INTERNATIONAL JOURNAL ON CONSUMER LAW AND PRACTICE

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Impact of RERA 2016 and its Ramifications – A Consumer-Centric Analysis
—*Raymond Keng Wan Ng*

Responsible Borrowing and Lending In U.K.
—*Jodi Gardner, Karen Rowlingson & Lindsey Appleyard*

Consumer Rights in A Democratic System and The Emerging Market In Nigeria
—*Nnawulezi Uche Augustus*

Emaar Mgf Land Ltd. v. *Aftab Singh*: The End of the Line for Consumer Arbitration in India
—*Ajar Rab*

International Legal Framework on Comparative Advertising in European Union, United States and India – A Contemplative Comparative Study
—*Ashok R. Patil & Anita A. Patil*

B2C E-Commerce and Consumer Protection with Special Reference to India – ADR A Best Possible Solution
—*Nandini CP*

Amended Need for Government Initiated Product Recall in India
—*K. Ritika & Akshay Narang*

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CONTENTS

1 IMPACT OF RERA 2016 AND ITS RAMIFICATIONS – A CONSUMER-CENTRIC ANALYSIS
—*Raymond Keng Wan Ng*

14 RESPONSIBLE BORROWING AND LENDING IN U.K.
—*Jodi Gardner, Karen Rowlingson & Lindsey Appleyard*

29 CONSUMER RIGHTS IN A DEMOCRATIC SYSTEM AND THE EMERGING MARKET IN NIGERIA
—*Nnawulezi Uche Augustus*

41 *EMAAR MGF LAND LTD.* V. *AFTAB SINGH*: THE END OF THE LINE FOR CONSUMER ARBITRATION IN INDIA
—*Ajar Rab*

54 INTERNATIONAL LEGAL FRAMEWORK ON COMPARATIVE ADVERTISING IN EUROPEAN UNION, UNITED STATES AND INDIA – A CONTEMPLATIVE COMPARATIVE STUDY
—*Ashok R. Patil & Anita A. Patil*

74 B2C E-COMMERCE AND CONSUMER PROTECTION WITH SPECIAL REFERENCE TO INDIA – ADR A BEST POSSIBLE SOLUTION
—*Nandini CP*

88 AMENDED NEED FOR GOVERNMENT INITIATED PRODUCT RECALL IN INDIA
—*K. Ritika & Akshay Narang*

IMPACT OF RERA 2016 AND ITS RAMIFICATIONS – A CONSUMER-CENTRIC ANALYSIS

—*Raymond Keng Wan Ng*[*]

Abstract *This paper examines the strengths and weaknesses of the recently-introduced Real Estate (Regulation and Development) Act, 2016 (RERA in short). In essence, the object of this "one nationwide" Act is to bring more harmony into the "home-buying" ecosystem. Boosting the sector's economy and enticing more Foreign Direct Investments into the same are also included.*

From the outset, RERA would bring more transparency into the purchasing process. Developer-promoters will be under more scrutiny with regards to financial management, as well as their deliverance of the end product. That said, for any new law to be effective and sustainable, effective policing and timely enforcement must work in tandem. The concerns here include: Would mere compliance be good enough to eradicate on-going issues? Under what condition would regulators step in to act on their own cognizance? Are there minimum standard stipulated to trigger a "red flag" and act suo motu? Does the individual state have the financial capacity to deploy the manpower to contain compliance standards? What if developer-promoters re-strategized to circumvent the Act? Are there any contingency plan? Apparently, information of such remains unclear.

This paper would attempt to go beyond the limits of this Act. A global-centric perspective would be presented. And to facilitate more multi-dimensional discussions, it will be presented in a succinct format. An out-of-the-box thinking is adopted. To disclaim, the recommendations suggested are not exhaustive but

[*] Founder CEO, Yuppies Club International Inc. USA (A Global Business Learning and Networking Alliance).

only to serve as a primer to stimulate "expanded" thinking and hence, deriving more sustainable solutions going forward.

I. INTRODUCTION

This paper intends to examine the impact of stakeholders' behavior with regards to India's recently-introduced Real Estate (Regulation and Development) Act, 2016 (RERA in short) .The object is to reengineer the balance of interests amongst various stakeholders and particularly to address the lopsided rules and practices which buyers of real estate had been disadvantaged.[1] It is also the intention of the government to boost India's real estate sector, improve industry standards and entice Foreign Direct Investments.[2]

From the outset, RERA would bring more transparency into the purchasing process and give clarity to buyers on purchasers' rights and duties as well as, how developer-promoters manage their finances by introducing safeguards to mitigate risk exposure. More accountability provisions on developer-promoters were also incorporated. These include: compulsory registration of developer-promoters for projects with site area of more than 500 sq metres and the number of apartment units less than eight, and registration of real estate agents, the 70% deposit to escrow account, higher penal punishments for major delays, the requirement for 2/3 purchasers' consent for major addition and alteration, redefining "carpet area", extension of defect period and a 60-day dispute resolution mechanism – to name just a few.[3] On the whole, such provisions are prudent and will aid in setting the boundaries of legal limits.

That said, for any new law to be effective and sustainable, effective policing and timely enforcement must work in tandem. Time and patience should also be granted.

Here, the author intends to play "devil's advocate" and would like to offer his insights by performing a critical analysis on the provisions embedded. A global-centric perspective (beyond the RERA regime) would be shared. And

[1] 'What is RERA and how will it impact the real estate industry and home buyers?', *Housing News Desk*, 2018, >..., (accessed 26 March 2018).

[2] *About RERA Act*, https://rera.karnataka.gov.in, (accessed 26 March 2018).

[3] *Ibid*.

to facilitate more constructive discussions to include the masses, this article is presented in the most succinct and comprehensible manner.

Solutions on how India could build a stronger homebuyer ecosystem are proposed. An out-of-the-box thinking approach was applied. To disclaim, these recommendations are not exhaustive but will only serve as a primer to stimulate deeper thinking and thus, will create more sustainable solutions over time.

II. RERA – A GOOD LAW?

From the outset, the RERA framework is a good starting point – from the perspective of the author. It should serve India well if prudently implemented, policed and enforced.

Being new, every good law is still subject to time and test – and it has to work in tandem with the dynamics of other public policies as well as the interplay of global economics and politics - beyond India's control. While scrutinizing the Act per se, it was prima facie agreeable that this Act is well-thought through on paper. That said, it could also pose innumerable challenges to stakeholders during its implementation. Further, the author anticipates an almost-immediate inflationary impact on property prices which could frustrate potential purchasers across India from now on. Developers' business will also experience some slow down during this transition period – where buyers/investors may adopt a wait-and-see attitude before entering the market.

III. HOW DEVELOPER-PROMOTERS WOULD REACT?

Under the new rule, a developer-promoter is required to register with RERA if the project involved more than eight apartment units to be built on a land plot of over 500 sq metres. This sets the baseline for developer-promoters (of all sizes) to comply within the new legal limit. The concern here from the perspective of 'increased costs' is: how many developer-promoters are willing to adhere or has the financial capacity to adopt the new standard, while still be able to make a justifiable operating margin without sacrificing quality standards? Would they circumvent such a regulation by building and marketing more "micro" sites projects that offer only low-rise 8 unit apartment development? If such a trend begins, then, would it negatively impact any urban development planning especially near inner cities with regard to policies on the optimization of "highest and best use" of

land? These are material issues for policy-makers to deliberate further - as short-time solutions provided may impact long-term efficiency. To say the least, undoing a public policy once commenced is always costly – especially to taxpayers.

IV. SETTING STANDARDS FOR HEIGHT LIMITS WITHIN EACH APARTMENT

RERA did not sanction any height limits as per apartment. The author feels that it is prudent for regulators – both at the Central and State level - to provide clarity and agree on a national standard – granted that differences in locality and human density could permit a difference to the height ratio. Though some may argue that height limits were already contained in the respective State's building codes, it is in this regard a different issue. To the Developers, they need more certainty on such standard to come out with more creative designs – hence aiding their sales. To homebuyers, they want to know how internal air space could be optimized and if they are getting the "best" perceived value for their purchase. Just to share, in high density cities like Tokyo, Japan, Manhattan, New York, Vancouver, Canada, Hong Kong and Singapore for instance, optimizing of airspace within the apartment's carpet area were proven to be feasible for value consideration.

V. WOULD ENFORCEMENT STANDARDS AMONGST DIFFERENT STATES DIFFER?

The next concern is, till date, not every state has the same land laws. Further, not every State had notified the Act or is ready to provide the necessary legal infrastructure to implement RERA. As the State government is given full discretion to implement RERA, would enforcement standards be similar? If not, then, would potential purchasers be given the same level of protection and legal recourse basing on judicial precedents of "more-established" states going forward? Clarity on these is thus solicited.

VI. ESTABLISHING A RATING AND CLASSIFICATION INDEX

Till date, there is no reliable government published statistics on the developer-promoters - with regard to past performance records, buyers-feedback and competent third-party auditing of financials of promoters. On this, the author proposes a performance-rating mechanism to be initiated and this must be administered by a government agency only – as public accountability should start and end with government. Such mechanism would act as

a catalyst to shed greater transparency for potential purchasers, regulators and lenders – hence, reducing "failed" projects to occur. Just to share, in the United States for instance, credit information on companies is ranked within each major industry – by a competent independent third party. With that, it helps provide more transparency to trade suppliers granting credit, lenders to decide on loan limits and to customers to decide if that company of choice is solvent or otherwise. Rating of developers could also motivate them to stay focused and enhance innovation - thus keeping the real estate sector productive and competitive. Oligopoly would thus be diluted over time.

VII. WOULD A SUDDEN INCREASE IN PROPERTY PRICING IMPACTS AFFORDABILITY AND PROMOTERS' BUSINESS?

With the new RERA in place, the author has predicted a sudden surge in real estate pricing. This is anticipated because higher administrative charges, inventory, labor and costs of capital are expected to rise under the new regime. It is also expected that such costs would likely be transferred to potential buyers. Further, developer-promoters would need to readjust their respective supply chain on materials and labor pool which may be sourced from abroad. The financial risks exposed by promoters (especially on mega-projects) which are usually backed by high-risk syndicated loans will need to be renegotiation - to prevent disruptions on the deliverance of on-going projects. At this juncture, some developers are already facing higher unsold inventory and some buyers had also shown preferences to buy ready-to-occupy properties – even by paying higher premiums.[4]

On the above concerns, those that deemed the new Act to be too tedious or costly to comply – may re-strategize or "cut corners" thus, impacting quality standards. The outcomes may hurt the intended objectives of RERA. It may also have an adverse impact on urban renewal and enticing foreign capital inflows. The question here is: Are the rules in RERA sufficient to provide a buffer to contain such scenario and still achieve intended objectives? Regulators must provide clarity.

VIII. ARE THERE PROVISIONS FOR RESOURCE SHARING?

As a country constituted under a 'quasi federal' model, it may be difficult for an Act like RERA to be effectively implemented equitably - all at one

[4] Ashwinder Raj Singh, 'RERA and GST impact: buyers prefer OC – ready projects', *MahaRERA Real Estate News/Housing News*, 2017, ..., (accessed 26 March 2018).

go. It is also anticipated that the more progressive states like Maharashtra, Tamil Nadu, Gujarat, Kerala, Karnataka and Telangana to name a few, would likely drive a higher volume of property purchase. In the interest of a common economic development goal across the nation, would the gains in revenue from these progressive states be shared equitably to aid other "less-developed" states? If not, then, would a trend of migration from less progressive states to the more progressive ones impacts India's strategic concerns? Here, clarity is needed.

IX. PROVISION FOR ARMS LENGTH TRANSACTION

At the moment, there is a silence in the rules on "Arms length Transaction" – where disclosure is needed particularly where public office-holders and their personal relationship with developer-promoters. Such "information gap" should be addressed. No law is good enough without this standard of disclosure in place. Hence, mandating each developer-promoter to make public declaration on shadow directorship/s or acting as proxies for office holders and their relatives - is vital with regards to the doctrine on freedom of information under the Indian Constitution and fair-trade.

X. SETTING A SHAREHOLDING LIMIT AND PREVENTING A FRANCHISE

For certain hybrid developments which may include a commercial and residential element, it is prudent for the regulator to set a limit on promoter's share-ownership after a project has been completed and handed over. The "staying" promoter-shareholder may own dominant shareholdings and is empowered to sets bylaws and policies to his advantage. For example, a building management rights contract may be tied in after the project handover stage – without constructive knowledge of other purchasers and hence, its implications may be downplayed. Maintenance fees may escalate and other financial shenanigans may surface without much justification and thus, may frustrate purchasers after the occupancy certificates are granted.

XI. WHAT DOES "SPEEDIER" DISPUTE RESOLUTION MEANS?

In essence, RERA did stipulates that all complaint filed must be initiated within 120 days.[5] However, it did not specify if all disputes filed could

[5] Ronak Mastakar, 'RERA: Everything you must know about the Real Estate Act', 31 July 2017, >..., (accessed 26 March 2018).

be resolved within a reasonable time line. It could even be dragged for a number of years if remain unresolved. On this, it is proposed that regulators provide a schedule on codified situations with estimated time line on settlement. Legal certainty is thus solicited.

XII. SETTING HIGHER STANDARDS ON THE QUALIFICATION OF ADJUDICATORS

At the moment, provision for dispute resolution at RERA and Appellate Tribunal is in place. Qualifications of those involved in rendering dispute settlements have also been stipulated generically. From the outset, the criteria for the adjudicating penal seem justified.

However, it is suggested that a higher standard should be demanded. In essence, property development and managing construction projects involve several phases and is a complex discipline. Hence, it is proposed that penal members should include at least one Chartered Quantity Surveyor conferred as Fellow Member of the UK Chartered Institute of Quantity Surveyors with at least 8 years of professional experience or a Chartered Architecture within the same standard - to head the proceeding. Simply appointing current or retired High Court judges without industry-specific domain expertise may lead to abuse and not result in rendering equitable justice to the aggrieved.

XIII. WHAT ABOUT QUALIFICATION OF REAL ESTATE AGENTS? IS MERE REGISTRATION ADEQUATE?

While RERA demands the registration of real estate agents, there is a silence in this Act with regards to the certification of real estate agents. In OECD countries, and even micro-cities like Singapore, real estate agents have to undergo stringent training and public examination (which include professional ethics, disclosure and the mechanics of real estate laws). In the United States for example, examination is divided into a two-tier system-for both - real estate brokers and salespersons. All involved are required to pass the state-organized examination first before they are granted licenses to practice and market real properties within their state. And failure to adhere to such regulation may lead to a suspension of license – which fines will be imposed or even imprisonment in cases where fraud is committed.

As India opens up its economy to the world, it is prudent and necessary to set global-centric standards on real estate agents and develop a world-class enabling talent pool. Right now, even if real estate agents are

registered, it does not verify core competence on the same to handle the complexities of property transactions. A community of untrained agents and salespersons is a high risk to purchasers and investors – both domestic and internationally. Further, the motivation to earn quick sales commission and "push" projects at all costs via selling the project off-the-plan and working within the fastest time limits as typically demanded by developers (their principals) is perceived as bias and against buyers' interests. The absence in such a component may weaken the main object of RERA and will put India in a bad light when more mala fide events occur.

On this, the author proposes establishing a nationwide training and assessment framework to be housed under a Central Agency and working in association with the respective state law university - to certify all real estate agents before any practicing certificate is granted. Current registered agents could be given a one-year window to attempt and achieve such certification. Grandfathering law to exempt existing agents from certification should be prohibited.

XIV. INTRODUCING A NEW CLAUSE TO MANDATE LONG-TERM DUTIES OF SUBSIDIARY PROPRIETORS IS VITAL

Making all potential purchasers understand the importance in performing community service is necessary during the pre-contract stage. Opponent may argue that there is no place for such a clause to be housed under RERA. The author's counter-argument here is: anything that concerns the strategic well-being of the purchasers as a community, and has a nexus to the transaction must be incorporated under RERA. As subsidiary proprietors of apartment communities, it is proposed that all should take turns to serve as members in their respective Resident-Welfare Committee on an annual rotational basis. In essence, there should be a law passed to gives the necessary legal effect.

Through empirical evidence and case precedents, many apartment communities across nations have been constantly facing issues to get volunteers to serve in their respective residents' welfare committee. This had led to mismanagement and financial abuses in some cases. Further, under the Indian Constitution, there are doctrines on fundamental rights and duties of citizens embedded - where Indian citizens have duties to serve the community.[6] And with this letter and spirit in mind, property ownership in apart-

[6] Vijay Jaiswal, 'List of Fundamental Duties in Indian Constitution', 6 September 2013, https://www.importantindia.co, (accessed 26 March 2018).

ment buildings and cluster housing should include a law mandating every household to nominate a representative to serve on their respective resident welfare committee. Such policies would help enhance constructive knowledge and increase the transparency and efficiency of estate management. It will also help instill a sense of community bonding. More importantly, it will help reduce malpractices of all kinds to occur – especially when a small group of residents dominate major decision-making on capital expenditures and long-term contracts. The author strongly advocates the incorporation of such rules into the RERA ecosystem. In essence, RERA should go further to offer "protection" in the collective interests of communities.

XV. REVISING THE INSOLVENCY AND BANKRUPTCY CODE

The current outstanding disputes on default from developers filed in the Indian courts which include the *Jaypee Infratech Insolvency* case where more than 25,000 homebuyers were placed in jeopardy speaks volumes that revising the current insolvency and bankruptcy law is needed. [7]

Such incidents have also impacted market confidence and would continue to create a slowdown in the real estate sector. Solicitation of Foreign Direct Investments (FDI) has also been hindered.

Under the current insolvency and bankruptcy code, aggrieved purchasers were placed as "unsecured creditors". This is deemed to be unjust and unfair. Though one could argue that there are noted risk exposures in real estate development and buyers should be aware and accept any contingency when insolvency occurs; the author argues otherwise. Government – both Central and State, has a fiduciary duty to ascertain buyers' protection especially in the purchase of an "owner-occupied" home. This should gel with Article 21 of the Indian Constitution on right to housing.[8] Mandating a performance bond based on total project costs should be imposed on the developer-promoters before a project can be launched. Indemnity insurance should also be required and pledged to the regulator as trustee. Other measures include: freezing of personal and company bank accounts of promoters when RERA detects or received a report on the promoter going under. Placing of garnishing order and initiating a Mareva injunction on defaulted developer-promoter operating under a special purpose vehicle is also

7 Raghav Pandey, 'Jaypee Infratech Insolvency case: Supreme Court is walking a tight rope as home buyers enter the fray', 6 September 2017, (accessed 26 March 2018).

8 'Right to housing – Opinion', *The Hindu*, 18 November 2016, , (accessed 26 March 2018).

necessary. This will further strengthen consumer protection in addition to the 70% quantum on restriction of funds to be utilized for other purposes.

XVI. ESTABLISH A GLOBALLY-RECOGNIZED TITLE REGISTRATION SYSTEM

One may constantly argue that for historical reasons, it is difficult to clean up the land titling system across India. Because of this, purchasers will always be exposed to the risks of encroachment onto someone's property. Such issues are in essence a government matter. And the duty to ascertain "clean" titles should rest with the state, and not on any developer-promoter or the purchaser. Hence, legal certainty of landownership must be guaranteed by the Central and State government. Litigation would thus be reduced. On this, Indian regulators could study the feasibility to adopt the Australian's Torrens Land Title Registration System.[9]

XVII. INTRODUCING TITLE INSURANCE IN INDIA

In a succinct definition, title insurance is a form of indemnity protection which insures against financial loss from defects in title to real property and will kick in when unenforceability of mortgage loans occur. At present, there seems to be no takers to provide for such insurance in India. In view of the risk exposure to developers and property purchasers , the author strongly propose the regulator to invite interests from established multi-national insurers to study the feasibility to offer the same under a Public-Private Partnership (PPP) Model. This should benefit India's economy in a long run.

XVIII. WHY IS PROSPECTUS DIRECTIVE NECESSARY?

Recent cases of developers' failures to deliver or had defaulted are bad optics to the Indian's real estate sector. Till date, many aggrieved purchasers were still unable to received equitable compensation and existing laws have not helped much. Delays from some developer-promoters had dragged completion time crossing ten years. In the "Jaypee" case, RERA has not provided "equitable" justice.[10] Why? From the global investors' standpoint, this is gross failure on the part of government – both Central and State.

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9 'Torrens Title Explained', *REISA – Real Estate Institute of South Australia*, ... (accessed 26 March 2018).

10 'Jaypee infra insolvency: IRP floats Eol for resolution plans', *ET Bureau*, 28 October 2017, https://economictimes.indiati..., (accessed 26 March 2018).

To mitigate this flaw, a prospectus directive is further proposed. RERA should demand that all developer-promoter only distribute marketing prospectus approved by RERA. Contents should include recent quarter audited reports, 5-year track record and other risk disclosures that must be fact-based. Similar standards could be adopted from the Securities Exchange Board of India model.

XIX. SKILL CERTIFICATION OF CONSTRUCTION WORKFORCE

RERA is silent on the skills set of construction workers. These include structural engineers, site supervisors, steel fabricators, clerk-of-work, bricklayers and installers, electrical and mechanical tradesmen, waterproofing technicians, carpenters, interior designers, plumbers and others. As the ultimate product to be hand over involves many hands, mandating skill certification to ascertain safety of "homes" and good workmanship are necessary.

India could study the Australian or Singapore model where training and certifications of builders and tradesmen are mandated. Compliance standards are thus ascertained.[11]_[12]

XX. STANDARDS AND GEOGRAPHICAL LOCATION OF BUILDING MATERIALS UTILIZED MUST BE SPECIFIED

Till date, there is insufficient transparency on the building material utilized. In essence, the country of origin for each major item as well as their respective industry standard attained (such as British Standard Institution or American Iron and Steel Institute) – must be clearing stated in the prospectus and contract schedule. There should also be a complementary mechanism from a government body to ascertain the same. The reason for such is mainly to prevent the developer or builder to use shoddy materials during construction –which may create latent defects after the warranty period. Promoters should also be prohibited to use disclaimers in their prospectus and contracts to absolve themselves from any legal liability with the pretext of unavailability of building materials. In essence, the clause in the RERA on getting 2/3 allottees' consent for changes and alterations may not have included this element. It is thus deemed as "risky" on the part of purchasers.

[11] 'Training - Builder & Trade Qualifications', *Master Builders Association of NSW*, ..., (accessed 26 March 2018).

[12] *BCA Academy*, www.bcaa.edu.sg, (accessed 26 March 2018).

XXI. TECHNOLOGY MATTERS

With a gross shortage of housing in both affordable and private housing sector – up to the tune of 20 million and growing, it is vital for India to recruit and train enough skilled workers to satisfy such demand and deliver on time. On this, India could look into more deregulation such as, taking away undue processes as well as employing e-governance models and other state-of-the-art construction technology to speed up construction. India could also borrow some ideas on fast building techniques from their Chinese counterpart – where a 20-storey building could be completed within a week. That said all safety measures must be factored in when applying within the Indian's context.

XXII. E-MARKETING COULD SAVE PURCHASERS' DOLLARS

In essence, "brick and mortar" model cause money. Hence, it is suggested that RERA introduce new provision/s for real estate transactions to be conducted by all parties through cyberspace. This is not a new phenomenon in more developed economies. Developer-promoters could either sell direct to purchasers or provide real estate agents with some flexibility to negotiate with purchasers on final purchase price. Either case, purchasers will benefit. That said rules must be clarified.

XXIII. LIBERALIZING THE REAL ESTATE SECTOR TO FOREIGN BUYERS

Till date, the real estate sector is still a "closed-door" sector from the perspective of foreign buyers. Such policies may be deemed necessary in the past but may disadvantage India in the future.

In essence, with respect to the doctrine of reciprocity and other WTO principles, purchasing of Indian real estate should be opened to other member-nations which have allowed Indian nationals to purchase real estates in their respective country. Though there may be good reasons to be conservative to allow access of foreign buyers at this stage, it is highly suggested that India should study the feasibility on allocating 10 to 20% of their private housing space to all "friendly" nations. The almost-immediate benefits from such policies would include: new capital investments, foreign technology transfers and new job opportunities for the young. It should also help reduce geopolitical risks over time and keep the country safe. And to initiate

such a policy, there should be amendments made in the existing Reserve Bank of India Act, the Foreign Exchange Management Act, existing immigration laws and the RERA. New Tourism directives would also help to open up more "doors" to entice foreign buyers.

XXIV. CONCLUSION

To sum, the author agrees that RERA is a good first step to instill discipline into the real estate sector. That said, the Act is still deemed as a "lagging" mechanism and how a derivative action could be initiated and financed by aggrieved homebuyers as a class still remains unclear. On this, homebuyers must be educated on how to organize "no-frills" class-action suit.

To be fair, property developers would need to be given time to reorganize their finances and operations. Inventory and manpower costs are expected to be increased substantially and such added costs would be likely transferred to potential buyers – hence impacting affordability. Supply chain management system of developers would also be impacted and reengineering the processes and locating alternative sources of supply are needed. For this, purchasers would need to find some balance between paying a premium versus receiving more "perceived" legal certainties. Further, it is still unknown as to whether existing resources deployed by regulators to work a "speedier" dispute resolution system could actually cope with the volume of complaints to be lodged. To deploy the "right" candidate pool as the author had defined above – would remain a challenge at this nascent stage. It is highly suggested that a Whistleblower law to empower homeowners via a coop mechanism be ratified by Parliament to strengthen existing protection. In essence, homebuyers need more "teeth" to affect their rights of self-determination. A stronger homeownership ecosystem will soon prevail. Do think beyond the boundaries of RERA.

RESPONSIBLE BORROWING AND LENDING IN U.K.

