CONTRACTUAL LIABILITY OF INTERMEDIARIES IN E-CONTRACTS

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INTRODUCTION

“The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine.”

- Lord Denning, in Thornton V. Shoe Lane Parking.³

Over the last several years the Internet has emerged as an important tool to facilitate the conduct of business for consumers and businesses alike. Conducting business in the off-line world requires that the parties engaging in commerce each understand and agree to the legal rules that will govern their business relationship. In order to ensure certainty, parties engaging in electronic commerce need to ensure that transactions conducted by electronic means over the Internet are legally binding and enforceable to the same extent as traditional paper-based transactions. The struggle of contract law to keep pace with technological change is not new; past technological advancements such as the telegraph and facsimile machine also introduced hurdles in the application of traditional contract law principles that the common law had to overcome. However, the Internet has revolutionized the ease at which businesses and individuals can engage in commercial activity and arguably has required contract law to adapt at a much faster pace. The Internet has introduced some uncertainty into many aspects of commercial transactions conducted via electronic means, such as in the areas of the formation of enforceable electronic contracts, jurisdiction, and statutory issues relating to evidence and signature requirements. Slowly, through the combination of common law developments and legislative reform, the legal rules relating the creation of enforceable electronic contracts are becoming increasingly more certain.⁴

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³ (1971) 2 QB 163 at 169
⁴ Available at http://www.itlaw.com/ecommerce_law_update.htm (last accessed on 9 Nov 2016.)
Electronic commerce or e-commerce, is now part of our daily lives. If consumers and businesses did not believe that the commerce they were transacting was enforceable, they would not enter the digital marketplace provided by the internet. The internet gives business access to a vast number of consumers and gives businesses access to each other. The first large scale consumer and business use that was made of the World Wide Web was the erection of websites for marketing and advertising purposes. These sites promoted companies and products. Initially, they did not offer the possibility of selling products and services. Sales took place in parallel through more traditional means of communication. A majority of websites now offer international and cost effective opportunities for selling goods and services to consumers.

An online marketplace is a method of conducting e-commerce transactions, which connects buyers and sellers. The marketplace itself does not undertake the activity of buying and selling – the sale transactions happen between the actual third party buyers and sellers. Though there exists no standard definition for the term e-commerce, it is generally used in the sense of denoting a method of conducting business through electronic means rather than through conventional physical means. Such electronic means include ‘click and buy’ methods using computers as well as ‘m-commerce’ or mobile commerce. This term takes into account not just the act of purchasing goods and/or availing services through an online platform but also all other activities which are associated with any transaction such as:

1. Delivery
2. Payment facilitation
3. Supply chain and service management.

The more significant feature of this communication network is that individuals have been empowered to access the widening knowledge repository anytime, anywhere by a click of the mouse. This access is at an inexpensive cost when compared to other current technologies. Some of the day to day activities that consumers indulge in be it buying and selling of various products, availing various services are now facilitated with the growth of e-commerce through platforms like Google, Amazon, Flipkart, BigBasket, Ola, Uber, OLX, etc. Contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. Right from hiring a taxi to buying airline tickets online,

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5 Cited from E-commerce in India, Nishith Desai Associates.
innumerable things in our daily lives are governed by contracts. The Indian Contract Act, 1872 governs the manner in which contracts are made and executed in India. It governs the way in which the provisions in a contract are implemented and codifies the effect of a breach of contractual provisions.

Section 106 of the Act lays down the requisites of a valid contract to be fulfilled. They are:

1. Offer and acceptance
2. Intention of parties to form legal relationship
3. Lawful consideration
4. Lawful object
5. Competency of parties
6. Agreements not declared void
7. Impossibility of performance

While the rules on formation of contracts are well established in the offline world, there are significant issues that call for enunciation of legal position in the electronic world. Electronic contracts are not paper based but rather in electronic form just like trading shares online by holding a Demat Account, which are born out of need for speed, convenience and efficiency. Imagine a contract that an Indian exporter and an American importer wish to enter into. One option would be that one party first draws up two copies of the contract, signs them and couriers them to the other, who in turn signs both the copies and couriers one copy back. The other option is that the two parties meet somewhere and sign the contract. By using e-commerce the whole transaction can be completed in a couple of seconds with both the parties simply affixing their digital signatures to an electronic copy of the contract. There is no need for delayed couriers and additional travelling costs in such a scenario.

