

IT CONTRACTS

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VALIDITY OF CONTRACTS FORMED THROUGH ELECTRONIC MEANS

Sec. 10A

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 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.

ATTRIBUTION & ACKNOWLEDGEMENT

- ◉ **11.** 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.
- ◉
- ◉ **12. (1)** Where the originator has not stipulated that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by—
 - ◉ (a) any communication by the addressee, automated or otherwise; or
 - ◉ (b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

TIME AND PLACE OF DESPATCH AND RECEIPT OF ELECTRONIC RECORD

13. (1) Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:—

- (a) if the addressee has designated a computer resource for the purpose of receiving electronic records,—
 - (i) receipt occurs at the time when the electronic record enters the designated computer resource; or
 - (ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;
- (b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be despatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

INFORMATION TECHNOLOGY CONTRACTS

- ◉ Employment
- ◉ NDAs
- ◉ Consultants
- ◉ Contractors
- ◉ Distributors & Resellers
- ◉ Sale & Installation
- ◉ Software Licences - Issues
- ◉ Warranties
- ◉ Trade Secrets

INFORMATION TECHNOLOGY CONTRACTS

- ◉ There are various forms of contracts that persons engaged in the field of hardware and software need to sign upon
- ◉ Thus it can be anything from employee contracts to hardware sales agreement or even a software license

What Agreements are contracts?

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EVERY CONTRACT IS AN AGREEMENT;
BUT NOT ALL AGREEMENTS BECOME
CONTRACTS;

AN AGREEMENT ENFORCEABLE AT LAW
IS A CONTRACT – **SEC 2(H) OF ICA**

Capacity to Contract:

PERSONS HAVING INCAPACITY:-

- A) MINORS**
- B) LUNATICS**
- C) UNDISCHARGED INSOLVENT.**

**ALL THE OTHER PERSONS HAVE
CAPACITY TO CONTRACT UNTIL THE
CONTRARY IS PROVED (SEC.11)**

OFFER AND ACCEPTANCE

- OFFER WHEN ACCEPTED.

A TENDER IS IN THE SAME CATEGORY AS QUOTATION OF PRICES. WHEN A TENDER IS APPROVED, IT IS CONVERTED INTO A STANDING OFFER.

A CONTRACT ARISES ONLY WHEN AN ORDER IS PLACED PURSUANT TO A TENDER.

“Free Consent” (Sec.14)

CONSENT IS SAID TO BE FREE WHEN
IT IS NOT CAUSED BY:

- 1) COERCION, AS DEFINED IN ***SEC 15;***
- 2) UNDUE INFLUENCE – IN ***SEC 16***
- 3) FRAUD – IN ***SEC 17;***
- 4) MISREPRESENTATION – IN ***SEC 18***
- 5) MISTAKE;

Quasi Contracts Or Certain Relations
Resembling A Contractual Obligation:- [Sec 68] : –

SUPPLY OF NECESSARIES WHERE NECESSARIES ARE SUPPLIED TO A PERSON WHO IS INCOMPETENT TO CONTRACT OR SOMEONE WHOM HE IS LEGALLY BOUND TO SUPPORT, THE SUPPLIER IS ENTITLED TO RECOVER THE PRICE FROM THE PROPERTY OF THE INCOMPETENT PERSON.

2) Payment by An interested person [Sec 69]

- REIMBURSEMENT BY A PERSON PAYING MONEY DUE BY ANOTHER, IN PAYMENT OF WHICH HE IS INTERESTED;
- A PERSON WHO IS INTERESTED IN THE PAYMENT OF MONEY WHICH ANOTHER IS BOUND BY LAW TO PAY, AND WHO THERE PAYS IT, IS ENTITLED TO BE REIMBURSED BY THE OTHER.

EMPLOYMENT CONTRACTS

- ◉ It is common knowledge that the computer industry is heavily dependent upon human resources
- ◉ Thus it makes it all the more important to frame an employee agreement after taking into consideration the various laws and the dynamics of the industry

EMPLOYMENT CONTRACTS

- ◉ Adequate care should be taken to ensure that the company has ownership over inventions created by the employee in the course of employment
- ◉ In many cases the company might have several trade secrets to protect; so the agreement should contain provisions to deal with the protection of such information
- ◉ Also provision prohibiting the employee from actions that compete with the employer's business, during the term of the agreement
- ◉ (and for some time even after leaving the employment?)

NON-DISCLOSURE AGREEMENTS

- ◉ In many cases software companies work in a specific project for their clients, which may be highly sensitive and relevant to the client's business.
- ◉ In such cases clients may insist that the employees of the companies who work in that specific project execute a non-disclosure agreement regarding the said project.
- ◉ This would be over and above to the employment contracts, which the employees had signed at the time of their appointment.
- ◉ For example if INFOSYS is doing a special project for the NOKIA, then NOKIA can ask the employees of INFOSYS who work in that special project to sign a Non Disclosure Agreement.

