

A COMPARATIVE STUDY OF STATUTORY LAW IN ONLINE RETAIL AND E-CONSUMER PROTECTION: INDIA AND THE UNITED KINGDOM

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INTRODUCTION

According to the October 2018 report by Telecom Regulatory Authority of India (TRAI), India had 512.26 million internet users at the end of June 2018¹. That is, 38 percent of the Indian population were internet users nine months ago and the percentage since then, has only risen. The consultancy firm, Bain and Company, reported that India has the fastest growing online retail market among top global economies in 2018. In its report, it stated that India's online retail market witnessed a compound annual growth rate of 53 percent between 2013 and 2017.²

The above reports make one thing clear. Online retail has evolved from being a luxury into something that is a necessity in India. This can be attributed to two main reasons. Firstly, the process *seems* more convenient and secondly, the online market grants access to a wider variety of goods. Despite the aforementioned perks, not being able to use e-commerce websites in a way that it empowers the other interests of the consumer such as quality of the goods and efficiency in delivery, will inevitably result in these websites falling out of favor with online consumers. It will make these websites a last resort. This could potentially slow down the spread of online retail, thereby, negatively impacting the economy of the country. Thus, as

¹ Shreya Ganguly, India crosses 500 million internet users as rural users surge, Inc42 Media (Dec. 28, 2018), <https://inc42.com/buzz/india-crosses-500-mn-internet-connections-as-rural-users-surge>

² Times News Network, India is the fastest growing e-commerce market: Report, Bennett, Coleman & Co. Ltd. (Nov. 29, 2018), <https://timesofindia.indiatimes.com/business/india-business/india-is-fastest-growing-e-commerce-market-report/articleshow/66857926.cms>

more and more consumers enter the online market, there is a need for a set of comprehensive legislations that regulate these online markets and protect the rights of consumers. In this paper, an attempt has been made to figure out whether the statutory laws currently in force in India provide for the protection of rights of the electronic consumer (e-consumer) sufficiently. For this purpose, a comparison has been drawn between the statutory law of India and the United Kingdom (UK) with respect to online retail. The UK was chosen because of the fact that both countries followed a rather similar pattern in the development of laws governing consumer protection and electronic commerce (e-commerce) till the year 2000. After that, the approaches diverged significantly.

THE SCENARIO IN THE UK

Firstly, online retail consists of a contract between a consumer and a seller using online marketplaces to carry on the purchase and sale of certain goods and services. Thus, the first law that comes into picture here is contract law. As no UK statute defines the term ‘contract’, it is necessary to rely upon the mostly widely used and accepted definition in the UK. It is given by Treitel. According to Treitel³, a contract is ‘an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.’ There are various case laws that have ruled on the essential elements required to constitute a valid contract enforceable by law. These elements include offer, acceptance, consideration, capacity and consensus ad idem or meeting of the minds. However, since this paper is concerned with the scope of statutory law and not common law, it will not be necessary to delve into the same.

Secondly, online retail is possible only when electronic contracts (e-contracts) are legal. The Electronic Communications Act, 2000⁴ gives legal recognition to e-contracts in the UK. The said act deals with three main issues: (a) the validity of electronic signatures, (b) the validity of electronic records in transactions, and (c) the legality of public key cryptography. It bestows

³ G.H Treitel, *The Law of Contract* (Sweet & Maxwell, 11th edition, 2003)

⁴ Anonymous, *Validity of Electronic Contracts in the UK*, Custom Writings, <https://customwritings.co/validity-of-electronic-contracts-in-the-uk>

legal status on them subject to a few exceptions, thus making e-contracts legally binding. E-contracts, just like non-electronic contracts must follow the essential elements laid down by UK courts in order to form a valid contract.

The Unfair Contract Terms Act, 1977 is another important legislation concerned with online retail. Its importance is exceptional since online consumers have to participate in click-wrap⁵ agreements when purchasing a product or service using an e-commerce website. It is impossible for a layman to go through each and every clause of these click-wrap agreements since they tend to be complex and lengthy. Even if he is able to achieve a thorough understanding of the terms and conditions of such agreements, he gains the ability to purchase a product or service using such e-commerce websites only if he accepts these pre-set terms and conditions. This means that there is no opportunity for negotiation. It is a 'take it or leave it' deal where the offeror of such deals has greater power than the offeree. In the absence of adequate regulation, the offeror is free to set agreements that are unconscionable in nature.

