

BHAGWADAS KEDIA CASE OPENED UP DOOR FOR E-CONTRACT: THERAPEUTIC ANALYSIS

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Abstract: The law of contract is the bedrock on which the whole superstructure of the economy is built on. Business, trade and commerce can flourish only when the law of the land is definite and clear in the minds of all concerned parties. Indeed, certainty of law is a vital factor in bringing down the risks and costs of business. This element of certainty should exist across all forms of contract, whether they be negotiated in the conventional form of postal communication or the modern way of electronic communication. Therefore, there is reason for Judges, jurists and practitioners engaging in the study of law to iron out the inconsistencies and make the law of e-contract easy to understand and simple to apply. This paper made an attempt to analyse concept of e-contract and the case of Bhagwandas Kedia. As the e-contracts are gaining acceptance in large numbers and due to the lack of clarity in some aspects, there may arise some disputes during and after transactions. There should be a policy to promote e-contracts by pre-emptively resolving the ambiguous and vague aspects of e-contracts. Presently, electronic communication is still regulated by the Indian Telegraph Act. There is an urgent requirement to codify the laws relating to electronic communication as well as e-contract and bring them into harmony with each other.

Keywords: E-contract, E-commerce, Contract, Internet

Introduction

Oxford dictionary defines contract as, a written or spoken agreement, especially one concerning employment, sales, or tenancy that is intended to be enforceable by law. It is the view of William Markby that Contract belongs to that class of acts which give rise to legal rights and duties upon occasions when the parties themselves have agreed so to declare.¹ In his book entitled *Elements of Law*, Markby quoted Savigny's definition of contract. Savigny defines contract as,

A contract is the concurrence of several persons in a declaration of intention whereby their legal relations are determined.

From the above definition of Savigny, it can be observed that the contract includes not only those agreements which are a promise to do or to forbear from, some future act, but also which are carried out simultaneously with the intention of parties being declared.

Section 2 (h) of Indian Contract Act, 1872 gives broader definition. It defines, 'an agreement enforceable by law is a contract'. Markby criticizes definition saying that it restricts the word contract to those agreements which the party making the promise is compelled by law to perform. Further, he states the definition of contract is very vague because there is no guidance with regard to what agreements or what classes of agreements are enforceable by law. Markby is of view that Savigny's definition is very comfortable to adopt, he also provides reason for the same.²

- That the agreement in order to become a contract must be one in which the parties contemplate the creation of a legal relation between themselves.
- That it clearly describes the true relation of the parties and how it arises.

BhagwandasKedia Case

Prior to judgment of *BhagwandasKedia*³ the Contract Act of 1872 was applicable to traditional mode of contracts, which means, contracts entered face to face between the competent parties. In order to understand *Kedia Case*, it is necessary to discuss *Entores Ltd. v. Miles Far East Corporation*.⁴ This is the case on which *Kedia Case* decision is based. The facts of the *Entores* case were that, an offer was made from London by telex to a party in Holland and it was duly accepted through the telex, the only question being as to whether the contract was made in Holland or in England. The Court of Appeal held that telex is a method of instantaneous

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¹ Sir William Markby, *Elements of Law*, 6th Ed., Oxford at the Clarendon Press, London, 1905, p.298

² *Ibid.* Ref. pp.301-303

³ *BhagwandasGoverdhandasKedia v. GirdharilalParshottamdas& Co.* AIR 1966 SC 543

⁴ (1955) 2 All ER 493

communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offerer; and the contract is made at the place where the acceptance is received. Denning LJ observed as follows:

Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that movement. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says.... Now take a case where two people make a contract by telephone. Suppose for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes 'dead' so that I do not hear his words of acceptance. There is no contract at that movement.

The principle of the *Entores* Case has been endorsed in *Kedia* Case. The rule above stated is called 'acceptance rule'.

