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LEGAL ISSUES IN THE FRAMEWORK OF ONLINE CONTRACT UNDER THE INTERNATIONAL PERSPECTIVE

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Abstract
Communication and the need for improved communication have been creating and resulting in technological advancements. Today, technology has stepped into the arena of computers, the internet, and the cyberspace. The advent of internet and related technologies has made irreversible changes to the world today. The world today is moving steadily towards an information society and knowledge economy; therefore it is essential that law must contribute its inputs to promote e-commerce. The Law is an organic being which has always managed to evolve to keep up with changes in society. However, the challenges posed by the growth of internet is perhaps its biggest yet not just because of its utter size, nor the speed with which it has developed. The relationship between law and the internet is based upon a simple conflict: laws exist to regulate society; the internet has created a new society founded upon the principle that it should be wholly unregulated.

Key words :
Commerce, E-Signature Ets

Introduction

The growth of e-commerce has created the need for vibrant and effective regulatory mechanisms, which would further strengthen the legal infrastructure that is crucial to the success of electronic commerce. The rapid development of Information Technology presents challenges to legal systems across the globe. Transactions accomplished through electronic means have created new legal issues. The challenge before the law makers is to balance the sometimes conflicting goals of safeguarding electronic commerce and encouraging technological development. It was also noted that the three major concerns for international online contracting are authenticity, enforceability and confidentiality. Authenticity involves the verification of the person that one is dealing with electronically. Enforceability includes the legal scope of the license granted or the warranty given under a national law. It also includes the provability and verification of the contractual terms of an online transaction. Confidentiality revolves around the protection of sensitive information such as payment information and trade secrets. The fear is that the public domain nature of e-commerce makes such information, susceptible to fraud and misappropriation by third parties.

The minimum level of due diligence pertaining to these three concerns entails a workable knowledge of the legal requirements of forming and proving a contract formed through the internet. The formation of a contract in cyber space is indeed an issue which is still to a certain extent unsettled or in other words, occupies an evolving field. Different jurisdictions world over have already enacted legislations to clarify the rules of formation of Online contracts; however, some issues still remain perplexing. These legislative provisions of Online contracts by and large follow the traditional rules of contracting in the physical world which are interpreted or marginally modified as per the characteristics of the online world. Hence it is very clear that the present Law of Contract could not face the contracts based on new technologies such as internet contracts and other contracts through electronic media & devices. The use of Computer & Internet is frequent now a days and present law has no provision to regulate the contracts based on these devices. The global medium has been transformed into a single community.

Uncitral model law on electronic commerce, 1996

On 16 December 1996, the United Nations General Assembly, through the Resolution 51/162, adopted UNCITRAL model law on Electronic commerce. Its purposes are to help states enhance their

legislation with respect to electronic communications and to serve as a reference aid for the interpretation of existing international conventions and other instruments in order to avoid impediments to electronic commerce. The principles expressed in the Model Law are also intended to be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce. The decision to undertake the preparation of the Model Law was based on the recognition that establishment of a model law will facilitate the use of e-commerce that is acceptable to States with different legal, social and economic systems, could contribute significantly to the development of harmonious international economic relations.

It was also stated that the adoption of this Model Law will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists. India is a signatory of the UNCITRAL model laws on Electronic Commerce, 1996 and based on this the Indian Legislature passed the Information Technology Act, 2000. UNCITRAL Model Laws do not define the online contracts in any manner. However, they do provide for the enforceability of an online contract. The model law aimed at providing regulatory framework for e-Commerce or online Contract. These laws encouraged member states to legislate various national laws and regulations keeping in with the principles contained in the Model Law. In 2001, the United Nations drew up the UNCITRAL Model Law on Electronic Signatures. As cyber law develops around the world, there is a growing realization among different nation states that their laws must be harmonized and international best practices and principles must guide implementation. Many countries are trying to establish harmonized legal regimes in order to promote online commerce. Articles 6 and 7 are intended to take the focus off of the mode of communication and place it on the fulfilment of traditional functions of writing. UNCITRAL determined that data messages can satisfy the traditional functions and therefore are 'functionally equivalent'. This is significant because it recognizes that future developments and applications are unforeseeable.[1]

