

# All about Electronic Contracts

-Sikha Bansal | Partner  
-Timothy Lopes | Senior Executive

Date – 17<sup>th</sup> November, 2020

## VINOD KOTHARI CONSULTANTS PVT. LTD.

### Kolkata

1006-1009 Krishna Building  
224 AJC Bose Road  
Kolkata - 700017

Phone: 033- 2281 7715/ 1276/ 3742

E: [finserv@vinodkothari.com](mailto:finserv@vinodkothari.com)

### Delhi

A-467, First Floor, Defence  
Colony,  
New Delhi-110024

Phone: 011 6551 5340

E: [delhi@vinodkothari.com](mailto:delhi@vinodkothari.com)

### Mumbai

403-406, 175, Shreyas Chambers,  
D.N. Road, Fort,  
Mumbai - 400001

Phone: 022 - 22614021 / 30447498

E: [bombay@vinodkothari.com](mailto:bombay@vinodkothari.com)

### Overview (Executive Summary)

The use of electronic contracts or e-contracts has grown substantially, owing to the advancing and enabling technology in this world of digital business.

Although e-contracts are relatively similar to that of conventional on-paper contracts, they come with their own added benefits, leading to a shift from the traditional mode of contracting with other parties to a completely electronic mode of entering into contracts.

Globally legal recognition is given to e-contracts. India, too has enabling laws permitting and even encouraging the use of e-contracts.

With advances in technology, amendments to law have also been made to facilitate ease of doing business.

However, not everyone is familiar with the regulatory framework governing e-contracts, as well as other aspects. This research paper seeks to give a comprehensive overview of e-contracts essentials in the Indian as well as international context.

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### Key areas of discussion -

- 1. Electronic contracts – Features, types, etc.**
- 2. Electronic signatures**
- 3. Stamping concerns and e-stamping**
- 4. Law of evidence and electronic evidence**

## 1. Introduction and concerns

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Contracts are undoubtedly an integral or even inevitable part of business worldwide. The need to enter into commercially and legally binding contracts depends, of course, on the needs of the parties and the mutual benefit they both stand to gain. The parties are essentially driven by the general principals of a contract, which are, *inter alia*, *quid pro quo* (something for something) and *consensus ad idem* (meeting of the minds).

While keeping the standard elements of contracts, as embedded in common contract law, businesses have substantially shifted from the conventional mode of contracting through at least some physical interaction, to a completely paper free, virtual mode of entering into a legally binding contract.

In this day and age, where time is of essence, the e-contract mode of conducting business is growing largely, with several laws being enacted to give way/ facilitate contracts electronically. It then, becomes imperative to see how e-contracts can be executed within a legal framework, where parties need not be known or even seen to each other.

In this write up, the author tries to analyse and understand in detail, the complexities of e-contracts in the Indian context, as well as analysing global laws or case studies from which reference can be drawn in India. The article specifically focuses on the following aspects pertaining to e-contracts –

- forms and legal validity of e-contracts
- manner of execution/authentication/signing
- stamping of e-contracts
- admissibility as evidence before courts of law

## 2. Legal Validity of E-Contracts

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In India, legality of contracts is governed by the Indian Contract Act, 1872<sup>1</sup> ['Contract Act']. The Contract Act gives recognition to agreements being enforceable as contracts if they are “*made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void*” [Section 10 of the Contract Act].

Thus, contracts are ‘agreements enforceable under law’. This includes oral agreements as well<sup>2</sup>. A typically conventional business contract involves two parties expressing an intention to form a legally binding contract and by agreeing to the terms of the contract, the same is executed, normally by affixing the physical signatures of both parties.

Accordingly, even e-contracts which have the same elements required in a contract as per the Contract Act, can be said to be legally valid and enforceable under law. The view emerges for explicit enabling provisions under the Information Technology Act ['IT Act'].

The IT Act came into force on 17<sup>th</sup> October, 2000 and is a comprehensive law governing, *inter alia*, electronic contracts, electronic records and electronic signatures in India. The law was formed keeping in view the Model Law on Electronic Commerce<sup>3</sup> adopted by the United Nations Commission on International Trade Law ['UNCITRAL'], which is also discussed in detail further on.

The preamble of the IT Act itself, states that it is “*An Act to provide **legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as —electronic commerce, which involve the use of alternatives to paper-based methods of communication and storage of information, xxx..***” [emphasis supplied]

This makes it clear that the Act intends to facilitate a mechanism for legality of e-contracts which form an integral part of electronic commerce.

Coming to specific provisions, electronic contracts get their validity from section 10A of the IT Act, which provides as under –

**“10A. Validity of contracts formed through electronic means.—Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means**

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<sup>1</sup> <http://legislative.gov.in/sites/default/files/A1872-09.pdf>

<sup>2</sup> See [Nanak Builders and Investors Pvt. Ltd. vs. Vinod Kumar Alag \[AIR 1991 Delhi 315\]](#) and [Alka Bose vs. Parmatma Devi & Ors \[Civil Appeal No\(s\). 6197 OF 2000\]](#), where courts have held that even an oral agreement can be a valid and enforceable contract.

<sup>3</sup> Refer to - [https://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)

*of an electronic records, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.” [emphasis supplied]*

Section 10A was not part of the initial Act, but was inserted by way of an amendment to the IT Act in February, 2009<sup>4</sup>. The Amendment Act brought in several other changes as well, which were based on the recommendations of the Expert Committee set up in January, 2005<sup>5</sup>.

