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UNDERSTANDING THE CONTRACT LAW AND ELECTRONIC BY ANALYSING THROUGH ITS HISTORICAL DEVELOPMENT

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Abstract

The English law developed from promise to contractual thought in England. Due to this, there was a rise in the promissory action of assumpsit, which became one of the cornerstones of the unified law of contract of the nineteenth century. A noteworthy feature of English Law between Glanville in the late twelfth century and Blackstone in the mid-eighteenth century is the dearth of theoretical treatments of contract law. The English Contract Law largely grew on-court practice and decision in relation to the three medieval actions of debts, covenant and assumpsit It is a standard observation to contrast the common law with the Romancivilian heritage of continental Europe, one remarkable shared feature of both English law and Roman Law is the extent to which legal development in each came about as a result of changes in forms of pleading rather than as a result of legal theory. While their content might be different, English Law and Roman Law were both essentially legal systems based upon actions. Due to the gradual development in legal and commercial practice, this theory of common law also gained importance.

Key words :
Electronic Contract, Historical View Etc

Introduction

Today, in the business world, the person liable for making the contract with the consumer, supplier or service provider or buying a goods or hiring a car, house or etc., on lease should have enough knowledge of law of contract because all business and commercial transactions are based on contracts which are regulated under the law of contract. So, it is highly essential for the traders to manage the contract effectively whereby many unexpected and unpredicted legal issues may be avoided. Both the parties making the contract may decide upon the terms and conditions before within the framework and structure of law. In a technological era, it is seen that business houses make the contract by e-mail with their consumers and sometimes they prepare their own fixed terms and conditions and upload it on the website and which are generally not flexible. While doing so, usually, they incorporate an excluding or limiting clause as a part of the contract. The law of contract provides all relevant keys to the contracting parties which would help them in better understanding the legal and managerial problems in contract formulation, performance and implementation so that they can successfully avoid some of the intrinsic mistakes usually committed by the parties while formulating the terms and conditions for making domestic and/or international commercial contracts.

Concept of contract

A contract is an agreement between two or more persons intended to create a legal obligation between them and to be legally enforceable.2 The essentials of a valid contract are that the parties must have had contractual capacity; must have reached agreement on all the material terms of the contract; must have intended the agreement to be legally enforceable, as opposed to merely a social or moral obligation; and the agreement must not be objectionable by virtue of illegality, impossibility, or the fact that it is contrary to public policy. A contract is an agreement which the parties intended to be legally binding. The word agreement is used in its ordinary sense but not every agreement, in the ordinary sense of that word, is a contract. For example; the peoples may agree that the conservative party will win the next general election, but this agreement is not contract because it does not involve either party undertaking to do anything. A contract may be defined as an exchange relationship created by oral or written agreement between two or more person, containing at least one promise, and

recognized in law as enforceable. Probably the most important attribute of contract is that it is a voluntary, consensual relationship. There need only be two parties to a contract, but there is no limit on the number of parties that could be involved in the transaction.[1]

A contract is created only because the parties, acting with free will and intent to be bound, reach agreement on the essential terms of their relationship. It is the element of agreement that distinguishes contractual obligation from many other kinds of legal duty (such as the obligation to compensate for negligent injury or to pay taxes) that arise by operation of law from some act or event, without the need for assent. Although voluntary agreement between the parties is essential to the creation of contract, "agreement" in the legal sense is subject to an important qualification. The law does not require that the parties reach true agreement, in a subjective sense-that their minds are in accord. It is enough that the words and conduct of a party, evaluated on an objective standard, would lead the other party reasonably to understand that agreement was reached. The essential purpose of the contract relationship is exchange. The trade in property, services, and intangible rights is fundamental to our economy and society, and the primary function of contract is to facilitate and regulate agreement to be legally enforceable, as opposed to merely a social or moral obligation; and the agreement must not be objectionable by virtue of illegality, impossibility, or the fact that it is contrary to public policy. A contract is an agreement which the parties intended to be legally binding. The word agreement is used in its ordinary sense but not every agreement, in the ordinary sense of that word, is a contract. For example; the peoples may agree that the conservative party will win the next general election, but this agreement is not contract because it does not involve either party undertaking to do anything. A contract may be defined as an exchange relationship created by oral or written agreement between two or more person, containing at least one promise, and recognized in law as enforceable. Probably the most important attribute of contract is that it is a voluntary, consensual relationship. There need only be two parties to a contract, but there is no limit on the number of parties that could be involved in the transaction. A contract is created only because the parties, acting with free will and intent to be bound, reach agreement on the essential terms of their relationship. It is the element of agreement that distinguishes contractual obligation from many other kinds of legal duty (such as the obligation to compensate for negligent injury or to pay taxes) that arise by operation of law from some act or event, without the need for assent. Although voluntary agreement between the parties is essential to the creation of contract, "agreement" in the legal sense is subject to an important qualification. The law does not require that the parties reach true agreement, in a subjective sense-that their minds are in accord. It is enough that the words and conduct of a party, evaluated on an objective standard, would lead the other party reasonably to understand that agreement was reached. The essential purpose of the contract relationship is exchange. The trade in property, services, and intangible rights is fundamental to our economy and society, and the primary function of contract is to facilitate and regulate.[2]

