

# ELECTRONIC CONTRACTS AND CONSUMER PROTECTION: DOES LEGISLATION PROVIDE ADEQUATE CONSUMER PROTECTION

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## **Abstract**

In recent times, e-commerce has been growing rapidly in India and the convenience provided by online business transaction turns more and more consumers towards it. Whereas, the main concern is the protection of consumer's rights and interests because it has rendered consumers vulnerable to new forms of unfair trade and unethical business practices. The main theme of this paper is to examine whether Indian law, as it currently stands, sufficiently governs the various commercial transactions in today's era that effect consumers. It will identify and discuss specific problems that arise in electronic contracts such as defective products, unsafe products, unfair contract terms, poor quality services, security and privacy issues, payment issues and analyse whether the existing law adequately deals with these issues. Further, it will conduct a comparative study with legislations in other jurisdiction in order to provide suggestions on how the existing law governing electronic contracts can be reformed to meet the challenges of the 21st century.

## **Introduction**

Modernization and vast technological advancement has made the lives of human beings more complex and this has inevitably extended to commercial transactions. Thus today, there is great complexity in the goods and services that consumer acquire in electronic contracts. The complexity of this problem has been accelerated by the growing popularity of standard form of contracts. In addition to the complexity of goods and services today, enormous changes have also occurred in the way consumers acquire these goods and services. Consumers today are able to purchase goods via e-commerce over the internet. In such a transaction, consumer has got no opportunity to suspect the genuineness of the person he/she is dealing with online and

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this places them at a greater risk of being swindled of their money by fraudsters. Consumers are often faced with unfair terms in the form of exemption clauses that attempt to exclude or limit the liability of trader, such as defective product, which otherwise they would be subject to. In fact, the principle of *caveat emptor* (let the buyer be aware) is no longer of reasonable application because most pre-packed products, cannot be reasonably inspected before purchase. It is therefore essential that the government has authority, through appropriate legislations to protect its citizens through from unfair contract terms and other abusive market practices by manufacturers or retailers that are only interested in reaping large profits even at the expense of the unsuspecting consumers. There is therefore need for up to date legislation to govern such matters.

### **Background: The theory underlying consumer protection**

Consumer protection is a form of government regulation which protects the interests of consumers, as well as all the activities of consumer organizations designed to ensure the protection and enforcement of consumer rights in the market place through advocacy and consumer education. Recognition that consumers could be at a disadvantage in contracting with business came as early in nineteenth century. The earliest forms of consumer protection were designed to discourage fraudulent trading practices and protecting consumers from the same.

The concept of consumer protection to the ordinary person in the eighteenth century would thus, at least mean protection from excessive prices levied on primary commodities. The nineteenth century, however, saw a rise in the maximum of '*caveat emptor*' (buyer beware) which has strongly called for by advocates of *laissez faire*. It was felt that it was only fair that each man should look out for himself and should not blame anyone when he purchased defective goods because he had the freedom of choice. However, due to the increase in the number of goods that could not be readily examined by the buyer, the court began to limit *caveat emptor*.<sup>1</sup> The courts began to imply terms into contracts, especially those for the sale of goods, which made sure the buyer got a fair deal by, for example, requiring that the goods were fit for the purpose. In 1930, the Sale of Goods Act was passed which codified the existing law. Most of the law protecting consumers was embodied in the Act. This was in the forms of a number of implied warranties regarding purchased goods. The Act thus

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<sup>1</sup> Brian W. Harvey, THE LAW ON CONSUMER PROTECTION AND FAIR TRADING, 13 (5<sup>th</sup> edn, London, Butterworths, 1996).

contributed significantly to the weakening of caveat emptor. The old rule of caveat emptor has been superseded by caveat venditor such change being “rendered necessary by the conditions of modern commerce and trade.”

Thus, the main justification for intervening on behalf of consumers today is that the nature of modern markets is such that consumers can no longer make prudent shopping decisions. Another aspect of consumer protection relevant to the philosophy behind the need to protect the consumer is the problem of compensation against the large producer where the goods or services are defective. Litigation is disproportionately costly and troublesome to the small consumer. So policy has been to encourage producers to adopt codes of practice where under legitimate complaints are promptly dealt with on the one hand, and also encourage small claims and arbitration procedures to solve actual disputes expeditiously, cheaply and relative informally.<sup>2</sup> The philosophy embodied in this type of consumer protection is now found in most of the developed jurisdiction in United States, Europe and elsewhere in the western world.

