

PROTECTION OF CONSUMERS IN CROSS-BORDER ELECTRONIC COMMERCE

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ABSTRACT

Electronic commerce platforms allow Internet-enabled trade in unprecedented ways. International sale of goods and services, which were earlier concerns of business-to-business (B2B) are now very much a part of business-to-consumer transactions as well. Businesses making use of online marketplaces reach far more markets than traditional business. At the same time, cross-border electronic commerce also comes with several impediments. Key obstacles to such consumption range from different contractual terms to consumer protection rules to potential risks of fraud and non-payment and higher costs of cross-border delivery, dispute redressal and enforcement to name a few. This paper attempts to analyse the various forms of electronic commerce models that enable cross-border transaction. The paper further expands to analyse the challenges that arise in such cross-border electronic commerce. Based on the consumer complaining trends, the paper concludes with certain recommendations for the governments and electronic commerce industry to enable smoother transaction and establish consumer trust and confidence in the online space.

INTRODUCTION

The current paradigm of Information and Communication Technology (ICT) based trade and commerce has created a new liaison between consumer and business. The Internet on which electronic commerce is strongly based makes it easier to operate across conventional country borders. Electronic commerce platforms allow for Internet-enabled trade in unprecedented ways. ‘Global start-ups’ or ‘born-global’ entities are an increasing phenomenon in the digitized economy today. The human and

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corporate actors and the computing and communicating tools, through which internet transactions are effected, have a real world existence, located in one or more places.

The ease with which electronic transactions take place attracts consumers to actively participate both in the domestic and global markets. International sale of goods and services, which were earlier concerns of Business-to-Business (B2B) are now very much a part of Business-to-Consumer (B2C) transactions as well. In traditional forms of commerce, small, medium and sometimes even large firms have opportunities to sell in limited regions only. However, businesses making use of online marketplaces reach far more markets than traditional business. In this context, new tools such as cooling-off period, information requirement, privacy and confidentiality are introduced with the object of protecting consumers in electronic transaction.

A recent ebay report shows that exporters on ebay platform sell to around 200 countries and consumers in India import through ebay from 141 countries.¹ Figures from Emota, the European Distance Selling Association, show that growth is fastest in the Asia Pacific region (with a 30% increase between 2009 and 2013).²

Among the top 10 list of consumers who complained of cross-border online purchases during 2013-2014, consumers in the United States made the highest number cross-border purchases and India stands 9th in the list. Among the companies that were complained of regarding consumer right violation across borders, the maximum number of companies located were in the United States, followed by China, United Kingdom and India.³ This

1 Consumer 3.0, Empowering Indian Businesses and Entrepreneurs,2014, *available at*http://www.ebaymainstreet.com/sites/default/files/ebay_Commerce-3_Empowering-Indian-Businesses-Entrepreneurs.pdf, Last Visited on 03/09/2014.

2 GSR Discussion Paper on Consumer Protection in the Online World, ITU 2013, *available at* <http://www.itu.int/en/ITUUD/Conferences/GSR/Documents/GSR2014/Discussion%20papers%20and%20presentations%20-%20GSR14/Session%201%20GSR14%20-%20Discussion%20paper%20-%20ConsumerProtection.pdf>, Last Visited on 01/08/2014.

3 Complaint Trends: Top-10 List of Consumer and Company Locations, *available at* <http://www.econsumer.gov/english/resources/trends.shtml>, Last Visited on 02/09/2014.

shows that India lags behind in terms of cross-border consumption than cross-border sales, but is certainly catching up.

This Article begins with a brief overview of the modes of electronic commerce which involve an element of cross-border transaction and continues with a description of consumer complaining trends that are presently at large. It proceeds with a delineation of regulatory strategies adopted by the international fora to control deceptive online market practices in the global realm. It concludes with a recommended set of strategies for governments and industry to regulate cross-border online consumer contracts.

E-COMMERCE MODELS INVOLVING CROSS-BORDER TRANSACTIONS

Electronic commerce involves both domestic and cross-border transaction models. It is not always the case that domestic transaction always involves delivery of domestic goods and services and cross-border transaction involves cross-border delivery of goods and services.

