



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Beyond ‘Meeting of the Minds’: Unpacking the Contract Formation in Modern Commercial Transactions

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Received 17 April 2023; Accepted 10 May 2023; Published 15 May 2023

The article elaborates on a common law concept, the doctrine of consensus ad idem or “meeting of the minds.” The doctrine is elucidated according to the Indian Contract Act of 1872 along with the relevant case laws where courts have applied different approaches to commercial transaction agreements. The article discusses two competing legal theories of contract formation, the subjective school, and the objective school, highlighting the difficulties in applying the doctrine of “meeting of the minds” in modern commercial transactions, especially those involving multiple parties, contracts, locations, or negotiations. The article recognizes the significance of the doctrine; however, the lacunae outweigh its positive application, thus requiring alternative approaches in modern transactions. It examines the subjective meeting of the mind and suggests the importance of objectively reasonable manifestations in understanding whether the contract has been formed and is valid and enforceable. The seminal purpose of this article is to explore the difficulties of applying the traditional “meeting of the minds” approach to contract formation in modern commercial transactions and make possible suggestions to ease the difficulties. Lastly, the major highlight of this article is where it explores the changing dynamics of modern commercial transactions in the form of smart contracts and the reliance on technology in determining the contract formation which is suggestive of the significance of the parties’ objective intent as opposed to their subjective intent.

Keywords: *contract, agreement, minds, consensus, commercial, transaction.*

INTRODUCTION

In the modern commercial world, contracts are a critical component of conducting business. The purpose of a contract is to provide a framework for conducting business and to ensure that all parties involved understand their rights and obligations. Contracts are essential for managing risk, facilitating the resolution of disputes, and providing predictability and certainty in the world of fast-paced business. The Indian Contract Act of 1872 governs the formation and enforcement of contracts in India. Section 2(h)¹ of the Act defines a contract as 'an agreement enforceable by law.' Parties only agree whereas a Contract is the legal implication of the agreement and can further be described as a set of mutual promises which become legally binding on the parties involved. Section 10² of the Act sets out the basic requirements for an agreement to become a contract, which includes free consent, capacity, lawful consideration, and a lawful object. It also states that there must be an intention to create a legal relationship between the parties during contract formation. The traditional approach to determining whether a contract has been formed is based on the concept of a 'meeting of the minds.'³ However, in modern commercial transactions, this approach can pose significant challenges, particularly when dealing with standardized forms and practices, multiple rounds of negotiations, and objective factors that may influence the parties' understanding of the contract.

DOCTRINE OF CONSENSUS AD IDEM

The Indian Contract Act is heavily influenced by Pothier's Will Theory⁴, which stipulates that a contract is formed when each party accepts its contractual obligations. *Consensus ad idem*, or 'meeting of the minds' is 'a common law concept that requires both parties, entering a contract, to have a common intention to accept and comply with the terms outlines in the contract.'⁵

¹ Indian Contract Act 1872, s 2(h)

² Indian Contract Act 1872, s 10

³ *Reniger v Fogossa* [1551] 75 Eng Rep 1

⁴ Joseph M Perillo, 'Robert J. Pothier's Influence on the Common Law of Contract' (2005) 11 Texas Wesleyan Law Review <<https://doi.org/10.37419/TWLR.V11.I2.6>> accessed 13 April 2023

⁵ Nik Ahmad Kamal Nik Mahmud, 'An Analysis of Consensus Ad Idem: The Malaysian Contract Law and Shari'ah Perspective' (2007) 25 *Pertanika Journals*

<[http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2025%20\(S\)%20Oct.%202017/JSSH\(S\)-0537-2017.pdf](http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2025%20(S)%20Oct.%202017/JSSH(S)-0537-2017.pdf)> accessed 13 April 2023

Section 13⁶ of the Indian Contract Act, of 1872, provides that parties are said to consent to something ‘when they agree upon the same thing in the same sense.’ Lay persons, as well as legal theorists, generally regard a meeting of the minds as a significant, if not necessary, step in the creation of an enforceable contract. It refers to the assent of two or more individuals to identical intentions that they each possess concerning the terms of a proposed understanding. In other words, the meeting of the minds takes place when both contracting parties understand and freely consent to undertake all contractual obligations upon entering into a contract.