Facts of the Case

Plaintiffs brought an action against the defendants for a decree for Rs. 31,150/- on the plea that the defendants had failed to supply cotton seed cake which they had agreed to supply under an oral contract dated July 22, 1959 negotiated between the parties by conversation on long distance telephone. The plaintiffs submitted that the cause of action for the suit arose at Ahmadabad, because the defendants had offered to sell cotton seed cake which offer was accepted by the plaintiffs at Ahmadabad. Also because the defendants were under the contract bound to supply the goods at Ahmadabad and the defendants were to receive payment for the goods through a Bank at Ahmadabad. The defendants contended that the plaintiffs had by a message communicated by telephone offered to purchase cotton seed cake and they (the defendants) had accepted the offer at Khamgaon, that under the contract delivery of the goods contracted for was to be made at Khamgaon, price was also to be paid at Khamgaon and that no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil Court Ahmadabad.

On the issue of jurisdiction, the Trial Court found that the plaintiffs had made an offer from Ahmadabad by long distance telephone to the defendants to purchase the goods and that the defendants had accepted the offer at Khamgaon, that the goods were under the contract to be delivered at Khamgaon and that payment was also to be made at Khamgaon. The contract was in the view of the Court to be performed at Khamgaon, and because of the offer made from Ahmadabad to purchase goods the Court at Ahmadabad could not be invested with jurisdiction to entertain the suit. But the Court held that when a contract is made by conversation on telephone, the place where acceptance of offer is intimated to the offeror, is the place where the contract is made, and therefore the Civil Court at Ahmadabad had jurisdiction to try the suit. A revision application filed by the defendants (*Kedia*) against the order, directing the suit to proceed on the merits, was rejected *in limine* by the High Court. Aggrieved by the order of the High Court, defendants preferred appeal to Supreme Court with special leave.

Defence of Defendants

The defendants (*Kedia*) contended that in the case of contract on telephone, the place where the offer is accepted is the place where the contract is made, and that Court alone has jurisdiction within the territorial jurisdiction of which the offer is accepted and the acceptance is spoken into the telephone instrument.

Reasoning and Judgment

Matter was decided by a three Judges Bench consisting of Justice J.C. Shah, Justice K.N. Wanchoo and Justice Mohd. Hidayatullah. There was a split verdict with 2:1. Shah (afterwards CJ) and Wanchoo JJ., gave majority view whereas Hidayatullah M, J (afterwards CJ) gave dissenting opinion. Shah J. gave judgment on behalf of himself and Wanchoo J. The Judges constituting majority opinion preferred to follow the English rule laid down in the *Entores* Case and saw no reason for extending the post office rule to telephonic communication. Shah, J. observed:

Making of an offer at a place which has been accepted elsewhere does not form part of the cause of action in a suit for damages, for breach of contract. Ordinarily it is the acceptance of offer and intimation of that acceptance which result in a contract. The intimation must be by some external manifestation which the law regards as sufficient.

On the general rule that a contract is concluded when an offer is accepted and acceptance is intimated to the offeror, is engrafted an exception based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decision. The exception may be summarized as follows: When by agreement, course of contract or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission the offeree by posting a letter or dispatching a telegram.

The rule that applies to acceptance by post of telegram does not however apply to contracts made by telephone. The rule which applies to contracts by telephone is the ordinary rule which regards a contract as complete only

when acceptance is intimated to the purchaser. In the case of a telephonic conversation in a sense the parties are in the presence of each other, each party is able to hear the voice of the other. 'There is an instantaneous communication of speech intimating offer and acceptance, rejection and counter-offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by Telegram.

It is true that the Posts and Telegraphs Department has general control over communication by telephone and especially over long distance Telephones, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, letters or messages cannot be transmitted. In the case of a conversation by telephone, once connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other; they are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously and communication does not depend on external agency.

...that the draftsman of the Indian Contract Act could not have envisaged use of telephone because it had not been invented and, therefore, the words of the provision should be confined to communication by post.

