

ELECTRONIC CONTRACT AND CONSUMER
PROTECTION ISSUES IN INDIA;
EMERGING LEGAL CHALLENGES AND REMEDIAL
MEASURES

Dr. Azmat Ali¹

Abstract

The present millennium is witnessing a new internet culture, which will change our way of life. The internet has, due to its speed, interactivity and flexibility, tremendous potential to disseminate information beyond the geographical boundaries. Diverse activities are possible over the internet, which might not have even envisioned by its inventors. The process has not yet ended, it is still evolving. The commerce is one of the major areas, which have been impacted by the internet. Efficiency has tremendously been increased, paper work reduced, time lag shortened and expenses lessened. All the facets of the business transaction with which we have been accustomed in physical environment, can be now executed over the internet including, on-line advertising, on-line ordering, publishing, banking, investment, auction and professional services. Although, many advantages offered by the information technology, a number of challenges have been also posed on the existing legal system.

¹ **DR. Azmat Ali, Assistant Professor , Aligarh Muslim University Center Malappuram**

Contents

Introduction

- 1. Meaning and Concept of E-Contract**
- 2. Cyber Consumer**
- 3. Consumer Complaint**
- 4. Reliefs under Consumer Protection Act, 1986**
- 5. Compensation under Consumer Protection Act, 1986**
- 6. Consumer Foras, Jurisdiction and Implications on Cyber Consumers in India**
- 7. Applicability of Consumer Protection Act, 1986 Foreign Goods is Sold or Services Provided to A Consumer in India**
- 8. Consumer Protection Bill, 2015; New Consumer Protection approach to ensure timely justice**

Conclusion

Key Words- E-Contract, Cyber Consumer, Consumer Complaint, Consumer Protection Act, 1986.

Introduction

The World Wide Web (WWW) is new digital technology, which has brought new opportunities and imposed challenges to existing legal environment. The corporate business explores and utilizes it for their benefit by expanding their activities not only in physical space but also in virtual space in search of the potential customers. While E-Contract has become a fundamental element in the E-Commerce world, the Electronic Contract raises various new legal issues. Generally, the legislature and the legal profession inclines to apply the existing law to the new sets of virtual commerce problems without much change and modification is necessary or unavoidable to protect the interest of e-businesses and e-consumers. Before understanding Electronic Contracts, it is essential to understand the general principles of contract and the law governing contracts in Indian perspective. Contract is always an essence in the agreement between two or more parties to conduct any business transaction. Such a contract must be valid and legally binding on the parties to be made mutually benefit their interest and transactions. These contracts may be oral or written as may be required by law in specific cases and is validated by the law.

In any community settings, breach of contract is settled through community adjudication legal system, which inquired into the breach and set right things. As with the evolution of the legal system, contracts came to be governed by specific laws under the respective legal systems. In other words, a contract is an agreement for a specified transaction between two or more parties for a specified consideration and is binding upon the transacting parties. The Contract, oral or written, is made through a process of negotiation with offers/proposals, counter offer/counter proposals towards acceptance by the contracting parties. Such an acceptance turns into an agreement. The Section 2(h) of the Indian Contract Act, 1872 clearly states that an agreement enforceable by law is a contract.

Important functions of the internet are to provide Information and knowledge, a mode of communication, which are effective, efficient and cost-friendly and a market for goods and services. Once the internet market becomes fully operational, civilization would witness a conversion of ordinary consumers to Cyber Consumers. Many products and services are available to cyber consumers through the internet whether it is online booking of air tickets or the purchase of consumer goods. The world market would be at the command of the cyber consumer through the screen of his/her Personal Computer. This cyber consumerism would be the subject of legal protection available to consumers. The issues, which arise in the cyber market, deserve as much importance as other issues of cyber crime, jurisdiction over the cyber world and taxation. Since, the cyber consumer does not come face to face with the seller in an online purchase of goods or hiring of services, the risk of defective goods delivered deficiency in services and other frauds may increase. As goods are purchased online from the Cyber market and delivered later, the cyber consumer does not get the opportunity to examine them. Retail web-shops can also disappear after booking orders and receiving payments through credit cards. The Law of consumer protection is significant in this age of e-consumerism. Every cyber consumer must understand the law or consumer protection. Similarly, E-Commerce players include manufacturers, suppliers, retailers and service providers in India and abroad need to be aware of the legal responsibilities towards them under the Consumer Protection Act, 1986

1. Meaning and Concept of E-Contract

This is an undisputed fact that E-Commerce has become a part of our daily life. E-Commerce is the practice of buying and selling goods and services through online consumer services on the internet. “The ‘e’ used before the word ‘commerce’ is a shortened form of ‘electronic’. The effectiveness of E-Commerce is based on electronically made contracts known as E-Contracts. Although E-Contracts are legalized by IT Act, 2000 but still majority feels insecure while dealing online. The reason being lack of transparency in the terms and conditions attached to the contract and the jurisdiction in case of a dispute that may arise during the pendency of a transaction with an offshore site”.²

“An E-Contract is a contract modelled, executed and enacted by a software system. Computer programs are used to automate business processes that govern E-Contracts. E-Contract can be mapped to inter-related programs, which have to specify carefully to satisfy the contract requirements. These programs do not have the capabilities to handle complex relationships between parties to an E-Contract. An electronic or digital contract is an agreement drafted and signed in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted”.³

For example, an agreement is drafted on your computer and was sent to a business associate via e-mail. The business associate, in turn, e-mails it back to you with an electronic signature indicating acceptance. An E-Contract can also be in the form of a "Click to Agree" contract, commonly used with downloaded software: The user clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed. Since a traditional ink signature is not possible on an Electronic Contract, people use several different ways to indicate their electronic signatures, like typing the signer's name into the signature area, pasting in a scanned version of the signer's signature or clicking an "I Accept" button and many more.⁴

² Rishabh Khandelwal, “Understanding E-Contracts and Its Impacts” available at: http://accessindia.org.in/pipermail/accessindia_accessindia.org.in/2009-July/028297.html(last visited on May 3, 2013).

