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## UNIT 5 FORMS OF ONLINE CONTRACTS

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### 5.1 INTRODUCTION

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E-markets are technological extensions of physical markets in the cyberspace. Everything that exists in the physical world now exists in cyberspace. E-markets are functioning like physical markets and have their respective set of e-buyers and e-sellers. These buyers and sellers are fulfilling all the legal pre-requisites to have binding relationship between them. Online contract is one such relationship that binds the buyer with the seller.

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### 5.2 OBJECTIVES

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After studying this unit, you should be able to:

- explain the different online contracts associated with various online commercial activities from the global perspective i.e. from European Council, the U.S. and the Indian legal perspective;
- describe online contracts covering the entire gamut of online business behaviour whether it is:
  - (a) business to business (B2B) or
  - (b) business to consumer (B2C)
- discuss the different forms of online contracts like EDI contract, access contracts, click wrap contracts and web wrap contracts.

### 5.3 THE NATURE OF ONLINE CONTRACTS

An online contract is formed over the Internet when an offer is made and an acceptance is received. The offer could be made by a seller (service provider) using an e-mail or a website. The buyer on receipt of an offer, places an order and the seller confirms receipt of the order. But there needs to be a clear statement as to how offers and acceptance are to be communicated and received.

In fact, it was the *United Nations Commission on International Trade Law* (UNCITRAL) Model Law on Electronic Commerce, which for the first time articulated about the nature of online contract mechanism in terms of its formation and validity. It was adopted by the General Assembly of the United Nations on 30<sup>th</sup> January 1997 by its Resolution A/RES/51/162. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. It provides<sup>1</sup> that “information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of data messages (electronic record)”.

Basically there are three legal issues related to online contracts:

- (a) What sort of contracts to be concluded by electronic means?
- (b) What sort of information related to offer to be provided by the service provider?
- (c) What sort of information on receipt of order to be provided by the service provider?

It is thus imperative to seek answers to aforesaid questions across various legislations.

#### 5.3.1 Nature of Online Contracts and the European Directive

The European Directive<sup>2</sup> on Legal Aspects of Information Society Services seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the member states. It has defined terms such as, service provider [Article 2(b)], established service provider [Article 2(c)], recipient of the service [Article 2(d)] and consumer [Article 2(e)].

- A Service provider is any natural or legal person providing an information society service.
- An Established service provider is a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period.
- A Recipient of the service is any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible.
- A Consumer is any natural person who is acting for purposes, which are outside his or her trade, business or profession.

Please answer the following Self Assessment Question.

**Self Assessment Question 1**

*Spend 3 Min.*

What are the issues related to online contracts?

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**Contracts to be concluded by Electronic Means**

Article 9 of the Directive deals with treatment of contracts to be concluded by electronic means. It states:

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.
2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:
  - (a) contracts that create or transfer rights in real estate, except for rental rights;
  - (b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
  - (c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;
  - (d) contracts governed by family law or by the law of succession.

**Information Related to Offer to be Provided by the Service Provider**

Article 10 of the Directive deals with the information to be provided by the service provider prior to the order placed by the recipient. It states:

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:
  - (a) the different technical steps to follow to conclude the contract;
  - (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

- (c) the technical means for identifying and correcting input errors prior to the placing of the order;
  - (d) the languages offered for the conclusion of the contract.
2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.
  3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.
  4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

#### **Information Related to on Receipt of Order to be Provided by the Service Provider**

Article 11 of the Directive deals with the information related to placing of order by the recipient and its receipt by the service provider. It states:

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:
  - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,
  - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.
2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to placing of the order.
3. Paragraphs 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

It is obligatory to note that the words “except when otherwise agreed by parties.....”, in the context of contract formation, intend to make it clear that the purpose of the Directive is not to impose the use of electronic means of communication on parties who rely on the use of paper-based communication to conclude contracts.

As evident from above, the European Directive provides specific safeguards for online contracts. It has provided a methodology whereby the onus is on the service provider to formulate proper ‘terms of use’ policies for the benefit of the consumer. Significantly, the Directive has made it clear that its provisions shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Moreover, the Directive also creates a bar on the contracts concluded by electronic means, like creating or transferring rights in real estate, exercising public authority, creating suretyship, creating testamentary disposition etc. This has been a right step in view of the nature of Internet and web technologies.