### **Challenges posed by electronic contracts**

The advent of electronic commerce in modern commercial transactions has posed a great challenge on the law of sale of goods. E- Commerce allows consumers to purchase goods through transactions that are agreed, settled and transferred in an open network environment. As a result, there are several problems that are of concern to the consumers which needs to be addressed are:

#### **1. Privacy and data protection**

Technology has played a great role in enhancing the capacity of internet companies to collect and analyze huge amounts of data relating to customers who merely visit their web sites, which raises concerns about how this data is treated. Many businesses around the world collect a variety of information on a regular basis about their own customer in order to understand their clients better, improve their business processes, and target special offers. Before internet, companies used to track the purchases made by individuals, while now there is more to take care of, as a company can also record pages of websites that grabs customer’s attention.<sup>3</sup> For instance, lots of companies request their

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<sup>2</sup> *Id.*

<sup>3</sup> Rohitashwa Prasad, Topical Issues in the Regulation of E Commerce in India, US INDIA BUSINESS COUNCIL, *available at* [http://www.usibc.com/sites/default/files/Files/blog/LegalServices\\_](http://www.usibc.com/sites/default/files/Files/blog/LegalServices_)

customers to register with the company through websites by providing personal information. However, some websites decline to provide their services to those who reject registering, as well as, consumer who register may mistakenly believe that the information will be just used by the company solely for the current transaction. In fact, the company may sell the information to third parties or use it for any other purposes.

Another concern that consumers suffer from invading their own information is called “identity theft” when a thief gains access to personal information of a consumer which lets him impersonate the consumer and starts buying whatever goods and services which are to be billed to the consumer. Furthermore, usage of credit cards, debit cards, and smart cards can lead to recording, tracking and selling consumer’s shopping and banking practices. Thus, increase in the way of collecting and using data has led to raising public awareness and consumer cautions about internet privacy.

## 2. Product returns and refunds

The other issue which arises in electronic contract is the right of the consumers to cancel the product after it is ordered by a party. Since the customer does not feel and touch the product, and consequently when the product arrives, the customer might not be satisfied with the product. It may be possible that the consumer finds it eye-catching when he looks it on the screen but when he observes it in his hands, the appearance of the product may not be as attractive as it seemed on the screen. This may defraud the consumers and as in a electronic contract the consumer is not provided with the right to inspect the goods, there must be a sufficient cooling-off period which must permit the consumer a reasonable time to cancel the goods and send it back to the trader. The court has also noted in the dotted line there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power. He has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever.<sup>4</sup> It must be further observed that once the goods are cancelled, the refund by the trader to the consumer may broaden out to an unreasonable stretch of time which may be injustice to the consumer as his money is blocked for a certain period of time. Hence even refund time has to be pre-stipulated by the law exceeding which the online trader will be liable for fine.

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Newsletter.pd.

<sup>4</sup> *LIC of India v. Consumer Education & Research Centre*, AIR 1995 SC 1811.

### 3. Delivery of faulty goods

The other issue in electronic contract related to the consumer when he receives faulty goods for totally wrong goods. www.Shopclues.com was served a legal notice for selling fake JBLspeakers Premium audio devices manufacturer Harman International (India) Pvt.<sup>5</sup> Recently there has been a case where a person who allegedly ordered a laptop received a brick instead.<sup>6</sup> A vim bar in place of a Samsung Galaxy Core 2, pieces of stones instead of iPhone 4S, Rs. 600 heater in place of a MacBook Pro<sup>7</sup>, man ordered smartphone gets bar of soap instead<sup>8</sup> and there are many other instances when the Indian customers receiving shocking surprises at their doorstep.<sup>9</sup> Another point raised when on 6<sup>th</sup> October 2014, Flipkart, naming it as the Big Billion Sale, indicated that it sold Rs 600 crore (\$100 million). While the frenzied buying indicates a coming of age for India's e-commerce Big Billion Day also uncovered the challenges with e-commerce in India which was highlighted on social media sites. User complaints ranged from operational issues such as products being out of stock to ones that claimed that Flipkart marked up prices before discounting them.<sup>10</sup> To curb these kind of undesirable practices it is pertinent to enact a legislation which provides for adequate amount of compensation to the suffered consumers as well as have a deterrent effect on the online trader so as to prevent them from engaging in these practices.

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<sup>5</sup> *Harman send legal notice to Shopclues.com for selling fake JBL speakers*, THE INDIAN EXPRESS (January 1,2015) available at <http://indianexpress.com/article/technology/technology-others/harman-sends-legal-notice-to-shopclues-com-for-selling-fake-jbl-speakers/>.

<sup>6</sup> *Bosco Dominique, Teen orders on laptop for Rs 14000 online, get brick*, THE TIMES OF INDIA (January 1,2016),available at <http://timesofindia.indiatimes.com/city/delhi/Laptops-worth-over-1cr-stolen/articleshow/53481380.cms>.