Broadly, there are two competing legal theorists of contract interpretation: the subjective school and the objective school.⁷ The subjective school asserts that in determining the existence of possible contract obligations, a court’s highest priority should be to identify each party’s actual understanding of the purported terms of the contract, and if their understandings are identical, then, irrespective of all other factors, to enforce these terms as the parties’ binding agreement.⁸ Whereas, the objective school of contract interpretation focuses on the reasonable person’s perspective and how a reasonable person would interpret the parties’ conduct and communication. Under this approach, a contract is formed when a reasonable person would believe that the parties intended to create a legally binding agreement, regardless of their subjective intent.⁹ The difference between the subjective school and objective school is most succinctly stated by Professor Robert Birmingham¹⁰:

Subjective Theory: There is a contract if and only if the minds of the parties meet.

Objective Theory: There is a contract according only to the outward manifestations of the parties.

DIFFICULTIES IN APPLYING THE DOCTRINE

The concept of ‘meeting of the mind in contract formation has traditionally focused on the subjective intent of the parties, but this approach may be inadequate in modern commercial

⁶ Indian Contract Act 1872, s 13

⁷ Damren, Samuel C, ‘A ‘Meeting of the Minds’: The Greater Illusion’ (1996) 15 Law and Philosophy <<http://www.jstor.org/stable/3504898>> accessed 13 April 2023

⁸ *Ibid*

⁹ Swaminathan Shivprasad, ‘The Will Theorist’s Mailbox: Misunderstanding the Moment of Contract Formation in the Indian Contract Act, 1872’ (2018) 39 *Statute Law Review* <<https://doi.org/10.1093/slr/hmw029>> accessed 13 April 2023

¹⁰ Joseph M Perillo, ‘The Origins of the Objective Theory of Contract Formation and Interpretation’ (2000) 69 *Fordham Law Review* 427 <<https://ir.lawnet.fordham.edu/flr/vol69/iss2/4>> accessed 13 April 2023

transactions. It fails to take into account the objective manifestations of the parties. Professor Swaminathan contends that the traditional approach is based on a flawed assumption that the parties have a shared understanding of the terms of the contract. He suggests that this assumption is unrealistic because the parties' mental states are often private and may not be accurately communicated to each other.¹¹ It is this that captures the difficulty being discussed with her.

A commercial transaction is a legal and economic term that refers to an exchange of goods, services, assets, or money between two or more parties, businesses, individuals, or other entities. In such a transaction that involves multiple contracts or parties, it can be challenging to determine when and how the parties reached a meeting of the minds. The parties may have different interpretations of the essential terms of the contract, or there may be disputes over the meaning of certain provisions. It should be noted that not all contractual arrangements involve a straightforward communication of offer and acceptance. For instance, in the case of *Carlill v Carbolic Smoke Ball Co.*,¹² the defendant company made a general offer to the world that anyone who contracted flu after using a smoke ball according to the instructions provided would be entitled to a reward of € 100. The plaintiff purchased and consumed the smoke ball as directed but still contracted influenza for which the plaintiff claimed the reward. The defendant refused to pay to argue that the advertisement was not an offer but mere puffery. The court rejected the defendant's argument and relied on the objective approach to contract formation. Bowen J. observed that the advertisement constituted an offer that was made to the world at large and acceptance could be inferred from the performance of the conditions stated in the offer. Thus, this case shows that a meeting of the minds is not necessary for the formation of a contract instead the significance of the objective approach focuses on the intention of the parties as inferred from their conduct.

Similarly, in a different jurisdiction, in the case of *Leonardo v PepsiCo*¹³, the objective manifestations were given paramount importance over the traditional meeting of the minds. It was held that the offer must contain definite, explicit, clear, and objectively reasonable terms to

¹¹ Swaminathan Shivprasad (n 9)

¹² *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA)

¹³ *Leonardo v PepsiCo* (1999) 88 F Supp 2d

be considered a valid offer that can be accepted to form a contract. The reasonable understanding and expectations of the parties are required to be determined when laying down the terms of the contract. Mere advertisements or promotional offers, without a clear intention to create a legal relationship, cannot be considered as enforceable contracts due to their subjective nature.

Moreover, the case of *Trans-Lex v Google Inc.*¹⁴ highlights the difficulty in determining a meeting of the minds in modern commercial transactions, where parties may be located in different countries and may have different understandings of the language and legal systems. In this case the plaintiff, a legal information and consulting firm sued Google for breach of contract in the licensing agreement. The dispute arose over the interpretation of a particular clause in the agreement regarding the jurisdiction of the court in case of any legal disputes. Trans-Lex claimed that the clause referred to the courts of their country, while Google argued that it referred to the courts of their own country. In such cases, an objective approach to the issue provides a more realistic and practical solution rather than the subjective intention to create a legal relationship.