On the other hand in his dissenting opinion Hidayatullah J., observed:

In the *Entores* Case Lord Denning no doubt held that acceptance given by telephone was governed by the principles applicable to oral acceptance where the parties were in the presence of each other and that the analogy of letters sent by post could not be applied. But the Court of Appeal was not called upon to construe a written law which brings in the inflexibility of its own language. It was not required to construe the words found in Section 4 of the Indian Contract Act, namely, "The communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor."

The law under consideration was framed at a time when telephone, wireless, Telstar and Early Bird were not contemplated. If time has marched and inventions have made it easy to communicate instantaneously over long distance and the language of our law does not fit the new conditions it can be modified to reject the old principles. But it is not possible to go against the language by accepting an interpretation given without considering the language of our Act.

The language of Section 4 of the Indian Contract Act, covers a case of communication over the telephone. Our Act does not provide separately for post, telegraph, telephone, or wireless. Some of these were unknown in 1872 and no attempt has been made to modify the law. It may be presumed that the language has been considered adequate to, cover cases of these new inventions. It is possible today not only to speak on the telephone but to record the spoken words on a tape and it is easy to prove that a particular conversation took place. Telephones now have television added to them. The rule about lost letters of acceptance was made out of expediency because it was easier in commercial circles to prove the dispatch of letters but very difficult to disprove a statement that the letter was not received. If the rule suggested on behalf of the plaintiffs is accepted it would put a very powerful defence in the hands of the proposer if his denial that he heard the speech could take away the implications of our law that acceptance is complete as soon as it is put in course of transmission to the proposer.

Where the acceptance on telephone is not heard on account of mechanical defects there may be difficulty in determining whether at all a contract results. But where the speech is fully heard and understood there is it binding contract, and in such a case the only question is to the place where the contract can be said to have taken place.

In the present case both sides admitted that the acceptance was clearly heard at Ahmadabad. The acceptor was in a position to say that the communication of the acceptance in so far as he was concerned was complete when he (the acceptor) put his acceptance in transmission to him (the proposer) as to be out of his (the acceptor's...) power of recall in terms of s. 4 of the Contract Act. It was obvious that the word of acceptance was spoken at Khamgaon and the moment the acceptor spoke his acceptance he put it in course of transmission to the proposer beyond his recall. He could not revoke acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new inventions into the frame of our statutory law we are bound to say that the acceptor by speaking into the telephone put his acceptance in the resource of transmission to the proposer.

It is worth to mention that at the time of enactment of Contract Act of 1872 there were no telephones, telex or computers. Therefore, the draftsmen never imagined about scientific inventions. So, the Contract Act of 1872 did not envision about communication using different technologies. Further, the Supreme Court of India, through Hidayatullah J., stated that law can be modified to suit present

day's requirements. At this point it can be stressed that, circumstances have changed and new inventions are coming up. Under this situation, it appears that, the majority opinion in *Kedia's* standstill and would virtually be overtaken by the fast changing technological innovations and circumstances. Further, these changes have made the dissenting opinion, expressed by Justice Hidayatullah, more relevant today than the majority opinion. In addition to this, India is signatory party to the Model Law on Electronic Commerce, 1996. On that basis India has enacted Information Technology Act, 2000. Signing of such a convention and enacting law makes the binding majority opinion in *Kedia's* case redundant.

Having discussed about e-commerce and an important case, while moving ahead, now e-contracts are discussed here.

E-Contract

After looking at bird's view of e-commerce, now it is time for understanding what is the meaning of e-contract? There is no hard and fast definition of e-contract. The traditional definition of 'contract' cannot be applied to 'e-contract', because realm of e-contract is much bigger than the realm of traditional mode of contract. To put it simply, e-contract is any agreement which is entered on internet by competent parties, with lawful consideration, free consent, without any mala fide intention and to create legal relationship.

E-contract can be defined in following words:⁵

E-contract is a kind of contract formed by negotiation of two or more individuals through the use electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.