<sup>7</sup> *SambitSatpathy, 4 unexpected things Snapdeal delivered to buyers and one that Flipkart did'nt*, BGR ( January 8, 2015) available at <http://www.bgr.in/news/4-unexpected-things-snapdeal-delivered-to-buyers-and-one-that-flipkart-didnt/>

<sup>8</sup> *Adrija Bose, The big Snapdeal screw up: Man orders smartphone, gets bar of soap instead*, FIRSTPOST( October 3, 2014), available at <http://www.firstpost.com/living/the-big-snapdeal-screw-up-man-orders-smartphone-gets-bar-of-soap-instead-1779633.html>.

<sup>9</sup> *Sriram Sharma, 15 Times India's Online Shoppers Got A nasty Surprise at their doorstep*, THE HUFFINGTONPOST ( May 25, 2015), available at [http://www.huffingtonpost.in/2015/05/26/brick-in-the-cart\\_n\\_7439972.html](http://www.huffingtonpost.in/2015/05/26/brick-in-the-cart_n_7439972.html).

<sup>10</sup> *KartikHosanagar, Flipkart's Big Billion sale fiasco hands edge to competitors like Amazon, Snapdeal*, THE ECONOMIC TIMES, (October 9, 2014),available at <http://economictimes.indiatimes.com/small-biz/startups/ecommerce-sales-what-does-flipkart-amazon-snapdeal-have-on-offer-today/articleshow/54640255.cms>.

#### 4. Fixation of liability

Another challenge with Electronic Contract is that it is very ambiguous to know as to who will owe the liability in case of some dispute arises in the manner as for delivery of faulty good, late delivery etc. As and when the goods services are purchased from websites like Flipkart, Snapdeal, etc and then a dispute arises, can there be any case filed against them as they are concerned in owning and managing a web portal that enables those sellers who stock storage devices to sell products through its web portal for a commission and is not engaged in the purchase or sale of goods and services. <sup>11</sup> As a landmark case of *ESSO Petroleum Co. Ltd. v. Mardon*<sup>12</sup> brings out, in a business contract; both the alternatives are of value to the innocent party. In electronic contract, however, the consumer discovers the misrepresentation only when he receives the goods or services. To set aside the contract, the consumer will have to establish that it was the misrepresentation which caused him to get in the contract. Further, it would be inconvenient for the consumer to return the goods and restore the benefits. In the same way the manufacturer or supplier of the goods and services can claim that they have entered into the contract with the online portal for the sale of the product or services and not have contrasted with the consumer.

Therefore the provision defining their liability has to be incorporated in the separate law in such a way that the consumer must have an option to sue the online portal, the manufacturer or both of them. By this the consumer will be saved from findings the appropriate to sue and can get compensation from both of them. In United Kingdom, the Electronic Commerce( EC Directive) Regulation 2002 deal with this complex problem and it covers all the websites selling goods and services online as 'service providers' and the liability is also imposed on these 'service providers' in case they does any act which goes against the internet of consumers and violates their consumer rights.<sup>13</sup>

#### **Legal framework addressing problems of e-consumers**

The terms and conditions that are framed in the electronic contract are generally arbitrary and the consumer being a layman is not vigilant enough to pay heed to it and enters into the deal

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<sup>11</sup> Ashish Ahuja v. Snapdeal, Case No. 17 Of 2014, (Competition Commission of India, May 19,2014).

<sup>12</sup> *ESSO Petroleum Co. Ltd. v. Mardon*, (1976) QB 801, (1976, Court of Appeal).

<sup>13</sup> Electronic Commerce (*EC Directive*)Regulations 2002, available at <http://whatis.techtarget.com/definition/Electronic-Commerce-EC-Directive-Regulations-2002>.

without seeing its legal perspective which gives the proprietor an undisputed chance to govern the customer by its own whims and fancies.<sup>14</sup> Though there is no specific and comprehensive legislation provides for consumer rights in electronic contract, there have been few efforts in certain legislations to address consumer rights. In India there is Information Technology Act 2000, which administers all e-commerce contracts and lays down the desired conditions for the same.

### 1. Statutory provisions of the IT Act, 2000

The Information Technology Act 2000 is based on the Model Law on E-Commerce adopted by the United Nations Commission on International Trade Law (UNCITRAL).<sup>15</sup> The Act aims to provide legal recognition for the transactions carried out by the means of electronic data interchange and other means of communications, commonly referred to as “Electronic Commerce”, which involve the use of alternatives to paper based methods of the communication and storage of information, to facilitate electronic filing of document with the government agencies.<sup>16</sup>

The Act comprises of the three significant aspect of e-commerce:

- Legal recognition of electronic records and communications- contractual framework, evidentiary aspects, digital signatures as the method of authentication, rules for determining time and place of dispatch and receipt of electronic records.
- Cyber contraventions- civil and criminal violations, penalties, establishment of the Adjudicating Authority and the Cyber Regulatory Appellate Tribunals.