### 5.3.2 Nature of Online Contracts and the U.S. Law

In the U.S., law related to online contracts is always in flux. Newer and updated versions of state and federal contract laws are being adopted to facilitate interstate online commerce. The basic legal principle behind all such legislations is that a “contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation”.

#### The Uniform Commercial Code (UCC)

In the U.S. contracts are generally governed by state law, either the common law for service contracts or the UCC for sales of goods. UCC provides flexibility to the parties to choose the law provided it bears a “reasonable relation” to the commercial contract. It has been updated periodically to accommodate new technologies and business practices. For example, Article 2 of UCC in its updated version applies to online sales of goods as well. Revised Article 2 has electronic contracting provisions which are consistent with UCITA and E-Sign Act.

#### The Uniform Electronic Transactions Act (UETA)

On July 29, 1999 the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the UETA for enactment in the states. UETA governs procedural rules for contracting. It applies to transactions related to business, commercial, and governmental matters. Wills, codicils, and testamentary trusts are removed from this Act. UETA applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored.

It applies “only to transactions between parties, each of which has agreed to conduct transactions by electronic means” [section 5(b)]. It validates electronic records, electronic signatures and electronic contracts. It legitimizes the concept of electronic contract, providing that “a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation” [section 7(b)].

Further, UETA provides a legal infrastructure for automated transactions using intelligent electronic agents. Section 14(1) validates contracts formed by electronic agents, even without human review of the terms and agreements.

#### The Uniform Computer Information Transactions Act (UCITA)

“UCITA” – was formerly known as Article 2B to the Uniform Commercial Code, which was also adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) on July 29, 1999.

UCITA is applicable to a wide variety of software-related contracts. It defines a license to mean a contract that authorizes access to distribute, perform, modify, or reproduce information or information rights. It provides a set of uniform rules for a wide variety of Internet-related mass market licenses, including software contracts, contracts to download software, access contracts, click-

wrap agreements, web-wrap agreements, electronic data interchange (EDI) and others.

UCITA’s contracting rules apply to the entire transaction if information is the predominant purpose of the transaction. Moreover, it permits the manifestation of assent to be fulfilled by an affirmative act such as clicking a display button labeled “I accept the terms of this agreement”. Accordingly, a licensor must give the licensee a right to a refund if the licensee has not had an opportunity to review the terms and to manifest assent prior to a requirement to pay [section 209 (b)].

**The E-Sign Act**

The Electronic Signatures in Global and National Commerce Act (E-Sign), a federal Act came into effect on July 1, 2000. Its objective is to promote the use of electronic records and authentication methods in interstate commerce. E-Sign gives legal legitimacy to electronic signatures, contracts and records. E-Sign defines the term “electronic signature” to mean an electronic sound, symbol, or process that is attached to or logically associated with the record and intended to act as a signature.

Section 101 of E-Sign validates electronic records and signatures – “A signature, contract or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form”. Likewise, “a contract relating to such transactions may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation”.

Further, under section 101(c), the E-Sign Act prescribes the following disclosures which constitute affirmative consent for consumers: (1) the consumers must have affirmatively consented to use of e-records and not withdrawn consent; and (2) the consumer, prior to consenting, must have been given a “clear and conspicuous statement informing the consumer of any right or option of the consumer to have the record provided or made available on paper or in non-electronic form”. If special software or hardware is required to access or retain electronic records, the consumer is entitled to a statement of the system requirements.

Please answer the following Self Assessment Question.

<b>Self Assessment Question 2</b>	<i>Spend 3 Min.</i>
Explain UCITA and list its applications.	
..... ..... ..... ..... ..... .....	

**5.3.3 Nature of Online Contracts and the Indian Law**

In India, there is no specific law pertaining to online contracts. Nevertheless, the Indian Parliament has enacted an Act called the Information Technology Act, 2000. This Act is based on the UNCITRAL’s Model *Law on Electronic Commerce*.

The Indian Information Technology Act, 2000 has made the following instruments/documents (contracts) non-applicable under section 1(4) of the Act:

- (a) A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881.
- (b) A power-of-attorney as defined in section 1A of the Powers-of-Attorney Act, 1882.
- (c) A trust as defined in section 3 of the Indian Trusts Act, 1882.
- (d) A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925 including any other testamentary disposition by whatever name called.
- (e) Any contract for the sale or conveyance of immovable property or any interest in such property;
- (f) Any such class of documents or transactions as may be notified by the Central Government in the Official Gazette.