Section 10A is substantially based on Article 11<sup>6</sup> of the Model Law. Notably, the Model Law clarifies that Article 11 is *not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed.* Therefore, what one can conclude that these provisions of the IT Act do not, in any manner, tamper with the established principles of contract formation but only provide for an enabling mechanism for formation of contracts by electronic means.

Therefore, section 10A of the IT Act provides legal validity to electronic contracts. It is clear from the language of section 10A that a contract will not be unenforceable for the sole reason that the contract is expressed in electronic form or by means of an electronic record. That is, if an agreement otherwise meets all the criteria as required under the Contract Act, in order to be enforceable under law, one cannot challenge its validity on the sole ground that the agreement has been effected by means of electronic record or in electronic form. It is to be noted that both the terms ‘electronic form’ and ‘electronic records’ have been defined in the IT Act.

What the section does is, to provide electronic contracts the same degree of legal acceptance as paper based communication.

There are, however, certain documents that are not covered by the IT Act and hence, cannot be dealt with by electronic means. These are documents or transactions specified in the First Schedule to the IT Act which include negotiable instruments (other than cheques), a power of attorney, a trust, a will and any contract for the sale or conveyance of immovable property or any interest in such property.

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<sup>4</sup> The IT (Amendment) Act, 2008 - [http://egazette.nic.in/WriteReadData/2009/E\\_13\\_2010\\_025.pdf](http://egazette.nic.in/WriteReadData/2009/E_13_2010_025.pdf)

<sup>5</sup> View the report of the Expert Committee here - <https://www.meity.gov.in/content/report-expert-committee-amendments-it-act-2000>

<sup>6</sup> Article 11 states, “**Formation and validity of contracts** (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.”

Thus, while e-contracts are valid under the IT Act, contracts for the sale or conveyance of immovable property or any interest in such property still requires to be on paper.

### 3. Acknowledgment vs. acceptance in e-contracts

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As stated earlier, an e-agreement shall meet all requisite essentials of a contract – therefore, it must be established that an offer was ‘accepted’ so as to constitute a legally binding contract. Now, what constitutes ‘acceptance’ in the context of e-contracts?

It may be seen that section 12 of the IT Act provides for ‘acknowledgement’ of receipt of electronic record which has been sent by an originator. Such acknowledgement may be given by the addressee by any communication by the addressee or any conduct of the address, sufficient to indicate to the originator that the electronic record has been *received*. Notably, the word used here is ‘*received*’ and not ‘*accepted*’, which also corresponds to Article 14 of the Model Law. The Guide to Enactment of the Model Law clearly states that the said Article is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. The acknowledgment of receipt simply evidences that the offer has been received. Whether or not sending that acknowledgement amounts to *accepting the offer is not dealt with by the Model Law but by contract law* outside the Model Law [see, para 93].

As for case laws, there have been rulings which have dealt with difference between acknowledgment and acceptance – see *Damodar Shah v. Union of India*, AIR 1959 Cal 526<sup>7</sup>, *Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories*, 724 F. Supp. 605 (1989)<sup>8</sup>, etc.

It follows from the above that the IT Act, does not actually deal with how acceptances can be done in an electronic framework, and that the same has to actually come and be deciphered from the framework under the Contract Act.

Now, as under the Contract Act, sections 7 and 8 become extremely important. Section 7 of the Contract Act states that the ‘acceptance’ must be absolute and unconditional, and that it must be “***be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed***

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<sup>7</sup> <https://indiankanoon.org/doc/1166491/>

<sup>8</sup> <https://law.justia.com/cases/federal/district-courts/FSupp/724/605/1468182/>

*manner, and not otherwise; but if he fails to do so, he accepts the acceptance.”* Further, section 8 validates acceptance by performing conditions or by accepting consideration.

As the authors commented earlier, e-agreements are broadly under the domain of the contract law with enabling provisions flowing in from the information technology law; there lies ample flexibility with the parties to structure the *modus operandi* of how the e-agreements be carried out, however, ensuring that all essentials of a valid agreement are met. There can be several potential permutations in between the spectrum that lies between oral agreements and ‘written’ agreements. Therefore, if the originator requires that the addressee ‘accepts’ the terms of an agreement by way of clicking on “I agree” button, that should be perfectly valid in terms of the contract law. Of course, the usual rules of ‘fair notice’ to the addressee, will have to be complied with (*see below*).

However, in this regard, it must also be noted that such kind of an acceptance (clicking on tick boxes, etc.) does not qualify to be falling in the definition of an ‘electronic signature’ under the IT Act, as ‘electronic signature’, as defined under the IT Act has been given a very restricted meaning in the Indian context (*see later*).

## 4. Types of e-contracts

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### (i) E-mails

A simple example of an e-contract can be an exchange of e-mails between two parties whereby one party extends an offer and the other party accepts the same. Assuming this has all the salient features of a contract laid out in section 10 of the Contract Act, it becomes a valid and enforceable contract when read with the provisions of section 10A of the IT Act.

There have been court rulings which have upheld the agreements in the form of e-mail exchanges between the parties. In Indian context, the Supreme Court in *Trimex International FZE v. Vedanta Aluminum Limited*,<sup>9</sup> upheld that if the terms of a Contract had been discussed over the email, such emails constituted to be a valid contract and hence were enforceable.