Domestic electronic commerce may involve transaction where the consumer purchases a product from the website of a domestic online retailer or foreign retailer having a physical presence or web shop in the consumers' home country, but the goods may be delivered from a warehouse in another country. Likewise, shopping from the website of a foreign e-retailer without a local web shop may involve domestic delivery of goods from a warehouse in the consumer's home country.⁴ A third category of electronic commerce involves transaction where the domestic web shop may import goods from foreign lands and simply distribute it to consumers within the country.

4 E-commerce and Delivery: A Study of the State of Play of EU Parcel Markets with Particular Emphasis on E-commerce, European Commission, DG Internal Market and Services, July 15th 2013, *available at* http://ec.europa.eu/internal_market/post/doc/studies/20130715_ce_e-commerce-and-delivery-final-report_en.pdf, Last Visited on 05/09/2014.

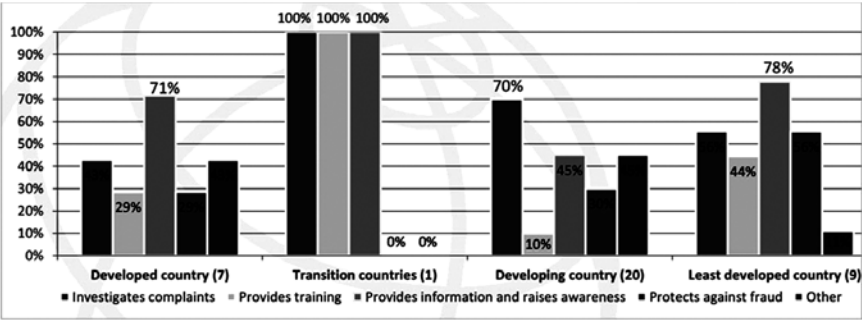
Let us understand the common domestic and cross-border e-commerce mechanisms with simple illustrations:

- a. Domestic e-commerce and domestic delivery: Indian e-shopper orders for electronic goods from flipkart.com, which is shipped from a warehouse in Bengaluru (India).
- b. Domestic e-commerce and cross-border delivery: Indian e-shopper orders for a computer game on ebay India, which is shipped from US.
- c. Cross-border e-commerce and domestic delivery: Indian e-shopper orders a book on amazon.in's Kindle out of a publishing company in France.
- d. Cross-border e-commerce and cross-border delivery: Indian consumer orders for a beauty product on Selfridges.com and the product is delivered from the store located in London.
- e. Domestic e-commerce selling goods imported from foreign manufacturers: Indian e-shopper orders for a watch on ishopinternational.com, where the product is imported by the web shop and sold to the domestic consumer.

CHALLENGES IN CROSS-BORDER ELECTRONIC COMMERCE

Electronic commerce has undoubtedly created huge opportunities for both business and consumer in the electronic civilization. While businesses have an easy entry to explore foreign markets through their online stores, consumers have a wide variety of products to choose from the global markets. However, e-commerce can be achieved to its fullest potential only when online consumers are afforded the same level of protection as conventional consumers. Cross-border electronic commerce also comes with several obstacles. Key obstacles to such consumption range from different contractual terms to consumer protection rules to potential risks of fraud and non-payment and higher costs of cross-border delivery, dispute redressal and enforcement to name a few.

Consumer complaints play a vital role in identifying those areas where current legislation/regulation may be lacking and where best to intervene. The most common consumer related provisions in terms of electronic commerce include access to information/transparency, equity/right of access to quality services, protection of personal data, privacy, confidentiality of information and right to complain. International Telecommunication Union (ITU) data shows that there is considerable variation between developing and developed/transition countries in the type of consumer protection responsibilities undertaken. For example, regulators in developed countries are less likely to play a direct role in complaints handling than those in developing countries, with responsibility for fraud protection most prevalent in least developed countries.⁵



Challenges to consumer protection in cross-border online market may be analysed under the following heads:

3.1. INFORMATION ASYMMETRY

Asymmetries in information between consumers, sellers and online intermediaries may have negative impact on consumers’ decision making. Such asymmetry has the potential to retard an integral right of the consumer - right to information. Consumers in the electronic space need access to complete information not only about the goods and services offered in

5 Regulation and Consumer Protection in a Converging Environment, March 2013, Telecommunication Development Sector, ITU, available at <http://www.itu.int/en/ITU-D/Regulatory-Market/Documents/Regulation%20and%20consumer%20protection.pdf>, Last Visited on 03/08/2014.

the market, but also assess the third party seller and the manufacturer/producer hiding behind the seat of the third party seller. Emails, electronic address or even domain names need not necessarily relate to the place of business of the supplier, which may end up in a wrong cross border deal. Accessibility and Assessibility are two important ingredients to effective consumer decision making.