Reasons of making aforesaid instruments/documents (contracts) non-applicable result not only from lack of proper IT infrastructure to support legal requirements of such instruments but also issues related to payment of stamp duty under the State or Central Stamp Duty enactments and so far there is no technology, which would facilitate payment of statutory stamp duty payable on such instruments.

## 5.4 FORMS OF ONLINE CONTRACTS

Online contracts cover the gamut of online business behaviour, whether it is business-to-business (B2B) or business-to-consumer (B2C). These contracts may exist in various forms, like EDI contracts, access contracts, click-wrap contracts and web-wrap contracts. All these contracts may deal with tangible (physical) as well as intangible (digital) goods depending upon the nature and type of transaction.

**Table 1: Types of online contracts**

Goods/ Services	EDI Contract	Access Contract	Click-wrap Contract	Web-wrap Contract
Intangible		+	+	+
Tangible	+		+	

EDI contract predominantly deals with tangible goods in B2B space<sup>3</sup>, whereas ‘access contract’ deal with intangibles. A click-wrap contract deals with both tangible and intangible goods. A web-wrap contract predominantly deals with intangible goods only.

### 5.4.1 Electronic Data Interchange (EDI) Contracts

EDI refers to the process by which goods are ordered, shipped, and tracked computer -to-computer using standardised protocol. It permits the “electronic settlement and reconciliation of the flow of goods and services between companies and consumers”.<sup>4</sup> EDI is made possible because trading partners enter into master agreements (or umbrella agreement) to employ electronic

messaging permitting computer-to-computer transfers of information and validating computer-to-computer contracts.<sup>5</sup>

It is important to note that EDI is a contracting practice by which the parties set guidelines for what qualifies as an offer or an acceptance. The difficulty of the EDI model, however, is that it requires trading partners to agree in advance to accept the validity of electronic contracts. Trading partner agreements set the ground rules for permitting the ordering of goods or services through computer-to-computer communications, such as given transaction sets that provide for electronic offers and acceptance<sup>6</sup>.

### 5.4.2 Access Contract

Internet service providers like Satyam, VSNL, and MTNL etc. provide facility of Internet access, but others like Rediff, Sify and Yahoo provide web mail services and proprietary content to their subscribers. The latter, may enforce a comprehensive content and interactive service contracts on their subscribers. Such contracts are visible on the website in a form of a link or an icon and provide legal clauses pertaining to notice, disclaimers, warranties, eligibility conditions, registration etc.

They are also being referred as a “content and interactive service contracts” – means a contract to obtain electronic access to, or information from, an information processing system of another person, or the equivalent of such access”. Accessing legal databases, like SCCONLINE, WESTLAW and LEXIS would also fall under this category.

### 5.4.3 Click-wrap Contracts

Click-wrap contracts are commonly used in connection with e-business transactions. It is being used to bind the user to ‘terms of use’ contract facilitating online sale or purchase of goods and services. The goods can be tangible or intangible (digital).

With these agreements the buyer or user usually explicitly assents to these terms by clicking on a button stating “I agree”, “I accept”, “Yes”, “I submit”, “No” or “I decline” after having had an opportunity to review the terms. The typical click wrap contract will state: “By clicking the ‘accept’ button, you are consenting to be bound by and are becoming a party to this agreement. If you do not agree to all of the terms of this agreement, click the ‘do not accept’ button and the installation process will not continue”.

An act by the buyer affirmatively assenting to the terms of the click-wrap contract significantly enhances its enforceability. Some sites, for instance, indicate that continuing use of the site by the user or buyer manifests assent to be bound by the terms and conditions applicable to using the site. It is critical that the users have an opportunity to review the terms of use applicable to the site. If they are buried deep inside the site or otherwise inconspicuous, they will be more difficult to enforce.

These contracts are typically used to specify the terms and conditions applicable to the use of the website as well as to the products and services purchased over the Internet.

Please answer the following Self Assessment Question.

<b>Self Assessment Question 3</b>	<i>Spend 3 Min.</i>
1) Click Wrap Contracts are used in ..... with .....	
2) The goods for which Click Wrap Contract one used may be ..... or .....	

**5.4.4 Web-wrap Contracts**

It represents purported contract terms in a separate link but does not require the reader to click to indicate agreement. It is also being referred to as “browse-wrap” contract. It is typically structured as a license agreement. Website visitors are given a license to use material on a given website. The license, for example, may restrict the visitor from distributing, copying, or preparing derivative works from a company’s posted materials. The license spells out permitted and restricted uses by visitors. Access to and use of the website is provided subject to the license agreement’s terms and conditions. In other words, web wrap contract will generally have a term such as: “By using this site, you agree to these terms of use. If you do not agree to these terms, you may not use this site”.

