

**DISPUTE RESOLUTION AS AN EFFICACIOUS TOOL FOR
CONSUMER PROTECTION vis-à-vis E-COMMERCE AND
PRODUCT LIABILITY**

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Submitted By

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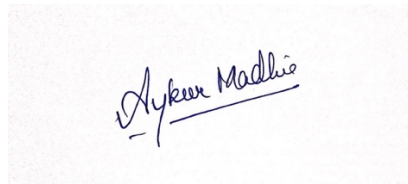
National Law University and Judicial Academy, Assam

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SUPERVISOR CERTIFICATE

It is to certify that **Mr. Sami Ahmed** is pursuing Master of Laws (LL.M.) from National Law University and Judicial Academy, Assam and has completed his dissertation titled **“DISPUTE RESOLUTION AS AN EFFICACIOUS TOOL FOR CONSUMER PROTECTION vis-à-vis E-COMMERCE AND PRODUCT LIABILITY ”** under my supervision. The research work is found to be original and suitable for submission.

Date: - 14th July 2022

A rectangular box containing a handwritten signature in blue ink. The signature reads "Ankur Madhia" with a horizontal line underneath the name.

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DECLARATION

I, **Sami Ahmed**, pursuing Master of Laws (LL.M.) from the National Law University and Judicial Academy, Assam, do hereby declare that the present dissertation titled **“DISPUTE RESOLUTION AS AN EFFICACIOUS TOOL FOR CONSUMER PROTECTION vis-à-vis E-COMMERCE AND PRODUCT LIABILITY”** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

Date: 11th July 2022
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1950- Constitution of India

1950- Emblems and Names (Prevention and Improper Use) Act

1951- Industries (Development and Regulation) Act

1952- Forward Market (Regulation) Act

1954- Drugs and Magic Remedies (Objectionable Advertisements) Act

1954- Prevention of Food Adulteration Act

1955- Essential Commodities Act

1955- Price Competition Act

1956- Companies Act

1956- Security Contract (Regulation) Act

1956- Standards of Weight and Measures Act

1956- Indian Standards Institutions (Certification of Marks) Act

1958- Trade and Merchandise Act

1963- Specific Relief Act

1969- Monopolistic and Restrictive Trade Practices Act

1972- Hire Purchase Act,

1975- Packaged Commodity Regulation Order

1976- Sales Promotion Employee (Condition of Service) Act

1980- Prevention of Black Marketing and Maintenance of Supplies of Essential
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1981- Essential Commodities (Special Provision) Act

1984- The Family Courts Act

1985- UN Guidelines for Consumer Protection

1986- Consumer Protection Act

1986- The Bureau of Indian Standards Act

1988- Textile (Consumer Protection) Regulations

1995- UN Guidelines for Committee for Trade and Development

1996- Arbitration and Conciliation Act,

1996- UNCITRAL Model Law on E-Commerce

1998- OECD Consumer Policy Committee

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2003- OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Border

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2011- Information Technology (Intermediaries Guidelines) Rules, 2011 & the Liability of Intermediaries in India and the Information Technology (Intermediary Guidelines) Rules

2013- Companies Act

2015- Commercial Courts Act

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2016- Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations

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2020- The Consumer Protection Act (E-Commerce) Rules

LIST OF ABBREVIATIONS

1.	ACC	Accidents Compensation Cases
2.	ADR	Alternative Dispute Resolution
3.	AIR	All India Reporter
4.	Anr	Another
5.	Arb	Arbitration
6.	Cal	Calcutta
7.	Ch.	Chapter
8.	Co.	Company
9.	ConfoNet	Computerisation and Computer Networking of Consumer Commission in Country
10.	Cir	Circuit
11.	CPR	Consumer Protection Reporter
12.	CPJ	Consumer Protection Judgments
13.	ed.	Edition
14.	Del	Delhi
15.	DRJ	Delhi Reported Judgments

16.	EDI	Electronic Data Interchange
17.	E-Commerce	Electronic Commerce
18.	E-contracts	Electronic Contracts
19.	GDPR	General Data Protection Regulation
20.	ICGRS	Integrated Consumer Grievance Resolution System
21.	IPC	Indian Penal Code, 1860
22.	IT Act	Information Technology Act, 2000
23.	IT Rules	Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
24.	LR	Law Reporter/Law Review
25.	Ltd.	Limited
26.	Med	Mediation
27.	MeITY	Ministry of Electronics and Information Technology
28.	NCH	National Consumer Helpline
29.	NITI Aayog	National Institute for Transforming India
30.	ODR	Online Dispute Resolution
31.	OECD	Organisation for Economic Co-operation and Development

32.	Ors.	Others
33.	LLC	Limited Liability Company
34.	Ltd.	Limited
35.	p.	Page Number
36.	Prof.	Professor
37.	PDPB	Personal Data Protection Bill 2019
38.	Res	Resolution
39.	s.	Section
40.	SEBI	Securities and Exchange Board of India
41.	Supp	Supplementary
42.	S.	Section
43.	SC	Supreme Court
44.	SCC	Supreme Court Cases
45.	SCR	Supreme Court Reporter
46.	UN	United Nations
47.	UNGA	United Nations General Assembly
48.	UNGCP	United Nations Guidelines for Consumer Protection

49.	v.	Verses
50.	WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

In today's world, the electronic mode of businesses or simply E-Commerce is considered an essential arm of the business ecosystem. With the advent of the internet and posts reaching even nook and corner of our society, the ambit of E-commerce is more comprehensive than ever, and activities related to it defy the traditional structure of trading and businesses practised over the centuries. E-commerce does not have any standard definition. Instead, it is the means of the mode of business or the transactions, which include buying, selling, marketing etc., through virtual mode. Though the description above is not exhaustive, however, to elaborate, it can be said that any transaction where the sale or purchase of goods or services is made through virtual or electronic mode. The term e-commerce has a wide ambit and covers all the types of transactions made via the internet or virtual method for buying and selling products or services. However, in every trade or business with a contract, the parties look for the instruments or guarantees that safeguard their interests if any disputes arise. The same is with E-commerce contracts which are similar to the traditional agreements under the Indian Contract Act, 1872. However, due to the virtual mode of the transaction, there come severe complexities and legal challenges in case of any dispute.

Nonetheless, it can be said that our makers of the Constitution have foreseen the potential of technology and the complexities that may arise in its disputes. Thus, the available legislation has its genesis in Art. 39(c)¹ of the Directive Principles of the Constitution of India maintain that the operations of the economic system do not result

¹ The Constitution of India 1950, art. 39(c)

in the concentration of wealth and the means of production to the common detriment. It is pertinent to note that to build a consumer-friendly and vibrant business ecosystem, there have to be two requisites i.e., Guaranteed fundamental rights for the consumers and a proper and streamlined redressal procedure for a quick resolution.

In the former the sanctity of the enactment lies in its objectives of identifying consumer rights and giving speedy and efficient redressal. Even though there are particular laws and rules administering e-commerce business in India, as far as Business-to-Consumer E-trade, the dispute in an online transaction is being adjudicated according *to* the current provisions of the Consumer Protection Act 1986. Nonetheless, the existing legislation sometimes fails to address the issues and resolve the disputes because of changed conditions in the way of finishing up a deal through electronic trade and the complexities of globalisation and cross-border transactions. Further, under the second requisite proper and streamlined redressal procedure for quick resolution: As e-commerce purchases are made through virtual mode, it is tricky as the consumer cannot experience the product in hand, which is challenging as it is against his trust and confidence.

1.1. Statement Of Problem

It is no doubt that within a short period of the globalisation era, E-commerce has grown exponentially in India and the rest of the world. This shift of business from the traditional method to the virtual medium has benefitted both the consumers and the seller(s), with products being available at just a click. Though this business mode has undoubtedly helped make the business ecosystem vibrate and accessible to all, it is no less of a pandora's box full of ambiguity and grey areas. The existing statutes or the

laws, which include the civil rules and special regulations such as Information Technology Act, 2000 and Consumer Protection Laws, have been amended over time and again by the respective legislature to best serve the interest of the business ecosystem of the country. However, it is still ambiguous with certain aspects related to the disputes regarding the e-commerce transactions ranging from the jurisdictional dispute between the parties to the intermediary liability to the question of the adjudicator(s) in resolving the conflicts and many more. Thus, the author initially desires to analyse and discuss all the issues in the B2C segment of E-commerce disputes and product liability in India and comparatively analyse the current scenario in India with the commercial hubs around the world to determine the shortcomings in our current system.

Further, the author will elaborate on and discuss the existing regulatory framework in India and analyse whether India's current framework meets international standards. This will enable the author to propose the changes that direly need to cater for the parties' best interests. Meanwhile, the author would like to also address and analyse the various unresolved points of contention during the e-commerce disputes which remain unanswered today and whether Alternative Dispute Resolution can be said to be an efficacious remedy in such disputes.

1.2. Literature Review

The parties in every business or transaction look for instruments to safeguard their interests. The first and foremost of it is the jurisdiction if any dispute arises. E-commerce, as we know, has grown to such an extent that it is not wrong to contend that it has become an integral part of our lives. With most of the population using the

services of e-commerce in our country, it is pertinent to develop and discuss its intricacies to balance the rights and liberties of both parties. The Legal book “*Dimensions of Cyberspace*” by authors S.K. Verma and Raman Mittal has covered every aspect of cyberspace, including the protection of consumer rights in this era of technology. Though there are references to the jurisdictional issues in e-commerce matters, the book is silent in giving any pertinent suggestions to overcome problems. Subsequently, the author referred to “*Alternative Dispute Resolution: Negotiation & Mediation*” by M. Sridhar to gain some perspective on the importance of Alternative Dispute Resolution in resolving disputes. The book explores the basics of Alternative Dispute Resolution, how it applies to various conflicts, and how it can be considered an efficacious mechanism. However, since the author of this dissertation is trying to analyse the specifics of the E-Commerce disputes and their intricacies, thus, the book does not cover such aspects specific to E-commerce or commercial matter. Nonetheless, the book is instrumental because it lays the basics and gives readers a perspective on Alternative Dispute Resolution.

Further, disputes regarding the jurisdiction in e-commerce matters are not only confined to the domestic arena; instead, since the internet is borderless, one of the parties may be from across the border too. “*The Governance, Regulation and Powers on the Internet*” by Eric Brousseau, Meryem Marzouki and Cecile Méadel is the book that gives you a perspective regarding cross-border disputes, especially in light of e-commerce matters. This book elaborately discusses the model laws and regulations and explains how the rules have evolved. It is to be noted that the legislation can be well compared by reading this book. Even though the book is a well-written and reader-friendly piece, it lacks the answers we are seeking. Part of it is due to the lack of

development in the international arena regarding jurisdictional disputes vis-à-vis e-commerce.

Further, the author tried to refer to Malcolm N. Shaw's *'International Law'* and though the book gives an insight into the recent developments and discusses the mechanism which can be used to tackle disputes, the same does not seem to be readily applicable in the Indian context. Nonetheless, the author referred to "*Russell on Arbitration*" by David St. John Sutton, Judith Gill and Matthew Gearing to gain an insight into the cross-border disputes in light of E-commerce and its various facets. The book mentioned above is a classic legal reference work and includes a discussion and analysis of arbitrations that are domestic and international commercial matters. Though the book discusses areas like the tribunal, award, and the role of courts and to an extent touches on the aspect of jurisdiction which the author seeks to resolve in this dissertation, however, despite being an indispensable aid to the arbitrators and the academicians around the world it fails to resolve the matters like jurisdictional disputes in cross-border e-commerce disputes.

The author, throughout this paper, even referred to various articles and research papers by different Indian authors to gain perspective on the scenario in India; one of such is the "*Place of suing and cause of action in E-commerce Disputes*" by Raghav Sengupta. The article gives an overview of the current scenario and well-articulated piece, even discussing the various tests and the judgements by the Indian Courts about the jurisdictional disputes in e-commerce matters; however, towards the conclusion, even though the paper discussed ADR as an alternative mechanism but failed to discuss the same elaborately. Thus, the author referred to another article entitled "*Caring the Map for a Protected Consumer: Establishing the Need of a Separate Legislation for E-Commerce*" by Chandini Ghatak, which discussed on similar lines to that of the

previous article which the author referred; however, it substantiated the latter part of the article by arguing for separate legislation which even the author has argued in this research paper. However, this referred article failed to discuss the provision of the Indian legislation at length. Due to this, the readers might not be able to have a comparative study of international and domestic laws.

Later, the author referred to some articles, which are “*Jurisdiction and Enforcement of E-commerce and E-contract*”s by Mrinali Komandur, “*B2C E-Commerce and Consumer Protection with Special Reference to India- ADR a best possible solution*” by Nandini C.P, and a Chapter entitled “*Consumer Protection and Electronic Contract: An Urgent Need for International Protocol*” by Kanika Bhutani. All the articles above and written pieces have helped the author to formulate this research paper to the current state. Through this research paper, the author has tried to develop an article that the aforementioned has missed out in some way or the other.

1.3. Aim

The author’s purpose in this dissertation is to identify and discuss the facets of the business-to-consumer (hereinafter referred as B2C) segment of e-commerce, the disputes arising out of it, and the alternative mechanism to resolve the conflicts. To achieve those above, the author would conduct an in-depth study of the legal framework for regulating e-commerce in India and determine whether it meets the International standards. Also, the author would like to explore whether native Dispute Resolution is an alternative mechanism to resolve the disputes arising from such e-commerce transactions for efficient and speedy resolution.

1.4. Objectives

1. Analyse the existing regulatory framework and legislation for E-Commerce transactions in India and the disputes arising from it.
2. Determine the issues faced by the E-Commerce consumers in India and the remedies available to them.
3. Examine the alternative mechanism of Alternative Dispute Resolution to resolve the disputes arising from E-Commerce disputes.

1.5. Hypothesis

The present Consumer Protection Mechanisms are insufficient to cater for the needs of the consumer in E-Commerce disputes.

1.6. Research Questions

1. Whether the current legal framework in India for e-commerce disputes adequate to deal with the grievances of the consumers?
2. Whether the current regulatory mechanism apt for tackling issues such as jurisdictional disputes, choice of the adjudicator etc., in E-Commerce disputes which deals with parties across borders?
3. Does the Standard Form of Contracts create unequal bargaining power between the parties, which ultimately violates the Principles of Nature Justice?
4. Since ADR is considered effective in resolving E-Commerce disputes, whether its facet, i.e., ODR is, a viable alternative?

1.7. Research Methodology

The author followed the doctrinal method to complete this research paper, including documental research, as the e-library was the only source of information. Internet sources and secondary data sources have been used for further interpretations and analysis of the research questions.

1.8. Chapterisation

The **first chapter** introduces the concept of Consumer Protection and the disputes arising out of it with a special reference given to E-Commerce Disputes. Further, the author tried to highlight how E-Commerce disputes are complex in nature with various issues from jurisdiction to the adjudicator to adjudication of the disputes in a cross-border transaction. Lastly, the author highlighted the efficacy of the Alternative Dispute Resolution in resolving such disputes and how it can be considered in light of the current regulatory framework.

