



## ERGO

*Analysing developments impacting business*

### E-CONTRACT IN TIMES OF COVID-19

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The global outbreak of COVID-19 has led everyone, from promoters to investment bankers to transactional lawyers to fund managers, to change the way in which business is done. One of the biggest challenges for any live transaction or commercial negotiation will be signing of documents. While remote execution is being adopted in the Indian market, parties are cautious about this approach and prefer physical signing of the documents. However, due to ongoing travel restrictions and the possibility of lockdowns, physical execution becomes next to impossible. One possible solution to overcome this challenge is by adopting electronic contracts and electronic signing of the documents.

#### **A. Electronic contract and electronic signature**

The Information Technology Act 2000 (IT Act) provides legal recognition to electronic records wherein any document, which is mandated by law to be in written, typewritten or printed form, will be deemed to be lawful if it is available in electronic form and accessible in future. However, negotiable instruments, power of attorney, trust deeds, wills and contracts for sale and transfer of immoveable property are excluded from the scope of electronic records.

Once the contract is finalised in the electronic form (e-contract) post negotiations, it is to be executed by way of electronic signature (e-sign). Under the IT Act, e-sign means authentication of any electronic record by means of: (i) digital signature; or (ii) the electronic technique specified in the Second Schedule of the IT Act. The latter specifies e-sign based on Aadhaar (12-digit identification number issued by the Unique Identification Authority of India) e-KYC services (Aadhaar e-sign). Aadhaar e-sign allows an Aadhaar holder to render its signature electronically through third-party applications. Further, such third-party applications maintain an audit trail that captures every alteration to the e-contract to which the Aadhaar e-sign has been affixed to.

Further, the IT Act makes it explicit that contracts that are otherwise validly concluded will not be rendered invalid merely because they were made in the electronic form. The Madras High Court in *Tamil Nadu Organic Private Ltd v. State Bank of India*, AIR 2014 Mad 103, observed that '*contractual liabilities could arise by way of electronic means and that such contracts could be enforced through law.*' The High Court further stated that Section 10A of the IT Act enables the use of electronic records and electronic means for the conclusion of agreements, contracts and for other purposes.

## **B. Enforceability of e-contract signed through e-sign**

Courts in India have taken a favourable stance towards enforcing electronic contracts, an instance of which is given above. However, there is a lack of specific jurisprudence on e-sign in India. From an evidentiary standpoint, the admissibility of an e-contract as 'evidence' is governed by the Indian Evidence Act 1872 (Evidence Act). The Evidence Act categorizes presumption of validity of documents in two buckets: (i) documents that are presumed valid (i.e. if any party refutes the validity, it has the onus to prove the same); and (ii) documents that are to be proved as valid (i.e. the party relying on the document has to establish its validity). Further, a conjoined reading of IT Act and Evidence Act vests presumptive value in e-sign rendered by way of digital signature or Aadhaar e-sign similar to wet ink signature and in case of litigation, the burden of proof would rest on the party challenging the authenticity of digital signature or Aadhaar e-sign.

### **Conclusion**

COVID-19 may act as a catalyst to move India Inc. towards paperless and faster ways of execution of documents. However, as the IT Act explicitly recognizes only digital signature and Aadhaar e-sign, foreign signatories who do not hold digital signature or Aadhaar e-sign will not be able to undertake e-signing. In that case, the foreign signatory may rely on the signing technique available to them and prove its authenticity by way of evidence such as email-exchange or conduct of the parties to establish intention.

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