—Jodi Gardner,[*] Karen Rowlingson[**] & Lindsey Appleyard[***]

Abstract *The UK has generally had a relatively 'light touch' regulatory framework for consumer credit, with the onus on the individual to behave responsibly when taking out unsecured loans. Concerns have however recently grown regarding the provision of short-term, high-cost credit,*[1] *with the actions of the lending institutions frequently labelled as irresponsible, exploitative and predatory. As a result, the legal and social obligations on lenders have been subject to significant analysis and reform. While the responsibility of lenders is an important issue for discussion, this paper focuses on the responsibilities of borrowers looking at the issues from a legal and social policy perspectives. It begins with a discussion of individual responsibility and what might constitute 'responsible borrowing' before applying this concept to the use of high cost credit. The paper draws on a range of literature on the topic from both a legal and social policy perspective, as well as analysing interviews with forty-four borrowers to examine the nature of responsible borrowing from a consumer perspective.*

I. INTRODUCTION

This paper has three parts. The first section considers the focus in the UK towards personal responsibility, particularly in relation to welfare and benefits. It discusses the government's attempts to move citizens towards

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[**] Professor of Social Policy; University of Birmingham; Deputy Director, CHASM.

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[1] Frequently referred to as 'payday loans'.

self-regulation of financial issues and away from government assistance. Until recently this approach was followed in the provision of credit, where the regulation focused on lender disclosure and borrower responsibility. The second part follows on from this discussion and examines the modern movement towards responsible lending, including enhanced obligations on firms to provide credit in an appropriate manner. Whilst there have been increasing legal obligations, significant research shows some firms continue to lend in an inappropriate and predatory manner. The third part then considers whether the movement away from individual responsibility has gone too far and an increased emphasis on responsible borrowing is necessary. This includes an analysis on what responsible borrowing entails, the limited responsible borrowing obligations currently in place and the extent of irresponsible borrowing. The paper concludes by holding that there is limited evidence of irresponsible borrowing, especially in light of the social and economic pressures on low-income families, and a continued focus on responsible lending is both desirable and appropriate.

II. 'RESPONSIBILISATION' AND FINANCIALISATION

Since 1979, the UK has witnessed a process of 'responsibilisation' whereby individuals have been expected to become more responsible for their financial wellbeing and welfare. For example, Conservative governments have promoted the idea of an 'active' welfare state to replace the supposedly 'passive' system. Such ideas were accepted by New Labour's Third Way approach which supported the idea of 'a modern, active welfare state' based on welfare-to-work, skills and flexibility (to support those in work or those actively seeking work).[2] The 1997 New Labour (and more recent Coalition governments) have extended this notion of obligations alongside rights through the personalisation of welfare and the strengthening of responsibility agendas, viewing the root causes of poverty as individual problems rather than structural issues.[3]

Under New Labour, the Gregg Review and the Department for Work and Pensions proposals for welfare reform aimed to reward responsibility whereby the welfare system adopts an active, personalised role to widen the

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2 Fran Bennett and Jane Millar, 'Social Security: reforms and challenges' in Jane Millar (ed.), *Understanding Social Security: Issue for Policy and Practice,* Policy Press, 2003, p. 20.

3 *See* for example discussion in Tony Blair, 'My vision for Britain: by Tony Blair', *The Observer*, 10 Novermber 2002, <http://www.guardian.co.uk/politics/2002/nov/10/queens-speech2002.tonyblair?CMP=email>.

obligations on people to both work and save. In this sense, Labour continued the reforms begun by the Thatcher and Major Conservative governments by further implementing pension reforms which were marketed as providing the public with greater information and choice in order to encourage individual responsibility in terms of savings behaviour.[4] This focus was also evident in Tony Blair's modernising agenda, which aimed to create a market-oriented 'third way' of delivering welfare 'as a process in which the state tries to absolve itself of social responsibilities - transferring them to other agencies'.[5]

Gilbert defines this as 'the enabling state' which is 'the emerging paradigm for social protection'.[6] These changes have reconfigured the relationship between individuals and the state so that citizens actively participate in their own and their families' social and economic wellbeing, mitigating 'poverty traps' or 'enforced dependency on welfare'.[7] Yet this has fragmented society further and those on low incomes have become disproportionately affected by these changes and further 'socially and politically marginalized as the state withdraws support'.[8] The political rhetoric (and associated policies) to mitigate the impact of welfare reform is around social and financial inclusion, but again this stresses the individual onus of responsibility for poverty (and its multiple deprivations) rather than the institutional support structures which therefore are likely to 'promote exclusion rather than inclusion'.[9]

Walker states that government policy promoted self-regulation to 'reproduce the financially responsible neoliberal subject' in order to blame individuals for 'feckless irresponsible financial behaviours...that require education', such as debt advice, as opposed to ensuring 'sustainable employment and a fit-for-purpose welfare system'.[10] In sum, there has been a marked shift in welfare to create

[4] Neil Gilbert, *Transformation of the welfare state: The silent surrender of public responsibility,* Oxford University Press, 2002.

[5] John Clarke, Mary Langan and Fiona Williams, 'Remaking welfare: the British welfare regime in the 1980s and 1990s' in Allan Cochrane, John Clarke and Sharon Gewirtz (eds.), *Comparing Welfare States,* 2nd edn., Sage, 2001, p. 101.

[6] Gilbert (n 4) 24.

[7] *Ibid* 40.

[8] Clarke, Langan and Williams (n 5) 101.

[9] Peter Dwyer, 'Making sense of social citizenship: some user views on welfare rights and responsibilities', (2002) 22 Critical Social Policy 273, 293.

[10] Carl Walker, ' "Responsibilizing" a healthy Britain: personal debt, employment and welfare', (2011) 41 Neoliberalism and Health 525, 531-533.

> a personalized welfare state, where a simpler benefits system underpins the expectation that nearly everyone on benefits is preparing or looking for work. We are determined to continue our radical approach to reforming the welfare state to help people now and in the future – based on opportunity for all and responsibility from all.[11]

The responsibility discourse has emerged alongside the financialisation of everyday life which is 'intimately related to the reconfiguration of welfare states, their retrenchment and the transfer of risk and responsibility from the collective to the individual'.[12] British governments successively encouraged and expanded the financial services sector from the mid-1980s onwards through de-regulation and the introduction of light tough regulation (e.g. the 'Big Bang' in 1986). As far as personal lending went, this approach to regulation allowed an expansion of credit from the 1970s onwards. In the 2000s, however, concern about the banking crisis led to debates about the responsibility of the financial services sector for the crisis and the treatment of low income borrowers (particularly in relation to 'irresponsible' sub-prime mortgage lending). At the same time, some commentators have held on to the idea that 'British households that borrowed too much money must "accept responsibility" for their role in the current economic troubles'.[13]

While mortgage lending has declined since 2008, there has been a corresponding increase in other types of borrowing, particularly payday lending and other forms of high-cost credit. Concerns about the irresponsible nature of lending in this field has led to the introduction of a cap on the cost of such credit and tighter regulation (discussed below). But what is the current balance between responsible lending and responsible borrowing and, given the more recent focus on irresponsible lending, what evidence is available on the levels of irresponsible borrowing?

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[11] Department for Work and Pensions, *Raising expectations and increasing support: reforming welfare for the future,* 2008, p. 17.

[12] Alan Finlayson, 'Financialisation, Financial Literacy and Asset-Based Welfare', (2009) 11 The British Journal of Politics and International Relations 400, 403.

[13] James Kirkup, 'Families must accept share of blame for Britain's woes', *The Telegraph*, <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9244414/Families-must-accept-share-of blame-for-Britains-woes.html>.

III. RESPONSIBLE (AND IRRESPONSIBLE) LENDING

A. Legal Obligations for Responsible Lending

Whilst the government has generally been reluctant to interfere with what they perceived as private agreements between individuals,[14] legislation protecting borrowers from exploitation has long been a part of the legal scene.[15] This regulation was however largely focused on registration of lenders and increasing disclosure to borrowers, continuing to put responsibility on borrowers to ensure they read and understood the agreement. It became clear in the 1960s that this approach provided inadequate legal protection for the increasing number of people accessing consumer credit products. After significant research, the 1971 *Consumer Credit: Report of the Committee* ('Crowther Report') made a number of recommendations, including limits on advertising of consumer credit products, provision of pre-contractual information, mandated disclosure of the cost of credit, rights of cancellation, and a uniform licensing system for consumer credit.[16] On the basis of these recommendations, the Consumer Credit Act 1974 was introduced with the stated rationale as 'the failure of private law to protect individual rights or deter unscrupulous practices and the limited scope of existing licensing regimes'.[17]

By the late-2000s it was clear that even this legislation was insufficient protection for borrowers. In 2010, the Office of Fair Trading (OFT) created the 'Irresponsible Lending Guidelines' (ILG). Responsible lending obligations are arguably the most important aspect of the current legislative regime for the regulation of high-cost lenders, especially as there were no explicit responsible lending duties in the 1974 Act. There are however certain implied obligations; for example, under section 25(2B), creditors are required to lend 'responsibly' as a licence condition. This means that responsible lending obligations are part of the fitness test for licensees; creditors must engage in responsible lending in order to obtain and continue a consumer credit licence.[18] There are also indications of responsible lending

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[14] Karen Rowlingson, *Moneylenders and their Customers,* Policy Studies Institute, 1994.

[15] *See* for example, the 1898 House of Commons Select Committee on Money-Lending and the Moneylenders Act 1927 (UK).

[16] Sir Geoffrey Crowther, *Consumer Credit: Report of the Committee,* Department of Trade and Industry (1971) pp. 257, 266, 271, 289 and 329-334.

[17] Iain Ramsay, *Consumer Law and Policy,* 3rd edn., Hart Publishing, 2012, p. 386.

[18] *See* references to the requirement to lend responsibly in The Office of Fair Trading, *Consumer Credit Licensing: General guidance for licensees and applicants on fitness and requirements*, pp. 4, 6, 8, 9 and 30.

obligations in the duty to explain the nature and consequences of credit,[19] and the duty to make a creditworthiness assessment.[20]

With the movement of the consumer credit jurisdiction to the Financial Conduct Authority (FCA), the ILG has been supplemented by the FCA's Consumer Credit Source Book (CONC 5) *Responsible Lending.* Lenders are expected to conform to general principles of fair business practice and must make 'reasonable creditworthiness assessment' to ensure that borrowers can meet their credit repayments in a sustainable manner (i.e. credit can be repaid without undue difficulty, over the life of the specific credit agreement and without the borrower having to release any assets).[21] The specific requirements of the assessment are proportionate to, and dependent upon, a number of different factors including the type of credit product, the amount of credit provided, the borrower's financial situation, existing and future financial commitments, and the borrower's credit history.[22] The FCA does not lay down any guidance on the type of steps that may be required in this regard, indicating that it is left to the discretion of the lender to determine what is reasonable in the specific circumstances of the loan.[23]

B. Examples of Irresponsible Lending

Despite the legal obligations in place for lenders, there have been ongoing evidence of irresponsible lending in the high-cost credit market. For example, in 2010 Consumer Focus published a report on payday lending based on desk research and in-depth interviews with 20 customers. The study highlighted the problems that some customers, particularly those on the lowest incomes, had with payday loans.[24] These issues were not addressed and, in fact, continued to worsen.

In 2012, the OFT conducted a detailed compliance review of the sector. It held that payday lenders were not meeting the standards set out in ILG and highlighted the disturbing and widespread lack of compliance with the current regulatory regime.[25] There was significant evidence of irresponsible

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19 Consumer Credit Act 1974 (UK) s55A

20 Consumer Credit Act 1974 (UK) s55B

21 Financial Conduct Authority, *Consumer Credit Sourcebook (CONC), Responsible Lending*, para 5.2.2.

22 *Ibid* [5.2.3].

23 *Ibid* [5.2.4].

24 Marie Burton, *Keeping the plates spinning: perceptions of payday loans in Great Britain,* Consumer Focus, 2010.

25 The Office of Fair Trading, *Payday Lending Compliance Review - Interim Report* (2012), results of which were confirmed in The Office of Fair Trading, *Payday Lending: Final*

lending; too many people are given loans they could not afford, and when they could not repay, were encouraged to extend them, further exacerbating their financial difficulties.[26] One of the most alarming findings of the review was that lenders made approximately 50% of their revenue from loans that were rolled over or refinanced.[27] This means that firms may have been 'incentivised' to lend to people who could not afford to repay on time. The perverse effect is that lenders who undertook proper affordability assessments and lent responsibly may have actually lost out to less scrupulous parties.[28]

The OFT findings were strongly supported by further research from different organisations. Firstly, the Citizens Advice Bureau (CAB) highlighted that three out of four payday borrowers had some ground for an official complaint to the Financial Ombudsman Service about their treatment. The organisation undertook an in-depth analysis of 665 payday loan cases between 1 January and 30 June 2013. Of these cases, 76% of borrowers had at least one ground for complaint, including fraud (20%), problems with Continuous Payment Authorities (CPAs) (more than 33%), harassment of borrowers (12%), and unfair treatment of people in financial difficulties (10%).[29] Secondly, Europe Economics conducted detailed research on compliance costs and firm behaviour in the payday lending market. The October 2013 report outlined a number of ingrained problems, including lenders not carrying out affordability assessment, overuse of loan rollovers, exploitative and inappropriate use of CPAs, provision of unsuitable advice, unfair dealings with borrowers experiencing financial difficulties, and aggressive debt collection practices.[30]

Thirdly, the Department of Business Innovation and Skills undertook in-depth consumer and business surveys which confirmed that payday lenders were not complying with the Good Practice Charter or the relevant Codes of Practice.[31] Whilst the report highlighted a number of disturbing

Compliance Review (2013).

26 *Ibid* 2.

27 *Ibid*.

28 *Ibid* 3.

29 'Citizens Advice urges payday loan customers to fight back against unscrupulous lenders', *Citizens Advice Bureau*, <http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_office 20130805.htm>.

30 Europe Economics, *A New Consumer Credit Regime: Benefits, Compliance Costs and Firm Behaviour* (2013).

31 Department of Business Innovation and Skills, *Making Consumer Credit Fairer: BIS report on surveys of the payday lending good practice charter and codes of practice* (2013).

practices, it was particularly concerned with the unfair treatment of borrowers in financial difficulty.[32] Finally, a 2014 report commissioned by the Association of Chartered Certified Accountants also highlighted continued irresponsible lending practices by lenders. It outlined that payday lending is harmful because the business model employed by most lenders is based specifically on lending to borrowers who often cannot afford to repay their loans. In their detailed review of business models, Beddows and McAteer concluded that 'consumer detriment, in the forms of default, repeat borrowing and the taking of multiple loans from different lenders, appears to play a highly profitable role in existing business models ... many payday loans serve only to increase the likelihood of future indebtedness'.[33]

These reports outlining firms' irresponsible lending practices are supported by many real life instances. For example, one of the UK's major payday lending companies, Wonga, was found in October 2014 to have behaved particularly irresponsibly by inadequately assessing customers' ability to meet repayments in a sustainable manner. The FCA came to this view based on analysis of the volume of Wonga's relending rates (i.e. lending to the same people more than once). On the basis of this finding, Wonga entered into an agreement with the regulator to compensate over 375,000 customers, at a cost of over £220 million, and has significantly impacted on their reputation.[34]

IV. RESPONSIBLE (AND IRRESPONSIBLE) BORROWING

A. What is 'Responsible Borrowing'?

There is no agreed definition of 'responsible borrowing'. At one extreme, some people might believe that all borrowing is irresponsible as it signifies that people are 'living beyond their means' and there are strong cultural taboos around the use of credit/debt. However, some forms of credit, such as mortgages, are seen more positively as they enable home ownership, something viewed positively in British society. Others might accept that the use of unsecured credit can be responsible under certain conditions, for example, if people are only borrowing as much as they need and know that they have the capacity to repay the money.

32 *Ibid* 13-14.

33 Sarah Beddows and Mick McAteer, *Payday lending: fixing a broken market,* Association of Chartered Certified Accountants, 2014, p. 65.

34 Financial Conduct Authority, *Wonga to make major changes to affordability criteria following discussions with the FCA* (2014).

Borrowing for things people do not necessarily 'need' and borrowing more than they can afford to repay may also be seen as irresponsible. However, ideas of 'need' are not clear-cut, and this is discussed further in the case studies.[35] Members of the public differ in what they see as a need, and people make mistakes when predicting what they can afford to repay. Should we, for example, expect people to foresee potential drops in income which would make it difficult to repay a loan? At another extreme, it may seem clear that lying on an application for credit is irresponsible, if not fraudulent. But if someone lies to take out credit because they are in desperate need, this may be a more responsible act than depriving their child (or themselves) of food and heat. The definition of 'responsible borrowing' is clearly open to debate. This section will therefore analyse the relevant legal obligations as well as real-life case studies to further explore the boundaries and complexities surrounding the notion of responsible borrowing.

B. Current Legal Obligations for Responsible Borrowing

Despite the movement away from individual responsibility in the context of high-cost credit, the UK regime continues some focus on responsible *borrowing*, as the law places an onus on *consumers* to ensure the loan is suitable for their needs. The lender has an obligation to provide the borrower with a sufficient explanation of the credit contract so that the *borrower* can determine whether the agreement is suitable for their needs and financial situation.[36] Effectively, this puts the obligation on the consumer to *borrow* responsibly. There are no references in the ILG to the lender enquiring about the borrower's intended use, requirements or objectives of the credit sought.[37] It is however a breach of the guidance to promote the sale of a credit product which is 'clearly unsuitable' for the specific borrower and their financial situation and/or intended use (if this information is known by the lender).[38] This focus was continued by the FCA, as the CONC 5 rules require a creditworthiness assessment 'taking into account the information of which the firm is aware at the time',[39] but no obligation to seek further information. This highlights that the legal regime has continued a partial focus on responsible borrowing, including an attempt to promote borrowers

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[35] *See* David Gordon and others, *The Impoverishment of the UK; PSE UK first summary report,* Economic & Social Research Council, 2013.

[36] Consumer Credit Act 1974 (UK) s55A(1)

[37] This was discussed in Karen Fairweather, *Apples and Oranges: Responsible Lending in the UK and Australia,* Brisbane, Consumers, Credit and the Law Symposium, 7 July 2012.

[38] The Office of Fair Trading, *Irresponsible Lending - OFT Guidance for Creditors,* (2010) p. 15.

[39] Financial Conduct Authority (n 21) [5.2.2].

making appropriate financial decisions and determining what type of credit is suitable for their needs.

In addition to the (limited) responsible borrowing obligations under the Consumer Credit Act, consumers can also be penalised for certain types of irresponsible borrowing (namely providing false or misleading information to lenders) under the Fraud Act 2006 (UK). Under section 2, it is an offence to dishonestly make a false representation knowing or believing it to be untrue or misleading in an attempt to obtain a benefit for yourself. If convicted of fraud, a borrower is liable for up to 12 months imprisonment on summary conviction and up to 10 years imprisonment for conviction on indictment.

Whilst lenders could technically pursue an action against borrowers who lied in their credit application, or in any of their general dealings, there have been no reported cases of fraud actions being taken against high-cost credit borrowers. Lenders need to be careful about making accusations or threats against borrowers on the basis that they have potentially acted fraudulently. In 2010 Wonga sent letters to borrowers who were unable to repay their loans suggesting that the borrower may be guilty of fraud and stating that, if the borrower fails to repay their loan, the firm may refer the issue to the police. The OFT held that Wonga did not have sufficient evidence to make any claims about potential fraud and therefore held that lenders could not send letters of this type.[40]

C. Examples of Irresponsible Borrowing

Obtaining credit on a fraudulent basis is generally considered irresponsible borrowing. Experian reports annually on levels of mortgage, credit card and insurance fraud in the UK. The most recent report highlights that over the last six years there have been successive increases in consumer fraud. Experian believes that this is due, in large part, to the fact that 'as challenging economic circumstances have continued, attempts by some cash-strapped borrowers to get their hands on funds have become more diverse and more inventive'.[41] There appears to be no research on high-cost credit fraud, so it is difficult to determine whether this is a problem, and if so, to what extent. Extrapolating the results of the Experian research would seem

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[40] Hilary Osborne, 'OFT criticises Wonga debt collection practices', *The Guardian*, 22 May 2012, <http://www.theguardian.com/money/2012/may/22/oft-criticises-wonga-debt-collection>.

[41] Experian, *The Fraud Report* (2013) p. 6.

to provide a strong basis for assuming that fraud is also an increasing problem for high-cost credit.

To obtain understanding of responsible borrowing from the consumer's perspective, we conducted forty-four semi-structured interviews to explore people's experiences in a grounded way. The interviewees were borrowers who had obtained short-term credit from a range of alternative lenders in the previous year – including payday lending both online and in shops, doorstep lending, pawn broking and credit union lending. The study focused on low and moderate-income borrowers who had accessed alternative forms of credit in the last twelve months and therefore those with no access to any of these forms of credit were excluded. Fieldwork took place in the West Midlands and Oxfordshire regions of the UK. We recruited interviewees using a specialist recruitment company who identified people in shopping centres and high streets using a screening questionnaire the authors had designed.

There was a broad a mix of participants in terms of age, gender, employment, family type and so on. Each interview lasted between 45 minutes and 2 hours at a place of the respondent's choice. The majority of interviews occurred in the respondent's home, but a small number took place in a public venue, such as a café. Where possible, the authors of the article conducted the interviews in pairs to ensure research quality and safety. The research received full ethical approval by the University of Birmingham and we took ethical concerns seriously. We gained informed consent by explaining, at the beginning of each interview the nature of our research, how the data would be used and this was also explained in an research information sheet given to all participants. To thank the interviewees for their time (and encourage participation), we gave them £30 cash. This payment was queried initially by the university ethics reviewers and we appreciate the debate about paying respondents.[42] We also gave an information sheet out to all participants with details of organisations providing free, confidential and independent advice on money issues, should this be of use. And we have used pseudonyms and other measures to ensure participant confidentiality. Each interview was digitally recorded and transcribed in full. We scrutinised our data using thematic analysis[43] aided by Nvivo computer software.

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[42] *See* discussion in S. Thompson (1999) 'Paying respondents and informants', University of Surrey, *Social Research Update,* vol. 14, 1999.

[43] J. Ritchie, J. Lewis, C. Nicholls and R. Ormston (eds.), *Qualitative Research Practice,* 2013, 2nd edn., Sage.

We asked all participants about the circumstances of their loan. On analysis, there were limited examples of activities that could be described as irresponsible borrowing. For example, Georgina – an unemployed young borrower – stated on her application form that she had a job when she was actually unemployed. She did this because she honestly believed that she would be able to find employment easily and have a job by the time her loans needed to be repaid. This was not the case and many months after taking out the loans, Georgina was struggling to repay the amount owed from her unemployment benefits. Another young borrower with two children, Sarah, obtained a loan from an online payday lender that she was unable to repay. As she did not have access to the internet, her friend applied for the loan on her behalf and falsely stated that she was employed. The funds were then transferred into her bank account within a number of minutes. Sarah knew she would not be able to repay the loan, however, she accepted the money because 'it was just getting offered to me and I needed it'.

Whilst we do not condone their actions, both of these cases involved young women who were financially struggling and the money was used for basic expenses, such as electricity, gas, food and rent. The funds were not used for luxury items by any means. In addition, in both cases, the 'fraud' was conducted on a very basic level and merely involved citing incorrect or fictitious employment information. If the lender had undertaken any formal checks on either of the borrowers' applications, such as asking for evidence of payslips, checking the borrowers' bank accounts for receipt of income and affordability, or contacting the employer for verification of employment, they would have picked up the incorrect information very quickly and could have denied the loan. The failure to take these, exceptionally basic, verification steps appears to be a breach of the responsible lending requirements to undertake a reasonable creditworthiness assessment and ensure that the borrowers can meet their credit repayments in a sustainable manner.

In addition to the minimal levels of fraudulent activities, the interview process also highlighted a reasonably low level of potentially irresponsible *spending* from borrowers. Most people interviewed used the funds obtained for necessary, general living expenses, such as electricity bills, rent, emergency home improvements etc. This finding is in line with the results from the consumer surveys undertaken by the Competition & Markets Authority (CMA), which reported that approximately 70% of all payday loan funds were used for general, everyday expenses.[44] For example, during the

[44] Competition & Markets Authority, *Research into the Payday Lending Market* (2014).

interview process, a young father who reluctantly obtained a payday loan for a new dryer before getting caught in a two-year long debt spiral, stated,

> It was a case of its middle of winter, winter in England not being funny but you can't hang clothes out on the line. We're in a property that has a severe damp problems so we couldn't stick clothing on airers or stuff like that without escalating damp so it's a case of we needed a tumble dryer [I thought] I could pay it off the next time I got paid, the problem was the next time I got paid I had other bills that had to go out and I couldn't turn round and not pay the electric bill because then we'd have been cut off and I couldn't not pay the gas bill. And it's like, what will I do now, I'll have to get out another [loan].

This is unlikely to be considered irresponsible borrowing, despite the fact that the interviewee was unable to repay the loan on time.

Notwithstanding the finding that a majority of people borrowed for 'responsible' purchases, there were limited examples of people borrowing for 'luxury' items or to socialise, including one borrower who purchased a professional photograph session and another who used the funds for regular Saturday nights out with friends. The former was an unemployed mother of three, including a child with disabilities, who became stuck in a home-collected credit cycle due to the ease in which she was able to obtain a loan, stating

> Once I'd paid [the first loan], then do you want another loan, and it's like well, I could buy this for the kids, I could buy that. It's like easy money, you have to pay it back but it's easy money when they're offering it you and you've got like two kids and single parent and then I was made redundant in 2007, so I had a new born baby and my son and, you know, she offered me money which kind of helped out buying beds and, you know, things like that. So it's kind of easy money.

The woman was quite vulnerable and appeared to have close relationship with her credit provider, which left her open to potential exploitation. Each time she paid off a loan, she was offered further credit even if it was not necessary and therefore she became a constant stream of profit for the collector. The latter was by a young single man, who considered the interest paid on the money as merely one part of the cost of a 'night out'. He commented,

> I think the thing was, the way I see life it's about memories, it's about going out having fun, I knew I'd have the money to pay them back and I knew that the interest, fair enough I don't want to pay it but I knew that I had that money accessible in my account. So I, yeah like I knew I could pay it off, I knew it weren't going to be a big deal.