Fraud in cross-border electronic transactions can be understood by the following case study which came up before the European Consumer Centres Network (ECC-Net)⁶ which looks at scams faced by consumers when shopping online.

A Bulgarian consumer was contacted by a British seller on Skype. The consumer ordered three mobile phones for the total price of 600 USD which was paid via a money transfer service. The consumer had suspicions about the trader's credibility, but as the price was so low he wanted to buy anyway. The trader reassured him that he had a legitimate business in the United Kingdom and he could easily be pursued in case of non-compliance. After a few days the trader requested the consumer to pay an additional 750 USD for tax and custom fees. The consumer paid this money as well but received nothing. Then he was asked to pay 1000 USD more. The consumer did not agree and asked for his money back. The trader refused and the consumer filed a complaint to the ECC in Bulgaria. The case proved to be a fraud and was closed without a solution because it is impossible to reach amicable solutions with fraudulent cases.⁷

6 European Consumer Centres Network (ECC-Net) is an EU-wide network co-sponsored by the European Commission, the Member States, Norway and Iceland. Presently, it has 29 centres, at least one in each of the 27 EU Member States and in Iceland and Norway. The network works together to provide consumers with information on cross-border purchase of goods and services. They also assist in amicable resolution of cross-border complaints and out of court procedures.

7 Ann Neville, Caroline Curneen et al., *Fraud in Cross-border E-commerce*, ECC-Net, available at http://ec.europa.eu/consumers/ecc/docs/ecc-report-cross-border-e-commerce_en.pdf, Last Visited on 04/09/2014.

Another case study involved an Irish consumer completed a survey online and received 7 free bids for 7 days for a Maltese-based auction-company as a reward. He won an iPhone and had to pay €7 delivery charge but the phone was never delivered. He then discovered that this credit card had been debited €200 in addition to the €7. The company claimed that this was a membership fee which he had agreed to in the terms and conditions.⁸

In the Business-to-Consumer (B2C) e-commerce market, information asymmetry can be broadly identified under the following heads:



In the consumer sphere, dispute avoidance is as important as, if not more important than, dispute resolution. A predominant feature of consumer protection law is to promote good business practices, such that the consumer is well-informed about the transaction. The anonymous character of online market demands a greater need for clear information on matters at every technical step for conclusion of the contract and also effective means to identify and correct input errors prior to the completion of the contract.

i. UN Guidelines on Disclosure of Information:

UN Guidelines on Consumer Protection, adopted in 1985,⁹ recognise access of consumers to adequate information, as a legitimate requirement

⁸ *Ibid.*

⁹ United Nations Guidelines for Consumer Protection 1985 (as expanded in 1999), Resolution A/C.2/54/L.24 9th, available at http://www.un.org/esa/sustdev/publications/consumption_en.pdf, Last Visited on 20/07/2014.

to consumer protection policy.¹⁰ Considering the growth in the number of transnational corporations, a strong need is felt among countries to regulate consumer protection in an international dimension. Consumer right is not *per se* a human right as recognised by the Universal Declaration of Human Rights.¹¹ However, it is recognised as an integral part of the economic right of the Declaration.¹² The UN in its Guiding Principles on Business and Human Rights imposes a duty upon the State to set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.¹³ This requires the home States to take steps to prevent abuse abroad by business enterprises within their jurisdiction. The Guidelines further recognise that failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Hence, it is pertinent that the State plays an integral role in filling the gaps by adopting adequate and transparent disclosure guidelines upon businesses carrying on electronic commerce both at national and transnational levels.

In an endeavour to update the UN Guidelines on Consumer Protection in the digital age, Consumer International (CI) has also recommended that businesses engaged in electronic commerce should provide accurate, clear and easily accessible information about themselves, the goods or services offered, and the terms and conditions on which they are offered, to enable consumers to make an informed decision about whether to enter into the transaction.¹⁴ In the context of consumer empowerment, CI has proposed

10 *Ibid*, Principle 3(c), Part II.

11 Universal Declaration of Human Rights, resolution 217 A (III) of 10 December 1948, adopted by the UN General Assembly on 10 December 1948, *available at* <http://www.un.org/en/documents/udhr/history.shtml>, Last Visited on 09/09/2014.