**VALIDITY OF E-CONTRACTS**

The main legislation governing e-contracts in India is The Information Technology Act, 2000. The Act comprises three significant aspects-

2. Regulation of certification authorities.

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6 Section 10, Indian Contract Act, 1872.
3. Cyber contraventions including civil and criminal violations, penalties, establishment of adjudicating authority etc.

Section 10A of the Act states as follows:

"Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose." The Sec 10A of Information Technology Act provides the legislative authority to electronic contract. It was inserted through an amendment in 2008. It corresponds to the Article 11 of the UNCITRAL Model Law on Electronic Commerce 1996.

Article 11 of the UNCITRAL Model Law on Electronic Commerce 1996 states:

Formation and validity of contracts:

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

The three most important terms that must be understood in Electronic Contracts are:

- **Addressee:** The term is defined under Sec 2(1)(b) of the Information Technology Act, 2000 “addressee” means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

- **Intermediary:** The term is defined under Sec 2(1)(w) of the Information Technology Act, “intermediary” with respect to any particular electronic records means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers.

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7 Section 10 of the Information Technology Act, 2000
9 The Information Technology Act, 2000
providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.

- Originator: The term is defined under Sec 2(1)(za) of the Information Technology Act. “originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary.

There are generally two main methods of electronic contracting.\(^{10}\) These two methods can be through a website and electronic mail. When a company is transacting business through e-commerce, it is likely to enter into contracts over the internet through advertisements on a website which would amount to an (invitation to treat).\(^{11}\) However, each case depends on its own facts and the intended objectives of a particular website would determine how the advertisement is worded. The first step in e-commerce contract formation is usually customer registration. This is adopted both in business to businessman (B2B) and business to consumer environments (B2C). This enables both the vendor and customer to establish a formal relationship and the customer is deemed to have read and agreed to adhere to security warnings, payment conditions, terms of use, privacy policies of the e-commerce website owner. It is important that the terms and conditions determining the transaction must be referred to and made available to the reader to read. Generally, a user scrolls down the terms and conditions and confirms that he has read and accepted them by clicking on a (I Agree) button. In such cases, the courts normally hold the users to be bound by the agreed terms and conditions by e-contracts. The prime objective is to bring to the knowledge of the consumer and to procure his express consent before entering into e-contract which is based on express terms and conditions. Prior to the formalization of e-contracts the consumer is asked to confirm that he has read relevant terms and conditions and accepts them, it would clearly indicate his (intention to establish legal relationship).

One of the key issues of e-contracting\(^{12}\) is, ‘When is a message considered sent or received when it is transmitted through a different mechanism such as emails?’ A message is said to be received by a designated mail box when it enters the system. If there is no designation it is

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\(^{10}\) Jeff C Dodd and James A Hernandez, ‘Contracting in Cyber Space’ at www.sbot.org/docs/Dodd.pdf

\(^{11}\) Sprecher Grier Halberstan LLP, ‘How to contract online’, at http://www.weblaw.co.uk/art_contract_online.php

\(^{12}\) Adapting contract law to accommodate electronic contracts: overview and suggestions at http://www.lawnet.lk/docs/articles/international/html
also deemed received when the message enters the system of the recipient. If the message is sent to the mail box other than the one designated, it is received when the receiver retrieves the message.

In e-commerce transactions there are four possible ways to convey acceptance.

1. By sending an email message acceptance.
2. By delivery of an online electronic digital product.
3. By delivery of an online electronic digital service.
4. By delivery of the physical products.

Or by any other act or conduct indicating acceptance of the offer.

The Information Technology Act, 2000\(^{13}\) provides that acceptance is binding on the offeree when the acceptance is out of control of the offeree and is binding on the offeror when he receives the acceptance. Section 12 of the Act provides for a default acknowledgement process if the originator and the addressee have not agreed upon a particular method of acknowledgement. It is provided that an acknowledgement maybe given by any means of communication by the addressee (automated or otherwise) or any conduct of the addressee sufficient to indicate to the originator that the electronic records have been received.

