

E – Commerce and the Rights of E–Consumers

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The Internet has provided consumers with a powerful tool for searching for and buying goods and services. Benefits have included increase competition and lower prices, more choice in products and services, and the convenience of shopping for goods and services from vendors located around the world, from anywhere and at any time. Today e – commerce has become an integral part of everyday life. Accessibility to e – commerce platforms is not a privilege but rather a necessity for most people particularly in the urban areas. E – Commerce is not only a new technology and a new frontier for global business and trade but it is still evolving. In this process of e – commerce, e – consumers are looking forward for appropriate consumer protective regulations for the protection of their rights on e – transactions. The present paper will try to foreground the different aspects of the above mention theme as well as in this paper endeavor has been made to assess and device to improve the existing laws and polices apart from analysis and comparison of usefulness of e –consumer protective mechanisms for the protection of consumer rights.

Introduction

Rudolf Von Ihering, a German Jurist, said, in the nineteenth century, “while the states were fighting with one another, trade found out and leveled the roads that lead from one nation to another, and established between them a relation of exchange of goods and ideas...”. This statement rings true even today rather with more authority than at time he made it. This is because of the reason that activities at the international level are going up at a record rate and it is anticipated that due to growth of e –commerce and computer networks, the drift will gather speed.

The Internet has provided consumers with a powerful tool for searching for and buying goods and services. Benefits have included increased competition and lower prices, more choice in product services, and the convenience of shopping for goods and services from vendors located around the world, from anywhere and at any time. The movement from the Industrial Age to the Information Age and later on shifting to the New Digital World, our economy has developed rapidly. This new ‘digital economy’ together with the globalization is having a major impact on the global economy.

Rapid development in Information and Communication Technology has fueled the new paradigm of Electronic Commerce. Enterprises all over the global have either created or are in the process of creating the e – commerce front-ends to their traditional business. Thus, today e – commerce has become an integral part of everyday life. Now accessibility to e – commerce platform is not a privilege but rather a necessity for most people, particularly in the urban areas. There are now alternative e – commerce platform available (instead of the traditional physical platforms) for almost every aspect of our lives, starting from purchasing of everyday household items to online brakeage. Mail order or catalogue shopping has been in existence in the United States, since 1980. This was the predecessor of online commerce, which started in India post 2000².

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²Venkatesh Ganesh, “Going back to Brick and Mortar”, (Feb 26, 2015, 10:30 PM) <http://www.thehindubusinessline.com/features/weekend-life/article3836141.ece>

Today the number of internet users in the world is close to 3 Billion³. Out of this India have a total of 259.14 Million internet and broadband subscribers⁴. Having this huge number of internet users, India is attracting the e – commerce tycoons to expand their business and services in India. Thus several changes in business regulations become necessary for the smooth conduct of business and to offer consumer protection.

1. E – COMMERCE WITH SPECIFIC REFERENCE TO INDIA.

Roger Clarke⁵ defines e – commerce as the “conduct of commerce in goods and services with the assistance of telecommunication and telecommunication-based tools”. However, there exists no standard definition of the term and different organizations have defined it differently. Yet nonetheless, a very useful definition is the one by A. R. Lodder⁶ who define e – commerce as “commercial activities concerning goods and services as well as any business, where participants are not necessarily at the same physical location and therefore do apply telecommunication means”. The Indian Information Technology Act, 2000⁷ whose object is to offer legal recognition to transactions carried out by electronic means, refer electronic data interchange and other means of electronic communication which involve the use of alternatives to paper – shaped methods of communication and storage of information.

A report by the Internet and Mobile Association of India has revealed that India’s e – commerce market expected to grow by 37% to reach USD 20\$ billion by 2015⁸. According to the report provided by Fosters⁹ Research shoppers in metropolitan India is driving e – commerce: these consumers primarily avail of e – commerce service in the areas of travel, consumer electronics, and online books.

The e – commerce has brought radical change in the industries and specially changed the travel industry to the extent that making travel plans in just a click away as is evident from the increasing numbers of the users of IRCTC i.e. the website for booking tickets for Indian Railways. Now people start using these services extensively which extending their limits to pay Electric Bill, Telephone bill and also people started rely on these e – services in the country.

