



# E-contract: Now Admissible in Court

Electronic contracts are modeled and deployed by software systems with specified requirements and are as legally binding between parties as normal contracts...

**A**s per Section 2(h) of the Indian Contract Act, 1872, "An agreement enforceable by law is a contract". Wikipedia defines a 'contract' as a legally binding agreement between 2 or more parties which, if it contains the elements of a valid legal agreement, is enforceable by law or by binding arbitration.

E-contract is a contract modeled, specified, executed and deployed by a software system. Software programs are used to automate business processes that govern e-contracts. E-contracts can be mapped to inter-related programs, which have to be specified

carefully to satisfy the contract requirements. These programs do not have the capabilities to handle complex relationships between parties to an e-contract.

An electronic or digital contract is an agreement "drafted" and "signed" in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted. For example, an agreement is drafted on your computer and was sent to a business associate via email. The business associate, in turn, emails it back to you with an electronic signature indicating acceptance. An e-contract

can also be in the form of a "Click to Agree" contract, commonly used with downloaded software. The user clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed. Since a traditional ink signature isn't possible on an electronic contract, people use several different ways to indicate their electronic signatures, like typing the signer's name into the signature area, pasting in a scanned version of the signer's signature or clicking an "I Accept" button and many more.

E-contracts can be categorized into two types—web-wrap agreements

and shrink-wrap agreements. A person signs these e-contracts almost on every e-transaction. but is unaware of the legal intricacies connected to it. Web-wrap agreements are basically web based agreements which require assent of the party by way of clicking the "I agree" or "I accept" button eg, Zapak user agreement, ICICI Bank terms and conditions, etc. Whereas shrink-wrap agreements are those which are accepted by a user when a software is installed from a DVD or removable storage device, eg, MS Office.

## Indian Evidence Act: E-contract as Evidence

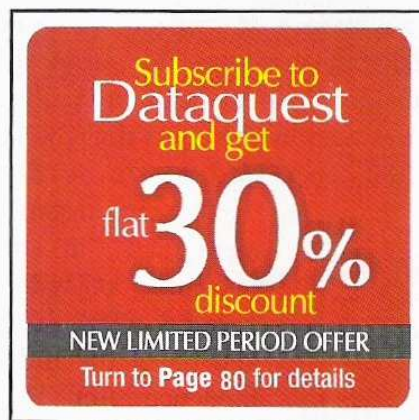
Evidence recorded or stored by availing the electronic devices is given the evidentiary status. For instance: the voice recorded with the help of a tape recorder, the digital voice recorder, digital cameras, digital video cameras, video conferencing have been added to new evidentiary assets. Justice Gururajan, of the Karnataka High Court also has already held in a civil suit that video conferencing evidence is a valid evidence.

The position of e-documents in the form of SMS, MMS and email in India is well demonstrated under the law and the interpretation provided in various cases. In *State of Delhi vs Mohd Afzal & Others*, 2003(3) 11 JCC 1669 it was held that electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it must prove the same beyond reasonable doubt. The court observed that mere theoretical and general apprehensions cannot make clear evidence defective and inadmissible. This case has well demonstrated the admissibility of electronic evidence in various forms in Indian courts.

The evidentiary value of e-contracts can be well understood in the

light of the following sections of Indian Evidence Act. Sections 85A, 85B, 88A, 90A, and 85C deals with the presumptions as to electronic records whereas Section 65B relates to the admissibility of electronic record. The above mentioned sections can be explained as follows:

**Section 85A:** As regards presumption to electronic agreements, this section is incorporated. It says that every electronic record of the nature of an agreement is concluded as soon as a digital signature is affixed to the record. Section 85A has been added in order to ensure the validity of e-contracts. But there are some restrictions as regards the presumptive value. The presumption is only valid to electronic records, electronic records



that are five years old and electronic messages that fall within the ambit of Section 85B, Section 88A and Section 90A of Indian Evidence Act.