Another notable case in which the court applied an objective approach to contract formation was the case of *ProCD, Inc. v Zeidenberg*¹⁵. In this case, the plaintiff created a database of telephone directories that it sold to customers on the condition that they agree to a license agreement that prohibited the resale of the database. The defendant purchased a copy of the SelectPhone database and then resold it on the Internet. ProCD sued Zeidenberg for copyright infringement and breach of contract on the violation of the terms of the shrink-wrap license agreement. Zeideneberg argued the contract to not be enforceable. The court applied the traditional meeting of the minds approach but on considering a more objective analysis of the parties' conduct the court held that it was a valid and enforceable contract as in the case of the Shrink-wrap license agreement i.e., by breaking the seal and opening the packaging of the database, the user indicates their acceptance of the terms of the agreement.

Therefore, it can be observed that in complex commercial transactions involving multiple parties, it can be challenging to determine when and how the parties reached a meeting of the

¹⁴ *Transcenic Inc v Google Inc* [2014] Civ App No 11-582/2014

¹⁵ *Pro CD v Zeidenberg* [1996] 86 F 3d 1447

minds. The parties may have different interpretations of the essential terms of the contract, or there may be disputes over the meaning of certain provisions. This further leads to uncertainty and ambiguity. In many cases¹⁶, parties use standard-form contracts that are widely accepted in their industry. These contracts often contain pre-drafted clauses and terms that are non-negotiable. It may become difficult to determine whether the parties reached a meeting of the minds, or whether they simply accepted the terms of the standard form of contract. Similar is the case of transactions that involve multiple rounds of negotiations, with each party proposing different terms and conditions.

On the contrary, in the case of *Raffles v Wichelhaus*¹⁷, the issue before the court was whether there was a mutual agreement between the parties, or a meeting of the minds, on the specific ship to be used for shipment, considering the conflicting subjective intentions of the parties. The Court of Exchequer held that the subjective intention of the parties was paramount in determining whether a contract has been formed. It concluded that there was no mutual agreement on the identity of the 'Peerless' ship, and therefore, no binding contract had been formed. This case exemplified the principle that in certain circumstances, the subjective intentions of the parties may prevail over objective manifestations in contract formation. Thus, it can be inferred that in some situations, where commercial contracts may be formed orally or through informal communications and the objective manifestations of the party's intent may be less clear, the subjective intent of the parties may become relevant to determine the existence and terms of the contract. This further implies that in cases of coercion, undue influence, mistake, fraud, duress, or misrepresentation in commercial transactions, the subjective intent of the parties may be relevant to determine the validity of the contract, even if the objective manifestations of their intent indicate otherwise.

Therefore, it can be argued that while the subjective meeting of the mind's approach is a fundamental principle, it may pose difficulties in modern commercial transactions due to issues related to communication, interpretation, standardized contracts, electronic transactions, time-sensitive transactions, business complexity, and changes in the contemporary world. Parties

¹⁶ Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd & Bharat Sanchar Nigam Ltd v Motorola India Pvt Ltd (2013) Civ app no 7419/2013

¹⁷ *Raffles v Wichelhaus* (1864) 2 Hurl & C 906

may have different interpretations of contractual terms and conditions based on their perspectives, cultural backgrounds, or business practices. In such scenarios, it may be challenging to establish a clear understanding or consensus among all parties, especially in cases where there are different levels of authority, decision-making, or cultural diversity. In today's dynamic business environment, circumstances can change rapidly, which results in disputes over the subjective meeting of the minds, as parties may argue that the changed circumstances affect the original intent or agreement.

SUGGESTIONS TO EASE THE DIFFICULTIES

Brian J.M. Quinn, in 'Rethinking the Meeting of the Minds: A New Perspective on Contract Formation,' argues that the traditional approach to contract formation is ill-suited to modern commercial transactions. He suggests that a more objective and contextual approach, i.e., taking into account the parties' conduct and industry norms, may prove to be more appropriate when determining whether a contract has been formed. The difficulties posed by the doctrine of 'meeting of the minds,' to some extent, have been rectified by the rule applicable in the case of instantaneous communication which introduced the rule of instantaneous delivery-failure notification¹⁸ as more comprehensive than the dispatch or postal rule¹⁹. It states that acceptance is complete only when communicated and comes to the knowledge of the offeror. This reasoning was further utilized in the case of *Bhagwan Das Goverdhan Das Kedia v Girdhari Lal & Co.*²⁰ which made acceptance of the offer and intimation of that acceptance necessary to result in a binding contract.

