

REMEDIES FOR BREACH OF E-CONTRACTS

Rachna Choudhary¹

INTRODUCTION

In recent times, the conventionally functioned models of business have become out-of-date and in many cases are not execution enough income to the owners or shareholders of the company. A usual example of such a situation in the business of newspaper in the United State of America wherein many of the noticeable newspaper have shut down or have lifted purely to the online medium.² New and inventive models and type of business need to be invented and worked. Existence of e-contract in the market is accomplishing the need for innovativeness in the traditional business segments. Businesses, both existing and new are trying to create an online individuality and an e-contract stand keeping in view the needs of the modern times.³

E-contract is one of the divisions of e-business.⁴ It holds a similar meaning of traditional business wherein goods and services are switched for a particular amount of consideration. The only extra element it has is that the contract here takes place through a digital mode of communication like the internet. It provides an opportunity for the sellers to reach the end of consumer directly without the involvement of the middlemen.⁵

New models of business demands different organisational charters. E-contract demands an organizational charter which caters to its new marketing needs. This mode of business enables businesses to save time on product design and device products according to the individual customer requirement, track sales and get immediate feedback from the customer.

Contracts have become so common in day-to-day life that most of the time we do not even recognize that we have entered into one. Right from buying a vegetable and hiring a Cab or to buying an airline ticket online, uncountable thing in our daily exists is governed by contracts.

¹ Assistant professor, School of Law, United World

² Suzane M. Kirchhoff, The U.S. Newspaper Industry in Transition (Sept. 9,2009)

³ T.P. Rama Rao, E-commerce and digital divide: Impact on consumers

⁴ Rajiv Shah, E-commerce

⁵ RICHARD DUNCOMBE, RICHARD HEEKS et al., ECOMMERCE FOR SMALL ENTERPRISE DEVELOPMENT 204 (2006)

The Indian Contract Act, 1872 deals with the principles of law of contract, its essential elements, its formation, its performance and the remedies for the breach of contracts. It determines the circumstances in which promises are made by the parties to a contract, general principles of the formation of contract and also prescribes the remedies which are available in the Court of law for the breach of contract against a person who fails to perform his undertaking created under the Contract.

As per Section 10 of the Indian Contract Law, 1872, an agreement is a contract which is enforceable by law. An agreement is enforceable by law and can be defined as a valid contract if it is made by competent parties, out of their free consent and for lawful object and consideration.

WHAT IS E-CONTRACT

Online contract or an electronic contract is an agreement modelled, signed and executed electronically, usually over internet. An Online contract is conceptually very similar and is drafted in the same manner in which a traditional paper-based contract is drafted. In case of an online contract, the seller who intends to sell their products, present their products, prices and terms for buying such products to the prospective buyers. In turn, the buyers who are interested in buying the products either consider or click on the 'I Agree' or 'Click to Agree' option for indicating the acceptance of the terms presented by the seller or they can sign electronically. Electronic signatures can be done in different ways like typing the name of the signer's in the specific signature space, copying and pasting the scanned version of the signature or clicking an option meant for that purpose. Once the terms are accepted and the payment is made, the transaction can be completed. The communication is basically made between two computers through servers. The online contract is brought to the scenario to help people in the way of formulating and implementing policies of commercial contracts within business directed over internet. Online Contract is modelled for the sale, purchase and supply of products and services to both consumers and business associates.

ESSENTIALS OF AN ELECTRONIC CONTRACT:

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

1. An offer requirements to be made: In many contacts (whether online or conventional) the offer is not made directly one-on-one. The consumer ‘browses’ the available goods and services showed on the seller’s website and then chooses what he would like to purchase. The offer is not made by website showing the items for sale at a particular price. This is essentially an invitation to offer and hence is revocable at any time up to the time of acceptance. The offer is made by the customer on introduction the products in the virtual ‘basket’ or ‘shopping cart’ for payment.
2. The offer needs to be acknowledged: As stated earlier, the acceptance is usually assumed by the business after the offer has been made by the consumer in relation with the invitation to offer. An offer is revocable at any time until the acceptance is made.

Processes available for forming electronic contracts include:

- I. E-mail: Offers and acceptances can be exchanged entirely by e-mail, or can be collective with paper documents, faxes, telephonic discussions etc.
 - II. Web Site Forms: The seller can offer goods or services (e.g. air tickets, software etc.) through his website. The customer places an order by completing and communicating the order form provided on the website. The goods may be actually delivered later (e.g. in case of clothes, music CDs etc.) or be directly delivered electronically (e.g. e-tickets, software, mp3 etc.).
 - III. Online Agreements: Users may need to take an online agreement in order to be able to avail of the services e.g. clicking on “I accept” while connecting software or clicking on “I agree” while signing up for an email account.
3. There has to be legal consideration: Any contract to be enforceable by law must have legal consideration, i.e., when both parties give and receive something in return. Therefore, if an auction site eases a contract between two parties where one Ecommerce – Legal Issues such as a person provides a pornographic movie as consideration for purchasing an mp3 player, then such a contract is void.