As the Act establishes the legal validity and enforceability of the digital signature and electronic records as well as the secure digital signatures and secure electronic records, it will enable the growth of e-commerce in India, because the secure computer based signatures will minimize the incidence of electronic forgeries, enable and foster authentication of computerized communications and facilitates commerce by the means of electronic communications. By virtue of the recognition given to

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<sup>14</sup> DevadattKamat, Information Technology Act, 2000-A contractual Perspective, THE PRACTICAL LAWYER *available at* <http://www.ebc-india.com/lawyer/articles/2004v1a2.htm>.

<sup>15</sup> UNCITRAL Model Law, 1996 states that in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by the means of “data message”. Valid contracts can therefore, be formed where offer and acceptances is conveyed via the Internet.

<sup>16</sup> Taxman’s IT Act (2000), *Information Technology Act 2000*, New Delhi: Taxman’s Allied services Ltd.

the electronic records, electronic documents and electronic signature, amendments have been made in some existing laws. The main purpose of these amendments is to address the related issues of electronic commerce, electronic crimes and evidence, and to enable further regulation as regards electronic fund transfer.<sup>17</sup>

- Security provision of IT Act, 2000

In the context of e-commerce, important issues related to the security of business and commercial transactions. A security threat in term of Internet has been defined as a circumstance, condition or even with the potential cause economic hardship to data/network resources in the form of destruction, disclosure, modification of data, denial of services, fraud and abuse. The IT Act 2000 not only amends the Indian Penal Code to bring within its scope conventional offences committed electronically, but also creates a new breed of information technology offences, the prevention of which are incidental to the maintenance of a secure electronic environment for e-commerce.<sup>18</sup> To make e-commerce transactions safe and secure, the IT Act 2000, provides for investigation, trial and punishment for certain offences (these offences are found in Chapter XI of the Act) like source code attacks (section 65), hacking (section 66), obscenity (section 67), failure to comply with the controller's directions (section 68), subscriber's failure to Controller's requirement for decryption (section 69), accessing designated protected systems (section 70), misrepresentation to CCA (section 71), breach of privacy/confidentiality (section 72), publishing false digital signature certificate (section 73), making available digital signature for the fraudulent purpose (section 74) and section 75 of the IT Act deals with the offences or contravention committed outside India which reads as<sup>19</sup>:

- Subject to the provision of sub-section (2), the provision of this Act shall apply also to any offences or contravention committed outside India by any person irrespective of his nationality.

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<sup>17</sup> Alwyn Didar, *E-Commerce in India: Assessments and Strategies for the Developing World*, 2008.

<sup>18</sup> E- COMMERCE LAWS IN THE INDIAN PERSPECTIVE, Sms Varanasi, available at [http://www.smsvaranasi.com/insight/ecommerce\\_laws\\_in\\_the\\_indian\\_perspective.pdf](http://www.smsvaranasi.com/insight/ecommerce_laws_in_the_indian_perspective.pdf).

<sup>19</sup> Mittal, D.P. (2000), *Taxman's Law of Information Technology*, New Delhi: Taxman's Allied Services Ltd.

- For the purpose of sub-section (1), this Act shall apply to an offences or contravention committed outside India by any person if the act or conduct constituting the offences or contravention involves a computer, computer system or computer network located in India.

Apart from these provisions, there is Information Technology (Intermediaries Guidelines) Rules, 2011, where the intermediaries have the obligation to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource by any person. Such rules and regulations must inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share certain prescribed categories of prohibited information. Also, the intermediary must not knowingly host or publish any prohibited information and if done should remove them within 36 hours of its knowledge. In *Consim Info Pvt. Ltd v. Google India Pvt. Ltd*,<sup>20</sup> the Delhi Court recognized that no injunctive relief could be granted to Consim since it did not pass the triple test of (i) prima facie case (ii) balance of convenience and (iii) irreparable hardship but here the decision of the court was greatly influenced by the fact that the trademarks in dispute were generic in nature. The court also observed that though the intermediary, Google, cannot be made liable for infringement arising out of a third party's actions since it is not possible to always check every advertisement posted online; however, this observation was subject to section 3(4) of the aforesaid Intermediaries Guidelines and Google had to act upon it within 36 hours of receipt, failing which it may be held liable.