Historical development of contract law in India

The history of the act brings to light the very origin of the economic processes and in this regard, contract is important in order to conduct one‘s business in everyday life. The prevalent system in the ancient times was barter, exchange and it was based on the mutual principle of give and take. This was confined to commodities as there was no medium of exchange as is seen in the form of money today and this system can be traced back in time to the Indus Valley Civilization (the earliest human civilization). The system still finds relevance in the contemporary world, where it can be found in commercially and economically underdeveloped areas. However, the relevancy of such a system in modern times is questioned as the complexity in the nature of the economic systems as well as the increasing demand and supply systems due to the change in the wants and needs of the human beings came to the fore. Also, money had evolved as the medium of exchange such that the value of every commodity could now be quantified. Thus, in such an era of greater economic transaction one finds the existence of Contract Laws and with it, their relevance. The Indian Contract Act codifies the way we enter into a contract, execute a contract and implement provisions of a contract and effects of breach

[1] See Treitel, Law of Contract (4th edn. 1975) pp. 131-132.
[2] Basu, Kaushik (January 2006) “Coercion, Contract and the Limits of the Market”.

of a contract. The contractual capacity is restricted in certain situations otherwise it is the prerogative of the individual to contract. There are specific areas which deal with property, movable goods and specific performance such as the Transfer of Property Act, the Sale of Goods Act and the Specific Relief Act. Some of these acts, were originally a part of the Indian Contract Act enacted in 1872 but were later codified as separate laws. Moreover the Act is not retrospective in nature. Hence a contract entered into prior to 1st September 1872, even though to be performed after passing of this Act is not hit by this Act. Hence, we arrive of the conclusion that the basic framework of contracting is covered in the Indian Contract Act and it is an important area of law, with roots deep in the history of civilization- and thus forms the subject matter of this project of this course of legal.[3]

Vedic and medieval period

During the entire ancient and medieval periods of human history in India, there was no general code covering contracts. Principles were thus derived from numerous referencesthe sources of Hindu law, namely the Vedas, the Dhramshatras, Smritis, and the Shrutis give a vivid description of the law similar to contracts in those times. The rules governing contracts form a part of the law called Vyavaharmayukha. Studies of the Smritis reveal that the concept of contract originated in the Vedic period itself. The general rules of contract bear a striking resemblance to the modern law of contract. For e.g. as mentioned in the Manusmriti, the first and the foremost requirement for a contract process to start is the competence of the persons who are willing to enter into a contract. This norm laid down for competence corresponds with the provisions of the present law (Section 11, Indian Contract Act), namely, dependents, minors, sanyasis, persons devoid of limbs, those addicted to vices were incompetent to contract. The Naradsmriti categorizes competent persons into three, the king, the Vedic teacher and the head of the household. The concept of liability in contract law finds its birth in the Vedic period too. Spiritual debts were referred as rina'and it was constantly reinforced by the Smritis that failure to pay back the debts meant re-birth as a slave, servant, woman or beast in the house of creditor. So, the son was liable to pay of his father's debts even if he did not inherit any property from him. Towards the end of the medieval age, the law of contracts was pretty much being governed by two factors, the moral factor and the economic factor. Activities like transfer of property, performance of services etc. required rules for agreements and promises, which covered not just business and commercial transactions, but also personal relationships in all walks of life.

