EVOLUTION OF E-COMMERCE IN INDIA: Challenges Ahead (Part 2)

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*[**Abstract**: Continuing with the subject of evolution of e-commerce in India as initiated in DN2014/07, this discussion note highlights the technological issues that surround e-commerce and the enabling service providers drawn from diverse domains. Long-term e-commerce players would do well to forearm themselves under the watchful eyes of their legal advisors having expertise in relevant domains. Diligence in this regard is required at every stage of e-business, right from the initial set-up stage to its phase of operation which will intensify with doses of feedback. Such diligence is particularly required—as apart from the applicability of stringent provisions of IT Act 2000, the existing laws of the land applicable to conventional module of businesses are applicable in an environment of fast-paced technological changes that are impacting the e-commerce landscape. Such a situation would require innovation in interpretation and applicability of such laws until a consensus is achieved for enacting a dedicated legislation to overcome certain deficiencies in the existing legal framework. Legal community itself has to develop necessary skills and insight to guide entrepreneurs on the one hand, and assist the courts in arriving at harmonious interpretations accommodative of technological impact on the mode of business on the other hand.]*

The relationship between law and technological innovation and development has to be interactive, dynamic and complex. Law making necessarily has to be slow and tedious but technology can proceed at break neck speed. Thus, there is bound to be a gap between technological innovation and legal change. This gap promotes legal uncertainty because the interacting parties cannot comprehend their legal rights and liabilities arising out of the application of technological innovations. However, on the contrary, this gap in time is not only necessary for a better analysis of the impact of technology, but also—prior to enactment of laws—helps to soberly decide on ways to encourage positive interaction between parties in order to achieve optimal satisfaction.

With the increasing deployment of internet infrastructure for e-commerce, there are radical changes in our ability to store, process and communicate information, leading to changes in the way products are packaged and delivered. Since the modes of e-commerce are subject to alteration, it dictates a relook at the various laws, policies

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and institutional arrangements to cope with them. Until a new set of understandings between the various interacting parties and the states is reached—leading to the enactment of appropriate legislations necessary for the smooth conduct of electronic operations in business in e-mode—the existing legal instruments would continue to apply and evolve through court rulings.

As a global body, the United Nations Commission on International Trade Law (UNCITRAL) was used as a forum by the government to develop uniform law standards for electronic commerce. This forum recognized that modern legislation on electronic transactions should take into account core elements such as: the electronic transactions should not be discriminated against solely because of their nature; the legal value of electronic transactions shall be equivalent to other forms of communication such as on paper in writing; and further, the law shall be technology-neutral to accommodate emerging technologies or generics. Such core elements may be complemented by the contractual choices of the parties to a specific transaction[1]. The General Assembly of the United Nations adopted a resolution on January 30, 1997 commending the Model Law on Electronic Commerce (worked out by the UNCITRAL) for a favourable consideration by the Member States as a Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information. Government of India enacted the Information Technology Act (henceforth referred to as IT Act) in June 2000. This enactment amended the related provisions of the Indian Penal Code, the Indian Evidence Act, the Bankers' Books Evidence Act, and the Reserve Bank of India Act. With the enactment of the IT Act, the information in the electronic format was granted legal status, digital signatures were defined and got legal recognition, and, electronic contract became legally binding.

[1] UNCITRAL Model Law on Electronic Commerce (1996), United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

Offences like hacking, damage to computer source code, publishing of information which is obscene in electronic form, breach of confidentiality and privacy, and fraudulent grant and use of digital signatures were made punishable offences.[2] The Act was amended in 2008 to make it technology-neutral and recognized electronic signatures over restrictive digital signatures. Besides, the state assumed specific powers to control websites in order to protect privacy on the one hand, and check possible misuse leading to tax evasions on the other hand.[3]