AGREEMENTS WITH CONSULTANTS

- Consultants are not full time employees of the company and thus they are not on the rolls of the company
- This would simply mean that the consultants may not be eligible for some of the benefits which the company extends to its employees like provident fund
- Consultant is not bound by the master servant relationship and operates on a principal to principal relationship with the company

AGREEMENTS WITH CONSULTANTS

- Because of this relationship, it becomes all the more important to ensure that all the intellectual property created during the period of consultancy belongs to the company
- Because in case of works produced under a contract for service the creator is the first owner and thus all the IPRs in the said work will have to be assigned to the company

AGREEMENTS WITH CONTRACTORS

- This is important during outsourcing;
- Because of various factors some companies outsource a major part of their work to a different company who acts as a contractor

AGREEMENTS WITH CONTRACTORS

- ◉ Here also adequate care has to be taken to make sure that the contractor assigns all the IPRs created during this relationship
- ◉ Another matter of concern which may arise is with respect to confidentiality
- ◉ The agreement has to contain specific clauses dealing with protection of confidential information of the company which the contractor may gain access

DISTRIBUTOR AND RESELLER AGREEMENT

- ◉ In this case the agreement should not be anticompetitive in nature
- ◉ Then sufficient care has to be taken to enforce the IPR of the company especially the trade marks and trade secrets

SALE AND INSTALLATION AGREEMENTS

More often than not a hardware contract is for the delivery of machines (computers), these computers can be easily ascertained by referring to a distinctive code no. which is normally printed in the machine along with a model name or number or any other identification tag.

- ◉ Various payment mechanisms can be formulated like outright sale, rental, lease etc.

SALE AND INSTALLATION AGREEMENTS

- ◉ The place of installation of the machine also plays a crucial role in such contracts because it finally determines the delivery, freight, packaging charges etc
- ◉ As a general rule in outright sales, the machine may be delivered immediately on signing the contract.
- ◉ The duty of the manufacturer/supplier of the machines/hardware is to assemble the components, subject it to a comprehensive test and safely transport the machines to the premises of the buyer.

SALE AND INSTALLATION AGREEMENTS

- ◉ Just as in any other sale the title to the machine pass to the customer/ buyer after the final payment.
- ◉ It is a common practice for the manufacturer/supplier to provide the Customer an indemnity with respect to third party Intellectual property right violations.

SOFTWARE LICENCES

- ◉ Software is seldom sold as any other product; it is always viewed as an intangible property.
- ◉ It is only licensed and this is the most popular form of agreement being made in relation to software.
- ◉ Under this agreement the person who develops the software licenses certain rights in relation to the software to the licensee.

SOFTWARE LICENCES

- ◉ What these contracts normally grant is a non-exclusive and non-transferable licence to run the software on a single computer at a time.
- ◉ The licensee is not in any way empowered to transfer this right to any third party. Since the licence is non-exclusive in nature the Licensor can grant these rights to other parties.
- ◉ The Licensee has the limited right to use the software only on one computer at a given time and in case anybody loads the same software into his computer by making a copy from the Licensee then the Licensee is deemed to have violated the Licence agreement.

SHRINK WRAP AGREEMENTS

- ◉ It is a sub category of software licences which intend to establish a binding legal agreement between the software vendor and the user.
- ◉ The agreement can be generally seen inside the box containing the software, printed on the envelope containing the CD-ROM or disks, or may be printed in the user manual.
- ◉ There is a warning to the user not to open the software envelope or use the software unless and until he or she fully agrees with the terms and conditions of the agreement.
- ◉ Shrink-wrap licences have traditionally been widely used in the computer software industry in mass market transaction

SHRINK WRAP AGREEMENTS

- ◉ Interestingly the word "shrink-wrap" has been linked to the fact that such agreements used to be included on the outside of the software packaging, which was visible through the clear plastic shrink-wrap which was used to seal the package.
- ◉ The enforceability of shrink wrap agreements were tested in the case of ProCD, Inc. v. Zeidenberg 908 F.Supp. 640 (W.D. Wis. 1996) ,
- ◉ In the said case a CD-ROM product was sold under the trademark "Select Phone."

SHRINK WRAP AGREEMENTS

- ◉ It had a listing of over 95 million telephone numbers, bundled with the software that enables a user to access those numbers on his or her computer, and cost ProCD millions of dollars to develop.
- ◉ The defendant, a student living in Madison, Wisconsin, purchased copies of Select Phone.
- ◉ He then copied the telephone listings from the CD-ROM onto his computer, created a software search engine, and uploaded the whole thing into a website that soon generated over 20,000 hits a day
- ◉ Naturally, ProCD sued, alleging copyright infringement, breach of the express terms of the shrink-wrap licence agreement.