- Privacy and data protection provision of IT Act, 2000

Privacy and data protection require that information about individuals should not be automatically made available to other individuals and organisations. Each person must be able to exercise a substantial degree of control over that data and its use. Data protection is legal safeguard to prevent misuse of information about individual person on a medium including computers. It is adoption of administrative, technical, or physical deterrents to safeguard personal data. Privacy is closely connected to data protection. An individual's data like his name, address, telephone numbers, profession, family, choices, etc. are often available at various places like schools, colleges, banks, directories, surveys and on various websites. Passing of such

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<sup>20</sup> *Consim Info Pvt. Ltd v. Google India Pvt. Ltd*, 2013 (54) PTC 578 (Mad).

information to interested parties can lead to intrusion in privacy like incessant marketing calls.<sup>21</sup> The main principles on privacy and data protection enumerated under the Information Technology Act, 2000 are defining data, civil and criminal liability in case of breach of data protection and violation of confidentiality and privacy. Section 43 A of IT Act provides for compensation to an aggrieved person whose personal data including sensitive personal data may be compromised by a company, during the time it was under processing with the company, for failure to protect such data whether because of negligence in implementing or maintaining reasonable security practices. This provision, therefore, provides a right of compensation against anyone other than the person in charge of the computer facilities concerned, effectively giving a person a right not to have their personal information disclosed to third parties, or damaged or changed by those third parties. The section is equally able to be used by data controllers or the subjects of personal information against third parties. It is only that they will be affected in different ways which justify compensation.

## 2. Inadequacy in the Act

The IT Act does not impose data quality obligations in relation to personal information and does not impose obligations on private sector organisations to disclose details of the practices in handling personal information. Since, privacy is a basic human right and computer systems contain large amount of data that may be sensitive. Though, chapters IX and XI of the Information Technology Act define liabilities for violation of data confidentiality and privacy related to unauthorised access to computer, computer system, computer network or resources, unauthorised alteration, deletion, addition, modification, destruction, duplication or transmission of data, computer database, etc but it does not include financial details, health information, business proposals, intellectual property and sensitive data.

Thus, today we can access any information related to anyone from anywhere at any time but this poses a new threat to private and confidential information. There is no provision whatsoever in the act which tries to address the issues that may arise in e-transactions from the perspective of e- consumers.<sup>22</sup> Hence, as per

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<sup>21</sup> Didar, *supra* note 17.

<sup>22</sup> JiteshBijlani and Sangeeta Singh, Ecommerce in India accelerating growth, PwC (January 10, 2016), *available at* <http://www.pwc.in/assets/pdfs/publications/2015/ecommerce-in-india-accelerating-growth.pdf>.

growing requirement different countries have introduced different legal framework like DPA (Data Protection Act), 1998 UK, ECPA (Electronic Communications Privacy Act of 1986) USA, etc. from time to time. In USA some special privacy laws exist for protecting student education records, children's online privacy, individual's medical records and private financial information. In both countries self-regulatory efforts are facilitating to define improved privacy surroundings whereas India does not have specific data protection legislation, other than the IT Act, which may give the authorities sweeping power to monitor and collect traffic data and possibly other data.

### **Consumer protection institutions**

The researcher will examine the role played by certain institutions in promoting and enforcing consumer protection rights. The following institutions will be studied: Consumer Protection Act, 1986 and Consumer Protection (Amendment) Bill, 2015.

#### **1. Consumer Protection Act, 1986**

The Consumer Protection Act of 1986 is a legislation that governs the relationship between a consumer and a provider of goods and services. The concept of consumer protection typically implies the liability of the service provider in case there is a deficiency in the service provided or there is some defect in the goods sold by the seller. The statute also includes unfair trade practices in its purview.

While the other countries have adequately amended their consumer laws to meet the challenges posed by e commerce, India has still failed to follow the line in aligning consumer protection laws with e commerce. The Consumer Protection Act, 1986 (as it exists today, without the amendment 2015) contains no express provision whatsoever pertaining to e commerce despite the spurt in e commerce transactions in the last decade predominantly. Before 2014, COPRA was impliedly made applicable to online transactions relying on the definition of consumer given in the Act. It was only in 2014 with a notification from the Ministry of State for Consumer Affairs, Food and Public Distribution<sup>23</sup> that this implied application of law was made explicit, thereby making remedies under consumer law applicable to consumers.

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<sup>23</sup> Ministry of Consumer Affairs, Food and Public Distribution, Government of India, Press Information Bureau Notification on e-commerce, available at <http://consumeraffairs.nic.in/home.aspx>.