The **second chapter** discusses Consumer Protection and Product Liability in light of E-Commerce in detail and its requirement and significance in the present era where the E-Commerce marketplace is accessed by the majority of the population around the world. Further, the author tried to discuss the issues which arise in E-Commerce disputes and the protections available to safeguard the interests of the consumers. Moreover, this chapter highlights the initiatives taken by the International bodies and discusses various International Instruments and Guidelines in reference to E-Commerce and tries to analyse whether the Indian laws align with it in the latter part. The author tried to delve into various Indian legislations which are being used to resolve E-Commerce disputes and come to a conclusion whether the Indian legislations and

practices match the international standards in terms of consumer protection vis-à-vis E-Commerce.

The **third chapter** discusses the growth of E-Commerce in India and how a plethora of complex issues have arrived due to it by discussing various stages of E-Commerce transactions. Further, the issues like choosing jurisdiction to the adjudicator to the standard form of contracts have been discussed in length with an analysis of judicial precedents and doctrine that the Courts have established. This chapter intends to analyse whether the current legislative framework is adequate to cater for the complex issues of E-Commerce disputes.

The **fourth chapter** discusses the usage of Alternative Dispute Resolution in resolving E-Commerce disputes in India and discusses it in light of the existing legislative framework. The initial part of this chapter covers the initiatives taken by the Govt. by promoting various schemes and departments to resolve the disputes but the rising complexities in the E-Commerce dispute whether it is apt to tackle and protect the consumers. Further, in this chapter, the author also discusses the role of ADR in resolving jurisdictional disputes vis-à-vis E-Commerce and will analyse the prospective usage of Online Dispute Resolution and its benefits in India.

The **fifth chapter** is the conclusion, where the author summarises the arguments made throughout the dissertation and will try to put forth a few suggestions. In this dissertation, the author is focused on identifying the various facets of e-code code disputes and analysing the redressal mechanisms under the existing legal framework regulating e-commerce transactions in India. Its scope shall be limited to the study of consumer-specific laws and shall specifically deal with the measures for consumer protection under e-commerce.

It is pertinent to note that the study shall help analyse the lacunas in the existing mechanism to resolve disputes related to E-Commerce transactions in India. Further, it shall help identify the loopholes in the current legislation and dispute resolution mechanism and how the Alternative Dispute Resolution Mechanism can be efficacious in resolving E-Commerce disputes.

CHAPTER 2

INTRODUCTION TO THE CONSUMER PROTECTION AND PRODUCT LIABILITY

Electronic commerce, commonly known as E-Commerce, bloomed with the advent of globalisation and has offered a significant business possibility for India. Businesses around the globe have utilised virtual mediums to connect with their potential consumers. E-commerce takes into account technology-enabled commerce in extraordinary ways. Its ubiquitous ambit gives a dynamic and conjunctive stage to business and customers. Customers get the opportunity to browse an entire scope of products over the world, from any place at any moment. E-commerce firms are constantly developing technological advances to adjust to new and developing difficulties in the territory of virtual business. With the exceptional spread of versatile communication and the innovation of the internet in the nation, purchasers are additionally purchasing on the web in enormous numbers. The Internet has watered down the discrimination factor between the small townships and the advanced urban communities, empowering purchasers from the former to approach the high-quality branded merchandise and products available in the big cities only.

Though it is not clearly defined, E-Commerce can be said to as purchasing and selling of products or any form of services over a virtual medium or mode such as the Internet and other computer networks.² It is pertinent to note that E-commerce

² Vladimir Zwass, 'Structure and Macro - Level Impacts of Electronic Commerce: From Technological Infrastructure to Electronic Marketplace' in Kenneth E. Kendall(edn), *Emerging Information Technologies: Improving Decisions, Cooperation, and Infrastructure*, (Thousand Oaks, Sage Publications 1999)

purchases or transactions include the usage of the Internet or any other virtual medium at least once during various stages of the transaction. These transactions are often found to be unique as they are virtuality, without boundaries, and can be enormous in size and quantity. As mentioned before, E-Commerce transactions have served several benefits to humankind in their commercial and business activities enabling businesses around the world to conduct various business activities like exchanging goods and services worldwide without any boundaries. It is pertinent to note that its growth has been immense due to its ability to be accessible and responsive. Still, due to the availability of the technology and internet in India, it has reached every nook and corner of our society.

Though it is no doubt about its usefulness and advantages, especially in this era of globalisation, however, on the other hand, there are always prospective disputes that may arise out of the transactions between the parties, which may include or may be in the form of disagreements over services or a breach in data, non-performance of contractual obligations, misrepresentations or for dissatisfactory services. Moreover, in E-Commerce businesses, the sellers are often seen taking a resort to the consequences of product liability due to their non-participation in the manufacturing of the product. The issues above further lead to complexities such as jurisdiction where the dispute shall be adjudicated, choice of law, cross-jurisdictional litigation etc. In such a scenario, the current legislation does not seem to cater the required protection during e-commerce transactions which without an adequate mechanism may be catastrophic to the business ecosystem in the country.³

³ Rajiv Khare and Gargi Rajvanshi, 'E-Commerce and Consumer Protection: A Critical Analysis of Legal Regulations' (2013) 1 IJCLP <<https://clap.nls.ac.in/wp-content/uploads/2021/01/E-COMMERCE-AND-CONSUMER-PROTECTION-A-CRITICAL-ANALYSIS-OF-LEGAL-REGULATIONS.pdf>> accessed 5 July 2022

2.1. Need And Significance of Consumer Protection Laws vis-a-vis E-Commerce

Consumer protection, as stated above, does not have an exhaustive definition. However, it is an assortment of unfair trade practices which, if performed virtually, come under the sphere of e-commerce.⁴ The primary reason behind consumer protection is to safeguard the interests of the consumer and avoid any kind of exploitation of the consumers at the hands of the sellers or business entities and stop malpractices there and put some onus on the seller in the form of Product Liability. It is essential to understand that the business ecosystem in our country or any around the world is such that they are in a dominant position due to their exposure to the market on a daily basis.⁵ Thus, the state should protect the consumers through legislation and mechanism to address their grievances. Thus, a strong consumer protection law or legislation must exist in an emerging market such as India, where businesses and startups bloom. It is pertinent to note that a few fundamentals to consumer protection in any market around the world include: -

- Right to Safety
- Right to Information
- Right to Choice
- Right to be Heard.

Further, with the increasing consumer awareness around the globe, a few other rights have been recognised under the guidance of a federation called Consumer

⁴ Rafat Jan, *Consumerism And Legal Protection Of Consumers* (Deep and Deep Publications, India, 2007)

⁵ Michael T Ryan, 'Consumption' in George Ritzer (ed.) *The Blackwell Encyclopaedia of Sociology* (Blackwell Publishing 2007)

International, wherein voices of the consumer groups representing various countries around the world work; they are as follows: -

- The satisfaction of basic needs: This means the consumers should have access to the primary and essential goods and services, and such products or services shall be free from hazardous substances or effects on human life.
- Right to information: It covers the aspects that the consumers ought to have complete details of the products and services they are availing and it should be able to make an informed decision about their rights and liabilities.
- Right to Redress: It covers the aspects wherein the grievance of the consumer should be heard and receive a fair mechanism where their grievances shall be addressed.

The above rights have been discussed, and the United Nations well recognise them in their Guidelines for Consumer Protection⁶, which even endorses the Principles of Natural Justice and the maxim *Ubi jus bi remedium intermedium*. The rights mentioned above are well required to protect consumers in the e-commerce market. Further, it ensures fair trade and authentic information, which is an intrinsic part of a marketplace. The legislation protecting the rights of the consumers is not merely intended to protect the consumers but to create an ideal business ecosystem devoid of fraud and unfair practices or bestows one party with dominant power in the business. It is well known to all that the commercial setups are well organised, and they play a dominant position over consumers while conducting the company, eventually leading to exploitation of the consumer on various levels. They can be viewed as the worst

⁶ UNGA Res 39/248 (16 April 1985)

affected victims and must be protected. Hence, a consumer protection mechanism is required to uphold their rights in a business ecosystem or during such transactions.⁷

To maximise the profits and revenues of the business, the consumers are always exploited by the business entities by practising unfair trade practices which include practices such as adulteration, hoarding, black-marketing etc violating the consumer of their fundamental rights and the very essence of a consumer-centric approach. Thus, the business entities' mere intention to gain more monetary profit can lead to a catastrophic situation wherein the very essence of the agreements is violated and hampering the growth of the economy. The discussion above clearly shows how businesses trying to earn more and more profit out of every aspect often tend to deceive the consumer through unfair trade practices in this era of globalisation. On the contrary, it is pertinent to note that without consumers there would be no businesses that would subsist. Still, due to their submissive position in the transaction, they are often at a disadvantage, especially in cases of E-Commerce wherein, due to the lack of human touch majority of the consumer fell prey to the sellers.

Further, until recently, product liability was not expressed in our legislation. It was merely in the Consumer Protection Act, 2019⁸, that the provisions related to Product Liability were included. Product Liability as we discuss comes under the wide ambit of consumer protection wherein the liability of the manufacturer, seller etc is adjudicated for selling dangerous and defective products. Though in India, usually, product liability draws its reference to the Law of Torts, which since is not codified, thus, the aggrieved have to prove the following for their grievances: -

⁷ *Consumer Protection Division v Luskin's, Inc*, 100 Md. 104 Md. Ct. Spec. App. [1994]

⁸ Consumer Protection Act, 2019, s. 82

- That the seller/distributor has the duty to take care
- A breach of duty has been done
- Any loss or injury caused to the consumer due to such a breach of duty
- The consumer/aggrieved is entitled to damage.

Critics have always considered Product Liability as negligence under the Tort. However, distinctions can be made between negligence and product liability, as for the product liability claims, the aggrieved has to prove that he was injured by the defect or fault in the product which was sold to him. On the contrary, in negligence cases, the aggrieved has to prove the aforementioned elements and that the product was defective due to the manufacturing fault.⁹

The laws regarding consumer protection, including Product Liability in India, can be said to be evolving by the judicial interpretations and amendments in the legislation. However, the legislations and mechanisms regulating consumer protection disputes aim to protect consumers' rights. Still, they are often faced with various challenges that arise due to the E-Commerce business ecosystem and the complexities arising due to it. Hence, a pro-consumer resolution regime is much required in this era wherein the virtual medium of the businesses providing goods and services to the consumers has taken over the traditional market. It is not merely to fight the battle for protecting consumers' rights but to ensure a free and fair business ecosystem for future growth and accessibility.

⁹ *Jiminez v Sears Roebuck & Co.*, [1971] 4 Cal. 379

2.2. Consumer Protection Framework available for E-Commerce Disputes and Product Liability

With the world of the internet and the advancement of technology growing phenomenally, the world has come under one net. It has become closer than ever in the history of humanity. From communication to lifestyle to trade and business, in every avenue, the internet and technological advancement has played a significant role in making lives easy and accessible for all. The shift in the medium of trade and business significantly has benefited the individuals, with products being available with just a click. The virtual medium of transactions has brought a new wave wherein accessing the products and amenities and buying and selling with just a click cumulatively can be termed as-commerce. The word e-commerce does not have a standard definition but rather a common abbreviation for how the business is conducted, i.e., through the electronic medium. This rise in e-commerce transactions has many positive aspects and has helped make things accessible. Still, it has also brought in a new form of disputes, especially that of the jurisdiction, adjudicator, legislation and to what extent the seller can be liable etc., as the contracts are agreed upon over the internet in the virtual medium. The e-commerce transactions are quite different from the traditional approach and where a court ascertains whether the dispute is of the territorial, pecuniary, or subject matter jurisdiction for adjudication. However, in e-commerce transactions, due to the usage of the internet, various complexities arise and to cater for this new medium of the business ecosystem, legislatures around the world have been either trying to come up with new laws and regulations or amend the existing legislation in their country to protect the rights of the consumers.

2.2.1. International Instruments and Guidelines

If we analyse the United Nations in 1996 released the UNCITRAL Model Law on E-Commerce¹⁰, which amended the UN Guidelines for Consumer Protection¹¹ and UN Guidelines for Committee for Trade and Development¹² with the start of globalisation and to keep up with technological advancement around the world. Amid the growing E-commerce businesses worldwide, the countries have brought strong consumer protection laws to regulate the e-commerce sphere, where distinctions have not been made between the consumers of the traditional market and the E-Commerce market. Further, in the international scenario, some recognised principles¹³ for ensuring standard at the e-commerce website the following are added¹⁴: -

- Providing complete information: Consumers must be provided with complete information regarding the product or services they are availing to make an informed decision.
- Contract Formation: The contract should be free and with full consent, and the seller is reasonable for it.
- Privacy: Sellers of any kind must practice accountability, free will consent, limiting collection and use, disclosure of all the necessary information etc, in consonance with the Model Code for the Protection of Personal Information.

These principles include: -

¹⁰ UNGA Res 51/162 (30 January 1997)

¹¹ UNGA Res 39/248 (16 April 1985)

¹² WTO (WTO Committee on Trade and Development) 'Decision by the General Council on 31 January 1995' (31 January 1995) WT/L/46

¹³ Organisation for Economic Co-operation and Development (OECD) 'OECD Guidelines for Consumer Protection in Context of E-Commerce' (24 December 1960)

¹⁴ Rajiv Khare and Gargi Rajvanshi, 'E-Commerce and Consumer Protection: A Critical Analysis of Legal Regulations' (2013) 1 IJCLP <<https://clap.nls.ac.in/wp-content/uploads/2021/01/E-COMMERCE-AND-CONSUMER-PROTECTION-A-CRITICAL-ANALYSIS-OF-LEGAL-REGULATIONS.pdf>> accessed 5 July 2022

- Secured Payment: The payments have to be allowed to be done securely with the necessary support from the sellers.
- Securing personal details: There should not be any breach of data of the consumer, and sellers need to safeguard their interests.
- Redressal mechanism: The consumers need to be provided with an efficient redressal mechanism to address their grievances.
- Immunity: The consumers should be immune to any liability arising out of the transaction that is frivolous
- Unsolicited Commercial E-mail: The consumer should be immune from receiving any commercials without their consent.
- Awareness: Consumer Protection rights and liabilities need to be promoted and discussed in all quarters of society.

Since the author has given an insight into the basics of the standard practice and principle, the International instruments and conventions related to consumer protection and E-Commerce shall be discussed in the latter part.

2.2.1.1. United Nations Guidelines for Consumer Protection of 1985 read with 2016

The United Nations Guidelines for Consumer Protection¹⁵ (hereinafter referred to as UNGCP) is a set of principles adopted by the UN General Assembly in 1985 and then by the Economic and Social Council in 1999, which was later revised in 2015. The main characteristics of the Guidelines above are effective consumer protection,

¹⁵ UNGA Res 39/248 (16 April 1985)

institutions for enforcement and redress mechanisms for providing support to the member states in formulating their own policies and legislation. Consisting of 97 Articles, the Guidelines do not have any legal effect but merely provide what could be called an internationally recognised set of primary objectives, still an essential start to what may one day be international consumer law. The aim of the guidelines is as follows: -

- Protection of the consumer by providing assistance to the countries.
- To cater for the needs of the consumers through distribution and production.
- Provide goods and services to the consumers by engaging in production and distribution.
- Assisting the consumers in curtailing unfair business practices.
- Independent consumer groups are promoted.
- Promotion of international cooperation for consumer protection.
- Mass production to make avail the products at a lower price.
- The sustainable consumer is promoted.