In order to avoid such unfair contracts, the Unfair Contract Terms Act⁶ regulates contracts by restricting the operation and legality of some contract terms. It extends to nearly all forms of contracts and one of its most important functions is limiting the applicability of disclaimers of liability. The terms extend to both actual contract terms and notices that are seen to constitute a contractual obligation. The act renders terms excluding or limiting liability ineffective or subject to reasonableness, depending on the nature of the obligation purported to be excluded and whether the party purporting to exclude or limit business liability is acting against a consumer.

The Consumer Protection Act of 1987 and the Consumer Rights Act of 2015⁷ are laws vital to the governance of digital retail in the UK. The latter act replaces the parts of Sale of Goods Act

⁵ Also known as a clickthrough agreement and clickwrap license. A form of agreement used for software licensing, websites, and other electronic media. It requires the user to agree to terms and conditions before using a website or completing an installation or online purchase process. These agreements typically present the terms and conditions followed by a check box with the words "I agree" or "I accept" that the user must click.

⁶ Anonymous, Overview Of The Unfair Contract Terms Act, Law Teacher (Nov. 2013), <https://www.lawteacher.net/free-law-essays/contract-law/overview-of-the-unfair-contract-terms-act-contract-law-essay.php?vref=1>.

⁷ Anonymous, Consumer Rights Act 2015, which, <https://www.which.co.uk/consumer-rights/regulation/consumer-rights-act>.

1979 which govern consumer contracts. It also replaces the parts concerned with unfair terms in Consumer Contracts Regulations 1999 and the Supply of Goods and Services Act 1982, insofar as it applies to transactions between traders and consumers. It makes changes to the rights of consumers to return faulty goods for refund, replacement or repair, and adding new rights on the purchase of digital content. The Consumer Protection Act of 1987 in the UK is largely akin to Consumer Protection Act of 1986 in India.

Lastly, the primary security concerns in online retail are data protection and privacy. In the UK, these concerns are addressed under statutory law and the personal data of individuals is protected under the Data Protection Act, 2018.⁸

THE SCENARIO IN INDIA

As previously noted, online retail consists of a contract between a consumer and a seller using online marketplaces to carry on the purchase and sale of certain goods and services. Therefore, it is necessary to understand Indian contract law first. The Indian Contract Act⁹ defines contract under section 2(h) as ‘an agreement enforceable by law.’ The same act lays down the various essential elements required to constitute a valid contract that are very much in line with the consumer law in the United Kingdom. The essential elements of a contract are given in section 10 of the act. According to this section, there must be a lawful offer, lawful acceptance and lawful consideration. The parties to a contract should have the capacity to contract and must give their free consent that is not obtained by coercion, fraud, misrepresentation or mistake. The object of the contract must be lawful. Every agreement of the contract must be certain, capable of being performed and not expressly declared void.

Secondly, it is essential to understand whether or not e-contracts are legal. In India, under the provisions of the Information Technology (IT) Act, 2000, particularly Section 10-A added by the 2008 amendment, an e-contract is valid and enforceable. The IT Act gives legal recognition

⁸ Anonymous, The UK Data Protection Act 2018 – what do you need to know? Bryan Cave Leighton Paisner LLP (June 1, 2018), <https://www.bclplaw.com/en-US/thought-leadership/the-uk-data-protection-act-2018-what-do-you-need-to-know.html>.

⁹ Indian Contracts Act, 1872, No.9, Acts of Parliament, 1872 (India).

to electronic signatures and electronic records. The only essential requirement to validate an e-contract is compliance with the necessary pre-requisites provided under the Indian Contract Act, 1872. Also, the courts in India give due regard to electronic contracts under the provisions of the Indian Evidence Act, 1872.¹⁰

The Consumer Protection Act, 1986 is applicable to the rights of e-consumers as it provides for legal remedy against defective goods and deficient services purchased or availed online and protects them from restrictive and unfair trade practices.

