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Consumer Protection Bill
Balancing Consumer Rights with Ease of Doing Business
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In an effort to bring India's Consumer Rights framework up to speed, the Consumer Protection Bill, 2018 is contemplated and in public domain. In this article, we examine the overall bill and what it means for businesses that are engaged in the manufacture and sale of consumer goods and provide consumer services.

Consumer Protection Watchdog

Under the scheme of the Consumer Protection Act, 1986, businesses were accustomed to defending claims from consumers alone. The definition of a consumer which excluded transactions availed for commercial purposes, raised jurisdictional issues which itself led to frequent dismissals of complaints.

What the earlier Act did not have was an agency to proactively screen the market for prospective consumer rights violations and respond before a consumer suffered an injury due to defective goods or deficiencies in services.

The proposed bill, vide Section 2 (4) contemplates a Central Consumer Protection Authority whose functions will now include, among other things, regulating matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the

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rights of consumers as a class. As a natural corollary, the definition of a "Complainant" has been introduced which now not only includes a consumer or a consumer welfare organisation, but even the central and state government and the central authority specified in Section 2 (4).

Unfair Contracts

The present Act of 1986 largely addresses three principal kinds of consumer rights offences, namely, deficiency in services, defective goods and unfair trade practices. Yet, a common theme in most defences against consumer complaints involved taking shelter under contracts entered into with consumers that disclaimed liability through elaborate and overarching disclaimers. For example, a consistent pattern emerged in construction agreements where a builder could seek shelter under "Acts of Force Majeure", whose definition included even labour shortage. Considering that Acts of Force Majeure refer to factors beyond a party's power or control, the aforesaid expanded definition of force majeure events which included a builder's failure to keep adequate labour, seemed patently untenable. Yet, consumers disabled by disproportionate bargaining powers in such contracts, often agreed to such clauses which, though ultimately assailable before a consumer forum, nevertheless deterred a consumer from even contemplating legal recourse.

In order to ensure that the lopsided power dynamic between a consumer and the manufacturer/seller/service provider is addressed, the Act seeks to discourage and appropriately penalise "unfair contracts", which is defined as a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:— (i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or (ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or (iii) refusing to accept early repayment of debts on payment of applicable penalty; or (iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or (v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a

consumer, without his consent; or (vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.

This definition of unfair contract has wide ramifications for businesses. Banks and Financial Institutions must now refrain from the unhealthy habit of pre-closure penalties. Hospitality organisations must now review and rationalise their standard disclaimer about right to admission, considering they may no longer unilaterally terminate the contract. Builders cannot introduce unreasonable penalties disproportionate to the nature of default on the part of the consumers.

For start ups who are keen on hiving off their business as a whole, the ban on unilateral assignment of contracts would have to be suitably addressed in their agreements with the consumers.

While the ban on concepts like pre-closure penalties is admirable, considering it penalises borrowers who perform ahead of schedule in repaying their dues, the concept of second guessing a contract which is the product of voluntary consent does raise legitimate concerns about ease of doing business.

It also fundamentally challenges the decades of jurisprudence emanating out of the maxim, "Caveat Emptor". The buyer, if this bill does go through, need not be aware and can always challenge contractual obligations on the ground that it was an "unfair contract".

The wisdom of such a provision is debatable. Take for example the ban against unilateral termination. Section 14 of the Specific Relief Act, 1963 already contemplates "determinable contracts" and thanks to centuries of litigation, common law has an adequate understanding of contracts which are inherently not terminable and which by their nature, are in fact terminable. Greater utility would have been served by summarising the jurisprudence of determinable and terminable contracts, than by seeking to introduce an altogether new concept called "unfair contract". In addition, even the caution against unilateral assignment challenges conventional jurisprudence. As held in the case of *Benode Behary Roy v. The General Assurance Society Ltd.,* reported in AIR 1950 Cal 232 and *Kanpur Development Authority v. Sheela Devi,* reported in AIR 2004 SC 400, when parties enter into a contract and one party agrees that, within the contractual framework, one or both of them will have some unilateral powers, such powers are valid. We would assume that when unfair contracts are litigated, the challenge before the consumer courts of the country will be to try to harmonise conventional jurisprudence around contracts and the novel concept of unfair contracts.