Apart from emails, there have been cases where communication over social media applications such as 'WhatsApp' may be used as evidence to conclude whether a contract has been entered into or not<sup>10</sup>.

### (ii) Click wrap or web wrap agreements

A web-based contract where the terms and conditions are prominently displayed on the users screen and the user must convey his acceptance of the terms by clicking on an "I agree", "I accept" or "Ok" button on the screen, is an example of a click wrap contract. This type of contract is usually coupled with the purchase of an online product, wherein the terms of the agreement must be accepted prior to using the product. In case the user disagrees to the terms, there is no contract and further, the purchaser will not be able to use the product. There is no scope for negotiation in a click wrap contract. The party must 'take it or leave it', where if he leaves it, he will not be able to proceed as a user.

#### *Enforceability of click wrap agreements*

Click wrap agreements are enforceable as electronic contracts, since there is acceptance of the terms of the agreement giving it the legally binding effect under contract law. However, click wrap agreements have been challenged in several courts owing to the one sided nature of the e-contract and non-negotiable terms.

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<sup>9</sup> 2010 (1) SCALE 574, see - <https://indiankanoon.org/doc/658803/>

<sup>10</sup> See *Ambalal Sarabhai Enterprise vs. KS Infraspace LLP Limited* - <https://indiankanoon.org/doc/51304221/>

In the case of *Feldman vs. Google*<sup>11</sup> the plaintiff argued that there was no meeting of the minds and that the “click wrap” agreement is a contract of adhesion which by its terms is unconscionable. It was held that the click wrap agreement was enforceable as there was reasonable notice of and mutual assent to the agreement and the agreement described with sufficient definiteness a practicable process by which price was determined.

Further, the decision in *Hotmail Corporation v. Van Money Pie*<sup>12</sup>, concluded that clicking of an ‘I agree’ button at the bottom of a terms and conditions page was considered sufficient to conclude a contract.

However, while click wrap agreements are enforceable, the terms and conditions of such contracts should not be unconscionable or extremely one sided. In the case of *Bragg vs. Linden Research Inc.*<sup>13</sup> the court upheld the contention of the plaintiff that the click wrap agreement was a form of adhesion contract where the terms of the contract were drafted in such a manner that it was extremely one-sided and would shock the conscience and refuted the validity of the contract.

In the case of *LIC India vs. Consumer Education and Research Centre*<sup>14</sup> the Supreme Court of India commented on the scope of its intrusion in a contract where the parties to the contract had unequal bargaining power. The Court held that when a contract is of such a nature that it can be stated to be an adhesion contract and further when the parties to the contracts do not have equal bargaining power then in the light of Article 14 of the Constitution of India (guaranteeing equal protection of law to its citizens) the Supreme Court shall strike an unfair or unreasonable contract.

Thus, a click wrap agreement would be enforceable if it does not contain provisions which are such that it would render the contract unconscionable. For details, read, the American Bar Association’s white paper titled: “Click-through Agreements: Strategies for Avoiding Disputes on Validity of Assent”<sup>15</sup> which deals extensively with the recommendations for proofing the click-wrap agreements.

Clicking on “I Agree” would be a mode of **acceptance** by the party selecting such option. There exist clauses in click wrap agreements that clearly tell the consumer that *by clicking on “I Agree” (or some similar icon), you **accept** the all the terms of the agreement.*

### (iii) Shrink wrap Agreements

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<sup>11</sup> For brief facts of the case, refer to - <https://www.lexisnexis.com/community/casebrief/p/casebrief-feldman-v-google-inc>

<sup>12</sup> Refer to - [http://www.internetlibrary.com/cases/lib\\_case21.cfm](http://www.internetlibrary.com/cases/lib_case21.cfm)

<sup>13</sup> Refer to - <https://h2o.law.harvard.edu/cases/4435>

<sup>14</sup> Refer to - <https://indiankanoon.org/doc/1513693/>

<sup>15</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1640196](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640196)

A shrink wrap agreement refers to the plastic wrapping on a software box which a buyer can read the license agreement prior to opening/ making the purchase. Unlike the click wrap agreement in which users must click on the “I agree” button, under the shrink wrap, a user it is considered that the user has agreed to the terms and conditions once the package has been opened.

The validity of these agreements has been questioned too, as there is no bargaining power at all in these agreements.

## 5. E-Signatures – Relevance, issues and intricacies

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The Working Group in preparation of the Model Law discussed the following functions of handwritten signatures: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to: the **intent of a party to be bound by the content of a signed contract**; the intent of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

E-signature, as the name suggests, is the electronic equivalent of a physical signature or a hand-written signature. There exists an UNCITRAL Model Law on Electronic Signatures<sup>16</sup> [‘Model Law on Electronic Signatures’] which details the technical aspects of electronic signatures as well as the model law for authentication and verification of such signatures. The said model law was prepared in the backdrop of the Model Law on Electronic Commerce.

In the traditional mode of signing, one would normally put pen on paper to physically sign the document/ contract. This demonstrates *consensus-ad-idem* and legally binds the signatories who are parties to the contract. Electronic signatures do not have the pen on paper effect, however, it intends to achieve the same features of a handwritten signature.