Further, Guidelines¹⁶ above are to promote consumer protection. However, the direct reference to e-commerce can be seen in Part – I, which is under the below-mentioned Articles, which are as follows: -

- Article 63¹⁷: - Under this provision, the countries which are signatory to the Guidelines must build confidence among the consumers' by practising transparency, and consumer protection. Member States should work towards enhancing consumers to cater for the needs of the consumers.

¹⁶ UNGA Res 39/248 (16 April 1985)

¹⁷ The United Nations Guidelines for Consumer Protection 1985, art. 63

- Article 64¹⁸: - Under this provision, the countries which are signatories to the Guidelines must promote and make people aware of their consumer rights and liabilities and obligations in the e-commerce market.
- Article 65¹⁹: - Under this provision, the countries signatory to the guidelines must cooperate with the other member states and adapt their policies in consonance with the international guidelines and standards on the electronic marketplace.

2.2.1.2. UNCITRAL Model Law on Electronic Commerce, 1996

The United Nations Commission adopted the UNCITRAL Model Law on Electronic Commerce on International Trade Law²⁰ (hereinafter referred as UNCITRAL) in 1996, which can be said to be the primary international instrument catering the E-Commerce businesses in the global scenario by promoting and harmonising and unifying international trade law, which is envisaged to remove any deterrence due to any inadequacies and divergences in the law affecting business. The Model Law was prepared in response to a significant change in how communications and businesses are conducted between parties over the virtual medium to protect the consumers. It has influenced consumer protection legislation worldwide since its adoption. The Model Law was brought in to evaluate and modernise areas of information technology for the establishment of relevant legislation where none presently exists. It is pertinent to note that it has been divided into three parts, namely,

¹⁸ The United Nations Guidelines for Consumer Protection 1985, art. 64

¹⁹ The United Nations Guidelines for Consumer Protection 1985, art. 65

²⁰ UNGA Res 51/162 (30 January 1997)

- Part I deals with E-Commerce in general and seeks to establish the legitimacy of electronic "writing", "signature", and "original" including messages, data etc, at par with the traditional method of hard copies.
- Part II deals with E-Commerce with regard to the carriage of goods and contains other legislative texts, including the “*UN Conventions on Contracts for International Carriage of Goods Wholly or Partly by Sea*²¹”, and maybe the object of additional work of UNCITRAL in the future.
- Part III deals with the recommendations and interpretations of the Art. II of the Convention on the Recognition and Enforcement of Foreign Awards²².

Moreover, regarding the importance of Model Law²³, the author has summarised the features of this Model Law, which are as follows: -

- Though there is no reference to Model Law²⁴ directly, but it provides means through which procuring and producing the documents through the electronic medium that shall not be denied and have similar effect or enforceability.
- Model Law²⁵ provides mandatory conditions for legally valid e-communication. It shall be equivalent to traditional communication if the e-communications are accessible and can be used by the other party.
- Electronic documents shall be considered authentic if there is an assurance of the integrity and authenticity of the information. The same can be accessed and opened to whom it has been presented. Notification of the alternation or any modification shall be presented.

²¹ UNGA Res 2205 (XXI) (17 December 1966)

²² ‘The Final Act of the United Nations Conference on International Commercial Arbitration’ (3 May 1956) UN Doc E/CONF.26/8Rev1

²³ UNGA Res 51/162 (30 January 1997)

²⁴ *ibid*

²⁵ *ibid*

- The circumstances shall be analysed for reliability, which is essential to corroborating in the future.
- Promotes data retention in the original form for subsequent reference.

2.2.1.3. OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (“1999 Recommendation”)

In April 1998, the OECD Consumer Policy Committee began developing general guidelines to protect consumers engaged in electronic commerce without creating trade barriers and provide assistance and setup to various Government or consumer groups etc. OECD recognised that e-commerce might offer multiple opportunities for the consumers and the sellers but at the same time may arise risk for the consumers for the cross border transaction, applicable law and jurisdiction in the said context, transparent and effective consumer protection mechanism with accessibility to all and address the grievance related to cross-border disputes.

2.2.1.4. UNCITRAL Model Law on Electronic Signature, 2001 (MLEs)

This Model Law²⁶ was brought by UNCITRAL in 2001 with the primary objective to provide legitimacy to e-signature during E-Commerce transactions and provide uniformity in national laws relating to e-signature. It is pertinent to note that this Model Law merely uses the commercial activities wherein the electronic signatures

²⁶ UNGA Res 56/80 (12 December 2001) UN Doc A/56/588

are being used and does not override the effect of the rule of law intended for the consumers' protection. Though this Model Law has merely two Parts, it is a significant and welcome step in the e-commerce business ecosystem to provide legitimacy.

Further, a few of the essential features of this Model Law are: -

- Providing legitimacy to the e-signatures and endorsing their reliability and appropriateness according to the circumstances and purpose for which the data message was generated or communicated.
- It defines an electronic signature as *"data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory concerning the data message and indicate the signatory's approval of the information contained in the data message"*.²⁷ Concluding that the parties involved are both signatories in the case of E-signature.
- An electronic signature is reliably provided it meets the following four conditions: -
 - That the data is exclusive of the signatory.
 - That the e-signature is under the owners' possession and control of the signatory.
 - That the tampering of signature shall be detectable.
 - That the purpose of the signature is to provide authenticity.
- It casts a duty on the signatories to protect their e-signatures to avoid discrepancies and misuse. Further, they are bound to inform the other party in case of any such breach without delay.

²⁷ UNGA Res 56/80 (12 December 2001) UN Doc A/56/588

- It casts a duty on a relying party, i.e., the one receiving e-records, to verify their liability of an electronic signature or limitations that may be placed on a certificate as the certificate finalises the business between the parties. Failure of this will attract legal consequences.
- The users of the e-signature must obtain Electronic Signature Certificate issued by a certification service provider who shall also be dealing with other services apart from issuing certificates also providing other services related to electronic signatures. However, he must fulfil the following: -
 - To abide by the standard practices and policies.
 - Due care must be taken to ensure the accuracy of the certificates
 - To cooperate and make information accessible to the opposite parties for verification.
 - Due care must be taken to ensure the usage of trustworthy systems.

Lastly, it is essential to note that the following factors must be considered when determining the trustworthiness of the certification service providers: -

- Monetary capability and manpower of the provider
- Quality of hardware and software systems
- Techniques for production of processing certificates
- Cooperation to provide necessary details of the parties.
- Scope of the independent audits
- The mechanism by government authorities.

2.2.1.5. OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Border (2003)²⁸

It can be detrimental to undermine the E-Commerce market's power, and scope determining the integrity of both domestic and global markets resulting in significant consumer injury, which harms both business and consumers' confidence. The guidelines above have been instrumental in safeguarding the interests of the consumers against unfair practices such as fraud and misrepresentation. The growth of the Internet and its influence around the world especially in the telecom industry has benefited the consumers to access the markets across borders. They even open the doors for new opportunities to many but not without the illegal practices carried on by some. Cross-border trade faces complex challenges catered by the countries' cooperative policies to safeguard the interests of the consumers and enforcement machineries. The progress of e-commerce, in particular, will make these challenges even more important.

The domestic policies influence the standard practices for the enforcement systems very much to tackle practices such as fraudulent and deceiving commercials. Still, the same might not be able to tackle the complexities of the cross-border e-commerce disputes due to diverse practices, procedures and the veracity of the consumer protection available in such jurisdiction. Hence, these guidelines foster international cooperation against fraudulent and deceptive commercial practices to bring every country on the same platform. Moreover, to qualify for these fraud and unfair trade practices, the standard practice is that one must be affected or harmed for these to be applicable. Further, this shall lead to adjudication at the national public body,

²⁸ Organisation for Economic Co-operation and Development (OECD) 'OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders' (11 June 2003)

as determined by each member country, which shall be responsible for formulating policies to protect the consumer from unfair commercial practices of all kinds and has power to the following: -

- conduct investigation or
- to pursue enforcement proceedings or both.

It is pertinent to note that the member countries should introduce a domestic framework to act against unfair trade practices. Member countries should review their domestic frameworks to identify shortcomings so that the member countries can cooperate in the cross-border disputes with the application of laws to protect consumers against fraud and other unfair trade practices and refer to the changing domestic frameworks, including adapting the domestic laws to counter the barriers. Further, the adaptation of judicial orders and precedents by the enforcement agencies can be helpful in improving their own system and can lead to an efficient system. Further, a few of the essential points which have been discussed in the Guidelines²⁹ mentioned above are: -

- Principles for international cooperation: - The parties must cooperate in case of cross-border disputes relating the e-commerce wherein consumer rights are in question.
- Information and confidentiality: - The states, along with their enforcement agencies, should develop a mechanism to inform the consumer protection enforcement agencies where there is any wrongdoing in their jurisdiction. Further, it is expected of the countries to act and protect the consumer's rights through their enforcement agencies to share the following information with

²⁹ Organisation for Economic Co-operation and Development (OECD) 'OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders' (11 June 2003)

consumer protection enforcement agencies of the other states in case of any necessity, a few of them are as follows: -

- Public documents which are non-confidential in nature.
 - Complaints of the consumer.
 - Information regarding communication and identification.
 - Expert opinions and the records.
 - Documents consisting of third-party information and other evidence are obtained under judicial or another compulsory process.
- Authority of consumer protection enforcement agencies: - They are bestowed with appropriate authority within their jurisdiction to act effectively against fraud and unfair trade practices.
 - Redress Mechanism: - Development of the cross-border redressal mechanism is a dire need of time and cooperation between the countries to develop a prospective mechanism.
 - Private sector cooperation: Member countries are bound to cooperate with the business entities to put forth their input and help them provide consumer protection education, including their rights and liabilities.

2.2.2. Consumer Protection Legislation in India

Consumers can be considered a vital element in every business transaction which impacts a country's growth as they are the ones who make transactions, without them no business ecosystem can subsist. Any transaction made by the consumers or their availing of the services creates rights and obligations through the contract, which

is protected by the Contract Act³⁰; the Trust Act, 1882³¹ was also enacted during this period as the earliest steps the national government took in the direction of consumer protection in India. Later, post-Independence, various other acts were enacted for the protection of the consumers and to address their grievances; a few of the legislations are as follows: -

- Banking Companies Act, 1949
- Industries (Development and Regulation) Act, 1951
- Emblems and Names (Prevention and Improper Use) Act, 1950,
- Industries (Development and Regulation) Act, 1951,
- Forward Market (Regulation) Act, 1952
- Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954
- Prevention of Food Adulteration Act, 1954
- Essential Commodities Act, 1955
- Companies Act, 1956
- Indian Standards Institutions (Certification of Marks) Act, 1956
- Standards of Weight and Measures Act, 1956 (amended in 1976)
- Trade and Merchandise Act, 1958
- The Bureau of Indian Standards Act, 1986
- Monopolistic and Restrictive Trade Practices Act, 1969

Though this legislation directly does not covers the E-Commerce aspects. However, their references can protect consumer rights in breach of contract, unfair trade

³⁰ Indian Contract Act 1872

³¹ Indian Trust Act 1882

practices etc. With the developing market and new businesses starting every day, India is a lucrative market for both domestic business players and international business entities. The advent of the Internet and technology has reached every corner of the world. India is one of the developing countries and, with potential resources available, is considered a hotspot for investment and business around the globe. In India, the legislations through which e-commerce disputes are regulated are the Indian Contract Act³², Consumer Protection Act³³, Information Technology Act³⁴ and, to some extent Civil Procedure Code³⁵. Though the provisions of these Acts above draw their influence from the international instruments, it is pertinent to note that none of these legislations deals with the matters of e-commerce directly or has a direct reference to it until recently. Though the amendments have helped reduce the gap vis-à-vis e-commerce disputes and product liability, it still lacks a clear vision.

2.2.2.1. Indian Contracts Act 1872

If we analyse the scenario, the Indian Contracts Act, which regulates the contracts and agreements, be it the traditional ones or the E-contract was enacted in the pre-Independence era. However, with time and the growth of information technology internet and other virtual modes of communication was possible. Further, decades later, businesses or business entities started using the virtual way to sell their product and provide services to consumers. Thus, the Contracts Act 1872 did not reference the

³² Indian Contract Act 1872

³³ The Consumer Protection Act

³⁴ Information Technology Act 2000

³⁵ The Code of Civil Procedure 1908

virtual contract medium, which includes the telephone, telex or computer. However, circumstances have changed, and new inventions have emerged.

Further, with the advent of E-contracts are executed and distributed via a software system. In theory, they are akin to customary commercial (paper) contracts wherein the sellers have presented their products, prices and conditions after examining their options, buyers negotiate prices and terms, order and make payments. The seller will deliver products bought by the consumers. However, because it differs from traditional commerce, e-commerce poses interesting technical and legal challenges. It can be defined as an electronic contract, also popularly known as an e-contract, mainly formed and executed by two or more individuals using electronic means, such as e-mail. E-contracts can be broadly categorised into clickwrap contracts, Shrink wrap contracts, and Browse arrangements.

- Click-wrap Contracts: - A clickwrap agreement is central to the software package installation process. It is also known as a "click" agreement or a click-in license. Such arrangements allow a buyer to express their consent to the terms of a contract by clicking on an acceptance button that appears when the buyer obtains or installs the product. A buyer cannot start using the software until he clicks the button to accept the terms and conditions of the agreement. Such an agreement is called a click-wrap agreement, wherein the consumers must take action on the agreement terms. Consumers can assent to the contract without reading it to use the product. However, consumers do not have much power in such an agreement to negotiate, leading them to agree on their requirement. Though most of the courts find these agreements enforceable, such practice

raises serious concerns as the consumers agree without users reading or understanding contract terms when manifesting assent.

- Click-wrap agreements can be of the following types:
 - Type and click where the user should type "I Accept" or other words you specify in an on-screen box, then click a "Send" button or the like. This proves acceptance of the terms of the contract. A user cannot proceed to download or view destination information without following these steps.
 - Icon Clicking where the user must click on the agreed terms and conditions, however, there is always an option for cancelling such an agreement.
- Shrink-wrap Contracts: - Shrink-Wrap License Agreements have been an essential part of software connections and developed as a feature of the computer market by the early 1980s³⁶. Shrink wrap contracts are license agreements or other relations and situations which can only be read and acknowledged by the purchaser after opening the product. Thus, the Shrink-Wrap Agreements in a laymen's language means an agreement printed on a box in which software is sold, and the opening of the box means the software is used.
- Browse wrap: - It is intended to bind the parties contractually through the website. They include the use policy and terms of use of websites.
- Electronic Data Interchange or (EDI): - These agreements are used in commercial transactions that allow the transmission of data from one computer

³⁶ David Einhorn, *The Enforceability of Tear-Me-Open Software License Agreement*, (1985, Journal of the Patent and Trademark Office Society)

to another so that every transaction in the commerce round (for example, from receiving an order from a foreign buyer to preparation and export of presentations and other official documents, possibly leading to the shipment of goods) can be handled virtually without documentation. There are no solid legal examples of the legitimacy of crucial shrinking and exchange agreements in India. Similarly, Click Wrap contracts are also valid in the United States.³⁷ The New Jersey Appellate Division considered the actor to sign a valid and binding agreement by clicking on the "Accept" option, and the first being unavoidable by the resulting contract.