Uncitral model law on electronic signature, 2001

The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques. The risk that diverging legislative approaches be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal harmony as well as technical interoperability is a desirable objective. UNCITRAL Model Law On Electronic Signature, 2001 was approved by the UNCITRAL and came into force in 2001. Its main objective was to grant legal recognition to e-signature and to bring uniformity in national laws relating to e-signature. UNCITRAL has attempted to support the functional equivalence supplied by Article 7 with the Model Law on Electronic Signatures, which was adopted from the former Draft Rules. In preparing and adopting the UNCITRAL Model Law on Electronic Signatures, the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to executive branches of Governments and legislators to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of communication techniques considered in the Model Law. Article 6(1) states that where the law requires a signature of a person, that requirement is met if an electronic signature is used that is as reliable as was appropriate for the purpose, in the light of all the circumstances, including any relevant agreement.[2]

[1] Peter Meijes Tiersma, “Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise”, U.C. Davis L. Rev. (1992), p.20

[2] RG Padia(ed.) , Pollock and Mulla, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 13TH ed. 2006 , p.253

United nations convention on the use of electronic communications in international contracts, 2005

The UN Convention on Use of Electronic Communication in International Contract, 2005 was adopted in November 2005 and came into force on 1st March 2013. The Convention was created to ensure the global recognition of international contracts formed using electronic means. It aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The UN Convention on Use of Electronic Communication in International Trade was held with the objective of removing the uncertainty and legal hassles which come in the way of International Contracts carried out through electronic means. The setting up of a legal structure to govern such contracts would enhance the legal certainty and help states gain access to modern trade routes. The Electronic Communications Convention applies to the "use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States". "Electronic communication" includes any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The word "contract" in the Convention is used in a broad way and includes, for example, arbitration agreements and other legally binding agreements whether or not they are usually called "contracts".[3]

The Convention, on the Use of Electronic Communications in International Contracts adopted by the United Nations General Assembly in 2005, provides that a party's place of business is presumed to be a location indicated by that party, unless another party demonstrates that the indication was incorrect. If a party has not indicated its place of business, or has more than one place of business then a judge or an arbitrator will select the one, which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. However, the convention states that a domain name or electronic mail address connected to a specific country does not create a presumption that a given party has a place of business in that country. The Electronic Communications Convention affirms in article 8 the principle contained in article 11 of the UNCITRAL Model Law on Electronic Commerce that contracts should not be denied validity or enforceability solely because they result from the exchange of electronic communications. In spite of convention being hailed as 'one of the most important developments in international e-commerce law', it has yet to gain widespread acceptance[4].

The us and an european approach to online contracts

Governments around the world, use more than one approach to select type of rules needed in the electronic environment. The first approach is to enact facilitative laws intended to make online commerce as legally effective as it in the traditional way of contracting normal one. This 'functional equivalent' approach, aims to identify how the same function could be achieved in electronic transactions, and extend the existing rules by analogy to cyberspace. Therefore, this approach attempts to fit cyberspace within the ambit of familiar legal rules through an examination of the role currently played by a particular legal rule in the non digital commercial world, identification of the way in which the same function can be achieved in electronic transactions and extending the existing rule by analogy to electronic transactions. The second approach would be through establishing a new set of rules that is better suited to the nature of the new environment. This approach intends to choose out the best rules existing in a non-digital context and import them into cyberspace. Although this approach aims to set new rules in the electronic contracting, it stresses the need for identifying the fundamental principles that govern nondigital transactions and re-examines how those principles could be best placed in the uniquely different sphere of cyberspace.