It is after this point that the approaches of the United Kingdom and India diverge. To begin with, Indian legislation does not cover unfair contract terms. The Law Commission of India in its 199th report on Unfair (Procedural & Substantive) Terms in Contract observed in 2006 that ‘There is, as of today, no general statutory provision in the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 whereby the courts can give relief to the consumer/weaker party by holding such terms in contracts as void on the ground of their being unreasonable, or unconscionable or unfair.’ It has been 13 years since the release of that report. Yet, there are no laws concerning unfair contract terms. This is a major disadvantage to e-consumers in India who are more vulnerable than e-consumers in developed economies such as the United States as the growth of online retail in India is a swift and new development with many e-consumers having limited experience in online marketplaces.

Section 46 of The Consumer Protection Bill¹¹, 2018 defines the term ‘unfair contract’ as:

a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer including the following, namely:

(i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or

¹⁰ Maneck Mulla, India: Validity of Electronic Contracts In India, Mondaq (May 4, 2018), <http://www.mondaq.com/india/x/699022/Contract+Law/Validity+Of+Electronic+Contracts+In+India>.

¹¹ The Consumer Protection Bill, 2018, No.1, Bills of Parliament, 2018 (India).

- (ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or
- (iii) refusing to accept early repayment of debts on payment of applicable penalty; or
- (iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or
- (v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or
- (vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.

The passing of this bill will benefit consumers immensely. In 1984, the 103rd report of the Law Commission was submitted and it was suggested that a single section (sec. 67A) be incorporated in the Indian Contract Act, 1872 with two sub-sections invalidating exclusion of liability for negligence and for breach of contract. The addition of this single section will simplify the judicial process, resulting in speedier justice. Better yet, it will prevent the occurrence of injustice relating to unfair contract terms.

At this juncture, one might be inclined to ask as to why statutory law relating to unfair contract terms would be needed when the common law is already in a position to progressively interpret and provide relief to those consumers who are victims of unfair contract terms. To answer this, it would appropriate to quote Lord Denning, who in the context of granting justice to consumers, said, ‘I am relieved that we no longer have to go through all kinds of gymnastic contortions to get around them (unfair contract terms),’ after the Unfair Contract Terms Act, 1977 protecting consumers against unfair exemption clauses was passed by the British Parliament.¹²

¹² Akhileshwar Pathak, Unfair Contract Terms: The Consumer Protection Bill, 2015, Live Law (Oct. 15, 2015, 2:57 PM), <https://www.livelaw.in/unfair-contract-terms-the-consumer-protection-bill-2015>.

Finally, we are concerned with data protection and privacy of e-consumers. In India, Information Technology (Reasonable Security Practices and Sensitive Personal Data or Information) Rules, 2011 has general application to all sectors in this matter. However, the rules are not comprehensive and were meant to be replaced in short period of time by a parliamentary legislation. As a result, there is an impending need to pass the 'The Personal Data Protection Bill, 2018' which is aimed at securing the rights of data subjects and overhauling completely the present data privacy and protection regime in India or rather the lack of it. The passing of this bill will greatly strengthen the scope of laws protecting online consumers in India.

CONCLUSION

In the year 2000, both India and the United Kingdom were in a similar position when it came to the presence of statutory law governing online retail, except that the UK, in addition, had the Unfair Contract Terms Act of 1977. In the next 19 years, however, both countries have chosen to adhere to different paths. The Indian approach has lagged behind by almost two decades in creating a strong framework to regulate online retail, especially when it comes to updating the Consumer Protection Act and the Indian Contract Act to cope up with changing needs of the consumer in an increasingly globalized world. This failure to update is not justifiable or reasonable as the changes to be made are readily available in the form of bills, suggestions by the law commissions and various independent organizations. By failing to update the aforementioned legislations or introducing new ones in their place, a dis-service has been done to both the judiciary and the common man. The case of Justice K. S. Puttaswamy v. Union of India recognized privacy as a fundamental right and recognized 'informational privacy' as an important aspect of the right to privacy that can be claimed against state and non-state actors. However, there is no appropriate legislation covering informational privacy and data protection in India as the Personal Data Protection Bill, 2018 is yet to be passed. This lack has resulted in a need for judicial activism in various cases concerned with online retail and has complicated a process that can easily be made simple. Therefore, this comparative study has led to the conclusion that the statutory laws currently in force in India do not provide for the protection of rights of the electronic consumer sufficiently. They do not cover the scope of

online retail satisfactorily. It is indeed high time that the aforementioned Consumer Protection Bill and Data Protection Bill are passed by the Indian Parliament.