2.2.2.1.1. Validity of E-contracts in India

Supreme Court of India in *Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd.*,³⁸ held that thate-mail conversations among parties relative to conjoint compulsions constitute a contract, which means the essential ingredients of a valid contract, i.e. communication of the proposals, acceptance of bids, revocation of proposals etc. are recognised both by the IT Act 2000 and Evidence Act, 1872 and these this communication articulated via electronic medium. The contract law of India does not prohibit the applicability of electronic agreements if such agreements provide all the vital components of a legal agreement. Alongside the Contract Act 1872 honours the formal agreements and all oral contracts until it is done with the free consent of the parties involved to bargain, take legal concern and by a lawful object provided the same should not explicitly be stated to be cancelled. Free support is one of the utmost

³⁷ *Hotmail Corporation v Van Money Pie Inc.*, [1998] WL 388389

³⁸ *Trimex International Fze v Vedanta Aluminium Limited India*, [2010] 3 SCC 1

essential ingredients of a legal agreement. However, there is no room for electronic contract negotiations; it is typically a "take or leaves" transaction.

In some instances, the other party of the agreement stood in an unfair dominant position due to using the standard form of contracts. The Indian courts have found that such electronic deals are unreasonable, irrational, unjust, and unnecessary. One such case is *LIC India v. Consumer Education and Research Centre*³⁹. The Supreme Court held that,

In dotted line contracts, there would be no occasion for a weaker party to bargain to assume equal bargaining power. He has to accept or leave the service or goods in terms of the dotted line contract. His option would be to get the unreasonable or unfair terms or forgo the service forever.

The standard contract form is prevalent in today's complex assembly of huge institutes with huge infrastructural connotations. Standard terms and conditions are restricted to contracts in merchantable businesses, indentures with civic establishments, global companies, banking and protection trade, etc. The standard form of contracts has become a common practice. They establish almost in each split of commerce and occupation, customer deals, service, hire- purchase, assurance, management, any form of travel or the carrier facilities or while taking software agreements from the internet etc. The dominance in the standard for traditional theory reduces the fairness and transparency in practice. A standard form of contract is a pre-prepared agreement used

³⁹ *LIC India v Consumer Education and Research Centre* 1995 (5) SCC 482.

by the sellers it gives them unequal power considering the consumer's position such agreement wherein they merely have little room in negotiation.

Amongst various standard form contracts, most of the time, the contracts are one-sided, bestowing uneven power to one party than another. Since they are already in practice over the period of time, these contracts have found their legitimacy, and the consumers, most of the time cannot negotiate which ultimately leads to an uneven legal document. It is merely a pre-printed contract with pre-designed terms and conditions without any flexibility. These terms and conditions are unilaterally prepared by one party and offered to the other on a take, without giving any opportunity to respond. the party has two choices they are as follows: -

- either to accept or reject but no right to bargain for any change
- the party has to fill the essential details in a blank space and make his sign an expression of acceptance.

Some services-providers seek to exclude their prospective legal liability by inserting exclusionary clauses in the standard form of contract offered. Thus, a situation of an unequal balance of power arises due to this practice.⁴⁰ It is pertinent to note that even the Law Commission of India, after times and again pointed pointing out this anomaly, in its 103rd Report on *Unfair Contract Terms*, instead out the Inadequacy of the Contract Act to meet the situation, it states,

The entire basis of the contract that parties with equal bargaining powers freely and voluntarily entered into it ultimately falls to the ground when it is

⁴⁰ Law Commission of India, Report No.199 of the Law Commission on 'Unfair (Procedural and Substantive) Terms in Contracts (Law Com No. 199, 2006)

practically impossible for one of the parties not to accept the offered term. To render freedom of contract a reality and particularly of one whose bargaining power is less than that of the other party to the agreement, various measures like labour legislation, money-lending laws and rent Acts have been enacted. However, the Indian Contract Act lacks a general provision under which courts can grant relief to the other party. Recommendation of the Commission at Chapter 6, Page 9: The Commission felt that the answer to this problem would be to enact a provision in the Indian Contract Act, 1872, which would combine the advantages of the (English) Unfair Contract Terms Act, 1872 and Section 2.302 of the Uniform Commercial Code of the United States.⁴¹

2.2.2.2. The Consumer Protection Act, 1986 and amendment of 2019

The primary legislation which deals with E-Commerce disputes in India is the Consumer Protection Act, 2019, which is an amendment to the original Act of 1986⁴² to provide for better protection of the interests of consumers. Further, the purpose of the provisions is to establish a redressal mechanism to address the consumers' grievances. On the other hand, due to the blooming of the internet and reaching every corner of the country, E-Commerce transactions have been challenging and complex due to the violation of contracts, privacy and security of consumers', disputes related to jurisdiction, seat or practice of a standard form of contract, jurisdictional issue etc.

⁴¹ Law Commission of India, Report No.103 of the Law Commission on 'Unfair Terms in Contracts' (Law Com No. 103, 1984)

⁴² The Consumer Protection Act 1986

Although the Consumer Protection Act of 1986 was enacted to “*provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers’ disputes and matters connected in addition to that*” yet many of the critics pointed out that it lacks the consumer protection to an individual in commercial transactions. However, discussing the term ‘consumer’ is pertinent before going deep into the legislation. According to Black Law Dictionary,

A consumer consumes. Individuals purchase, use, maintain and dispose of products and services. Users of the final product. A member of that broad class of people affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted.

Further, under provisions of the Indian Consumer Protection Act, 1986, i.e., under Section 2(1)(d)⁴³, it is defined as: -

“any person who buys any goods for consideration but does not include a person who obtains such goods for resale or any commercial purpose; or Hires or avails of any services for a consideration when such services are availed of with the approval of the first-mentioned person but do not include a person who benefits from such services for any commercial purposes”.

Over the years, even the Courts have discussed the term and held it as a comprehensive expression.⁴⁴ Further, it extends from a person who purchases any

⁴³ Consumer Protection Act 1986, s. 2(1)(d)

⁴⁴ *Lucknow Development Authority v M.K. Gupta*, [1994] 1 SCC 243

product or service.⁴⁵ The Act endorses no less broad definition, and it is divided into two parts which are as follows: -

- goods
- the other with services.

The primary act of the parties is to declare the meaning of goods and services through broad expressions. The use of the inclusive clause further enlarges their ambit. For instance, it is not merely the purchaser of goods or services but rather the services of beneficiaries who avail those. Additionally, in *Morgan Stanley Mutual Fund v. Kartick Das*⁴⁶, the Supreme Court stated the meaning of the expression ‘consumer’ in the following words:

“The consumer, as the term implies, is one who consumes. As per the definition, the consumer is the one who purchases goods for private use or consumption. The meaning of the word ‘consumer’ is broadly stated in the description to include anyone who consumes goods or services at the end of the production chain. The comprehensive purpose aims at covering every man who pays money as the price or cost of goods and services. The consumer deserves to get what he pays for inaccurate quantity and authentic quality. In every society, the consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacturer, producer, supplier, wholesaler and retailer.”

⁴⁵ *Lucknow Development Authority v M.K. Gupta*, [1994] 1 SCC 243

⁴⁶ *Morgan Stanley Mutual Fund v Kartick Das*, [1994] 4 SCC 225

In another judgment, the Court held that “*The definition of the consumer ‘ under the Act also includes the beneficiary for whose benefit the services are hired or availed of*”⁴⁷ excluding the person whose mere intention to buy the good and services is to resale or any other commercial purpose. Though it has not been defined in even the Consumer Protection Act 1986, however, the same has been determined before the Consumer Forums in numerous cases and even contradictions can also be seen. In *Smt. Pushpa Meena’s case*⁴⁸, the Court opined that the jeep used as a taxi for commercial benefit does not come under the preview consumer law but it seems to contradict the Court's view in the case of *M/s. Cheema Engineering Services*⁴⁹, where the Court opined that if the person is doing something to earn livelihood, the person can be considered as a consumer, and that shall come under the ambit of consumer laws. It is pertinent to note that the nature of the business and essentials is an important factor to consider regarding whether something will fall under the consumer laws or not.⁵⁰ However, the stand of the Court does not seem to be resolved and firm considering the continuous string of contradictory judgements where the definition of the consumer law has been reiterated as wide in its ambit⁵¹ but does not include the service providers such as businessmen doing large scale business is not considered as a consumer.⁵²

Further, a similar view can be seen in various other cases wherein the parties are not considered as the consumer for merely not paying tax.⁵³ The Courts' stand on the above-discussed cases seems to defeat the very essence of the consumer laws in the view that a purchase has been made by the consumer, and even after fulfilling the

⁴⁷ *Regional Provident Fund Commissioner v Shiv Kumar Joshi*, [2000] 1 SCC 98

⁴⁸ *Pushpa Meena v Shah Enterprises*, [1991] CPR 229

⁴⁹ *M/S Cheema Engineering Services v Rajan Singh*, [1996] 2 CPR 11 (NC)

⁵⁰ *M/S Abhinav Publishing India Pvt. Ltd. v M/s Graphics & Print*, [1995] 2 CPR 6 (NC)

⁵¹ *M/S Spring Meadows Hospital v Harjal Ahluwalia*, AIR [1998] SC 1801

⁵² *Vijay Narayan Aggarwal v M/s Chowgule Industries Ltd.*, [1993] 2 CPJ 231 (NC)

⁵³ *Mayor, Calcutta Municipal Corporation v Tarapada Chatterjee*, [1994] 1 CPR 87 (NC)

essentials of the availing goods and services, they are not considered as consumers. It is a way goes against the fundamentals of consumer protection legislation merely due to the condition that the consumer used the product to earn a living. Also, the Courts tried to define the unfair trade practices which do not relate to purchasing goods and availing services.⁵⁴ However, the contrary was opined by the Court wherein it was held that the unfair trade practices related to merely goods.⁵⁵ Nonetheless, the role of the judiciary in developing jurisprudence is commendable and laudable, which can be seen wherein the Court held that admitting students in quota without approval by the concerned authorities amounts to unfair trade practices.⁵⁶

Though the legislation serves its purpose, with the growing marketplace and development of the e-commerce arena, various complexities have come to light. It is pertinent to mention here that where the complainant's case involves a determination of complex questions of law and facts which cannot be satisfactorily determined by the Consumer Forum in the time frame provided under the Act, it would be better for the complainant to seek redress of his grievances in a civil court. The Court has reiterated in *Pannalal v. Bank of India*⁵⁷, that the Act does not contemplate the determination of complicated issues involving the taking of elaborate evidence as it was done by the Consumer Redressal Forums. Thus, it is high time we analyse the Consumer Protection Act on account of rising E-Commerce disputes in the country; the following are the ground: -

⁵⁴ *Mantora Mantra Oil Products (P) Ltd. v Oriental Insurance Co. Ltd.*, [1991] (1) CPJ 326 (N.C)

⁵⁵ *Mukesh Jain v V.K. Gupta*, [1992] 2 CPJ 493 (NC)

⁵⁶ *Akhil Bhartiya Grahak Panchayat v Secretary Sbarda Bhawan Education Society*, [1994] 2 CPJ 283 (NC)

⁵⁷ *Pannalal v Bank of India*, [1992] 1 CPR 34 (NC)

- Failure to address and satisfy the consumers' needs by addressing their grievances through an efficient machine is the essence of consumer protection in the current age of e-commerce.
- The objective of the Consumer Protection legislation in India is the promotion and protection of the consumers' rights, which seems to be contrary to the international practice that provides fundamental consumer rights. Though the difference seems to be very thin, the approach is way different as the primary legislation dealing with consumer protection will merely deal with the mechanism to promote and protect the rights of the consumers rather than providing them with fundamental rights.
- The existing Consumer Protection Act fails to create and give effect to rights and liabilities but merely provides the procedure for enforcing consumer rights. It is pertinent to note that Act does not give any details regarding the practices that should be followed for consumer protection. Hence, it can be inferred that the consumer's rights should be created, provided and recognised. However, the Consumer Protection Act 1986 and the amendment of 2019 fail as they merely talk about the enforcement and liabilities of the businesses. Further, even though the latest amendment of 2019, the legislature tried to bring in robust legislation but there are certain drawbacks which are as follows: -
 - Lack of eagerness among parties to refer to the consumer court and their reports, orders and summons resulting in pending grievances and outcomes.
 - Non-compliance with the verdicts results in a delay in the execution of the order. Thus, we must come up with alternatives such as prospective usage of Alternative Dispute Resolution.

- With the inability of the Consumer Courts to provide justice without bias at times and to cater to such events, we need to limit the human touch and analyse to what extent the Online Dispute Resolution can be used.
- The lack of provisions specific to E-Commerce disputes has a variety of conflicts, including the various facets of the E-Commerce disputes involving jurisdictional disputes to adjudication etc.

2.2.2.3. Information Technology Act and E-Commerce

As we have discussed above, E-Commerce disputes arise out of transactions carried out through electronic mediums or virtually. It is essential to analyse India's Information Technology Act 2000 under its respective legal provisions. It is pertinent to note that the Information Technology Act, 2000 (hereafter referred to as IT Act, 2000) was enacted to facilitate the conduct of businesses taking place virtually with the usage of technology and addressing and encountering all the challenges causing hurdles in such transactions, however, the Act does not provide or addresses the issues relating to the E-Commerce transactions directly but rather only by inference. Further, the Act fails to protect the consumers from unfair marketing practices, which include - lack of disclosure of policies related to refund, cancellation, warranty etc., enforceability, delivery practices, fraud and misrepresentation of facts etc.

Though certain issues were tried to be addressed in the Information Technology Act, 2000, the latest amendments like Section 6A⁵⁸ of the Act envisage efficient service.

⁵⁸ Information Technology Act 2000, s. 6A

Further, Section 8⁵⁹ of the Act allows for the publication of provisions to make people aware of the rights and liabilities. However, it fails to put scrutiny upon the businesses regarding their confirmation and cancellation policies. Another issue is with Section 10A⁶⁰ of the Act though it provides the validity of contracts⁶¹ but lacks in providing contractual terms needed for the protection of the consumer. Still, it does not states the required terms of a contract for the e-commerce agreements. Whereas, secured transactions are promoted in Chapter V⁶² of the IT (Amendment) Act, 2008. Still, it does not discuss the remedy if a person suffers the consequences of unsecured transactions and payment mechanisms.

It is pertinent to note there is no direct mention of E-Commerce or its entities under the IT Act 2000 to provide safety for the consumers during their virtual transaction. Though the privacy provisions related to online transactions, such as Section 72 and 72A of the IT Act, 2000, its applicability is limited as one has to prove wrongful loss or wrongful gain.⁶³ The Apex Court in one of the cases decided that “*the quantum of damages for breach of contract in cases where neither the parties nor the statute has not quantified the loss, the breach of contract may result in injustice to the actual victim of the breach of contract. In IT Act, 2000 also, Section 72A⁶⁴ has not decided the limit of penalty to be imposed to the nonpayer*”.

Although for E-Commerce matters, both the IT Act 2000 and the Consumer Protection Act need synergy to cater to the consumers' needs and protect their rights.