Section 4 of the Indian Contract Act, 1872 provides that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete when it is put in course of transmission to him as against the acceptor. In *Entores Ltd V. Miles Far East Corporation*,\(^ {14}\) the offeree had sent his acceptance from Amsterdam by telex to the offeror in London. Lord Denning held that telex is a virtually instantaneous form of communication which when used makes acceptance through mail box inapplicable. The above view was accepted by the Supreme Court of India in *Bhagwan Das V. Girdharilal and Co.*\(^ {15}\)

The Information Technology Act 2000 provides that the dispatch of an electronic record occurs when it enters an information system outside the control of the person who sent the record unless otherwise agreed. The time for receipt of an electronic record is determined by the time when the electronic record enters the computers resource. If no computer resource

\[^{13}\text{Available at }\text{http://www.dot.gov.in/sites/default/files/itbill2000_0.pdf (Last accessed on 24/11/2016)}\]

\[^{14}(1955)\text{ 2 QB 327}\]

\[^{15}(1966)\text{ 1 SCR 656}\]
has been designated, then the receipt occurs when the electronic record enters the computer source of the addressee.\textsuperscript{16}

The issue as to when a message is deemed to be received poses few questions, example: when the messages will be deemed to be received, when the message is received in A’s designated inbox at a remote server or when A actually logs on to his inbox and retrieves the mail. In Germany, jurisdiction practise has established that a message sent by an email id is deemed to be received when it reaches the host computer of the addressee, if the addressee has published the email address on his letter or otherwise makes it publicly known.\textsuperscript{17}

In \textit{P.R. Transport Agency V. Union of India &Ors.}\textsuperscript{18}, Bharat Cooking Coal Ltd. held an e-auction for coal in different lots. P.R. Transport Agency’s bid was accepted for 4000 metric tons of coal from Dobari Colliery. The acceptance letter was issued on 19 July 2005 by PRTA’s e-mail address. Acting upon this acceptance PRTA deposited the full amount of Rs. 81.12 Lakhs through a cheque in favour of BCC. This cheque was accepted and encashed by BCC. BCC did not deliver coal to PRTA; instead it e-mailed PRTA saying that the sale as well as the e-auction in favour of PRTA stood cancelled “due to some technical and unavoidable reason.” The only reason for this cancellation was that there was some other person whose bid for the same coal was slightly higher than that of PRTA. Due to some flaw in the computer or its program or feeding of data the higher bid had not been considered earlier. This communication was challenged by PRTA in the Allahabad High Court. The court held that the acceptance was received by PRTA at Chandauli/ Varanasi. The contract became complete by receipt of such acceptance. Both these places were within the territorial jurisdiction of the High Court. Therefore, a part of the cause of action had arisen in U.P. and the court had territorial jurisdiction.

In another case of \textit{J.K. Enterprise V. State of M.P.}\textsuperscript{19}, according to the plaintiff, he made an offer to the defendant, for the purchase of tendu leaves. It was the stand of the plaintiff that he was never informed that his offer had been accepted. He made the offer on 11.1.1993 and when he did not get the acceptance till 3.3.1993 and thus by a fax message sent on 3.3.1993

\textsuperscript{16} Section 13, Information Technology Act 2000
\textsuperscript{17} Legislative Fact Sheet on UETA, The National Conference of Commissioners on Uniform State Laws, Available at http://www.nccusl.org
\textsuperscript{18} AIR 2006 All 23
\textsuperscript{19} AIR 1997 MP 68
he withdrew his offer. In the return filed on behalf of defendant it has been stated that the offer of the plaintiff dated 11.1.1993 was accepted and communicated under registered cover on the address disclosed by the plaintiff itself and was sent by the letter dated 12.2.1993 which was retuned as the address was incomplete. Defendant further stated that their return that the alleged fax machine dated 3.3.1993 withdrawing the offer was not received by the defendant as it was sent on the wrong fax number.

The court held that the communication of the acceptance of the offer made by the plaintiff was never made by the defendant and as the defendant failed to communicate his acceptance within the given period, the offeror can withdraw his offer.