This takes us to the next source, i.e. the Arthashastra by Kautilya, which is considered to be the only existing secular treatise on politics and governments. During Chandragupta's reign, contract existed in the form of bilateral transactions‖ between two individuals of group of individuals. The essential elements of these transactions were free consent and consensus on all the terms and conditions involved. It was an open contract openly arrived at. It was laid down that the following contracts were void contracts formed during the night. Contracts entered into the interior compartment of the house. Contracts made in a forest contracts made in any other secret place .There were certain exceptions to clandestine contracts such as: Contracts made toward off violence, attack and Contracts made in celebration of marriage Contracts made under orders of government Contracts made by traders, hunters, spies and others who would roam in the forest frequently. The contract would be rendered void if there was any undue influence or if the contract was entered into a fit of anger or under influence of intoxication etc. In general, women could not make contracts binding on their husbands or against family properties. It was possible for a competent person to authorize a dependent to enter into transactions[4].

History in the fifteen and sixteenth centuries

The challenge faced by the common law Courts in the fifteenth and sixteenth centuries was to develop a general criterion for enforcing promises within the framework of the forms of action. And by the end of the 15th century, two forms of action for enforcing rights, which included some of those which we

[3] A. A. H. Hassan, Sales and Contracts in Early Islamic commercial law (University of Edinburgh, 2nd ed., 2007)
[4] Supra 17.

now call contractual, had taken a fairly definite shape. These were action on debt‘ and the action on convenant.

The seventeenth and eighteenth centuries

The seventeenth and eighteenth centuries saw the recognition of the transferability of contract rights as kind of property, the enactment of legislation requiring writing for some kind of contracts, and the shaping of the concept of the dependency of promises. But the movement was slow during this period. Towards the end of the eighteenth century, things had dramatically changed. A modern legal historian wrote that in America years from 1800-1875 were, above all else, the years of contract. Contract expressed, energetic self-interestand the law it governed it expressed the nature of contract by insisting that men assert their interests, push them, and fight for them, if they were to have the help of the state. It is also generally supposed that it was during this period that Adam Smith had proclaimed that freedom of contract, freedom to make enforceable bargains would encourage individual entrepreneurial activity. Also from the utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore works for the good76 of the society, which is still in force, provided that the law to be observed in the trial of suits be the Acts of Parliament and regulations of government applicable to the case, and in the absence of such acts and regulations; the usage of the country in which suit arose; and if none such appearedthe law of the defendant, and in the absence of specific law and usage, equity and good conscience.The expression justice, equity and good conscience‘ was interpreted to mean the rules of English law so far as applicable to the Indian society and circumstances. It has been observed that in practice, the application of English law did not raise difficulty because on many points there were no differences between the English and the personal law, and there was no rule of personal law in many cases, moreover because many Indian businessmen acquired experience from their relations with Britons. The law of England, so far as consistent with the principles of equity and good conscience, generally prevailed in the country unless it came in conflict with Hindu or Mahommedans law[5].

Concept of electronic contract

Introduction of e - contract

Internet has unfolded a new market for businesses to explore and exploit. The enormous flexibility and speed of Internet makes it the most modern platform for businesses as well as consumers to execute business transactions. The goods and services of diverse nature are being offered to the businesses inter se or to the consumers globally. The whole world has been converted in to the market to be available on the click of a mouse on the laptop or palmtop. To provide security and legal recognition to the transactions executed electronically, the Indian Parliament enacted the Information Technology Act, 2000 modeled on Uncitral's Model Law, though it departs in many respects from the spirit of the Model Law. Immediately after the enactment of the IT Act, it was found that certain significant provisions are missing in this enactment; its provisions lack harmony and above all many legal issues have not been properly spelt out. The IT Act was amended in the year 2008 which contains the objectives[6].

(1) To harmonize protection of personal data and information and implementation of information technology enabled services such an e- governance, e-commerce and e-transactions with the provisions of the IT Act.