4. There has to be an intention to create lawful relations: If there is no intention on the part of the parties to create lawful relationships, then no contract is possible between them. Usually, agreements of a domestic or social nature are not contracts and therefore are not enforceable, e.g., a website providing general health related data and instructions.

5. The parties must be able to contract: Contracts by minors, lunatics etc. are void. All the parties to the contract must be lawfully competent to enter into the contract.

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

7. The object of the contract need to be lawful: A valid contract presumes a lawful object. Thus a contract for selling narcotic drugs or pornography online is void.

8. There must be conviction and possibility of performance: A contract, to be enforceable, must not be ambiguous or unclear and there must be possibility of performance. A contract, which is impossible to perform, cannot be enforced, e.g., where a website promises to sell land on the moon.

Online Contracts Can Be Categorized into Three Types Mainly i.e.

- Browse or web wrap contracts- An agreement made intended to be binding on two or more parties by the use of website can be called a browse wrap agreement. In case of browse wrap agreement a regular user of a particular website deemed to accept the terms of use and other policies of the website for continuous use.
- Shrink wrap contracts - Shrink-wrap agreements are usually the licensed agreement applicable in case of software products buying. In case of shrink-wrap agreements, with opening of the packaging of the software product, the terms and conditions to access such software product are enforced upon the person who buys it. Shrink-wrap agreements are simply those which are accepted by user at the time of installation of software from a CD-ROM, for example, Nokia pc-suite

- Click wrap contracts- Click- wrap agreements are web based agreements which require the assent or consent of the user by way of clicking “I Agree’ or “I Accept” or “Ok” button on the dialog box. In click –wrap agreements, the user basically have to agree to the terms and conditions for usage of the particular software. Users who disagree to the terms and conditions will not be able to use or buy the product upon cancellation or rejection.

VALIDITY OF ONLINE CONTRACT

The Information Technology Act, 2000 provides various procedural, administrative guidelines and regulates the provisions relating to all kinds of electronic transactions. These include computer data protection, authentication of documents by way of digital or electronic signature. Though electronic contracts have been given recognition by the IT Act, 2000, but majority feels it less secured to get into any kind of online contracts as there are no concrete judicial precedents for the validity and enforceability of online contracts in India. In case of browse wrap contracts, we usually accept the terms and conditions of the contract by clicking the button that indicates ‘ I Agree’ and in case of shrink wrap contract or purchase of a software product, assent is given by the consumer or the purchaser with tearing of the wrapper and using it. Many have the tendency of not reading the terms and conditions carefully before agreeing to such. But these actions should be taken consciously and carefully only after reading the terms of the contract properly as it leads to a valid contract and the terms can be strictly enforced against them.

An online contract is simply a communication between two parties in regard to transfer of goods/services. And as per Indian Evidence Act any e- mail communication and other communication made electronically is recognized as valid evidence in a Court of law. By considering the points, it can be concluded that the contract that follows the communication is valid too and Indian law thus recognizes the validity of online contracts. Several laws such as The Indian Contract Act, 1872, Information Technology Act, 2000, Indian Copyright Act, 1957 and the Consumer Protection Act, 1986 to some extent are working and acting on resolving issues that arise relating to the formation and validation of online contracts.

EVIDENTIARY VALUE OF ONLINE CONTRACT

In a country like India, where the literacy rate is not so high, the concept of 'Digital India' is a far reach. People still feel insecure to do online based transactions mainly because the terms and conditions of such contracts are not transparent. Documents are mainly registered for conservation of evidence, assurance of title and to protect oneself from fraud. The evidentiary value of electronic contracts has been given recognition and can be understood in the light of various sections of Indian Evidence Act. As per Sec 65B of the Indian Evidence Act any information contained in an electronic record produced by the computer in printed, stored or copied form shall deemed to be a document and it can be admissible as an evidence in any proceeding without further proof of the original subject to following conditions are satisfied such as the computer from where it was produced was in regular use by a person having lawful control over the system at the time of producing it, during the ordinary course of activities the information was fed into the system on a regular basis, the output computer was in a proper operating condition and have not affected the accuracy of the data entered. Section 85A, 85B, 88A, 90A and 85C of the Indian Evidence Act deal with the presumptions as to electronic records. Sec 85A has been inserted later to confirm the validity of electronic contracts. It says that any electronic record in the form of electronic agreement is concluded and gets recognition the moment a digital signature is affixed to such record. The presumption of electronic record is valid only in case of five years old record and electronic messages that fall within the range of Section 85B, Section 88A and Section 90A of Indian Evidence Act.

REMEDIES FOR BREACH OF ONLINE CONTRACT

There is no specific rule in case of breach of online contract but the rules regarding remedies for breach of contract can be followed as provided in The Indian Contract Act. A valid contract gives rise to co- relative rights and obligations and they are enforceable in the court of law when infringed on breach of contract. The Contract Act mainly talks about two remedies for the breach of contract such as Damages and Quantum Merit. But few other remedies are also available as provided in the Specific Relief Act such as specific performance of contract and injunction restraining the other party from making a breach of contract. Sec 73 and Sec 74 of the Indian Contract Act, 1872 deals with the rules regarding the remedy of damages on breach of contract.