These examples highlight the complexities of responsible borrowing and even though they both obtained the credit for 'wants' rather than 'needs', it is difficult to define their borrowing as completely irresponsible.

One large category of potentially questionable expenses relates to children. A significant number of interviewees had borrowed money to make purchases for their children, including Christmas and birthday presents, birthday parties, new bicycles and even a weekend trip to a theme park. Whilst it would be easy to label these types of expenses as unnecessary and irresponsible, this overlooks the complex societal pressures related to raising children. For example, the lady obtained a loan to take her young son to a theme park. She justified her actions on the basis she was feeling guilty about being a single mum and the impact this was having on her son, so wanted to make sure she gave him a birthday he would enjoy and remember.

The interview process also included a range of hypothetical scenarios where interviewees were asked whether the borrower was acting 'responsibly'. These scenarios included a mother obtaining a doorstop loan to buy school shoes for her children, a young man obtaining a payday loan to buy a new pair of designer jeans and a woman lying about her family's income level on an application for a Credit Union loan. The majority of interviewees talked about the importance of borrowing responsibly, with a strong distinction drawn between 'needs' (i.e. school shoes for children) and 'wants' (i.e. designer jeans). For example, one borrower in his sixties with a Credit Union loan to repair damage to his home caused by flooding, commented on the need for not only responsible lending, but responsible *living*, stating,

> Before we talk about responsible lending, it's responsible living. Living and lending have gotta be hand in glove; they've gotta be together, because … if it's responsible living first, everything else should come into line.

The consumer interviews confirmed that most people borrowing from short-term lenders are doing so in a responsible and appropriate manner. There are many social and economic pressures on people today that can

result in them obtaining credit in a questionable manner or for questionable purposes, and we should be hesitant to label these actions as 'irresponsible' without fully understanding the context in which the borrowing occurs.

V. CONCLUSION

Despite industry claims to the contrary, our empirical research recorded minimal evidence of irresponsible borrowing or inappropriate consumer behaviour. Regardless, questions on responsible borrowing are important to the broader issues about the free market, paternalistic nature of the state and role of the law in society, and are therefore highly deserving of further consideration. Whilst the state has tended towards a focus on individual responsibility, particularly in relation to welfare provision, consumer credit has gone the opposite direction and the government has moved away from the 'light touch' approach, increasing obligations on firms and away from individuals. The current legal regime for high-cost credit has a strong emphasis on responsible lending, with minimal responsible borrowing obligations. Whilst the Consumer Credit Act does emphasize, to a certain extent, borrowers making appropriate credit decisions and the Fraud Act potentially criminalizes borrowers lying on applications for credit, the focus remains strongly on the obligation of firms to act responsibly in their lending decisions. And, for a variety of reasons, this is very appropriate approach. Borrowers, particularly people from lower socio-economic backgrounds, have a variety of pressures on them impacting their ability to act reasonably and rationally when determining their credit needs. The law should continue to acknowledge this and protect borrowers from lenders who recognise this vulnerability and may exploit it for their own profits.

CONSUMER RIGHTS IN A DEMOCRATIC SYSTEM AND THE EMERGING MARKET IN NIGERIA

—Nnawulezi Uche Augustus[*]

Abstract *Over the last twenty years, there has been a revolution in the way and manner consumers in Nigeria are treated when it has to do with his right of purchase of goods and services. In some cases, consumers are abused, intimidated or hoodwinked into accepting adulterate goods offered to them by manufacturers or service providers. The central purpose of this paper is to identify some of the strategies upon which the rights of consumers in Nigeria can be adequately protected in the face of the various challenges confronting them and furthermore, to present a coherent framework that will guarantee a sustainable implementation of the international standards for consumer protection in Nigeria. This paper however shall examine the various laws and regulatory agencies put in place to safeguard consumers in Nigeria vis-à-vis the weakness of those mechanisms. The paper relied on documentary evidence and hence scooped much data from secondary sources such as textbooks, journals, articles, periodicals etc. This paper will consider what has driven these dramatic changes in an emerging market in Nigeria. Thus, recommendations are made in this paper. Also, the paper concludes that for an enduring consumer rights in a democratic system in Nigeria, the legal and institutional frameworks for the protection of consumers of goods and services that has hindered effective implementation of the international standards for consumer protection in Nigeria should be reformed and made proactive.*

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I. INTRODUCTION

The legal status of a consumer over the years has been neglected despite the fact that a consumer is the king and his assertions are always right in every commercial transaction between him and the producer or service provider. This belief was demonstrated by Adam Smith when he stated that in every commercial transaction, the interest of the consumer is paramount to that of the producer or service provider".[1] Thus, a discourse on consumers rights is not only desirable, but inevitable, given the numerous challenges they faced. In the light of these challenges, another scholar opined that consumers in Nigeria are always in a precarious condition, always prone to a myriad of problems of product safety and product quality as well as unfair trade practice.[2] In the same vein, in *Nigerian Bottling Company Ltd* v. *Constance Ngonadi*[3] per Aniagolu, JSC observed that:

> "It is often the unhappy lot of consumers that are ill-treated by some pretentious entrepreneurs, producers, businessmen and uncultured retailers whose only sole interest is to maximize their profit with utter disregard to the interest of the consumer."

Apart from the controversy on the rights of a consumer in a democratic system, the consumer protection has received a boost following the landmark law reform commission in exercise of its powers[4] embarked on a review and reform of the Consumer Protection Council Act, No. 66, 1992 (hereinafter referred to as "CPCA" and all other relevant laws with a view to producing an all-embracing consumer protection legislation which will articulate clearly the rights and obligations of the consumers and providers of goods and services in Nigeria.

In 1980, the air of controversy surrounding the understanding of the rights of a consumer of goods in a commercial transaction was exemplified by the then President of consumer international, Anwar Fazal who incorporated sets of consumer responsibilities to complement consumer rights. He further maintained that absence of a legislation making the rights and interests of consumers the focal point has really made consumers, who are

1 R.N. Campbell, *Adam Smith: An Inquiry into the Nature and Causes of the Wealth of Nations* (Indianapolis: Liberty class, 1981) p. 660.

2 F.N. Monye, The consumer and consumer protection in Nigeria. Struggles, Burden and Hopes. (59th Inaugural lecture, University of Nigeria, Nsukka), p. 6.

3 (1985) NWLR (pt. 4) 739 at p. 753

4 Nigerian Law Reform Act, 1990 CAP 313, s5 & s7.

usually in a weaker bargaining position, very vulnerable in the hands of suppliers of goods and providers of services.

II. CONCEPTUAL MEANING OF THE TERM "CONSUMER" AND "CONSUMER PROTECTION"

Recent challenges and developments have made experts and scholars in this field to examine the legal status of a consumer in Nigeria and the adequacy and efficiency of the Consumer Protection Council Act (hereinafter referred to as CPCA) in order to recommend provisions to sensitize producers, importers, distributors and consumers of goods and services on their respective rights and obligations under the law. These two concepts are closely related and are very important terms for consumer protection legislation in the sense that they set parameters of the legislation.

However, Black's Law Dictionary[5] defines "a consumer" as:

> "A person who buys goods or services from personal, family or household use, with no intention of resale, a natural person who uses products for personal rather than business purposes."

Further, the Consumer Protection Act defines consumer as "an individual who purchases, uses, maintains or disposes of product or services". Thus, this definition has been widely criticized by scholars for not considering the legal status of consumers in a commercial transaction.[6] In this definition, the term individual excludes artificial persons.[7] It should be pointed out that the definition of "consumer" varies from jurisdiction to jurisdiction. However, another scholar defines "consumer"[8] as a person to whom goods, services or credit are supplied or sought to be supplied by another in the course of a business carried on by him.

Similarly, some writers have adopted a broad view of the term "consumer" among whom are Harvey and Barry[9] who defined a consumer to include anyone who consumes goods or services at the end of the chain of production. In O'Grady's[10] view a consumer is simply the final or end user

5 B.A. Garner, 9th edn., 2009.
6 O., Ajai, Caveat Venditor: Consumer Protection Decree No. 66 of 1992 (Amended No. 23 at p. 26).
7 Consumer protection decree, No. 66 of 1992, s6 (1)
8 *See* Mickleburgh on *Consumer Protection*, p. 3.
9 B.W. Harvey and D.L. Parry, *The Law of Consumer Protection and Fair Trading*, 3rd edn., London, Butterworths, 1980, p. 7.
10 (1982) 60 Canadian Bar Review No. 4, p. 49.

of all goods and services. The term "Consumer" is further defined as any person, natural or legal, to whom goods or services or credit are supplied or sought to be supplied by another person in the course of a business carried on by that person.[11] Notably, the above definitions of "a consumer" is not all encompassing, too narrow and does not reflect the existing norms and practice of the society which experts have advocated for a wider definition of a consumer to accommodate all levels of consumers recognized in tort under the neighbourhood principle vis-à-vis legal persons who buy goods and services for their private consumption.

The Black Law Dictionary defines "consumer protection" as a shield from danger, injury, loss, given to the consumer designed to protect consumers against unfair trade and credit practices involving consumer goods.[12] Consumer protection can be defined as the act of safeguarding the interests of the consumers in matters relating to the supply of goods and services, fraudulent and hazardous practices, as well as environmental degradation.[13] In a similar view, consumer protection simply means the prevention from accidents, civil or criminal wrongs, or injuries occurring to the buyers or users of goods and services. Thus, it should be pointed out herein that prevention of injury or accident to the consumer is the fundamental objective of the law in consumer protection issues and other related matters therein.

Furthermore, the enabling laws creating offences and/or providing for its control in the interest of the consumer(s) encompasses accident prevention or some policies which serve as a deterrent. For instance, the punishment sections of the laws as provided under the National Agency for Food and Drugs Administration and Control (NAFDAC), Standard Organization of Nigeria (SON) and or any other related food and drugs act. The term "consumer protection" has been defined as rules of law which recognize the bargaining weakness of the individual consumer and which ensures that such weakness is not unfairly exploited.[14] Another author rightly observed that Robert Lowe's definition of consumer protection is narrower and focuses on consumers obtaining products and services in a commercial transaction. He maintained that this narrow view of the consumer interest is generally regarded as the thrust of consumer protection legislation which confines itself to transactions involving goods and services.[15] In the light of the above

[11] *See* consumer protection legislation and the market place (1981-84) 5 Otago L.R.P. 397.
[12] *Ibid* p. 359.
[13] F.N. Monye, op. cit, p. 20.
[14] R. Lowe, *Commercial Law*, p. 457.
[15] *See* Cranston's *Consumer and the Law*, 3rd edn., p. 8.

definitions of consumer protection, Monye's definition is all-embracing and includes protection in matters relating to the … of goods and services, protection of consumers against environmental degradation can hardly be said to be a matter relating to supply of goods and services. Thus, protection of consumers against environmental degradation is aptly dealt with in the various environmental laws.

III. OVERVIEW OF CONSUMER PROTECTION LAWS IN NIGERIA

The idea espoused in this paper is situated within the context of the functionality of these laws i.e. The Consumer Protection Council Act (CPCA 1992), Standard Organization of Nigeria Act (SON) No. 18, 1990, National Food and Drugs Administration and Control (NAFDAC) cap 150, 1990 and Hire Purchase Act (HPA), cap. 169, 1990 respectively; however, consumer protection covers all spheres of life, ranging from the air we breathe, water we drink, food we eat, even drugs we take, etc. The afore-mentioned legislations cover all these spheres. Thus, the concept of consumer protection in the sense that governments have to intervene through legislation is novel even in the advanced western countries. It has been observed that these extant laws are meant to prevent unnecessary and unwarranted violation of consumer's rights. More importantly, these laws are of dual background i.e. Civil and Criminal Laws. It should be pointed out that business organizations and professional bodies as well regulates its conduct by prescribing an acceptable standards of behavior for its members this regulation affords protection to consumers by adopting both compensatory and punitive measures for both he injured and or the offender respectively.

This paper shall only examine the vital areas of protection of those laws, its impact on consumer and will not embark on a comprehensive analysis of these areas of law. Under the civil law based protection, consumer under the law of contract focuses on the simple agreement between two or more persons which the law recognizes as affecting their legal rights and obligations and which is enforceable in law.[16] Consumers have always been protected at common law in contract. It is trite law that a supplier whether producer, manufacturer, distributor or retailer, who has a contract for supply of goods is liable for breach of contract if the product is defective. The party cannot sue the supplier because of the privities of contract principle which pre-

[16] M.O. Adesanya and E.O. Oloyede, *Business Law in Nigeria,* Lagos, University of Lagos and Evans Brothers Ltd., 1972, p. 19.

cludes a person not privy to a contract from suing.[17] More so, consumer protection under the law of contract is concerned with the entitlements of persons who enter into a consumer transaction. Thus, it focuses on the provision of remedy for consumers where there is a breach of the contract by the producer. Also under the privities of contract and consumer protection, it is only a person who is a party to the contract can acquire a right or assume an obligation under it.[18] The legal implication of the above under consumer protection is that if a consumer has suffered loss, injury or damages as a result of defective goods or services, he is entitled to any contractual remedy against the supplier.[19]

Additionally, the doctrine of Caveat Emptor and consumer protection as it relates to sale of goods and landed property means "let the buyer beware". In the circumstance, the general rule herein is that there is no duty on a seller to disclose material information relating to the goods which he is about to sell to the buyer. In the strict sense of it, it means that in the absence of fraud, mistake and express guarantee or warranty the purchaser assumes the risk of any defect in the goods. In this case, the seller is not under any obligation to disclose to the purchase any defect that may be in the gods and no warranties would be implied as an incident of such contract.[20] We note that under the common law doctrine of "Caveat Emptor", this doctrine constitutes a formidable obstacle for consumers in recovering damages for injury, loss or damage resulting from defective products.[21] In a similar vein, the essential nature of Sale of Goods Act (1893) is that there shall be a transfer of property in the goods from the seller to the buyer for a price in money. The Act therefore defines a contract of sale of goods as a "contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a monetary consideration called the price".

Under the Sale of Goods Act, 1883 of the United Kingdom that codified the existing common law on the subject, some terms were implied into the contract for the sale of goods which was subsequently re-enacted by some states in Nigeria to form their own sale of goods laws. Thus, in providing for the obligations of the seller, the law imply certain terms into the contract

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17 *See* Priest v. Last [1903] 2 KB 148, p. 82.

18 Price v. Easton [1833] 4 B & Ad 433 : 110 ER 518; Tweddle v. Atkinson [1861] 1 B & S 393 : 121 ER 762.

19 Daniels v. R. White & Sons Ltd. [1938] 4 All ER 258.

20 K.I. Igweike, 'Consumer Protection in a Depressed Economy: The Nigerian Experience', Lagos, Nigerian Institute of Advanced Legal Studies, 2001, p. 359, UTC Nigeria Plc. v. Maobison Interlink & Associates Ltd. [2004] 10 CLRN 87.

21 UTC Nigeria Plc. v. Maobison Interlink & Associates Ltd. [2004] 10 CLRN 87.

of the sale of goods. These terms are implied into the contract in order to give it business efficacy. Also, this term will only be implied by the court if it is obvious that if the parties had adverted their minds to it at the time of the contract, they would have adopted it unanimously.[22]

Furthermore, this paper notes that international law played a significant role in the contract of sale of goods, though usually seen in terms of regulating relations between states, its effects however extend to individual and corporate persons in the very direct sense of facilitating and regulating all manner of activities, even reaching into areas where national laws apply but are affected by international considerations.[23] Notably, the direct effect of international law in this regard on transactions involving corporations has been evidenced in cases in which arbitral tribunals deployed rules governing international law to settle disputes between states and foreign company or companies, as the case may be.[24] Generally speaking, the law governing contracts for the sale of goods was put into statutory form (codified) by the Sale of Goods Act 1893. Thus, being a pre-1900 English statute of general application, the English enactment was applicable in Nigeria. However, several states of the federation later re-enacted the Act as part of their state laws. [25] Furthermore, as for the states that do not have their own laws on the subject matter, the 1893 Act still applies as a pre-1900 English statutes of general application. So, for ease of reference and convenience, the Act is a codification of the law governing the sale of goods. It is the backbone of international trade in all countries of the world which has provided modern uniform legislation for the international sale of goods that would apply whenever contracts for the sale of goods are concluded between parties within a place of business in contracting states.

Indeed, in the formation of the contract of sale and the determination of price, Sale of Goods Act of 1893provides no special provisions concerning formalities in the making of a contract of sale. It is therefore not necessary to observe complex formalities to create a contract for the sale of goods. On the other hand, the consumer protection under the Hire Purchase Act of 2010[26] usually contains implied terms intended to protect the hirer in this case the consumer. Also, there is an implied warranty that the owner shall give the hirer quiet possession and except for condition as to fitness

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[22] Hutton v. Warren [1836] 1 M & W 466, p. 194 : 150 ER 517.

[23] R.K. Gardner, *International Law*, Pearson Education Ltd., 2003, pp. 1-2.

[24] Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 1979 LR 531.

[25] *See* the Sale of Goods Law, Cap S2, vol. 7, Laws of Lagos State, 2003.

[26] *See* Cap C20, LFN, 2010.

for a particular purpose, all other implied terms cannot be expressly or otherwise excluded in the contract.[27] The hire-purchase device immigrated into Nigerian legal system when the need for secured financing of these consumer goods arose.[28] Suffice it to say that in spite of these consumer protection provisions in the Hire Purchase Act, consumers in Nigeria are deprived of the benefits derivable from the protection offered by the statute because of the abysmally low monetary limit of the Act. Thus, this accounts for the waning of the hire purchase transactions in Nigeria because other than motor vehicles, the goods that come within the scope of the Act are very few indeed. This shows that there is a compelling need to amend the Hire purchase Act to increase its financial limit in order to reckon with hire purchase transactions in Nigeria.

IV. CONSUMER PROTECTION UNDER THE LAW OF TORT

The principal aims of law of tort include appeasement, compensation, deterrence as well as loss distribution.[29] Its effect is to transfer resources from one party to another in order to return the victim to his or her position prior to the loss or injury suffered.[30] Another landmark development of consumer protection law through common law is that of product liability in tort against suppliers of goods where the defective goods cause damage or injury to a consumer. While under contract of sale of goods only a consumer who is a party to the transaction can seek redress against the supplier or manufacturer, the situation is different under the law of tort. Thus, such a person is regarded as a third party or an intruder in the transaction under the Sale of Goods Act.[31] It is to avoid the injustice that would result in some cases if an injured user of a defective product is left without redress, that the courts evolved the doctrine of negligence with its vital ingredient, "foresee-ability" in Donoghue's case. This case has of course, resurrected the spirit of an equally landmark case[32] which exhibited a major judicial activism in protection of consumers.

More so, the principle of Res Ipsa Loquitor which would have given succor to consumers in negligence cases was downplayed by the court.[33] This

[27] Lowe v. Lombank Ltd. [1960] 1 WLR 196 : [1960] 1 All ER 611.
[28] *See* The Interpretation Act, Cap. 123, vol. 8, 2004, LFN.
[29] G. Williams, The Aims of Law of Tort (1951) 4 CLP 137.
[30] P. Cartwright, *Consumer Protection and the Criminal Law: Theory and Policy in the UK Cambridge*, Cambridge University Press, 2001, p. 15.
[31] Donoghue v. Stevenson [1932] AC 562.
[32] George v. Skivington [1869] LR 5 Ex 1.
[33] Okonkwo v. Guinness (Nigeria) Ltd. [1980] 1 PLR 581.

paper however advocates for a reform that will proffer a lasting solution to this problem. However, a serious impediment to consumer redress under the tort of negligence is the non-recovery of damages for pure economic loss. A claim may only be allowed for pure economic loss where it can be linked to injury to person or property. An attempt to establish recovery for pure economic loss that is accompanied by physical damage has not been very successful.[34] It should be pointed out in this paper that, for an adequate consumer protection in a democratic system like Nigeria, major changes in the law relating to liability for negligence should be properly looked into as a matter of urgent necessity. It is in the light of the foregoing that this paper suggest an introduction of strict liability for defective products which is not based on fault in order to alleviate the hardship caused by the need to prove negligence before a consumer obtains redress, especially as an average consumer has no means of knowing how the manufacturer or producer produced his products or whether he used the right process in doing that. More so, for a consumer right in an emerging market in Nigeria to be adequately protected, a person who is injured by a faulty article or service should be entitled to compensation whether or not he was the person who purchased the article or service, provided he obtained it lawfully. In other words, the doctrine of privities of contract should be abolished.

V. CONSUMER PROTECTION UNDER CRIMINAL LAW

A person incurs individual criminal responsibility when liability for a particular crime an be ascribed or attributed to that person. Attribution in this case is premised on the satisfaction of the conduct elements that constitute the actus reus of the offence and provided that the accused possessed the required violation and knowledge or foresight. In the light of the widely accepted belief that a consumer is the king in a commercial transaction, this paper however noted that this belief is different in Nigeria and other developing economies where consumers have no say of their own but rather rely more on government intervention agencies for protection.

More importantly, most statutes that impact on consumer protection in Nigeria are penal in nature and may be categorized, for administrative convenience there as those that aim at protecting the consumer by prohibiting dealings on certain products, the regulation of the standards or quality of products to ensure the safety of the consumer and those that merely seek to regulate measurement, control prices and other forms of trade practices in

[34] Murphy v. Brentwood DC [1990] 3 WLR 415.

order to protect the consumer from exploitation by producers. Thus, some of these criminal law enactments under consumer protection are Criminal Code Act[35] applicable in the southern states, the penal code Act[36] Northern states of Nigeria, the Food and Drugs Act[37] the Standard Organization of Nigeria Act[38] the National Agency for Food and Drug Administration and Control Act[39] the National Law Drug Enforcement Agency Act,[40] the Consumer Protection Council Act[41] and so on.

VI. NOTABLE EFFECTS OF THE OVERLAPPING FUNCTIONS OF THE CONSUMER PROTECTION STATUTORY REGULATORY AGENCIES

Undoubtedly, the regulatory agencies such as the Consumer Protection Council (CPC), the Standard Organization of Nigeria (SON) and the National Food and Drugs Administration and Control (NAFDAC) established by government to protect consumer rights have either failed or have been unable to brace up for the challenges of the twenty first century. Thus, this paper notes among other things that in Nigeria today, consumers are still ignorant of their rights and not aware of the particular agency to channel their complaint to. There appears to be some overlapping in the functions of these agencies charged with protection of consumers in their respective operations. Having looked at the apparatus setting them up, we note in this paper that the apparent overlapping of functions would not present any hindrance to the smooth operations of these agencies but would rather complement and strengthen their tasks of protecting the consumer. Also, there are some statutes which, need to be streamlined in order to reduce the number of statutes on the same subject matter and or to reduce duplication. From the foregoing expression, and without prejudice to the powers of the consumer protection councilor state committee to negotiate, mediate or conciliate in matters referred to it by a consumer or producer, a section of the magistrate court or High Court should be established to deal with small claims.

[35] Cap C 38, vol. 4, LFN, 2010.
[36] Cap F 32, vol. 6, LFN, 2010.
[37] Cap S 9, vol. 13, LFN, 2010.
[38] Cap N1, vol. 9, LFN, 2010.
[39] Cap C 34, vol. 3, LFN, 2010.
[40] Cap N 30, vol. 9, LFN, 2010.
[41] Cap C 25, vol. 3, LFN, 2010.

VII. SIGNIFICANCE OF CONSUMER PROTECTION LAW REFORM

This paper examines those areas of protection that are fundamental in nature that deserves urgent reform given the position of a consumer in a democratic system. In view of the fact that consumer protection covers all spheres of our lives ranging from the air we breathe, water we drink, food we eat and even drug we take. There are various legislations covering all these. However, a reform of the law by providing an enforcement mechanism that will be proactive or alternatively reforming the existing law to incorporate ADR centers for small claims will be desirable. It should be noted that S.2 (a) of the CPCA had already empowered the council to give speedy redress to consumer's complaints through negotiations, mediations and conciliations. Regrettably, the council lack enforcement powers to make this beautiful provision effective.

The proposed reform should aim at evolving a comprehensive, coherent and national consumer protection regime based on appropriate policy choices as to the basis of liability both in contract and tort. Also, at the level of legislation, there is a compelling need to revise our sale of goods laws which in their present forms do not offer adequate protection to the consumer. The relevant rules of contract and tort should be consolidated and codified into a concrete and formidable consumer protection code. Strict liability regime should cut across both products and services in this case the reformed sale of goods laws should incorporate the remedies of refund, replacement and repair of defective products at the option of the buyer in appropriate cases. To this end, the Nigerian Law Reform Commission on Consumer Protection Law has recognized the urgent need and has embarked on the exercise on how to improve on the existing CPC Act so as to ensure that there is on ground, a consumer protection regime that articulates the protection of consumers with respect to product liability of products suppliers.[42] The reform should as well, address the visible overlapping functions between the Consumer Protection Council and the Nigerian Communication Commission in relation to the regulation of telecommunication sector.

VIII. CONCLUSION

This paper explores the strategic interest and protection desired by a consumer in a democratic system and emerging market in Nigeria, especially

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[42] Nigerian Law Reform Commission, Workshop papers on the reform of consumer protection laws (2006) p. 4.

by examining the existing legislations and or the regulatory agencies in place so as to ascertain its functionality in terms of the protection of the rights of an innocent consumer. The paper concludes by advocating that for there to be adequate protection of consumer's right, there should be a coherent body of consumer protection law in Nigeria, rather than a lopsided case laws or statutory rules. More so, while the rules of privities of contract remained sacrosanct, the doctrine of Caveat Emptor has greatly been modified by the terms implied under the sale of goods laws and the hire purchase Act. But in spite of the statutory modification of the doctrine, the unbridled application of exclusion or limiting clauses remains a severe impediment to consumer redress. The concept of redress transcends reparation or compensation for injury already suffered to include prevention of injury, loss or damage, hence the prescription of criminal law could be regarded as a form of redress. Finally, some of the regulatory agencies like the standard organization of Nigeria and the consumer protection in the area of criminal law though clothed with legal personality lack the power to prosecute offenders.