It also raises a larger question around ease of enforcing contracts in India. If "unfair contract(s)" are considered a violation of consumer rights and even amounts to an injury warranting compensation under the proposed bill, then are those clauses which constitute unfair contracts incapable of enforcement on the premise that they are contrary to the law of the land? On one hand, the bill really bats for the underdog and intents to provide a level playing field to consumers transacting with big businesses, but the inherent scope for mischief in the said definition could potentially frustrate the larger efforts at improving India's scores in the ease of enforcing contract's index.

Enhanced liability

Liability in a consumer dispute rapidly evolving in a world where e-commerce has come to challenge brick and mortar based models of product and service delivery.

To begin with, the proposed bill calls for a fundamental review of warranties being provided by manufacturers and sellers alike. The definition of product liability, among other things, calls

for an examination of the "express warranty" being offered alongside the product. Section 2 (20) defines express warranty as any material statement, affirmation of fact, promise or description relating to a product or service warranting that it conforms to such material statement, affirmation, promise or description and includes any sample or model of a product warranting that the whole of such product conforms to such sample or model. Clearly, this provision is intended to address a whole range of misleading products in the market, ranging from spurious pharmaceutical goods which promise instantaneous weight loss to mass produced and tele marketed totems that promise to bring wealth in the place of poverty. This also fundamentally challenges ethically debated products like fairness creams. The liability contemplated appears to be strict in nature and therefore independent of the burden to establish negligence or fraud on the part of the manufacturer or seller.

But where the bill could be a cause of concern, is in its understanding of the term "product seller". Under the Act of 1986, a consumer, to qualify for protection under the Act would have to establish the passing of consideration for the purchase of goods or services or at least a promise to pass such consideration. This often translated to the requirement of producing a purchase invoice or a purchase order. Thus, online marketplace providers like Amazon, who merely provided virtual space and supply chain support to enable seller-buyer transactions, would largely avoid liability under the 1986 Act. After all, the invoice for the purchase was issued by the seller to the purchaser and not by the e-commerce platform provider. This bill on the other hand, defines a product seller as not only someone who sells goods but also someone who markets or otherwise places such products for commercial purpose. Further Section II (37) (c) (II) excludes from the definition of a product seller, a person who is "not a electronic service provider". The confusing use of the double negative seems to suggest that electronic service providers are now placed on par with product sellers, as far as consumer rights in the country is concerned.

For e-commerce platform providers, the new bill represents an unprecedented obligation to verify sellers, verify products and ensure a process is put in place where intelligence can be collected real time on complaints and remedial action is initiated to safeguard consumer rights.

Also, the seller agreements and agreements with manufacturers and distributors will have to ensure adequate representations, warranties and indemnities to safeguard against the particularly vulnerable exposure to liability under the new law.

What next?

The Bill is a fantastic beginning to what could be a comprehensive legislation for the consumer rights movement in India. That, being said, the bill must make an effort to also ensure honest traders, sellers and manufacturers don't find themselves frequently before consumer forums.

It is great to see that endorsement of products or services by making impractical promises through advertisements, which cannot be fulfilled, can attract exorbitant penalty and imprisonment. Under this provision, not only the manufacturers, sellers or service providers but also the endorsers such as celebrity endorsers can be held accountable for making misleading endorsements. Placing responsibility on the endorsers to do their homework and choose their brands would perhaps greatly curb the patently false representations being pushed through advertisements.

Lastly, we hope to see the bill clarify the issue of jurisdiction in consumer disputes, particularly where the transaction is done online. For startups in the e-commerce domain, this would greatly assist the cause for resource planning to defend such claims or even respond earlier in order to prevent escalation to a consumer court.

Conclusion

Though the final shape of the bill will be known to us only in time, the bill itself is a wake up call for businesses and consumers alike. We suggest businesses to take the following steps in anticipation of the bill,

a. Review the science leading to express warranties and ensure adequate documentation to justify the statement contained in the express warranty. From the "best before" details to the anticipated utility of the product, ensure evidence is collated to justify the science behind the statement or warranty itself.

b. The general rule of good drafting mandates fairness in a contract. It is time to put that principle into practice. But also ensure that correspondences with consumers, especially those in writing, adequately reflect a democratic process leading to the contract. For a consumer contract, it is no longer sufficient to document consent. Effort must be made to document informed consent for the contract itself.