SHRINK WRAP AGREEMENTS

- ◉ The court of appeals held in favour of ProCD
- ◉ It highlighted the fact that the information provided on the box and under the shrink-wrapping gave ample notice to Ziedenberg about the existence of an agreement
- ◉ If the agreement was been unacceptable to him he could have prevented the formation of the contract by merely returning the CD to ProCD

ISSUES IN CUSTOMISED SOFTWARE AGREEMENTS

- ◉ While software licensing via the "shrink wrap" contracts contained on store-bought programs is applicable in the case of general software like MS-Office, licensing of customized software involves a lot of flexibility regarding negotiation.
- ◉ But of course, there are some issues which need to be negotiated very carefully

OWNERSHIP ISSUES

- ◉ There should be absolute clarity regarding ownership.
- ◉ This should include terms regarding the owner of the customized software product and should point out in precise terms what kind of a licence the owner is getting.
- ◉ Unlike, other software, customized software is usually a joint project between a programmer/developer, and a client with specific needs.
- ◉ So the agreement will contain clauses on who will own the software when it's completed and who will own its copyright.

SOFTWARE CONTRACTS

Duration of the Licence

- ◉ The second concern is regarding the duration of the licence.
- ◉ What is the duration of the licence
- ◉ Whether it is exclusive or non exclusive

The Importance of Source Code

- ◉ It is very much essential to include terms regarding access to the software's "source code"
- ◉ If there is no access to the source code, the user will land in trouble if the licensor fails or refuses to maintain the program or shuts shop

SOFTWARE CONTRACTS

- ◉ The best available option is to get a licence to the source code, but in case this is not possible then the user should ensure that the source code is available in cases of emergency by virtue of a concept termed "Source Code Escrow."
- ◉ A source code escrow is a distinct agreement entered into among the licensor, the licensee (user) and an independent, third party escrow agent.
- ◉ As per this source-code escrow, the licensor deposits true copies of the software, including its object and source code and pertinent documentation, with the escrow agent,
- ◉ The escrow agent will confirm its receipt in good order and release it to the beneficiary or its agents under certain designated circumstances

SOFTWARE CONTRACTS

- ◉ Generally this might occur when there is a failure to maintain the software or the bankruptcy or other dissolution of the licensor's company
- ◉ Developing a customized software is a time consuming process and usually consists of several modules or functional areas to it,
- ◉ Thus it makes better sense to insist on progress payments in exchange for specific milestones.
- ◉ Furthermore clauses should be there to make sure that any modules developed in progress actually work, both independently and with the rest of the system.
- ◉ Then there shall be provisions which relate to final acceptance of conditions, under which the licensor will be entitled to its full payment.

WARRANTIES

- ◉ Warranties are the declarations that licensors make about how the software will perform and what will be done if it doesn't live up to those promises.
- ◉ The main issues here are the availability of refunds for software that doesn't perform as promised and the promptness on the part of the Licensor to repair or enhance the software in a timely manner.
- ◉ Other issues pertain to the licensor's responsibility for business damages sustained by the licensee because of non-functional software.

CONFIDENTIALITY AND TRADE SECRETS

- Provisions relating to confidentiality and trade secrets are very important and should be properly addressed in the agreement.
- This is because in all customized software the user or his company is in real sense a co-creator of the software with the licensor.
- Thus the software may embody the user's proprietary methods, concepts, etc. along with the proprietary algorithms, techniques and expressions of ideas developed by the licensor.
- Both the parties should declare that they will not reveal the trade secrets and confidential information of the other party and this must be an important part of any software licence.

GENERAL FEATURES OF SOFTWARE CONTRACTS

- Between whom it is signed
- The agreement will define terms like software, location, source code etc
- Products and services to be provided
- Payment
- Delivery and installation
- Testing and Acceptance
- Warranty

GENERAL FEATURES OF SOFTWARE CONTRACTS

- ◉ **Licence**
- ◉ **Proprietary Rights**
- ◉ **Intellectual Property Rights Indemnity**
- ◉ **Confidentiality**
- ◉ **Alterations**
- ◉ **Maintenance**
- ◉ **Termination**
- ◉ **Assignment**

GENERAL FEATURES OF SOFTWARE CONTRACTS

- ◉ Force Majeure
- ◉ Governing Law
- ◉ Entire Agreement
- ◉ Dispute Settlement
- ◉ Severability
- ◉ Schedule/s

OPEN SOURCE SOFTWARE

- ◉ Licences
- ◉ Copyright?
- ◉ Compliance

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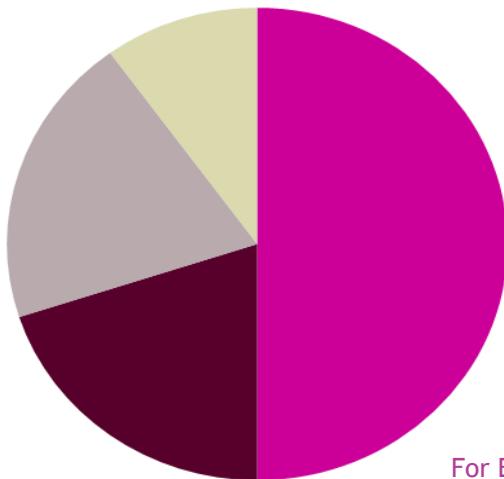


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Offshore Legal Department –OLD
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Service Profile



- Litigation and ADR
- Preventive Legal Solutions
- Strategy consulting
- Private International Law

ANY QUESTIONS?

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