What proceeds from the foregoing, therefore, is that a wider definition of a consumer to accommodate the category of consumers recognized in tort under the neighbourhood principle and also legal persons who buy goods and services for their private consumption.

EMAAR MGF LAND LTD. v. *AFTAB SINGH*: THE END OF THE LINE FOR CONSUMER ARBITRATION IN INDIA

—*Ajar Rab*[*]

Abstract *The recent decision of the Supreme Court upholding the judgment of the National Consumer Disputes Redressal Commission in Aftab Singh* v. *Emaar Mgf Land Ltd. finally clears the confusion over arbitration of consumer disputes. While jurisprudence prior to the NCDRC's decision left the choice to the consumer to seek redressal before the forums established under the Consumer Protection Act, 1986, or to seek redressal through arbitration, it was for the first time that a judicial body had entered the murky waters of whether consumer disputes are arbitrable or not. NCDRC's decision marked a watershed in jurisprudence on consumer arbitration in India and ultimately held consumer disputes unarbitrable under Section 2(3) of the Arbitration & Conciliation Act, 1996. This paper takes a critical look at the decisions on consumer arbitration prior to the decision of the NCDRC, the decision in Emaar, and whether consumer disputes should be arbitrable. It argues that while the NCDRC arrived at the right conclusion, the analysis should not have been restricted to the Consumer Protection Act being a special legislation and consumer disputes being unarbitrable on grounds of public policy. Thus, the paper argues that the Supreme Court too, in following suit, missed a golden opportunity to not only examine the issue of arbitrability but also to consider the inherent nature of consumer disputes, thereby resulting in the right position of law, but on half-baked legal reasoning.*

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I. INTRODUCTION

The reference of consumer disputes to arbitration or consumer arbitration as it is sometimes called, has for long been an unpleasant road in Indian law.[1] Judicial precedent has forced consumers to row in two boats, i.e., it has maintained jurisdiction of both the consumer fora and the arbitral tribunal in the presence of arbitration clauses and has never completely ousted the jurisdiction of the arbitral tribunal.[2]

However, the recent decision of the Supreme Court of India ("**SC**")[3] upholding the judgment of the National Consumer Disputes Redressal Commission ("**NCDRC**") in *Aftab Singh* v. *Emaar Mgf Land Ltd.*[4] ("***Emaar***") has finally sunk the boat of arbitration by holding that consumer disputes are unarbitrable under Section 2(3) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and hence, consumer forums are not bound to refer consumer disputes to arbitration under Section 8(1) Arbitration Act.

Admittedly, the decision of the NCDRC and now the SC, marks a watershed in the development of jurisprudence on the issue of arbitrability of consumer disputes and the jurisdiction of the fora created under the Consumer Protection Act, 1986 ("**CoPRA**"). Section 3 of CoPRA *prima facie* states that the remedies under the CoPRA shall be in addition to, and not in derogation of, the provisions of any other law. Thus, the CoPRA only provides for additional remedies, and does not oust the possibility of arbitration of consumer disputes. On the other hand, the addition of the words "*notwithstanding any judgment, decree or order of the Supreme Court or any Court*"[5] to Section 8(1) of the Arbitration Act in 2015[6] arguably manifests the intention of the legislature to disregard any previous judgments,[7]

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[1] Alan S. Kaplinsky and Mark J. Levin, 'Consumer Arbitration: If the FAA "Ain't Broke", Don't Fix It', *The Business Lawyer,* vol. 63, no. 3, May 2008, pp. 907-919.

[2] Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294; National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506; and Rosedale Developers (P) Ltd. v. Aghore Bhattacharya [2018] 11 SCC 337 : [2015] 1 WBLR 385.

[3] Emaar Mgf Land Ltd. v. Aftab Singh, Civil Appeal Nos. 23512-23513 of 2017, decided on 13-2-2018 (SC).

[4] Aftab Singh v. Emaar Mgf Land Ltd., 2017 SCC OnLine NCDRC 1614.

[5] Arbitration Act, s8(1) (this provision states as:

"*A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration*..")

[6] As amended by the Arbitration and Conciliation (Amendment) Act, 2015.

[7] Such as that passed in National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506, Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294 and Rosedale

which held that the remedy of arbitration is not the only remedy available to the consumer, but is an optional remedy. Therefore, the consumer is free to choose whether the consumer wishes to opt for the remedy under the CoPRA or seeks to resolve his/her dispute through the remedy of arbitration.

However, the moot question is: What should prevail? Should consumer forums disregard the consent of the parties and force parties to seek redressal from consumer forums when they have specifically opted for resolution of their dispute through arbitration, or should they hold the consent of the parties supreme, and refer consumers to arbitrate disputes under Section 8(1) of the Arbitration Act?

Part I of this paper surveys the important judicial precedents on whether the presence of an arbitration clause effectively ousted the jurisdiction of the consumer fora prior to the judgment in *Emaar.* Part II takes a look at the arbitrability of consumer disputes. Part III analyses the judgment in *Emaar* and how the reasoning of the NCDRC diverges from the existing jurisprudence to completely oust the possibility of consumer arbitration in India. Part IV takes a critical look at the inherent nature of consumer disputes irrespective of the test of arbitrability. It supports the decision of the SC and NCDRC in *Emaar* on various grounds other than those considered by the NCDRC.

II. TO ARBITRATE OR NOT TO ARBITRATE? – SAILING IN TWO BOATS BEFORE EMAAR

The Indian courts have for long hesitated to make up their mind about consumer arbitration. Caught between being pro-arbitration, and fulfilling the social welfare objective of the CoPRA, judicial precedents have been shy to hold that consumer disputes are unarbitrable. Instead, they have conveniently left it to the choice of the consumer, who by the very dint of being a 'consumer' has no idea about litigation options.

In this context, it is to be noted that the preamble to the CoPRA states that the CoPRA was enacted to provide for better protection of the interests of the consumers and for that purpose establishes authorities for the settlement of consumer disputes.[8] Thus, the CoPRA was enacted as a special social legislation to address the unequal bargaining power of consumers and to provide swift and efficacious remedy. However, the CoPRA lacked a

Developers (P) Ltd. v. Aghore Bhattacharya [2018] 11 SCC 337 : [2015] 1 WBLR 385.

[8] Preamble of the CoPRA.

non-obstante clause giving it overriding application in supersession to other laws, unlike the recently enacted Real Estate (Regulation and Development) Act, 2016 ("**REA**").[9] Instead, Section 3 of the CoPRA made the remedies under the CoPRA in addition to other existing remedies. Thus, the courts decided not to choose one way or another as to which remedy would prevail, i.e., arbitration or the remedy under the CoPRA.

In their hesitation to decide in favour, or against arbitration of consumer disputes, the courts until *Emaar* never examined the question of arbitrability of consumer disputes under Section 2(3) of the Arbitration Act which clearly provides that not all matters are capable of being referred to arbitration.[10] Instead, they chose to focus their attention on whether the remedy under the CoPRA is exclusive, or in addition to other remedies.

In order to fully appreciate the ramifications of the present problem, it is pertinent to examine the jurisprudence with respect to Section 8(1) of the Arbitration Act prior to its amendment in 2015 vis-à-vis consumer disputes. In *Skypack Couriers Ltd.* v. *Tata Chemicals Ltd.*,[11] the Supreme Court held that the remedy under the CoPRA is in addition to provisions of any other law and therefore, the existence of the arbitration clause cannot oust the jurisdiction under the CoPRA. In another case, the Supreme Court considered the preamble of the CoPRA and the statements of objects and reasons and held that "*it is apparent that the main objective of the Act is to provide for better protection of the interest of the consumer and for that purpose to provide for better redressal mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers*".[12] Therefore, the remedies under the CoPRA cannot be curtailed in favour of arbitration.

Similarly, in *Fair Air Engineers (P) Ltd.* v. *N.K. Modi*,[13] the Supreme Court took the view that the Parliament was well aware of the Contract Act, 1872 and therefore, while passing the CoPRA wanted the remedy under the Arbitration Act to be in addition to the remedy under the CoPRA and not to

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[9] REA, s89 (this provision states as:
"*The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force*.")

[10] Arbitration Act, s2(3) (this provision states as:
"*This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration*.")

[11] Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294.

[12] Thirumurugan Coop. Agricultural Credit Society v. M. Lalitha [2004] 1 SCC 305.

[13] Fair Air Engineers (P) Ltd. v. N.K. Modi [1996] 6 SCC 385.

serve as an ouster of the jurisdiction of consumer fora. The court explained its view as "*The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own [...] come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act*".

Thereafter, in *National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy* ("***National Seeds***"),[14] the court emphasized on the remedies under the CoPRA being in addition to the other remedies provided under the law and held that the consumer may choose either to go to arbitration or consumer fora.

Thus, prior to *Emaar* the courts were primarily concerned with the remedies available and not whether consumer disputes themselves were arbitrable under Section 2(3) of the Arbitration Act or not.

III. ARE CONSUMER DISPUTES ARBITRABLE?

Before the decision in *Emaar,* courts have applied the jurisprudence on arbitrability of disputes only on the sidelines. However, in order to evaluate the rationale of the NCDRC in *Emaar,* it becomes imperative to examine the existing tests of arbitrability. One such test is the type of remedy sought and whether such remedy is one which the arbitral tribunal is empowered to grant,[15] especially in the presence of special legislation or public policy considerations. In this context, the most important question is whether an arbitration clause can undermine statutory protections granted under the CoPRA for consumer disputes[16] and whether consumer disputes ought to be referred to arbitration. In order to answer the above, it is necessary to look at the position of law with respect to arbitrability of disputes.[17]

The landmark judgment on the question of arbitrability is the case of *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.*,[18] ("**Booz Allen**") which categorically held:

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14 National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506.

15 Russell on *Arbitration* 28, 2007 (22nd edn., 2002).

16 Aftab Singh v. Emaar Mgf Land Ltd. [2017] SCC OnLine NCDRC 1614.

17 For arbitrability of disputes, see generally Ajar Rab, 'Redressal Mechanism under the Real Estate (Regulation and Development) Act 2016: Ouster of the Arbitration Tribunal?', NUJS *Law Review,* vol. 10, no. 1, 2017. Available from http://nujslawreview.org/2017/03/26/redressal-mechanism-under-the-real-estate-regulation-and-development-act-2016-ouster-of-the-arbitration-tribunal/, (accessed 6 February 2018).

18 Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. [2011] 5 SCC 532.

> "*Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora.*"

Thus, the court specifically held that public policy considerations or matters exclusively reserved by the legislature for public forums shall be outside the purview of the arbitration. One such public policy consideration relevant to the present analysis is whether parties can contract out of the special legislation in favour of dispute resolution by arbitration and oust the jurisdiction of public courts, tribunals or forums.

Addressing such a concern, in *Vimal Kishor Shah* v. *Jayesh Dinesh Shah*,[19] the court held that the claims under the Trusts Act, 1882 are not arbitrable since the Act exhaustively provides for remedies before the Principal Civil Court. Interestingly, the court relied on the interpretation in *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke*,[20] wherein the issue before the court was whether a civil suit can be barred in the context of remedies provided under the Industrial Disputes Act. Further, in *Natraj Studios (P) Ltd.* v. *Navrang Studios,*[21] while discussing the inter-play of the Arbitration Act versus the remedies provided under the Bombay Rents Act, the Supreme Court held:

> "*17. ...Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by Special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rents Act cannot be recognized by a court of law.*"

The Supreme Court clearly emphasized that if special courts have been constituted under a legislation, especially when such legislation is used to address a social objective, parties cannot be permitted to contract out of the legislative mandate which requires that disputes under such legislations be resolved through redressal mechanisms created under such a legislation.

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19 Vimal Kishor Shah v. Jayesh Dinesh Shah [2016] 8 SCC 788.

20 Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [1976] 1 SCC 496.

21 Natraj Studios (P) Ltd. v. Navrang Studios [1981] 1 SCC 523.

Recently, in *Ayyasamy*,[22] which is post the amendment to the Arbitration Act, Dr. D.Y. Chandrachud J. referred to the decisions of the Hon'ble Supreme Court[23] and held that the existence of an arbitration clause will not be a bar to the consumer forum(s) entertaining a complaint under the CoPRA. In this case, the court took the test mentioned in *Booz Allen* a step further and created a distinction between a public fora and special fora. The rationale of the court was that the general principle is that a dispute which is capable of adjudication by an ordinary civil court will also be capable of being resolved by an arbitration. Therefore, the test of public fora may not be adequate to oust the jurisdiction under the Arbitration Act. The court explained that there are classes of dispute which falls within the exclusive domain of special fora under legislation and where such legislation confers exclusive jurisdiction to the exclusion of the ordinary civil court, then as a matter of public policy such dispute would not be capable of resolution by arbitration. Surprisingly and erroneously, the Supreme Court recently upheld this reasoning in *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia*[24], even when the dispute between the landlord and tenant was not governed by a special rent legislation.

IV. *EMAAR* – BRINGING CONSUMER ARBITRATION TO AN END

Relying on the aforesaid judgments, the NCDRC took the view that the amendment to the Arbitration Act could not be interpreted in a manner by which the Parliament intended to undo the jurisprudence under the CoPRA and reduce it to "useless lumber" or "dead letter".[25] The NCDRC stated that the purpose of the Law Commission's report with respect to the amendment to the Arbitration Act was self-evident, being related to the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of the Section 11 of the Arbitration Act.[26] The NCDRC held that the Law Commission while using the phrase "*notwithstanding any judgment, order or decree*" did not have the issue of non-arbitrability of consumer disputes

22 A. Ayyasamy v. A. Paramasivam [2016] 10 SCC 386.

23 Skypack Couriers Ltd. v. Tata Chemicals Ltd. [2000] 5 SCC 294; National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506; and Rosedale Developers (P) Ltd. v. Aghore Bhattacharya [2018] 11 SCC 337 : [2015] 1 WBLR 385.

24 Himangni Enterprises v. Kamaljeet Singh Ahluwalia [2017] 10 SCC 706.

25 Aftab Singh v. Emaar Mgf Land Ltd. [2017] SCC OnLine NCDRC 1614, para 31.

26 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, August 2014).

or any other dispute in mind. It was limited to changing the position of law after the judgment in *SBP & Co.* v. *Patel Engg. Ltd.*[27]

The NCRDC also made reference to Section 2(3) of the Arbitration Act and held that the mandate of the provision was that the statutory regime concerning the arbitration will not be applicable where public law regime operates, and unlike many general savings clauses, Section 2(3) of the Arbitration Act categorically prevents the application of the Arbitration Act to disputes which are unarbitrable. Therefore, even the Arbitration Act recognizes that there are certain disputes which cannot be referred to arbitration and are to be adjudicated and governed by statutory enactments which have been specifically passed for a particular public purpose and to attain the public policy objective. If a tribunal attempts to deal with such matters, the award so passed would be unenforceable.[28]

It is extremely important to note that the NCDRC's reasoning is different from the existing jurisprudence. In *National Seeds*,[29] the court held that consumers can choose whether to go for arbitration or to seek remedy under the CoPRA. The NCDRC, in *Emaar,* expressly held that consumer disputes are not arbitrable and effectively ousted the jurisdiction of the arbitral tribunal by placing reliance on Section 2(3) of the Arbitration Act.

Subsequently, while hearing the appeal against the judgment in *Emaar,* the SC in one line held that it does not find any ground for interference with the order of the NCDRC. The effect of this is that consumers no longer have a picking-option with respect to the choice of forum for adjudication of their disputes. By interpreting Section 2(3) of the Arbitration Act and holding that consumer disputes are no longer arbitrable, irrespective of the choice of the client, the courts have now closed the future of consumer arbitration in India. Sadly though, the position of law has emerged on half-baked legal reasoning and not on the strength of a comprehensive analysis of consumer arbitration.

V. CONSUMERS SHOULD NOT BE COMPELLED TO ARBITRATE DISPUTES

While the SC and the NCDRC have ensured that the consumers are no longer forced to arbitrate their disputes, both courts have missed a golden

27 SBP & Co. v. Patel Engg. Ltd. [2005] 8 SCC 618 : [2005] 3 Arb LR 285.
28 Aftab Singh v. Emaar Mgf Land Ltd. [2017] SCC OnLine NCDRC 1614.
29 National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [2012] 2 SCC 506.

opportunity to discuss and examine the nature of consumer disputes and consider whether the traditional rules of the philosophy of arbitration apply to consumer disputes.

Freedom of Contract - One of the key features and premise of arbitration is that arbitration is a creature of consent, i.e., the starting point is the contract to arbitrate.[30] Parties willingly consent to refer their dispute to a forum apart from the court. They are usually informed and the decision to arbitrate is voluntary, i.e., they have the opportunity to determine what disputes are to be subjected to arbitration, they have the freedom to choose the arbitrator, the seat of arbitration, the procedure to be followed by the arbitral tribunal and the applicable law.[31] Thus, the entire premise of arbitration rests in the freedom of contract. However, it is this very freedom of contract that is missing in the agreements and contractual relationship between businesses and consumers.[32]

No Explicit Bargain - In consumer disputes, the decision to arbitrate is almost never the subject of an explicit bargain.[33] The parties, especially the consumers, never get to choose or even negotiate on whether they are agreeable to settle their disputes through arbitration. The choice to arbitrate is usually made unilaterally by the drafter of the standard form, who most likely selected arbitration not for its fairness but for its advantage.[34] Thus, arbitration clauses in consumer contracts do not involve arm's length negotiation but instead comprise terms which are given to the consumer on a take-it-or-leave-it basis, the classic case of adhesion in contracts.[35]

Result Shopping – Businesses, thus, impose arbitration to effectively keep the national courts or the judicial system out of the business of the consumer protection and replace it with a system of private justice, i.e., an effective result shopping and not just forum shopping alone.[36] Another

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[30] Richard E. Speidel, 'Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?', (1998) 40 Arizona Law Review 1069.

[31] *Ibid*.

[32] *Ibid*.

[33] Edward A. Dauer, 'Judicial Policing of Consumer Arbitration', (2000) 1 Pepp. Disp. Res. L.J. 91.

[34] *Ibid*.

[35] Thomas J. Stipanowich & J. Clark Kelso, 'Protecting Consumers in Arbitration: Consumer Due Process Protocol Sets Forth 15 Principles for Assuring Consumers a Fundamentally Fair Dispute Resolution Process', (1998) 5 Dispute Resolution Magazine 11.

[36] Cherisse Mastry, 'Arbitration of Consumer Disputes: The AAA's Consumer Due Process Protocol', (2001) 5 Journal of Texas Consumer Law 43.

reason for businesses to use arbitration clauses as part of their boilerplate contract is to enact major changes in the substance and application of law.[37]

Bar to Class Actions - It is abundantly clear that only businesses get to decide whether their dispute shall be governed by arbitration or not. It is in the interest of businesses to use arbitration as it excludes class action suits.

Lop-sided - Additionally, a system of private justice such as arbitration will always favour those who control axes, procedures, and the money.[38] Thus, businesses analyze and determine the attributes of arbitration which will operate solely in their favour, e.g., a private venue chosen by an economically stronger party will effectively serve as a deterrent to the consumer from pursuing his/her claim at a far off venue.[39] Thus, though on the face of it, the arbitration mechanism seems to be fair but it can be systematically lopsided[40] in terms of the cost of arbitration, selection of venue, choice of arbitrators, etc., and therefore, unfair to the consumers.[41]

Cost of Arbitration - The cost of arbitration is usually high, and in some cases prohibitively high, either because the consumer may not be in a position to afford the fees of lawyers and the arbitrator's fees, or because the cost of bringing a claim would outweigh the benefit of the remedy.[42] Since consumer disputes arise most frequently with respect to small grievances such as home repairs, sale of cars, purchase of appliances or home furnishings, etc., the goods sold and services rendered are often necessities and not luxuries.[43] Therefore, to include arbitration for such small claims makes little sense, especially in light of the fact that businesses can tailor arbitration clauses to favour them.

Invalid Waiver - It is settled law that the principle of *quilibet potest renunciare juri pro se introducto*, i.e., anyone may renounce a law introduced for his own benefit, is applicable only when the statute makes the provision for individual benefit and the prohibition is not a matter of public

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[37] *Ibid*.
[38] *Ibid*.
[39] Dauer (n 33).
[40] Dauer (n 33).
[41] Sugandha Kamal, 'Mandatory Consumer Arbitration', 3 May 2012. Available from SSRN: http://ssrn.com/abstract=2050418, (accessed 6 February 2018).
[42] Mark E. Budnitz, 'The High Cost of Mandatory Consumer Arbitration', *Law and Contemporary Problems*, vol. 67, no. 1/2, Mandatory Arbitration, Winter-Spring 2004, p. 133-166.
[43] Aryeh Friedman, 'The Effectiveness of Arbitration for the Resolution of Consumer Disputes', (1977) 6 N.Y.U. Review of Law & Social Change 175.

policy. However, in cases where the statute has been enacted in the interests of public policy and for the benefit of the public, such a right cannot be waived under any circumstance.[44] Therefore, if it is to be argued that parties validly gave up the remedy under the CoPRA in favour of arbitration, such a waiver would be invalid in light of the CoPRA being a statute enacted in the interest of public policy and hence, its application incapable of being contracted out of.

Uninformed Consumers – Most often than not, consumers are not aware of the process of arbitration, the consent to an arbitration clause and its effect of waiver of the right to go to trial or consumer forum. Furthermore, consumers have no access to information about arbitration procedure and their complexity. They often do not understand who should be appointed as arbitrator and what role that person is supposed to play. Therefore, the consumers' understanding the questions of independence and impartiality of the arbitrators does not even arise. Inevitably, parties have to engage lawyers to help them navigate the unchartered territory of arbitration. Therefore, the intent of allowing consumers to represent their own cases under the CoPRA would be rendered futile.[45]

Non-publication of awards – Since arbitration awards are not available in public domain, it forces consumers to compulsorily arbitrate disputes raising public policy concerns. The public is not only interested in resolving independent disputes but is also entrusted with ensuring that publicly promulgated laws are enforced and publicized.[46] Also, it is in the interest of the State to regulate consumer affairs in order to protect consumers. Otherwise, the objective of better protection of consumers mentioned in the preamble of the CoPRA would be negated as the State will not have any information on the violations of the CoPRA and hence, will not be able to regulate consumer affairs or enact or amend existing legislation in light of new consumer concerns.

Lack of Binding Precedent – Another problem that comes with forcing consumers to arbitrate their disputes is that the arbitrators cannot create or

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[44] Murlidhar Aggarwal v. State of U.P. [1974] 2 SCC 472 : [1975] 1 SCR 575 – the tenant waived his right to approach the civil court under the U.P. (Temporary) Control of Rents and Eviction Act. The lease deed was declared illegal as the provision was for the benefit of the public and could not be waived; Indira Bai v. Nand Kishore [1990] 4 SCC 668.

[45] Consumer Protection Regulations, 2005, s26 (3) and s 26(4).

[46] Kamal (n 41).

modify existing law.[47] Thus, arbitrators would not be able to further develop jurisprudence on consumer rights and concepts such as deficiency of service, strict product liability, definition of consumer, etc., would become stagnant and arbitrators will simply continue to apply existing principles of law even though nature of dispute may demand new tests, approaches and jurisprudence.

Consumers Cannot Choose the Right Arbitrators – Consumers might choose people who they know. Such people may not necessarily be lawyers or judges. Thus, there is ample scope for the possibility that there might be procedural unfairness or divergence from rules of evidence, etc., which may not be sufficient for a successful challenge of the award under Section 34 of the Arbitration Act since the grounds for challenge are limited.[48]

CoPRA Will Become Futile – If parties are forced to arbitrate their consumer disputes, the entire purpose of the CoPRA would be frustrated. The Supreme Court in *National Insurance Co. Ltd.* v. *Hindustan Safety Glass Works Ltd.,*[49] categorically highlighted that the CoPRA was enacted by the Parliament as the beneficial legislation to overcome the disadvantage a consumer has vis-à-vis the supplier of goods and services. In several cases,[50] the court has held that the provisions of the CoPRA have to be interpreted in favour of the consumer in order to equalize the bargaining power of consumers. Furthermore, on several occasions, the court has held that the CoPRA should be interpreted in a liberal manner and such interpretation should be preferred which fulfills the purpose of the Act. Thus, forcing consumers to arbitrate would effectively undo the CoPRA and the existing jurisprudence.

VI. CONCLUSION

It is clear from the foregoing that *Emaar* marks the first judicial precedent which engages in the real examination of the question of arbitrability of consumer disputes. However, the NCDRC came to the right conclusion only on the basis that consumers cannot be forced to arbitrate in light of CoPRA being a special legislation and on grounds of public policy. The Supreme

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[47] Richard M. Alderman, 'What's Really Wrong with Forced Consumer Arbitration?', Business Law Today, November 2010, paras 1-2.

[48] Justice R.S. Bachawat's *Law of Arbitration & Conciliation*, vol. 1, 6th edn., 2018, p. 1795.

[49] National Insurance Co. Ltd v. Hindustan Safety Glass Works Ltd. [2017] 5 SCC 776.

[50] LDA v. M.K. Gupta [1994] 1 SCC 243 : AIR [1994] SC 787, relying on ESI Corpn. v. High Land Coffee Works [1991] 3 SCC 617; CIT v. Taj Mahal Hotel [1971] 3 SCC 550 and State of Bombay v. Hospital Mazdoor Sabha AIR [1960] SC 610.

Court has now followed suit. While hearing the appeal, it should have at least examined the long-standing confusion over consumer arbitration after analyzing the entire philosophy of consumer disputes. Instead, the judges chose to shy away from that onerous, yet necessary task, by simply opting to not interfere with the NCDRC's judgment in *Emaar,* without any reasons.