⁵⁹ Information Technology Act 2000, s. 8

⁶⁰ Information Technology Act 2000, s. 10A

⁶¹ *D.S. Nakara v Union of India*, AIR [1983] SC 130

⁶² Information Technology Act 2000, ch. V

⁶³ Rajiv Khare and Gargi Rajvanshi, ‘E-Commerce and Consumer Protection: A Critical Analysis of Legal Regulations’ (2013) 1 IJCLP <<https://clap.nls.ac.in/wp-content/uploads/2021/01/E-COMMERCE-AND-CONSUMER-PROTECTION-A-CRITICAL-ANALYSIS-OF-LEGAL-REGULATIONS.pdf>> accessed 5 July 2022

⁶⁴ Information Technology Act 2000, s. 72A

However, the author finds it missing. The same leads to a scenario wherein it leads to confusion or mayhem among the consumers. The author has tried to summarise the loopholes in the following points: -

- Non-disclosure of the sellers' identity: - Under the IT Act, the seller is not obliged by the Act to disclose their identity to the consumers, merely under Sec. 66D, there is the punishment if the seller cheats the consumer.
- IT Act, 2000 has no provision to mention the E-Commerce entities to provide information such as appearance, quantitative and qualitative information of goods and services purchased. Rather remedies are merely available under the Contracts Act, 1872.
- Lack of flexibility to negotiate the contracts as most businesses follow the standard contract warranty, sometimes detrimental to consumer protection.
- IT Act, 2000 does not discuss the compensation in cases of damages caused, where the insecure payment methods suffer injuries.
- Due to no direct reference to E-Commerce in the IT Act, 2000 to safeguard the consumer's interests in case of any data or information leak during the E-Commerce transaction. Though the guidelines are there that are to be followed but no penal provision is available for the breach of privacy or the non-compliance with these guidelines.
- IT Act, 2000 under Sec. 48⁶⁵ has provided for the Cyber Appellate Tribunal to adjudicate the matters arising due to violating the IT Act 2000. However, no reference to consumer protection or redressal is made. Rather the consumers have to approach the consumer forums for their grievances.

⁶⁵ Information Technology Act 2000, s. 48

- There is no specific provision to restrict the products selling at different prices, due to which the E-Commerce companies gain much profit by exploiting the consumers economically.

2.2.2.4. Information Technology (Intermediaries Guidelines) Rules, 2011 & the Liability of Intermediaries in India

The entity that contacts the service provider via the platform in online intermediary services is generally a consumer. It is pertinent to note that a person who acts as a link between people to try and bring about an agreement is an intermediary. They act as a bridge between the parties on the Internet by providing a host of services for consumers' accessibility. The relationship between the service provider and the intermediary is an agency contract. The service provider is the principal, and the intermediary is the agent. However, generally speaking, the agent is responsible for its principal. A legal relationship comes into existence once a client of a final service uses an intermediary to conclude such a contract. Examples in the form of hypothetical scenarios: -

- The intermediary offers services that the provider has indicated (in quantity, price, and characteristics). , Through its platform, it contacts the two parties of the deal, receiving a fee from the provider without asking the consumer any cost.
- The intermediary informs the consumer that he will have to pay a fee for the service rendered by the platform.

- The intermediary limits itself in providing commercial information concerning the service provider but does not, generally, make it possible for a contract to be concluded between the latter and the consumer.

Section 79⁶⁶ of the Information Technology Act, 2000 exonerates the intermediaries in certain instances. It states that “*intermediaries will not be liable for any third-party information, data or communication link made available by them*”. It is baffling to say that the Act extends safe harbour protection where the intermediary acts as a bridge between the parties and is not involved in the creation or modification of the data or information even though under the product liability, they should be held accountable. The provision gives unwarranted protection to the intermediary allowing it to remove any incriminating content on its computer resource on being notified by the appropriate Government or its agency or upon receiving actual knowledge.⁶⁷

Thus, from the above discussion, it is clear that though there are provisions in both legislation to address the grievances of the consumers, but it still lacks at times due to the growing complexities in the E-Commerce marketplace. Thus, tailor-made consumer protection legislation is much needed to address E-Commerce disputes' complexities.

⁶⁶ Information Technology Act 2000, s. 79

⁶⁷ Correspondent, 'Players Involved in Cybercrime & Role of Intermediaries' (*ManagingIP*, 10 May 2019) < <https://www.managingip.com/article/2a5brqcfb83rfpjrfxh4w/players-involved-in-cybercrime-role-of-intermediaries>> accessed 1 July 2022

CHAPTER 3

AN ANALYSIS OF THE E-COMMERCE SCENARIO IN INDIA: ISSUES AND CHALLENGES

The phenomenon of E-Commerce is as such that it has become a part of our daily lives. It is a process which includes the buying and selling of goods and services, by electronic means. However, the Asia Pacific Economic Cooperation has adopted a more comprehensive, more expansive broader definition of e-commerce that includes usage of e-communication and technology for all business activity and the same was elaborated a bit by the United Nations Economic and Social Commission for Asia and the Pacific as the process of using electronic methods and procedures to conduct all forms of business activity. Notably, the development of information and communication technology in the last decade has significantly affected the people's lives in a positive way, with the whole global marketplace available to them on their palms. Further, the UNGA, in its resolution⁶⁸, considered that e-commerce must include portal virtual technology devices, including phones as consumers commonly use them worldwide to provide opportunities and empower all in terms of economy and exponential network technologies growth, with a computer, mobile phones and connected devices that promote consumer welfare.

The word e-commerce does not have a standard definition but rather a common abbreviation. It is precise that the phrase e-commerce does not have a legal definition but rather a standard abbreviation used for how the business is being conducted, i.e., through the electronic medium. This rise in e-commerce transactions no doubt has many

⁶⁸ UNGA Res 70/186 (22 December 2015)

positive aspects and has helped make things accessible to all, but it has also brought in a new form of dispute which shall be discussed by the author, which has been divided into three parts: -

- **Pre Purchase Part:** - It includes the stage wherein the consumers often face difficulty due to the unfair practices practised by the sellers like concealing the material facts, information, and nature of product or services etc. Further, the sellers via E-Commerce often try to take resort to the excuse of them being merely a seller, which is not the case as there has to be accountability under product liability from which they can be exonerated.
- **Purchase Part:** - It includes the stage wherein the consumers are provided with sub-par products and services by unfair trade practices and try to avoid any accountability by the standard contract form wherein the sellers have unequal bargaining power.
- **Post Purchase Part:** - It includes the stages wherein the consumers have grievances related to the E-Commerce products and services they have availed, and they are not satisfied with them they have benefited and are not happy.

3.1. Pre Purchase Part

Pre Purchase Part is the stage wherein the consumers look at and scrutinise the goods and services, and especially when one is availing of such services through the virtual medium it is difficult to identify the location of the origin of the product or feel the product like in the traditional way of purchasing and availing services. There might be various other aspects like the price of the product may be different on different

websites to differences in the consumer laws from where the seller is selling the goods and services raising the aspects of unfair trade practices and product liability etc on the part of the seller. Due to such practices, the vulnerability of the consumer can be observed during the majority of the time leading to the lack of trust between the parties. Thus, the older generation is often found to be reluctant to use e-commerce marketplaces as they are adaptive to the habit to make informed choices.

Further, their practice of providing withholding pertinent information, untruthful information, hardcore marketing, etc hamper the reputation of the e-commerce marketplace. It is relevant to note that all the practices above are done merely to gain monetary advantage and popularity among the consumers.

3.2. Purchase Part

The most common problem consumers face during this stage is Unfair Contract Terms due to the practice of a standard form of contracts. With the availing of the products and services from the E-Commerce companies or the sellers, disputes at times are inevitable due to the nature of the transactions. However, with such a high potential for conflict, the parties should have a say over the contracts and dispute resolution process. Consumers are subject to considerable protection when entering into contracts with companies. The law automatically assumes that companies and consumers have unequal negotiating power. When consumers conclude contracts with companies that use standard form conditions, such as e-commerce companies, the customer has not had the opportunity to negotiate those conditions, and there is a risk that the conditions are unenforceable. In most contracts these days, insertion Arbitral Clause has become routine and is considered a part of the standard form of contract; insertion Arbitral

Clause has become common and is regarded as a part of the traditional legal contract form. Mainly these types of contract arrangements wherein the arbitral clause are there is pre-drafted and have a standard form which is very hard to negotiate. Thus, even though the consumer agrees upon it due to their requirement of the products and services, it is sort of a one-way negotiation or contract that has been agreed upon. Further, such one-way negotiations wherein contract agreements are agreed upon are considered unfair and unreasonable⁶⁹ as it gives one party an upper hand and acts as a dominating party during the negotiations.

Over time, the Courts in India have a significant role in developing jurisprudence and giving direction to righteous ways concerning such arbitral clauses in the standard form of contracts. It is evident from the judicial precedents over the years that the Courts have endorsed mutuality⁷⁰ between the parties and held that any deprivation of rights under the contract through any mechanism is void and unenforceable.⁷¹ The Delhi High Court reiterated the same stand in *Lucent Technology v. ICICI Bank*⁷². It is pertinent to note that the exclusivity of the parties to determine the adjudicator shall have an asymmetric outcome to dispute, which has also been opined in *Bharat Broadband Network's case* as 'it violates Section 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996 and further held such as void ab initio.'⁷³

Further, with the practice of the standard form of contract, many aspects of disputes arise in the following stages of the dispute resolution, wherein the parties

⁶⁹ *Central Inland Water Transport v Brojo Nath*, [1986] 3 SCC 156

⁷⁰ *Bhartia Cutler Hammer Ltd. v AVN Tubes Ltd.*, [1995] 33 DRJ 672

⁷¹ *Emmsons International Ltd. v Metal Distributors*, [2005] 80 DRJ 256

⁷² *Lucent Technology v ICICI Bank*, [2009] SCC OnLine Del 3213

⁷³ *Bharat Broadband Network v United Telecoms Ltd.*, [2019] 5 SCC 755

mutually agree to undergo arbitration proceedings. S. 11(2)⁷⁴ allows both the parties to adopt any procedure for the arbitrator's appointment. Apart from general contracts, where the E-Commerce companies draft the standard form of contracts or the seller's E-Commerce companies or the sellers recruit the common form of contracts, the customer as the other party has no say in preparing the terms of an arbitral clause in such agreements. Therefore, in most cases, the arbitral clause stipulates that “the arbitrator shall be appointed at the sole discretion of the ‘Seller’ if any dispute arises between the parties, and accordingly, the matter shall be referred to arbitration.” It is pertinent to note that there is a difference between “unilateral appointment of the arbitrator” and “referring the matter to arbitration unilaterally by the privileged party”. Where an arbitration agreement allows only one party to appoint an arbitrator, such a case is called the unilateral appointment of the arbitrator. PC Markanda writes that if only one party has the right to refer the matter to arbitration, an agreement would be valid.⁷⁵ In such a case, the absence of mutuality cannot be argued.⁷⁶ However, if there is no mutuality, then it is a case of unilateral reference, and such an agreement cannot be enforced in a court of law.⁷⁷

Further, in *TRF Eastman’s case*⁷⁸, the Supreme Court ruled against the unilateral appointment of arbitrators. However, this case opened floodgates of multiple interpretations. Because of this in *DK Gupta’s case*⁷⁹ and *Bhayana Builders’ Case*⁸⁰, the Delhi High Court distinguished *TRF’s case*⁸¹ on facts and held otherwise. The Delhi

⁷⁴ Arbitration and Conciliation Act, 1996

⁷⁵ P.C Markanda, *Law Relating to Arbitration and Conciliation*, (8th edn, Lexis Nexis Butterworths Wadhwa)

⁷⁶ *New India Assurance Co. v Central Bank of India*, [1984] Arb LR 101

⁷⁷ *A.VN.Tubes Ltd. v Bhartia Cutler-Hammer Ltd.*, [1992] 2 Arb LR 8

⁷⁸ *TRF Limited v Energo Engineering Projects Ltd.*, [2017] 8 SCC 377

⁷⁹ *D.K. Gupta v Renu Munjal*, OMP(T)(COMM) 106/[2017]

⁸⁰ *Bhayana Builders Pvt. v Oriental Structural Engineers Pvt. Ltd.*, OMP(T)(COMM) 101/[2017]

⁸¹ *TRF Limited v Energo Engineering Projects Ltd.*, [2017] 8 SCC 377

High Court gave a strict interpretation of S. 11(2)⁸² and observed that the parties are free to adopt any mechanism for the arbitrator's appointment. This means that parties can mutually agree that the unilateral appointment of an arbitrator can be made. Because of these controversies, the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*⁸³ removed the ambiguity created by the *TRF case*⁸⁴ and found that unilateral appointment was not allowed. Though the legality of such a standard form of contract has not been questioned per se, however, the contents or the essence of such agreements where it is one-sided or has unilateral powers conferred upon one party if analysed and interpreted through the judicial precedents can be said to miss the essence of the very purpose of the contracts or agreements. The mutual understanding of a contract is a must and providing equal opportunity to resolve disputes or any matter in a contract is part of the Mutuality Doctrine, which even the Delhi High Court has discussed in one of the cases above⁸⁵. The Court in foreign countries such as the USA has already upheld the Mutuality Doctrine, but even though the Delhi High Court has endorsed the same but the Apex Court is yet to interpret the same species, thus currently as the standard form of contract is recognised under the Indian Contract Act, 1872 the practice of insertion of arbitral clause can be said to be valid. However, the author feels that the unequal powers conferred through such contracts should be avoided to safeguard such agreements' very essence.

⁸² Arbitration and Conciliation Act, 1996

⁸³ *Eastman Architects DPC & Anr. v HSCC (India) Ltd.*, [2019] 9 SCC Online SC 1517.

⁸⁴ *TRF Limited v Energo Engineering Projects Ltd.*, [2017] 8 SCC 377

⁸⁵ *New India Assurance Co. v Central Bank of India*, [1984] Arb LR 101

3.3. Post Purchase Part

It is pertinent to note that the post-purchase phase includes liability and arrangements for the goods the consumers have already purchased or the services they have availed. Moreover, if the product is not received there are provisions which allow the return of goods and refunds and in case delivered they are provided with a subpar product or service which is unsatisfactory or materially different from the goods ordered. During this phase, often the consumers face difficulty in reaching out to the seller or the intermediaries due to various reasons. Moreover, a cooling-off period during e-commerce purchases is needed. The Consumer Protection Act, 1986 as amended in 2019 provides a three tier Redressal Machinery approach to resolving consumer disputes with pecuniary and territorial jurisdiction. Still, it is pertinent to note that the product liability has merely been added recently and the same has a contradictory view if we consider it from the aspect of the Information Technology Act, 2000⁸⁶, as according to the same Act, the intermediary acts as a bridge between both parties and have no part to play in creation or alternative of the data or information.⁸⁷

Further, it is pertinent to note that the courts in India consider e-consumers disputes as everyday online consumer disputes and have failed to live up to the present scenario. According to Civil Procedure Code, 1908, suits other than immovable property should be instituted where the defendant resides, or cause of action arose. Also, the Consumer Protection Act, 1986 states that the District Forum has jurisdiction to try suits where the defendant voluntarily lives, carries on business, has a branch office, or personally works for gains or where the cause of action wholly or partly arises. Further, it states that the suit should be filed within the local limits of the concerned

⁸⁶ Information Technology Act 2000, s. 79

⁸⁷ *ibid*

District Forum and thus, it raises a question of law regarding the position and power of the Consumer Court in cross-border disputes that whether the suit filed by the consumer where the cause of action wholly or partly arises is maintainable or not. Section 75⁸⁸ of I.T Act, 2000 prescribes offences or contraventions committed outside India by any person irrespective of his nationality to which it can be said that the legislations are quite contradictory to one another. Further, this provision merely applies to the offences committed in a foreign land involving a computer, computer system or computer network located in India. Interestingly, this section applies to those offences and violations listed under the I.T Act, 2000, as the same is purely industry-based and does not address consumer grievances.

