

COVID-19 SERIES: IS THE “E-CONTRACTING-AGE” FINALLY HERE?

The COVID-19 outbreak has caused many organisations to reevaluate how they do business. Offices are only allowed to operate at limited capacity, a large part of the work force is still social distancing and work from home looks like it is here to stay. It has become increasingly more difficult for organisations to contract, sign and maintain documentation physically as they used to.

An alternative approach is required. In this update, we explore the state of play of e-contracting and e-signatures as an option under Indian law.

1. E-contracting in India

IT Law: As a general principal, contracts under Indian law can be in written or oral form. Indian IT laws treat (most) electronic contracts the same as physical contracts. The (comparatively) low usage of e-contracting in India seems more a matter of habit and convenience, than law. The Information Technology Act, 2000 (“**IT Act**”) provides legal recognition to electronic records and electronic signatures. Where a law requires a contract to be in written form, the IT Act allows contracting through electronic records. An ‘electronic record’ includes any data or record received or sent in an electronic form.

Contract Law: Under the Indian Contract Act, 1872 (“**ICA**”) a valid contract should include offer and acceptance; lawful consideration; lawful object; free consent; parties competent to contract; intention to create legal relationship; certainty and possibility of performance; and not be expressly declared void. These can be present in e-contracts too – Indian courts have even held an exchange of emails to be a valid contract.

As such, so long as prerequisites for contract formation under the ICA, are fulfilled, an electronic contract is enforceable in the same way as a physical contract. There are, however, certain types of contracts that cannot be executed electronically – these are detailed in paragraph 3 below.

2. Electronic signatures

As a general principle, a contract can be entered into by: (a) express consent (e.g., oral consent or written ‘wet’ signatures) or (b) by course of conduct (if a party acts on the terms of the contract).

Digital Signatures v. Electronic signatures: The terms digital signature and electronic signature are sometimes used interchangeably. In practical terms, a digital signature is a type of electronic signature that may be considered more secure than an electronic signature. However, both digital signatures and electronic signatures are recognised as means of authenticating electronic records under the IT Act.

Validity Requirements: The IT Act recognises the following two types of electronic signatures: (a) electronic signatures that combine an individual’s Aadhaar identity number with an electronic Know-Your-Customer method (for e.g., a one-time password), and (b) digital signatures that are generated by an asymmetric crypto-system and hash function.

Digital signatures are valid when they are properly issued as per IT Act requirements, and there is a legal presumption as to their authenticity. For electronic signatures to be valid under Indian law, they must satisfy the following reliability conditions:

- the electronic signature must be linked only to the signatory;
- at the time of signing, the signatory must have control over the data used to generate the electronic signature;

- alterations to the electronic record or electronic signature, made after the electronic signature is affixed must be detectable; and
- a Certifying Authority recognised by the Controller of Certifying Authorities appointed under the IT Act must issue the digital signature certificate issued upon authentication.

Once these conditions are met a legal presumption is created with regards to the authenticity and validity of the electronic signature.

3. What's holding back e-Contracting adoption?

The (comparatively) low usage of e-contracting in India seems more a matter of habit and convenience, than law.

Lack of Clarity on Payment of Stamp Duty: Indian stamp law identifies certain instruments that must be stamped either prior to or at the time of their execution. Stamp duty is a revenue tax payable in India to make documents admissible before courts and authorities and it varies from state to state. As a general principle all instruments are required to be stamped, and electronically executed contracts have not been exempted from payment of stamp duty. Some Indian states, such as Maharashtra, Karnataka, and Delhi, have specifically clarified that 'electronic records' are subject to stamp duty. While the government has made it possible for parties to purchase stamp paper online in some states, there are other states which still do not permit such purchase. Having to physically purchase stamp paper, may sometimes act as a roadblock in the paperless execution of contracts.

Requirement for Physical Contracts: Certain documents requiring a notarial process, or which have to be registered with Government authorities, must be executed using "wet" signatures. These include: (i) negotiable instruments, like promissory notes, bills of exchange (other than a cheque), (ii) powers of attorney, (iii) trust deeds, (iv) wills and any other testaments, and (most importantly) (v) real estate contracts, such as leases or sales agreements. Real estate contracts, in particular, account for large portion of economic activity, and still require physical presence.

Cost and Convenience: Until now at least, it may be cheaper to print, sign and store hard copies of documents. Obtaining a valid digital or electronic signature is not simple, and third party e-sign vendors charge subscription fees. Of course, it may not be physically possible, in some real life instances now, to contract physically, meaning that the cost-benefit equation relating to e-contracting is likely going to change.

4. Towards electronic documents in the COVID 19 age

There has been a discernible movement towards e-contracting in the recent past, in part due to the challenges posed by COVID 19. Usage and familiarity with electronic documents and filings will help increase the comfort with e-contracting.

- Electronic Corporate Documentation:** Indian companies are allowed to sign and maintain certain documents, records, registers, minutes, etc., in electronic form, provided these are digitally signed and dated and are not be capable of being edited or altered. This will likely pick up even more, given the issues with physical records now.
- Electronic Court Filings:** Indian courts have now started conducting electronic hearings and accepting digitally signed, electronic documents through their designated online portals. Even after COVID 19 passes, it is likely that courts will stick to these new online methods and procedures.

- c. **Electronic Tax Filings and Customs Clearances:** Tax filings have been digital in India for some time now. The government has allowed paperless customs clearances and electronic submission of documents to speed up imports, web based goods registration, etc.
- d. **Intellectual Property Filings:** It is also possible to submit digitally signed, electronic applications for registering certain types of intellectual property. Given that the practice of physical submissions is becoming difficult, this will likely pick up too.

5. What's Next, and how we can help you

Even with electronic signatures having been in India for many years, most contracting parties continued to contract physically through 'wet' signatures. This trend seems to have continued primarily out of habit, and also possibly due to the other reasons noted in this update. As the pandemic continues with no sight of when everything will go back to normal, organisations should start considering adapting electronic signatures, as these offer a safe and legally enforceable method of contracting remotely. Organisations can start by identifying where to procure a valid electronic signatures, under what circumstances it can affixed and the internal actions required to be taken by it to authorise personnel to contract on its behalf.

Should you wish, we can assist with and/ or advise further on:

- Contract review and contracting electronically
- Procuring and maintaining digital signatures
- Indian stamp laws
- Managing legal proceedings and filing court documentation.
- Maintaining e-corporate documents