³ *Supra not.1* p 201.

⁴ *Ibid.*

1.1. Essentials of E-Contract

An electronic or digital contract is an agreement drafted and signed in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted. The normal rule of contract law applies to the Electronic Contracts also.

Traditional approach of contract provides for the foundation of all types of valid and enforceable contract, keeping in view the meaning of definition of contract in Section 2(h) of The Indian Contract Act, 1872 as *an agreement enforceable by law and further requiring that it should be made by the free assent of parties, competent to contract, for a lawful consideration and with a lawful object and should not be expressly declared to be void.*⁵ Hence, it is clear that every contract needs certain conditions to be fulfilled which are known as essential ingredients of a contract. Contract exists only when following terms are fulfilled:

- (1) An unconditional offer should be made
- (2) That offer should be accepted unconditionally
- (3) There must be some consideration passing between the parties
- (4) The parties are having intention to bind themselves and
- (5) The agreement must be legally binding upon the parties

These are the necessary conditions without which no agreement will be a valid contract. It is to be noted that the rules of normal contracts are also applicable in the Electronic Contracts, therefore, Electronic Contracts also need few conditions to be fulfilled and the basic principle is same as in normal contract with slight modifications.

3.2.1. Offer

An offer is a proposal made on certain terms by the offeror together with a promise to be bound if the offeree accepts the stipulated terms. An offer can be made expressly: an employer writes to a prospective employee to offer him a job impliedly, or by conduct: clicking a computer mouse.⁶ The offer can be made to a specific person or to a group of persons or to the public at large. When the offer is made to a specific person or a group of person it can be called as bilateral and when it was made to public at large it is called unilateral offer.

⁵ See, Sec. 10 of The Indian Contract Act, 1872.

⁶ SarabdeenJawahitha, Noor RaihanAb Hamid, "Electronic Contract and The Legal Environment", available at: http://www.irfd.org/events/wf2003/papers_global/R38.pdf (last visited on February 15, 2013).

In *Carlill v. The Carbolic Smoke Ball Company*,⁷ the company advertised in a number of news papers saying that it would pay £100 to anyone who caught flu after using its smoke ball for 14 days. The company further stated that it had deposited £1,000 at a bank to meet possible claims. Mrs. Carlill bought one of the smoke balls, used it as directed and still caught flu. She claimed the reward but it was refused, so she sued the company in contract. The company put forward many arguments. One of such is that the offer was made with the whole world, which was clearly impossible. The court held that the company had made an offer with whole world and it would be liable to anyone who came forward and performed the required conditions.

In the case of *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors*,⁸ the Sheriff of the Seremban High Court advertised a motor vessel at Port Dickson for sale. The appellant wanted to buy the vessel and made an offer. The offer was sent to the Sheriff, under cover of the appellant's letter dated 12th February 1998, together with a banker's draft for 10% of the purchase price. The letter made it clear that the offer was on the Sheriff's terms but subject to two conditions. The Sheriff accepted the appellant's offer. The Court of Appeal held that the advertisement is an invitation to treat and the subsequent offer from the appellant created a binding contract. Regarding the invitation to treat the learned judge Gopal Sri Ram JCA stated that:

“An advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers.”

Consequently, “under the Information Technology Act, 2000, the offer is made, unless otherwise agreed between the originator and the addressee, at the time when the electronic record enters any information system designated by the addressee for the purpose, or, if no system is designated for the purpose, when the electronic record enters the information system of the addressee, or, if an information system has been designated, but the electronic record is sent to some other information system, when the addressee retrieves such electronic record. This reflects

⁷ (1893) 1 QB 525.

⁸ (2001) 3 CLJ 864.

the Model Law as to when an offer is made. The Act further provides that an electronic record shall be attributed to the originator if it was sent

(a) by originator, or

(b) by a person who had the authority to act on behalf of the originator in respect of that electronic record, or

(c) by an information system programmed by or on behalf of the originator to operate automatically.

This will presumably cover situations when an intelligent `agent' is programmed to issue offers on behalf of an individual. But does not cover where a file containing the offer is found by another.”⁹

However, if the advertisers would like to treat the advertisements as invitation to treat, the invitation to treat and offer must be spelt out unequivocally. Before a customer is permitted to purport to make a purchase order, a statement should be made on a web site in a prominent place that the holding out of the goods or services on such web site constitutes an invitation to treat only and is not an offer. Further, safeguards may be installed by creating a ‘checkout counter’ icon on the web page and by making it mandatory for the customers to click on to the icon before the offer of the purchase procedure can be completed and also clearly stating that the client will conclude the contract.

In *Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co.*¹⁰ The Supreme Court granted great Offshore’s application for the appointment of an arbitrator, on the basis of the finding that the parties had got into the charter-party agreement and, consequently, there was an arbitration agreement in place. The court held that there was no requirement that the arbitration agreement (as per section 7 of the Arbitration and Conciliation Act 1996) be an original one or that parties stamp the agreement. Applying section 7(4)(b) of the 1996 Act, the court considered that the arbitration agreement, when sent by fax, constituted an agreement in writing as it was contained in ‘an exchange of letters, telex, telegram or other means of telecommunication which

⁹ SubhajtBasu, Richard Jones, “Legal Issues Affecting E-Commerce: A Review of the Indian Information Technology Act, 2000”, 17th BILETA Annual Conference Free University, Amsterdam (April 5th-6th, 2002), available at: <http://www.bileta.ac.uk/02papers/basu.html> (last visited on October 11, 2012).

¹⁰ *Great Offshore Ltd. vs Iranian Offshore Engg. & Construction Co.* (2008)14 SCC 240.

provide a record of the agreement'. Hence, this case also goes on to prove that a valid contract can be concluded by communicating through fax.

