

## **E-signing of contract and documents in India**

In this article, we have discussed the legal provisions and position with regard to execution of documents by way of electronic mode.

### **Legal recognition of electronic records under Information Technology Act, 2000**

The Information Technology Act, 2000 (“IT Act”) provides for recognition of electronic records under Section 4, which illustrates that any document which is required by law to be in writing, typewritten or in printed form, will be considered to be valid if it is rendered or made available in electronic form and accessible for a subsequent reference in future.

As per Section 10A of the IT Act, in case of a contract formation, where the communication of proposals and acceptance are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose. The aforesaid provision was introduced by the Information Technology (Amendment Act), 2008 taking into account the growing reliance on electronic means for executing commercial agreements/documents.

There are a number of judicial pronouncements on this for instance in the matter of *Trimex International FZE Ltd. Dubai v. Vedanta Aluminium*, (2010) 3 SCC 1, the Supreme Court held that where the offer and acceptance has been made by the parties through e-mail the same shall not affect the implementation of such contract. Also, in the matter of *Tamil Nadu Organic Pvt. Ltd. and Ors. v. State Bank of India*, AIR 2014 MAD 103 wherein, the e- auction took place between the parties, the concerned High Court while applying the provisions of IT Act held that even if a contract is executed by electronic means it gives rise to a contractual liability and is enforceable under law.



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Further, as regards signing of the contracts, electronic signatures are treated as equivalent to traditional wet signatures and are also legally recognised under Section 5 of the IT Act.

It may be noted that the first schedule of the IT Act, specifically excludes the following documents and transactions from the application of the IT -

- (i) Negotiable instruments other than a cheque as defined in section 13 of the Negotiable Instruments Act, 1881;
- (ii) Power of attorney as defined in section 1A of the Powers-of-Attorney Act, 1882;
- (iii) A trust as defined in section 3 of the Indian Trust Act, 1882;
- (iv) 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; and
- (v) Any contracts for sale or transfer of immovable property or any interest in such property.

#### **Evidentiary value of e- signature under Indian Evidence Act, 1872**

The Indian Evidence Act, 1872 was also amended to bring it in consonance with the electronic methods of execution of documents introduced by the IT Act.

Section 65A of the Indian Evidence Act, 1872, recognizes admissibility of electronic records as evidence. It states that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the said Act.

Section 65B of the Indian Evidence Act, 1872 provides for acceptance of electronic evidence and further states that any information stored in an electronic mode that can be printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document and such documents shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact.

In addition to the above, section 65B(4) states that a certificate needs to be presented that recognizes the electronic record having the statement and explicates the way in which it is to be presented.

Section 73A of the Evidence Act, 1872 provides that in order to ascertain whether a digital signature is that of the person by whom it purports to have been fixed, the Court may direct that person or the Controller or the Certifying Authority or any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

Furthermore, Section 47A of the Evidence Act, 1872 provides that where the Court is required to give its opinion on the electronic signature of any individual, the opinion of the certifying authority which has issued the electronic signature certificate is a relevant fact. Section 85B of the Evidence Act, 1872 provides that, unless it is proved otherwise, the court shall presume that -

- The secure electronic record has not been altered since the specific point of time to which the secure status relates;
- The secure digital signature is affixed by subscriber with the intention of signing or approving the electronic record.

Section 85C of the Indian Evidence Act, 1872 provides that if a digital signature is affixed to a particular document then the court shall presume that such document is true and correct.

#### **Execution of the contract electronically**

For executing contracts electronically, the contract needs to be authenticated by the respective parties to the contract. There are two methods by which contract can be authenticated, firstly, by affixing digital signature certificate and secondly by affixing the hand written signature electronically. According to the provisions of section 3A of the IT Act, a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which is considered reliable or may be listed in the second schedule of the IT Act.

Further, an electronic signature is considered to be reliable only when it fulfils the following criteria such as:

- (i) electronic signature is linked only to an individual and not to any other person;
- (ii) electronic signature while executing the contract was under the control of the signatory to whom it belongs;
- (iii) any alteration to be made to electronic signature after affixing signature is detectable.

As per Second Schedule of the IT Act, electronic signature technique using Aadhaar or e-KYC services shall be considered to be a valid electronic signature. Users with an Aadhaar ID are free to use online e-signature services to securely sign documents online.

Additionally, IT Act read with the Evidence Act, 1872 equates presumptive value in e-sign affected from digital signature or Aadhaar e-sign to wet ink signature. The presumption of proof in the event of litigation will fall on the party questioning the validity of the digital signature or the Aadhaar e-sign.

Until 2015, while the Information Technology Act, 2000 provided a provision for electronic signature, there was no mention of the mode of electronic signature in the Second Schedule of the IT Act. On January 27, 2015 vide notification number GSR 61(E) issued by the Ministry of Communications and Information Technology, the E-authentication technique using Aadhaar e-KYC services were introduced. As a result, Aadhaar Electronic Signature was used by several institutions and organisations in order to identify customers and enable customers to sign the documents using Aadhaar based electronic signatures.