The fact that only a small market share is attributable to the e – tailing industry does not defy the growing influence that online shopping has no people. In recent times, e – tail business are adopting various technologies to create a near virtual world to overcome the biggest hurdle that e –tailing faces, namely, the direct connection that the consumer has with goods¹⁰. In the initial year’s e –tailing seemed more popular for purchase of computer products and is still does contribute to a majority of e – tailing, but

³ “Internet usage Statistics – The Internet Big Picture”, World Internet Users and Populations Stats, (Feb 27, 2015; 11:00 AM) <http://www.internetworldstats.com>

⁴ “The Indian Telecom Services Performance Indication (April – June 2014)”, (Feb 27, 2015; 11:30 AM) <http://trai.gov.in/writereadData/PIReport/documents/Indicators%20-%20Jun-14.pdf>

⁵ Clarke, “Electronic Commerce Definitions”, (March 02, 2015; 02:00 PM) <http://www.anu.edu.au/people/roger.clarke/EC/ECDefines.html>

⁶ Lodder, “Legal Aspects of Electronics Commerce”, (March 02, 2015, 02:40 PM), <http://www.rechten.vu.nl/~lodder/enlist/ec.pdf>

⁷ The Information Technology Act 2000 (also known as IT Act) is an Act of the Indina Parliament (No. 21 of 2000) notified on Oct 17, 2000.

⁸ (March 02, 2015, 02:45 PM), <http://www.livemint.com/Industry/ZH8rVD65WLhQzsUFYE9zCJ/Indian-ecommerce-market-to-react-20-billion-next-year-rep.htm>

⁹ Trends in India’s e – commerce Market: Report provided by Forrester Research for ASSOCAAM’s 2nd National Conference on e-commerce 2012.

¹⁰ Cited from using tech to make e-tail as real as retail, PRAGYA SINGH, DNA, Sep 26, 2012, (March03, 2015, 07:00 AM) http://dnaindia.com/analysis/column_using-tech-to-make-e-tail-as-retail_1745323

lifestyle shopping seems to be the new found trend for internet users. These business have capitalized on the convenience factor that online trading offers to customers and this has been the success mantra not just for Flipkart and Paytm only but also for the host of other websites.

Despite being trendy, allowing ease and quickness and received with a huge response by consumers both in urban as well as rural areas, online shopping cannot be said to be foolproof. Rather it has become an easy target for the evildoers. Online shopping poses a wide range of challenges from the consumer's protection perspective, ranging from invasion of privacy to insecure payments, and to jurisdictional issues.

2. NEED OF PROTECTION OF E – COMMERCE.

In India, the government has promoted e – commerce aggressively which is indirectly a promotion of e – consumer activities, focusing especially on the delivery of services but the legal control for the online sale of goods have yet to catch up with those for conventional shopping.

In this part of the paper, we discuss some of the pertinent issues related to the e – commerce business and protection of e – consumers:

2.1. JURISDICTIONAL CONCERN.

In any dispute, one of the primary issues that a court determines is whether or not the said court has jurisdiction to try the dispute i.e. the court must have both the jurisdiction over the parties involved in the dispute and territorial jurisdiction. With the increased use of the internet it becomes impossible to be restricted in terms of traditional concept of territory and thus the complications in determining the jurisdiction is a problem. According to the traditional rules of jurisdiction determination, the courts in a country have jurisdiction over individual who are within the country and/or to the transactions and events that occur within the natural borders of the nation¹¹. Therefore in e – commerce transactions, if a business derives customs from a particular country as a result of their website, it may be required to defend any litigation that may result in the country.

Jurisprudence in India with respect to issues relating to jurisdiction and enforcement issues in e-commerce is still nascent.

There are certain provisions in the laws in India which provide for the long arm jurisdiction:

2.1.1. INFORMATION TECHNOLOGY ACT, 2000¹²

Section 1 (2) of the Information Technology (IT) Act read along with section 75 of the IT act provides that:

- the Act shall extend to the whole of India, and save as otherwise provided under the Act, it shall apply also to any or contravention there under committed outside India by any person and,
- the Act shall apply to any offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system, or computer network located in India.

2.1.2. INDIAN PENAL CODE, 1869

Section 3 of the Indian Penal Code (IPC), 1869 provides that any person who liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provision of the IPC for any act committed beyond India in the same manner as if such act had been committed within India.

