

## E-Solutions Sanctity: Running Business as Usual

### Consider this:

- ✚ Company A was in discussions with Company B for execution of a service contract. The transaction and the documentation were being finalised and the government announced a nation-wide lockdown in wake of the Covid-19 outbreak. The negotiations are final, but the contract is pending execution and therefore the work is stalled.
- ✚ Customer data/third party data is saved in company's server and the same is required to be provided to employees working from home. Can we share the data on cloud? Or do we need prior approval of the customer or client?

### If you have faced the above or similar issues in the past few weeks, then read on.

Given the sudden change in scenario due to the lockdown, most of the entities are not prepared to cope with working from home due to which, the ongoing transactions and business activities have been halted. In order to ensure that this change in the set-up does not affect the entities, their businesses and workforce during the period of lockdown, below are some simple yet effective measures that the entities may adopt to smoothen this transition.

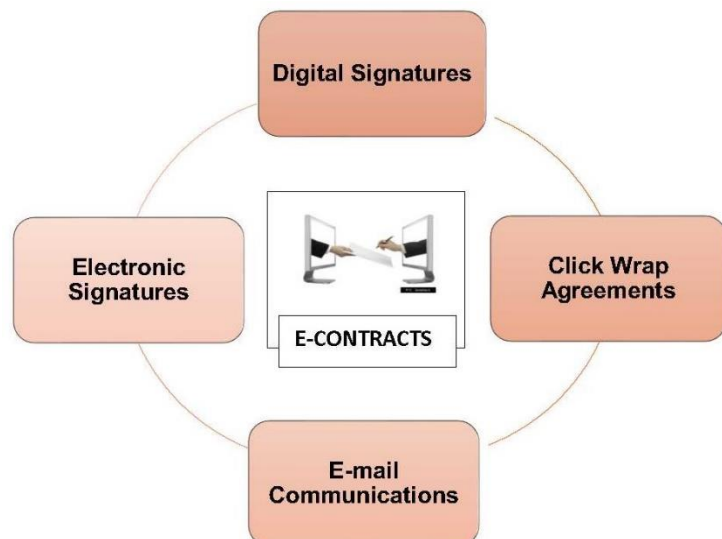
#### 1) E-contracts is virtual reality

Due to the lockdown across nation, it is not possible for the parties to physically meet and execute an agreement. The day to day business as well as transactional work of the entities are now required to be contracted through electronic medium. In this regard, the foremost question which comes to the mind is enforceability of these e-contracts in India. As per the provisions of the Indian Information Technology Act, 2000 ("IT Act"), an electronic contract is valid and enforceable

subject to the condition that all pre-requisites of a valid contract as provided under the Indian Contract Act, 1972 are fulfilled viz. offer and unconditional acceptance, lawful purpose and consideration and capacity of parties to contract and their free consent. entities may opt for any of the following ways to execute valid e-contracts from remote locations:

##### (a) Digital Signatures:

Digital Signatures are legally valid as per the provisions of the IT Act. To obtain it one may apply directly to any of the authorities that are certified by the controller of certification agencies under the provisions of IT Act, to issue digital signatures, by providing relevant documents along with the required details of the form and the



requisite fee. Digital signatures are in the form of a coded message and securely associates a signer with a document in a recorded transaction. The enforceability and evidentiary value of such agreement is equivalent to physically signed document. Generally, all entities and key managerial persons of such entities do have digital signatures and the same maybe utilized when entering into contracts with other entities. In cases where both the parties entering into a contract do not posses digital signatures, then the parties may opt for the other mechanisms mentioned below.

**(b) Electronic Signatures:**

Electronic signatures may be used by entities; in case the digital signature certificate is not available with them. Electronic signatures are in the form of any electronic symbol or process that is associated with the contract and is essentially considered as an intention to sign the contract. Electronic signatures are also valid and enforceable as per the provisions of the IT Act and Indian Evidence Act, 1872 subject to certain conditions provided therein. The e-contracts signed by electronic signature will required to adhere to security standard prescribed under the IT Act however there will be an additional responsibility of proving the electronic signature as secured electronic signature will be on the party approaching the court. For instance, signatures provided under platforms of Doc U Sign, Adobe signature etc. qualify as electronic signatures. Therefore, it is advisable to analyze the electronic signature from enforceability standpoint.

**(c) Click-wrap Agreement:**

Click-wrap agreements are the type of agreements which are commonly used for standard contracts. These agreements essentially create a 'take it or leave it' situation wherein if the other party does not consent to the terms and conditions of the agreement, they cannot proceed with the transaction. In such type of agreements, the other party does not have the power to negotiate or alter the terms of the agreement. With reference to the enforceability of the click-wrap agreements, Indian courts have accepted their validity, however, this is not a blanket acceptance. The courts, in case of click-wrap agreements, usually look into the contents of the agreement, the bargaining powers of the parties and the terms and conditions of the agreement. It is advisable for the entities to evaluate their ordinary business agreement in order to convert it into standard click-wrap agreement by making it either available on their website or sending it through e-mails. This would bring efficiency in closing ordinary agreements however entities should be mindful to create multiple channels for recording the acceptance of such an agreement by the other party from an enforceability perspective.

**(d) Email Communications:**

Email communication concerning acceptance of the terms and conditions of the agreements are legally valid as per the provisions of the IT Act. Further, Supreme Court of India, has ruled that if the terms of an agreement have been discussed over email and have been accepted by the other party, then such emails collectively constituted a valid contract, if all the essential elements of a contract are present<sup>1</sup>.