The IT Act legally recognizes electronic transactions, electronic records and electronic contracts at par with other legally recognized formats. Recognizing the fact that there are a set of intermediaries like the Internet Service Providers (ISPs) who provide facilitation to interacting parties to exchange and store information and retrieve the same as per their requirement, a set of obligations have been brought on them to create necessary safeguards to ensure data security and privacy interests of the parties involved. Beside, e-contracts like all other contracts continue to remain governed by the basic principles governing the Indian Contract Act, which mandates certain prerequisites for a valid contract between competent parties such as free consent and lawful consideration. The terms and conditions associated with e-commerce platform have to remain in conformity with the Indian Contract Act, irrespective of the mode of entry—click wrap/shrink wrap agreements—into contract and the mode recognized by the IT Act. In e-commerce, particularly in B2C segment, there is little scope for negotiation regarding the terms of contract. U.S. courts have not been averse in treating such standard contracts as unconscionable, making them liable to be struck down in facts and circumstances of the cases. In India, judicial pronouncements arising out of e-commerce contracts deemed unconscionable may not be many but the Indian courts have dealt with instances where the terms of a contract, including those of a standard contract, were negotiated between parties in unequal bargaining positions. Section 16(3) and

[2] Information Technology Act 2000

[3] Prakash, Pranesh (2009), "Short Note on IT Amendment Act, 2008," The Centre for Internet & Society.

Section 23 of the Indian Contract Act provide enough flexibility to courts to provide appropriate safeguards to the contracting parties[4].

Long-term players entering the e-commerce sector are required to conduct due legal diligence right from the basic stage of creating a website, particularly ensuring that no infringement of copyright, trademark, etc., is caused in the content and style of the webpage. A higher degree of diligence would thus be required as they enter into contract with internet service providers, ensuring that privacy of consumers is maintained as per the requirement of IT Act and other laws of the land. Further, appropriate provisions would have to be built in the contract to safeguard the ISPs; the ISPs are not allowed to stop hosting without cause. Similarly, if the e-business itself expands its web activities, including posting of views and reviews of its users and customers, it has to safeguard itself and its host against the possible misuse by such "chat room" resulting in defamation suit, etc.

The core elements of e-business are registering order, arranging delivery, and receiving e-payments. If and when a problem arises in such programmes, the setback can be irreversible if the malfunctioning of the programmes is not self-correcting or is not addressed with expediency. Thus, contracts with such programme providers will have to provide for remedial measures to the extent of neutralizing the losses occasioned by malfunctioning programmes[5]. Concerns about the privacy aspect have been elaborated later in this note.

Settlement of disputes in the B2C segment, particularly, is challenging. Disputes are traditionally settled within the physical territory where one or both of the disputants are located. Different principles came to be applied in different national jurisdictions in this regard. In the beginning, courts in different countries began to access the internet merely to use it as a sufficient ground for assuming jurisdiction over internet related transactions. This principle was refined in the *Zippo* case in the U.S. It required the courts to look at something more than mere internet access to assume

[4] Nishith Desai Associates (2013), E-commerce in India, Legal, Tax and Regulatory Analysis, August.
[5] E-commerce: An Introduction, http://cyber.law.harvard.edu/olds/ecommerce/setuptext.html

jurisdiction. That "something else" could be interactive web form for the website or any such factor. A substantial refining on the subject of jurisdiction came about in the year 2001 in the case of *Yahoo! France***,** wherein two groups in France complained to the court that Yahoo! France's auction website sold Nazi memorabilia and Third Reich related goods, which were banned under the French law and it was prayed that the related activities of Yahoo! France be banned. Yahoo's plea was that since the company was incorporated in U.S., its conduct was beyond the jurisdiction of the French courts. Besides, it was technically infeasible to ban all Nazi memorabilia and content from its website. The French court ruled that the auction sites—which outlawed the sale—violated French law. After hearing from a panel of experts that it was technically possible to block 70 to 90 per cent of French users from a website, the court gave Yahoo! 90 days to block French users or face a fine of 100,000 Franc for each day of noncompliance. When *Yahoo!* approached the U.S. court seeking it to declare the judgment of the French court as unenforceable in the U.S., the court upheld that the decision of French court could not be enforced in the U.S. However, it respected the judgment of the French court as it was passed in the peculiar facts relating to France and thus leaving the door open for the foreign courts to step in. Yahoo! voluntarily banned the sale of hate group related merchandise. The above ruling of the U.S. court underlines the fact that orders of a foreign court against a legal entity of another country would not automatically become operable in the country of origin, but would need scrutiny by the court of country of origin with reference to its laws and constitution. Thus, the ruling is a deterrent to unnecessary assumption of jurisdiction on internet related matters[6].