There does not seem too much jurisprudence in India on the issue of jurisdiction in cases of e – commerce. However, there are some instances where in the courts had in the preliminary stages assumed jurisdiction over a matter. In the case of **SMC Pneumatic (India) Pvt. Ltd. V. Jogesh**

¹¹ PARAS DIWAN & PIYUSH DIWAN, PRIVATE INTERNATIONAL LAW (Deep & Deep Publication, New Delhi 4th review)

¹² Supra Note 6.

Sharma¹³, the Delhi High court assumed jurisdiction where a corporate's reputation was being defamed through e-mail.

2.1.3. INTERNATIONAL JURISPRUDENCE.

The United States courts have developed the "minimum contacts" theory whereby the courts may exercise personal jurisdiction over persons who have sufficient minimum contacts with the forum state. There "minimum contacts" may consist of physical presence, financial gain, stream of commerce and election of the appropriate court via contract¹⁴.

2.2. PRIVACY¹⁵

For an e – commerce platform it is almost difficult to complete any online transaction without collecting some form of personal information of the users such as details about their identity and financial information.

Hence, an important consideration for every e – commerce platform is to maintain the privacy of its users. Two primary concerns that user of e – commerce platform would have are:

- (i) Unauthorized access to personal information.
- (ii) Misuse of such personal information.

Historically, the concept of privacy and data protection were not addressed in any Indian Legislation. In the absence of a specific legislation, the Supreme Court of India in the cases of **Kharak Singh v. State of Uttar Pradesh**¹⁶ and the **People's Union of Civil Liberties v. Union of India**¹⁷ recognized the "right to privacy" as subset of the larger "right to life and personal liberty" under the Article 21 of the Constitution of India. However a right under the Constitution can only be exercised under the State action. Non – State initiated violations of privacy may be dealt with under the principles of torts.

The IT Act deals with the concept of violation of privacy of a person is deemed to be violated where images of her private body areas are captured, published or transmitted without her consent in circumstances where she would have a reasonable expectation of privacy¹⁸.

2.3. AUTHENTICATION AND IDENTIFICATION.

Though the internet eliminates the need of physical contrast, but it does not vanish the fact that any form of contrast or transaction would have to be authenticated and in certain instances recorded. Different authentication technologies have been developed over a period of time for authenticating the documents and also to ensure the authenticity of the parties.

Electronic signatures may be considered as one of the methods used to determine the authority and legitimacy of the person to authenticate an electric record. The IT Act gives legal recognition to the authentication of any information by affixing an electronic signature as long as it is in

¹³ Suite No. 1279/2001. This case is still pending. Orders available on Delhi High Court website <http://delhihighcourt.nic.in/dhc-case-status-list-new-asp>

¹⁴ International Shoe co. v. Washington (1945) cited from "A Separate Jurisdiction for Cyberspace?" JULIET M. OBERDING and TERJA NORDERWERHAUEY (March 03, 2015; 07:30 AM) <http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.1996.bol86.x/abstract>

¹⁵ The Word PRIVACY stems from the Latin root, "private" which means "to separate". To want privacy is to want to separate, to be individual. See MILLER, PROF. A (March 1999), PRIVACY IN CYBERSPACE,(Berkman Centre for Internet and Society, Harvard University) (March 03, 2015; 07-45:00 AM) <http://eon.law.harvard.edu>

¹⁶ AIR 1963 SC 1295

¹⁷ 1997 (1) SSC 318

¹⁸ Section 66 – E of the IT Act 2000.

compliance with the manner as prescribed under the IT Act. Furthermore, the IT Act also provides the regulatory framework with respect to electronic signatures including issuance of electronic signature certificates.

In particular the IT Act provides that an electronic signature shall be deemed to be a secure e – signature if:

- (i) the signature creation data, at the time of affixing the signature, was under the exclusive control of the signatory and no other party; and
- (ii) the signature creation data was stored and affixed in such exclusive manner as may be prescribed

3. E – COMMERCE AND CONSUMER PROTECTION.

E – Commerce being global and trans – border in nature, efforts have been made at the national and international level to ensure the protection to the e – commerce.

In India, the Consumer Protection Act (CPA), 1986 governs the relations between consumers and services of goods providers. There is no separate consumer protection law that is specific to and regulates online transactions. Liability under the CPA arises when there is “deficiency in services” or “defect in goods” or occurrence of “unfair trade practice”. The CPA specifically excludes from its ambit the rendering of any service that is free of charge.