However, the notification just made the existing law applicable to the e- transactions, without including substantial provisions for addressing loopholes specific to e commerce. The Act as it existed was suited for conventional transactions and problems that emerge therein and making it applicable to online transaction did not effectively provide remedy to electronic consumers apart from enabling them to seek relief under the act is “defect in goods” or “deficiency in services”. Apart from these two situations, the Act does not protect the consumers against any other grievances. While in conventional transactions these two headings substantially cover major grievances suffered by customers, in online dealings, major grievances pertain to delivery which is specific to online transactions. Consumer Protection Act does not contain any provision whatsoever to cover delivery menace.<sup>24</sup> Under the Act, only consumers of goods/ services paid for are taken to be consumers for the purpose of remedy. As is a practice among various online portals, delivery of the product is given free of cost as an incentive for consumers. Since, it is a service not paid for, consumers cannot seek redressal for it under the existing law.<sup>25</sup> Thus, consumer law as it exists now fails to provide sufficient support to e- consumers in case of grievance. Certain amendments have been proposed to the 28 years old law which is further analysed.

## 2. Consumer Protection (Amendment) BILL 2015-the Proposed Bill-Extent and Operation in the Area of E-Commerce

On August, 2015 a new bill was introduced in the Parliament called The Consumer Protection Bill, 2015 which will be replacing the already existing Consumer Protection Act, 1986 if passed. The bill has tried to resolve such issues and include in its ambit the subject of e- commerce and rights of online consumers.<sup>26</sup>

- Concept of product liability

Chapter VI of the bill comprises of altogether new concept of product liability which provides any personal injury, death, or

<sup>24</sup> E- Commerce and Consumer Rights, Applicability of Consumer Protection Laws in online in India, SSRN, *available at* [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2626027](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2626027).

<sup>25</sup> Legal issues in e-commerce: Think before you click! PSALegal, *available at* <http://www.mondaq.com/india/x/299686/IT+internet/Legal+Issues+In+ECommerce+Think+Before+You+Click>.

<sup>26</sup> PTLB, Cabinet approves new Consumer Protection Bill, The economic Times (July 29, 2015) *available at* <http://economictimes.indiatimes.com/news/economy/policy/cabinet-approves-new-consumer-protection-bill/articleshow/48271098.cms>.

property damage is caused to the consumer resulting from defects in the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labelling of any product, the manufacturer or producer of such product shall be liable for the product in product liability action provided that in any product liability action, personal injury shall not include mental anguish or emotional harm in the absence of proof of related and contemporaneous personal physical injury, illness, or death.

The bill thus provides two distinct remedies to the consumer:

- a. Right to purchase goods without having sample and test the products if there is no means to do the same.
  - b. Remedy against detriment caused due to the consumption of defective goods.
- Rights against unfair contractual terms

The contracts made online, regarding the purchase of some goods and services, are generally one click contracts wherein by clicking on the 'I agree to the terms and conditions', or such similar phrase, check box a contract is formed between the seller and the buyer. By and large it can be said that such pre-formulated contracts are very lengthy and expansive. Thus, the same are almost never read by the consumers and are most times made in such a manner so as to mislead and deceive them. To curb this, the bill proposes the cancellation of unfair terms and conditions in a contract to protect the exploitation of the consumers by traders/service providers. With this, they rule out those provisions of the contract which are unfair in nature, however, the rest of the contract remains binding in nature. If however, the cancellation of such unfair terms goes to the root of the contract, the contract would be held void. The Bill has to this effect added a provision, which has made the following as an unfair trade practices: "after selling such goods and rendering of such services, refuses to take back or withdraw the goods or withdraw or discontinue the service and refuses to refund the consideration thereof, if paid, within a period of thirty days after the receipt of goods or availing of services if it is so stipulated and requested by the consumer"<sup>27</sup>. Thus, in the light of this new provision in the draft the consumer has a right to return the goods. This is particularly important in cases of online transactions since the examination of goods in such cases happens only when the goods are delivered.

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<sup>27</sup> Section 2 (41) (H), The Consumer Protection Bill, 2015.

- Establishment of a Central Consumer Protection Authority

The Bill establishes the Central Consumer Protection Authority (CCPA) to inquire and investigate into consumer complaints, issue directions and impose penalties. The authority will intervene when necessary to prevent consumer detriment to unfair trade practices and to initiate class action suit including enforcing recall, refund of products.<sup>28</sup>

### 3. Lacunae in the Consumer Protection Bill

The new bill has covered many aspects of e-commerce regime but still all the spheres have not been brought under one roof. Some facets of the electronic contract are still not covered under the proposed amendments. There is no separate provision dealing with the rights of consumers in the new bill. Though, rights of the consumers have been laid down in Section 6 of the Bill which deals with the objects of the Consumer Protection Councils.