In the context of internet, a website operator will not normally limit its viewers or customers to those residing in a certain state. The courts have determined jurisdiction based on the level of interactivity and commercial nature of the exchange of information that occurs on the website and have categorized the website to into three areas:

[6] Chauhan, Abha (2013), "Evolution and Development of Cyber Law – A Study with Special Reference to India," Social Science Research Network.

- Fully interactive sites where users purchase goods or services, exchange information or files, or enter into agreements;
- Fully passive sites where information is available for people to view; and,
- Sites somewhere in the middle, with limited interaction.

Courts are likely to take jurisdiction over the out-of-state operator of fully interactive sites, unless the operator forbade the sale in the state or did not target them. Fully passive websites are not likely to be subject to jurisdiction as they operate from outside the state. In the middle courts, the facts of the interaction would determine the existence of jurisdiction on out-of-state operators. Companies that do not wish to be subjected to jurisdiction in foreign states and countries should consider limiting their websites to passive activity.

After the issue of jurisdiction, loss of evidence is another challenge in the enforcement of cybercrime laws as crucial data are destroyed by the perpetrators in seconds and without a trace. Also, collection of data from another location in another country makes it very difficult to prosecute the offenders. Section 75 of the IT Act does provide for extraterritorial operation in this law—it can be enforced with orders and warrants from external authorities and would require a high level of interagency co-operation[7].

In the commercial relationship between parties in different segments, e.g., B2B and B2C, disputes are bound to arise. Some of those would arise out of contracts between the parties and some would be of a non-contractual nature, e.g., Copyright issues, data protection issues, and competition issues. Disputes surrounding the B2C segment though small in monetary terms, yet involve issues such as jurisdiction, choice of law, and high cost of cross border litigation which are costly to pursue. Many workable cost-effective mechanisms are being advocated. Enterprises are advised to establish internal complaint resolution procedures that are quick, accessible, free and fair.

[7] Baharul Isalm, K.M. (2008), "E-commerce: Laws and Cyber Crimes," academia.edu.

In case the internal dispute settlement mechanism is unable to satisfy the complainant, the complainant may be asked to avail of the Online Dispute Resolution (ODR) mechanism, keeping the conventional forums aside in expectation of saving the botheration of personal appearances and costs. In this mode, an independent third party entertains the complaint online and invites the other party to participate in the process. Generally peer pressure of the ODR, if sponsored or backed by media group or social networks, is able to work out a satisfactory resolution. It would be in the interest of B2C e-commerce segment if independent ODR agencies are promoted and accredited in order to make themselves easily available to consumers and offer to resolve their disputes quickly and at low costs in an objective, impartial and transparent manner. Of course, the instrument of ODR would not exclude the right of consumers to seek remedies provided under the law.

The urgency to expand both internet and supply chain infrastructure and the necessity to put in place internal and external dispute settlement mechanisms have been felt all at once in the experiment done by Flipkart, terming it as the Big Billion Sale. On 6th October 2014, it claimed to have sold Rs 600 crore ($100 million) worth of goods within 10 hours of starting its sale. Snapdeal and Amazon also benefited from Flipkart's aggressive advertising. While the frenzied buying signifies a coming of age for India's e-commerce, the Big Billion Day also exposed the challenges with e-commerce in India which was highlighted on the social media sites. User's complaints ranged from operational issues such as products being out of stock to ones that claimed that Flipkart marked up prices before discounting them. Such adverse publicity that Flipkart received despite impressive sales of Rs 600 crore in a day has forced the promoters of Flipkart to tender an open apology to its consumers over their poor handling of servers, which were unable to cope with high incoming traffic volume leading to the outages and sudden cancellation of purchases.[8],[9] In a fiasco of this magnitude, there can arise many legal issues for which advanced preparatory action should be in place to prevent the onset of expensive litigation

[8] Hosanagar, Kartik, "Flipkart's Big Billion Sale Fiasco Hands Edge to Competitors like Amazon, Snapdeal," *The Economic Times*, October 9, 2014.