If an online platform is not charging the users, the CPA may not apply. If actual sale is taking place on online platform, the users will be considered as ‘consumers’ under the CPA and its provision will apply to the sale of products by the online platform. Depending upon who is actually selling the goods or rendering services the liability may trigger. The distribution of goods also comes within the purview of the CPA.

There is a special adjudicating forum (will appellate forums) which is constituted under the CPA. Some of the various sanctions which may be imposed under the CPA are as below:

- (i) Removal of defects/deficiencies
- (ii) Replacement of goods
- (iii) Return of price paid
- (iv) Pay compensation as may be awarded
- (v) Discontinue the unfair trade practice or the restrictive trade practice or not to repeat them.

There are leading international organizations which are working in order to provide the protection to the consumers in the e – commerce spectrum. These organizations include, Organization for Economic Co-operation and Development (OECD), International Chamber of Commerce (ICC) and International Consumer Protection and Enforcement Network (ICPEN) have proposed regulations in the field.

Organization for Economic Co-operation and Development (OECD)¹⁹: At the end of 1999, and after 18 months negotiation, the OECD completed and adopted Guidelines for consumer Protection in the context of e – commerce. These guidelines are very much helpful to government, business, and consumers in very practical ways as they offer instructive principles for both applying existing laws as well as developing new ones, if necessary, as they seek to achieve consumer protection in e – commerce. The guidelines are also the first of its kind establishing a global benchmark for consumer protection in an online marketplace. They have the ability to facilitate online consumer protection mechanism without acting as a barrier to trade. In the context of the protection of consumer in e – commerce and for the purpose of this paper, following measures, as forming part of the recommendations demand as mention:

¹⁹ The OECD's Committee on Consumer Policy represents the main forum regulations of e – commerce at global level. It should be noted that electronic commerce is a central element in the OECD's vision of the potential that our network world holds for sustainable economic growth.

- (i) E – Commerce should be no less protected when shopping online than when they buy from their local store or order from a catalogue.
- (ii) Disclosure should include complete and accurate information about the business, about the goods or services for sale and about how the transaction is made. What this means is that e – customers should know which business they are really dealing with. They should have a complete description of what they are buying and they should have enough information about the transaction process to be able to make an informed decision.
- (iii) The confirmation process for a sale should give the consumer a chance to see what he has agreed to buy and to change his mind if he wants before the purchase is completed.
- (iv) Payment systems need to be secure and easy to use.
- (v) In an international transaction, redress is one of the most difficult areas to address, and the OECD recommendations recognize that further work is needed. The use of alternative dispute resolution is strongly recommended.
- (vi) The OECD has been at the forefront of international privacy work for decades. More than 20 years ago, the OECD developed Guidelines Governing the Protection of Privacy in e – commerce. Even today, the OECD Privacy Guidelines are considered to be a “flagship” OECD document and shall still serve member countries as the basis for current international work on privacy in the online environment²⁰.

International Chamber of Commerce (ICC): In the 1990s, the International Chamber of Commerce, as the world’s foremost developer of self – regulatory codes of ethical conduct for advertising and marketing practices, recognized that advertising and marketing in the interactive media were at an early stage of development and thus acknowledged that the relevant principles and guidelines had to change and evolve as we learn more about the new technologies and their specific uses. In 1996, the ICC released “Guidelines on Advertising and Marketing on the Internet”²¹.

These guidelines were meant to serve as a recommendation and, in light of experience acquired; the ICC presented hereafter an updated version of the 1996 guidelines due to new developments in this area in 1998. These guidelines apply to all marketing and advertising activities on the Internet for the promotion of any form of goods or services. They set standards of ethical conduct to be observed by all involved with advertising and marketing activities on the Internet.

The guidelines intent to fulfill, inter alia, the following objectives:

- (i) To improve the public confidence in advertising and marketing provided over the new interactive system;
- (ii) To safeguard optimal freedom of expression for advertisers and markers;
- (iii) To minimize the need for governmental and/or inter-governmental legislation or regulation
- (iv) To meet reasonable consumer privacy expectation.