Click-wrap agreements are entered into by an affirmative assent as opposed to the failure to act. In contrast, a “browse-wrap agreement” was not enforced where the agreement was available in the form of an on-screen icon to a browser seeking to download software, but where the browser could complete the download without clicking on the agreement, viewing the agreement, or otherwise manifesting affirmative assent.

(Specht v Netscape Communications Corp. 150.F. Supp. 2d 585 S.D.N.Y. 2001 aff'd, 2002 U.S. App. LEXIS 20714.2d Cir. Oct.1, 2002).

Please answer the following Self Assessment Question.

<b>Self Assessment Question 4</b>	<i>Spend 3 Min.</i>
What is a “Browse-Wrap” Contract? Answer briefly.	
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**5.5 OBJECTIVE OF ONLINE CONTRACTS**

The objective of online contracts is to facilitate the online buying and not to erode the consumer confidence. It is important to note that if the contracts are too overbearing or contain unusually harsh terms it is possible, especially in a consumer law context that the click-wrap agreement, even if assented to, may be found unconscionable and unenforceable. It is thus imperative that click-wrap contracts must be easy to read and understand and should provide a clear and simple mechanism allowing the consumer to return the products for a refund within a reasonable period of time.

Moreover, since the nature of e-commerce is dynamic, it is imperative that the posted online contracts on the website should be reviewed and revised periodically. Further, the company must establish a policy of maintaining records of the disclaimers and contract terms contained on its website, including any changes made over through time. On the first page (home page) of the website, a company should include a prominent notice instructing users to review the terms and conditions of usage and alerting users to changes in the terms as they occur.

E-businesses must keep records showing what version of their electronic agreement is applied to what e-customer and at what time. This was one of the problems Pay Pal experienced in *Comb v. Pay Pal, Inc.*, (2002 WL20002171 N.D. Cal. Aug. 30, 2002) where Pay Pal was unable to show which of the six versions of its Terms of Use applied to which plaintiff making it very difficult for Pay Pal to prosecute its breach of contract claims. Besides the record-keeping requirements necessitated by electronic agreements mean that there is also the risk that an exchange of e-mails may be treated as a binding contract inadvertently.

Let us now summarize the points covered in this unit.

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## 5.6 SUMMARY

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- Online contracts are dynamic in nature and represent both business-to-business (B2B) and business-to-consumer (B2C) space.
- All over the world, various legislations have been framed to articulate legal principles creating binding relationships between e-businesses and e-consumers.
- Online contracts deal with both tangible and intangible goods.

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## 5.7 TERMINAL QUESTIONS

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1. Enumerate the legal issues related to contracts concluded by electronic means.
2. Differentiate between click-wrap and web-wrap contracts.
3. Explain the objective of online contracts.

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## 5.8 ANSWERS AND HINTS

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### Self Assessment Questions

1. (a) What sort of contracts should be concluded by electronic means  
(b) What sort of information related to offer is to be provided by the service provider  
(c) What sort of information on receipt of order is to be provided by the service provider
2. UCITA was formerly known as Article 2B to the UCC. It is applicable to a wide variety of software related contracts. It defines a License to mean a contract that authorizes access to distribute, perform, modify or reproduce information or information rights (Refer sub section 5.3.2.).
3. 1) Connection, Business transaction.  
2) Tangible, Intangible

4. It is typically structured as a license agreement. Website visitors are given a license to use material on a given website.

### Terminal Questions

1. Refer to sub-section 5.2.2 of the unit.
2. Refer to sub-sections 5.3.3, 5.3.4 of the unit.
3. Refer to section 5.4 of the unit.

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## 5.9 REFERENCES AND SUGGESTED READINGS

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1. Article 11 of the “UNCITRAL Model Law on Electronic Commerce”.
2. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J.
3. EDI contracts may also exist in IT and ITeS sectors
4. Teitelman Robert and Stephen Davis. “How the Cash Flows?” Institutional Investor 58 Aug. 1996.
5. Electronic Messaging Services Task Force, The Commercial Use of Electronic Data Interchange: “A Report and Model Trading Partner Agreement”. 45 Bus. Law 1645.1990.
6. Rustad Michael L, Cyrus Daftary. E-business Legal Handbook. 2000.