As it is already stated that there is no exhaustive definition as to e-contract and most of times only generic definitions are available. E-contracts are also referred as 'cyber-contract' or 'digital contract' or 'online contracts'.

Etymologically one can give as many as definitions for e-contract, but there is no border line for its meaning. In broader sense, it can be summed up as contracts made using computers, either via e-mail or the Internet, or that involve computer related products, such as databases and software.⁶

The International Chamber of Commerce refers to 'electronic contracting' as 'the automated process of entering into contracts via the parties' computers, whether networked or through electronic messaging.'⁷ This definition is an amalgamation of two separate explanations, one contained in the UN Convention on the Use of Electronic Communications in International Contracts and the other taken from the US Uniform Electronic Transaction Act and Uniform Computer Information Transactions Act providing for 'automated transactions'. 'Electronic Communication' means 'any communication that parties make by means of data message', whereas 'automated transaction' means 'any transaction conducted or performed, in whole or in part, by electronic means or electronic records'.

Kinds of E-Contract

There are two ways through which commercial contracts can be entered electronically. A common and popular method is through the exchange of electronic mail 'e-mail'. The other method of contracting is using the World Wide Web or 'website'. Further the website based is divided into following kinds:

- Click Wrap
- Browse Wrap and
- Shrink Wrap

E-mail Contract

A contract can be entered into and concluded following the exchange of a number of e-mails between the parties. Here the e-mails serve the same purpose as normal letters, do had a contract been negotiated through letters written by both parties. The fact that a contract has been negotiated electronically will not raise any specific legal or contractual consideration *sui generis* to the type

⁵ US Legal Definitions, available at <http://definitions.uslegal.com/e/e-contract/> last visited on 28 November, 2012

⁶ Available at, http://highered.mcgraw-hill.com/sites/0073524948/student_view0/glossary.html last visited on 28 November, 2012

⁷ General Usage for International Digitally Ensured Commerce (GUIDEC) Version II, International Chamber of Commerce, available at, <http://www.iccwbo.org/> last visited on 28 November, 2012

although there may be evidential considerations raised dependant on the existing legislation and if there are any formal requirements for a written signed contract.

Contract through web sites

Normally, a vendor would provide a display of products on his website and indicates cost of such product. A customer can scroll through the website previewing the items or products on offer, click on the item for further information and if interested in the purchase, can place an order by filling in an order form and clicking 'Submit' or 'I Agree' or 'I Accept' or something similar button. Shrink wrap,⁸click wrap and browse wrap are common types of agreements used in electronic commerce.

Click wrap

A click wrap agreement is mostly found as part of the installation process of software packages. It is also called a 'click through' agreement or click wrap license. The name 'click wrap' comes from the use of 'shrink wrap contracts' in boxed software purchases. In a Click Wrap Agreement, the party after going through the terms and conditions provided in the website or programme has to typically indicate his assent by clicking "I Agree/I Accept" icon or decline the same by clicking the icon "I disagree". These types of contracts are extensively used on internet for granting permission to access the site or downloading the software or selling some product. Click-wrap agreements can be of the following types:

- i. **Type and Click** where the user must type 'I accept' or other specified words in an on-screen box and then click a 'Submit' or similar button. This displays acceptance of the terms of the contract. A user cannot proceed to download or view the target information without following these steps.
- ii. **Icon Clicking** where the user must click on an 'OK' or 'I agree' button on a dialog box or pop-up window. A user indicates rejection by clicking "Cancel" or closing the window.