Despite the broad and encompassing language of Section 3 of the CoPRA, the Supreme Court should have ventured into the inherent problems with consumer arbitration and not just rely on the existing jurisprudence on arbitrability which was examined by the NCDRC. In this context, the court would have found ample support from various jurisdictions across the globe which have specifically amended or enacted law(s) explicitly excluding consumer disputes from arbitration.[51]

Thus, while the road for consumer arbitration in India now remains forever closed, it is sadly not the result of a deliberate and conscious step towards protecting consumer rights but as a result of a landslide of the jurisprudence of arbitrability of disputes barricading consumer arbitration.

[51] New Civil and Commercial Code of Argentina, s1651; Marval O'Farrell & Mairal, 'Ruling on arbitrability of consumer disputes under new Civil and Commercial Code', *Lexology,* 19 April 2016. Available from https://www.lexology.com/library/detail.aspx?g=fd646ec7-657e-48b9-9a54-7868a7333752, (accessed 6 February 2018); For the amendments to the International Commercial Arbitration Act and to the Consumer Protection Act of Bulgaria, see, Velislava Hristova, 'Changes in the Arbitration Law: Greater Certainty for Consumers Comes with Greater Control over Arbitration in Bulgaria', *Kluwer Arbitration Blog,* 26 June 2017. Available from http://arbitrationblog.kluwerarbitration.com/2017/06/26/arbitral-women/, (accessed 6 February 2018).

INTERNATIONAL LEGAL FRAMEWORK ON COMPARATIVE ADVERTISING IN EUROPEAN UNION, UNITED STATES AND INDIA – A CONTEMPLATIVE COMPARATIVE STUDY

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Abstract *The commodity market is not just about the commodity but largely about how one sells it, which in today's world is mostly through advertisements. Advertising has been with us in one form of another for the past 5000 years*[1]*. It plays a significant role in today's economy and its presence in both print and electronic formats is likely to continue. One of the essential functions of advertising has been to persuade potential consumers that a particular product is superior to competing products. In today's market, they frequently attempt the task not just by saying 'our product is good', but by saying 'our product is better than the others'*[2]*– which is the basic concept behind comparative advertising.*

Comparative advertising is defined as advertising that "identifies the competition for the purpose of claiming superiority or enhancing perceptions of the sponsor's brand", as opposed to advertising that promotes one's product solely on its own merits.[3] *The comparison may be of a specific attribute of the*

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[1] J.S. Chandan et.al, *Essentials of Advertising*, 3 (1990).

[2] This is one of the most prevalent methods of advertising. The effectiveness of comparative advertising is shown not only by consumer studies, but by its continuing use by advertisers. According to a survey, approximately one-third of all advertising in the United States is comparative. See, J.D. Beller, 'Law of Comparative Advertising in the United States and Around the World: A Practical Guide for U.S. Lawyers and Their Clients', (1995) 29 Int'l Law 917.

[3] Comparative advertising is also defined as "a technique by which a product is compared to a competitive product with the intent of proving its superiority." P E Pompeo, 'To Tell the

product, such as price or taste, or it may be a general, all-encompassing comparison. This type of advertising, i.e., taking the competitor head-on and comparing the respective products, to show the advertiser's superiority, is one of the most controversial areas in advertising today. This becomes problematic essentially because advertising is not always truthful. Sometimes it relies on misleading claims and sometimes it engages in deceptive advertising to sell products.

This article herein narrates the laws relating to comparative advertising, as they exist in the United Kingdom, the United States and India respectively. By traversing this path, the article attempts to compare these laws. An attempt is also made therein to find out the aptness of these laws and whether they are in parity with the situation in their respective territory and whether they are in need of any change.

I. INTRODUCTION

Comparative advertising aims at enabling the consumers to make an objective choice of products by giving them proper information of the other product/products in the market. However, the tendency is generally to highlight the merits of the goods endorsed and display only the negative points of the goods compared. Comparative advertising can be theoretically divided into two types on which also relies its legality and tolerance, namely: puffery[4] and denigration. Puffery is where the advertiser intends to draw the attention of the consumer by making superlative and flamboyant claims and praises of his product which can be considered as mere positive assertions of opinion, rather than statements which can be precisely verified, measured or quantified. Statements of puffery are generally subjective in nature. When puffery tends to get aggressive and ends up portraying the competitor's product in a bad light, it takes the form of denigration. Comparative advertisement up to the stage of puffery is generally considered lawful and

Truth: Comparative Advertising and Lanham Act - Section 43(a)', (1987) 36 Cath. U. L. Rev., 565.

4 See also Carlill v. Carbolic Smoke Ball Co. [1892] 2 QB 484; De Beers Abrasive Products Ltd. v. International General Electric Co. [1975] 1 WLR 972 : [1975] 2 All ER 599; Reckitt & Colman of India Ltd. v. M.P. Ramchandran [1998] SCC OnLine Cal 422 : [1999] 19 PTC 741.

very much tolerable in all jurisdictions however almost all laws of the world heavily scrutinize denigration of any form.[5]

Along with the interests of the consumers, comparative advertisements also potentially influence the competitors and the proprietary right holders of the trademark, if the case is one of comparison with goods/services bearing a reputed trademark in the market. There is many a chance of the trademark being economically exploited by a comparative advertisement wherein consumers start associating the goods/services of the advertiser with that of the trademark owner.[6]

II. WHY IS COMPARATIVE ADVERTISING DONE?

In the world of advertising, it is well known that nothing said in an ad can be 100 percent true nor the formula to determine the meaning of an expression there can be as rigid as it is in the cases of determining the meaning of an expression in legal document. So the question that arises is of determining the falsity requirement in the cases of advertisements.

Law in the cases of ads tolerates advertisers to make false statements to the extent that it doesn't mislead the consumers. Right term used for this kind of advertisement is puffing. The toleration of puffing has developed with the doctrine of caveat emptor. For instances, exaggerated advertising or boasting upon which no reasonable consumer would rely is not grounds for legal action. Example of such advertising can be as product A is as good as B or this the most reliable, everlasting product. Even a vague, general claim of superiority will usually not be actionable.

For example, in *White* v. *Mellin*[7], the House of Lords held that to say of a baby food that it was "far more nutritious and healthful than any other preparation yet offered" was not actionable. There was no "imputation of intentional misrepresentation for the purpose of misleading purchasers", but merely a claim that the plaintiff's food was inferior to the defendant's. However specific claims of superiority, shown to have been supported by research, if found false are less likely to be dismissed as harmless puffing.

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5 Parth Gokhale and Shriyani Datta, 'Comparative Advertising in India: Evolving a Regulatory Framework', (2011) 4 NUJS L. Rev. 131.

6 *Ibid*.

7 [1895] AC 154.

III. CASES ON PUFFERY ADVERTISEMENTS

The Court in *De Beers Abrasive Products Ltd.* v. *International General Electric Co.*[8] upheld this same line of argument. In the particular case, the defendants had circulated in the International Trade Market a pamphlet which sought to compare the effectiveness of the abrasives manufactured by the defendant with that manufactured by the plaintiff, concluding that the defendants' abrasive was superior. The Court held this to be more than a mere 'puff' and was capable of amounting to slander of goods. Therefore mere 'advertising puffs' that praise, perhaps in exaggerated terms, an advertised product over a rival's product in an attempt to win the customers is not actionable. What amounts to mere puffing and what crosses the limit doesn't always depend upon the nature of the statements. It depends upon various other factors as well. Sometimes what type of product is being advertised also has a bearing on whether a claim made in respect that product is actionable or not.

In *Ciba-Geigy Plc*. v. *Parke Davis & Co. Ltd*.[9], Aldous J stated: "I have no doubt that statements such as 'A's flour is as good as B's' or 'A's flour can be substituted in all recipes for B's flour' are puffs and not actionable. However, that doesn't mean that a similar statement would be puff and not actionable, if made in relation to a pharmaceutical product."

A. United Kingdom

Advertising regulations in the US & UK has gained recognition across all tiers of the consumer market and indicates growing interest in the way goods and services are advertised. Unlike in India in developed countries such as United Kingdom (UK), and United States of America (US) the consumers are at an advantage and enjoy more rights. The fine and punishment is imposed on the companies that mislead the public through advertisements is also much severe than the fine and punishments imposed in India.

Regulation 2A of the Control of Misleading Advertisements Regulations 1988 defines *"comparative advertising."* It stated that:

> *"For the purposes of these Regulations an advertisement is comparative if in any way, either explicitly or by implication, it identifies a competitor or goods or services offered by a competitor."*

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8 [1975] 1 WLR 972 : [1975] 2 All ER 599.

9 [1994] FSR 8.

Directive 84/450/EC concerning Misleading Advertisement was amended by Directive 97/55/EC in 1997 to include within its ambit, *"comparative advertising."* It is *inter alia* stated that any advertisement which either explicitly or impliedly referred to another's product, such an advertisement must abide by certain rules, enumerated in Article 3A, namely: the advertisement must not contain any misleading messages; it should not create confusion between the advertiser and the concerned competitor. The advertisement should also not take unfair advantage of the competitor's trademark or other distinguishing material and should not present its goods or services as replicas of the other product and it does not discredit or degenerate it. Comparative advertisement should compare the products objectively, that is, the material should be relevant and must relate to verifiable features of the two products compared.

In 2006 Directive 2006/114/EC also known as the Advertising Directive, was adopted which consolidated the 1984[10] and 1997[11] Directives. Among the few amendments was that the condition that the comparison should not be misleading. The most important amendment herein is that, Article 1, the 2006 Directive only aims to protect traders against misleading advertising. Whereas consumers are *inter alia* protected against, misleading advertising in the Unfair Commercial Practices Directive.[12]

Although member states have the freedom to have their own law on comparative advertisements, yet national Courts can and also refer matters to the European Court of Justice for clarification whenever necessary.[13] The European Court of Justice has always had a pro-advertising approach. Discussed below are some of the leading European Court of Justice judgements on comparative advertisement.

B. Comparative advertisements of Products

(a) Toshiba Europe GmbH v. Katun Germany GmbH[14]

The question herein was whether it is comparative advertising for a supplier of spare parts suitable for the products of an equipment manufacturer

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[10] 84/450/EC.

[11] 97/55/EC.

[12] Paul Reeskamp, 'Is comparative advertising a trade mark issue?', (2008) EIPR 130.

[13] Patty Kamvounias, 'Comparative Advertising and The Law: Recent Developments In The European Union', *Proceedings of the European Applied Business Research Conference EABR*, 2010, Available from http://www.cluteinstitute.com/proceedings/2010_Dublin_EABR_Articles/Article%20479.pdf, (accessed 14 November 2012).

[14] European Court of Justice decided this case on 25 October, 2001, Case C-112/99.

to indicate the manufacturer's product numbers in its catalogues. The European Court of Justice held that it was permitted for a representation to be made in any form which referred, by implication or otherwise, to a competitor or to the goods or services which he offered. No actual comparison was necessary for an advertisement to be described as comparative but what was required was a reference to a competitor or his products. The European Court of Justice further observed that an advertiser is not said to take unfair advantage of the reputation attached to distinguishing marks of his competitor if effective competition on the relevant market is something that is conditional upon a reference to those marks.

(b) Pippig Augenoptik GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH[15]

This was another landmark decision of the European Court of Justice on comparative advertising. Pippig operated three specialist opticians' shops in Austria, and obtained its supplies from around 60 different manufacturers. Hartlauer was a commercial company that had optical shelves where the spectacles sold were mostly of less known brands and were sold at low prices. Hartlauer circulated throughout Austria an advertising leaflet stating 52 price comparisons for spectacles carried out over six years which also showed a total price differential of ATS 3 900 on average per pair of spectacles, between the prices charged by Hartlauer and those of traditional opticians.

The advertising leaflet contained a comparison between the price and the same was also announced in Austrian radio and television channels as advertisements, in which, in contrast to the advertising leaflet, it was not stated that the spectacles compared had lenses of different brands. The Oberster Gerichtsh of referred this case to the European Court of Justice. The European Court of Justice held in this case *inter alia* that the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form and content of the comparison was concerned is precluded and that a price comparison did not entail the discrediting of a competitor. The application to comparative advertising of stricter national provisions as compared to the EU Directives as far as the form and content of the comparison was concerned were precluded.

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[15] European Court of Justice decided this case on 8 April, 2003, Case C-44/01.

(c) O2 Holdings Ltd. v. Hutchison 3G UK Ltd.[16]

The European Court of Justice held that use by an advertiser of a sign identical with or similar to a competitor's mark was to be regarded as of a trade mark and could be prevented where necessary. However, the rights conferred by the trade mark were to be limited to a certain extent in order to promote comparative advertising and the associated benefits to consumers. The Court further held that the proprietor of a registered trade mark is not entitled to prevent the use by a third party of a sign identical with, or similar to, his mark, in a comparative advertisement which satisfies all the conditions, laid down in Article 3a(1) of Directive 84/450 except when it is likely that the use of the trade mark was likely to cause confusion on the part of the public between the advertiser and a competitor, the advertisement would not satisfy the condition, laid down in Article 3a(1)(d) and would not be permitted.

There existed many a difference in national laws on comparative advertising. The October 1997 of Directive 97/55/EC which amended Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising signified a major shift in approach. Over the years, in the course of its deliberations, the European Court of Justice has clarified the scope of the Directive and in doing so has interpreted it in favour of the advertiser who engages in comparative advertising.

C. United States of America

In US, the advertisement regulatory body is Federal Trade Commission (FTC hereinafter). This body is empowered to (*a*) prevent unfair methods of competition and unfair and deceptive acts affecting commerce, (*b*) seek monetary redress for conduct injurious to consumers, (*c*) conduct investigations relating to organisation, business, practices and management of entities engaged in commerce and (*d*) make reports and legislative recommendations to Congress.[17] The United States has two major self-regulating bodies which look into the issue of deceptive and misleading advertisements; The Better Business Bureau and The Advertising Self-Regulatory Council.

The Federal Trade Commission (FTC) in 1979 issued a *Statement of Policy Regarding Comparative Advertising.*

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[16] 12 June 2008, Case C-533/06.

[17] G.J. Thain, 'Advertising Regulation: The Contemporary FTC Approach', *Fordham Urban Law Journal*, vol. 1, no. 3, 1973, p. 349.

It defines comparative advertising in the following words:

> *"For purposes of this Policy Statement, comparative advertising is defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information."*[18]

The policy encourages the naming of or referencing to the particular competitor but warrants clarity and if need be, disclosure to avert confusion. Truthful comparative advertisements should not be restrained. Brand comparisons are permitted, provided the bases of comparison are identified clearly.

FTC permits disparaging advertising, as long as they are truthful and not deceptive. The FTC evaluates comparative advertising in the same manner as it evaluates all other advertisements and does not require a higher standard of substantiation by the advertisers for comparative claims.[19] The National Advertising Division (NAD) of the Council of Better Business Bureaus, Inc., a self-regulatory body which commands the respect of national advertisers, advertising attorneys, federal and state regulators, and the judiciary; comparative advertising issues brought to its attention receive thorough review by highly competent attorneys who apply relevant precedent in reaching a determination of whether the advertising claims at issue are truthful, non-misleading, and substantiated.[20] The decisions of NAD are appealable to the National Advertising Review Board (NARB). One of the vital benefits of using the NAD process is the ability to obtain a thorough review on the merits in only a fraction of the time required for litigation.[21]

The FTC on the other hand evaluates comparative advertising the same way it evaluates all other advertising and therefore does not require a higher standard of proof for substantiating comparative claims. Thus, advertisements that attack, discredit or otherwise criticize another product are permissible if they are truthful and not expressly or impliedly deceptive.[22]

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[18] Available from http://www.ftc.gov/bcp/policystmt/ad-compare.htm, (accessed 6 February 2017).

[19] John E. Villafranco, 'The Law of Comparative Advertising in the United States', (2010) 16 IP Litigator.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*.

The FTC considers an advertisement to be deceptive if it includes a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances; the representation, omission or practice is likely to affect the consumer's conduct or decision regarding a product or service.[23]

Better Business Bureau (BBB) and Advertising Self-Regulatory Council, earlier known as National Advertising Review Council are among the self-regulatory organizations that look into the case of misleading advertisements. BBB deals with the disputes between advertising practices and companies marketing.

D. Cases on Misleading Advertisements on Food & Cosmetic Products

In *Markus Wilson* v. *Frito-Lay North America Inc.*[24] class action suit was filed where it was alleged that the Lay's Potato Chips were misbranded by Frito-Lay. It was claimed that Lay's Potato Chips were advertised to be healthy and contained 0 grams of Trans Fat. It went on to say that the snacks were good for certain group of population including the people with diabetes, children, adolescents, elders and pregnant women. The company failed to mention that every 50 chips contained more than 13 g of fat.

In *Lorena Trujillo* v. *Avon Products Inc.*[25]. was slapped with a class action over its skin care line. In the Californian Central District Court it was alleged that the Avon products such as Anew Clinical Advanced Wrinkle Corrector, Anew Reversalist Night Renewal Cream, Anew Reversalist Renewal Serum and Anew Clinical Thermafirm Face Lifting cream products were compared with the procedures found in the office of a dermatologist. It went on to say that its products repaired damaged tissue, boosted collagen and recreated fresh skin. Warning was also served to the company in the form of letter stating that the products were misrepresented to the consumers.

Maybelline was also slapped with a consumer fraud class action where it advertised its Super Stay lipstick to last for 14 hours. It also claimed that its Super Stay lip gloss lasted for 10 hours. The case is known as *Carol*

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23 *Ibid*.

24 Case 12-cv-01586, U.S. District Court, Northern District of California, Oakland Division.

25 Case 12-9084, California Central District Court.

Leebove et al. v. *Maybelline LLC*[26], one of the plaintiffs alleged that her lipstick would wear off as soon as she had a meal or a drink. The lawsuit alleged that Maybelline had engaged in breach of warranty, unjust enrichment and violation of various consumer-protection laws[27].

Consumer fraud class action was filed in 2012 against Coty's Rimmel London Lash Accelerator in the Federal Court in California. In this case known as *Alagrin* v. *Coty Inc*.[28], it was alleged that the company Coty deceived its consumers by advertising that Rimmel London Lash Accelerator mascara with Grow-Lash Complex lengthened the eyelashes by 37% in a month and led to increase in the eyelash growth on regular usage.

E. India

Even after 32 years of enactment of COPRA and even after a paradigm shift from *caveat emptor* to *caveat venditor*, the manufacturers and service providers of all the sectors exploit the Indian consumers. With the cut-throat competition, truth and ethics often take a back seat and advertisements more often than not make tall claims to increase their consumer base. The purpose of the advertisement is not just of providing information but also influencing the consumers to purchase that particular product. There is no doubt about the fact that advertisements impact consumer choice and thus it is essential that the advertisements should be truthful.

The question has arisen before the Supreme Court of India whether the right to advertise was a fundamental right to freedom of speech guaranteed under Article 19(1)(a). The Supreme Court held in *Hamdard Dawakhana* v. *Union of India*,[29] that though advertisement was a form of speech, it was not constitutive of the concept of free speech. A different stand was taken by the Supreme Court later in *Tata Press Ltd*. v. *Mahanagar Telephone Nigam Ltd*.,[30] wherein it was observed that advertising is beneficial to consumers because it facilitates the dissemination of information and resultantly public awareness in a free market economy. It was held that advertising is a form of commercial speech, and therefore should be protected under Art. 19(1)(*a*).

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[26] Case 12-cv-07146.

[27] Lucy C., available from <http://www.lawyersandsettlements.com/blog/tag/maybelline>, (accessed 2 January 2017).

[28] Case 12-cv-2868 JAH JMA.

[29] AIR [1960] SC 554.

[30] [1995] 5 SCC 139.

The consumer grievance forums under the Consumer Protection Act, 1986 enquire into complaints of unfair trade practices. Though this Act provides for an effective mechanism for grievance redressal of the consumer, it does not address the interests of manufacturers, sellers and service providers.[31] There have been many cases in India dealing in **comparative advertisement**. Some of the important cases are discussed herein below.

(a) Reckitt & Colman of India Ltd. v. M.P. Ramchandran.[32]

It was contended by the plaintiff, manufacturer of the detergent clothing brand *'Robin Blue'* that the defendant, manufacturer of the detergent clothing brand *'Ujala'* in its advertisement, had intentionally displayed a container that was similar to the one in the plaintiff's product and the price shown was also that of the plaintiff's product. The advertisement alleged that the said product 'Blue' was uneconomical, and that the product failed to dissolve effectively in water, and hence damaged clothes by leaving blue patches on them. It was observed by the court that this advertisement aimed at denigrating the product of the plaintiff by indicating to existing and future customers that the product was both uneconomical and ineffective.[33] Hence an order of injunction was passed against the defendant, restraining the defendant from broadcasting the advertisement henceforth.[34]

(b) Colgate Palmolive (India) Ltd. v. Anchor Health & Beauty Care (P) Ltd.[35]

The contention of the plaintiff in this case was that in the advertisement the defendant had stated that its product *'Anchor'* was the only one that contained calcium, fluoride and triclosan and that the defendant had also claimed that *'Anchor'* was the first toothpaste that could provide *"all round protection."* The plaintiff argued that, the plaintiff being a pioneer company in dental care, the assertion made by the defendant, that it was the first and the only company which contained the aforementioned ingredients and which gave all round protection was an act which amounted to denigrating the competing product.

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[31] Peter Miskolczi-Bodnar, 'Definition of Advertising, (2004) 3 European Integration Studies 25. Available from www.uni-miskolc.hu/uni/res/kozlemenyek/2004/DEFINITION.doc, (accessed 17 April 2017).

[32] [1998] SCC OnLine Cal 422 : [1999] 19 PTC 741.

[33] Peter Miskolczi-Bodnar (n 31).

[34] *Ibid*.

[35] [2008] SCC OnLine Mad 627 : [2009] 40 PTC 653.

The argument placed on behalf of the defendant was that the term *'only'* referred to the fact that theirs was the only toothpaste comprising the aforementioned ingredients within the range of white toothpastes and the term *'first'* was used with reference to the phrase *"all round protection."* The Court came to the conclusion that the concerned advertisement was sending a message to an average consumer that *'Anchor'* was actually the only product containing the said ingredients, and also that it was the first one to ultimate protection to the teeth. This case herein reflects the trend of the Court thus enunciated to protect the interests of the consumers from getting misled by any advertisement in particular a comparative advertisement intending to so mislead.[36]

(c) Dabur India Ltd. v. Colortek Meghalaya (P) Ltd.[37]

In this case the appellant was a manufacturer of mosquito repellent creams: *'Odomos'* and *"Odomos Naturals."* The respondent manufactured a mosquito repellent cream and advertised the same under the name *"Good Knight Naturals."* The Court held herein that each has the right to try to affirm that his wares are good enough to be purchased, or of superlative quality. The Court however, went on to add that if an advertisement extended its scope beyond the grey areas so much so that it became false, misleading, unfair or deceptive, it would not entail the protection of Article 19 (1) (a). The Court further added that in the process of glorifying one's own product, the advertiser must not disparage or denigrate the rival product.

(d) Procter and Gamble Home Products Ltd. v. Hindustan Unilever Ltd.[38] *(The 'Rin' and 'Tide' dispute)*

The petitioners were manufacturers of a detergent powder brand *'Tide'*, while the respondents were the manufacturers of the detergent powder *'Rin'* and also the market rivals of *'Tide'*. The respondents aired a commercial which compared both the products and allegedly portrayed the petitioner's product in a negative manner, claiming that *'Rin'* was better than *'Tide'* in providing whiteness to clothes. The petitioner herein applied before the Court for an injunction to restrain the respondent from telecasting the advertisement, contending that the same had not stopped at merely puffing

[36] Peter Miskolczi-Bodnar (n 31).

[37] [2009] SCC OnLine Del 3940 : [2010] 42 PTC 88.

[38] CC 42 of 2010, GA No. 614 of 2010 and CS No. 43 of 2010, decided on 7 April 2010 (Cal).

the advertised product, but had disparaged the competing product.[39] The Court held that there was an express denigration of the petitioner's product because it was evident from the very format of the advertisement and the manner in which it was depicted that it had the overall effect of portraying the competing product in a poor light rather than promoting the seller's own product. Court therefore, passed an interim injunction, restraining the petitioner from broadcasting the denigrating advertisement.

(e) Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd.[40]

In this case the plaintiff company was engaged in manufacture and sale of liquid shoe polish under the name of Cherry Blossom Premium Liquid Wax Polish. Here the defendant is also engaged in the manufacture of polish and one of the brands being manufactured and marketed by the defendant was 'KIWI' brand of liquid polish. Now, in an advertisement programme, the defendant shows a bottle of 'KIWI' from which the word 'KIWI' is written on white surface which does not drip as against another bottle described as 'OTHERS' which drips. The product shown as 'OTHERS' which is marked as 'Brand X' allegedly looks like the bottle of the liquid shoe polish of the plaintiff. Also, the bottle of 'OTHERS' had a red blob on its surface which allegedly represents 'CHERRY' which appear on the bottle of the plaintiff's product. Therefore, the plaintiff had filed the suit for an injunction restraining the defendant from advertising the products in the manner they had been doing otherwise it would cause irreparable loss to its reputation, goodwill, brand, equity, etc. In response the defendant argued that there is nothing disparaging or defamatory conveyed through the said advertisements against the plaintiff, as no reference has been made to Cherry Blossom Premium Liquid Wax Polish in any of the advertisements. In the alternative, it was also argued by the defendant that even if a reference in the advertisement can be related to the plaintiff, there was nothing unlawful about the statement made by the defendant in the said advertisement as it was a true statement of fact and substance and, according to the defendant, no injunction can be granted against the said defendant. The Court without deciding on the issue of whether the statements made by the defendants of its superiority were true or not disposed that the matter on the reasoning that a consumer who watches this advertisement on the electronic

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[39] Peter Miskolczi-Bodnar (n 31).