12 Sinai Deutch, *Are Consumer Rights Human Rights?* OSGOODE HALL LAW JOURNAL, 32(3), pg. 558, *available at* http://www.ohlj.ca/archive/articles/32_3_deutch.pdf, Last Visited on 11/09/2014.

13 Principle I, Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework, New York and Geneva, 2011, *available at* http://shiftproject.org/sites/default/files/GuidingPrinciplesBusinessHR_EN.pdf, Last Visited on 11/09/2014.

14 Consumers International Proposals for Amendments to the UN Guidelines for Consumer Protection, Consumer International 2013, *available at* <http://a2knetwork.org/sites/default/files/ungcp-submission.pdf>, Last Visited on 02/08/2014.

the adoption of Access to Knowledge (A2K) policy, which involves more equitable access to information to enable consumer decision.

ii. Organisation for Economic Co-operation and Development (OECD) Council on Consumer Protection in Electronic Commerce:

Addressing the issue of information asymmetry in electronic commerce, the OECD Council in its Guidelines for Consumer Protection in the Context of Electronic Commerce (1999)¹⁵ laid emphasis on transparent and adequate information to be furnished by electronic businesses with regard to business as well as goods and services. In many countries, the Guidelines served as a basis for development of B2C codes of conduct, trust-mark, and self-regulatory programmes. In its approach to combat online fraudulent practices, the OECD also laid the Guidelines for Consumer Protection against Fraudulent and Deceptive Commercial Practices across Borders (2003). The Council recognised that fraudulent and deceptive commercial practices against consumers undermine the integrity of both domestic and global markets to the detriment of all businesses and consumers, and undermine consumer confidence in those markets. The guidelines emphasised on the need to improve the ability among member states to protect domestic consumers from foreign businesses engaged in fraudulent and deceptive commercial practices.

iii. EU Directive:

The new Directive on Consumer Rights (2011/83/EC),¹⁶ adopted on 13 June 2014 also emphasises on adequate and transparent disclosures both

15 Guidelines based on Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce of 8-9 October 1998 [C(98)177], Adopted on December 9, 1999.

16 Directive 2011/83/EU Of The European Parliament And Of The Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal L 304, Vol 54, 22 November 2011, *available at*<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1>, Last Visited on 28/07/2014.

in the context of business and product at the pre-contractual and post-contractual stages. The Directive has aligned and simplified consumer rights at all the four stages:

- a. Before Purchase – consumers purchasing through distance and off-premise modes should get clear and comprehensive information before they buy.¹⁷ The Directive also lays provisions on formal requirements for distance contracts, such as use of plain and intelligible language, payment modes, delivery restrictions, confirmation of contract in durable medium etc.¹⁸
- b. Purchase - consumers shouldn't pay excessive fees.¹⁹
- c. After purchase – easy cancellation policy, extended cooling-off period and offer helpline at basic rates.²⁰
- d. Additional payments - no additional payments unless the consumer expressly agrees.²¹

iv. Country-wise Regulations on Information Requirements in Electronic Commerce:

(a) US :

The US Safe Web Act was enacted by the US Congress in December 2006, in response to the increasing threats and cross-border frauds faced by consumers in the global markets. The Act enables Federal Trade Commission (FTC) to protect consumers from cross-border fraud and deception, and particularly to fight spam, spyware, and Internet fraud and deception. The Act allows FTC to share confidential information in its files in consumer protection matters with foreign law enforcers, subject to appropriate confidentiality assurances. The Act also permits FTC to provide investigative cooperation in consumer matters to foreign law enforcement agencies. If the foreign agency requests confidential

17 *Ibid*, Article 6, Information Requirement for Distance and Off-Premises Contracts.

18 *Ibid*, Article 8, Formal Requirements for Distance Contracts.

19 *Ibid*, Article 5(1)(c).

20 *Ibid*, Articles 9-16.

21 *Ibid*, Article 22, Additional Payments.

treatment as a precondition of providing information, the FTC protects the confidentiality of the information or any material reflecting a consumer complaint obtained from the foreign source. The Act permits the FTC to cooperate with Department of Justice in using additional staff and financial resources for foreign litigation of FTC matters.