This approach conceivably has the merit of leading to a much more healthy development of the law in the long term, because taking a deeper consideration of principles would probably lead to the discovery

[3] Randy E. Barnett, "A consent theory of contract", 86 Colum. L. Rev. (1986), p.269

[4] Joseph M. Perillo, "The Origins of the Objective Theory of Contract Formation and Interpretation", 69 Fordham L. Rev.(2000), p.427

of sui generis rules for electronic transactions that takes into account the unique features and potential of computer-based communications systems. While both approaches have been used in developing regulatory regimes for electronic transactions, it is noteworthy that the functional equivalency approach has dominated proposals for regulating electronic commerce. The US and European Union (EU) approaches to revise contract law to accommodate electronic commerce are diverging. The U.S. legal system has tried to fit the online transactions into existing doctrinal categories, leaving protection of consumers primarily to market mechanisms. The EU has similarly responded to online transactions much as they have to conventional contracts, but this has involved greater governmental intervention in consumer transactions, expressing requiring some terms while prohibiting others. In America, the choice of law is available for the citizens, because of the diversity of the state laws and is also available to the citizens of different countries of European Union by virtue of Rome Convention of 1980. The Rome Convention gives parties of the contracting state, a free hand to a make choice of law which will govern their contract. The only requirement is that the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice, the parties can select the law applicable to the whole or only to a part of the Contract. It is only the absence of such choice that the contract will be governed by the law of the country with which it is mostly closely connected[5].

The united states electronic signatures in global and national commerce act (e-sign act), 2001

Despite the promulgation of UETA, the federal government feared that states would be slow to adopt UETA, and it sought to speed the adoption of a uniform, nationwide law.84 In order to persuade states to implement electronic commerce laws confirming with the UETA and to confirm that all states recognize the validity of contracts entered through electronic means, US Congress passed the Electronic Signatures in Global and National Commerce Act (E-Sign), which came into force on I st October 2000. E-Sign Act gives broad legal recognition to electronic signatures and governs all interstate and international electronic transactions. E-Sign seems to has borrowed similar concepts and provisions from UETA, as it has more similarities with the UETA than it has differences. ESign, like the UETA, is procedural in nature and does not modify the substantive law of contracts formation, still, the two are not identical. E-Sign adds heightened consumer consent requirements, but it lacks other guidelines found in UETA, such as provisions regarding attribution disputes.

In light of these similarities and differences, Congress added a unique pre-emption provision to E-Sign that 'a state that enacts the official version of UETA is exempt from federal pre-emption under E-Sign; a state that enacts anything other than the official version of UETA is pre-empted to the extent that the law either conflicts with E-Sign or prefers certain technologies over others'. E-Sign Act recognizes the validity of contracts entered electronically, and where electronic signatures have been incorporated. The main purpose of this Act was to bestow on electronic contracts, the same authority as its paperbase counterpart. E-Sign Act is not applicable to wills and documents covered under the UCC other than UCC Sec. 1-107 and 1-206 and Art. 2 and 2A. It also does not apply to judicial documents; creditor proceedings; and certain documents pertaining to the transportation of hazardous materials. E-Sign has adopted technological neutrality and no other form of technology, such as PKI or biometrics, has received any preference or favouritism; equality is maintained toward all of them. In the USA, even unification of the rules is the main goal of electronic legislations acts but different approach has been taken than that in UK. The US approach is considered as a simplest and minimalist approach in regulating electronic commerce in general and regarding electronic contracting rules particularly. This is due to the influence of the UNCITRAL in electronic commerce legislations in US. Many examples in UETA and UCC show the trend towards unification of the rules in US. Providing details provisions for electronic contracting rules will affect the main goal for that unification. Simplest and minimise the rules achieve that trend. Therefore, the electronic agreements should be given the same legal effect as traditional paper based contracts. This principle has been clear for most legislation around the world and has been supported by many US scholars. This approach comes as a reflection of the apparent

[5] Wayne Barnes, “The Objective Theory of contracts”, 76 U. Cin. L. Rev.(2008), p.1119

capitalist economic policy in this country. This policy, which depends on the notion of free market economy and laisser-faire philosophy, has affected US legislation efforts in regulating electronic commerce through its role as 'the world's economic hegemony'. The United States has played a critical role in the global level in the development of electronic commerce. This US political and deregulation role spreads via national and international organizations such as UN and WTO. U.S has also implemented this policy in the area of e-commerce. This is apparent through the U.S framework for electronic commerce, which issued under former president Bill Clinton to guide U.S regulation according to this policy[6].