[40] Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd. [1996] SCC OnLine Del 335 : [1996] 63 DLT 29.

media only for a fleeting moment may not get the impression that the bottle is the bottle of the plaintiff.

(f) Marico Ltd. v. Adani Wilmar Ltd.[41]

The facts of the case are that both companies sell cooking oil under the names Saffola (Marico) and Fortune (Adani Wilmar) respectively. The plaintiff, filed two suits against the defendant restraining them from broadcasting, printing and publishing advertisements of its product alleging that it disparaged the goodwill and the reputation of the plaintiff's product. The plaintiff's also claimed that the statements were also misleading as they were not backed up by adequate research or scientific study. The court using the principles already discussed above decided on the question whether there was disparagement in the negative. They said that the said advertisements were not disparaging and were only comparing the advantages of the defendant's goods over the goods of others. The court also said that the advertisements did not denigrate the plaintiff's product.

(g) Pepsi Co. Inc. v. Hindustan Coca Cola.[42]

The plaintiffs in the present case contended that the commercials of the defendants disparaged their products, which resulted in the dilution of the goodwill and reputation enjoyed by them. The plaintiffs add that at various parts of the commercial, the drink was named as "PAPPI", which was an obvious reference to the "Pepsi". Thereby their product has been mocked and ridiculed by terming Pepsi as a "Bachhonwali" drink and therefore and showing the preference of kids of Pepsi over Thumbs Up. The plaintiffs therefore sought an injunction from the Court that would restrain the defendants from further telecasting the commercials. The Delhi High court in the present case, while deciding the issue went into the definition of the term disparagement as defined in authoritative sources such as the Black's Law Dictionary and the Webster's Dictionary. The Court further referred to the case of *Reckitt & Colman of India Ltd*. v. *M.S. Ramchandran*,[43] where the court laid down 5 principles to decide whether a party was entitled to an injunction. The court further noted that in the same case, the court had come to the conclusion that comparative advertisements per se were permissible but what was impermissible was any disparagement of the goods of the competitor in the process. With this in mind, the Court laid out three

[41] [2013] SCC OnLine Del 1513.

[42] Pepsi Co. Inc. v. Hindustan Coca Cola [2001] SCC OnLine Del 30.

[43] [1998] SCC OnLine Cal 422 : [1999] 19 PTC 741.

guidelines for the determination of whether an action for disparagement lay, they are:

i. A false or misleading statement of fact about a product.

ii. That statement either deceived, or had the capacity to deceive, substantial segment of potential consumer, and

iii. The deception was material, in that it was likely to influence consumers' purchasing decisions.

The Court in the present case concluded that in the present case the comparisons drawn in the course of the commercial were merely attempts at puffing up their own products. Further the court noted that there was no evidence presented on the part of the plaintiff as to how this particular commercial had adversely affected its business. Thus, the conditions laid down above were found not to be fulfilled in the case of the defendants' commercial. On these accounts the court dismissed the plaint.

(h) Hindustan Lever Ltd. v. Colgate Palmolive (India) Ltd.[44]

The court maintained that any ridiculing of the plaintiffs' products would amount to disparaging whereas a mere comparison would not. In the present case, the Judge concluded that various terms such as "bachhonwali drink" and "yehhai wrong choice baby" were of ridiculing nature and hence amounted to disparagement of the appellant's products. The court therefore accepted the appeal and passed an order of restraint in respect of the commercials.

In the same year before this case the Delhi high Court had dealt with another case of *Reckit Benckiser (India) Ltd.* v. *Naga Ltd.*[45] In this case the plaintiff filed the suit for permanent and mandatory injunction, against the defendant's television commercial. The commercial depicted a woman in an advanced stage of pregnancy needing urgent medical assistance during a train journey. Then doctor calls for hot water and is handed a cake of soap, which is rejected by the lady, stating that an antiseptic soap is needed. It is not in dispute that the soap which was handed over to the doctor is identifiable by viewers as the Plaintiff's product, namely, Dettol Soap. The doctor further states in the commercial that "at a time like this, you do not need just antiseptic, you need a protector". The Defendant's Ayurvedic soap

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[44] [1998] 1 SCC 720 : AIR [1998] SC 526.

[45] [2003] SCC OnLine Del 365 : [2003] 104 DLT 490.

is then shown and it is concurrently stated that it is body 'rakshak' soap, the first Ayurvedic soap that completely removes all seven kinds of terms and protects from infection. The Plaintiff here alleged that this commercial disparages its Dettol Soap and the intention behind the commercial is malicious. On the other hand, the defendant's soap Ayush is based upon the Ayurvedic system of medicine and is manufactured under a drug licence granted by the Director of Drugs, Tamil Nadu. Thus, it was observed that "consumers perceive Dettol soap as strong and effective in maintaining personal hygiene and regard it as an efficient antiseptic soap that kills harmful germs and bacteria and ensures good health and hygiene" So if a competitor makes the consumer aware of his mistaken impression, the Plaintiff cannot be heard to complain of such action. Court further held that to hold a party liable for libel when all that has been stated by the competitor is the truth. On the grounds the Court did not grant any injunctory relief.

(i) Dabur India Ltd. v. Colgate Palmolive (India) Ltd.[46]

In this case the principles that were elucidated in *Reckitt & Colman of India Ltd.* v. *Kiwi T.T.K. Ltd.*[47] were reiterated upon by the court. The court said that comparative advertisement is allowed if:

(*a*) The trader is entitled to declare that her goods are the best, even though the declaration is untrue.

(*b*) One may also say that her goods are better than her competitors, even though such statement is untrue.

(*c*) For the purpose of saying that her goods are the best and that her goods are better than her competitors, she can even compare the advantages of her goods over the goods of the others.

(*d*) One, however, cannot while saying her goods are better than her competitors, say that her competitors', goods are bad. If she says so, she really slanders the goods of her competitors. In other words, she defames her competitors and their goods, which is not permissible.

(*e*) If there is no defamation, to the goods or to the manufacturer of such goods no action lies, but if there is such defamation, an action lies and if an action lies for recovery of damages for defamation, then the court is also competent to grant an order of injunction restraining repetition of such defamation.

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46 [2004] SCC OnLine Del 718 : AIR [2005] Del 102.

47 [1996] SCC OnLine Del 335 : [1996] 63 DLT 29.

(j) Annamalayar Agencies v. VVS and Sons (P) Ltd.[48]

In this case also there were three tailors who had adjacent working counters put up notices in their respective windows saying 'the best tailor in the world', 'the best tailor in the town', the 'best tailor in the street'. This was a clear case of puffing and nothing more and in such a case it was decided that it was within the boundaries of harmless advertising but trying to promote one specific product or services by clearly abusing another is not appreciated in law. Though in any situation, the choice finally lies with the consumer. The lack of creative or smart advertisement has indeed taken a toll on the very concept of 'comparative advertisement'. There is no denial that it is a fiercely competitive market out there but this can never be an excuse for resorting to disparagement of other goods or services.

IV. SELF-REGULATORY BODY IN INDIA

The Advertising Standards Council of India (ASCI) is a non-statutory self-regulatory body set up in 1985 and incorporated under Section 25 of the Companies Act, 1956. It entertains and disposes of complaints based on its Code of Advertising Practice (CAP). The Code is based on certain fundamental principles, one of which is "To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements". The ASCI code deals with various provisions that pertain to advertisements. The problem with respect to self-regulatory body Advertising Standards Council of India has been that it has not been able to effectuate proper compliance because of lack of an enforcement mechanism and there also lies a problem of non-compliance if the complaint is filed against a non-member.[49] Therefore, the plausible future discrepancies can be obviated only by a proper piece of legislation exhaustively enumerating the law therein leaving no scope of confusion and vagueness.

A. Lacunas in ASCI

1. More powers should be given to ASCI control Ads along with Government controlling machinery.
2. ASCI will not be accessed by majority of the population; hence majority of people do not know the ASCI. Also, the ASCI Complaint

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48 [2008] 38 PTC 37.

49 Peter Miskolczi-Bodnar (n 31).

mechanism is not consumer friendly. Therefore, ASCI have to take steps in this regard

3. The font size of the ads must be uniform size especially the information where they have put star-mark (*) and its explanation. Also, they must clarify details of conditions apply clause.
4. ASCI should act as 'Prevention is Better than Cure', i.e., before ads go on air should be checked by ASCI board.
5. ASCI effectively regulate only its members not all companies; ASCI have no control over ads in print media; therefore, necessary steps like All Advertisers should automatically members of ASCI, etc., should be taken to cover all.

V. CONCLUSION

The cases discussed above have one thing in common, the practice of puffing. As per the authors' understanding any incident of puffing must amount to an "unfair trade practice" under the Consumer Protection Act as doing so would not be in public interest and should not be permitted. This observation comes from the case of *Colgate Palmolive (India) Ltd.* v. *Anchor Health & Beauty Care (P) Ltd.*[50] wherein the Court decided that all puffing was illegal. The reasons which prompted the Court in reaching this conclusion were primarily related to consumer protection. It held that the question of the legality of puffing needed to be decided by balancing the right to freedom under Article 19 along with reasonable restrictions on that right in the form of consumer laws. The Court noted that the contrary decisions of other Courts were based on old English cases decided before consumer protection laws were put in place. Therefore, any proper determination of the legality of puffing must necessarily take into account consumer protection laws in India. The Court's motivation is clear from the following statement, "But the recognition of this right (to puff) of the producers, would be to de-recognise the rights of the consumers guaranteed under the Consumer Protection Act, 1986." The basis for the rejection of prior Indian cases was that they relied on British law prior to the developments in consumer protection. But, the Indian cases were nonetheless decided after consumer protection laws came into effect. This means that Indian law on the point kept the two causes of action separate – an action for protection of consumer interests was conceptually distinct under Indian law from the tort

[50] Colgate Palmolive (India) Ltd. v. Anchor Health & Beauty Care (P) Ltd. [2008] SCC OnLine Mad 627 : [2009] 40 PTC 653.

of commercial disparagement. The Court seems to have equated the two, thereby also equating the interests of consumers and the interests of competitors. Of course, *none of the other decisions held that consumers would not have a remedy if there was in fact a violation of consumer rights; they only held that this was not a relevant factor in considering questions vis-à-vis competitors*. In other words, the approach of the Court does not take into account the fact that comparative advertising can have two effects. It can, of course, have an impact on consumer interest – and the Consumer Protection Act is relevant in adjudicating on disputes between consumers and the advertiser. But, comparative advertising can also have an effect in terms of commercial disparagement – it can disparage the trade name of a competitor. The previous decisions did not take into account the impact of consumer laws because they were concerned solely with this second effect. This second effect is the basis of the tort of disparagement. And the case before the Court was a case between two competitors for disparagement – not between a producer and a consumer. This decision brings to notice the fact that Indian Courts till now were ignoring the Consumer Protection aspect of such cases and there is a need for Courts to start looking at this aspect as well to ensure that consumer interest is also taken care of. Cases like the *Colgate* v. *Pepsodent* are needed to ensure that consumer interest is also taken care of and not ignored. Comparative advertising holds significance in the market as it encourages product improvement and innovation; it also helps in lowering prices and thus, acts as a price leveller. However, the misuse of this form of advertising may mislead the consumer or may adversely affect the interests of the competitor whose goods are so compared.

The European Union, United States and India, all three have recognized the importance and magnanimity of comparative advertising in the society. The laws of these countries aim to protect the consumer from getting confused by deceptively similar products and also protect the competitor by preventing his product from getting adversely affected by disparaging comparative advertisements. Mere puffery is tolerated to a substantial extent in the three laws, however, the degree and mechanism of protection afforded to various forms of comparative advertising varies keeping in mind the scenario and requirement of the particular land. The legal framework in India, however, needs to develop substantially. The law relating to comparative advertising must take care of the interests of all the concerned stakeholders, including manufacturers, advertisers, competing parties and consumers. The Consumer Protection Act, 1986, for instance, has proved insufficient as it excludes from its ambit competing manufacturers and sellers. A regulation

scheme within the market should also be encouraged. Courts should be cautious to intervene, keeping in mind the fragility of the situation. Nevertheless, it can be concluded that the legal framework of India, though not ideal, has been successful to a great extent, in addressing the adverse effects of comparative advertising in India.

B2C E-COMMERCE AND CONSUMER PROTECTION WITH SPECIAL REFERENCE TO INDIA – ADR A BEST POSSIBLE SOLUTION

—Nandini CP[*]

Abstract *The growth of e-commerce in the liberalized economy has opened the options for States to endure their economic growth in the free market conditions. Buying and selling is made easier in the virtual market through e-commerce. The revolutionary changes in India relating to e-commerce were made and fine-tuned through application of Contract Laws to online contracts by validating it through Section 10A. The legal framework has seen an enormous growth in Business-to-Business (B2B) contracts, and a modest increase in Business-to-Consumer (B2C) contracts. The B2B contracts are well regulated under the Private International law and the United Nations Convention on Contracts for the International Sale of Goods (CSIG). However, the B2C contracts are still in a nascent stage and expected to have faster growth by 2020. In B2C contracts, the parties in most of the cases reside beyond the boundaries of States. In this latest development, consumer rights are gravely challenged the existing Consumer Protection Laws without timely amendments. The author, in this paper, will endeavor to look at various developments of law and policy in the National and International sphere for the protection of consumers' rights in B2C e-age contracts and emphasize if the ADR or ODR can be a reasonable response in order to protect consumer interest. The suggestion made by the author in this paper may find its way into the 2018 Consumer Protection Bill where mediation is promoted as a prompt attempt to protect consumers.*

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I. INTRODUCTION

The growth in e-commerce has seen a sea change since the 1990s, especially when consumers started buying and selling through online vendors, both within and across the border. Recent data shows that B2B transactions accounted for more than 80% of all e-commerce transactions, whereas B2C transactions accounted for around 10-20% in 2010.[1] A study by Frost & Sullivan shows that B2B e-commerce to hit $12 trillion in sales worldwide by 2020.[2] Since 2000, most governments have allowed and enabled internet facilities and online consumer purchasing potential and expected to increase by 28% per year, and reach $1 trillion by 2020. According a report by Accenture and AliResearch, a 15% annual growth in consumers' web purchasing power with $3.4 trillion by 2020 is predicted.[3] eMarketer expects that retail e-commerce sales will increase to $4.058 trillion by 2020, making up 14.6% of total retail spending.[4] It is forecasted that the Asia-Pacific will remain the world's largest retail e-commerce market with sales doubling-up from $1 trillion in 2016 to $2.725 trillion by 2020. This region will also see the fastest rise in retail e-commerce sales, climbing to 31.5%. India been the developing country and fastest growing platform for online retail market at 30% compound annual growth rate for gross merchandise valued $200 billion by 2026[5] as per the study by Morgan Stanley.

More the number- more the problems; especially with legal implications that need to be addressed from the start including the nature of agreements, existing rules and regulations, and monitoring anti-competitive agreements and conduct that may directly or indirectly affect consumer rights, like *excessive pricing*, *collusion*, *price discrimination*, *predation*, *vertical restraints*, *quality* and *refusal to supply essential facilities*.[6] Though used extensively the online consumer lacks minimum understanding of

[1] It is a type of transaction that exists between businesses, such as one involving a manufacturer and wholesaler, or a wholesaler and a retailer. Available from www.investopedia.com/terms/b/btob.asp, (accessed 25 July 2017).

[2] Electronic Data Interchange (EDI) means a computer-to-computer exchange of business documents in a standard electronic format between business partners. Available from www.edibasics.com/what-is-edi/ (accessed 2 June 2017).

[3] 'Almost half of web consumers will buy across borders by 2020', *Digital Commerce 360*, <https://www.digitalcommerce360.com/2015/06/16/almost-half-web-consumers-will-buy-across-borders-2020/>, (accessed 2 June 2017).

[4] 'Worldwide Retail e-Commerce Sales will Reach $ 1.915 Trillion this year', *eMarketer*, <https://www.emarketer.com/Article/Worldwide-Retail-Ecommerce-Sales-Will-Reach-1915-Trillion-This- Year/1014369>, (accessed 1 June 2017).

[5] https://www.livemint.com/, (accessed 2 June 2018).

[6] http://cci.gov.in/images/media/ResearchReports/AnkitaIntComp080811.pdf, (accessed 27 February 2014).

legal impediments. The novel exciting nature of transaction has webbed the online consumer, but they been unaware with the application of various laws.[7] Commonly accepted modes of online agreements/contracts are the click wrap,[8] shrink-wrap, or browse wrap contracts.[9] All resemble the Standard Form Contracts/Adhesive Contracts. In such contracts, the terms and conditions, the mode of performance, enforceability of the contract, forum selection,[10] choice of law,[11] etc. are specified. Most clauses are written in understandable language, but the possible ambiguity always exists but in vane as,[12] in reality, most consumers do not read all the terms or clauses of the contracts, or even if they do read them, they may lack the understanding and clarity, ultimately leading to disputes between the seller and the consumer[13]. It is a known fact that the terms are mostly favorable to the vendors, with their choice of law and selection of forum[14], etc. These agreement forms are developed by sellers, and are largely in the form of *"Take it or Leave it"*, favouring the seller rather than being beneficial to the consumer. Most of the proponents of e-contracts agree that there must be fundamental fairness in the terms that can be enforced. To gain consumer trust, most of the popular online vendors are developing their own dispute resolutions mechanism and using them extensively, and making it convenient for parties

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[7] Emile Loza & Shasta Kilminster-Hadley, Technology Law Group, LLC – 'The Law of Electronic Contracts : The New United National Convention', *The Advocate*, August/September 2007.

[8] A click wrap agreement is considered to be one to which an offeree must signify her agreement by clicking on. *See* Juliet M. Moringiello and William L. Reynolds, 'Survey of the Law of Cyberspace: Electronic Contracting Cases 2007-2008', *Business Lawyer*, vol. 64, no. 1, 2008, p. 199.

[9] 'Browse-wrap agreement'-where acceptance is based on "use" the site. See Ian A. Rambarran, 'Are Browse-Wrap Agreements All They Are Wrapped Up to Be?', *bepress Legal Series,* Working Paper 1885, 25 November 2006, Available from http://law.bepress.com/expresso/eps/1885.

[10] Scarcella v. America Online, case 1168/04, [2005] WL 2093429 (N.Y. Civ Ct., 8 September 2004) where the Civil Court refused to enforce a forum selection clause in the click-wrap licence because it violated a state policy favoring the simplified proceedings of the small-claims court for low-value disputes. However though few aspects in the agreements were not very well presented to the consumer, the court held that the contract was valid. However the court struck out the forum selection clause as it violated the basic public policy of the State. See Robert L. Oakley, 'Fairness in Electronic Contracting: Minimum Standards For Non-Negotiated Contracts', (2005-2006) 42 Houston Law Review 1041.

[11] Juliet M. Moringiello and William L. Reynolds, 'Survey of the Law of Cyberspace: Electronic Contracting Cases 2007-2008', *Business Lawyer*, vol. 64, no. 1, 2008, p. 199, http://www.jiclt.com/index.php/jiclt/article/viewFile/65/64, (accessed 2 June 2017).

[12] *Ibid*.

[13] *Ibid*.

[14] 'Selection of forum' means a party's act of looking for a court or a judge that he/she feels is likely to render a favourable result (which is bad in principle). Available from <http://www.yourdictionary>, (accessed 1 June 2017).

with a finer online dispute resolution system as provided by online auction site- eBay.[15]

II. INTERNATIONAL LAW DEVELOPMENT OF ONLINE CONSUMER RIGHTS

The Consumer Protection is of concern these days, as transactions are borderless and more of International Trade Law and Foreign Policy. A brief overview would help us understand as to how UN Commission on International Trade Law (UNCITRAL),[16] a special body of the UN involved in the facilitation of international trade and commerce helped the States to develop their e-commerce laws. UNCITRAL released a Model Law on E-Commerce (1996). The amendment of the UN Guidelines for Consumer Protection and[17] the United Nations Committee for Trade and Development (UNCTAD) that embarked on the revision of the UN Guidelines for Consumer Protection (UNGCP)[18] with a view to update them in light of new developments in technology, business practices, and consumer concerns.[19] Though most of the provisions in the Convention are reminiscent to the Uniform Commerce Code (UCC),[20] there are a few provisions that are pro e-commerce, and few exceptional provisions are a non-application. The United Nations Guidelines for Consumer Protection, 2016 are also a valuable set of principles laid down with the main objective of effective consumer protection legislation, enforcement institutions and redress systems. These guidelines apply to B2C transactions, by State-owned enterprises also. They are Consumer Protection policies that include laws, regulations, rules, frameworks, procedures, decisions, mechanisms and programmes of the Member States, as well as private sector standards and recommendations to protect and promote consumer welfare. Here, the term 'consumer' has generally been made in order to refer to natural persons, regardless of

15 *eBay*, <http://pages.ebay.com/services/buyandsell/disputeres.html>, (accessed 3 June 2018). *See* the conditions for filing a complaint.

16 *See* https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, (accessed 25 July 2017).

17 <http://www.consumersinternational.org/news-and-media/resource-zone/un-guidelines-on-consumer-protection-briefings-and-reports/>. (accessed 3 June 2018).

18 http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf, (accessed 2 June 2017). The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015.

19 http://www.consumersinternational.org/media/1360501/ungcp_summary_english.pdf, (accessed 5 March 2015).

20 Uniform Commercial Code, https://www.law.cornell.edu/ucc, (accessed 3 June 2018).

nationality, acting primarily for personal, family or household purposes, recognizing that Member States may adopt differing definitions to address specific domestic needs as per their requirements. The States as members are expected to provide the consumers with access to remedies- that do not impose cost, delay, or undue burden on the economic value which is at stake, and also to restrict themselves to impose excessive or undue burden on society and businesses. India has taken note of such points to action in the CPB, 2015 (now 2018) to meet the international standards application for B2C contracts.

India with the Common Law principles of law is now in juxtaposition; either to prefer Coordinated Market Economy (CME) of European Union or the Liberal Market Economy (LME) of US. The EU- Electronic Commerce Directive of European Union was adopted in 2000 and transposed by most EU Member States in 2002.[21] It provided legal certainty for businesses and consumers alike, and established harmonized rules on issues such as the transparency and information requirements for Online/Internet Service Providers (OSP/ISP), commercial communications, e-contracts, and limitations on the liability of ISPs with safe harbors. It basically ensured the *'country-of-origin principle'*, in which the businesses need to comply with domestic laws when selling abroad.[22] Since the Directive does not provide any rules regarding Internet jurisdiction, the Brussels I Regulation fills the gap. A major proposal that may be noted is the European Commission's Proposal for a Consumer Rights Directive, 2014 that replaces Council Directive 85/577/EEC, 1985 to extent the protection of consumer rights even in contracts negotiated away from business premises. The Directive of 97/7/EC provides for protection of consumers in respect to distance contracts[23] with the overall objective to 'bring about a true internal market for "business-consumer trade"' and to achieve a high level of consumer protection.[24] But the European Commission has opted for additional regulations

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21 http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_070907.pdf, (accessed 2 June 2017).

22 Dr Faye Fangfei Wang, 'Obstacles and Solutions to Internet Jurisdiction A Comparative Analysis of the EU and US laws', *Journal of International Commercial Law and Technology,* vol. 3, no. 4, 2008.

23 http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf, (accessed 2 June 2017).

24 Martijn W. Hesselink, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General contract law after the consumer rights directive', Centre for Study of European Contract Law, Working Paper Series No. 2009/06, Electronically. Available from http://ssrn.com/abstract=1416126.

for internet consumers, similar to those provided in brick-and-mortar.[25] The EU regulators are very cautious about safety provisions regarding consumer interests, and expect a high level of minimum mandatory regulations for the protection of online consumers. Major consumer law reforms in the EU include the Unfair Contract Terms Directive, which regulates both online and offline contracts. Other than this, the Distance Selling Directive[26] regulates transactions,[27] engaging with both remote merchants and consumers.[28] Furthermore, the Electronic Commerce Directive[29] promotes transparency and accountability in online commerce, which has a significant impact on B2C transactions. A recent case of *Fadden* v. *Sony Germany*[30] highlights the problems faced by sellers, buyers with respect to an infringement of copyright (Sony) through ISP liability exemptions provided under the e-Commerce Directive and the loophole, with short-term and long-term consequences for the future of protection through safe harbours, their scope and IP enforcement.[31] Despite good regulations on e-commerce, the EU is facing challenges while combating infringement and the protection of parties' interests.

On the other hand the US Laws are made applicable to both types of jurisdictions: General and Specific[32] in regard to electronic contracts and consumer interest. Though the US laws were very consumer-conscious in the early 1960s, a liberal outlook on consumer interests has slowly developed to a free market system with "*hands off" approach* and has let the market forces play a significant role in defining consumer interest and rights, including security for internet transactions.[33]. However, the principle

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[25] *See* Geraint G. Howells/Stephen Weatherill, published by Ashgate Pub Ltd, 2005. ISBN 10: 0754623386/ISBN 13: 9780754623380.

[26] Directive 97/7/EC.

[27] 'Distance Marketing of Financial Services Directive 2002/65/EC', eur-lex.europa.eu › EUROPA › EU law and publications › EUR-Lex, (accessed 25 July 2017).

[28] "The transactions may be by means of television, telemarketing, internet, or the electronic communications medium."

[29] 'Electronic Commerce Directive', eur-lex.europa.eu › EUROPA › EU law and publications › EUR-Lex (accessed 25 July 2017, EU Electronic Commerce Directive 2000/31/EC.

[30] Case C-484/14, http://curia.europa.eu/juris/liste.jsf?num=C-484/14, (accessed 2 June 2017).

[31] Husovec, Martin, 'Holey Cap! CJEU Drills (Yet) Another Hole in the E-Commerce Directive's Safe Harbors', 26 September 2016, *Forthcoming, Journal of Intellectual Property Law & Practice (JIPLP).* Available from SSRN: https://ssrn.com/abstract=2843816, (accessed 2 June 2017).