Software Developers generally rely on the use of contracts in the form of click wrap license agreements as a means to protect software from unauthorized use, modification and copying. By granting a license to the purchaser to use the software rather than selling the program outright, the Software Developer is able to retain and have control over his product. Most of click wrap license agreements are non-exclusive licenses which mean that the licensor reserves the right to license the same software to other licensees.⁹

Click wrap agreements usually include provisions such as a 'Notice of Agreement Clause' stating that the using of the software/product constitutes agreement to the license's terms, a 'Title Retention Clause' which, in effect, states the user does not own the copy of the program he/she has contracted for, but takes possession subject to a perpetual license, an 'Exclusive Use Clause', a clause preventing the user from creating unauthorized copies of the software/ product for use or otherwise, an 'Anti-refuse Clause' prohibiting the user from lending, renting, or transferring the software to others, in case of softwares, a clause prohibiting usage in more than one computer specified for that parties, an 'Anti-reverse Engineering Clause', prohibiting the user from reassembling the product from the already available version, a provision protecting the copyright over the software/ product design, a usual limitation or disclaimer of warranties and liabilities, a clause limiting the liability of the vendor, a purchaser's right to decline the terms of the agreement by returning the software program or the product, as the case may be, and miscellaneous provisions such as a governing law clause, jurisdiction clause, force majeure clause etc....¹⁰

Thus, click wrap agreements are adhesion contracts which do not involve the concept of mutual assents and bargains as provided in the contract theory. Actually they are "take it or leave it" agreements in which the user is not made aware of the terms until late in the transaction (just before the use of the product) which is different from traditional written contract.¹¹

In click wrap agreements, the meeting amongst the parties is virtual i.e. they do not meet physically. The contract could be for the sale of any kind of product, physical or otherwise. Following are some of the issues that may arise out of click wrap contracting, which will be dealt at later juncture:

- Identity of Parties
- Jurisdiction and
- Legal Recognition of Transaction

The validity and enforceability of click wrap agreements will be dealt in later chapter.

⁸The clinging transparent plastic film that is used to shrink-wrap the Compact Disks.

⁹Kunal Singh, *Click Wrap Agreements in Indian Contract Law*, available at <http://lex-warrier.in/2012/03/click-wrap-agreements-in-indian-contract-law/> last visited on 05-11-2012

¹⁰*Ibid*

¹¹Mark A. Lemley et al., *Software and Internet Law*, Aspen Law and Business, California, 3rd Ed., 2006, p.363 available at <http://www.law.berkeley.edu/5368.htm> last visited on 24-11-2012

Shrink Wrap

Shrink wrap contracts are license agreements or other terms and conditions which can only be read and accepted by the consumer after opening the product. The term describes the shrink wrap plastic wrapping used to coat software boxes, though these contracts are not limited to the software industry.

A shrink wrap contract is the prior license agreement enforced upon the buyer when he buys software. Before he or she tears the pack to use it, he or she is made aware by tearing the cover or the wrap that they are bound by the license agreement of the manufacture.

This is done to protect the interests of the manufacturer where the consumer cannot reproduce the package, copy it or sell it or donate it to others affecting the sale of the software. The license, which is shrunk and wrapped in the product, same becomes enforceable and taken as consent before the buyer tears the package. The usual clauses that are part of the shrink-wrap license are that of:

- prohibiting unauthorised creation of copies
- prohibiting rentals of the software
- prohibition of reverse engineering, de-compilation or modification
- prohibition of usage in more than one computer specified for that purpose
- disclaimer of warranties in respect of the product sold
- limitations of liability

The logic and business sense is that to protect the manufacturer of the package, as it is easy to copy, manipulates and duplicate under other brand name.

The legal status of shrink wrap is somewhat unclear. In the 1980s, the US courts tried to solve the problem of status. The first legal ruling to address the enforceability of a shrink wrap license grew out of a pair of decisions (a trial court decision and an appeal to the Fifth Circuit) from Louisiana. In case of *Vault Corp. v. Quaid Software Ltd.*¹², the district court stated without explication that the shrinkwrap license at issue in that case was “a contract of adhesion which could only be enforceable” if the provisions of a Louisiana statute—which explicitly made such license agreements enforceable—were a valid statute that was not preempted by federal law. It was held that the shrink wrap is unenforceable.