As per the UNCITRAL Model Law on Electronic Signatures *“The common purpose of e-sign techniques is to provide functional equivalents to (a) handwritten signatures; and (b) other kinds of authentication mechanisms used in a paperbased environment (e.g. seals or stamps).”*

Here, it is important to note that ‘e-signature’ has varied connotations in different jurisdictions, as we discuss below. Different countries may adopt different methods of e-signing, i.e., what constitutes an e-sign in one country may not constitute an e-sign in another country.

Some countries adopt a minimalist approach, where the law provides only minimum requirements and follows the principle of technological neutrality (a somewhat ‘free to adopt approach’), other countries (like India, for example) may adopt a technology specific approach.

- (i) Electronic signatures as defined in Model Law

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<sup>16</sup> See - <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-elecsig-e.pdf>

The Model Law on Electronic Signatures provides a wide definition of electronic signatures. The definition reads as under –

*“Electronic signature” means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message;”*

The above definition can be inferred to mean e-signature of any form, including digitized version of hand signatures, clicking on an “OK” or “I agree” box, involving the use of a PIN or OTP based e-sign, Digital Signature Certificates [‘DSC’], etc. Most of these, however, are not relevant in the Indian context.

Article 6 of the Model Law on Electronic Signatures provides broad compliance requirements for an e-sign and states *“Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.”*

It further provides conditions relating to when e-signs may be reliable.

(ii) Scope of e-signatures in other jurisdictions

### **United States of America [‘USA’]**

The Uniform Electronic Transactions Act<sup>17</sup> [‘UETA’] and the Electronic Signatures in Global and National Commerce Act<sup>18</sup> [‘ESIGN’] govern e-signs in the US.

In the US, for any transaction covered by ESIGN or the UETA, if other law requires the transaction to be in “writing” or have a “signature”, electronic records and signatures may be used instead of paper and ink. ESIGN and UETA define an “electronic signature” as *“an electronic sound, symbol or process that is attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”* Examples of different types of electronic signatures under US law would

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<sup>17</sup> Refer to -

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2c38eebd-69af-aaaf-ddc3-b3d292bf805a&forceDialog=0>

<sup>18</sup> Refer to - <https://www.govinfo.gov/content/pkg/PLAW-106publ229/pdf/PLAW-106publ229.pdf>

include an “I agree” button, a check box, a typed name, biometric measurements, and digital signatures created using PKI digital certificate encryption technology<sup>19</sup>.

Thus, clicking on the “I agree” box in a clickwrap agreement in the US is taken to mean electronically signing the same. Moreover, US laws do not establish preferences between different types of electronic signatures.

### **European Union [‘EU’]**

In the EU, the regulation governing electronic transactions is the Electronic Identification, Authentication and Trust Services<sup>20</sup> [‘eIDAS’]. The law defines electronic signatures as “*electronic signature means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign;*”

Although, this is a wide definition somewhat similar to that of the US ESIGN Act definition, the eIDAS further establishes two types of electronic signatures, (a) advanced, and (b) qualified. These signatures receive preferential treatment under the regulations.

Advanced electronic signatures would in simple words mean a DSC of an individual which is uniquely linked to the signatory and is capable of identifying the signatory, whereas a qualified electronic signatures are advanced that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.

Thus, while clicking on an “I agree” or “OK” box in a clickwrap agreement would be taken to be an electronic signature and would not be denied legal effect and admissibility as evidence in a court, a qualified electronic signature shall have the equivalent legal effect of a handwritten signature. [Refer article 25 of eIDAS]

#### (iii) Electronic signatures in the Indian context

In India, the electronic signature framework largely draws its reference from the Model Law on Electronic Signatures itself. Initially the term used under the IT Act, was ‘digital signatures’. Later, an insertion was made to include the definition of ‘electronic signatures’<sup>21</sup>, which includes digital signatures. The term electronic signature is much wider than digital signature as it allows for several

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<sup>19</sup> Reference drawn from - [https://www.docuSign.com/sites/default/files/the\\_effectiveness\\_of\\_clickwrap\\_for\\_legally\\_enforceable\\_agreements\\_0.pdf](https://www.docuSign.com/sites/default/files/the_effectiveness_of_clickwrap_for_legally_enforceable_agreements_0.pdf)

<sup>20</sup> Refer to - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN>

<sup>21</sup> The insertion was made under the IT (Amendment) Act, 2008 (supra)

other modes of electronically signing a document. A timeline of legislative changes/ events surrounding electronic signatures is laid out in [Annexure-1](#).

The e-sign framework in India was inserted into the IT Act, vide an amendment in 2008. Section 5 of the IT Act, provides legal recognition to electronic signatures and prescribes that wherever law requires authentication by signing, it will be sufficient if the signatory affixes an electronic signature in the manner prescribed by the Government.

Electronic signatures are defined under section 2 (ta) of the IT Act as *“electronic signature means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature”*

Thus, in India electronic signing includes the following –

- E-sign through electronic authentication technique specified in the Second Schedule; and/or
- Digital signature.

Looking at the above, it can be concluded that clicking on an “I Agree” box in a clickwrap agreement would not be electronically signing the document since it does not fall under the above definition. However, merely because the “I Agree” box is not considered an electronic signature, it does not render the contract void. As already discussed, as long as there are suitable clauses and reasonable notice of the terms of the contract, a click wrap agreement would be perfectly valid if the terms are accepted by the consumer. For a contract to be binding under Contract law, **acceptance** is a crucial factor and acceptance is given when the consumer clicks on the “I Agree” box in a click wrap agreement.