3.2.1.1. Termination of An Offer

An offer can come to an end in a number of ways:¹¹

1. Once the offer is accepted by the offeree;
2. By rejection. It can be rejected if:
 - a. The offeree informs the offeror that he is not accepting the offer;
 - b. The offeree wants to accept but subject to certain conditions; and
 - c. The offeree makes a counter-offer.
3. By lapse of prescribed or reasonable time of acceptance.
4. Failure to fulfil conditions required on death or mental disorder of offerer.

“Revocation may be effective anytime before the offeree accepts the offer provided that the revocation is communicated to the offeree. If the acceptance is to be made by post like e-mail, the revocation must be communicated before posting.”¹²

2.2. Acceptance

Once a valid offer is made the next stage for formation of a valid agreement is an acceptance of the offer. The acceptance must be made while the offer is still open. Section 2(b) of the Contract Act states that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to have been accepted. A proposal, when accepted, becomes a promise. The acceptance must be absolute and unqualified.¹³ Meaning that the offeree agrees to each and every term in the offer and does not add additional terms. If the offeree adds additional terms in the acceptance or requests a change in the offer, the offeree has made a counter offer and becomes the offeror. In *Caspiv. Microsoft Network, L.L.C.*,¹⁴ the U.S. court accepted the validity of an additional clause after conclusion of a contract.

¹¹ SarabdeenJawahitha, Noor RaihanAb Hamid, “Electronic Contract and The Legal Environment”, available at: [http:// www.irfd.org/events/wf2003/papers_global/ R38.pdf](http://www.irfd.org/events/wf2003/papers_global/R38.pdf)(last visited on February 15, 2013).

¹² *Ibid.*

¹³ See, Sec. 7 of The Indian Contract Act,1872.

¹⁴ 323 N.J. Super.118, 732 A.2d 528 (1999).

Similarly, in *Rich and Enza Hill v. Gateway 2000 Inc.*,¹⁵ the plaintiffs purchased a Gateway 2000 computer based on the telephone conversation. When the plaintiffs received the computer, the box contained additional terms including arbitration clause. The plaintiffs were given option to accept the additional terms within 30 days. When the computer did not function effectively the plaintiffs filed a suit in the court arguing that they should not be bound by the terms of the arbitration clause because they did not know about when they entered into the contract. The court of Appeal held that the terms are enforceable because the plaintiffs were given with an option of returning the items within a specified 30 days which they failed. By not returning the item, the buyer implicitly accepted the seller's conditions. Therefore, the plaintiffs should refer the case to the arbitration.¹⁶ In the case of *Timex International Fze Limited, Dubai v. Vedanta Aluminium Ltd.*¹⁷ The Court accepted the unconditional acceptance through e-mails and held the same to be a valid contract which satisfied the requirements of section 4 and 7 of the Contract Act 1872 and further it satisfied sections 2(1) (b) and 7 of the Arbitration and Conciliation Act, 1996. Applying section 4 of the Contract Act, communication of acceptance was complete as against the respondent as soon as confirmation of 5 shipment lots came to the knowledge of the petitioner. Additionally, as per section 7 of Contract Act, the acceptance was unconditional and unqualified.

Under The Indian Contract Act, 1872, the acceptance of a valid offer results in a valid contract. Such an acceptance may be expressed, in written or oral form or may be implied by the conduct of the offeree. The timing of an acceptance depends upon the context of mode of communication as *inter praesentes* means when the contracting parties are face to face with each other or *inter absentees* means where the contracting parties are not face to face with each other). Section 4 of Indian Contract Act, 1872 states acceptance is complete as against the offeror, when it is put in the course of transmission; the communication of acceptance is complete as against the offeree, when it reaches the knowledge of offeror.

In E-Commerce environment, there are four possible ways to convey acceptance:

- by sending an e-mail message of acceptance, or

¹⁵ U.S. Court of Appeals for the Seventh Circuit 105 F. 3d 1147 (1997).

¹⁶ *Supra note.* 13 p. 213.

¹⁷ *Timex International Fze Limited, Dubai v. Vedanta Aluminium Ltd.*(2010)3 SCC 1 : (20110) 1 SCC (civ.) 570 : (2010) 2 CTC 581 (SC).

- by delivery online of an electronic or digital product /service, or
- by delivery of the physical product, or by any other act or conduct indicating acceptance of the offer.

The IT Act, 2000 provides that the acceptance is binding on the offeree when the acceptance is out of his control, and binding on the offeror when he receives the acceptance. This differs from the position under the Contract Act. Section 12 of the IT Act, 2000 provides for a default acknowledgement process, if the originator and the addressee have not agreed upon the particular method of acknowledgement. It is provided that an acknowledgement may be given by Any communication by the addressee (automated or otherwise) or any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received. Section 12(2) of the IT Act, 2000 stipulates further that "*where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by him, then, unless acknowledgement has been so received, the electronic record shall be deemed to have never been sent by the originator.*"

This provision prima facie appears reasonable, but it can lead to unrealistic situations. To illustrate, *if A sends a message and insists on an acknowledgement and B responds with an acknowledgement, but with a rider that acknowledgement must be acknowledged, then A and B may be constantly acknowledging each other's message and may never be able to complete the loop. If one of them does not acknowledge the receipt of the other's message, then the other's message will be deemed as never sent. This may result in the previous message being deemed as never sent, which would affect the earlier message and so on!*

Thus, such legal fiction can create issues that lead to ridiculous situations. It must be noted however, that the provisions of the IT Act, 2000 requires that they should be interpreted in tune with the provisions regarding the manner in which offers and acceptances are communicated and revoked under the contract act.¹⁸

¹⁸ *Supra note.* 16 p.121.