Internet being an important channel of commerce in the United States, The Restore Online Shoppers' Confidence Act was passed by the US Congress in January 2010. Through the enactment, the Congress emphasises that Internet must provide consumers with clear, accurate information and give sellers an opportunity to fairly compete with one another for consumers' business. An investigation by the Senate Committee on Commerce, Science, and Transportation found abundant evidence that the aggressive sales tactics many companies use against their online customers have undermined consumer confidence in the Internet and thereby harmed the American economy. A lot of confidential information of the consumers was also found to be shared without consent. Third party sellers charged millions of consumers for membership clubs without ever obtaining consumers' billing information, including their credit or debit card information, directly from the consumers.²²

The Act prohibits any post-transaction third party seller (a seller who markets goods or services online through an initial merchant after a consumer has initiated a transaction with that merchant) from charging any financial account in an Internet transaction unless it has disclosed clearly all material terms of the transaction and obtained the consumer's express informed consent to the charge. The seller must obtain the number of the account to be charged directly from the consumer. The Act prohibits initial merchants from disclosing purchasers' financial account numbers or other billing information to third party sellers. In addition, for all online

22 Restore Online Shoppers' Confidence Act, Pub. L. 111-345, 124 Stat. 3618, *available at* <http://www.ftc.gov/system/files/documents/statutes/restore-online-shoppers-confidence-act/online-shoppers-enrolled.pdf>, Last Visited on 02/08/2014.

transactions with a negative option feature (both initial sales and post-transaction sales), the Act requires the seller to disclose clearly all material terms, obtain the consumer's express informed consent to the charge, and provide a simple means for the consumer to stop recurring charges.²³

(b) UK :

Electronic consumers in UK are protected both by traditional laws, which are common to buyers purchasing over the counter as well as over the internet and regulations exclusively designed to deal with online transactions. The Consumer Protection (Distance Selling) Regulations 2000 was the first regulation designed to protect customers who are not physically present with the seller at the time of purchase. The Regulations mandate businesses to provide appropriate information about the e-commerce transaction both during pre-contractual stage and information required once the purchaser has decided to continue to order for the product/service and details of any guarantee or after-sales services.

On lines with the new EU Directive on Consumer Rights (2011/83/EC), UK enacted the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013. The Regulation distinctly covers on-premises, off-premises and distance trader to consumer contracts subject to certain restrictions. A detailed set of information about the business, description of goods and services, pricing, withdrawal, refund and additional payments are explicitly laid out in the Regulation.

(c) India:

Right to information is recognised as one of the fundamental rights under the Constitution of India. Article 19(1)(a) of the Constitution recognises the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

²³ Section 3, Restore Online Shoppers' Confidence Act.

The Supreme Court of India in *Secretary, Ministry of Information and Broadcasting, Government of India & Ors.v. Cricket Association of Bengal & Anr.*²⁴ observed that “One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce. Freedom of speech and expression includes right to impart and receive information...”

Consumer Protection law in India is grey on information asymmetry in electronic commerce market. Consumer Protection Bill, 2011 has only made an attempt to address the asymmetry by including misinformation and non-information within the context of deficiency in service.²⁵ The Information Technology Act, as amended in 2008, includes online market place within the definition of ‘Intermediaries’.²⁶ Section 79 of the Act explicitly provides for exemption from liability of intermediaries if such intermediaries prove due diligence beyond reasonable doubt. Information Technology (Intermediaries Guidelines) Rules, 2011 was introduced, which requires intermediaries to publish rules and regulations, privacy policy and user agreement for access or usage. The Rules also requires the intermediary to publish on its website the name of the Grievance Officer and his contact details by which users who suffer as a result of access to the computer resource can notify their complaints.

However, the subject of disclosure guidelines in the context of business, pricing, cancellation, withdrawal and refund, grievance redressal etc. are not dealt either as a subject of electronic transaction law or consumer protection law. Much needs to be analysed on the consumer complaining trends, both in terms of domestic and cross-border transactions in bringing

24 *Secretary, Ministry of Information and Broadcasting, Government of India & Ors.v. Cricket Association of Bengal & Anr.*, (1995) 2 SCC 161.

25 Section 2(1) (g), Consumer Protection Bill, 2011.

26 Section 2(w) of Information Technology Act, 2008 - "Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.

about regulatory framework, which address the issue of deficiency in information. Adequate and transparent information at every stage of the electronic commerce contract should be worked out.

