

E-contracts should comply with relevant laws to be legally enforceable

COVID 19 pandemic is accelerating the adoption of digital technologies across all sectors, viz. education, healthcare, financial and legal services. Digitization is gaining traction even in the field of contract enforcement, with companies, government departments, financial institutions and other entities increasingly opting for paperless mode of entering into agreements.

In an interview to MVIRDC World Trade Center Mumbai, Ms. Gautami Raiker, Founder of the Goa-based law firm LawMate.in shares useful information about digital contracts. Ms. Raiker is also the Director and CEO of The Legal Capsule, which assists enterprises in digitizing their contracts. Ms. Raiker cautions that digital contracts or e-contracts will be legally binding and enforceable only if they comply with the provisions of Indian Contract Act, 1872 and the Information Technology Act, 2000.

Ms. Maithili Chodnekar, Chief Legal Officer (CLO) of the Legal Capsule also contributed her perspectives to this interview.

Excerpts of the interview:

1. Many of our MSME members are eager to know how they can access bank loans through video KYC, Aadhar-based KYC and online authentication channels. Can you explain the RBI's regulation and procedures involved in these modes?

The Covid19 pandemic has transformed the way the Government Departments, Banking Institutions function. There has been a recent clarification from Securities Exchange Board of India (SEBI) dated April 24th, 2020. SEBI held discussions with various market participants and based on their feedback and with a view to allow ease of doing business in the securities market, it has been decided to make use of technological innovations which can facilitate online KYC.

Moreover, with a latest guideline circular from the National Payments Corporation of India dated 26th May 2020 which mandates all NACH enabled Banking Institutions to use KYC and e-signature for loans and other insurance products. This will surely be a complete digital revolution in the financial sector enabling MSMEs to apply for loans or insurance products online.

The circular by SEBI has mentioned about e-signature using Aadhaar. It is pertinent to note that citizens including MSMEs can now sign digitally using Aadhaar card having registered mobile number that generates OTP and impresses sign on the document. This meets the criteria and is legal as per the Information Technology Act, 2000. MSMEs can be ensured to even enforce documents that are digitally signed using Aadhaar in the court of law.

2. How can manufacturing companies, service providers and government contractors benefit from the provisions of the Information Technology Act 2000 (IT Act), which provides legal recognition to electronic records?

- The IT, Act 2000 empowers government departments to accept filing, creating and retention of official documents in the digital format. It has also proposed a legal framework for the authentication and origin of electronic records/communications through digital signature.
- From the perspective of e-commerce service providers in India, emails would now be a valid and legal form of communication that can be duly produced and approved in a court of law.
- Companies shall now be able to carry out electronic commerce using the legal infrastructure provided by the Act.
- IT Act, 2000 Act now allows Government to issue notification on the web thus heralding e-governance.
- The Act enables the companies to file any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in electronic form by means of such electronic form as maybe prescribed by the appropriate Government.
- The IT Act also addresses the important issue of security, which are so critical to the success of electronic transactions. The Act has given a legal definition to the concept of secure digital signatures that would require to have passed through a system of a security procedure, as stipulated by the Government at a later date.
- Under the IT Act, 2000, it shall now be possible for corporates to have a statutory remedy in case if anyone breaks into their computer systems or network and damages or copies data. The remedy provided by the Act is in the form of monetary damages, not exceeding Rs. 1 crore.

3. Apart from loan contracts, what are the other contracts that can be entered into digitally and which are legally enforceable? What are the precautions to be taken by the contractual parties while entering into such digital contracts?

- Commercial agreements between corporate entities, including (Non Disclosure Agreements (NDAs), procurement documents, sales agreements
- Consumer agreements, including new retail account opening documents
- Certain forms of real estate documents, such as certain lease agreements, purchase and sales contracts, and related documentation for residential and commercial real estate
- HR documents, including employment contracts, paperwork and other new employee onboarding processes

Digital Contracts are regulated by the provisions of both Indian Contract Act, 1872 and the Information Technology Act, 2000. Every e-contract, therefore, needs to comply with the provisions of these Acts to make them legally binding and enforceable.

Essential elements of a valid e-contract:

- Offer and Unconditional Acceptance - Which may be made online or by e-mail communication.