Further, section 3A of the IT Act, provides that a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which is *considered reliable* and may be specified in the Second Schedule. Conditions as to when will an e-sign be considered reliable is laid down in sub-section (2) which are similar to those specified in article 26 eIDAS which lays down conditions for an “advanced electronic signature”.

Till date there are two electronic authentication techniques specified under the Second Schedule of the IT Act –

- Aadhaar; or,
- Other e-KYC services

This means that the mode of electronic signature would have to be ‘Aadhaar e-KYC based’ or ‘other e-KYC based’. Other e-KYC could include offline Aadhaar XML e-KYC, PAN based e-KYC, etc.

(iv) Aadhaar and E-Sign

The Supreme Court in 2018 passed an Order striking down certain provisions of the Aadhaar Act. It is important to note that the word 'other' after the word 'Aadhaar' was inserted in the Second Schedule post the Aadhaar judgment<sup>22</sup> in 2018 in the matter of *Justice K.S. Puttaswamy and another v. Union of India and Ors.* which restricted private entities from mandatorily demanding Aadhaar of customers.

Subsequently, the Aadhaar and Other Laws Amendment Act, 2019 was passed which amended the provisions of Section 11A of PMLA. Pursuant to the amendment, authentication under the Aadhaar Act, for the purpose of verifying the identity of a client can be undertaken only by Regulated Entities ['REs'] that are banks and other REs notified by the Central Government in this regard<sup>23</sup>. REs other than banks are permitted to undertake offline verification or other specified modes only.

On 5th March, 2019, the Second Schedule to the IT Act was further amended to include "Other e-KYC services" as one of the permitted e-authentication techniques under section 3A of the IT Act. This amendment broadened the scope of authentication beyond Aadhaar e-KYC to include "Other" e-KYC services as well.

In case of e-signing, post the Aadhaar judgment, there still prevails uncertainty on private entities offering online Aadhaar based authentication. Some e-Sign providers have made a shift from Online Aadhaar e-KYC to Offline Aadhaar e-KYC and other e-KYC services. There is no specific circular or notification issued by the UIDAI or the Ministry of Electronics and Information Technology either permitting online Aadhaar authentication by the e-sign service providers or restricting the same.

The Second Schedule of IT Act provides both Aadhaar and other eKYC as an option to validate e-sign. Further, the Controller of Certifying Authorities ['CCA'] has also issued e-authentication guidelines for eSign- Online Electronic Signature Service (Version 1.6) which specifies online Aadhaar e-KYC as well as offline Aadhaar e-KYC as modes of authentication that can be used to generate e-signature. Hence, it can be inferred that an e-sign Service Provider ['ESP'] is entitled to provide e-sign service by following either of the options.

Accordingly, electronic signatures in India are technology specific, wherein the procedure for electronic authentication techniques specified in the Second Schedule must be followed. Such

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<sup>22</sup> Refer - [https://uidai.gov.in/images/Aadhaar\\_Judgment.pdf](https://uidai.gov.in/images/Aadhaar_Judgment.pdf)

<sup>23</sup> The Central Government has notified certain REs which include insurance companies and SEBI intermediaries to carry out authentication under the Aadhaar Act vide notifications dated [22nd April, 2020](#) & [23rd April, 2020](#)

electronic signatures are issued by an approved Certifying Authority ['CA'] which is also known as an e-sign provider. Some examples are NSDL, eMudhra, etc.

Therefore, the word 'electronic signature' cannot be interpreted liberally in the Indian context, as is there in USA. The e-signature has to meet the specific criteria as pointed above. As such, the click-wrap agreements, cannot be said to be 'electronically signed' in the Indian context.

As discussed above, 'acceptance' of an offer leads to a promise and each such promise/set of promises constitutes an agreement. Further, there is no particular defined manner in which the 'acceptance' is to be communicated – the acceptance can even be implied. Therefore, 'signing' is one mode of acceptance is not a pre-requisite to a valid contract. We have already discussed that even oral contracts are perfectly valid. It is important to note that, however, the requirement of signing, may be made mandatory by law in case of certain documents or agreements and under specific laws – say for instance, stamp laws, or may have more evidentiary value (*as we discuss later in the article*). However, in a simple traditional commercial contract, signing is not required to make the contract valid and legally binding.

In the matter of *Reveille Independent LLC and Anotech International (UK) Ltd*<sup>24</sup>, the court held that even if a contract says it has to be signed to be binding, if it is unsigned it may still have a legally binding effect. See also *Trimex International FZE vs Vedanta Aluminum Limited* (supra). The Supreme Court recognised the validity of electronic contracts even if they were not electronically signed and registered.

Then again, this is from the perspective of the Contract Act only. This aspect of signing must be analysed from the perspective of stamp law as well as the law of evidence as to whether or not an agreement insufficiently stamped will be admissible as evidence or not.

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<sup>24</sup> Refer to - <https://www.schindlers.co.za/2016/reveille-independent-llc-v-anotech-international/>

## 6. Stamp Duty on e-contracts

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Stamp duty is a tax levied by the Government on any 'instrument' chargeable to duty. In India, the Central Government has the power to levy stamp duty on the instruments specified in Article 246 read with Schedule VII, List I, Entry 91<sup>25</sup> of the Constitution and the State Government has the power to levy stamp duty on instruments falling under Article 246 read with Schedule VII, List II, Entry 63<sup>26</sup> of the Constitution.