3.2.3. Intention to Create Legal Relation

An agreement itself does not create a binding contract. It must be shown that the parties had the intention to be legally bound. Even if the Contract Act is silent, the case law (legal precedent) had shown the necessity of this element to form a valid contract.¹⁹ The general presumption is that the business agreements are intended to face the legal consequences unless the parties specify otherwise. In the context of online contract, the existence of intent is normally automatic. However, an unclear or deceptive web site may dupe a consumer into making an unwanted contract. For example, an online merchant offering a digitized service may construct a web site which gives no purchasing information and merely displays the product and a 'Save' or 'Download Now' button. An unsuspecting customer will assume that the service is free and has no intention of creating a contract when the customer clicks the button. After the digitalized service has been delivered, the online merchant cannot demand payment because of the customer's absence of intention to create legal relation.

3.2.4. Consideration

The agreement by offer and acceptance and intention to create a legal relation does not make a contract. There is a need for consideration. Each party must promise to do or give something for the other side. The element of exchange is known as consideration. Section 25 of the Contract Act, 1872 says that a contract without consideration is void. Consideration is as an act or abstinence or promise by a promisee or by any other person at the desire of a promisor. The consideration is of three types. They are executory, executed and past consideration. In executory consideration the parties exchange promises to perform acts in the future. The promise to pay for the car and the promise to deliver the car are considered as valid considerations.

In *Wong Hon Leong David v. Noorazman bin Adnan*,²⁰ the respondent promised the appellant to help him in conversion and subdivision of the appellant land. The appellant promised to pay him.

¹⁹ See, In *Phiong Khon v. Chonh Chai Fah* (1970) 2 MLJ 114, FC, A Chinese lady, who had a daughter and a son (respondent), lived together with the appellant after her first husband death. The respondent had executed a document which the appellant alleged was a transfer of land to him. The respondent denied. The Federal Court held that the appellant has to prove that the transfer was on his name which he failed. The Court further held the terms of the document create doubt that shows that there was no intention to create a legal relationship.

²⁰ (1995) 3 MLJ 283.

These mutual promises were held as valid consideration. Executed consideration is where one party promises to do something in return for an act of the other party.

Section 25 (b) of The Indian Contract Act, 1872 states that “*an agreement made without consideration is void unless it is a promise to compensate a person who has already voluntarily done something for the promisor.*”

In an online web based contract, the position is likely to be straight-forward between contracting parties in buying goods or services over the internet and very often the consideration is executed in nature. The customer has to do some positive act like paying by credit card or e-cash and the retailer will promise to perform his part. Another possible situation on consideration in online contract will be on ‘click-wrap’ agreements. A web site which offers free of charge services requires a customer to agree to certain terms and conditions, which exclude the liability or prohibit commercial use, before allowing, the customer to download the digitized service. The concern is whether a click-wrap agreement of such nature has any consideration. Since free software or access to a web site represents a benefit there is a possibility to hold that there is a consideration.²¹

3.2.5. Capacity

It is assumed that everyone is capable of entering into a contract. However, minors, mental patients and drunks are in need of the law’s protection because of their age or inability to appreciate their own actions. Generally a contract entered by a minor is void. In the often cited Indian case of *Mohori Bibee v. Dhurmodas Ghose*,²² the Judicial Committee of the Privy Council held that all agreement entered into by the minors are void. This case had been followed in the *Government of Malaysia v. Gurcharan Singh*,²³ In this case learned judge *Chan Min Tat* held that an infant is totally incompetent and incapable of entering into a contract and thus there is no contract on which he can be sued. The decision implies that Section 65 of The Indian Contract Act, 1872 will not be applicable to contracts entered by minors. This Section gives right to parties in a voidable contract who have received any benefit hereunder must restore benefit.

²¹ *Supra note.* 13 p.213.

²² (1903) 30 Cal 539.

²³ (1971) 1 MLJ 211.

Similarly, had a minor purchased goods online using his parent's credit card, the minor or his next friend will be able to recover any money paid, even though the contract is discovered to be void. As a precautionary measure, the vendor should obtain as much information on the person clicking the "Accept" button as possible for evidentiary purposes in case enforcement of the terms of the license is required. The vendor also should take opportunity to obtain specific information from the purchaser, such as his/her name, address, age, etc.

The possibility for an e-business to enforce a contract entered into by a minor is where the minor misrepresented or cheated the other party of his age. However in the case of *MahomedSyedolAriffin v. YeohOoiGark*,²⁴ the plaintiff's action to enforce a contract entered into by a minor failed because the plaintiff failed to prove that there was a misrepresentation. Thus, the court held that the contract is void. Has the misrepresentation been proven in this case the court might have ordered the defendant to restore the benefit received as in UK. In UK the courts developed an equitable principle of restitution which requires the infant to return the benefits received which are still in his possession.²⁵

1.2. Kinds of Electronic Contract

An Electronic Contract is also known as a "click-wrap", "click-through", "web-wrap", "browse-wrap" or "point and click" contract. This is an agreement presented and consummated entirely in an on-line environment; most often on the internet. These contracts are typically contracts of adhesion i.e., one-sided (in favour of the presenting party), boiler plate agreements presented to customers on a 'take-it or leave it' basis. There is little if no room to negotiate the contract and, if the customer does not accede to the agreement, he or she will be denied access to the product or service. The term, 'wrap' is a misnomer and has nothing to do with the manner in which such agreements are physically presented. 'Click-wrap' or 'browse-wrap' agreements take their name from 'shrink-wrap' agreements; written paper contracts that were included in the plastic shrink-wrapped packaging containing, most often, computer software."²⁶

²⁴ (1916) 2 AC575, PC (Penang).

²⁵ *Supra note*. 13 p.214.

²⁶ Jeffery E. Wittmann, Vancouver, BC. "Electronic Contracts", Negotiation and Drafting Major Business Agreements Conference Federated Press (October, 2007)., available at: http://www.wdwlaw.ca/ELECTRONIC_CONTRACTS_111007_280312.pdf (last visited on April 5, 2013).