[32] *See* International Shoe Co. v. State of Washington [1945] SCC OnLine US SC 158 : 90 L Ed 95 : 326 US 310 (1945) and later Zippo Mfg. Co. v. Zippo Dot Com Inc. 952 F Supp 1119 (WD Pa 1997), Cybersell Inc. v. Cybersell Inc. 130 F 3d 414, 420 (9th Cir 1997).

[33] E. Brousseau, M. Marzouki, C. Méadel (eds.), *Governance, Regulations and Powers on the Internet*, Cambridge University Press, (Revised edn.), September 2008. Available from http://ssrn.com/abstract=1099516.

that has largely been adopted is one of unconscionability since, *ProCD Inc.* v. *Zeidenberg*,[34] for validated Standard Form e-Contracts, to regulate e-commerce until and unless the terms are objectionable on general grounds applicable to contracts in general.[35] The casual approach of the US laws fails to specify Unfair Contract Terms law in place like that of the EU. *Ad hoc* case based principles are followed by the courts with fewer laws. Uncertainty in courts decisions are not favorable to the consumer and their interest protection, the ambiguity due to lack of good mechanism for protection against unfair or oppressive terms in End User Licensing Agreements (EULAs) is a challenge for consumers. As no statute or regulation has clearly defined the terms of such contracts, and decisions have solely evolved under the *'test of unconscionability'* with added vague and inadequate solutions, it has forced many consumer groups to consider alternative remedies.[36] The US with its market-oriented approach strives to ensure limited government intervention in the online markets and the CP laws has remained substantially unchanged over a long period of time, and has led to "creeping deregulation through statutory obsolescence", especially with regard to consumer in internet markets.[37] Despite not having consumer-specific legislations compared to the EU, US gives an impression that consumer protection laws are more in the nature of economic legislations, rather than social legislations that were earlier aimed at protecting the health and safety of consumers.[38] So, there are contrasting approach in regulating e-commerce between the US and EU.[39]

Unable to follow either of these markets, India has good but aged Consumer Protection law without changes since 1986. It enacted the Information Technology Act, 2000 to facilitate and encourage e-commerce with the objective to remove legal obstacles and also in order to address certain ambiguities surrounding the formation of digital/e-contracts and codify certain doctrines to bring legal certainty in online transactions.[40] In India,

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[34] 86 F 3d 1447 (7th Cir 1996).

[35] *Ibid*- The doctrines are as follows:
a) Unconscionability
b) The Restatement (Second) of Contracts, and
c) The Doctrine of Reasonable Expectation.

[36] Robert L. Oakley, 'Fairness in Electronic Contracting: Minimum Standards For Non-Negotiated Contracts', Hein online, (2005-2006) 42 Houston Law Review 1041.

[37] E. Brousseau, M. Marzouki, C. Méadel (eds.) (n 33) 5.

[38] *Ibid* 7.

[39] *See* Hall P.A., Soskice D., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, 2001.

[40] Emile Loza & Shasta Kilminster-Hadley, Technology Law Group , LLC, 'The Law of Electronic Contracts : The New United National Convention', *The Advocate,* August/ September 2007.

the ITAA, 2008, validated electronic contracts by inserting Section 10A. This provision protects the interest of online consumers, with few uniform rules respecting the freedom of the parties to choose appropriate media and technology with functional equivalence as chosen by the parties. The ITA, ITAA and the recent changes Consumer Laws has attempted to address the consumer interest.

III. E-COMMERCE AND CONSUMER PROTECTION-LEGAL REGIME IN INDIA

Even with a good old legal framework in place, there are virtually no watchdogs to protect online consumer rights. Due to its complexity of working, it is doubted whether the new form of business will effectively deal with issues of consumer welfare for those Indian Consumer who plunge to online buying even without basic understanding including the trust, privacy, and the sovereignty of consumers.[41] In order to understand these issues, the CAG conducted a study and published a report in 2006 stating that the consumer responses clearly demonstrated that, there were problems associated with online shopping and they lack its understanding. These problems continue to persist with inadequate laws with new forms of consumer related problems in online shopping, including of offences as phishing, spamming etc are rising. In response to this, the ITAA, 2008 was brought about to tackle a few problems from the criminal perspective, but it does not offer much in the form of consumer rights. Post-2011 i.e. in 2015 and 2018[42] (CP Bill of 2018), Indian lawmakers urged for the updation of laws,[43] to correct the legal uncertainty and lack of precedents. Since CPA has seen no change, **Indian laws are largely considered to be unfriendly, with an added problem of delay in justice delivery system. T**he CPA was enacted in 1986,[44] and amended in 1993 and 2002. However, even the 2002 amendment failed to specify the online transactions or e-contracts. Though the applicability of the Act to online transactions was not contemplated in the earlier laws, it was expected that some mention of the same would be inserted in

[41] 'E-Commerce and Consumer Protection in India', Comptroller-Auditor General, <http://www.cag.org.in/project/consumer-protection/e-commerce-and-consumer-protection-india>, (accessed 5 March 2014).

[42] Bill No. 1 of 2018, http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/1_2018_LS_Eng.pdf, (accessed 2 June 2018).

[43] s4, Legal recognition of electronic records.
s10A, Validity of contracts formed through electronic means.
s75, Act to apply for offence or contravention committed outside India.
s81, Act to have overriding effect.

[44] "An Act to provide for better protection of the interests of consumers…"

2002, as this amendment took place after the enactment of the ITA, 2000. The regulators let down the interest of consumers due to lack of forethought choosing to remain with the provisions without regard to online transactions and failed to extend the ambit of the CPA. It widened the meaning of 'consumer' to include online consumers, 'consumer dispute', 'defect', 'deficiency of services', 'complaint', 'Unfair Trade Practice', etc. but vagueness continues till date. The CPA Amendment Bill 2011 lapsed. It had proposed specific provisions to protect consumers in the digital era[45] but just added a punishment chapter (VII). It intended to repeal the CPA, 1986 and extensively covered and extended the protection of the law to online consumers in Section 2(7).[46] The CP Bill 2018 also contains product liability through the inclusion of Section 2(34)[47] and has a complete chapter on the imposition of liability on manufacturers. The consumer interest is provided with an emphasis on mediation to ensure the relatively easy protection of the consumer. But jurisdiction of these forums, are territorial and pecuniary in nature curbing the consumer interest.[48] Even the proposed changes does not provide for the extension of jurisdiction beyond the territory of India. As online transactions are usually beyond national boundaries, the application of the CPA may become practicably unworkable. Though the ITA and Indian Penal Code, 1860 can be applied beyond the territory of India. Where former applies to both civil and criminal liability and later only to criminal liability and same is reflected in CPA 2018. If these laws are used as an additional measure for the protection of consumers, then the jurisdiction (including extraterritorial) may apply to protect consumers. Criminal liability has no issues, but principles of private international law and application to contract, torts and consumer law without good law in place would have restrictions. So, the best possible measure for now is the application of international legal principles on jurisdiction and their application in the Indian context, as applied in the Banyan Tree case,[49] though a case of Intellectual Property, its application of jurisdiction to online transactions is laudable.[50]

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45 http://consumeraffairs.nic.in/writereaddata/CP%20Bill%202015.pdf, (accessed 2 June 2017). See also http://www.prsindia.org/administrator/uploads/media/Consumer/Consumer%20Protection%20Amendment%20Bill,%202011.pdf, (accessed 31 March 2017).

46 *Ibid*.

s(7) "consumer" means any person who—

Explanation- For the purposes of this clause,— …

(*b*) … inclusive of but not limited to, offline, online through electronic means, teleshopping or direct selling or multi level marketing;"

47 Product liability chapter VI in CP 2018 Bill.

48 "S9, Establishment of the Consumer Redressal Forum."

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

50 *Ibid*.

It is not just the CP laws and the redressal mechanism that is concerned with consumer rights, but even the Competition Commission of India (CCI) is playing a vital role in extending the protection to online consumers. The same is highlighted in the complaints against online retail portals, alleging that these e-commerce portals contravene the provisions of the Competition Act, 2002 for alleged price predation by the online retailers, and entering into exclusive dealing agreements. In *Ashish Ahuja* v. *Snapdeal.com*,[51] while rejecting the allegations of abuse of dominant position by the online portal Snapdeal.com and SanDisk Corporation in the portable small-sized consumer storage device market, the CCI pointed out that both offline and online markets have different features like discounts offered, shopping experience, etc. The Commission stated that these two markets are different channels of distribution for the same product, and are in no way different relevant markets. It also pointed out that the e-commerce market in India has a number of web portals like flipkart.com, Amazon, eBay, yebhi, etc., which thrive on special discounts and deals, and hence no *prima facie* case was made out against Snapdeal.com or SanDisk for the abuse of dominant position under Section 4 of the Competition Act, 2002. However, in *Jasper Infotech (P) Ltd. (Snapdeal)* v. *Kaff Appliances (India) (P) Ltd.*,[52] the CCI made out a *prima facie* case against a company engaged in manufacturing and selling kitchen appliances and covered it under the provisions of Section 3(4) of the Act and observed that as Kaff appliances held 28 % share in the market of 'supply and distribution of kitchen appliances in India', the agreement entered into with its dealers *prima facie* may have both adverse effect on competition in India, and also ultimately result in consumer harm.[53] Against this consumer favoured decision, in *Mohit Manglani* v. *Flipkart India (P) Ltd.*,[54] a case against four major online retail players of the Indian e-commerce industry, namely, Flipkart, Jasper Infotech, Xerion Retail, Amazon and Vector E-commerce it was alleged by the informant that the Opposite Parties had been indulging in anti-competitive practices in violation of the Competition Act, 2002, by means of exclusive supply and distribution agreements with manufacturers/sellers of goods and services with exclusive agreements for the sale of certain products to the exclusion of other e-portals or physical channels stating the example of author Chetan Bhagat's novel '2 States', which was launched exclusively on

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[51] [2014] SCC OnLine CCI 65

[52] Case 61 of 2014, decided on 29 December2014 (CCI)

[53] Vidhi Madaan Chadda; 'Competition Law and E-Commerce Industry: Predicting the Future for India Inc', *Abhinav International Monthly Refereed Journal of Research in Management & Technology*, vol. 5, no. 5 (May, 2016), online ISSN-2320-0073.

[54] Mohit Manglani v. Flipkart India (P) Ltd. [2015] SCC OnLine CCI 66

Flipkart. As per the Informant, this allows the Opposite Parties to control the supply of goods exclusively sold on their portals causing an *Appreciable Adverse Effect on Competition* ("AAEC"). These manipulative practices are detrimental to the interest of the consumers. Though the CCI favoured the Opposite Party, it is also taking initiatives to regulate the online markets or any allegations of unfair trade practices by, Flipkart, SnapDeal, Jabong, Myntra and Amazon.[55] Even in this state of ambiguities and uncertainty in laws, there is a ray of hope: that the CPA Bill of 2018, may bring right approach in protection of online consumer. Lack of timely legislative reforms has forced the market to provide alternative remedies to keep the consumers happy.

IV. ADR - BEYOND THE STATUTE

Beyond the statute (now mediation is provided in CP Bill 2018) the best thing that a seller can do to retain the consumer's faith is to provide a good Alternate Dispute Resolution Mechanism (ADR) for dispute resolution. When the ADR system is practised fairly the satisfied consumer will trust the online seller. But the application of ADR in the international sphere still needs to be practiced and accepted on a large scale. Many existing ADR systems facilitate ODR, and the same is carried out by various organisations established with such objectives. One such organisation is the Virtual Magistrate Project (VMAG),[56] formed to solve issues similar to those before a Magistrate in the internet community but failed to receive complaints and resolve them successfully. Another such organisation is the *Online Ombuds Office*, established to solve the disputes that were growing in the online environment. Worked like Virtual Magistrate Project and the Maryland Mediation Project,[57] indicating as to how the network can be a resource while confronting online problems. These were foreseen as laboratories of ideas and practices for working toward the resolution of even non-cyberspace disputes and turn out to be prototypes of the courtrooms of the future.[58] In this context, there is a need to mention the World Intellectual Property Organisation's (WIPO's) role in adopting an ADR system for IP

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[55] 'CCIs take on the Indian eCommerce Market', *Mondaq*, <http://www.mondaq.com/india/x/400076/Trade+Regulation+Practices/CCIs+Take+On+The+Indian+ECommerce+Market+Protect+Competition+Not>, (accessed 3 June 2017).

[56] Three key features of Virtual Magistrate Project were to work for the net and like that of a net community, http://www.umass.edu/dispute/ncair/gellman.html, (accessed 2 June 2017).

[57] Msa.maryland.gov/ mdcourts.gov, (accessed 7 June 2017).

[58] http://www.umass.edu/dispute/ncair/katsh.html, (accessed 2 June 2017).

Disputes.[59] ICANN's UDRP (now known as eUDRP) is another well-known and an acknowledged ADR system, which has taken many initiatives to help online B2B and B2C consumers resolve their disputes relating to domain names and cybersquatting.[60] Another organisation that made a name for its dispute resolution was SquareTrade,[61] which operated in the US, UK, and Finland and later acquired by Allstate in 2016 worked for consumer warranties and had tie-up with eBay. For instance, SquareTrade mediated a dispute between a purchaser and eBay. The purchaser was distraught when he noticed a strong mildew smell emanating from the leather chair he purchased on the eBay website. Within one week, eBay sent the purchaser a $150 cheque to clean the chair. This example highlights some of the advantages of using an online ADR system to resolve contractual disputes.[62] Within the ambit of the ADR mechanism, there is a new concept that may be used for the dispute resolution of online transactions, known as the Online Dispute Resolution (ODR). This mechanism uses technology to facilitate and resolve the dispute between the parties online (paperless). This technique also uses all the mechanisms of ADR, like Arbitration, Negotiation, and Mediation, or a combination of all of them. This new method of dispute resolution is seen as an equivalent to the ADR system, to benefit and augment the traditional ADR system by the application of new technicalities and online technologies to the process of ADR. This new technology may be used to resolve online consumer disputes. But, though paperless concept is appreciable, this technique will have to use paper and pen to bring in documentary evidence, so as to be beneficial to both the parties who agree upon the decision of the ODR. Cybersettle.com,[63] ClickNSettle,[64] iLevel,[65] Internet Neutral,[66] and WEBdispute.com[67] are also involved in such dispute settlement. It can be said that both the Government and business organizations have recognized the importance

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[59] William Krause, 'Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution', (2001) 19 J. Marshall J. Computer & Info. L. 457.

[60] https://www.icann.org/resources/pages/help/dndr/udrp-en, (accessed 3 June 2017).

[61] SquareTrade was launched as the first online service for resolving e-commerce disputes between 1999 and 2001.

[62] *See* Michael Grebb, 'Settle This: Which Technology Resolves Disputes Best?', National Arbitration and Mediation. Cited in FN 68 Aashit Shah, *Using ADR to Solve Online Disputes*, (2004) 10 RICH. J.L. & TECH. 25.

[63] https://www.crunchbase.com/organization/cybersettle, (accessed 25 July 2017).

[64] https://www.crunchbase.com/organization/clicknsettle-com#/entity, (accessed 3 June 2017). https://www.bloomberg.com/research/stocks/private/snapshot.asp, (accessed 25 June 2017).

[65] https://www.mediate.com/articles/awiener1.cfm, (accessed 3 June 2017).

[66] *See* Richard Michael Victorio, 'Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century', *Pepperdine Dispute Resolution Law Journal* , vol. 1, no. 2, 2001.

[67] https://www.mediate.com/articles/awiener1.cfm, (accessed 3 June 2017).

of an appropriate ADR/ODR for online consumer transactions. Even the Organization for Economic Development and Co-operation (OECD) has recommended that member countries adopt the *Guidelines for Consumer Protection in the Context of Electronic Commerce*.[68]

V. IS ADR THE BEST POSSIBLE SOLUTION?

ADR is best suited and effective for e-commerce disputes such as the Domain Name disputes, Intellectual Property disputes and Monetary/ Pecuniary disputes.[69] Economically viable, speedy resolution, and is a non-confrontational mechanism due to its neutral forum. Essentially, it eliminates the complex jurisdictional and choice-of-law problems, and also facilitates record-keeping. These advantages can be best utilised only when the consumer develops confidence in such resolution and is satisfied with the relief granted. The businesses have to build trust with the consumer, and this can only happen when ADR proceedings are fair, especially when the consumer is ripped off because of the negligence of the business, or because of a billing error, etc. The business should concentrate on the imposition of a binding arbitration clause with appropriate terms and conditions, so that it would be beneficial for success of the ADR. Beyond this, it is important to have good technology infrastructure with a feasible level of sophistication, so that the consumer finds it convenient to deal with.[70] There is also a flipside to ADR, which includes a lack of human interaction, miscommunication, inadequate confidentiality and security, inadequate authenticity, unable to meet the "writing" requirement for the arbitration of disputes, difficulty in the enforcement of online arbitration agreements or decision, insufficient accessibility and user sophistication, inadequate "discovery" procedure, and a limited range of disputes. With the failure of the courts in providing quick remedies, and the delay in the justice delivery system, India needs to invest its thought into ADR as the best possible solution to deal with breaches in e-commerce transactions. This need is well-understood, and has been asserted in Chapter V of the CPA Bill of 2018[71]. The chapter recommends establishment of the Mediation Cell, the empanelment of the mediators, the procedure, and recognition of such disputes through writing, offer

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68 *Ibid*.

69 Aashit Shah, *Using ADR to Solve Online Disputes*, (2004) 10 Rich. J.L. & Tech. 25.

70 Dean Perritt, Demand for New Forms: Henry H. Perritt, Jr., 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR', 15 Ohio St. J. On Dis Res. (The VMP FAQ's).

71 http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/1_2018_LS_Eng.pdf, (accessed 3 June 2018).

of settlement, recording, and passing the necessary order for enforcement. The effort is laudable, and most of the businesses, ISPs and consumers are looking forward to the Bill to be passed.

VI. CONCLUSION

To conclude, it is appropriate to highlight an organization that has made its mark in resolving such disputes, is AFFECT – Americans for Fair Electronics Commerce Transactions.[72] It is the best example of consumer education and the protection of consumer interests while entering into a non-negotiating contract. The objectives of AFFECT are to look into the lack of balance in non-negotiating e-contracts, so as to set some principles to help the consumer by restoring the balance. This was basically established to seek a few changes in the Uniform Computer Information Transactions Act (UCITA).[73] AFFECT had been set up with basic principles that warn the people about the consequences of certain types of online agreement. One such principle is *"Stop before you click*" The universal nature of such transactions may face practical difficulties, if conventional laws are not adaptable, and make it difficult to find a solution. If the law does not adapt to suit the changes that are taking place, it may become obsolete, and the purpose of the law would fail miserably. Until the CPA 2018 comes into force the rights of online consumer is prejudicially affected. Indian scenario is neither adapting to a LME way of market-oriented regulation, nor the CME way of strict regulation. The insertion of Section 10A, and the CP Bill 2018, as well as the steps taken by the CCI and the judgments of various courts has not positioned the online contracts and their legal enforceability friendly to consumers. With lapses in legislature reforms, the consumer may doubt the lawmakers, and draw the assumption that India is not serious about providing for consumer rights or regulating the e-commerce market. Considering the facts on Indian illiterate and uneducated population using online transactions in the Digital India initiative, threats for online consumer is flashing red. Even the implementation existing law is tough. It is preferable for India to have a safe and strong law, rather than just allow the industry to regulate consumer rights. Lastly, in order to facilitate faster and smoother remedies, both businesses and the legal framework must formulate the best practices in the ADR/ODR system providing easier, faster effective and remedies to parties; especially to consumers meaning online consumer also.

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[72] http://www.ucita.com/, (accessed 25 July 2017).

[73] Affect opposes UCITA, see http://www.ucita.com/, (accessed 25 July 2017).

AMENDED NEED FOR GOVERNMENT INITIATED PRODUCT RECALL IN INDIA

—*K. Ritika*[*] *& Akshay Narang*[**]

Abstract *With the rise in consumer base, there has been a steep increase in the consumer goods. As the production of goods has increased, the need to produce merchantable goods has also come up. Hence, any product which is not fit for use has to be taken back from the market before they create customer dissatisfaction. Thus, the concept of product recall came up. It can be defined as a mechanism through which a company on its own or through a Government initiative recalls a specific product, which has already been sold in the market.*

The Paper would be based on a doctrinal research and the objective of the paper is to analyze the trend of product recalls in India and the reasons behind it. The paper will also analyze whether there are any legislations or pending legislative bills which deal with the subject of product recall.

I. INTRODUCTION

The concept of product recall has become old music to the ears now. It has already become common in recent times. It was not an idea that came up out of the blue, it has always been there but now it became more efficiently used because of the awareness amongst the consumers.

Before dwelling into the concept, the term "*Product"* has to be understood. In layman terms a *product* is anything that provides services or goods. It is either manufactured or refined for sale.[1] It can be physical or in

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1 "Product", *English Oxford Living Dictionary*. Available from https://en.oxforddictionaries.com/definition/product.

virtual or cyber form. Every product is made at a cost and each is sold at a price. Therefore, a product can be anything that is manufactured at a certain cost and thereafter sold at a certain price with a commercial purpose, i.e. with a motive of earning profit.[2] The process of setting uniform characteristics for a particular good or service is called product standardization.[3]

The recent Consumer Bill of 2018 has taken an initiative to define the term 'Product'. It is an effort to include anything and everything that may fall under the domain of Product. According to the Bill, a product is:

> "*any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs*"

With the technological advancement there has been so much that in production of a particular commodity by a brand that has been completely done away with. Thus, when several units of the same commodity are sold there must be zero scope for any anomalies created by human intervention. In such a situation the makers of the product may provide certain specifications regarding the product and it becomes the consumer's right to get a product, which is actually true to all such specifications. Thus, if in a particular unit there is any anomaly regarding a particular trait then the consumer may on his own demand a replacement of the product whereas when a substantial portion of a particular product released by a manufacturer suffers from identical anomalies then it is desirable that the manufacturer should recall all such products and make necessary improvements in the product, this has led to the creation of the mechanism of Product Recall. It is in the interest of the consumer and it is also desirable that the government on the discovery of any product must be able to initiate a product recall through a dedicated authority created especially for this purpose; thereby leading to the idea of Government initiated Product Recall.

A defect in the Product needs to be removed or minimised. The defect cannot continue to subsist for the detriment of the consumer. Government initiated product recall has also become necessary because entrepreneurs

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2 "Product", *Law Dictionary*. Available from http://thelawdictionary.org/product/.

3 Definition of "Product Standardization", Business Dictionary. Available from http://www.businessdictionary.com/definition/product-standardization.html.

who work purely for the profit motive may be reluctant to carry out a recall on their own in case of anomalies in a substantial portion of the total output of a specific product.

Over the past few years, there has been a huge decline in the manual form of production, as technology has become the dominant factor in the era of mass production. A firm producing a particular commodity ends up making identical units of that commodity, so, for example if an automobile company produces a particular model say 'X' then all the units of X will be identical, i.e. every unit of X will have similar characteristics and quality. Accordingly, as this phenomenon has become universal the consumers also have developed a legitimate expectation of getting a product that conforms with certain pre-determined set standards.

Therefore, the consumers tend to deny any product with anomalies especially if the anomaly in question compromises with the safety of the consumer. This, in turn, has compelled large-scale manufacturers to make product recalls in order to enhance consumer satisfaction in case of any technological defaults in mass production.

The paper herein focuses majorly on the Indian Automobile Industry related Product Recall. It has merged with all form of societies around the world. It discusses the law in place in relation to such recalls. The authors have divided the paper into different sections wherein each section contributes to the concept in one manner or the other. The first and foremost section deals with the recent instances of product recall within India. The next section deals with the comparative analysis of product recall mechanism between different countries i.e. US and Australia. Then finally followed up by the conclusion reached by the authors that will determine whether there is a need for the establishment of a dedicated government authority in India empowered to set production standards or societies ensuring voluntary compliances are enough.

The paper would be based on a doctrinal research aiming to place the pieces of jigsaw puzzle in its appropriate manner and the researcher relies heavily on the secondary resources and tries to gather information through news clippings, Internet sources like sites, articles or journals, famous blog having authentic information about the topic.

II. INSTANCES OF PRODUCT RECALL

In the recent past, almost all the manufacturing sectors in India have recorded an emerging trend of product recalls, some of them have taken up voluntary product recalls whereas some were initiated by a Governmental body.

Following is the analysis of such recalls by different manufacturers in the automobile sector with an analysis on whether there is a need of a product recall agency and whether there is such an existing law empowering a Government Agency to bring the product recall mechanism in motion in case of breach of safety norms.

In the Automobile sector, there have been several instances of product recall in this sector and almost all major manufacturers have recalled a number of their sold units mostly on account of technical glitches in interest of consumer safety. In just 3 months post the beginning of 2018, about 1.12 lakh of cars have already been recalled.

A few other product recalls over the years have been:

A. Recall by Honda Cars India Ltd. (HCIL)

In 2016, Honda Cars India Ltd. (HCIL) recalled 1.9 lakh cars; it was a mark of the fourth Takata-related recall by the company in less than a year.[4]

Previously on 18th September 2015, it had announced the biggest ever product recall and announced that it will voluntarily replace airbag inflators of 223,578 vehicles of previous generations of CR-V, Civic, City and Jazz as part of Honda's preventive global recall campaign concerning airbag inflators.[5]

Thus, the product recall was concerned with a threat to the security of the consumers; it has the effect of shaking the public confidence as there was an inherent flaw with the 24.5 million cars of the Japanese manufacturer worldwide which compelled it to recall such units globally to fix Takata Airbag issue. Honda City which was sold between 2007 and 2012

[4] 'Honda recalls 41580 cars in India to replace airbag inflators', The Times of India. Available from http://timesofindia.indiatimes.com/auto/cars/honda-recalls-41580-cars-in-india-to-replace-airbag-inflators/articleshow/56895333.cms.