Stamping of an instrument determines the admissibility of the document as evidence as per the law of evidence in India. As per section 35 of the Indian Stamp Act, 1899 ['Stamp Act'], unless the instrument chargeable to stamp duty is duly stamped, *the said instrument would not be admissible in evidence*. Of course, the restriction would apply in case where stamping is mandatory under the Stamp law and not otherwise.

Such an instrument (such as a contract between two parties) which is not stamped or insufficiently stamped would not be admitted as evidence. However, if the requisite stamp duty is paid along with the penalty amount, the same can still be made admissible.

Thus, an unstamped contract would not be admissible as evidence. However, if stamp duty along with penalty is paid, the same may be made admissible as evidence in courts.

This does not mean that an unstamped instrument is completely negated by Indian courts. An unstamped instrument can be admitted in evidence on payment of the relevant amount of duty *"together with a penalty of five rupees, or, when **ten times the amount** of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."*<sup>27</sup>

### (i) Stamping requires 'execution'

Stamp duty is payable on 'instruments' as defined under section 2 (14) of the Indian Stamp Act, 1899, *"which includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded"*

Section 3, being the chargeable section, provides that all instruments specified in the Schedule are chargeable to duty. Further, stamp duty on such instruments chargeable to duty must be paid *before or at the time of execution* [refer, section 17 of the Stamp Act].

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<sup>25</sup> Entry 91 provides for rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

<sup>26</sup> Entry 63 provides for rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

<sup>27</sup> First proviso to section 35 (a) of the Stamp Act.

(ii) Execution means 'signing'

Execution is defined as “executed” and “execution” used with reference to instruments, mean “signed” and “signature” [and **includes attribution of electronic record** within the meaning of section 11 of the Information Technology Act, 2000.]<sup>28</sup>

Here, in the authors view, 'signed' and 'signature' will include 'electronic signing' also since section 5 of the IT Act, provides a deeming provision that says –

*“Where any law provides that information or any other matter shall be **authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature** affixed in such manner as may be prescribed by the Central Government.”* [emphasis supplied]

(iii) Unsigned instruments are not 'executed' under Stamp Law

Thus, stamp duty is liable to be paid on instruments that are chargeable to duty. An instrument becomes chargeable to duty only upon execution of that instrument. If there is no execution, i.e., the instrument is not 'signed' as per the definition, liability to pay stamp duty does not arise.

The above view was taken in the matter of *Hazrami Gangaram vs Kamlabai And Anr*<sup>29</sup>, where the Court held that *the time at which an instrument executed in India should be stamped is specifically provided for under Section 17 which states that “all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution”. In view of this requirement, a document not signed is clearly not liable to stamp duty. It is interesting to note that in Burma, formal documents written on palm leaves are by custom treated as completed documents and admitted in evidence though not signed. But under Section 2 (12) being unsigned, such documents will not be liable to stamp duty as they are not 'executed'.*

(iv) Meaning of attribution

The definition of “execution” under the Indian Stamp Act was amended to include **attribution of electronic record within the meaning of section 11 of the Information Technology Act, 2000.**

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<sup>28</sup> Inserted by the Finance Act, 2019 - <http://egazette.nic.in/WriteReadData/2019/198304.pdf>

<sup>29</sup> AIR 1968 AP 213 - <https://indiankanoon.org/doc/568157/>

The dictionary meaning of 'attribution' is 'the action regarding something as being caused by a person or thing'. Hence, when we say 'attribution of electronic record', the idea is to say, that the electronic record was produced/generated by a particular person. To understand what 'attribution' means in the context of e-records, one may have to look at section 11 of the IT Act, which states the following -

*"An electronic record shall be **attributed to the originator**—*

- (a) if it was sent by the originator himself;*
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or*
- (c) by an information system programmed by or on behalf of the originator to operate automatically."*

The section intends to attribute an electronic record as the electronic record of the originator, if it was sent by the originator himself or a person authorised on its behalf or a system generated response on behalf of the originator.

The section draws its reference from Article 13 of the Model Law on Electronic Commerce. As per the Model Law, *"Article 13 is intended to apply where there is a question as to **whether a data message was really sent by the person who is indicated as being the originator.**"*

It further goes on to state that *"In the case of a paperbased communication the problem would arise as the result of an alleged forged signature of the purported originator. In an electronic environment, an unauthorized person may have sent the message **but the authentication by code, encryption or the like would be accurate.**"*

Thus, the article intends to effectively attribute the message to the originator.

In the context of execution under the Stamp Act, where an electronic contract is being signed by the parties to the contract, the said signature of one party will be attributed to the signatory, if the signatory is the originator in that context. If the contract is being signed by a person authorized in this behalf, the signature of such person would be attributed to the originator. If the contract was executed by an information system programmed to operate automatically by the originator, the execution by such information system will be attributed to the originator.

#### (v) Eligibility of e-contracts to stamp duty

It is clear that e-contracts which can be said to be 'executed' and which fulfil other requirements for imposition of stamp duty, shall be liable to be stamped. Specific concerns would arise, where the e-

contract is not 'signed', but is accepted via other means (that is, say in case of emails or click wrap agreements).