[9] Rohit, K.V.N., "Flipkart Apologizes to Beleaguered Patrons Over Big Billion Day Sale Fiasco; Promises Better Service in Future," *International Business Times*, October 7, 2014.

besides putting the reputation of the brand at stake. Big e-commerce players may, besides setting up an internal redressal mechanism, encourage an independent dispute settlement mechanism to come up so that consumers finally do not feel the necessity of approaching formal legal forums.

Episode of Big Billion Day sale presents a snap picture signifying a whole set of legal issues involving e-retailing besides infrastructure issues. Top electronic firms such as Samsung, LG and Sony have expressed surprise at the discounted prices offered by Flipkart which, for them, are below the cost of manufacturing; they are terming these prices as "predatory pricing". Heavy discounts offered by the e-retailers affects the business of brick and mortar retailers, thus eliminating them and finally gaining an environment of "no competition" from such stores. Delegation of Confederation of All India Traders (CAIT) in its memorandum to MoS (Commerce) has raised questions on the business module of online retailers and has desired the creation of a Regulatory Authority to monitor and regulate e-commerce business. The CAIT has also said that the tax charging procedure of online retailers needs to be looked into. Further, it needs to be investigated whether the sellers are funded by the owners of technology platform or if the manufacturers are giving products to online sellers at a different price than the offline markets. In both cases, such practices tantamount to predatory pricing that may contravene the Competition Act. CAIT has also said that there is no "overseeing" of e-commerce retailers to satisfy if they are observing the plethora of laws which govern the brick and mortar stores, and in this connection, they have given an example of the Legal Metrology (Packaged Commodity) Rules, 2011. It has been apprehended that the e-retailers manage to get around the various taxes, including entry tax. That is, since e-companies are registered with the taxation department of one state and deliver their products through their logistic arrangement in different states across the country, it contributes to the loss of tax revenue to the consuming state. It is claimed by CAIT that in the absence of a level playing field between the two modules of retail segment, unfair and disadvantageous conditions are being brought on the offline traders, which is

violative of the Competition Act[10]**.** The concern about the loss of revenue has been expressed from time to time by many states; however, this aspect remains a challenge to e-commerce vis-à-vis states and would remain so till the tax structure does not become uniform across the states[11].

Though there is no proof of any wrongdoing yet, legal issues pertaining to publication of print books and e-books are surfacing across the countries. Apple has been fined in a Beijing Court for unauthorised sale of e-books. Publishers have entered into settlement with the European Union for e-books price fixation. The Penguin Group also settled an e-book price escalation lawsuit recently. It has been alleged that e-commerce websites are operating in an unregulated environment, which leaves scope not only for violation of various Indian laws, including taxation laws, foreign exchange laws and consumer laws, but also for indulging in predatory pricing. The Federation of Publishers and Book Sellers Association in India (FPBAI) has written to the government at the highest level complaining about the questionable trade practices indulged into by e-commerce websites like Flipkart. Flipkart has been served a legal notice by S. Chand, a well-known publisher, accusing it of modifying discount structures, violating the clause, and retailing only their fast-selling titles. Despite S. Chand snapping its ties with Flipkart after serving the notice, Flipkart has managed to sell S. Chand's books by sourcing them from other wholesalers. The FPBAI is alarmed that many books stores of repute such as Capital Book Depot in Chandigarhs, Teksons and New Book Depot in Delhi have shut their shops and many others are struggling for survival due to the predatory nature of pricing activities of e-commerce websites in India. Scenario is fast building up for the big fishes to explore and monopolize the Indian market[12]. Some experts dismiss the allegation of predatory pricing by e-commerce companies as online retailers, despite

[10] Sharma, Vijyender (2014), "CAIT Delegation Met Commerce Minister on E-commerce Irregularities; Demanded Probe and Regulatory Authority for E-commerce," Face2News, October 9, http://www.face2news.com/news/10793-cait-delegation-met-commerce-minister-on-e-commerce-irregularities-demanded-probe-and-regulatory-authority-for-e-commerc.aspx