[5] J. Srikant & Nabeel A. Khan, 'honda-recalls-over-2-2-lakh-cars-in-india', The Economic Times. Available from http://auto.economictimes.indiatimes.com/news/passenger-vehicle/cars/honda-recalls-over-2-2-lakh-cars-in-india/49013987.com.

were recalled. 54,200 units of Honda Civic too were recalled and those sold between 2003 and 2012 were recalled, making it the longest period of recall for any of its models.

B. Recall by General Motors

The General Motors in July 2015 announced yet another recall of 1.55 Lakh vehicles in India, its largest such exercise in the country, to fix problems related to a remote keyless entry accessory that allows opening of cars without a mechanical key.[6] This was then the second biggest product recall in the automobile sector of the Indian Economy. "The remote keyless entry accessory meets all the relevant regulatory standards; however, GM India has been made aware of some isolated cases where certain Chevrolet Spark, Beat and Enjoy vehicles were fitted with a faulty accessory" the company said in a statement. An official at the company added that GM had found a potential wiring fault that could make the accessory malfunction and lock customers out. GM India has asked customers facing problems with their remote keyless entry accessory to go to their Chevrolet dealer.[7]

In one of the biggest recalls, the General Motors India, in July 2013 had recalled 1,14,000 units of Chevrolet Tavera, manufactured between 2005 and 2013 to address emissions and specification issues.[8]

C. Recall by Ford India

In April 2016, Ford was all set to recall 42,300 units of Figo, Aspire in India in order to fix some software glitch that could possibly lead to malfunctioning of airbags during a collision.[9] Preceding recall had taken place in November 2015, the Company yet again recalled 16,444 units of Ford Ecosport, the models manufactured between November 2013 and April 2014.[10]

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6 Yuthika Bhargava, 'General Motors to recall 1.55 lakh cars in India', The Hindu. Available from http://www.thehindu.com/business/Industry/gm-to-recall-chevrolet-spark-beat-andenjoy-manufactured-between-2007-and-2014/article7417613.ece.

7 'GM to recall 155,000 vehicles in India to fix wiring trouble', Reuters.com. Available from http://www.reuters.com/article/us-gm-india-recall-idUSKCN0PN0ID20150713.

8 'General Motors recalls 1.14 lakh units of Chevrolet Tavera', The Hindu. Available from http://www.thehindu.com/business/Industry/gm-recalls-114-lakh-units-of-chevrolet-tavera/article4948429.ece.

9 'Ford Recall', The Hindu. Available from http://www.thehindu.com/business/Industry/ford-to-recall-42300-units-of-figo-aspire-in-india/article8509823.ece.

10 Pankaj Doval, 'Ford-India-recalls-16444-units-of-compact-SUV-EcoSport', The Times of India. Available from http://timesofindia.indiatimes.com/business/india-business/Ford-India-recalls-16444-units-of-compact-SUV-EcoSport/articleshow/49770531.cms.

It had also recalled before that in September 2013, when its few models encountered certain problems related to steering and rear suspension.[11] This was the then biggest product recall in the manufacturing sector in India.

D. Recall by Maruti Suzuki India Ltd. (MSIL)

Maruti Suzuki India Ltd. (MSIL) has the largest market share in the automobile industry amounting to around 45% as far as passenger car segment is concerned, but one of its major weaknesses has been reflected in the product recalls of some of its most popular models in the recent past.

MSIL has recently i.e. in 2017 recalled 151 units of Grand Vitara, which were manufactured from 2008 to 2013. They were recalled due to due to some transmission issue.[12] Not even a complete year ago, it had recalled more than 75,000 units of the Baleno and some Dzires.[13]

It had recalled over 33,000 of its Alto 800 and Alto K10 models in March 2015. Even in April 2011, MSIL had recalled over 13,000 cars manufactured in November and December 2010, which included models of its bestselling cars.

In February 2010, the Maruti Suzuki recalled 100,000 cars in India and overseas markets due to potential fuel leakage problems including 50,000 units of A-Star, a major model in the hatchback segment.[14]

E. Recall by Toyota Kirloskar Motor (TKM)

In July 2015, Japanese car giant Toyota announced recall of 7,129 units of Toyota Corolla, its executive Sedan Model, to fix faulty passenger side airbags as part of its global exercise. The units being recalled were manufactured between April 2007 and July 2008.[15]

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[11] 'Ford-to-recall-166-lakh-units-of-figo-classic-models', The Hindu. Available from http://www.thehindu.com/business/Industry/ford-to-recall-166-lakh-units-of-figo-classic-models/article5124662.ece.

[12] Maruti Suzuki India Ltd. Available from http://www.marutisuzuki.com/Information.aspx.

[13] Yuthika Bhargava (n 6).

[14] 'Maruti Suzuki recalling 100,000 cars with faulty fuel tank from India, abroad', The Times of India. Available from http://timesofindia.indiatimes.com/business/india-business/Maruti-Suzuki-recalling-100000-cars-with-faulty-fuel-tank-from-India-abroad/articleshow/5607773.cms.

[15] 'Toyota recalls 7,129 units of Corolla in India to fix airbags', The Times of India. Available from http://timesofindia.indiatimes.com/business/india-business/Toyota-recalls-7129-units-of-Corolla-in-India-to-fix-airbags/articleshow/47970852.cms.

On April 9, 2014, Toyota announced the recall of 45,000 units of Innova in India as part of its global recall of 6.39 Million vehicles announced by Japanese parent Toyota Motor Corp, one of its Multi-Purpose Vehicles manufactured between February 2005 and December 2008 to rectify a faulty cable on the steering wheel.[16]

Thus, marking a huge increase in the number of recalls in the previous decade itself. The contributing reason could either be that the consumer/customer awareness has increased manifold in the previous decade or the qualities of the goods have gone down exponentially. Whatever may have been the reason, a clear consequence of it is the shattering of consumer confidence in the product or the brand.

III. GOVERNMENT INITIATED PRODUCT RECALL MECHANISM IS AUTOMOBILE SECTOR: WHETHER NEEDED

From the above instances, it is amply clear that in the recent past there have been several instances of voluntary product recall, some of them being rather massive in scale; almost all the major car manufacturers have announced recall of several units on account of several grounds. Moreover, many of such recalls have been made due to safety related issues, for instance defects in the Airbags or braking system.

There is not an iota of doubt about the fact that car manufacturers, must comply with their specifications in general and specifications of safety components in particular to make sure that Road Safety which is a rather critical issue in India is not compromised and not deteriorated to a deplorable level. Therefore, a government initiated product recall mechanism in at least the automobile sector is a must on account of increased manufacturing and ever increasing road traffic along with a shaken public confidence out of such recalls, in order to avoid a situation where the automobile manufacturers do not consider product recalls to prevent increased costs, Government initiated Product Recall is the only mechanism which can tackle any such situation and improve standards of road safety as far as the component of vehicle specifications is concerned apart from fulfilling consumer satisfaction.

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[16] 'Toyota to Recall 45,000 units of Innova in India', India Today. Available from http://indiatoday.intoday.in/story/toyota-to-recall-45000-units-of-innova-in-india/1/354841.html.

IV. ANALYSIS OF CURRENT PRODUCT RECALL MECHANISM

India is among the top seven automotive markets in the world but the country lacks a well-established recall policy. The Society of Indian Automobile Manufacturers (SIAM) had announced a voluntary recall policy in July 2012, specifying that companies must follow standard procedures on detecting manufacturing defects. The policy specified that all makers of motor vehicles need to rectify all errors in any of the units sold by a manufacturer ranging from two wheelers to commercial vehicles and even those imported by the automobile manufacturers, all such rectifications related to errors related with consumer safety were to be made free of cost and the policy also recommended the Government to intervene in case of proven violations.[17] Hence, an amendment such as Motor Vehicles (Amendment) Bill, 2016 is the change that is required.

V. MOTOR VEHICLES (AMENDMENT) BILL, 2016

India has been having a lacuna in relation to legislation with respect to Product Recall. It just has a society, which helps it in executing voluntary product recall in relation to Automobiles but yet, it lacked appropriate mechanism that could provide a legal backing to the customers. They were not ensured of having a proper protection against receiving a defective product or about which authority to approach to redress such an issue wherein most products of similar nature were defective. The parliament must have sensed this lacuna, as it decided to finally inculcate some sections in the amendment of one of its Acts. It therefore, has recently passed the Motor Vehicles (Amendment) Bill, 2016 which was an amendment to The Motor Vehicles Act, 1988.

The Bill elaborately discussed that the Central Government by order would be able to direct a manufacturer to recall motor vehicles of a particular type or its variants, if there is a defect in a particular type of motor vehicle that may cause harm to the environment or to the driver or occupants of such motor vehicle or other road users[18] and it has been reported to the Central Government[19] by such percentage of owners, as the Central

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[17] 'Society of Indian Automobile Manufacturers announces recall policy', The Economic Times. Available from http://articles.economictimes.indiatimes.com/2012-07-03/news/32523689_1_manufacturers-for-such-violation-vehicles-nhtsa.

[18] The Motor Vehicles (Amendment) Bill, 2016, s110A(1)(a), (Pending).

[19] The Motor Vehicles (Amendment) Bill, 2016, s110A(1)(b), (Pending).

Government, may have specified in its Official Gazette notification[20] or by a testing agency[21] or through any other source.[22] This ensures an active role of the Central Government in ensuring the awareness towards consumers and the responsibility that a manufacturer of goods own towards them. In fact in case of a defect in its component, such component must be recalled as well.[23]

If such an aforementioned scenario do arise then the buyer whose vehicle has been recalled may either be reimbursed for the full cost of the motor vehicle (subjected to any hire-purchase or lease-hypothecation agreement)[24] or replace the defective motor vehicle with another motor vehicle of similar or better specifications which complies with the standards specified under this Act or repair it[25] and pay such fines.[26] In place of the buyer, if the manufacturer notices such defect then he is under an obligation to notify the central government and recall such product, in such cases the manufacturer shall not be liable to pay fine.[27]

The Central Government may authorize any officer to conduct investigation in relation to the given matter and who shall have all the powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, which may include summoning and enforcing the attendance of any person and examining him on oath[28], requiring the discovery and production of any document[29], receiving evidence on affidavit[30] and any other matter as may be prescribed.[31] The Central Government would even have the power to make rules for regulating the recall of such motor vehicles, of a particular type or its variants, for any defect, which in its opinion, may cause harm to the environment or to the driver or occupants of such motor vehicle or to other road users.

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[20] *Ibid* (i), (Pending).

[21] The Motor Vehicles (Amendment) Bill, 2016 (n 19) (ii), (Pending).

[22] The Motor Vehicles (Amendment) Bill, 2016 (n 19) (iii), (Pending).

[23] The Motor Vehicles (Amendment) Bill, 2016, s110(2), (Pending).

[24] The Motor Vehicles (Amendment) Bill, 2016, s110(3)(a), (Pending).

[25] The Motor Vehicles (Amendment) Bill, 2016, s110(3)(b), (Pending).

[26] The Motor Vehicles (Amendment) Bill, 2016, s110(3)(c), (Pending).

[27] The Motor Vehicles (Amendment) Bill, 2016, s110(4), (Pending).

[28] The Motor Vehicles (Amendment) Bill, 2016, s110(5)(a), (Pending).

[29] The Motor Vehicles (Amendment) Bill, 2016, s110(5)(b), (Pending).

[30] The Motor Vehicles (Amendment) Bill, 2016, s110(5)(c), (Pending).

[31] The Motor Vehicles (Amendment) Bill, 2016, s110(5)(d), (Pending).

The testing agency that has granted it the certificate shall be liable for its accreditation and registration to be cancelled in case such motor vehicle having a type-approval certificate is recalled.[32]

Hence, It is ample evident that obligations will be bestowed on the manufacturer and he may even be made liable for any such recall that he may initiate.[33] Since, the legislation has not yet been effectuated. This need must be addressed as efficiently as possible. The legislation deals with only sector and therefore it may be construed as only a small step towards the establishment of a regime where products with mass defects could be compulsorily recalled by the Government. However, the significance of this legislative bill cannot be undermined as it may pave the way for this much needed regulatory reform.

VI. CONSUMER PROTECTION BILL, 2018

Donoghue v. Stevenson is the landmark case that revolves around the definition of a consumer and discusses the range of consumer liability on streamlining the defect. It brought consumer awareness and redressal under the proper ambit of law. Subsequent to this case, any liability for a complaint brought for a defect in a product has been satisfied only by a proper compensation.

The Consumer Protection Bill of 2018 (Bill) is all set out to replace the erstwhile Consumer Protection Act of 1986. It has been recently placed in front of the parliament and sets out to address consumer rights, and provides a mechanism for redressal of complaints regarding defect in goods and deficiency in services. Product Recall is one such concept which can fall under this domain of deficiency in Service. It addresses on the liabilities brought in due to a defect in massive product recalls and even provides the penal provision to addressing such defects.

Section 20 of the Bill has provided the Central Authority to withdraw or recall goods. It states that a reasonable opportunity must be given to the goods or consumer manufacturer or the service provider before a recall is directed. It states that the Authority has the power to recall goods which are dangerous or hazardous in nature, to reimburse the purchaser of such

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[32] The Motor Vehicles (Amendment) Bill (n 29).

[33] 'Law to be introduced to regulate automobile product recalls in India', Economic Times. Available from http://auto.economictimes.indiatimes.com/autologue/law-to-be-introduced-to-regulate-automobile-product-recalls-in-india/2286.

goods or services and to disable a product or service manufacturer or provider from continuing an act that is unfair and prejudicial to the consumer interest.[34]

Chapter VI of The Bill aims to cover the liability for the harm caused due to defective product manufactured or services provided either by a service provider or the seller.[35] The Bill addresses any harm caused, including harm to the property damage or a personal injury, illness, or death as well as mental agony or emotional harm caused due to the situation.[36]

Under the Bill, the liability of a producer ranges from a simple defect in manufacturing, designing or distinction in specification and extends to non-conformity to express warranty and to extend to even include any inadequacy of instructions to prevent any harm warning regarding improper or incorrect usage.[37] Instances, in which a car manufacturer who installs the air bag system and fails to mention the essential detail that such front seat (wherein the airbags are installed) are not meant for children can be held liable. The product liability action brought under this bill shall arise even if he proves that he was not negligent or fraudulent in making the express warranty of a product.[38]

The chapter VI of the legislative Bill provides a clear intent of the legislature to establish elaborate framework on the liabilities faced. The liabilities and the limitation of the manufacturer shall stand dispensed in the following cases, wherein:

> "*Where at the time of harm, the product was misused, altered, or modified.*
>
> *In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer shall not be liable, if—*
>
> *(a) the product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to such employer;*

34 The Consumer Protection Bill, 2018, s20, (Pending).

35 The Consumer Protection Bill, 2018, s83, (Pending).

36 'The Consumer protection Legislative Brief', *PrsIndia*. Available from http://www.prsindia.org/uploads/media/Consumer%20Protection,%202018/Legislative%20Brief%20%20Consumer%20Protection%20Bill,%202018.pdf.

37 The Consumer Protection Bill, 2018, s84(1), (Pending).

38 The Consumer Protection Bill, 2018, s84(2), (Pending).

> *(b) the product was sold as a component or material to be used in another product and necessary warnings or instructions were given by the product manufacturer to the purchaser of such component or material, but the harm was caused to the complainant by use of the end product in which such component or material was used;*
>
> *(c) the product was one which was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts; or*
>
> *(d) the complainant, while using such product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.*
>
> *A product manufacturer shall not be liable for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product."*[39]

The Bill is a comprehensive legislation which also discusses the penal liability of the manufacturer for causing such harm. It impose a penalties for manufacturing, selling, storing, distributing or importing adulterated products as well as spurious products.[40]

The growth of recall in various industries has been really high; therefore, a need to regulate the functioning of liability needs to be brought in. A Bill preventing consumer detrimental situations arising from unfair trade practices and initiate class action including enforcing recall, refund and return of products is required in today's competitive world. Thus, the bill acts an active attempt to address the growing consumer complaints.

This Bill along with the Motor Cycle Amendment Bill can safely lead to consumer to obtain a structured reason for such liabilities and ensure proper compliance. It moreover, creates a deterrence effect and due to the wide

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39 The Consumer Protection Bill, 2018, s87, (Pending).

40 The Consumer Protection Bill, 2018, s90 and s91, (Pending).

ranges of liability the compliances requirements, many product defects shall be addressed effectively.

Thus, both the Bills are a need for today's product recall scenarios and provide a way forward for all such instances.

VII. COMPARATIVE ANALYSIS WITH PRODUCT RECALL MECHANISM OF OTHER COUNTRIES

It is beyond doubt that product recalls is emerging as a dominant phenomenon in the Indian Economy, increasing product recalls hint at decreasing product quality, and the declining level of consumer safety and satisfaction, therefore, in order to ascertain whether the Indian Product Recall Mechanism is adequate to deal with the issue of increasing recalls, there is a need to make a comparative analysis of the Indian Product Recall Mechanism with the product recall mechanism provisions of other countries which also face similar issue of product recalls.

For the purpose of this paper, a comparative analysis is made with the Product Recall Mechanism with two countries, the US and Australia, having effective product recall mechanisms establishing a Government Agency to initiate Product Recalls.

VIII. PRODUCT RECALL MECHANISM IN THE US

US Law does not establish a single Agency through which the Government can initiate Product Recalls but it has six Federal Agencies through which product recalls can be initiated. These Federal Agencies have vastly different and separate jurisdictions based on product categories. Therefore, the US Consumer Product Safety Commission (CPSC) has jurisdiction over more than 15,000 Consumer Products, related to everyday household consumption. The National Highway Traffic Safety Administration (NHTSA) of the US Department of Transportation governs the recalls under the Automobile Sector and deals with recall information consisting of vehicle and equipment changes since 1966 till date. The US law also empowers the US Coast Guard to investigate into consumer complaints about recreational boats and safety norms.

Thus, even though the US does not have a Government Agency empowered to recall a Product in case it flaunts any safety norm, it establishes an extensive umbrella mechanism on product recalls and the six Federal Agencies deal with all the major industrial sectors. Moreover, the US also

provides a common online Government platform where complaints can be made by the Consumers regarding any product which can be recalled by a Federal Agency.

IX. PRODUCT RECALL MECHANISM IN THE AUSTRALIA

During the past 2 decades about 10,000 products have been recalled in Australia[41]. The responsibility of the general consumer product recalls are of the Australian Competition and Consumer Commission (ACCC).

The Australian Energy Regulator (AER) shares staff, resources and facilities with the ACCC (AER).[42] It is Australia's national energy market regulator and has an independent board.

The ACCC and AER, two distinct bodies share many common objectives and both working to protect, strengthen and supplement competitive market processes.

The ACCC is an independent statutory authority, which got established in the year 1995 to administer the Trade Practices Act 1974 and other acts. Trade Practice Act, 1974 was later renamed as the Competition and Consumer Act 2010 on 1st January 2011. Appointments to the ACCC involve participation by Commonwealth, state and territory governments. ACCC also promotes competition and fair trade in markets to benefit consumers, businesses, and the community. Its primary responsibility is to ensure that individuals and businesses comply with Australian competition, fair-trading, and consumer protection laws - in particular the Competition and Consumer Act 2010.

If a product or service is plagued with a safety risk or fails to comply with the prescribed imperative standards, it may be recalled. Many suppliers voluntarily undertake product recalls after observing material defects in their products. The suppliers initiating a voluntary product recall are needed to notify about the same to the Commonwealth Minister responsible for competition and consumer policy within two days of initiating the product recall and in case any injury or death has been caused by the reason of the

[41] Australian Competition Consumer Commission, Australian Government. Available from https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc.

[42] AER & ACCC, Australian Government. Available from http://www.aer.gov.au/.

product being defective there is also a provision for mandatory reporting to the ACCC.[43]

In the alternative, if suppliers are identified as being unsafe or non-complaint, product recalls may be initiated by the Australian Competition and Consumer Commission. It may even advise that the Commonwealth Minister initiate a compulsory recall in order to protect the public from an unsafe product.

The power of determining the manner in which a compulsory recall is to be undertaken and the procedure of its enforcement vests wholly in the ACCC.[44]

X. CONCLUSION

The Indian Economy has seen an overhaul in relation to such recalls in the past decade. It has been highlighted and presented by many media houses. One such recall example, which is known to all households in India, is of Maggi. In 2016, due to a growing concern of it having lead content the product was recalled.

As far as automobile sector is concern the same trend of growing recall has been seen. It is amply clear that there has been a definite increase in the instances of recent recalls in India. Such rising trend can be attributed to our ever-increasing economic activity and completely mechanized mode of production in certain sectors, which leads to uniform flaws in a particular product line.

Several manufacturers till now have been coming forward and making efforts for recall in order maintaining their customer base and trust intact. But, there is a possibility that many other cases are still going unnoticed because of lack of proper vigilant Authority in place. As the bill is still pending and hasn't been passed yet. Serious concerns are caused, as any delay with respect to the passing of the bill could be detrimental to society as lives of many may be at risk because of the non-assurance of compliance.

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[43] Treating customers fairly, Australian Competition Consumer Commission. Available from https://www.accc.gov.au/business/treating-customers-fairly/product-safety#recalls.

[44] 'Guidance for suppliers: Product Safety', Australian Government. Aavailable from https://www.productsafety.gov.au/recalls/guidance-for-suppliers/conducting-a-recall?source=recalls#when-a-recall-is-required.

In addition to this, according to the comparative analysis of the two other countries i.e. the US and Australia, they either have an Agency, which is fully entrusted to govern issues in relation to such recalls, or there are a host of agencies that are dealing with separate sectors of the economy. In fact in the case of Australia, the ACCC is not only a powerful body initiating product recalls but it also provides for certain safeguards where the producer itself undertakes a product recall even as certain material defects appear.

Therefore, it is prime facie evident that India has at least taken a prospective step towards establishing one such mechanism in the case of automobile sector wherein the Government will look to check the supply of a defective product or service and move closer towards ensuring fair competition and consumer protection.

The passing of the bill may be one such initiative that will be taken up by India to ensure proper compliance and creating such obligation on the Manufacturer. Since, the present Authorities have very minimal power in their hands and hence, exercising it renders them ineffective.

With the recent bills in place, there is a scope of the government directing the flow of recall in a proper structured manner. The conversion of this bill into an act shall lead many consumer issues to be addressed in a proper manner. It is a change worth welcoming. The ultimate aim of the legislature should be to move towards a regime where a single authority or a host of authorities are established dealing with every major sector and ensuring that instances of pecuniary or personal injuries due to defective products is minimized and a rightful obligation is imposed upon the producer in the greater interest of the consumer.

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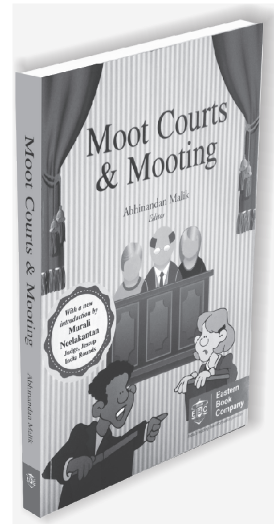

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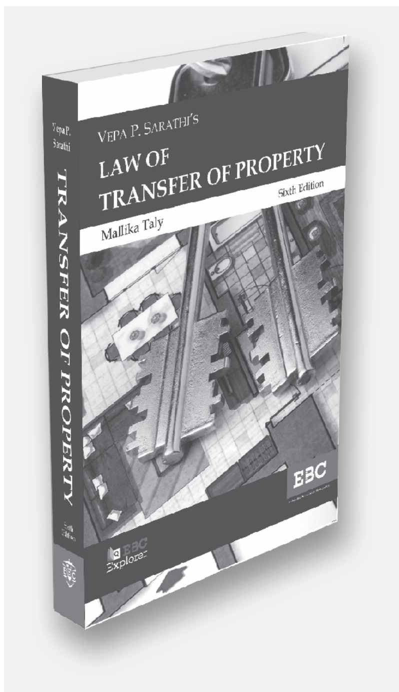

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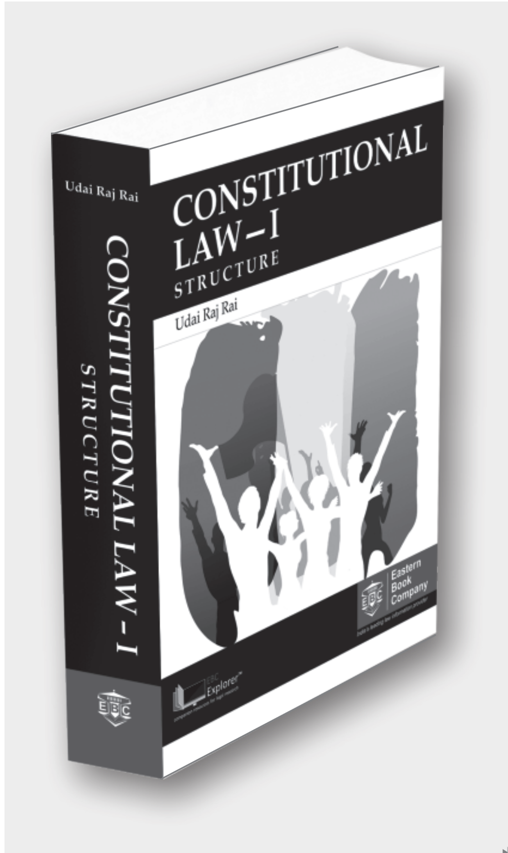

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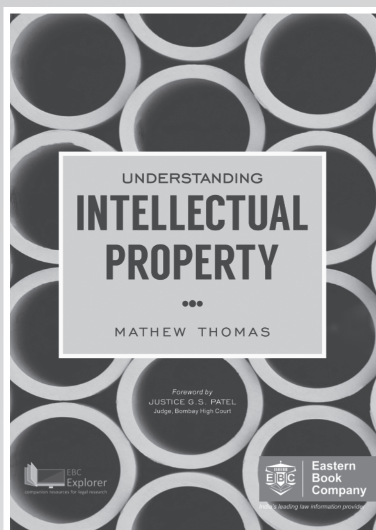

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