During the drafting of the Indian Contract Act of 1872, the difficulties, such as the loss of offer in transit, opening of the offer after the due date of acceptance, etc, posed by the dispatch or postal rule in the contract formation were rectified in Section 4, which states that "the communication of an acceptance is complete against the proposer, when it is put in a course of transmission to him, to be out of the power of the acceptor," and was inspired by the landmark Scottish case of *Dunmore v Alexander*.²¹ Additionally, the notable Scottish case of *Dunlop v*

¹⁸ *Entores Ltd v Miles Far East Corporation* [1955] 2 QB

¹⁹ *Adams v Lindsell* [1818] 1 B & Ald 681

²⁰ *Bhagwan Das Goverdhan Das Kedia v Girdhari Lal & Co* (1966) SC 543

²¹ *Dunmore v Alexander* (1830) 9 S 190

*Higgins*²² set out the rule for the revocation of offer and acceptance which was the blueprint for Section 5. It stipulates that an offer may be retracted until the acceptance is dispatched, and an acceptance may be revoked until it reaches the offeror. This implies that a contract is formed only when the offeror becomes aware of the acceptance therefore a simple meeting of minds is not enough for contract formation.²³

Additionally, in the recent case of *Gujarat Maritime Board v L&T Infrastructure Development Projects Limited*²⁴, the Supreme Court of India upheld the objective intention of the parties in a commercial transaction involving a concession agreement for the development of a port. It was further held that the party's intention to transfer operational control and management of the port was objectively evident from the terms of the contract, and the transaction should be treated as a 'service' control rather than a lease or license, despite the use of the term 'concession' in the agreement. In such cases, one should look at the plain meaning of the contract terms and the context of the transaction which can further aid the court to determine the objective intentions of the parties.

Moreover, the concept of a 'reasonable threshold' over the doctrine of 'meeting of the minds' proposes a more objective and pragmatic approach to contract formation.²⁵ It is more suitable for modern commercial transactions as it is a more realistic way of assessing whether a contract has been formed. It reduces the reliance on subjective intentions and focuses on the objective actions of the parties, further avoiding disputes and uncertainty in commercial transactions. A reasonable threshold can be defined as the minimum level of understanding and agreement required between the parties to a contract for it to be considered valid and enforceable. For instance, in the case of *Grainger & Son v Gough*²⁶, the understanding that the minds of the seller and buyer may have metaphysically met concerning the bottles the seller has in stock would be an unreasonable threshold to consider advertisement to sell whiskey as an offer. This

²² *Dunlop v Higgins* (1848) 1 H L C 381

²³ Swaminathan Shivprasad (n 9)

²⁴ *Gujarat Maritime Board v L&T Infrastructure Development Projects Limited* (2016) Civ App No 9821/2016

²⁵ Swaminathan Shivprasad, 'The travails of teaching "offer" and "acceptance" in Indian contract law' (2022)

9 Indonesian Journal of International and Comparative Law <<https://pure.jgu.edu.in/id/eprint/5760/>> accessed 13 April 2023

²⁶ *Grainger & Son v Gough* [1896] UKHL TC 3 462

advertisement may be open for negotiation and the seller can always say that the item is out of stock. Therefore, in this case, applying the doctrine of 'meeting of the minds' would stand futile whereas the concept of reasonable threshold makes the advertisement a mere invitation to offer which serves the purpose of the parties as the confirmation of order placed by the buyer will be the point of no return for the seller and amount to acceptance by the seller on the offer made by the buyer. Overall, the concept of reasonable threshold has the potential to better accommodate the realities of modern commercial transactions as compared to the doctrine of 'meeting of the minds.'