A “significant similarity between click-wrap and shrink-wrap contracts relates to their manner of acceptance as legally binding agreements. Users of software purchased in shrink-wrapped packages have been held to have agreed to the terms of a shrink-wrap contract by virtue of opening the package and installing the software. Similarly, in some instances, the courts have held that an Electronic Contract can bind the web user by the simple act of downloading software or purchasing products or services on-line. In both cases, the end user may not necessarily have read, much less understood, the contract. The term ‘click-wrap’ comes from the fact that in order to accept the terms of the contract on-line, the party must ‘click’ with a mouse on an on-screen icon or box.”²⁷

The four basic forms of Electronic Contract are as follows:²⁸

1. The Click-wrap or Web-wrap Agreements
2. The Shrink Wrap Agreements
3. The Electronic Data Interchange
4. The E-Mail Contract

2. Cyber Consumer

The Information Technology Act, 2000 is silent on Cyber Consumerism and leaves this entire area to the Consumer Protection Act, 1986. The Consumer Protection Act, 1986 (hereinafter referred to as CPA) is a protective legislation against manufacturing defect in goods, deficiency in services, unfair trade practices and restrictive trade practices committed by manufacturers, traders and service providers. The CPA is the first codified legislation to protect the interest of consumers. “Before the inception of the CPA, a consumer has to file a suit in the civil court to claim damages and compensation from manufacturers and traders for defects in their goods and from service providers. Though the CPA was legislated to ensure expeditious consumer justice, it does not serve the intended purpose due to lack of proper infrastructure for consumer courts and inadequate number of Judges in proportion to long list of consumer litigants. The CPA intends to relieve the consumers from arbitration proceedings or civil action. The peculiar facts and the circumstances, of a particular case come, to the conclusion that the appropriate forum for

²⁷ *Ibid.*

²⁸ *Ibid.*

adjudication of the dispute would be given to the CPA such as by arbitration or remedy before the civil court the parties may be relegated to arbitration or civil court as the case may be where the consumer court finds that the case before it involves acute and serious questions of facts requiring examination of witnesses etc. It may regulate the parties to the remedy of filing a suit in the civil court.”²⁹

2.1. Definition of Consumer

The Consumer in Section 2(d) of the Consumer Protection Act, 1986 Consumer means “*any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any user of such goods for consideration paid a promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person but does not include a person who obtain such goods for resale or for any commercial use or hires or avails of any services for a consideration which has been paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised or under any system of deferred payment, when such services are availed with the approval of the first mentioned person*”.³⁰

However, a person who hires services for consideration shall be consumer whether or not the same are hired for any commercial purpose. In the case of services, the law does not provide for any exclusion as in the case of goods. For example, where a company engages the services of an architect to design its factory building, the said company shall be a consumer within the ambit of the definition irrespective of the fact that the services are hired for a commercial purpose. Therefore, in so far as services are concerned, all persons who hire services for a consideration are consumers, irrespective of whether they are manufacturers and traders requiring the services for a commercial purpose.

²⁹ V.D. Dueja, *Crimes in Cyber Space: Scams and Frauds* p.184 (Commonwealth ,1st edn.,2003)..

³⁰ *Ibid.*

2.2. Good and Services

Goods means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass, and thing attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

Service has been widely defined to mean service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing, construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. Since the definition of service is inclusive, the various services provided therein are not exhaustive of the list and are only illustrative in nature meaning thereby that all services of any nature are covered under the definition, except free services or under a contract of personal service. Government companies, bodies and local authorities rendering services or selling goods are also covered under the CPA. All services rendered through the internet are also covered within the ambit of this definition. However, it is reiterated that free services, which are countless on the internet, are not covered under the CPA as per the exclusion in the definition of service. Duties, which are judicial, quasi-judicial and statutory in character, which are exclusive sovereign functions of the state, are not services under CPA. The officers implementing the registration act and stamp act do not render any service under the CPA, as they perform statutory duties to raise and collect state revenue, which is a part of a sovereign power of the state.³¹

3. Consumer Complaint

The Consumer Protection Act, 1986 can be invoked only if the complainant consumer makes any or more of the following allegations:

- The goods bought or agreed to be bought suffer from one or more defects.
- The services hired or availed of or agreed to be hired or availed of, suffer from deficiency in any respect.
- An unfair trade practice or a restrictive trade practice has been adopted by any trader, i.e. who sells or distributes goods for sale and includes the manufacturer.

³¹ *Ibid.*

- A trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed such a price on the goods or any package containing such goods. This clause includes cases where price above the MRP (Maximum Retail Price) is sought to be charged.
- Goods which are hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force which requires traders to display information in regard to the contents, manner and effect of use of such goods.

3.1. Defect in Goods and Deficiency in Services

Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods. Cause of action for defect in the product, deficiency in service, unfair trade practice or restrictive trade practice, cannot in all cases be avoided by the manufacturer, trader or service provider as the case may be, merely on placing reliance on a document containing the statement of the consumer to the effect that he is completely satisfied by the product or service. The mere execution of the discharge voucher would not always deprive the consumer from preferring his claim with respect to the deficiency in service. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the consumer forums under the Act that such a discharge voucher or receipt had been obtained from him under circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case, the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, under influence; coercive bargaining compelled by circumstance or the like, the authority before which the complaint is made would be justified in granting appropriate relief.³²

4. Reliefs under Consumer Protection Act, 1986

The Consumer forum has the power to grant the following reliefs to aggrieved consumers against the opposite party.³³

³² V.D. Dueja, *Crimes in Cyber Space: Scams and Frauds* p.186 (Commonwealth, 1st edn., 2003)..

³³ *Ibid.*

- To remove the defects from the goods in question.
- To replace the goods with new goods of similar description this shall be free from any defects.
- To return to the complainant the price paid by him and to pay such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.
- To remove the defects of deficiencies in the services in question.
- To discontinue the unfair trade practice or the restrictive trade practice or not to repeat them.
- Not to offer hazardous goods for sale.
- To withdraw the hazardous goods from being offered for sale and to provide adequate costs to the parties.