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<sup>1</sup> *Trimex International FZE v. Vedanta Aluminum Limited, India*, 2010 (1) SCALE 574.

entities should be mindful of recording the details of agreements properly on emails and casual open-ended languages should be avoided. Since each topic has multiple emails, subject line and content should be distinctively recorded. It would also be a good practice to summarize the chain of emails into one final email and take acceptance of the other party on the same.

## 2) **Re-evaluating the Modes of Payment**

Once a contract is executed, the next most important step would be in relation to payment of the consideration amount agreed under the contract. In view of the current situation, the entities may consider opting for various online modes of payment such as banking cards, Aadhaar enabled payment systems, UPI, mobile wallets, prepaid cards, bank transfers, etc.

Amongst the popular modes of online payments, in relation to smaller payments to the vendors or receipts from customers, the entities may opt for payment facilities provided by payment aggregators and payment gateways (“**PG**”), which are faster and hassle free. entities which are collecting payments not only for itself but for other parties as well, should opt for nodal bank arrangements or through payment aggregators and/or PGs. PGs are entities that facilitate e-commerce sites and merchants to accept payments from their customers for completion of their payment obligations without the need for merchants to create a separate payment integration system of their own. These modes operate in accordance with the Reserve Bank of India guidelines and are a safe mode for transmission of funds.

## 3) **Seamless access to Information**

In order to finalize any transaction and to carry out the day-to-day business activities, an entity will need to access its data. As the lockdown has made maintenance of physical servers more taxing, the entities may consider switching to cloud computing practices, wherein the data is stored using a network of remote servers hosted on the internet by cloud service providers to store, manage and process data. While cloud-based storage of information is cost effective, ensures high speed and accessibility, the entities should be mindful and take necessary precautions against security threats that is associated with it. Third party contracts and Customers terms and conditions should be re-visited in shifting data, in case the approval is required then the same should be planned for past data as well as future data.

All regulated entities should also ensure that, such cloud-based storage of data is in compliance with the regulatory requirements such as in case of entities licensed as payment systems are prohibited from storing the data related to payment systems, on any server which may be located outside India. It would be advisable for the entities to properly scrutinize the terms and conditions of cloud services before opting for the same.

## 4) **Use of Technology for Other Compliances**

Execution of transactions also calls for compliances with other statutory requirements such as Board and/ or shareholders’ approvals, wherever applicable. Given the situation, in order to ease the other compliances, the Ministry of Corporate Affairs (“**MCA**”) has released a

circular relaxing the requirements of holding board meetings and extraordinary general meetings with physical presence of the participants. As per the MCA circulars, such meetings, till 30<sup>th</sup> June 2020, shall be conducted through video conferencing or other audio-visual means. Further, the maximum time period between 2 (Two) board meetings has been extended to 180 days from the erstwhile 120 days till 30<sup>th</sup> September 2020. Further, the ordinary and special resolutions may be passed through the mechanism of postal ballot/ e-voting in accordance with the provisions of the Companies Act 2013 and the rules made thereunder, without holding a general meeting which requires the physical presence of the members.

In addition to conducting board and shareholders meetings as per the Companies Act 2013, other regulatory authorities such as Securities and Exchange Board of India, Competition Commission of India, Reserve Bank of India, etc. have also relaxed compliances with various provisions under the respective acts and have provided facilities of conducting meetings with the authorities by means of video-conferencing for urgent matters. At the same time most of the courts in India have also started hearing urgent matters through videoconferencing.

### **How Juris Corp can help?**

Juris Corp is known for its business facilitating advises. The Firm consists of a multi-disciplinary group of lawyers who have extensive experience in tackling legal-techno issues relating to digital transformation of entities. The Firm can assist you in the following ways:

- (a) Advising on various channels of executing agreements digitally including use of various facilitating platforms;
- (b) Drafting and vetting commercial agreements in tune with digital execution such as clickwrap agreements;
- (c) Preparing, drafting and standardizing internal processes, policies and documents according to the various executing methodology, payment methodology, cloud policies etc; and
- (d) Training employees on do's & don'ts for entities on the path of digital transformation.

**In case of any queries/clarifications, please feel free to contact:**

**Jayesh H**

Partner

Email : [jayesh.h@jcllex.com](mailto:jayesh.h@jcllex.com)

**Arunabh Choudhary**

Partner

Email: [arunabh.choudhary@jcllex.com](mailto:arunabh.choudhary@jcllex.com)

**Avikshit Moral**

Partner

Email: [avikshit.moral@jcllex.com](mailto:avikshit.moral@jcllex.com)

**Aditi Joshi**

Senior Associate

Email: [aditi.joshi@jcllex.com](mailto:aditi.joshi@jcllex.com)

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### Contact us:

#### MUMBAI OFFICES

##### Corporate Office

307, Century Bhavan, 3<sup>rd</sup> Floor  
Dr Annie Besant Road, Worli,  
**Mumbai** - 400 030, India  
Tel: +91 22 6720 5555 / +91 22 4057 5555  
Fax: +91 22 2421 2547

##### Dispute Resolution Office

148, Jolly Maker Chamber II,  
14<sup>th</sup> Floor, Nariman Point,  
**Mumbai** - 400 021, India  
Tel.: +91 22 4920 5555  
Fax: +91 22 2204 3579

#### DELHI OFFICE

809, Ansal Bhawan, 8<sup>th</sup> Floor,  
16 Kasturba Gandhi Marg,  
**New Delhi** - 110 001, India  
Tel: +91 11 4175 1889  
Fax: +91 11 4014 4122

#### BENGALURU OFFICE

Kheny Chambers, Upper Ground Floor,  
4/2 Cunningham Road,  
**Bengaluru** - 560 052, India  
Tel: +91 80 4669 8200  
Fax: +91 80 2226 6990

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