**Section 85B:** Section 85B provides that the court shall presume the fact that the record in question has not been put to any kind of alteration, in case contrary has not been proved. The secure status of the record may be demanded till a specific time. The digital signature should also be presumed to have been affixed with an intention of signing and approving the electronic record. Further it has been provided that the section should not be misread so as to create any presumption relating to the integrity or authenticity of the

record or digital signature in question.

**Section 88B:** "The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such message was sent".

This section is self-explanatory as it purports to follow the basic rules of a valid hard-copy agreement. The words "may presume" authorize the court to use its discretionary power as regards presumption. Sections 85A and 85B contained the words "shall presume" which expressly excluded this discretionary power of the court.

**Section 90A:** In case of an electronic record being 5 years old, if proved to be in proper custody, the court may presume that the digital signature was affixed so as to authenticate the validity of that agreement. The digital signature can also be affixed by any person authorized to do so. For the purpose of this section, electronic records are said to be in proper custody if they are in the custody of the person with whom they naturally be. An exception can be effected in case circumstances of a particular case render its origin probable.

**Section 85C:** As far as a digital signature certificate is concerned, the court shall presume that the information listed in the certificate is true and correct. Inclusion of the words "shall presume" again relates to the expressed exclusion of the discretionary power of the court.

**Section 65B:** Section 65B talks about admissibility of electronic records. It says that any information contained in an electronic record which is printed on a paper or stored/recorded/copied on optical/magnetic media produced by a computer shall

be deemed to be a document and is admissible as evidence in any proceeding without further proof of the original, in case the following conditions are satisfied:

The evidentiary value of electronic records is widely discussed under section 65A and 65B of the Evidence Act, 1872. The sections provide that if the four conditions listed are satisfied any information contained in an electronic record which is printed on paper, stored, recorded or copied in an optical or magnetic media, produced by a computer is deemed to be a document and becomes admissible in proceedings without further proof or production of the original, as evidence of any contents of the original or any facts stated therein, which direct evidence would be admissible.

## The 4 Required Conditions

■ The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for the purpose of any activities regularly carried on during that period by the person having lawful control over the use of the computer.

■ During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities.

■ Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents.

■ The information contained in the electronic record should be such as

reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

It is further provided that where in any proceedings, evidence of an electronic record is to be given, a certificate containing the particulars prescribed by 65B of the Act, and signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities would be sufficient evidence of the matters stated in the certificate.

The supreme court in *State v Navjot Sandhu* (2005) 11 SCC 600. while examining the provisions of newly added section 65B, held that in a given case, it may be that the certificate containing the details in sub-section 4 of section 65B is not filed, but that does not mean that secondary evidence cannot be given.

It was held by the court that the law permits such evidence to be given

in the circumstances mentioned in the relevant provisions, namely, sections 63 and 65 of the Indian Evidence Act 1872. Paragraph 150 of the judgment which is apposite, reads as under: 150. According to Section 63, secondary evidence means and includes, among other things, “copies made

from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies.

Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through

a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Indian Evidence Act 1872, namely, sections 63 and 65.

The evidentiary value of an electronic record totally depends upon its quality. The Indian Evidence Act, 1872 has widely dealt with the evidentiary value of the electronic records. According to section 3 of the Act, “evidence” means and includes all documents including electronic records produced for the inspection of the court and such documents are called documentary evidence. Thus the section clarifies that documentary evidence can be in the form of electronic record and stands at par with conventional form of documents.

As per the IT (Amendment) Act, 2008, Section 79A empowers the central government to appoint any department, body or agency as examiner of electronic evidence for providing expert opinion on electronic form of evidence before any court or authority.

## Conclusion

To conclude with, it can be said that electronic contracts are almost same as other hard copy contracts as far as its evidentiary value is concerned and in case of any discrepancy there are certain prerequisites that fill the lacunae. All electronic contracts are valid contracts as they are legalized by the Information Technology (Amendment) Act, 2008 and one could be made liable if there is any infringement with the terms and conditions.

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