PRINCIPLES OF ONLINE CONTRACTING

The postal contract law provides that written acceptance completes the contract once it has been posted. This principle is correspondent to the principle of non-discrimination under e-commerce that there shall be no discrimination made between written documents and electronic data. This common law rule has been adopted widely in the Indian courts. This view was accepted by the Supreme Court of India in Bhagwan Das V. Girdharilal Co.20 the general rule regarding instantaneous communication was laid down Entores Ltd. V. Miles Far East Corporation21 where Lord Denning held that the contract will only be completed when the acceptance has been received by the offeror. The contract will be made at the place where the acceptance was received and at what time it was received. When this rule was applied to fax,22 the court found the contract was made where and when the acceptance was received.

In India, the Consumer Protection Act, 1986 is applicable even in the context of online e-commerce transactions in the case of Anupama Purohit V. Make My Trip.com23 the court held that the defendant had committed both deficiency of services and was guilty of unfair trade practises within the meaning of Consumer Protection Act, 1986 when it failed to allot a room to the complainant despite having received an advance payment and giving confirmation of the same to the complainant. Further the defendant unauthorised debited twice the account of the complainant by using his credit card details and password that were

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20 (1996) 1 SCR 656
21 (1955) 2 QB 327
22 Reese Bros. Plastic Ltd. V. HAMON-SAPEL CO. Australia PTY Ltd. (1998) 5 BPR (197325) (NSWCA)
23 Decided by Consumer Disputes Redressal Forum/ II on 3.04.07
used to make an online payment to the defendant. Therefore courts in India apply consumer protection legislation to transactions in the e-commerce world made by consumers to protect their general interests.

**LIABILITY**

When it comes to the modern supply chain, the linkages between different players are changing. Wholesalers continue to serve an important function in the supply chain. However, their role is no longer confined to purchasing from suppliers to distribute to retailers. In order to survive, they must provide a tangible value adding function that’s clear to their customers.

The rise of e-commerce platforms such as eBay, Amazon, Flipkart and ASOS etc. indicates the rise of a whole new type of intermediaries. It’s an interesting new way to think about the supply chain. Platforms are an additional rung in the chain and are also merely a medium for those who further up the supply chain to connect with those that are further down, by bypassing traditional linkages. Regardless of its role in the supply chain however, the simple fact remains that the trend towards B2C firms selling through hosted platforms is inevitable. Trust and convenience are the two primary factors giving rise to the role of intermediaries. Backed by big names like Amazon, consumers feel assured that certain consumer protection policies are in place. ASOS for instance, offers a 14 day returns policy. Given the multitude of alternative options on the internet, maintaining trust in the platform is central to its success. Active reviewers are also a big part of creating and maintaining a functional and trustworthy platform. Online reviews have become an integral part of the purchasing process. With online platforms, where sellers can access a larger customer base, there are also likely to be more reviews available for consumers to evaluate their purchasing decision.²⁴

At a basic level, the internet's technology requires the insertion of intermediaries²⁵ between interacting parties in two ways. First, for all the transactions over the internet, the communication necessarily involves the internet itself, as well as the parties necessary to facilitate the particular communication, with the exception of few entities involved in direct

²⁴ Available at https://www.tradegecko.com/blog/the-new-middlemen-ecommerce-model last accessed on 11 November 2016
internet transmissions. Secondly, commercial transactions on the internet require the use of other intermediaries.26

A network service provider represents an interactive network service. It may provide access to the internet only or offer a range of additional resources. Depending upon its functional attributes a network service provider may act as an 'information carrier' or 'information publisher'. A network service provider means any person who provides access to information service in electronic form. They perform two tasks:

   a) To provide access to the network.
   b) To act as an "intermediary"27 with respect to any particular electronic message.

The function of a network service provider has to be understood in the terms of its role as a facilitator with respect to any particular electronic message between an "originator" and an "addressee". These network service providers act as intermediaries between the originator and addressee. This does not mean that all intermediaries are network service providers. For instance, a search engine like Google though may be referred to as an intermediary but it is not a network service provider.

It is possible that the "information publisher" is not only publishing its own "in-house" content but also buys from other content providers; this does not make the service provider "less of a publisher". An act of publication includes distribution also. The conditions under which they shall be liable are:

   a) The Internet Service Provider (ISP) knows, or has a reason28 to believe that the information content it is transmitting is unlawful.
   b) Regardless of the ISP's knowledge, it benefits directly from the transmission i.e., it receives benefits beyond the indirect benefit that it receives from internet access fees.
   c) The ISP fails to take reasonable steps to determine if the information content that it transmits is unlawful.