In the above context, it is pertinent to note that developed countries like the United States of America and the United Kingdom have joined other developing countries like China, Chile, etc. They have already formed an International Network called International Consumer Protection Network (ICPEN) to gather and share cross-border complaints and help consumers resolve their issues complaint complaints through arbitration. When we look at the agreement of some online shopping websites, they mentioned that in case of a dispute, only arbitration is available, and Court review is limited to the arbitral award.

Further, in their agreements, some international online websites specifically stated that they are subjected only to the law of their country. However, they have business in India, and these agreements have a prior notification to e-consumers. Therefore in such a situation, the genuine plea of e-consumer remains unheard or unattended due to the want of an appropriate forum and mechanism. Another aspect of

⁸⁸ Information Technology Act 2000, s. 75

this post-purchase clause which states it is subject to change without and is that of the Cross Border E-Commerce disputes wherein, due to the following reasons often disputes become more complex,

- Unfamiliar language due to differences in the location or the jurisdiction.
- Uncertainty regarding the product as the purchase has been done through virtual medium and lacks the physical touch.
- There might be costs which may be levied on the consumer in the form of customs duties and currency conversion, and shipping or delivery.
- The product or the service availed may be different from the standard followed or practice followed in the consumer's jurisdiction.
- Due to the different geographical locations, there is a lack of clarity about the protection afforded by the seller's jurisdiction, the remedies available in the event of disputes and the enforcement of decisions in favour of the consumer.

In this era of globalisation, it is inevitable for consumers access to foreign goods and services through the internet or any other virtual medium. The internet allows the consumer to cross boundaries in seconds without being aware of the transaction or the foreign jurisdiction. Moreover, the website domain name and email address are not necessarily sufficient in determining the location and physical space of the re-seller. Jurisdiction becomes a challenge due to the complexity of the e-commerce transactions wherein the seller, buyer, server, and internet service provider is located in different countries. In *Harshad Chiman Lal Modi v DLF Universal Ltd*⁸⁹, the Apex Court states that,

⁸⁹ *Harshad Chiman Lal Modi v DLF Universal Ltd*, [2005] 7 SCC 791

'The jurisdiction of a court may be classified into several categories. The important categories are: -

- (i) Local or territorial*
- (ii) pecuniary jurisdiction*
- (iii) jurisdiction over the subject matter*

In *Kiran Singh v. Chaman Paswan*⁹⁰, the Court speaking through held that,

It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the execution stage and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties⁹¹. Now when a business goes online, it may subject itself to the jurisdiction and system of law of every country around the world. The question of 'territorial' jurisdiction gets complicated. The seller's connection with the purchaser's jurisdiction may be vague and remote. On the one hand, consumers familiar with their domestic laws when going online may lose the benefit of domestic consumer protection laws... Globalisation has increased the international dimensions of access to justice and consumer protection as developments in communication and technology facilitate the possibility of cross-border frauds.⁹¹

⁹⁰ *Kiran Singh v Chaman Paswan*, AIR [1954] SC 340

⁹¹ *ibid*

The e-commerce transactions are quite different from the traditional approach and where a court ascertains whether the dispute is of the territorial, pecuniary, or subject matter jurisdiction for adjudication. However, in e-commerce transactions, due to internet usage, the determination of the territorial jurisdiction gets complex as the internet does not have any territorial restriction and is borderless. It is pertinent to note that due to this decentralised nature of the e-commerce transaction, it involves multiple parties from across the borders, which often causes complexities in ascertaining where the contract was formed. Due to the lack of uniformity in statutes or rules, the existing complexities become more complex in determining the jurisdiction. Every traditional contract includes a provision to fixate the jurisdiction of a court and a mechanism to adjudicate the matter in case of a dispute. The same is being followed in the e-contracts, too. However, there are times when such agreements are missing in the contracts, especially in e-commerce transactions, due to the lack of specific provisions leading to complexities in an already complex transaction.

In India, the primary legislation through which e-commerce disputes are regulated is the Indian Contract Act, Consumer Protection Act, Information Technology Act and, to some extent Civil Procedure Code, 1908. Though the provisions of these Acts above draw their influence from the international instruments, it is pertinent to note that none of these legislations deals with the matters of e-commerce directly or has a direct reference to it. Through mere interpretation, e-commerce disputes are regulated through these Acts in India. Though Consumer Protection Act, several bills have been brought recently in 2015 and later in 2018, which have widened the scope the consumer protection vis-à-vis e-commerce disputes, it still lacks a clear vision. With respect to the practice that is to be followed, India has been practising both the Coordinated Market Economy of the European Union and the

Liberal Market Economy of the United States. Though the dilemma still continues but the EU-Electronic Commerce Directive of the European Union was adopted in 2000 and provides a balance between the parties, and the mechanism of harmonisation curbs the discrepancies in many issues related to e-commerce transactions.⁹² However, the primary thing missing in this aforementioned Directive is jurisdiction-related rules. However, the vacuum was filled with Brussels I Regulations but not shortcomings and loopholes in its application.

On the other hand, the United States regards consumers' rights highly in e-commerce matters. Initially, the United States laws were very conscious about consumer rights. However, over a period of time, a liberal outlook has been developed with regard to the consumer laws and how to safeguard their interests a "*hands-off*" approach and which has given the concerned parties to define the rights and liabilities of the various parties in the consumer marketplace.⁹³ This was mainly adopted unconscionability since *ProCD Inc. v. Zeidenberg*⁹⁴, to validate the standard forms of e-contract to regulate e-commerce. However, despite all these, if we consider the Indian scenario, we cannot follow these kinds of markets due to the nature of the needs and diversity among the consumers.

In India, the e-contracts are considered to be valid under the provisions of the Information Technology Act 2000. Further, in case the disputes arises between parties to determine jurisdiction in light of the e-contract they are free to ascertain such

⁹² Nandini CP, 'B2C E-Commerce and Consumer Protection with Special Reference to India- ADR a Best Possible Solution' (2018) IJCLP <<https://clap.nls.ac.in/wp-content/uploads/2020/6ijclp.pdf>> accessed 1 July 2022

⁹³ Eric Brousseau, Meryem Marzouki, Cecile Méadel, *Governance, Regulations and Powers on the Internet* (Cambridge University Press, 2012)

⁹⁴ *ProCD Inc. v Zeidenberg*, 86 F 3d 1447 7th Cir [1996]

jurisdiction.⁹⁵ However, there are many cases wherein such agreements are not enforced, and Section 20⁹⁶ of the Code of Civil Procedure, 1908 is being followed wherein the Courts have the jurisdiction. However, it is must to have the authority to adjudicate the matter even if the Court has the jurisdiction.⁹⁷ Hence, there is no scope to create a new jurisdiction that does not exist in the first place.

Further, the bare reading of Section 20⁹⁸ of the Code of Civil Procedure, 1908, it can be said that the problem can be resolved between the parties to determine the issue of jurisdiction. However, that is not the case, especially with the e-commerce transaction, where it is challenging to decide where and when the offer has been accepted. The parties merely have an online presence, which involves the location of both the parties as they are making the transaction from two different places over the Internet. These complexities with e-commerce are because it is unlike the traditional business transaction stated above. It is to be noted that the jurisdictional disputes are often complex in nature and involvement of the intermediaries add more complexities to it.

The legislations like the Consumer Protection Act and the Information Technology Act, which govern e-commerce transactions in one way or the other, failing to resolve the disputes, especially that of jurisdiction, is baffling, and the question arises as to why there is a need to delve into the discourse on the jurisdiction even after having the legislations. The answer seems to be lying within the legislation, which instead of resolving the issues, has added the complexities because it contradicts added

⁹⁵ Indian Contract Act 1872, s. 28

⁹⁶ Code of Civil Procedure 1908, s. 20

⁹⁷ *Official Trustee v Sachindra Nath Chatterjee*, [1969] 3 SCR 92

⁹⁸ The Code of Civil Procedure 1908, s. 20

complexities and one another. For the statement above, one must read Section 13⁹⁹ of the Information Technology Act, which states that the jurisdiction shall be decided upon the opposite party's place of business. In contrast, Section 11¹⁰⁰ of the Consumer Protection Act states that the aggrieved party may approach the District Courts if the opposing party has branches. These disputes have been aggravated due to the inconsistency in the statutes and lack of specific provisions or legislation related to the e-commerce of conflicts. Even if we see analyse the UNCITRAL Model Law on Electronic Commerce, which stresses the place of business and is even incorporated in the Information Technology Act, 2000 under Section 13¹⁰¹ is not enough to cater for the current needs where trades or transactions can be made from any part of the world there is a need for new legislation or rules to regulate the disputes related to e-commerce. Thus, dispute arguments will eventually be null and void without adjudication jurisdiction. It is pertinent to note that the jurisdiction can be either territorial, pecuniary, or even subject matter and it is mandatory for the Court to have some adequate jurisdiction to adjudicate. Even if both parties consent to a particular court's jurisdiction, the law will strike down the court's authority in such a case.¹⁰²

This growing phenomenon of e-commerce which has become a part of our lives, no doubt has made our lives easier; however, with the increasing disputes, it is the dire need of the hour to have specific legislation which is tailor-made to regulate it and to resolve the disputes arising out of it. In India, e-commerce matters are traditionally governed by Sections 15¹⁰³ to 19¹⁰⁴ of the Code of Civil Procedure, 1908. Moreover,

⁹⁹ Information Technology Act 2000, s. 13

¹⁰⁰ The Consumer Protection Act 1982, s. 11

¹⁰¹ Information Technology Act 2000, s. 13

¹⁰² *Kiran Singh v Chaman Paswan*, [1955] 1 SCR 117

¹⁰³ The Code of Civil Procedure 1908, s. 15

¹⁰⁴ The Code of Civil Procedure 1908, s. 19

the issue of the jurisdictional dispute has grown day by day due to the increasing usage of the e-commerce medium and also due to the legal vacuum. However, this vacuum has not gone unrecognised, and the Courts, despite the lack of jurisprudence, have ascertained the jurisdiction by several tests in e-commerce matters. One such test is the *Purposeful Availment Test*, in which the defendant can be said to be placing the goods into the stream of commerce, with the expectation that a consumer will purchase the same within the forum of the State, however, not amending the rule of personal jurisdiction to elucidate the concept.¹⁰⁵ In this test, the defendant seeks to know if their activities will be submissive in front of the sovereign matter.¹⁰⁶ It was introduced in *India Independent News Service Pvt. Ltd. v India Broadcast Live LLC and Ors*,¹⁰⁷, where the court held that the parties' incident must have an adequate relationship with the forum state and the execution of jurisdiction must be reasonable. Moreover, in *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy*¹⁰⁸ and *Impresario Entertainment & Hospitality (P) Ltd. v. S&D Hospitality*¹⁰⁹, this Purposeful Availment Test was reaffirmed. However, the Court contemplated the issue of mere accessibility rather than intended usage and held,

*to establish jurisdiction in cases where the defendant does not reside/carry on business in the forum state. Still, the website in question is “universally accessible”, and the plaintiff must show that the defendant purposefully availed the jurisdiction of the forum court.*¹¹⁰

¹⁰⁵ *Banyan Tree Holding (P) Ltd. v A. Murali Krishna Reddy*, [2009] SCC OnLine Del 3780

¹⁰⁶ *Banyan Tree Holding (P) Ltd. v A. Murali Krishna Reddy*, [2009] SCC OnLine Del 3780

¹⁰⁷ *India Independent News Service Pvt. Ltd. v India Broadcast Live LLC and Ors*, [2007] 2 ILR Delhi 1231

¹⁰⁸ *Banyan Tree Holding (P) Ltd. v A. Murali Krishna Reddy*, [2009] SCC OnLine Del 3780

¹⁰⁹ *Impresario Entertainment & Hospitality (P) Ltd. v S&D Hospitality*, [2018] SCC OnLine Del 6392

¹¹⁰ *Banyan Tree Holding (P) Ltd. v A. Murali Krishna Reddy*, [2009] SCC OnLine Del 3780

Another test adopted by courts in India is the *close connection test*, wherein the jurisdiction of the dispute will be the place that has the most intimate relation with that transaction made which is eventually used to ascertain the jurisdiction and laws which shall be applicable.¹¹¹ However, the party cannot sue in multiple jurisdictions as they are doing businesses in multiple jurisdictions.¹¹² Though there are various other methods or tests for determining jurisdiction adopted by courts abroad, the courts in India have only utilised *close connection tests* and *purposeful availment tests* determining jurisdiction adopted by courts abroad. The courts in India have only used *quick connection tests* and *purposeful availment tests*. Due to this limited usage of the international precedents and lack of jurisprudence in the Indian justice delivery system, the complexities of the jurisdictional disputes have been multiplying.

Apart from previous tests, there are a few, like the test of minimum contacts, wherein the minimum contract with the state is required for the defendants to be brought within the jurisdiction. Irrespective of the physical presence of a plaintiff with meaningful ties, the forum state is permissible to approach the courts within its jurisdiction.¹¹³ However, this method is not free of shortcomings, and there is no definite solid understanding of what minimum contact means minimum contact. There is an ambiguity as to whether minimum communication is influenced by the number of times of usage, accessed, or received hits, or any other factor. Further, it is pertinent to note the landmark judgement of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*¹¹⁴ evolved a test for determining jurisdiction based on sliding scale theory. According to the method, a website can be classified into the following: -

¹¹¹ S.K Verma & Raman Mittal, *Legal Dimensions Of Cyber Space* (Indian Law Institute, 2004) 269

¹¹² S.K Verma & Raman Mittal, *Legal Dimensions Of Cyber Space* (Indian Law Institute, 2004) 272

¹¹³ *Compuserve Inc. v Patterson*, 89 F.3d 1257 (6th Cir. [1996])

¹¹⁴ *Zippo Mfg. Co. v Zippo Dot Com Inc.*, 952 F Supp 1119 (WD Pa [1997])

1. Active websites: it facilitates contractual relationships, and this test on sliding theory can be well applied in our scenario, too; even if the website is operated outside India, the jurisdiction is drawn towards the personal jurisdiction of the forum if it is available for use by the forum state.
2. Interactive websites: It is wherein the jurisdiction shall be decided upon where the exchange of information is facilitated by the individual.¹¹⁵
3. Passive websites: Since the information is made in the absence of contractual and commercial relations the individual jurisdiction shall not be applicable.¹¹⁶

Unlike traditional business transactions, e-commerce involves a complicated set of processes. And in the absence of a uniform law for e-commerce, the Courts have difficulty determining the place to adjudicate the matters. Defects in the jurisdiction can be either territorial or pecuniary or of subject matter. The Court loses power to judge if it has neither of the proper jurisdictions and even if the parties agree to a specific court's jurisdiction, the law can strike down the court's authority in such a case.¹¹⁷ Due to inexperience in e-commerce transactions, courts initially made some wrong decisions. A prominent primary significant example is that of a decision made by the Delhi High Court in the matter of *Casio (I) Co. Ltd. v. Ashita Tele Systems (P) Ltd.*¹¹⁸, wherein the Court concluded the Court has jurisdiction considering the plaintiff was only able to use the internet from a particular place which comes under it.¹¹⁹

However, in the present times, with the advent of internet connectivity and availability, any website can be accessed from any place. Thus if the Delhi High Court's

¹¹⁵ *Maritz, Inc. v Cyber Gold, Inc.*, 947 F. Supp. 1328 [1996] (E.D. Mo.)