3.2. GRIEVANCE REDRESSAL

Failure to develop a practical framework for resolution of consumer disputes is another obstacle to effective cross-border electronic commerce. Much depends on the power of the local governments to address protection of consumers in the global environment. Consumers cannot be sure that they will receive the same level of protection they do in their home country when they shop cross-border, even though they are well protected by their home country rights. Low cost of the product and high cost of legal advice and litigation also tend consumers to refrain from cross border transaction. In a bid to clamp down fraudulent websites operating in the electronic realm, the Communication and Information Ministry of Indonesia has effectively brought control on cross-border e-commerce and make it mandatory for foreign firms looking to invest in the country, must register as an electronic agent operator with the Ministry.²⁷

When making purchases online, consumers are usually asked to tick a box to confirm that they accept the terms and conditions. The conditions may contain a grievance redressal clause, which is generally very long and consumers have no choice in accepting them if they want to make the purchase. If the grievance redressal adopted by the business is not suitable to the consumer, such as choice of law or venue of arbitration, the consumer has very weak chance of even accessing to dispute resolution.

A recent case study on grievance redressal challenges in cross-border transaction is as follows:

27 Article 37(1) of Regulation of the Government of the Republic of Indonesia Number 82 OF 2012 Concerning Electronic System and Transaction Operation, *available at* http://rulebook-jica.ekon.go.id/english/4902_PP_82_2012_e.html, Last Visited on 04/09/2014.

A Canadian consumer ordered an item from an Amazon marketplace seller that was processed and shipped by Amazon. Shipping was free via Amazon Prime. The item cost \$32 was charged to the consumer's Amazon Visa. When the consumer received the package and looked at the invoice, the price charged was shown as \$290. On checking and verifying the Visa account, the consumer discovered that he was charged \$290 by Amazon market place. On contacting the seller, the seller replied that the customer had to contact Amazon's customer service for refund, since the entire transaction was handled by Amazon.

On contacting Customer Service, the consumer was told that the error was on the seller. The consumer could receive a refund without the seller only after receiving the item from the consumer. However, the shipping charge for reverse delivery was too expensive. On losing faith in the transaction, the consumer complained to the card company for the charges. But the consumer was not able to find an appropriate government agency to submit fraud complaint.²⁸

Extra-territorial character of cyberspace activities is also provided under Section 75 of the Information Technology Act, 2008, which extends jurisdiction of Indian courts to any offence or contravention committed outside India by any person irrespective of his nationality. The only requirement in assuming jurisdiction by the Indian courts is that the act or conduct constituting the offence or contravention must involve a computer or computer system or computer network which is located in India. However, this provision applies only to those offences or contraventions listed under the Information Technology Act, 2008. The IT Act, being a purely industry-based enactment apparently does not address the domestic concerns of consumer grievance. At the same time, this raises another concern of traditional territorial-based consumer protection law trying to exercise sovereign powers over a borderless space.

28 Cross-Border Consumer Complaint reported by Barbara of Canada, on Aug 30, 2014, at <http://www.consumeraffairs.com/online/amazon.html>, Last Visited on 03/09/2014.

Online Dispute Resolution (ODR) mechanism has been found to be a more logical way of redressing consumer grievance in the e-commerce market today. ODR is gradually gaining momentum from all the key players in e-commerce at present. For instance, under the ebay Buyer Protection Policy, buyers can file a report when they have not received an item they purchased or if the item was received but did not match the seller's description. In Mexico, Concilianet, an online dispute resolution system run by the Consumer Protection Federal Agency (“Office of the Federal Prosecutor for the Consumer”) (Profeco), has been established to strengthen the protection and defence of consumers’ rights.

3.3. ENFORCEMENT

While enforcement of consumer protection policy is a challenge to policy makers, enforcement of decisions is equally a challenge to judicial bodies in cross-border consumer contracts. Even where jurisdictional issues are not the problem, effective enforcement may not be possible with buyer sitting in one country and seller in another. For instance, even if Indian law is to apply to a cross-border consumer case and Indian court has jurisdiction on the overseas trader, it may be too expensive to enforce the judgement against the trader who has no assets in India.