MODERN APPROACHES TO MODERN COMMERCIAL TRANSACTIONS

In today's dynamic world, modern commercial transactions, which include smart contracts, typically take place on blockchain platforms and are executed using digital currencies, such as Bitcoin or Ethereum, which serve as a medium of exchange within the smart contract ecosystem. The smart contract, also known as a code-based agreement, resembles a typical legally enforceable contract in many ways. The principle of 'code is law,' which contends that the code contained in a smart contract represents the parties' actual intentions and is enforceable as such, is frequently used in the context of smart contracts and blockchain technology. This indicates that the predefined code-based rules and conditions, or contract terms, dictate how the smart contract is executed and that the smart contract's code, once deployed on the blockchain, is thought of as the official embodiment of the parties' intent.

It is essential to review and analyze the code to ascertain the objective manifestations of the parties to comprehend the formation of a smart contract. This involves reviewing the contract's codebase, looking at the functions and logic contained therein, and comprehending the prerequisites and triggers for contract formation. In addition, it could be required to take into account the smart contract's larger environment, such as any off-chain or on-chain communications or external documents. These protocols can offer a clear, unalterable, and independently verifiable record of the exchange, which might be used as proof of the parties' willingness to be bound by the contract.

It might be challenging to identify how the doctrine of the meeting of the minds or their subjective intents should be applied in such automated procedures. In cases of smart contracts,

where parties may interact with code and not necessarily with each other, it may be challenging to establish a mutual understanding or agreement between the parties. Contrary to the objective school of thought, which focuses on the parties' outward expressions of intent, which can be objectively verified and executed by blockchain technology, these code-based agreements may run into technical limitations that would make it even more difficult to ascertain the subjective intentions of the parties.

A hypothetical may be used to illustrate this. For instance, *A*, a global artwork company, enters into a smart contract with *B*, an artist, for the purchase of artwork. The smart contract is deployed on a blockchain platform and contains self-executing code that automates the payment and delivery process. The parties agree to the terms and conditions of the smart contract, including the cryptos in exchange for the artwork, by digitally signing the transaction on the blockchain. However, due to a technical glitch in the platform, the smart contract fails to execute the transaction as intended by *B*. *B*, now alleges that there was no meeting of the minds between the parties and does not wish to enter into a contract. However, applying the objective approach of 'reasonable threshold' can be well-argued whether a contract is formed or not. In this case, the point of no return arises when the smart contract is digitally signed on the blockchain, which serves as the acceptance of *A* on *B*'s offer of buying the artwork from them.

Lord Denning²⁷, a renowned English Jurist, was known for his pragmatic and flexible approach to the interpretation of contracts. Even though he did not have the opportunity to address such cases during his time as a judge, he might have then emphasized the importance of the objective intentions of the parties as manifested through the blockchain, considering the unique features and characteristics of such contracts. It is now, more than ever, a need to point out that the use of blockchain technology in smart contracts introduces a new paradigm where the parties' intentions are objectively manifested through the technology itself, rather than relying solely on subjective expressions.

²⁷ J L Montrose, 'The Treatment of Statutes By Lord Denning' (1959) 1(1) University of Malaya Law Review <<http://www.jstor.org/stable/24874702>> accessed 08 April 2023

CONCLUSION

Taking into account the arguments presented, it can be observed that the doctrine of *consensus ad idem* or ‘meeting of the minds,’ though a conventional subjective approach that plays a crucial role in the formation of contracts, is inadequate and can pose several challenges when applied directly to modern commercial transactions. This makes it significant to look for alternatives considering the approaches of the objective school of thought to mitigate these challenges which consider objective manifestations of the parties’ intentions. It provides a more practical and realistic solution in cases where parties may be located in different countries or parties may face communication gaps. It can be seen that the Indian courts have been increasingly applying an objective approach to contract interpretation and enforcement. The difficulties posed by the doctrine of ‘meeting of the minds’ are rectified in Section 4 and Section 5 of the Indian Contract Act, of 1872 which is an express adoption of objective standards.²⁸ Further, the application of the concept of reasonable threshold shows greater potential to better accommodate the nuances of the contract formation that takes place in modern commercial transactions. Lastly, the evolution of modern commercial transactions in the form of smart contracts makes the blockchain act as a decentralized and transparent ledger that records the parties’ transactions, signatures, and other relevant information. The objective manifestation of intent on the blockchain should be accorded great importance in determining the parties’ contractual obligations which in turn streamlines the process of contract formation. Thus, this shift of moving beyond subjective intention to objective manifestation will promote greater certainty and predictability in legal contractual relationships which will thus reduce disputes arising from disagreements in the doctrine of *consensus as idem*.

²⁸ Indian Contract Act 1872, s 4-5