c. For banks and financial institutions, it is time to carefully review pre- closure penalties. They may be on their way out and ensuring the absence of such clauses would greatly undo the damage of the contract itself being challenged as contrary to law.

d. For builders- offer realistic deadlines for completion, ensure fair penalties for failure to meet deadlines either for payment or for completion and avoid creative definitions of force majeure which may defy common sense.

e. E-Commerce operators must introduce representations and indemnities in their agreements with sellers and even secure insurance considering the large ecosystem that they work with often makes verification of individual sellers and products untenable. Furthermore, e-commerce operators must introduce pro-forma declarations for sellers that their products are compliant with the express warranties contained therein.

TRAI Recommends In-Flight Connectivity- Implications for Satellite based services

-By Priya Subramaniam[3] and Ashok G.V.[4]

Introduction

In-Flight Entertainment and Connectivity or "IFEC", is an umbrella term encompassing a wide range of entertainment and mobile/internet connectivity services offered to passengers during aircraft travel. In its earliest form, IFEC services included screening of movies on a single screen during flight and preloaded music content made available on personal devices. In recent times, many airlines are offering wi-fi based internet connectivity and streaming of entertainment content during flights.

The technology infrastructure employed to provide IFEC services can either be through satellites or through ground stations and equipment set up on ground along the flight routes. Considering the cost and effort involved in setting up of this kind of infrastructure, airlines may either make the investment themselves or engage the services of third parties like GoGo or Panasonic Avionics to provide IFEC services to airline passengers.

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While IFEC services are fast becoming ubiquitous overseas and are frequently provided on many international routes, customers in India have not been able to reap the benefits of such services either while overflying the territory or domestically. The reasons could be many, ranging from the yet evolving business case around IFEC services for airlines in India to the efforts involved in procuring and/or setting up the infrastructure. That being said, one of the key challenges for IFEC services is the absence of an enabling regulatory framework.

Summarising the recommendations

Telecom Regulatory Authority of India, ("TRAI") has recommended that both Internet and Mobile Connectivity on Aircraft services may be permitted by the Department of Telecommunication by carving out a *sui generis* regime under the category heading "IFC Service Provider". In addition,

a. Permission for the provision of IFC services can be given to the registered IFC service providers by making the rules under Section 4 of Indian Telegraph Act, 1885. These rules are yet to be framed.

b. IFC Service Providers may be Indian or foreign entities and provide services by entering into an arrangement with a Licensee under the Unified License Regime.

c. IFC Service Providers who use satellite uplink for their services should look at partnering with a Unified Licensee that either has a license for "Commercial VSAT CUG Service Authorisation" or "National Long Distance Service Authorisation".

d. It is inevitable that one IFC Service Provider will be expected to situate their gateway in India to enable intercept and monitoring by Indian authorities.

e. In a move that will give much needed encouragement to IFC Service Providers, a token license fee of Rs. 1/- per year is required to be paid for the grant of the license.

f. Satellite Link may be achieved through INSAT systems or through systems outside of INSAT by entering into an arrangement through the office of the Department of Space.

The Question of Satellite Capacity

While TRAI has initiated the process of enabling an IFC economy in India, the larger regulatory regime needs to be suitably reviewed to make this a reality. Firstly, IFC Service Providers have been given the option of either securing satellite capacity from INSAT or from the private sector through the offices of the Department of Space.

Satellite capacity, as on date, can be broadly classified under two categories, a) Capacity owned by the State and b) Capacity owned by non Indian private enterprises. As a matter of practice, Antrix aggregates the demand for capacity and then goes about procuring it from state and non state capacity providers. However, the symbiotic relationship of ISRO and Antrix provokes apprehensions of a conflict of interest in the industry. Consequently, there is a need to revamp the process and role of the state on the subject of leasing of capacity, in order to inspire confidence in the industry.

Use of INSAT capacity is regulated by the SATCOM Policy and the Norms. The Policy authorizes capacity on the INSAT satellite systems to be leased to non-government (Indian and foreign) parties as well as for Indian parties to provide services including T.V. through Indian Satellites. Clause 2.5.2 read with Clause 2.6.2 of the SATCOM Norms specifies that a certain percentage of INSAT capacity will be earmarked for lawfully authorised non governmental users to provide telecommunication services including broadcasting or any other service so authorized by the Department of Space. However, the terms of the agreement for INSAT capacity, have been known to be stringent, often requiring payment of capacity fee prior to getting regulatory approvals, delays in accounting processes, overbearing indemnities and

exorbitant bank guarantees. The commercial feasibility of such practices remain debated in the industry.