Taking into consideration the aspects as above, one can put forward counter-views.

**One line of argument can be -**

Attribution of electronic record in the context of execution is meant only for attributing "electronic signatures" to the originator. It would not be correct to say that attribution of electronic record is meant to include all contracts entered into electronically but not signed. In case a click wrap agreement is entered into by two parties, it cannot be said to mean that the agreement is "executed" within the meaning of the Stamp Act. If that was the case, e-mails or even oral contracts entered into between parties should also fall within the purview of the Stamp Act.

Further, the word "chargeable" is defined under the Stamp Act to mean "*as applied to an instrument executed or **first executed** after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, **first executed***"

If an electronic record is attributed to the originator and attribution is taken to mean "execution", a partially accepted contract would be taken to mean "executed" when sent by the originator.

**View 2 –**

Attribution of electronic record was inserted with the intent to cover a wider range of contracts entered into electronically, such as click wrap contracts where the electronic record is generated by an information system but attributed to the originator. Therefore, once the user of the website clicks "I agree" button, the electronic record (that is, the electronic document which he has agreed to) can be attributed to the user, and thus can be said to be "executed" in terms of the Stamp Act.

Accordingly, there exists some difference in views stemming from the definition of "execution" under the Stamp Act, as to what exactly is intended by "attribution of electronic record" inserted within the definition of "execution". Accordingly, in case of unsigned electronic contracts or click wrap contracts (which may not constitute signing, per se), a view may be taken that sign these contracts were not "signed", they are not "executed" and thus, there is no requirement to pay stamp duty since, although the contract was an "instrument" as defined under the Stamp Act, it was not "executed".

(vi) Modes of stamping e-contracts – physical or electronic

A typical e-contract would be executed virtually, with the parties to the contract agreeing to the terms electronically and affixing their electronic signatures. Stamp duty on such e-contract would have to be paid before or at the time of execution as per section 17 of the Stamp Act.

Here, there are two modes of payment of stamp duty –

**Electronic stamping (e-stamping) –**

Given that the entire contract execution process was electronic, it only makes sense to go for e-stamping. E-stamping in India is facilitated by the Stock Holding Corporation of India [‘SCHIL’]. SHCIL is the only Central Record Keeping Agency [‘CRA’] appointed by the Government of India which is responsible for the overall E-Stamping application operations and maintenance<sup>30</sup>.

E-stamping is beneficially as the authenticity of an e-stamp can be verified online. The e-stamping is on track to replace the present modes of physical stamping, i.e. impressed and adhesive stamps.

However, while e-stamping is presently available in most states and UTs, other States still follow the practice of physical stamping.

**Physical (Impressed or adhesive) –**

Physical stamping is the traditional mode of payment of stamp duty, either by executing the contract on stamp paper or getting the same franked. The mode of payment of stamp duty is governed by section 10 of the Stamp Act.

However, physical modes of stamping in case of e-contracts would be relevant only in States that do not have the option, presently, of paying stamp duty electronically.

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<sup>30</sup> Refer - [https://www.shcilestamp.com/estamp\\_intro.html](https://www.shcilestamp.com/estamp_intro.html)

## 7. Admissibility of e-contracts as evidence

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The enactment of the IT Act meant changes in other laws would also necessarily be made. Accordingly, necessary amendments were made to the Evidence Act as well, more importantly, the insertion of sections 65A, 65B dealing with electronic records and their admissibility as evidence.

(i) Section 65A and 65B a complete code

Section 65A of the Evidence Act provides recognition to 'electronic records'. It states that the contents of electronic records may be proved in accordance with the provisions of Section 65B.

Section 65B speaks of "admissibility" of electronic records and states as under –

*"(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible."*

The conditions are laid down in sub-section (2) of 65B.

In a recent ruling, the Supreme Court in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) SCC OnLine SC 571<sup>31</sup>, held that furnishing a certificate under section 65B (4) of the Evidence Act is a precedent to admission of electronic records in evidence. The judgment, reconsidered the decision of a Division Bench judgment in the case of *Shafhi Mohammad v. State of Himachal Pradesh*<sup>32</sup> and upholds the view of the court in an earlier ruling in the case of *Anvar P.V. v. P.K. Basheer*<sup>33</sup>.

In the case of *Anvar (supra)*, the Court had held that "any documentary evidence by way of an electronic record under the Evidence Act, in view of sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B." The SC held that the "non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose."

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<sup>31</sup> Refer to - [https://main.sci.gov.in/supremecourt/2017/39058/39058\\_2017\\_34\\_1501\\_22897\\_Judgement\\_14-Jul-2020.pdf](https://main.sci.gov.in/supremecourt/2017/39058/39058_2017_34_1501_22897_Judgement_14-Jul-2020.pdf)

<sup>32</sup> (2018) 2 SCC 801

<sup>33</sup> (2014) 10 SCC 473

The same ruling has been upheld in the case of *Arjun (supra)*.

Accordingly, sections 62 to 65 need not be looked at when it comes to admissibility of electronic records before a court. Thus, in case of e-agreements, such as that between a lender and borrower, the provisions of section 65A and 65B will be looked into.