¹¹⁶ S.K Verma & Raman Mittal, *Legal Dimensions Of Cyber Space* (Indian Law Institute, 2004) 241

¹¹⁷ *Kiran Singh v Chaman Paswan*, (1955) 1 SCR 117

¹¹⁸ *Casio (I) Co. Ltd. v Ashita Tele Systems (P) Ltd.*, [2003] SCC OnLine Del 833

¹¹⁹ *ibid*

decision is taken precedence in the current times, then every court could have competent jurisdiction, leading to chaos. However, later the inadequacy was removed by the Court in the *Banyan Tree*¹²⁰ case, in which the Court concluded that the plaintiff must either show that the business is carried within that particular jurisdiction of the court and, if not, that the injury suffered is within the Court's jurisdiction. Thus, the Court developed good precedence over the previous one where mere accessibility of the internet at a place gave the court authority to adjudicate an e-commerce transaction.

There is no question that the judiciary has played an active part in developing the jurisprudence and fulfilled the void to an extent by even developing new tests for determination of jurisdiction, like the Effect Test which will empower the Courts in India to have the exclusive jurisdiction.¹²¹ However, the same is not enough for the current scenario in which we are in, as the lack of proper legislation and inability to adopt the substantial number of international precedents in the form of tests is setting the sun over the e-commerce market in India.

¹²⁰ *Banyan Tree Holding (P) Ltd. v A. Murali Krishna Reddy*, [2009] SCC OnLine Del 3780

¹²¹ *Himalayan Drug Company v Sumit*, [2010] PTC 739

CHAPTER 4

ALTERNATIVE DISPUTE RESOLUTION AS AN ALTERNATIVE MECHANISM TO RESOLVE E-COMMERCE DISPUTES IN INDIA

The growing phenomenon of e-commerce has become a part of our lives, and no doubt undoubtedly, it has made our lives easier. However, with the increasing disputes, the dire need of the hour is to have specific legislation tailor-made to regulate and resolve the disputes arising. Judiciary and the quasi-judicial forum over the times have played a significant role in resolving disputes between the parties in consumer disputes matters and especially e-commerce disputes in India. It is pertinent to note that the Department of Consumer Affairs under the Ministry of Consumer Affairs, Food and Public Distribution is entrusted with the regulatory powers, which include the implementation of the consumer protection legislations, consumer cooperatives, laying down the standards, standards and codes etc. Under the Department of Consumer Affairs, various divisions include the Consumer Protection Unit, which is bestowed the powers to implement the Consumer Protection Act¹²² and allied rules and regulations. Their objective is to protect the consumers' interests if their grievances arise from the goods and services they have availed of.

¹²² The Consumer Protection Act 2019

4.1. Existing Regulatory Authorities in Light of The E-Commerce Disputes and Product Liability

In India, the Ministry of Consumer Affairs, Food and Public Distribution under the Department of Consumer Affairs constituted The Consumer Protection Unit which provides the quasi-judicial dispute resolution mechanism at various levels, i.e., the District, State and the National, via the Consumer Forums, to address the consumers' grievances and resolve them quickly. The aforementioned quasi-judicial Forums deal with complaints related to breach of contract between the parties, deficient services, unfair trade practices etc., by the sellers. However, apart from these quasi-judicial forums, there are alternate mechanisms provided to the consumers to address their grievances which are as follows: -

- **Integrated Consumer Grievance Resolution System (ICGRS):** - It is a portal developed by the Department of Consumer Affairs acting as the central registry for lodging consumer complaints or grievances. Its primary objective is to make the consumer aware of their consumer rights and redress consumer grievances. Through this portal, the Department of Consumer Affairs brought all the stakeholders, including the consumers and the private entities/sellers, onto a single platform to create a vibrant business ecosystem.
- **Computerisation and Computer Networking of Consumer Commission in Country (ConfoNet):** - It is a project initiated by the Govt. of India to improve the efficiency of the Consumer Redressal Commissions by introducing Information Communication Technology. It desires to provide quality E-Governance, a quick and efficient, transparent system of working to cater for the needs of the consumers with grievances.

- National Consumer Helpline: - It is a Ministry of Consumer Affairs project for the consumers to register their complaints and grievances over the toll-free telephone helpline number. Further, the consumers may also seek information, advice and others related to their grievances and rights. The National Consumer Helpline has helped the consumers by making the service available to every stratum of people in the country with easy and quick solutions.

Nonetheless, it is pertinent to note that though the current regulatory mechanism provides consumer protection to consumers, even at times, due to the vulnerabilities of E-Commerce transactions and businesses, the current approach falls short in offering resolution. The matters such as product liability, jurisdictional disputes in the case of domestic e-commerce and even cross-border disputes, the appointment of the adjudicators, arbitrators etc., which are complex in nature, especially when one of the parties is in the dominant position compared to the other. Thus, it leads to burdening the Courts, which are already overburdened. The author feels that it is not merely the regulatory mechanism, but the legislation governing do not seem to fulfil the needs of the current time. Hence, the author feels a mechanism such as Alternative Dispute Resolution can really help in balancing the rights of the consumer and at the same time ensure that the procedure is not too stringent.

4.2. ADR as an Efficacious Mechanism in resolving disputes related to E-Commerce

It is pertinent to note that with the advancement of technology and the internet accessible to all the cross border ties have increased over time, giving rise to complex disputes, especially in cross border disputes. The primary challenge to coping with the issues of legal relations in the international arena arises due to no correlation in the legal structures with each other. Thus, implementing the regulations from one regulatory regime would often provide different outcomes.¹²³ Further, all of these transactions come under private international law, which was even recognised by the Courts in India¹²⁴ and left to the discretion of the parties to select the place of jurisdiction to resolve the disputes, which are even endorsed under Section 28 of the Indian Contract Act, 1872. However, disputes often arise due to discrepancies in the contracts and agreements. Still, the harmonisation of contradictions or differences can be avoided through Alternative Dispute Resolution, wherein the contradictory laws or rules must be removed.¹²⁵

In India, the Naya Panchayat System, Lok Adalat, Arbitration and Conciliation Act, 1996, have been using ADR based on the UNICITRAL Model law. Further, it is supported by the Section 89¹²⁶ and Order X Rule 1A of the Code of Civil Procedure, 1908, which endorses the usage of the ADR mechanism between parties and includes the following methods,

- Arbitration

¹²³ Malcolm N. Shaw, *International Law* (5th edn., Cambridge University Press 2003)

¹²⁴ *Ramanathan Chettiar v Somasundaram Chettiar*, [1963] SCC OnLine Mad 187

¹²⁵ Raghav Sengupta, 'Place of suing and cause of action in E-commerce Disputes' (*SCC OnLine Blog*, 5 June 2021) < <https://www.sconline.com/blog/post/2021/06/05/e-commerce-suits/>> accessed 5 July 2022

¹²⁶ The Code of Civil Procedure 1908, s. 89

- Conciliation
- Mediation
- Judicial settlement through Lok Adalat

Further, there are a plethora of legislations providing benefits of ADR in India, a few of them are namely: -

- The Family Courts Act, 1984: - The Act endorses settlement between the parties through conciliation which can be even seen in Section 9 of the Act. Further, the Supreme Court has mandated that the mechanism of mediation has to be exhausted in matrimonial disputes.¹²⁷
- Securities and Exchange Board of India (Ombudsman) Regulations, 2003: - The aforementioned Act serves the ombudsman services to resolve disputes concerning various issues like securities allotment, debentures, share-certificate, dividends, interests and other related matters. Further, the Ombudsman under the provisions of the Regulation i.e., 16(1)¹²⁸ is empowered to resolve the disputes of the listed companies by agreement or mediation.¹²⁹
- Commercial Courts Act, 2015: - The Act provides mandatory mediation prior to litigation due to which the parties are obliged to the mechanism before initiating the suit proceedings to resolve the dispute amicably and reduce the burden of the Courts.¹³⁰

¹²⁷ *K. Srinivas Rao v D.A. Deepa*, [2013] 5 SCC 226

¹²⁸ Securities and Exchange Board of India (Ombudsman) Regulation 2003, s. 16(1)

¹²⁹ *ibid*

¹³⁰ Leonardo D'Usro 'Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36 *Alternative to High Cost of Litigation* 49, 58

- Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016: - Promotes the ‘Grievance Redressal Committee’ to act upon the complaints in case of any allegations and try to resolve them by the mediation.
- Companies Act, 2013 and the Companies (Mediation and Conciliation) Rules, 2016: - The Act under the provision Section 442¹³¹ is mandated to establish a panel for mediation namely Mediation and Conciliation Panel. Also, it allows the parties to seek mediation during adjudication of their matters.
- Consumer Protection Act, 2019: - The Act under provision i.e., Section 74¹³² endorses the establishment of mediation cells to address the grievances of the consumers. It is pertinent to note that the latest amendment in Chapter V includes the mechanism of mediation to curtail the burden of the Courts. Later, in the year 2020 the Consumer Protection Act (E-Commerce) Rules, 2020, directed e-commerce businesses to establish and develop grievance redressal mechanisms through a virtual medium, which can be said to be promoting Online Dispute Resolution.
- Industrial Relations Code, 2020: - The code promotes conciliation for industrial disputes for amicable settlements.¹³³ Also, it promotes arbitration for effectively resolving conflicts and cater the needs of the labours
- Indian Evidence Act, 1872: - It is pertinent to note that the Evidence Act allows and recognises electronic evidence.¹³⁴ Though they are held as secondary

¹³¹ The Companies Act 2013, s. 442

¹³² Consumer Protection Act 2019, s. 74

¹³³ Industrial Relations Code 2020, s. 2(zi)

¹³⁴ The Indian Evidence Act 1872, s. 65B

evidence the aforementioned provisions allow the parties to produce material evidence in the virtual medium.

- Information Technology Act, 2000: - With the growth of the internet and the introduction of this Act electronic attestations have found legitimacy. Moreover, the provisions such as Sec. 4¹³⁵ and Sec. 5¹³⁶ of the Act, allow electronic records and signatures which eventually leads to recognising the end-to-end digitisation of judicial outcomes.

4.3. ADR in resolving the Jurisdictional Disputes in the E-Commerce Disputes

The process of resolving the disputes related to the jurisdiction in case the parties are across the borders needs to be implemented through treaties that can be negotiated or conciliated between the nations to bring uniformity. In the domestic scenario, the Alternative Dispute Resolution can be said to be effective with e-commerce disputes as they are economical with a speedy resolution. Further, due to its neutral forum, the parties can participate in resolving the jurisdictional argument, which may not only give a boost from the consumer's point of view but also the e-commerce giants as they are required to tackle many such cases. However, to achieve this, the e-commerce transactions should have a necessary binding clause and have an excellent technological infrastructure, especially in a country like India, wherein many parties live outside the metropolitan cities. It is pertinent to note that alternative dispute resolution has been endorsed and considered adequate even in provisions like Section 89¹³⁷ of the Civil Procedure Code, and the Chapter V of the Consumer Protection Act,

¹³⁵ Information Technology Act 2000, s. 4

¹³⁶ Information Technology Act 2000, s. 5

¹³⁷ The Code of Civil Procedure 1908, s. 89

2019. With these times of e-commerce and technology and in a country like India, where every major technology giant wants to enter the market, it is the legislature's duty to provide the parties with equal bargaining power, which will synergise the system and help overcome the contradictory laws or rules. Developing or bringing in new legislation to merely regulate e-commerce disputes is the dire need of the hour, and alternative dispute resolution should be part of the dispute resolution process. The statement above draws its influence from the 'Guidelines for Consumer Protection in the context of Electronic Commerce' of the OECD Convention, 1999, wherein the drafting committee emphasised resolving disputes vis-à-vis e-commerce, especially in cross-border transactions.

Further, with the growth in technology, the option of Online Dispute Resolution also needs to be considered. The two approaches which were advocated by David Post with the Online Dispute Resolution are as follows¹³⁸: -

- By increasing the international coordination among the countries and creating new international bodies like WIPO or WTO, which works on developing new international bodies like WIPO or WTO which works in a specific field.¹³⁹
- By providing the individual network access providers the powers related to governance and rule-making to create an stringent society which will not influence the laws relating to Internet.¹⁴⁰

Though these approaches seem too far-fetched, especially in the context, they are slowly gaining momentum among consumer and business conflict entities worldwide.

¹³⁸ Mrinali Komandur, 'Jurisdiction and Enforcement of E-Commerce Contracts' (2017) 5 IJCLP <<https://clap.nls.ac.in/wp-content/uploads/2020/5/ijclp.pdf>> accessed 4 July 2022

¹³⁹ David Post, 'Governing Cyberspace' [1997] 43 Wayne LR 155

¹⁴⁰ *ibid*

It can be applied in cross-border transactional and disputes within the country. Nonetheless, for the conflicts related to e-commerce, we need specific legislation to regulate them and consider the ADR mechanism as one of the primary mechanisms.

4.4. Prospective Usage of Online Dispute Resolution

The Online Dispute Resolution (hereinafter referred to as ODR) method has been new but has had its supporters for a decade. It is a technique wherein the disputes are resolved over the virtual medium involving E-Commerce disputes to any other consumer protection dispute. It is a facet of the Alternative Dispute Resolution wherein a virtual medium is preferred over the traditional physical mode of conducting the dispute resolution proceeding. In the early years of its usage ODR was mainly used in matters which involved the issues of the virtual medium. However, over time, people have slowly accepted its effectiveness. It can be used in traditional offline dispute resolution proceedings too, which can be used in the conventional offline dispute resolution proceeding. It is pertinent to note that Virtual Courthouse in 1996 is where the discussion regarding ODR started based on essential factors, namely,

- Convenience
- trust
- expertise

In India, the Courts have recently been seen accepting the usage of technology by recording evidence such as the usage of video conferencing is acceptable.¹⁴¹ Further,

¹⁴¹ *State of Maharashtra v Dr. Praful B. Desai*, 4 SCC 601 [2003]

in *Grid Corporation of Orissa Ltd. v. AES Corporation*¹⁴², the Court held that “*when an effective consultation can be achieved by resorting to electronic media and remote conferencing, it is not necessary that the two people required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or the ruling contract between the parties*”.

Thus, in some way, the Courts in India are also adopting the technology to streamline the stringent judicial process. ODR can be used to resolve disputes between parties. It is pertinent to note that the ODR is exceptionally cost-effective, convenient and efficient. Thus, it provides the resolution or addresses the grievances of the consumers quickly, even compared with the traditional method of ADR. It is helpful in cross-border disputes where the parties are located in different places, which is usually the case in E-Commerce disputes.