International Consumer Protection and Enforcement Network (ICPEN): The ICPEAN, an organization composed of consumer protection authorities from almost 40 countries aims to (a) protect consumer’s economic interests around the world, (b) share information about cross – border commercial activities that may affect consumer welfare and, (c) encourage global cooperation among law enforcement agencies²². ICPEN since does not handle individual consumer complaints; however, its econsumer.gov website helps

²⁰ Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the context of Electronic commerce, (March 04, 2015; 07:50 AM) <http://www.oecd.org/sti/consumerpolicy/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm>

²¹ (March 04, 2015; 05:15 PM), http://www.iccwbo.org/home/statement/rules/rules/1998-interest_guidelines.asp

²² (March 04, 2015; 05:20 PM), <http://www.icpean.org>

consumer who choose to resolve their disputes by means of ADR mechanism²³. Econsumer.gov is portal for consumer to report complaints about online and related transactions with foreign companies. In April of 2001, responding to the challenges of multinational Internet fraud, and working to enhance consumer protection and consumer confidence in e – commerce, 13 countries unaided econsumer.gov, a joint effort to gather and share cross – border e – commerce complaints. Today, consumer protection agencies in 28 countries²⁴ participated in this initiative. India is not a member to the organization.

Including these organizations, there are several industry groups and trade associations have who have addressed the issue of consumer protection in the context of e – commerce. They have proposed detailed guidelines for consumer protection.

The E – Commerce and Consumer Protection Group (e – commerce group) is composed of leading companies in the Internet, online and e – commerce industries (American Online, AT & T, Dell, IBM, Microsoft, Network Solutions and Time Warner). The group has developed guidelines²⁵ for consumer protection to help established and effective global framework that reduces the needs for compliance with a multitude of different laws. Consumer protection legal predictability, and continued growth of global e – commerce and all addressed in the guidelines for merchant-to-consumer transaction.

The Okinawa Charter on Global Information Society (GIS) by G8 while recognizing ‘Information & Communication Technology’ as one of the potent forces in shaping the 20th Century, G8 has issued a charter on Global Information Society (GIS). This charter addressed, at length, the issues such as: seizing digital opportunities, bridging, and digital divide and, promoting global participation. To achieve its objectives, the charter has set priorities on fostering policy, regulatory and network readiness; improving connectivity, increasing access and lowering cost; building human capacity and encouraging participation in global e – commerce networks²⁶.

4. CONCLUSION.

Technology develops faster than law and it will continue to be one step ahead of law. To cope up with the technological advancement we have to take the help of technology, as Charles Clark once remarked, “the answer to the machine is in the machine²⁷”. In other words, the perfect solution to the technical abuses is the application of technical innovation.

Consumer protection issues in the context of e – commerce have gained a considerable amount of attention both from academics and policy-makers. Furthermore, governments as well as inter – governmental organization have discussed the issues involved and developed various frameworks. But a review of existing legal framework shows that it has failed to address the e – consumer needs. The Consumer Protection Act, 1986 specifically excludes from its ambit the rendering of any service that is free of charge. If online platform is not charging the users, the Consumer Protection act may not apply. The legal system has constantly tried to catch up with the enactment of the various rules under the IT Act to deal with a host of issues emerging from the use of internet. But still it is far away from the goal.

²³ (March 04, 2015; 05:35 PM), <http://icpen.org/for-consumer-experts/what-we-do>

²⁴ The number of countries are Australia, Belgium, Egypt, Estonia, Canada, Costa Rica, Chile, Denmark, Dominican Republic, Finland, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Mexico, Netherland, New Zealand, Norway, Poland, South Korea, Spain, Sweden, Switzerland, Turkey, UK and United States.

²⁵ The Electronic commerce and consumer Protection Group (E-Commerce Group), <http://www.ecommercegroup.org.guidelines.htm>

²⁶ Okinawa Charter on Global Information Society, <http://europa.eu.int/comm/external-relations/g7-g8/into/global-info-soiecty .htm>

²⁷ CHARLES, CLARKE, THE ANSWER TO THE MACHINE IS IN THE MACHINE, P. BENT HYGENHOLTZ (ed.) , The Future of Copyright in a Digital Environment.

Therefore an in-depth understanding of the legal regime and the possible issues that an e-commerce business would face coupled with effective risk management strategies has been the need of the hour for e-commerce business to thrive in the industry.