Further in *Arizona Retail Sys. v. Software Link*¹³ and *Step-Saver Data Sys. v. Wyse Technology*¹⁴ the courts did not discuss much about the shrink wrap agreements. It was in *ProCD, Inc. v. Zeidenberg*¹⁵ courts gave bit of relief to the software companies by enforcing shrink wrap agreement. Further it was held that shrink wrap agreements were enforceable.¹⁶

ProCD was followed by *Klocek v. Gateway, Inc.*¹⁷, which found the contracts at hand unenforceable, but did not comment on shrink wrap contracts as a whole.

Browse Wrap

In a browse-wrap agreement, the terms and conditions of use for a website or other downloadable product are posted on the website, typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, where the user must manifest assent to the terms and conditions by clicking on an “I agree” box, a browse-wrap agreement does not require this type of express manifestation of

¹² 655 F. Supp. 750, 761 (E.D. La. 1987), aff’d, 847 F.2d 255 (5th Cir. 1988) available at http://itlaw.wikia.com/wiki/Vault_v._Quaid last visited on 29-11-2012

¹³ 831 F. Supp. 759 (D. Ariz. 1993) available at http://itlaw.wikia.com/wiki/Arizona_Retail_Systems_v._Software_Link last visited on 29-11-2012

¹⁴ 939 F.2d 91 (1991) available at http://itlaw.wikia.com/wiki/Step-Saver_Data_Systems_v._Wyse last visited on 29-11-2012

¹⁵ 908 F. Supp. 640 (W.D. Wis. 1996) available at http://itlaw.wikia.com/wiki/ProCD_v._Zeidenberg last visited on 29-11-2012

¹⁶ David L. Hayes, Esq., *The Enforceability of Shrink wrap License Agreements On-Line and Off-Line*, (1997) available at <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ShrinkwrapFenwick.pdf> last visited on 29-11-2012

¹⁷ 104 F.Supp.2d 1332 (D. Kan. 2000) available at <http://www.law.unlv.edu/faculty/rowley/Klocek.pdf> last visited on 29-11-2012

assent. Rather, a web-site user purportedly gives his or her assent by simply using the product — such as by entering the website or downloading software. Browse-wrap agreements, like click wrap agreements, derive their name by analogy to ‘shrink wrap’ used in the licensing of tangible forms of software sold in packages.

As in case shrink wrap agreements there is uncertainty of enforceability, same way the uncertainty continues with browse wrap agreements. But browse-wrap agreements present different issues because it is less clear that the person using the website has accepted the terms of the agreement. The courts have held that the validity of a browse wrap agreement primarily depended on whether a website user has had actual or constructive notice of the terms and conditions prior to using the website or other product.

In *Hubbert v. Dell Corp.*,¹⁸ on appeal, an Illinois state appellate court reversed the trial court’s refusal to compel arbitration. The appeals court took note of how prominently Dell had warned the user that Dell’s terms and conditions would apply:

...The blue hyperlink entitled “Terms and Conditions of Sale” appeared on numerous Web pages the plaintiffs completed in the ordering process [...and] should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract. Although there is no conspicuousness requirement, the hyperlink’s contrasting blue type makes it conspicuous. Common sense dictates that because the plaintiffs were purchasing computers online, they were not novices when using computers. A person using a computer quickly learns that more information is available by clicking on a blue hyperlink.

Additionally, on three of the defendant’s Web pages that the plaintiffs completed to make their purchases, the following statement appeared: “All sales are subject to Dell’s Term[s] and Conditions of Sale.” This statement would place a reasonable person on notice that there were terms and conditions attached to the purchase and that it would be wise to find out what the terms and conditions were before making a purchase.

The statement that the sales were subject to the defendant’s “Terms and Conditions of Sale,” combined with making the “Terms and Conditions of Sale” accessible online by blue hyperlinks, was sufficient notice to the plaintiffs that purchasing the computers online would make the “Terms and Conditions of Sale” binding on them.