The judicial system in India is already overburdened due to the huge pendency of cases, resulting in a delay in justice. Further, with the cost of litigation too high for the average citizen, people have turned to the ADR, which is cost-effective compared to litigation but can still be costly. Thus, ODR is one of the alternatives which can be promoted, primarily when the parties reside in distant places or in a different jurisdiction. It is pertinent to note that it shares the same fundamentals as the ADR mechanism.¹⁴³ As stated above, it can be said as a facet of the ADR and has mirrored ADR processes with ICT (hereinafter referred to as Information Communication Technology). However, should not be anyway considered an e-ADR as it is a multi-door dispute resolution mechanism which is consumer-centric and helps to address their

¹⁴² *Grid Corporation of Orissa Ltd. v AES Corporation*, AIR SC 3435 [2002]

¹⁴³ Colin Rule, ‘Is ODR ADR’ (2016) 3 IJ ODR <<http://www.colinrule.com/writing/ijodr.pdf>> accessed 6 July 2022

grievances creating an ecosystem for ideally adequate for dispute resolution.¹⁴⁴ The scope of the ODR is as such that it is more comprehensive in its ambit and can be said to be expansive as it can be more than merely a mechanism to resolve the dispute. Instead, as articulated by Professor Richard Susskind, it has the following stages¹⁴⁵ in the life cycle of a dispute: -

- Promotion of Legal Health: As we know ODR has a major role in promoting legal health by creating awareness among people about the laws and legislation wherein the sellers are obliged to inform the consumers of the availability of ODR in case of any dispute arises. Thus, it promotes the rule of law and creates a consumer-centric business ecosystem.
- Dispute Avoidance: ODR mechanism with data can be made available to the citizens which shall enable the consumers to make a better choice about the available legislation. It shall enable the parties to make better choices and be free from any disputes.
- Dispute Containment: ODR mechanism promotes easy and efficient resolution of disputes.¹⁴⁶ The traditional ADR mechanisms already provide a platform to resolve conflicts before approaching the Court. Further, since ODR is a facet of ADR, it can digitise the traditional ADR mechanism and increase its efficiency by even prospective usage of pre-litigation ODR for quick disposal of cases¹⁴⁷

¹⁴⁴ NITI Aayog, *Designing the Future of Dispute Resolution: ODR Policy Plan for India* (NITI Aayog Expert Committee on ODR, 2021)

¹⁴⁵ Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 114

¹⁴⁶ Amitabh Kant and Desh Gaurav Sekhri, 'Technology could make justice delivery Efficient and affordable' (*Mint*, 12 August 2020) <<https://www.livemint.com/opinion/online-views/technology-could-make-justice-delivery-efficient-and-affordable-11597244653331.html>> accessed 4 July 2022

¹⁴⁷ NITI Aayog, *Designing the Future of Dispute Resolution: ODR Policy Plan for India* (NITI Aayog Expert Committee on ODR, 2021)

4.4.1. Benefits of Online Dispute Resolution

With the usage of technology in dispute resolution processes, there can be immense potential to counter the challenges typically associated with litigation.¹⁴⁸

Thus, a few of the benefits of ODR are as below: -

- **Cost-Effective:** - Though the ADR is comparatively cost-effective rather than litigation, ordinary citizens still cannot bear the expenses in reality. Thus, it causes hinders access to justice. Hence, ODR, since conducted over a virtual medium, offers a cheaper alternative dispute resolution for the aggrieved. Moreover, due to the nature of teaching the proceedings, it even reduces the time for explanation.
- **Easy and Efficient:** - It is a well-known fact that the Indian courts are overburdened, which is one of our judicial system's primary challenges. Further, due to the unfair practices of adjournment by the litigants and lack of manpower in the system have aggravated the situation. The usage of ODR can curtain the problem such as delays and provide more efficient and streamlined procedures for dispute resolution. The ability to conduct the proceedings virtually and resolve the dispute benefits the aggrieved even in cross-border disputes.
- **Flexible Process:** - The ADR mechanism has evolved a lot over the years, and the processes of arbitration and mediation have seen such changes due to it which, including the hybrid variants of arbitration and mediation. Usage of ODR with the latest technology such as AI can open various avenues' which will lead to multi-door dispute resolution through the streamlined processes.¹⁴⁹

¹⁴⁸ *ibid*

¹⁴⁹ Colin Rule, 'Is ODR ADR' (2016) 3 IJ ODR <<http://www.colinrule.com/writing/ijodr.pdf>> accessed 6 July 2022

Thus, making the dispute resolution process more cost practical, cost-effective and convenient for the user.

- Promotion of dispute resolution: - ODR, due to its simple and streamlined nature, can be a significant change to the dispute resolution process and also, at the same time, provides access to all the aggrieved parties, including the physically challenged ones. Since ODR mechanisms involve the consensus of the parties they provide holistic justice to the parties. Thus, making the ODR mechanism more accessible which encourages the aggrieved parties to refer their grievances through such mechanism.¹⁵⁰
- Free from any error or bias: - Since the world is seeing so much of biases, prejudice, and stereotype, human judgement cannot be free from any prerogative. Thus, limiting the human unconscious bias and helping to adjudicate the matters based on merits.

While the Consumer Protection Act is the primary legislation for consumer protection, the legislation like Information Technology Act of 2000 must be referred to for the development of ODR in India to provide legitimacy to the usage of ODR. In its current form, no framework exists to oversee the process of ODR in India. There are a plethora of legislations which refer to ADR and allow technological support. The primary legislation that promotes the ADR is the Arbitration and Conciliation Act of 1996 supplemented by the Arbitration and Conciliation (Amendment) Act, 2019 which promotes the Arbitration Council of India to act as a regulatory body.¹⁵¹ However, even though these legislations provide a preliminary framework for ODR to be introduced,

¹⁵⁰ Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Civil Justice Council, 2015)

¹⁵¹ Arbitration and Conciliation Act 1996, ss. 43D and 43I

but India needs to take further strides in legislative preparedness for ODR. To start with the process the legislature needs to take the opportunity to propose the required amendments to promote ADR with technology and especially introduce the ODR mechanism.

Even the Judiciary has felt the need for tailor-made legislation for ADR¹⁵² and has from time to time taken steps to promote the mechanism of ADR which can be recently seen with the formation of the ‘Mediation and Conciliation Planning Committee which has been entrusted with to draft a framework or legislation that provides legal sanctity and legitimacy to settlements through mediation. Though the aforementioned Committee has prepared the draft but it is yet to be enforced thoroughly which includes the following features¹⁵³: -

- Recognising of Online Dispute Resolution Mechanism.
- Helpful in addressing and enforcing settlements.
- Establishment of a regulatory authority in the centre for different forms of ADR.
- Pre-litigation mediation shall be included.
- Inclusion of the enforcement of international mediation settlements.

Such tailor-made legislation for the ADR mechanism shall provide a robust platform for the ODR in India and support the protection of consumers' confidentiality. With Personal Data Protection Bill 2019 still pending in Lok Sabha, these alternative mechanisms can cater to the present needs by providing support to ODR and virtual security.

¹⁵² *M.R. Krishna Murthi v The New India Assurance Co. Ltd.*, [2019] 1 ACC 730

¹⁵³ NITI Aayog, *Designing the Future of Dispute Resolution: ODR Policy Plan for India* (NITI Aayog Expert Committee on ODR, 2021)

In the International scenario, the ODR has been in very much use, and various business hubs worldwide have taken full advantage of it, including cases related to businesses or personal matters. As stated above, it has several advantages over the traditional court and ADR systems. However, a few of the significant problems as reported by the NITI Aayog's Report¹⁵⁴ from the Indian context are as follows: -

- Lack of trust: - The masses in India like the tried and tested methods of redressal mechanism. Thus, convincing people to transit to a mechanism conducted virtually is tough.
- Lack of infrastructure and facilities: - Due to the lack of accessibility to the Internet in the rural areas and destitute, it is hard to conduct the redressal proceeding in such sites.
- Lack of qualified workforce or human resources: - Skill people are a must for smooth functioning of such grievance mechanism.

Nonetheless, despite the shortcomings, the author feels that the ODR can be the future of the ADR, especially in the context of E-Commerce disputes and the current scenario of the judiciary. Hence, regulation of ODR should be bought on priority, and the existing framework needs to be amended to synchronise the start of the dispute resolution mechanism. The introduction of ODR in the current legislation shall enable the regulatory structure to act more efficiently.¹⁵⁵ The monopoly practice of the arbitration institutions to adjudicate the disputes involving a party can also be relaxed as one party may have various cases or disputes, especially when dealing with the

¹⁵⁴ NITI Aayog, *Designing the Future of Dispute Resolution: ODR Policy Plan for India* (NITI Aayog Expert Committee on ODR, 2021)

¹⁵⁵ Rafal Morek, 'The Regulatory Framework for Online Dispute Resolution: A Critical View' [2006] 38 University of Toledo LRev

vulnerabilities of E-Commerce faces every day. Thus, the same will makes it convenient for the parties to cooperate with their pre-existing adjudicators making it in consonance with ‘UNCITRAL Working Group on Arbitration and Conciliation’, which advocated for ODR in the existing legislation in their 43rd Session.¹⁵⁶

¹⁵⁶ NITI Aayog, *Designing the Future of Dispute Resolution: ODR Policy Plan for India* (NITI Aayog Expert Committee on ODR, 2021)

CHAPTER 5

CONCLUSION

The author, through this dissertation, attempted to discuss the E-Commerce scenario in India with references to the international practices and standards practices by virtue of the international instruments and guidelines. Further, through the discussions in the various parts of the dissertation, the author delved into the grey areas of E-Commerce and the dispute that arises out of it, which includes the complex areas of jurisdictional dispute to the choice of law to the adjudicator. The effectiveness of the consumer protection laws in the country and around the world has evolved exponentially over a period of time which is aided by judicial precedents. In India, especially the Consumer Protection Act, 1986 (and amendment of 2019) acts as the primary legislation to deal with consumer protection issues and has benefited the consumers and deserves liberal construction.¹⁵⁷ With the speedy mechanism for redressal to empower the concerned authorities to grant the relief, the legislation has been consumer-centric. It even can be held not contrary to the objective of the legislation.¹⁵⁸ However, with the growth of the internet and technology, the issues and challenges faced by consumers have changed exponentially over the decades, and a new marketplace called E-Commerce has gained its place in the lives of the people. Though, as discussed, the E-Commerce and product liability matters are often dealt with by the Consumer Protection Act, 2019, which was recently amended a few years back and has made some significant changes by including the E-Commerce aspects and

¹⁵⁷ *Om Prakash v Reliance General Insurance*, [2017] 9 SCC 724

¹⁵⁸ *Lucknow Development Authority v M.K Gupta*, [1994] 1 SCC 243

product liability. However, the author feels there is still a lack of reference to the prospective challenges that E-Commerce disputes face.

The enactment of Consumer Protection legislation and the provision of other legislation such as the IT Act, 2000 and Arbitration and Conciliation Act, 1996, attempts to resolve the complex issues mentioned above of jurisdiction, choice of law or adjudicator but in vain. As discussed by the author in the above chapter, Alternative Dispute Resolution has recalibrated and took the burden of the Court and the consumer forum. However, even with the Alternative Dispute Resolution, there are issues of being physically present to the cost which even though as argued is effectively less than the litigation or approaching the traditional consumer forum but still high for an average citizen. Thus, being adaptive to the current scenario and the recent steps taken by the judiciary itself to conduct the Court proceeding online, the author felt the need to analyse the prospective usage of Online Dispute Resolution, which is a facet of Alternative Dispute Resolution and can reach to every corner without any boundary.

It is pertinent to note that even though the Alternative Dispute Resolution is an effective grievance redressal mechanism but is still facing challenges, especially in E-Commerce disputes, due to the inadequate framework and overlapping of the legislations. The author feels there is a dire need for indigenous legislation to cater to the consumers' needs in the country for domestic and international disputes. Alternative Dispute Resolution, especially Online Dispute Resolution, can be considered a consumer-centric approach that is much needed and will be a more accessible dispute resolution mechanism.

Since the world is adapting to the technological changes around the globe, it is pertinent for the justice delivery system even to curate a mechanism which resolves the

disputes between businesses and consumers, enabling the economy to grow with all its potential. As the author has been advocating for the ODR, it is pertinent to note that the concept of ODR is not new or alien as it has been in use in various parts of the world for more than a decade now, which has been discussed in the previous chapter. Further, it shall decentralise the dispute resolution mechanism and help cater for the aggrieved of their complex and unique disputes.

To conclude, the author would like to put forth that the growth of the E-Commerce marketplace in India has somehow been a boon to our society. However, every consumer must have safety and soundness in case of prospective disputes, which the E-Commerce legislation though provides is not enough considering the practices still in use like the standard form of contracts or the disputes that arise out of such disputes such as jurisdictional disputes or choice of adjudicators. Though legally binding and recognised in practice but mutuality and the agreement with any dominant effect form the very essence of a valid contract which in light of such practices can be argued to be missing in the present situation, and it is the dire need of the legislature and the E-Commerce entities to move away from it.

Thus, in light of all the author would like to propose a few suggestions for better resolution of e-commerce disputes and a better market for the greater public interest; they are as follows: -

- Need For A New Indigenous Legislation Which Regulates The E-Commerce Disputes: - Throughout this paper, the author felt that there is a need for newer legislation that is tailor-made considering the scenario in India. This legislation should, even though it should influence the UNCITRAL and other international

instruments, should instead develop its practices to cater to the consumers' needs for better resolution in this advancing world.

- Need For Revamp In The UNCITRAL And 'Guidelines For Consumer Protection In The Context Of Electronic Commerce' Of The OECD Convention, 1999: - Though these Model Laws and guidelines were brought in to resolve the disputes related to e-consumer matters, however, due to the lack of any specific provision about the jurisdiction which is considered as a significant area they are unable to guide or provide directives for the laws around the world. Thus, the Model Laws and the Guidelines recommending the state legislation and catering for the need of the parties in cross-border transactional disputes needs to be updated with time.
- Limiting the practice of Standard Form of Contract: - Agreements that provide for unilateral appointments should be rendered as *void ab initio*. Rendering them as *void ab initio* will safeguard the interest of the weaker party in obtaining justice and shall also ensure that principles of natural justice are complied with. Further, these practices will unnecessarily increase litigation and will waste the time of the parties on procedural and technical issues of the appointment of the arbitrator. The law should be carved out in such a manner that it focuses on the factual dispute between the parties, and the law should become a tool to strangle justice merely on preliminary and procedural issues.
- Adaptation Of Alternative Dispute Resolution: - Bring in legislation that can step up for better resolution of disputes. However, an alternative solution in the form of ADR is much needed for the speedy delivery of justice. The same has been endorsed in various International instruments worldwide and domestic

legislation like the Civil Procedure Code, 1908 and Chapter V of the Consumer Protection Act, 2019 in India.

- Prospective usage of Online Dispute Resolution: In cases wherein the parties face difficulty with the expenses and to continue with the traditional form of ADR, the online medium should be given an option to resolve their disputes.
- Adaptation of the tests by the Courts In India: - The Courts in India have done a tremendous job in resolving the disputes related to e-commerce. However, there seems to be a lack of proactiveness in drawing references from foreign Courts, which might help speedy justice delivery.
- Adaption of the Doctrine of Mutuality: - It is high time that the legislature should consider the need to incorporate the Doctrine of Mutuality so that both parties have an equal procedural right in case of any disputes, especially the ones that arise in E-Commerce.

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