- Lawful Purpose and Consideration - A contract is enforceable by law only when it is made for a lawful purpose and for some consideration. It must not defeat any provision of law and must not be fraudulent in nature.

- Capacity of Parties and Free Consent - Parties to a contract are capable of entering into a contract, if they satisfy the requirements of Section 11 and 12 of the Indian Contract Act, 1872 (capacity to contract), and consent of the parties must be free as per Section 13 of the Indian Contract Act, 1872.

As per Section 2(a) of The Indian Contract Act, 1872, which defines the term 'offer', states that an offer must be communicated to the offeree. The terms of the contract cannot be changed after the approval and acceptance of the recipient has been given and communicated.

Any changes if made should specifically and exclusively be communicated to the recipient.

4. Many of our members are exporters, importers, tour operators and software service providers, who deal with overseas clients. How can our members enter into e-contracts with foreign clients? What is the relevant jurisdiction for enforcement of cross-border contracts? Are these contracts enforceable under the Information Technology Act and the Indian Evidence Act 1872?

The place of contract in an e-contract for the purposes of determining jurisdiction (i.e., the place where the cause of action arose) would be deemed to be where the originator has his place of business and where the addressee has his place of business. However, since Section 13 of the IT Act is subject to the mutual agreement of the contracting parties with respect to the agreed place of contract, it is recommended that all parties in their electronic contracts provide for a specific clause on jurisdiction to avoid future conflicts on jurisdictional or choice of law issues.

5. What are the uses of Digital Signature Certificates (DSC)? What is the procedure for getting this certificate and who are the Certifying Authorities (CAs)?

Use of DSC:

Digital Signature Certificate helps achieve three most important goals of Information Security: Information, Authentication, Non-Repudiation.

A DSC authenticates your identity electronically and provides high level security for online transactions by ensuring absolute privacy of any information that you exchange using Digital Signature Certificate. If you use a DSC to sign information/document, the recipient is assured that it has not been changed in transit and it also verifies your identity as the sender of the information/document, which in other words means that Only the intended recipient will be able to read the information/document as your DSC can be used for encrypting information.

Procedure for obtaining DSC:

- STEP 1: Log on and select your type of entity

Log on to the website of a Certifying Authority licensed to issue Digital Certificates in India.

Once you open the page, you will be guided to the Digital Certification Services' section.

Now under the 'Digital Certification Services' section, click on the type of entity for which you want to obtain the DSC:' individual or organization', etc.

In case you are applying for an individual DSC, click on 'individual'. A new tab containing the DSC Registration Form will appear. Download the DSC Registration Form on your PC.

- STEP 2:

Fill in the necessary details.

After filling up all the necessary details you must affix your recent photograph and put your signature under the declaration. Check thoroughly for completion of the form. Take a print of the completed form and preserve it.

- STEP 3: Proof of Identity and address

- STEP 4: Payment for DSC

- STEP 5: Post the required documents

WHO ARE THE CERTIFYING AUTHORITIES?

A licensed Certifying Authority issues DSC in India.

Following are some of the authorised Certifying Authorities under Controller of Certifying Authorities (CCA) -Government of India:

E-MUDHRA

NIC

IDRBT

CDAC

CAPRICORN

(n)CODE SOLUTIONS CA

TCS

MTNL

SAFESCIPT

Notifications

Press Information, Bureau, Government of India

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<https://pib.gov.in/PressReleasePage.aspx?PRID=1631701>

India joins Global Partnership in Artificial Intelligence

<https://pib.gov.in/PressReleasePage.aspx?PRID=1631676>

CBIC automates internal office procedures

<https://pib.gov.in/PressReleasePage.aspx?PRID=1631672>

Centre suggests states to engage with private sector in healthcare infrastructure

<https://pib.gov.in/PressReleasePage.aspx?PRID=1631776>

Daily Bulletin on COVID 19

<https://pib.gov.in/PressReleasePage.aspx?PRID=1631709>

CBIC

Tariff fixation for edible oil, gold, silver etc.

<https://www.cbic.gov.in/resources//htdocs-cbec/customs/cs-act/notifications/notfns-2020/cs-nt2020/csnt52-2020.pdf>