5. Compensation under Consumer Protection Act, 1986

The Compensation under Consumer Protection Act, 1986 (hereinafter referred to as CPA) is only for any loss or injury suffered by the consumer because of the negligence of the opposite party. Loss means some detriment or deprivation or damage or injury. Compensation under CPA can be granted only when it is found that the person from whom damages are claimed is found to have acted negligently and such negligence must result in some loss to the person claiming damages. In other words, loss or injury if any, must flow from negligence.³⁴

Usually the consumer foras in India have been extremely conservating in granting compensation towards mental agony suffered by consumers. It is only in those cases where death has occurred on a account of medical negligence or otherwise that consumer foras in India are a little more liberal but still are nowhere near their counterparts in the United States of America or the European countries. Every claim for compensation must be supported by evidence and material in support thereof without which no compensation can be granted. Bad claims have no remedy under the law.³⁵

³⁴ V.D. Dueja, *Crimes in Cyber Space: Scams and Frauds* p.189 (Commonwealth, 1st edn.,2003).

³⁵ *Ibid.*

6. Consumer Foras, Jurisdiction and Implications on Cyber Consumers in India

In the age of cyber consumerism, where products and services from all over the globe would be freely and easily available to Indian consumers, issues of jurisdiction of consumer foras are of significance. Issues of jurisdiction affect a consumer more than they affect any other person. It would be next to impossible for a domestic consumer of a product or service to seek redressal of his grievances if he has to litigate in a foreign land. For Instance, if a consumer 'C' buys a Sony Television set from a retail website based in Japan, which is found to be defective, it would not be viable if C has no litigate in Japan. The multitude of consumers cannot even of litigating in foreign lands; hence, the subject of jurisdiction of consumer foras in India assumes relevance for them.³⁶

A three tier redressed mechanism for aggrieved consumers are provided under the Consumer Protection Act. The three consumer disputes Redressal agencies established for the purposes of the Act are District Consumer Disputes Redressal Forum for every state and National Consumer Disputes Redressal Commission. Subject to the jurisdiction based upon pecuniary limits as state above, a consumer complaint is to be filed in the District Forum or State Commission as the case may be, having jurisdiction over either of the following places:³⁷

- Where the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain.
- Where any of the opposite parties, where there are mere than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office or personally work for gain, as the case may be, acquiesce in such institution.
- Where the cause or action, wholly or in part, arises.

Territorial jurisdiction under consumer law is the same a under the civil law as provided in the Code of Civil Procedure, 1908 'Jurisdiction over the Cyber World'. Cause of action means the

³⁶*Ibid.*

³⁷*Ibid.*

fact or facts, which give a person a right to judicial relief. It is a situation or state of facts, which would entitle a party to sustain action and give him the right to seek a judicial remedy in his behalf. Cause of action means the whole material facts, which are necessary for the plaintiff to prove in order to entitle him to succeed in the suit. Cause of action includes the circumstances forming the infringement of the right or the occasion for the action. Cause of action in a consumer dispute ordinarily would arise in either or more of the following places, depending upon the nature of the dispute raised by the consumer.

7. Applicability of Consumer Protection Act, 1986 Foreign Goods is Sold or Services Provided to A Consumer in India

Foreign manufacturers and distributors may or may not be liable under the CPA for a manufacturing defect or deficiency of service or unfair trade practice or restrictive trade practice, depending upon different fact situations. In a case where a foreign manufacturer or distributor does not intend nor has any knowledge nor does it authorize the sale of its products in India, it would not be liable under CPA merely because its products are sold in India. The onus of proving such intention would however lie upon the foreign manufacturer.

- The consumer buys the goods or hires services from India.
- The goods are sold or services are provided to the consumer in India.
- The product is delivered or services are availed of in India.
- The consumer suffers the manufacturing defect or deficiency in services in India.
- The consumer makes payment for the goods from India.

Therefore, web sites intending to play in the market in India would have to exercise caution and adjust their actions in line with the law of consumer protection in India. This is not an impossible task for it requires proper legal planning in accordance with the laws in India. They must act like the Multi Nation Companies who do business globally by following the laws of the respective countries where they operate in.

9. Consumer Protection Bill, 2015; New Consumer Protection approach to ensure timely justice

The introduction of electronic medium in retailing has been manifested by expressions, such as, online, e-commerce, e-sales and e-retail. Moreover, there are a number of business practices in e-

retailing. However, the company running the website may be the seller or it may run a website only as a platform for the buyer and seller to transact.

9.1 CONSUMER PROTECTION BILL, 2015:

Further, consumer markets for goods services have undergone drastic transformation since 1986. The emergence of global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have provided new options and opportunities for consumers.³⁸ All these have also rendered the consumer vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele-marketing, multi-level marketing, direct selling and e tailing pose novel challenges to consumer protection. Therefore, it has been felt necessary to replace the existing Consumer Protection Bill, 2015 has recently been introduced in the Lok Sabha. The bill seeks to replace the Consumer Protection Act, 1986.

In offline retailing, a customer visits a store and gets information regarding the product and its performance. He can see, touch, sense and get the product tested before buying it. On the other hand, in e-retailing, the consumer only interacts with a computer or a mobile phone screen. The transactions happen online and the buyer and seller never meet. As a result, besides many advantages, there are certain inherent challenges for the customer in such type of retailing. It is not uncommon that there are diverse e-retailing malpractices prevalent today. In e-commerce, consumer are often taken for a ride at different levels. Firstly, they are allured by misleading advertisements. Secondly, when they buy an item online, either they don't get it on time, or the product they get it sub standard (old, fake, or of inferior quality), or sometime, they get something entirely different from the contracted product. Thirdly, the buyers also sometimes face difficulties with post-purchase defect(s) in the products. And many a time, there is no relief after the customers have bought a product.