The person whose rights are infringed by the breach of contract may bring an action for damages or compensation in terms of monetary value for the loss suffered by the party. Sec 73 to 75 provides rules regarding the assessment of damages based on the famous case Hadley vs. Baxendale. According to the rules laid down in this case, there can be damages which naturally arose on the usual course of things from such breach of contract and can be called ordinary damages and secondly, damages for loss arose from special circumstances i.e. special damages.

REMEDY CLAUSE

These clauses state what rights the non-breaching party has if the other party breaches the contract. In contracts for the sale of goods, remedy clauses are usually designed to limit the seller's liability for damages.

Arbitration Clauses: An arbitration clause states that disputes arising under the contract must be settled through arbitration rather than through court litigation. Such clauses generally include the name of the organization that will conduct the arbitration, the city in which the arbitration will be held, and the method for selecting arbitrators.

Merger Clauses: Merger clauses state that the written document contains the entire understanding of the parties. The purpose of merger clauses is to ensure that evidence outside the written document will not be admissible in court to contradict or supplement the terms of the written agreement.

Breach of Contract: The parties to a contract must either perform or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Act, or any other law. Promises bind the representatives of the promisor in the case of death of such promisor before performance, unless a contrary intention appears from a contract.

In a contract the agreement being enforceable by law, each party to the contract is legally bound to perform his part of the obligation. Non-performance of the duty undertaken by a party in a contract amounts to breach of contract, for which he can be made liable.

Remedies for breach of contract

The legal remedies for breach of contract are: (a) damages; (b) specific performance of the contract; and (c) injunction.

Damages: In practice damages constitute the main remedy. When a contract has been breached, the party who suffers by such breach is entitled to receive, from the party who has breached the contract, compensation for any loss or damage caused to him thereby, being loss or damages which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.

A person who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through non-fulfillment of the contract.

Liquidated damages and penal stipulations

If a sum is named in the contract as the amount to be paid in case of breach of contract, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive, from the party who has broken the contract, reasonable compensation, not exceeding the amount so named or the penalty stipulated for.

A stipulation for increased interest from the date of default may be regarded as a stipulation by “way of penalty”. The court is empowered to reduce it to an amount which is reasonable in the circumstances.

Specific performance

In certain special cases (dealt with in the Specific Relief Act, 1963), the court may direct against the party in default “specific performance” of the contract, that is to say, the party may be directed to perform the very obligation which he has undertaken, by the contract. This remedy is discretionary and granted in exceptional cases. Specific performance means actual execution of the contract as agreed between the parties.

Specific Performance of any contract may, in the discretion of the court be enforced in the following situations

- When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or
- When the act agreed to be done is such that monetary compensation for its non-performance would not afford adequate relief.

Instances where compensation would be deemed adequate relief are:

- Agreement as a consequence of a breach by a landlord for repair of the rented premises;
- Contract for the sale of any goods, for instance machinery or goods.

Exceptions

A contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, cannot be specifically enforced.

Another situation when a contract cannot be specifically enforced is where “the contract is in its nature determinable”. A contract is said to be determinable, when a party to the contract can put it to an end. A contract the performance of which involves the performance of a continuous duty, which the Court cannot supervise, cannot be specifically enforced.

Persons who cannot obtain specific performance

The specific performance of a contract cannot be obtained in favor of a person who could not be entitled to recover compensation for the breach of contract.

Specific performance of a contract cannot be enforced in favor of a person who has become incapable of performing the contract that on his part remains to be performed, or who violates any essential term of the contract that on his part remains to be performed, or who acts fraudulently despite the contract, or who willfully acts at variance with, or in subversion, of the relation intended to be established by the contract.

CONCLUSION

E-contract in India has definitely come a long way from the days of bazee.com which was underway as the first large online retail website. At present, with the increase in number of internet users, e-contract is organized to grow further. The growing trend of internet banking and credit or debit cards along with the rise in the number of educated and computer literate persons will further support this growth. The need of the hour is law which covers all the aspects of e-contract extending from payment mechanism and maintaining minimum standards in the delivery of services. Such a legislation will help to restrain the growth of websites which rise within a few days and then stop functioning in the absence of suitable funds for sustenance. As all business through e-contract sites is ended through the internet without any direct physical interfaces, the main basis of connections is the trust of the customers which should be engaged at any cost. A law in this field will detect the criminals who have used the internet as a source for making quick money. This will also act as a defense for the genuine e-contract websites and help in further growing of business. There is also a need for the creation of an authority in the consumer court to look into the grievances arising out of e-contract transactions. Such an authority should have experts in areas such as payment security. This will embolden speedy redressal of disputes and promote e-contract transactions. E-contract which is a developing segment in the commercial arenas is scheduled to grow and it is the accountability of the prevailing players to ensure that growth is not hindered by their acts and policies.

JCII