### **Provisions under the Companies Act, 2013**

Under the provisions of the Companies Act, 2013 (“Act”) and the Companies (Registration Office and Fees) Rules, 2014, electronic documents must be authenticated by authorized signatories using digital signatures.

As per sub-rule 5 of Rule 8 of the Companies (Registration Offices and Fees) Rules, 2014, the electronic forms required to be filed under the Act or the rules thereunder shall be authenticated on behalf of the company by the Managing Director or Director or Company Secretary of the Company or other Key Managerial Personnel (KMP) as defined in Section 2(51) of the Act.

Further, as per sub-rule 6 of Rule 8, the scanned image of documents shall be of original signed documents relevant to the e-forms or forms and the scanned image must not be left blank without bearing the signature of the authorized person. This means that the scanned documents must have the original sign of the authorized person.

### **Notarization of E-Contracts**

Notarization is a process that involves certifying a legal document by a public notary. As government officials, notaries serve to witness the validity of signatures attached to legal documents like a contract, deed, mortgage, and testament etc.

The Concept of E-Notarization is out of the public eye even while electronic signatures are deemed valid under the IT Act, pertaining to certain exceptions provided under the aforesaid act. In order for the signature to be validated, traditional notarization demands that the signer be physically present before a notary at the time of the execution. Remote or online notarization, however, enables the signer and the notary to be at separate places at the time of execution and the process takes place by way of audio-visual technology.

### **Stamp duty on e-contracts**

It is pertinent to note that according to the provisions of Section 35 of the Indian Stamp Act 1899, the instrument which is chargeable with stamp duty shall be admissible as evidence when the appropriate stamp duty has been duly paid on the instrument. Moreover, the contracts executed electronically have not been exempted from payment of stamp duty.

Therefore, it can be established that the documents authenticated with electronic signatures in compliance with the procedure as prescribed under IT Act are validly executed and are liable to payment of stamp duty.

Section 3 of the Indian Stamp Act, 1899 defines two criteria which will determine whether stamp duty is to be paid or not:

- The document attracting stamp duty must be an “instrument”.
- The instrument must be executed.

As per Section 2(14) of the Indian Stamp Act, 1899, “Instrument” includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Therefore, all the electronic contracts, which are enforceable before the court of law, must attract payment of stamp duty.

The Central Government has allowed payment of stamp duty online for various purposes including payment of stamp duty on agreements, share certificates etc. In certain states such as Delhi, all stamp duty payments are made through electronic mode. The Central Government has appointed Stock Holding Corporation of India Limited (**SHCIL**) as the Central Record Keeping Agency for all e-stamps used in India.

Followings are the popular mode of payment of stamp duty electronically:

1. **E-GRAS**: E-GRAS is the electronic aggregator of government receipts of a State Government. Any person who wishes to deposit any government receipt can do the same by using the aforesaid facility. In addition to the above, many State Governments in India have also provided an option to pay stamp duty by using the E-GRAS facility. Where the amount of stamp duty to be paid is less than INR 50,000 then the payment may be done either online or by depositing cash in an authorised bank branch and if the amount is more than that, then it must be paid via NEFT or RTGS.
2. **E-Stamp Paper**: Payment of stamp duty through e-stamp paper is also one of the popular methods in India. In this mode of payment, the amount of stamp duty can be transferred to the bank account of SHCIL or any other authorised e-stamp paper vendor. SHCIL or the authorised e-stamp vendor on receipt of stamp duty amount generate e-stamp paper of requisite amount.
3. **eSBTR**: In addition to the above mentioned methods, the State Government of Maharashtra has provided a facility for the payment of stamp duty through the Electronic Secure Bank and Treasury Receipt (eSBTR). In eSBTR system, a person will have to visit the bank, and makes the requisite payment of stamp duty to a

designated officer after filling up the necessary application form. The concerned officer, after entering the details in their database online, issues an eSBTR which acts as a proof of payment of stamp duty similar to a stamp paper.

**National e-Governance Services Limited (NeSL)** - Certain states such as Himanchal Pradesh, Tamil Nadu, Rajasthan etc. have also recognised the payment of stamp duty through electronic mode through NeSL. It is the 100% paperless mode of payment of stamp duty without visiting the government authority in person. For example – In Tamil Nadu, e-Kaiyoppam portal is designed to enable the property owners and tenants to remotely execute the agreements in a completely automated manner without any intervention of the Rent Authority. This portal enables the owners/tenants to complete the one time registration process by following minimal and user friendly steps. Registered users will then be able to register the other party /witness and will also be able upload the agreement draft. Thereafter, the parties along with the witness can view and sign the agreement by using the eSign functionality of Aadhaar from anywhere without visiting the concerned government authority. e-Kaiyoppam portal also enables digital payment of the Stamp Duty Charges by using the digital eStamping ecosystem of NeSL.

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