

## Hurdles to electronic execution of commercial contracts in India

Ashwini Vittalachar<sup>i</sup>

### Introduction:

Technology has radically changed the way businesses are managed across the world. One of the key technology-driven change that business houses have welcomed is automation of business processes, including electronically executing commercial contracts. However, corporate India is yet to tap into this potential completely, due to the absence of a relevant legal framework. Although technology has progressed, the legal structure is far from adapting to the demands of such progress.

### The existing legal framework:

The Information Technology Act, 2000 (the “Act”) is the legal framework governing e-commerce activities in India. The Act stipulates various administrative and procedural guidelines for all electronic or computer data related transactions, including electronic document authentication by way of electronic signatures, data protection or deterring heinous crimes like child pornography. The Controller of Certifying Authorities (“CCA”) is the notified authority for ensuring effective implementation of the Act. The CCA discharges the role of regulating both e-governance as well as e-commerce.

### Scope of the Act:

The Act was formulated with the intention of regulating both e-commerce as well as e-governance. Although this legislation was enacted in accordance with the model law prescribed by UNCITRAL, the scope of the Act has been constricted to formulate regulations for authentication of only such electronic documents whose physical form is required to be attested and authenticated by affixing signature of the parties<sup>1</sup>.

The Act clearly excludes transactions through negotiable instruments (other than a cheque) or power of attorney from the scope of its applicability<sup>2</sup>. The Act also does not enable the creation of a trust, execution of a will and the execution of any contract of sale or conveyance of immovable property or any interest in such property electronically.

Owing to its limited scope, the Act has failed to provide a proper locus for electronic execution of private contracts. However, the most important limitation to the scope of the Act is that the Act governs execution of only such electronic documents that have been mandated by any other applicable Indian law to be executed in a prescribed manner<sup>3</sup>. Since the Indian Contract Act, 1872 does not mandate contracts to be executed in writing and the parties to the contract have the liberty to negotiate the format of their contract, the Act does not throw any light on this aspect of e-commerce.

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<sup>1</sup> See Section 5 of the Information Technology Act, 2000.

<sup>2</sup> Schedule I and Section 1(4), Information Technology Act 2000.

<sup>3</sup> See Sections 4 and 5 of the Information Technology Act, 2000.

### **Commercial Contracts – law and practice:**

Although most businesses enter into a document (signed by the representatives of both parties), to record the terms of their agreement, it is done so only as a matter of good corporate practice, rather than a mandate of law. Entering into written agreements also pre-empts the party to a contract from subsequently denying the existence of an agreement or disputing its terms. Therefore, the manner in which commercial contracts can be executed electronically has not been prescribed by the Act.

### **Evidence and e-Contracts:**

While evidentiary value and authenticity of e-mails and other electronic documents have been recognized in the recent past, the law has not provided any interpretive guidelines on admissibility of electronically executed commercial contracts. Pertinent questions like “how can a company seal a business deal electronically with their vendors?”; and “whether contracts executed by affixing a scanned image of the physical signature of the party would have the same validity as affixing a digital signature using crypto programming and hash key functions”, are yet to be answered.

### **Manner of attesting e-contracts:**

The amendments to the Act<sup>4</sup> introduced the concept of “electronic signatures” thereby widening the scope of the forms that may be used to authenticate an electronic document. However, the amended Act limits these forms of authentication to only such techniques as have been approved by the Indian government and included in the schedule 2 of the Act. Currently, the Indian government has only recognized and notified digital signatures using crypto programming and hash function<sup>5</sup>, as the approved form of authorization technique or electronic signature. Therefore, parties to the contract must apply to a certifying authority to avail a digital signature to be able to electronically execute (i.e authenticate) a commercial contract.

### **Stamping laws and e-contract:**

The last and the most difficult hurdle to be crossed by corporate India while executing a commercial contract electronically, is compliance with Indian stamping laws. The Indian law stipulates that any instrument chargeable with duty (including electronic documents) must be stamped in accordance with the relevant laws, immaterial of the form of execution<sup>6</sup>. Appropriate stamp duty needs to be paid either prior to, or at the time of, electronic execution of the commercial contract in order for it to be capable of enforcement by a court in India, without having to pay penalty.

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<sup>4</sup> The Information Technology (Amendment) Act, 2008, that came into force on 5<sup>th</sup> February 2009.

<sup>5</sup> Section 3 of the Information Technology Act, 2000 defines ‘hash function’ as an algorithm mapping or translation of one sequence of bits into another, generally smaller, set known as “hash result” such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally infeasible-

(a) to derive or reconstruct the original electronic record from the hash result produced by the algorithm;

(b) that two electronic records can produce the same hash result using algorithm..

<sup>6</sup> Instruments that are chargeable with duty are elucidated in respect of each state in accordance with the applicable stamp acts. For example, see Section 3 read with Article 5 (B) of Schedule I, The Bombay Stamp Act, 1958.

Although Indian law recognizes that stamp duty is payable on instruments executed electronically<sup>7</sup>, it is yet to prescribe procedures to be followed for “electronic stamping” of electronic documents. As of date, the applicable Indian law on stamping only enables procurement of electronically stamped certificate (confirming payment of stamp duty), in addition to payment of stamp duty through conventional methods (such as getting the instrument franked or through procuring non-judicial stamp paper). Therefore, electronic commercial contracts cannot be “stamped” electronically.

**Conclusion:**

The absence of confluence of stamping laws and the Act, has resulted in lack of legal infrastructure to facilitate “paperless stamping” of electronic documents. The extent of evidentiary value conferred to an electronically executed contract attested by other forms of signature, is also ambiguous. All of these factors hinder Indian businesses from moving towards a “paperless” world and renders most e-business initiatives largely futile. Considering that India has a huge business potential in the coming years, initiatives towards bettering the technological infrastructure and the legal framework regulating the same would be highly beneficial. This would also attract more cross-border transactions, further benefiting the economy of the country.

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<sup>i</sup> *Ashwini Vittalachar is a Senior Associate at Narasappa, Doraswamy & Raja, an Indian law firm that specializes in corporate and commercial laws. The views of the author are personal and do not reflect the views of the firm. The author would like to thank Harish B. Narasappa, Roopa Prasad Doraswamy and Siddharth Raja for their invaluable inputs from time to time.*

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<sup>7</sup> Electronic documents are included within the purview of the term “instrument” in the stamp acts applicable in each state. For example, see section 2 (l) of the Bombay Stamp Act, 1958.