7) where such application would involve a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law, provided that the mere requirement that information be "in writing," "written" or "printed" shall not by itself be sufficient to establish such intent.

(b) The Central Government may modify in the public interest, by notification published in the Official Gazette, the provisions of section (a) by adding, deleting or amending any class of transactions or matters specified in that section.

(c) In relation to this Act, electronic records shall not be liable to stamp duty under the Stamp Act, 1899.

(d) Notwithstanding anything contained in the Telegraph Act, 1885, or rules made under this Act, it shall be lawful to transmit and receive records electronically.

Comments: It is not feasible to give broad legal recognition to all documents that are signed with an electronic signature because, under Indian Law, hand written signatures are more appropriate for certain categories of agreements. Therefore, the purpose of limiting application of this Act is to acknowledge the intent of relevant laws that mandate the use of pen and ink for some documents. For example, in the case of negotiable instruments, the current state of technology does not adequately provide a reliable mechanism for the transfer or negotiation of electronic records to holders in due course beyond an originator and an initial recipient of the electronic record. Additionally, this section provides authority to the Central Government to amend, as appropriate, the limitations set forth in this section. Further, the application of the Stamp Act has been limited to recognize the intangible nature of electronic records, based upon precedent set in the Depositories Act, 1996. The applicability of the Telegraph Act also has been limited in recognition of the necessity to encrypt data in relation to the transmission of certain types of secure electronic records.

SECTION 5:

As between parties involved in generating, sending, receiving, storing or otherwise processing electronic records, any provision of Part II or IV of this Act may be varied by agreement of the parties.

Comments: This section states the general principle that parties may vary the provisions of Parts II or IV by agreement. Thus, where the signer and the recipient of an electronic record, agree to the terms of a **contract**, the rules set forth in this Act may be varied by a **contract** between the parties.

Essentials of a valid e-contract

The electronic commerce act 1998 has prescribed various ingredients of a valid e- contract. These are as follows:-

1. That there should be complete reliable electronic record.
2. That there should be highly secure electronic record.
3. That there should be complete reliable electronic signature. If the document is signed by digital signatures then it should be deemed to be secure electronic signature and then it shall be secured electronic record.
4. That there should be interaction of electronic agents that confirm or indicate the existence of contract. Here all the journal principals of Indian Contract Act for a valid contract may be held applicable.
5. That the attribution must be between originator and addressee, either by self or by authorized agent.
6. That there should be acknowledgement of receipt of both parties as per wishes of the parties themselves.

7. That the contract in parties should apply ordinary prudence to keep away any kind of fraud representation etc. The contracting parties must also assure that the computer working is free from virus or any other kind of problem which may damage or destroy the e contract itself. Both parties must assure fairness as far as possible.
8. That the e contract shall be deemed to be original record and it shall be admissible in the evidence.

Punishment for breach of provisions

Section 26 & 27 has prescribed punishment for breach of the provisions of this act for e contract, these sections are as follows:-

26. Publication for Fraudulent Purpose. Any person who knowingly creates, publishes or otherwise makes available a certificate for any fraudulent or unlawful purpose shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding 2 years or a fine not exceeding Rs.1,00,000 or both.

This section prohibits the publication of a certificate for fraudulent purposes. Under this section use of a certificate for fraudulent purposes is an offense punishable by imprisonment or fine or both.

27. False or Unauthorized Request. Any person who knowingly misrepresents to a certification authority his identity or authorization for the purpose of requesting a certificate or for suspension or revocation of a certificate shall be guilty of an offense and shall be liable on conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding Rs. 50,000 or both.

This section prohibits misrepresentation when obtaining a digital signature certificate. Under this section obtaining a certificate by misrepresentation is an offense punishable by imprisonment or fine or both.