In March 2013, Italian authorities of the European Union charged Apple with a fine of up to €900,000 for not making it clear that EU customers have an automatic two-year guarantee. This was followed by ongoing legal action in Belgium, Germany, Luxembourg and Portugal, the EU noted. The controversy surrounded on how Apple was selling its product, advertising a basic one-year warranty and selling an additional extended warranty on top of it. EU consumers are guaranteed at least a two-year warranty covering manufacturing defects.

Apple warranty case was seen as a prime example for a more stringent enforcement mechanism of consumer protection laws since in this case, the EU was not able to take action directly against Apple or any other firm over

such issues, but to insist on the member countries to address the problem. Similar complaints had arisen against Microsoft and Google, which offered one-year warranty for their products. But their terms mentioned that the 'statutory rights' were not affected.

Several instances such as the Yahoo! case²⁹ and Speak Asia have arisen in the past on issues of enforcement of decisions and applicability of national law, where parties to the transaction are located in different countries. The United Nations Guidelines on Consumer Protection encourages all possible avenues for international cooperation through bilateral and multipartite agreements for cross-border consumer protection to address the issues of enforceability. The OECD also in its Recommendation on Consumer Dispute Resolution and Redress in 2007³⁰ encouraged its member states to develop multi-lateral and bi-lateral arrangements to improve international judicial co-operation in the recovery of foreign assets and the enforcement of judgments in appropriate cross-border cases.³¹ Such arrangements ease cross-border enforcement in terms of providing channel to information-sharing and coordinated enforcement through regular meetings. Henceforth, several international initiatives such as EU Council on Consumer Protection Cooperation, Association of Southeast Asian Nations (ASEAN) Committee on Consumer Protection, COMPAL, CONCADECO, Ibero American Forum of Consumer Protection Agencies (FIAGC), Organisation of American States (OAS), Asia-Pacific Economic Co-operation (APEC), Trilateral Cooperation Secretariat (TCS) etc. have been striving towards enabling harmonious and converged consumer protection cooperation.

Considering the exponential growth in electronic commerce, a Blue print for action on electronic commerce was brought out by Asia Pacific Economic Co-operation (APEC) in 1998. The APEC members agreed

29 *Yahoo! Inc. v. La Ligue Le Racisme et L'Antisemitisme*, 169 F.Supp. 2d 1181 (N.D.Cal.2001).

30 OECD Recommendation on Consumer Dispute Resolution and Redress, adopted on 12 July 2007, available at <http://www.oecd.org/sti/consumer/2956464.pdf>, Last Visited on 28/07/2013.

31 *Ibid*, at Part III of Guidelines.

among others to the role of government in providing a favourable environment, including legal and regulatory aspects, which is predictable, transparent and consistent. The members also recognised the need to provide an environment which promotes trust and confidence among electronic commerce participants, in the areas of safe, secure and reliable communication, information and delivery systems, and which address issues including privacy, authentication and consumer protection.³²

Australia and Canada worked on a joint statement to work together and through international organizations to develop a global environment which facilitate the growth of global electronic commerce building trust for users and consumers, establishing transparent, objective ground rules for the digital marketplace, enhancing the information infrastructure and developing a broad collaborative approach that includes governments, the private sector, the wider community and international organizations which aims at maximizing the social and economic potential of electronic commerce across all economies and societies.³³

So far, India has implemented 83 bilateral agreements mainly addressing investment promotion and protection agreements (bilateral investment promotion and protection agreements (BIPPA's)) with various countries.³⁴ Likewise there are also various Free Trade Agreements such as the Regional Comprehensive Economic Partnership (RCEP), being negotiated between the 10 ASEAN Member States and ASEAN's Free Trade Agreement (FTA) partners viz. Australia, China, India, Japan, Korea and New Zealand. The Free Trade Agreements identify areas for negotiations such as goods, services, investment, economic & technical cooperation, intellectual

32 APEC Blueprint for Action on Electronic Commerce, 1998 Leaders' Declaration, available at http://www.apec.org/Meeting-Papers/Leaders-Declarations/1998/1998_aelm/apec_blueprint_for.aspx, Last Visited on 26/07/2014.

33 Australia-Canada Joint Statement on Electronic Commerce, available to <https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00378.html>, Last Visited on 26/07/2014.

34 India reviewing its 83 bilateral investment pacts: Anand Sharma, Feb 2014, *available at* http://articles.economicstimes.indiatimes.com/2014-02-22/news/47581787_1_investment-protection-bilateral-treaties-investment-promotion, Last Visited on 15/09/2014.

property, competition and dispute settlement. However, these agreements do not play a significant role in terms of cooperation in consumer disputes across borders.