The Bill addresses by giving the right to the consumer to cancel a consumer contract (sale contract as well as a contract of service) within thirty (30) days³⁹. The right of a consumer to cancel a contract and receive a refund against the return of the purchased item/product is called

³⁸ See 'Statement of Objects and Reasons' to the Consumer Protection Bill, 2015.

³⁹ See Akhileshwar Pathak, "E-Retailing and the Consumer Protection Bill, 2015"

‘cooling off period’ is a period of time following a purchase when the purchaser may choose to cancel a purchase and return the product which has been supplied and obtain a full refund.

9.2. SALIENT FEATURES OF THE BILL:⁴⁰

The following are some of the salient feature of the Consumer Protection Bill, 2015:

- I. Consumer: “a consumer has been defined as any person who buys any goods or hires a service for a consideration. This includes the user of such goods or service but not one who obtains the goods for resale or commercial purposes. It covers transactions through all modes including offline, online through electronic means, teleshopping or multi-level marketing.
- II. Rights of consumers: The rights of consumers include the right to: (i) be protected against marketing of goods and services which are hazardous to life and property, (ii) be informed of the quality, quantity, potency, purity, standard and price of goods or services, (iii) be assured of access to a variety of goods and services at competitive price, and (iv) to seek redressal against unfair or restrictive trade practices.
- III. Central Consumer Protection Authority: The Bill provides for the establishment of an executive agency to be known as the Central Consumer Protection Authority (CCPA) which will protect and enforce the rights of consumers, The CCPA will carry out the following functions, among others: (i) inquiring into violations of consumer rights, investigating and launching prosecution at the appropriate forum; (ii) passing orders for recall of goods, or withdrawal of services and reimbursement of the price paid, and pass directions for discontinuation of unfair trade practices; (iii) issuing safety notices and order withdrawal of advertisements; and (iv) declaring contracts, that are unfair to a consumer, as void”.

This fills an institutional void in the regulatory regime extant. Currently, the task of prevention of or acting against unfair trade practices is not vested in any authority. This has been provided for in a manner that the role envisaged for the CCPA complements that of the sector regulators and duplication, overlap or potential conflict is avoided

Consumer Disputes Redressal Commissions: “Consumer Grievance Redressal Commissions are to be set up at the district, state and national levels. A consumer can file a complaint with these

⁴⁰ Available at <http://www.prsindia.org/uploads/media/Consumer/Consumee/020Protection%20bill,%202015.pdf> and <http://www.prsindia.org/uploads/media/Consumer/Bill%20Summary%20%20Consumer%20Protection%20Bill.pdf>.(Last visited on 12 November 2015).

commissions, regarding: (i) unfair or restrictive trade practices, (ii) defective goods or services, (iii) overcharging or deceptive charging, (iv) the offering of goods or services for sale which may be hazardous to life and safety, and (v) incurring loss due to an unfair contract.

The District Commission may issue the following orders regarding a complaint: remove the defect, replace the good, return the price amount, stop the sale or manufacture of hazardous products, discontinue unfair trade practices or pay compensation for any loss suffered by the consumer. Appeals from its decisions will be heard by the State Commission. Further appeals may be filed before the National Commission, and then before the Supreme Court”.

IV. Product Liability: In the Bill, “provisions for 'product Liability' action for or on account of personal injury, death, or property damage caused by or resulting from any product has been added. The Bill defines 'product liability' as the responsibility of a manufacturer or vendor of goods or service provider to compensate for injury or damage caused to a consumer by defective product sold to a consumer or deficiency in services. The basis for product liability action and the liability of a manufacturer to a claimant have been provided”.

V. Mediation: “The provision of 'mediation' as an alternate dispute resolution mechanism has been added. This is aimed at giving legislative basis to resolution of consumer disputes through mediation, thus making the process less cumbersome, simple and faster. This will be done under the aegis of the consumer courts”.

VI. The Bill provides for several provisions aimed at simplifying the consumer dispute adjudication process of the Consumer Grievance Redressal Agencies.

- The “internet contracting is not essentially different from the paper world. Consequently, major changes in the approach of contract law are not imperative. The era of e-standard form contracting does not require a major overhaul of contract law, and hence, does not necessitate a fundamental change of mind, Standard-form transactions thus remain within the sphere of contract, which itself serves the symbolic purpose of substantiating society's freedom.⁴¹ However, it does suggest the need for lawmakers to refine their approaches to take into account new opportunities for both businesses and consumers to enhance their positions in the e-world. Although the electronic environment is in fact a novel advance in the history of consumerism, existing contract law is up to the challenge. The influences that effect the judicial approach to the enforcement of standard terms in the paper world are also inclined to affect the

⁴¹ See James J White. ‘Contracting Under Amended’ 2-207, 2004 *Wisdom Law Review* 723 (2004).

electronic world or have close parallels in the electronic world. The fundamental economics of the two kinds of commerce are identical. In both the paper and the electronic worlds business choose between adopting a set of boilerplate terms that are mutually beneficial or exploitative”.⁴² In both worlds, these business houses know more than consumers about the contractual risks, thereby creating an opportunity to exploit consumers. At the same time, in both worlds, consumers can defend themselves by investigating these terms or by making their purchasing decision based on a business’s reputation.

- The present Consumer Protection Act, 1986 has served the purpose of consumer protection to a considerable extent, yet several shortcomings have been noticed while administering the various provisions of the said Act.
- Further, “consumer markets for goods and services have undergone drastic transformation since 1986. The emergence of global supply chains, rise in international trade and the rapid development of e-commerce have led to new delivery systems for goods and services and have also rendered the consumer vulnerable to new forms of unfair trade and unethical business practices. Misleading advertisements, tele-marketing, multi-level marketing, direct selling and e-tailing pose novel challenges to consumer protection. Therefore, it has been felt necessary to replace the existing Consumer Protection Act. 1986 by way of introducing a new law which can address the situation effectively. Keeping these objectives in mind, the present Union Government has introduced the Consumer Protection Bill, 2015”.