EPILOGUE

It is still a fact that the new electronic commerce act is governing various legal aspects of the E contracts but the provisions of Indian Contract Act, Sales of Goods Act, Partnership Act and Specific relief Act, Forward Contract Regulation Act 1952, Hire Purchase Act 1972, Multi Modal Transportation of Goods Act 1993, Securities Contract Regulation Act 1956, Consumer

Protection Act 1886, Recovery of Debt Due to Bank & Financial Institutions Act 1993 and various other claim tribunals such as railway claim tribunal, road transport tribunal etc cannot be ignored. I have to submit that the provisions of Electronic Commerce Act should be read with other laws governing contract as described by me here. It may be said that electronic commerce act is one of the specie of a great tree of Law of Contract covering various legislation. Electronic Commerce Act 1998 has laid down various legal aspects of the Econtracts by electronic devices like email etc. Section 15 to 20 prescribes the condition for formation of valid contract by such devices. This contract does not require signature. Section 6 to 12 of the aforesaid act prescribes the ground & essential ingredients of electronic contract. Delhi High Court recently in the case of Himachal Joint Venture vs. Pani Peena World Transport (Manu / DE / 002 / 2008) has described e contracts to be valid for all purposes. This case law has followed the earlier decision of Hon'ble Delhi High Court itself, in Ratna vs. Vasutech Ltd. (Manu / DE / 806 / 2007) and the verdict of Hon'ble Supreme Court in Citi Bank vs. TLC (Manu / SC / 3879 / 2007). The Hon'ble supreme court has also said in the case of Cable network vs. CNN (MANU / DE / 0022 / 2008) that in case of e contracts it is the duty of the parties to prove that everything is bonafied and genuine and nothing has been concealed and no fraud or any other kind of technical or electronic mistake has been committed. After the perusal of the provisions of the electronic contract act, it is clear that the act is not free from defects. There are several loop holes. There is no provision for claiming damages in a case of breach of contract by either of the party. There is also no provision for any other kind of redressal for not complying with terms & conditions of the contract. We are compelled to take help of general principles of law of general contract for these purposes. Section 4 & Section 17 (3) has reduced the applicability & importance of the act. Section 4 & 17 (3) prescribes exceptions where act is not applicable. Creation of will & negotiable instruments, transfer of immoveable property and transfer of title of moveable property is not governed by the provisions of this act. It goes to show that for these transactions e contract is not possible. Maximum commercial activities are carried out either for transfer of moveable & immoveable properties or for creation of negotiable instrument or for creation of will but unfortunately e contract are not possible in this field. The main purpose, for keeping out these transactions out of the scope of the act, to save revenue the main reason is that when the act was framed e stamps were not expected. And if such type of transactions could have been allowed then the government could have suffered maximum losses of stamps & revenue. Hence to save stamps & revenue these transactions were kept out from the purview of the act. Now the position has changed. E stamps are possible like railway & air ticket available on internet. If this system is adopted then certainly section 4 shall be obsolete & no longer shall reduce the scope of the act. Consequently all kinds of e contracts shall be possible. Further it is also suggested that punishment for breach of e contracts as prescribed by the present act is inadequate, punishment should be strict & higher. Presently the punishment is covering a few circumstances, but entire circumstances which are in contradiction & contravention to the provisions of the act should be made punishable strictly. Security measures should be enhanced so as to keep the electronic record free from all kind of damage & destruction either by computer virus or by hacking or by any other kind of illegal electronic devices.

Hence it is very clear that the law of E contract is governed by the Electronic Commerce Act 1998 for the purposes mentioned in the act. Other purposes which have not been

mentioned in the act are being covered by other ancillary enactments regarding law of contract i.e. Indian Contract Act, Sales of Goods Act, Partnership Act and Specific relief Act, Forward Contract Regulation Act 1952, Hire Purchase Act 1972, Multi Modal Transportation of Goods Act 1993, Securities Contract Regulation Act 1956, Consumer Protection Act 1886, Recovery of Debt. due to Bank & Financial Institutions Act 1993 and various other claim tribunals such as railway claim tribunal, road transport tribunal etc, looking into the relevancy of the facts whichever is applicable. It is also a fact that at present time the Electronic Commerce Act 1998 is at the stage of childhood under development. Future circumstances and other technological developments may suggest or compel us to add, remould, delete, modify or otherwise change any provision. These situations must be undertaken and studied minutely to thrash out a proper law relating to e contract and other electronic activities in future better than the present one.

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