The India-EU Broad Based Trade and Investment Agreement (BTIA) negotiations entered in 2007 cover Trade in Goods, Trade in Services, Investment, Technical Barriers to Trade, Trade Remedies, Rules of Origin, Customs and Trade Facilitation, Competition, Trade Defence, Government Procurement, Dispute Settlement, Intellectual Property Rights & Geographical Indications and Sustainable Development.

The United States Federal Trade Commission and the United States Department of Justice and the Ministry of Corporate Affairs (Government of India) along with the Competition Commission of India entered into a Memorandum Of Understanding On Antitrust Cooperation in 2000,³⁵ to enhance effective enforcement of their competition laws by creating a framework that provides for enforcement cooperation between the U.S. and Indian competition authorities. However, there is no specific Agreement on Mutual Enforcement Assistance in Consumer Protection Matters.

A MoU was signed between India and the Government of Mauritius for Cooperation on Consumer Protection and Legal Metrology in 2005.

Considering the rapid increase in cross-border consumer transactions in India, international co-operation through bilateral and multipartite agreements addressing mutual enforcement and information sharing is the need of the hour.

35 Memorandum Of Understanding On Antitrust Cooperation Between The United States Department Of Justice And The United States Federal Trade Commission, And The Ministry Of Corporate Affairs (Government Of India) And The Competition Commission Of India, 2000, *available at* <http://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/1209indiamou.pdf>, Last Visited on 15/09/2014.

CONCLUSION

A predominant feature of consumer protection law is to promote good business practices, such that the consumer is well-informed about the transaction. Consumer protection laws in the context of electronic commerce need to have an international perspective to address the global market network. Most consumer protection laws apply to overseas traders carrying on business in the country, but they may not be clear on sales made over the internet by such traders without a physical presence.

Despite best consumer protection policy, lack of consumer redressal mechanism hinders electronic commerce across borders. Most countries adopt consumer protection policies such that the consumer has his grievance redressed in his home country even if the consumer contract states otherwise. For instance, if an internet overseas trader is found to have been carrying on business in Australia, then Australian consumer protection laws will apply, even if the *contract* states otherwise (e.g. “This contract is governed by the laws of California”). If there is no Australian consumer protection (i.e. the trader is found not to have been carrying on business in Australia), then only the consumer protection laws of the trader's country (if any) will apply. But, chances are that the other country may offer the consumer with lesser rights than having purchased the good or service within Australia.

Websites may appear to be of a certain national origin by language and domain name, but in fact headquartered in another state which is not likely to be transparent to the consumer. Difficult and unsettled legal problems relating to jurisdiction, choice of law, and in particular, enforcement would arise regularly if e-commerce disputes were to be litigated in conventional fora. This suggests that national laws will need to focus on negotiating new rules and common standards of practice that are relevant in the global environment.

Regulatory innovations in both consumer empowerment and consumer protection perspectives need to be worked out considering the electronic commerce in the international perspective.

RECOMMENDATIONS

5.1. FOR GOVERNMENTS

- a. Constant update on the technological innovations and emerging electronic commerce models which promote cross-border trade both directly and indirectly.
- b. Regular appraisal on consumer complaint statistics to identify and handle gaps in the legal and regulatory framework
- c. Enhance quality of information that intermediaries/third party sellers are to provide in terms of both business and goods/services
- d. Establish specialised Online Dispute Resolution Mechanism within consumer grievance redressal machinery, to address disputes at different levels of purchase such as inadequate pre-contractual information or complaints about various pricing issues, return issues or re-fund.
- e. International arrangements through bilateral and multi-partite participations can help combat enforcement issues to a large extent.
- f. Extensive consumer education programmes relating to fraud in electronic commerce both in the domestic markets and across borders.
- g. A tripartite effort of the State, industry and consumer groups in blacklisting websites which are habitually fraudulent.

5.2. FOR INDUSTRY

- a. Provide clear and adequate information about the business as well as product description.
- b. Provide easy ordering process.
- c. Promote innovative consumer friendly complaint handling and customer service.
- d. Payment gateways/intermediaries like PayPal to take initiatives as part of corporate social responsibility to educate consumers about potential cross-border risks and update consumers on ranking of portals.