The Information Technology Act, 2000 provides that network service providers are not liable in certain cases, for any third party information or data made available by such providers, if it proves that the offence was committed without his knowledge,29 or that he had exercised all


27 Section 2(1) (w) of Information Technology Act, 2000.
28 Actual or constructive knowledge [Tennessee Code, 39-17-901(1)]
29 Knowledge here means actual or constructive knowledge of contents of the material which would put a reasonable person on notice.
due diligence to prevent the commissioning of such offence for the purpose of Section 79 of the Act. For the purpose of this section:

a) "network service provider" means an intermediary

b) "Third party information" means any information dealt with by a network service or provider in his capacity as an intermediary.

The position on ISP liability in India is the same as in other countries. However, with the enforcement of the Information Technology Amendment Bill 2008, certain additional grounds have been added whereby an intermediary shall not be liable for any third party information, data, or communication made available if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored and the intermediary observes due diligence while discharging his duties under the Act. The amended Section 79 of the Act, provides that intermediaries will be held liable if the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of an unlawful act.

In a very famous US case also known as the Demon case an anonymous posting through the ISP to its bulletin board was allegedly defamatory of Mr. Godfrey. Mr. Godfrey asked Demon to remove the posting but it refused to do so. He sued Demon for defamation. The court held that the ISPs hosting bulletin boards are 'publishers' and not merely passive carriers of information and, therefore, liable. The analogy of the bookseller was used. Demon agreed to pay approximately US$ 22,000 in damages and US$ 350,000 towards legal costs. This obviously opens doors for huge potential liability not only for ISPs but also similar web services. This issue is still debatable but underscores the importance of clarifying in the user agreement that the website had no responsibility or liability on account of any material posted on its public space.

As far as criminal liability is concerned, it would be useful to note that Section 75 of The Information Technology Act, 2000 would apply to any offence or contravention committed outside India by any person irrespective of nationality as long as it involves a computer, computer system or computer network located in India.
In the case of Westland Ltd. V. Flipkart, Westland had signed a two-month exclusive deal with Amazon for the sale of a book in question, and that Flipkart has violated the Copyright Act and the Information Technology Act, 2000 by selling the same on its platform. It would seem that this is a breach of an exclusive distribution contract on the part of Westland, and not even a copyright violation. The contention was that even if sellers were selling the book on Flipkart, the point to be taken into consideration was that the sellers were selling the book, and not Flipkart. They are therefore not directly liable by any count. The question, therefore, becomes one of secondary liability, i.e., intermediary liability. This case was filed in another country's jurisdiction. Westland Ltd, the Tata Group-owned publisher of the 'Scion of Ikshvaku', has now dragged Flipkart to the Delhi High Court, alleging that the e-commerce company is violating copyrights and Information Technology Act, 2000 by selling the novel on its platform (the same issue as in the above mentioned case filed in another jurisdiction).

Flipkart however, denied any violation. Flipkart is a marketplace which helps sellers to connect with customers across the country. They themselves do not sell the books directly. The matter is sub judice as under Section 10 of Civil Procedure Code, 1908 before the Honourable Delhi High Court, which on 30 June 2015 declined to pass any restraint order against Flipkart India or any of the sellers on the sale of the said book.

CONCLUSION

An inference can therefore be drawn now from the research conducted, that the requirements for a binding contract to be made over the internet remain the same as mentioned under Section 10 of The Indian Contract Act, 1872 and are corollary to it. The offer acceptance dichotomy is now solved and it can be finally concluded that once acceptance has been delivered to the offeror or retrieved by the offeror, an e-contract is said to be concluded and no further steps towards the non-performance of the contract shall be entertained (as ruled by the Indian courts in various judgements mentioned above).

Intermediaries would include online marketplaces as mentioned under Section 2 (1) (w) of the Information Technology Act, 2000 and will be categorised to be network service

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providers as mentioned under Section 79. Therefore, these intermediaries shall be liable only in instances when they indulge in unlawful acts by conspiring or abetting or aiding the third parties. They shall not be liable in instances where the conduct of the third party is not known to them and they have exercised all due diligence to prevent the wrong from taking place.

The only debatable issue with this regard is whether these intermediaries would be classified as information carriers or information publishers. The Indian law courts with this regard are still to take a legal stand.