(2) to add new penal provision in the IT Act, IPC, Indian Evidence Act and the Code of Criminal Procedure to provide provisions for new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data personation commonly known as phishing, identity theft and offensive messages through communication services.

(3) To provide alternative technology of electronic signatures for bringing harmonization with the Model Law on Electronic Signatures adopted by the Uncitral‘s and to fall in line with the resolution

[5] B. L. Benson, The Spontaneous Evolution of Commercial Law, Southern economic journal, 644-650 (1989).

[6] M. J. Bonell, An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contract,s 50 (3rd ed., 2009).

No.56/80, dated 12 th December,2001 recommending that all states accord favourable consideration to the said Model law on Electronic Signatures.
(4) To authorize service providers to set up, maintain and upgrade the computerized facilities and also collect, retain and appropriate service charges for providing such services at such scale as may be provided by the central Government or the State Government. Interestingly, the draftsmen have admitted that the digital signatures prescribed for authentication of electronic records in the original IT Act are linked with specific technology, it has become necessary to provide for alternative technology of electronic signatures, nevertheless the original provision for digital signatures has been retained which has compounded the confusion.

Electronic contracts and the indian law

Electronic Contracts: - Contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. Right from morning to evening we make many contracts. The Indian Contract Act, 1872 governs the manner in which contracts are made and executed in India. It layce down the conditions for making contract and beach of contracts. Parties are free to contract on any terms they choose. India Contract Act consists of limiting factors subject which contract may be entered into, executed and breach enforced. It only provides a framework of rules and regulations which govern formation and performance of contract. The rights and duties of parties and terms of agreement are decided by the contracting parties themselves. The court of law enforce the contract in case of non performance or breach.Electronic contracts (contracts that are not paper based but rather in electronic form) are born out of the need for speed, convenience and efficiency. Imagine a contract that an Indian exporter and an American importer wish to enter into. One option would be that one party first draws up two copies of the contract, signs them and couriers them to the other, who in turn signs both copies and couriers one copy back. The other option is that the two parties meet somewhere and sign the contract. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a scenario. There was initially an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. the issues that arise in electronic contracts. The Information Technology Act (IT Act) solves some of the peculiar issues that arise in the formation and authentication of electronic contracts[7].

Conclusion

Contract is changing due to privatization, industrialization. New terms has come in the contract e.g. e-contract, escrow agreement, joint venture agreement contract farming, outsourcing contracts. All forms of e-contracts ought to be made as conspicuous as possible to satisfy legal standards of notice of terms. Its binding legal nature ought to be impressed upon the end-user, and browse-wrap notices must ideally only be supplemental to a contract that the user has already manifested his assent to. The instantaneous nature of electronic transactions also invites a re-conceptualization of the mailbox rule of contract formation, and this is reflected in both case-law as well as provisions of the IT Act, 2000. With respect to the status of software contracts, it has been noted that rights such as perpetual possession cannot be treated as dispositive. Given the fact that software tends to be heavily encumbered by restrictions that detracts from ownership as it is conventionally understood, software contracts geographical barriers and increases the probability of consumers entering into transnational contracts. This raises several issues of private international law, and the legal regime here is quite obscure. There is no clarity or uniformity since countries tend to apply their own domestic laws on jurisdiction, recognition and enforcement, and determination of the applicable law. The need of the hour is an International Convention that would provide a holistic basis for the development of substantive and procedural aspects of e-contracts. Escrow agreement plays an important role in today‘s life but in India there is no law regarding escrow agreement. Successful joint ventures require utmost harmony, understanding,

[7] Melvin Aron Eisenberg, “Symposium in the twentieth century: the Emergence of Dynamic Contract Law”, 88 Calif. L. Rev. (2000), p.1743

and confidence between parties. On the basis of our study, we have arrived at the following conclusions, some of which relate to legal aspects of outsourcing contracts and some of which apply to the outsourcing industry in general, offshore outsourcing has grown at a hectic pace over the past decade and more, mostly due to the fact that properly executed outsourcing transactions can lead to cost savings which is increasingly important in a globalize world but also partly due to the quality of outsourcing services offered, especially in destinations like India.

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