[11] Vardhan, Jai (2014), "Kerala Denies E-commerce Shipments Evading State's Sales Tax [A quick look at tax structure across states]," Your Story, June 05, http://yourstory.com/2014/06/ecommerce-shipments/

[12] E-retailing Laws and Regulations in India. http://ptlb.in/ecommerce/

their impressive performance, represent a small portion (about 1%–2%) of the overall retail market. It becomes predatory pricing if the operator is a dominant player, capable of killing competitors and warranting entry of new players[13]. There are a set of experts who recall that the MRTPC (Monopolies and Restrictive Trade Practices Commission) had defined the rules of discount pricing about twenty five years ago. According to the ruling laid by MRTPC, it should be mandatory for retailers to come out with full disclosure of the sale, at least a week in advance. Discounts that are being offered should be compared with the manufacturer's suggested price or the MRP and not some inflated price offered by the retailer. There should be specific information on the brands and models being offered at discounted prices, the time taken for delivery, the return and refund policy, etc., to enable the consumers to make informed choices. MRTPC's *suo moto* investigations had blown the lid off many "festival discount offers". In the changed times, social media is a vibrant community and can put the reputation of the operators at risk much faster than intervention by a formal forum as demonstrated by the 6th October episode of Big Billion sale. While government mulls over various options and formulations, e-retailers need to have a strong internal dispute resolution mechanism in place[14].

Advertisement and marketing in the online medium also raise considerable novel issues of which the e-commerce operator should be aware, lest it transgresses laws on spamming and/or offends some members of the target groups, flooding them with emails containing information about their products[15].

For an e-commerce platform, it would be imperative to collect some form of personal information of the users such as details about their identity, financial information, personal choice and preferences. A notification has been issued under Section 43A of the IT Act, providing a framework for the protection of data particularly relating to personal information and sensitive personal data. Personal Information relates to the identity of the person and the sensitive personal data

[13] Doval, Pankaj, "E-sales May Not Fall Afoul of CCI," *The Times of India*, New Delhi, October 10, 2014.
[14] Girimaji, Pushpa (2014), "Discount Sales Need More Clarity to Protect Consumer Interests," htSyndication, October 12.
[15] *Op. cit*., 5

includes information on password; bank account or credit card or debit card or other payment instrument details; physical, physiological, mental health condition; sexual orientation; medical records and history; and, biometric information. The relevant rules under the notification cast obligations for the protection of privacy in relation to personal information and sensitive personal information on the punishment as provided under the IT Act besides making the entities liable for monetary compensation. E-retail companies and entities are thus required to have foolproof instruments and arrangements in place to remain on the right side of law. Their servers and those of their associates have to safeguard their systems from any unauthorised intrusion, both internally and externally.[16]

From the forgoing, it is evident that e-commerce in India is witnessing rapid growth and will gain further momentum with the spread of internet access and also with the growth of the middle class and smart cities. More and more business entities in India, including small-scale and protesting brick and mortar retailers, are becoming aware of the benefits of online presence and brand promotion & protection. In India, e-commerce, despite the episode of 6th October 2014, will become a more popular method of doing business and resultantly, domain name protection will assume significance. India has no dedicated e-commerce regulatory law other than the IT Act which regulates the e-commerce business and transactions in India. Liabilities of various intermediaries under the IT Act are fairly stringent. For instance, e-commerce site owners and players can be held liable for infringement of copyright in India. In India, cyber law due diligence is essential for the long-term e-commerce players and they must continuously engage in such diligence, lest they face legal consequence as a result of oversight and/or cavalier attitude.

Technology is the most critical component of e-commerce. Legal community in India is required to develop the necessary expertise to guide entrepreneurs, consumers and even courts in a manner that the fast emerging business module is enabled to adhere to existing legislations normally applicable to business transactions in conventional modules. Simultaneously, it should ensure that the advantages of

[16] *Op. cit*., 4

technology are availed of unhindered by judicious evolution of law through learned interpretation of courts till a consensus emerges that a specialized law to govern and regulate certain aspects of e-commerce is imperative and an exclusive necessity.

In the next and final Discussion Note on the subject, the aspect of taxation of e-commerce transactions would be explored.