

## Conflict Of Laws In E-Contracts

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### Article Info

#### Article History

Received:  
May 24, 2021

Accepted:  
October 28, 2021

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#### Keywords :

Electronic Contracts,  
Electronic Commerce,  
Commercialization,  
Issues, Challenges,  
UNICTRAL

#### DOI:

10.5281/zenodo.5610164

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### Abstract

*E-contractis are recent phenomenon which has grown due to E Commerce. E commerce has created new domains which has no limits in terms of commercial & business transactions. There are no territorial limits in the domain of e-contracts. Physical presence is not a major requirement in e-contracts. However, at the same time the need to govern E contracts has also arisen. E-contracts are vital part of the E Commerce which cannot be left unregulated. There are major challenges which are posed while dealing through the electronic medium. The current research paper will discuss the basic issues pertaining to e-contracts with the major issues and challenges faced while contracting electronically. Doctrinal research methodology has been undertaken for this study. At the end, these issues and challenges are addressed properly in order to create a safe and secure electronic platform.*

### Introduction

In the last two decades, Internet has become the basic necessity for individuals. It has led to the development of E-commerce. E-commerce has assisted every business and corporate to increase the business. This has led to development of e-contracts at a large scale. One of the unique features of e-contracts is that the consumer may not come to know that he has entered into an e-contract. Merely clicking on "I agree with Terms and Conditions" may amount to entering into e-contract with the respective party at the other end. E-Contract has become a very common phenomenon that no aspect of life is untouched by it whether it is Online Shopping through Amazon, Travel Booking, hiring taxi online, food delivery etc.

However, we need to understand at this juncture that, e-contracts cannot be left unregulated. A strict regulatory regime is required in order to govern the e-contracts. There are major issues which we need to address in order to regulate e-contracts such as capacity of parties, jurisdictional aspect, governing law etc. The paper will be addressing all these major challenges faced in the formation of e-contracts.

### E-Contracts: Challenges and Legal Issues

Electronic contract are those contracts which are formed between the parties through electronic medium. Two or more than two parties may be involved in the formation of e-contracts. Electronic contracts are also known as digital contracts or cyber contracts.

There are different forms of electronic contracts such as click wrap contracts which are usually found in the agreements which contain "I agree or I disagree" clicking option. The other form is shrink-wrap agreement which is generally found in the CD Rom of the software. All terms and conditions are provided on the CD cover. The last form is Electronic Data interchange contract. This is mostly found in the contracts which enable trading transactions. It enables the transfer of data from one computer to other computer.

The development of e-contracts has taken place through e-commerce websites, portal or applications. The rules applicable to the traditional contracts are applicable in the electronic contracts as well.

### Challenges in E-contracts

Although E-contracts have many advantages over traditional contracts such as ease of doing business, no complicated compliances, easy and simple negotiations, no physical appearances etc. However, we also need to understand that the regime of e-contracts has various challenges also. These challenges and issues need to be addressed properly so that e-contract platform doesn't become an unregulated and uncontrolled platform. Parties entering into e-contracts are not limited to a particular jurisdiction or country. Rather contracting parties may be situated in remote locations such as UK, India, Japan etc. So now the issue which arises is which law should be

applied to govern the said e-contract? English law, Indian Law or Japanese law? There are multiple issues of conflict of laws involved in such electronic contracts. These challenges are discussed below.

### **Capacity to Contract**

It is one of the essential requirements for the formation of contracts. In the traditional contracts, capacity and competency to contract refers to age and soundness of mind of the contracting parties. In the Electronic contracts also, competency and capacity of the parties is the basic requirement. In an electronic contract, parties to the contract must take steps to ensure that the contract is binding, e.g., that the major elements of the contract are complied with and are agreed upon in the same sense by the parties. In the electronic contracts it is to be ensured that the parties entering into the agreement have the legal competence and capacity to enter into an agreement.

However, in the electronic contracts, the individuals entering into a contract are generally nameless parties. The other party who is providing a service has no idea whether the individual who has clicked on the agreement terms icon or text is legally competent to enter into a contract. Such type of situation is majorly faced in the contracts executed at any E commerce portal where any minor who is not competent to contract enters into a contract by clicking on "I agree" option.

### **Choice of Law**

The Choice of law is another aspect which needs in depth deliberation in the e- contracts regime. There may be instances where the parties entering into a contract are based in different nations or states. Every country has its own rules and regulations pertaining to e-contracts. In such a case, there is a possibility of conflict of laws. So now the question arises that which law should be applicable? Law of the either of the contracting parties or law of the place where the contract was to performed or proper law of contract?

### **Choice of Forum**

This is again a problem similar to that of the choice of law. Parties residing in different states or nations would prefer to make their local forum as the governing forum in cases of any disputes. Each party may file a suit in his or her respective jurisdiction.

### **Free Consent**

Free consent is one of the essential requirements of a legally enforceable contract. But determination of free consent is not always possible in e-contracts. In dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power, he has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever. Hence it can be concluded that the user should be prudent while giving his consent to avoid troubles.

### **Legal issues involved in E-Contracts**

There is no uniformity of contract law worldwide. Every country has its own law on major issues such as formation of contract, validity of contract etc. A contract may be valid in a country but maybe void in another jurisdiction due to lack of consideration. Similarly, in some jurisdictions a contract is formed at the place of acceptance whereas in some jurisdictions at the place when the acceptance is heard or received by the offeror. These challenges and issues are also faced in electronic contracts.

### **Suggestions**

Issues pertaining to capacity to contract, choice of Law, choice of forum, free consent and other legal issues can be resolved by developing laws specifically dealing with electronic contracts. Model law governing electronic contracts should be developed and every country should develop its law governing electronic contracts on the basis of the Model Law. There should be uniform laws globally so that there is no conflicting law on competency of party or choice of law etc.

Fortunately, now we have UNICTRAL model law to govern e-commerce and contracts. However, not every country has made necessary amendments in its local laws on the basis of Model Law. Till the time all the countries are not on the same page, we will keep facing these challenges in e-contracts.

### **Conclusion**

E commerce provides ease and flexibility in commercial transactions and businesses. However, there are multiple challenges in e-contracts in global scenarios which needs to be addressed properly. To overcome these issues, we need uniform laws which govern electronic contracts as due to globalization contracts are not restricted to a particular jurisdiction. E-contracts should be promoted as it improves the productivity and

competitiveness of our industries by providing unprecedented access to an online global market place with millions of customers and thousands of products and services.

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