It may be noted that the provisions of section 65B has its genesis in section 5 of the Civil Evidence Act 1968 (UK). Sub-sections (2) to (5) of section 65B of the Evidence Act are a reproduction of sub-sections (2) to (5) of section 5 of the Civil Evidence Act, 1968, with minor changes.

(ii) Certificate under section 65B (4) – A precedent to admissibility of electronic records

When furnishing an electronic record – such as an electronic agreement as evidence before a court, a certificate is required to be produced under section 65B (4). The certificate would require to identify the record and describe the manner of production or give particulars of the device involved in the production of the electronic record. This certificate must be signed and furnished by *“either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of relevant activities – whichever is appropriate, to the best of his knowledge and belief.”*

The apex court ruled that section 65B (4) is indeed mandatory. The certificate is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar (supra)*. However, in case the original document is itself being produced, the certificate under section 65B (4) is of course not required.

Therefore in case of electronic contracts stored on a computer device, they may be presented to the court by furnishing a certificate under section 65B (4). However, where the computer on which the electronic record is stored, is itself being presented to the court as primary evidence, then in that case the certificate under section 65B (4) is not required.

In case of execution of a loan agreement, the borrower affixes the e-signature through the borrower's electronic device and the lender receives the same on the lender's electronic device. Once an electronically-signed agreement comes into the electronic record of the lender, the same is stored in a storage device, which may be the server, cloud-server or any other storage device. Of course, the device must be meeting the conditions of section 65B (2). When it comes to producing the evidence of such e-signed agreement in a legal proceeding, the same may be done by providing the certificate referred to in section 65B (4). The certificate may be given by “a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant

activities". The conditions primarily relate to the integrity of the input, storage and retrieval system used for e-signed agreements.

## Annexure-1 – Timeline of legislative changes/ events surrounding electronic signatures and related matters

Date	Particulars of event
9 <sup>th</sup> June, 2000	The <a href="#">Information Technology Act, 2000</a> was enacted which provided legal sanctity to electronic signatures;
5 <sup>th</sup> February, 2009	The <a href="#">Information Technology (Amendment) Act, 2008</a> was enacted which amended the IT Act, 2000 to introduce ‘electronic signatures’ in addition to ‘digital signatures’
27 <sup>th</sup> January, 2015	The <a href="#">Electronic Signature or Electronic Authentication Technique and Procedure Rules, 2015</a> was notified which amended the Second Schedule to the IT Act, 2000 to include e-authentication technique using Aadhaar e-KYC services;
25 <sup>th</sup> February, 2016	The <a href="#">Master Direction - Know Your Customer (KYC) Direction, 2016</a> was introduced.
26 <sup>th</sup> March, 2016	<a href="#">Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016</a> was enacted;
1 <sup>st</sup> June, 2017	<a href="#">Prevention of Money-laundering (Maintenance of Records) Second Amendment Rules, 2017</a> was notified which brought in changes to the Customer Due Diligence [‘CDD’] process and incorporated submission of Aadhaar number;
26 <sup>th</sup> September, 2018	SC passed an order in the case of <a href="#">Justice K.S Puttaswamy (Retd) and Anr Vs. Union of India and Ors</a> which partially struck down section 57 of the Aadhaar Act, 2016 which enabled fintech companies to use Aadhaar number for verifying the identity of a person for the purpose of KYC;
2 <sup>nd</sup> March, 2019	<a href="#">The Aadhaar and Other Laws (Amendment) Ordinance 2019</a> was notified;
23 <sup>rd</sup> July, 2019	<a href="#">The Aadhaar and Other Laws (Amendment) Act, 2019</a> was passed which amended section 11A of Prevention of Money Laundering Act, 2002 (dealing with Verification of Identity by a RE). The said amendment allowed an RE which is a banking entity to carry out verification of identity by authentication under the Aadhaar Act, 2016;
5 <sup>th</sup> March, 2019	The Ministry of Electronics and Information Technology <a href="#">amended the Second Schedule to the Information Technology Act, 2000</a> and inserted the word “Other” after Aadhaar e-KYC. The Second Schedule post the amendment

	<p>would read as ‘e-Authentication technique using Aadhaar and other e-KYC services’. Further, amendments were made to <a href="#">Form C Schedule IV of the Information Technology Certifying Authority Rules, 2000</a>.</p>
<p>3<sup>rd</sup> May, 2019</p>	<p><a href="#">e-authentication guidelines for eSign- Online Electronic Signature Service</a> was issued under Electronic Signature or Electronic Authentication Technique and Procedure Rules, 2015 by the Ministry of Electronics and Information Technology</p>
<p>9<sup>th</sup> May, 2019</p>	<p>The Department of Revenue (DoR), Ministry of Finance issued a <a href="#">circular dated May 09, 2019</a> on procedure for processing of applications under section 11A of the Prevention of Money Laundering Act, 2002, for use of Aadhaar authentication services by entities other than the Banking companies. In terms of the said circular, if the Central Government is satisfied with the recommendations of the Regulator and Unique Identification Authority of India and the reporting entity complies with such standards of privacy and security under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, and it is necessary and expedient to do so, it may by notification, permit such entity to carry out authentication of the Aadhaar number of clients using e-KYC authentication facility.</p>

## **Other relevant articles-**

1. <http://vinodkothari.com/2019/10/validity-of-e-agreement-and-e-signature/>
2. <http://vinodkothari.com/2020/01/stamp-duty-implications-on-e-agreements/>