Because the “Terms and Conditions of Sale” were a part of the online contract and because the plaintiffs did not argue that their claims were not within the scope of the arbitration agreement, they were bound by the “Terms and Conditions of Sale,” including the arbitration clause.

Whereas in *Specht v. Netscape*,¹⁹ the influential Second Circuit court of appeals affirmed denial of a motion (or application) to compel arbitration; the court agreed that:

... a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants’ invitation to download the free software, ...defendants therefore did not provide reasonable notice of the license terms.

In *Hoffman v. Supplements Togo Mgmt. LLC*,²⁰ and *In re Zappos.com Inc., Customer Data Security Breach Litigation*,²¹ the court held that “without direct evidence that Plaintiffs click [sic] on the Terms of Use, we cannot conclude that Plaintiffs ever viewed, let alone manifested assent to, the Terms of Use.

Online shopping agreements

This is another kind of e-contract, in this people can purchase goods, home appliances and many more things online. Very recently in India some websites are selling some products are services online. This type of sale is gaining more popularity. Therefore, this kind of agreement assumes importance.

Generally a typical B2C e-commerce cycle involves the following five major activities:²²

- **Information Sharing:** The general practice in information sharing is that the Company uses the following application/methodology to share information with its prospective customer. This information could be in the form of the

¹⁸ 359 Ill. App.3d (Ill. Ct. App. 2005) available at http://itlaw.wikia.com/wiki/Hubbert_v._Dell last visited on 29-11-2012

¹⁹ 306 F.3d 17 (2d Cir. 2002) available at http://itlaw.wikia.com/wiki/Specht_v._Netscape last visited on 29-11-2012

²⁰ 18 A.3d 210 (2011)

²¹ No. 3:12-cv-00325-RCJ-VPC MDL No. 2357, 2012 WL 4466660 (D. Nev. Sept. 27, 2012)

²² *Supra* Ref. 3, pp.1246-1247

Company's website, online catalogs, email alerts, online advertising, bulletin boards, message Board systems, news groups and discussion groups.

- **Order:** Once a customer is familiarized with his needs the customer may use the electronic forms which are available on the Company's website and order for the necessary goods.
- **Payment Channels:** The website gives the customer various options for payment for the goods or services selected, all of which are listed with the website. The most popular modes of payment are credit and debit cards cheques and cash on delivery or charge cards.

The web company to ensure security and confidentiality with respect to each of these electronic transactions incorporates various security measures. These measures in the form of digital signature, authentication, public key cryptography, certificate authorities, SSI, secure HTTP digital signatures and public and private key transactions.

- **Performance of Order:** The function of performance of the order, depending on the nature of the transaction and the directions of the customer might be either simple or complex. The mode of fulfillment will also depend on how the e-business handles its own fulfillment operations or outsources this function to third parties.
- **Support and Services:** In any e-business service plays a very vital role by virtue of the fact there is a lack of physical presence and other innovative methods are required to maintain current customers. The general ways of applications of technology for providing such service and support are having; periodic follow up by e-mails, email confirmation/alerts, Online surveys, Help Desk and Guarantee of secure transaction.

Conclusion

The law of contract is the bedrock on which the whole superstructure of the economy is built on. Business, trade and commerce can flourish only when the law of the land is definite and clear in the minds of all concerned parties. Indeed, certainty of law is a vital factor in bringing down the risks and costs of business. This element of certainty should exist across all forms of contract, whether they be negotiated in the conventional form of postal communication or the modern way of electronic communication. Therefore, there is reason for Judges, jurists and practitioners engaging in the study of law to iron out the inconsistencies and make the law of e-contract easy to understand and simple to apply.

While, in its fundamentals e-contract is no different from a conventionally formed contract, i.e., through postal communication, there are some aspects which stretch the capacity and imagination of the contract law. Firstly, there is the question of relevance of the "postal rule" to contracts made through electronic communication. Secondly, there is the question of jurisdiction, given that the infrastructure and working of the internet is highly dynamic, and thus fixing any one place as jurisdiction of the contract is highly contentious and problematic. Thirdly, there are issues relating to evidence of the contract, such as to how identity of the parties to the contract could be ascertained, and their assent to the contract determined.