- Recognition of right to terminate the contract

One of the important rights which need to be recognized is the right to terminate the contract. The effect of termination of a contract is to put the parties in a situation they were before the contract and give damages to the consumer for the breach of the contract.<sup>29</sup> A termination can take several forms. It may be based on the conduct of the parties or due to material breach. In certain cases, the Consumer Council may need to order that the contract stands terminated.<sup>30</sup> This right is important especially for online consumers who are at distant from the sellers and have no way to ensure that the terms of contract will be complied with or products that will be delivered to them are the same as contracted for.

- Unfair trade practices: Need to clarify the power of CCPA

The legislatures never realized that unlike MRTP (dealt with the aspect of unfair trade practices under which “any person or trader” could approach the MRTP Commission against an unfair trade practices, CPA has a limited protection. Under CPA, only “consumers are protected”.<sup>31</sup> Since, a company is not a consumer under the CPA; therefore, it can approach a consumer forum.

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<sup>28</sup> Section 16, The Consumer Protection Bill, 2015.

<sup>29</sup> LexisNexis, *available at* <http://www.Lexisnexis.com/uk/lexispsl/disputeresolution/synopsis/claims-and-remedies/contract-termination>.

<sup>30</sup> Section 2(7) (vii), The Consumer Protection Bill, 2015.

<sup>31</sup> Section 2 (1) (b), The Consumer Protection Act, 1986.

Thus, with the repeal of MRTP Act companies were left with no platform against unfair trade practices. The proposed amendment widens the scope of the CPA. As per which, any person can report to the authority that a business entity is indulging in an unfair trade practices.<sup>32</sup> However, the provision in relation to function and power of CCPA are inconsistent. This is because, as per the statement and object of the Act, Central Consumer Protection Authority is an executive agency. But the powers and functions of the authority in relation to “unfair trade practices” is adjudicatory in nature since it has power to issue orders. This creates a parallel authority to National Consumer Disputes Redressal Commission. However, ministry has failed to recognize it. Further, the procedure to be followed by the authority in adjudicating matters related to unfair trade practices has not been laid down.

### **International perspective: Approach of US and EU on electronic consumer protection**

E-Commerce is a global and transborder matter. Its successful development and acceptance will largely depend on international and transborder solutions. Those solutions have to be found in harmonized regulation and legislation based on policy coordination between the countries.<sup>33</sup> It is not surprising that international organisations are interested in contributing to regulate e-commerce. Therefore international organisations have released proposals for regulations in the area of electronic transactions and e-commerce.

#### **1. The United States Approach**

The United States has mainly promoted industry self-regulation by governmental laws and regulations in specific departments, which would be considered the best trend to assure data protection and privacy in an evolving environment like electronic commerce. Indeed, consumer protection has not been a major concern. It was verbally recognized by the United Nations Commission on International Trade Law (UNCITRAL),<sup>34</sup> the Organisation for Economic Co-operation and Development (OECD).

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<sup>32</sup> Section 2(6), The Consumer Protection Bill, 2015.

<sup>33</sup> Organisation for Economic Co-operation and Development (OECD), Electronic Commerce, *available at* <http://www.oecd.org/development/electroniccommerce.htm>.

<sup>34</sup> The United Nations Commission on International Trade Law was established by General Assembly Resolution 2205 (XXI) of 17 December 1966, web site: [www.uncitral.org](http://www.uncitral.org).

- UNICTRAL

UNCITRAL Model Law mainly deals with the legal recognition of data messages in general and electronic contracting. It is applicable to “any kind of information in the form of a data message used in the context of commercial activities”. The purpose of the Model Law is twofold:

1. To offer national legislators a set of international rules for creating a more secure legal environment for e-commerce in order to facilitate its use; and
2. To provide equal treatment “to users of paper-based documentation and to users of computer-based information”, known as the functional-equivalent approach.

- OECD

The OECD’s Committee on Consumer Policy represents the main forum for regulation of e-commerce at global level. It should be noted that electronic commerce is a central element in the OECD’s “Guidelines for Consumer Protection in the Context of Electronic Commerce”, which apply only to business-to-consumer electronic commerce, and not to business-to-business transactions. The guidelines are designed to help ensure that consumers are no less protected when shopping on line than when they buy from their local store or order from a catalogue. They are intended to help eliminate some of the uncertainties that both consumers and business encounter when buying and selling online.<sup>35</sup>The OECD Guidelines are technology-neutral, encourage private sector initiatives, and emphasize the need for co-operation among governments, businesses and consumers. Their aim is to basically encourage:

- Fair business;
- Clear information about an online business’s identity;
- A transparent process for the confirmation of transactions;
- Fair and affordable dispute resolution and redress;
- Consumer and business education; and
- Privacy protection

## 2. The European approach

The European Union took the international proposals into consideration and enacted various directives. For the purpose of this paper, the most important legislative initiatives affecting e-

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<sup>35</sup> *Supra* note 33.

commerce are “Distance Selling Directive”, “E-Commerce Directive” and Data Protection Directives.