Conclusion and suggestions

All Electronic Contracts are valid contracts and enforceable as they are legalized by the Information Technology Act and if there is any infringement with the terms and conditions that one could be made liable. The issue relating to electronic or online contract has become the fundamental forming an e-transaction. As contracts are formed online without human interaction, there is possibility of having been encountered with new problems and grievances. The contract formation issues arise on every time one purchases goods or services online. Purchasers may have question whether a particular advertisement on a vendor’s home page constitutes an offer or an invitation to treat; whether the consumer is the offeror or the offeree, when an offer is treated

⁴² Rebort A Hillman & Jechlinski, ‘Standard –from Contracting in the Electronic Age’P 69. Available at <http://ssrn.com/abstract=287819>. (Last visited on 28 May 2012).

as accepted. One might assume that the vendor is the offeror, and the purchaser would be the offeree, and accepting to purchase the goods and services under terms dictated by the vendor in the name of standard form contracts and exclusion clauses. There are several questions as to what does constitute consideration, how can be determined the intention of parties and who may enter into an Electronic Contract with validity of digital signature.

The challenges presented by technology to contract law merely involves existing principles suppose to be a case of old wine in new bottles. All forms of E-Contracts must to be made conspicuous to satisfy legal standards of notice of terms. Its binding legal nature should to be impressed upon the end-user, and browse-wrap notices must ideally only be supplemental to a contract that the user has already manifested his assent to. The instantaneous nature of electronic transactions also invites a re-conceptualization of contract formation. E-Contracting has reduced geographical barriers and increases the probability of consumers entering into transnational contracts.

Although, The Information Technology Act, 2000 has been passed but it does not form a complete code for E-contract. The Indian Contract Act, 1872 is still fundamental law for contract formation which causes problem in respect with cyber space because in the formation of E-contract, there are many issue which cannot be answered within exiting provision of Indian Contract Act. It is, therefore, required to either amend the Indian Contract Act, 1872 or bring a new legislation specifically dealing with the E-Contract.

Some issue relating to E-Contract should be more clarified in order to facilitate basic principle for the time of formation of E-contract. The principle of Attribution in the formation of E-Contract should be provided more strengthen by using identification technology. The government does not give due attention to new peril resulting slow legislation to respond emerging new legal issues and problems concerning to E-Commerce and E-Contract. It is, therefore, advised that before making law, information technology's experts, researchers and practitioner should have been consulted in the specialized field of law. The application of information technology is a constant developmental process. Therefore, the vibrant and effective legal regulatory mechanism should be developed at required pace.

Without effect consumer protection in online transactions, the Business to Consumer and Consumer to Consumer market places would not possibly attain its full potential in the following years, and the number of consumers transacting online or using the internet would probably reduce if they would not enjoy the protection and confidence as in the offline world. In order to provide a satisfactory level of protection and to enhance consumer in the electronic marketplace, consumers should trust on: (i) an effective consumer regulatory framework; (ii) the consumer protection doctrine related documents and documentations issued by international organizations' and cross-border consumer networks; (iii) industry standard and best practices; (iv) educative and preventive online tools; and (v) international cooperation in the enforcement of laws among government agencies and consumer networks to curb fraudulent, misleading and unfair commercial practices occurring on the internet.

References

1. Farooq Ahmad Mir, “ Emerging Legal Issues of E-Commerce in India” 2(2) *International Journal of Electronic Commerce Studies* (2011).
2. Farooq Ahmad, *Cyber Law in India* (New Era Law Publication, 4th edn., 2013).
3. Fatima, Talat, *Cybercrimes* (Eastern Book Company, Lucknow, 1st edn.,2011).
4. Gaur, K.D., *A Textbook on The Indian Penal Code* (Universal Law Publishing Co. Pvt. Ltd New Delhi, 4th edn., 2013).
5. Hossein Bidgoli, *Electronic Commerce: Principles and Practice* (Academics, California, 2002).
6. Jeffery E. Wittmann ,Vancouver, BC. “Electronic Contracts”, Negotiation and Drafting Major Business Agreements Conference Federated Press (October, 2007)., *available at: http://www.wdwlaw.ca/ELECTRONIC_CONTRACTS_111007_280312.pdf* (last visited on April 5, 2013).
7. Kamath, Nandan, *The Law Relating to Computers, Internet and E-Commerce* (Universal Law Publication Co.2nd edn., 2000).
8. Kapil Raina, “Evidentiary Value of E-Contracts,” *available at: <http://www.legalserviceindia.com/article/1127-E-Contracts.html>* (last visited on February 5, 2013).
9. Kaushik, Anjali, *Sailing Safe in Cyberspace* (SAGE Publication Ltd, London, 1st edn, 2013).

10. Kesari, U.P.D., *The Administrative Law* (Central Law Publications, 2003).
11. Kumar, Sujeet, *Encyclopaedia of Cyber Laws* ABD Publishers, New Delhi, 1st edn., 2011).
12. Malthan, Rahul, *Law Relating to Computers and Internet* (Butterworths India, New Delhi, 1st edn., 2000).
13. Rishabh Khandelwal, “Understanding E–Contracts and Its Impacts” *available at: http://accessindia.org.in/pipermail/accessindia_accessindia.org.in/2009-July/028297.html* (last visited on May 3, 2013).
14. Rishabh Khandelwal, “Understanding E–Contracts and Its Impacts” *available at: http://accessindia.org.in/pipermail/accessindia_accessindia.org.in/2009-July/028297.html* (last visited on May 3, 2013).
15. The Indian Contract Act, 1872.
16. V.D. Dueja, *Crimes in Cyber Space: Scams and Frauds* (Commonwealth ,1st edn.,2003).
17. R.K. Singh *Law Relating To Electronic Contract* (LexisNexis 2nd edn 2016).