The Supreme Court in the *BhagwandasKedia* had established the acceptance rule in the case of contracts negotiated over instantaneous communication like telephone. Some commentators and some judgments seem to suggest that by analogy, the acceptance rule would prevail in contracts negotiated over electronic means also. However, it is important to note that there have been two major developments which have struck at this position: firstly, the passage of the Information Technology Act, 2000, which was substantially inspired by international legal trends, and secondly, the judgment of the Allahabad High Court in *PR Transport v. Union of India*.²³

Section 13(1) of the Information Technology Act, 2000 provides that except as agreed to between the parties to the contract, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. This is a major blow against the acceptance rule enunciated by the majority of judges in the *BhagwandasKedia* case, and re-establishes the postal rule, as advocated by Hidayatullah J., in his dissenting opinion. Thus, it can be said that the *Kediacase* has taken a back seat with respect its application regarding e-contracts.

The Allahabad High Court in the *PR Transport v. Union of India* recognised email communication as analogous to postal communication, and applied the postal rule as to communication between parties by email. This is a very significant development since it goes against conventional wisdom that email communication was in the same class as telephone communication, i.e. instantaneous communication.

Although, e-contracts are gaining acceptance and there should be a policy to promote e-contracts by pre-emptively resolving the ambiguous and vague aspects of e-contracts. Further the following practices may help for promotion and acceptance of e-contracts with the general public as well as the business community:

- The Indian Contract Act requires that for an enforceable contract, the parties to the contract must be above 18 years of age. However, the basic problem in the electronic sphere is that there is no proof way of knowing the correct age of the customer. Thus, in a recent case filed in the Delhi High Court, the bench asked orally as to how minor persons are registering with

²³AIR 2006 All 23.

online sites such as Facebook and Orkut, when they do not fulfil the requirement of being above the age of 18 years. The government must frame a policy whereby online service providers should try to ascertain the age of the customer before such customers are registered on their sites. Failure to ensure this can lead to information, privacy and money of minor customers being used and abused.

- Presently, electronic communication is still regulated by the Indian Telegraph Act. This Act was framed at a time when there was no idea of the internet or the modern communications systems we have today. Therefore, to suit today's exigencies, the ancient law is being stretched beyond imagination. There is an urgent requirement to codify the laws relating to electronic communication as well as e-contract and bring them into harmony with each other. We should also take inspiration from the various international treaties and standards regarding contracts and electronic communication so that there is no hurdle to international commerce and business with India. Particularly, the model laws framed by UNCITRAL are very helpful in this regard.
- Since the electronic commerce and communications field is a very dynamic and fast-changing area, many of the definitions and concepts provided for in the laws become very soon outdated. Therefore, to obviate the possibility of injustice, the courts should give high value to the evidence of experts in the computer field, who will be having knowledge of the latest trends.
- Ideally, the parties to the contract should have freedom of contract, that is, the terms of the contract should be mutually agreed and acceptable to the parties. Such acceptance can come only from open bargaining and negotiation. Unfortunately, in e-contracts, the seller is in a highly advantageous situation, and he employs it to impose unfair terms on the buyer. There is a need to regulate the imposition of such unfair terms so that the interests of the consumers are not harmed.
- The question of jurisdiction is very important as regards to e-contracts. The Supreme Court of India in the BhagwandasKedia case endorsed the ruling in the Entores case, that there will be instantaneous communication when transactions are conducted over telephone. However, later developments like the introduction of the Information Technology Act, 2000 have seriously impacted the instantaneous communication rule since the Information Technology Act, 2000 provides that email communication is deemed to be complete when the email goes out of the computer of the sender. Therefore, there is a serious need to revise and update the laws regarding jurisdiction under e-contracts.