- Data protection in EU

The European Union issued a data protection Directive in 1995,<sup>36</sup> which became effective in 1998. This directive set a milestone in the history of protecting privacy and personal data among the European Union. Data protection directive stipulates that in case a company transfers personal information of an individual outside the European Union, then the country where the receiving company is situated or the company itself must have adequate data protection in its own privacy statement. Personal data covers all information relating to an identified person either in a direct or indirect way, and to determine whether an individual is identifiable, it should be taken into account all the manners reasonable to be used by the controller or any other person to identify the individual. Along with, transparency is a fundamental condition which enables individuals to control their own data and to assure protecting it. Consequently, under the Directive 95/46/EC, individuals must be clearly informed in a transparent way by data controllers about who is collecting their data, how, what are the reasons, and for how long.

Thus, Electronic Commerce Directive which was adopted in 2000 situated unique rules concerning electronic contracts for ensuring consumer confidence in the electronic commercial medium and provide legal certainty. One of the most significant contributions created by the Electronic Commerce Directive to the field of electronic contracts within the European Union is encouraging the member states of the EU to expand the range of electronic commercial activity. Further, the European Union has implemented various procedures and initiatives for ensuring utmost fairness in settling disputes, also allowing consumers to use such dispute settlement mechanisms for suing electronic businesses.

### **Need for separate law dealing with electronic contract**

The gravity of laws governing e-commerce has not been that accurate as compared to its enlargement in the last decade. The Information Technology Act which is said to be the guardian of consumer in area of e-commerce or any online transaction in itself

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<sup>36</sup> Directive 95/46/EC of the European Parliament and of the Council of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31)

holds a very restricted scope. A very sparkling example of the Act being a constrained one is of the term privacy which borders the violation only upto to the extent when image of a person is captured in a situation which can reasonably be expected to be said as infringement upto three years. Furthermore the Act is silent on the aspect of e-commerce when it comes to the situation that goods and services that are being provided through online transaction are deficient or not up to the mark. There have been instances where a person ordered a cell phone but to his surprise he was delivered soap. The most contemporary of the consumer exploitation is of Flipkart Big Sale which was in news due to its failure because of the proprietor all of a sudden raising the prices of product which were expected to be at their all time low. All these instances give clarity on the fragile nature of law that is governing these industries and indicates on the requirement of a mechanism that can make e-commerce more accountable to customers moreover the breach of which can lead to rigorous action or litigation against them.

Even the Consumer Protection Bill that is proposed to bring changes in the Consumer Protection Act but still the lacuna in the law concerning specifically “e-commerce” will surely exist. The new law may incorporate the concept of e-commerce in it but the Indian law makers need to realise that in this era of growing attractiveness towards the online world, the perks which it provide need to be empowered and disadvantage should be lessened down. The concept of e-commerce is so wide that merely incorporating it in consumer protection legislation will not do the needful. The only solution to the above problem is enactment of a separate law for electronic contracts.

If we compare India with other countries in terms of regulation of e-commerce India stands far behind in bringing customer to justice, there are several lacunas that are observed which leads to breakdown of an efficient legal system, such as there is no separate law to deal with e-commerce. An independent study undertaken by IIM, Ahmadabad reviewed the proposed amendments and suggested the introduction of a separate dedicated law on e-commerce as is the practice of most countries.<sup>37</sup> It noted that there is a significant difference in the nature of transactions undertaken online and offline. A dedicated law especially for e-commerce will provide more concrete

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<sup>37</sup> Law on e commerce needed to protect online consumers: IIM study, Indian Express, available at <http://indianexpress.com/article/business/business-others/law-on-e-commerce-needed-to-protect-online-consumers-iim-study/>.

protection to consumers especially since, electronic contracts is here to stay.

### **Conclusion**

Consumer Protection in relation to the e-commerce has been one of the reverberating talks of the country for half a decade now, however, no concrete solution to the problem has yet been incorporated in the Indian economic scenario. The existing laws are not competent enough to protect the rights of the consumers and thus the need for introduction of a new law is felt in order in order to secure the rights of affected parties. Further, it is also to be put forth that the consumers in the present economic environment are not aware of their rights and thus the path to exploitation is smooth. Hence, the new law should be introduced in such a manner as to protect the rights of consumers while taking into consideration, all the covering aspects of disputes that may arise in the marketplace concerning electronic contracts.