The european approach to online contracts

The EU has created a coherent regulatory framework for electronic commerce. This framework comprises many Directives including Electronic Commerce Directive, the Distance Contracts Directives (e.g. Directive Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, Council; Directive Concerning the Distance Marketing of Consumer Financial Services; Directive on the Protection of Consumers in Respect of Distance Contracts, etc.), Unfair Terms in Consumer Contracts Directive, and the Community Framework for Electronic Signatures. In addition, a number of horizontal directives have been adopted, such as Privacy and Intellectual Property Rights in Cyberspace. Several sectoral directives have also been adopted. These include the Directives on Consumer Credit (including Directive for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, amended by Council Directive 90/88 and European Parliament and Council Directive 98/7); the Directive on Package Travel, Package Holidays and Package Tours; the Timeshare Directive, etc. These electronic commerce directives have been designed to facilitate the provision of electronic commerce services. and adopted a minimalist approach, requiring a service provider to set out all the necessary steps so that consumers can have no doubt as to the point at which they are committed to an electronic contract. For a free and fare online contract, consumer's consent has to be expressed in a way that 'reasonably demonstrates' that the consumer is able to access the information in the electronic form, which will be used to provide the information that he/she is the subject of the consent. If there is any change in the hardware or software requirements needed to access or retain electronic records or if the change will create a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the consumer's consent must be re-obtained[7].

Conclusion

Advancements in the field of information technology have had an impact on the economy of a country and also on the quality of human life. The technological developments have created tremendous opportunities as well as challenges for both the developed and developing countries. One of the chief areas wherein the information technology has made a tremendous impact is 'business and commerce'. The speedier means of communication has abridged the time and distance factor in transacting business. The information technology has brought forth an incredible revolution in the field of contract-formation. In the latest rounds of negotiations at UNCITRAL on a new electronic contracting convention, proposals similar to those described above were made in order to deal with error. An argument has been made, however, that to the extent the provision deals with substantive matters of contract, it should be deleted. Such an argument fails to recognize that as electronic contracting evolves, the issues it raises will cease being unique to an electronic environment, but will have to be addressed to accommodate modern market practice. The US and European Union have each enjoyed successes and failures in their attempts to bring contract law doctrine into line with the commercial realities of the 21st century. The European Union disposes of a comprehensive programmatic framework of directives that allows to enforce the general European concepts of consumer protection in electronic contracts.

[6] RG Padia(ed.) Pollock and Mulla, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 13thed. 2006, p.243
[7] Allan Farnsworth, “Meaning” in the Law of Contracts, 76 Yale L.J. (1967), p.939

These issues are not dealt with either in national laws or UN Model Law or EU Directive. There is a need to adequately address these issues so that the businesses as well as the consumers will be comfortable in utilizing the information dossier for transaction purposes. The method of the directives to fix goals but not the ways to achieve them is reasonable considering the lack of a broad basis of uniform contract law rules in Europe. However, this method on the one hand, and some lack of coordination between the instruments on the other hand, may result in non-uniform implementation in the member states and, accordingly, to remaining legal uncertainty. The US success with UETA, a model of clarity and rationality, has been undercut by the ineptitude of E-SIGN. The effort at largescale codification of electronic contract law in the US that produced UCITA has failed due to political controversy, but a lively debate about the appropriate contours of electronic contract law doctrine is emerging in case law.

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