The SATCOM Norms outright prohibit the second option of availing services through foreign satellites unless specifically permitted by the Indian government. While the emphasis on supporting Indian satellite systems was admirable through what appears to be a form of affirmative action or positive discrimination, chronic shortage of available capacity nevertheless has enabled a robust market for private satellite service providers. In fact, a third of the 286 satellite transponders in use over India were non Indian.[5] The engagement with these non Indian actors involves a tri-partite arrangement between the customer, Antrix and the non Indian satellite service provider. Antrix, as the commercial arm of the Indian space program retains a central role in facilitating this relationship by aggregating the demand among customers and then floating requests for proposals with non Indian actors, which eventually culminates into the aforesaid tri-partite arrangement. Antrix plays a key role in negotiating and determining the terms of the transponder lease between the customer and the non Indian state actor.[6] This arrangement has also been controversial, with both service providers and customers feeling particularly vulnerable to disruption and high migration costs.[7]

Way forward

We believe that the move by TRAI to recommend In-flight connectivity services would enable economic opportunities for both state and the airline operators. Furthermore, customers in

5. http://www.thehindu.com/news/national/karnataka/Chronic-capacity-shortage-sends-ISRO-searching-for-lease-of-overseas-satellite/article16946490.ece

6. http://www.thehindubusinessline.com/info-tech/as-transponders-lie-vacant-dth-industry-pitches-for-price-cuts/article8516644.ece

7. http://economictimes.indiatimes.com/industry/media/entertainment/media/isro-wants-dth-companies-to-share-transponders-on-one-satellite/articleshow/52441332.cms

India will look forward to an enhanced flight experience. Overall, TRAI must be lauded for making these recommendations.

We feel however that these recommendations remind us of the need to embark on a comprehensive reform package for Satellite Communication Regulations in India. The Space Activities Bill will hopefully move ahead with speed and momentum and result in changes to the SATCOM Norms and Policy. The Government of India must now use the opportunity to review the SATCOM Policy and Norms and formulate transparent and business friendly guidelines for providing Satellite enabled communication services. Unless we enable "Ease of Doing Business" for availing and use of satellite capacity, both state owned and privately owned and addresses the problems discussed in this article, we fear that the market for IFC services will either not see much competition or will impose barriers of entry that will exclude smaller players. In turn, this will make IFC, both as a service and an experience, unaffordable.

Delhi High Court Notifies New Rules

-Kumar Sudeep[8]

The High Court of Delhi has recently notified a new set of rules that will regulate the practice of ordinary original side civil suits i.e., ordinary civil suits which are instituted at the High Court of Delhi as the court of first instance. The new rules titled Delhi High Court (Original Side) Rules, 2018 replace the earlier set of rules that had governed the practice on the original side since 1967, and come into effect from the 1st of March, 2018. The new rules have as their aim the faster disposal of civil suits while ensuring the efficiency and efficacy of justice delivery in such process.

The rules include several provisions for checking unnecessary adjournments and delays during trial, imposition of costs to deter frivolous litigation, fixing the time allotted for hearing short-cause and other matters etc.

Chapter XXIII pertaining to costs, for instance, provides that:

"1. Power of Court/ Registrar General/ Registrar to impose cost.-
(i) If the Court considers any party abusing the process of Court or in any manner considered dilatory, vexatious, mala fide and abuse of process by them, the Court shall require the delinquent party to make deposit / payment upfront, in the manner directed by Court of such costs as the Court deems appropriate, before proceeding further in the matter. For the purpose

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of this Chapter, the expression ―Court‖ shall mean and include the Court, the Registrar General and the Registrar, as the case may be.

(ii) In addition to exercise of powers under Rule 1(i) above, the Court may impose suitable costs upon any party at any stage of the proceedings, including at the stage of filing any interlocutory application; framing of issues; determining order and conduct of recording evidence etc., if it considers imposition of such costs just, necessary and proper, according to the proceedings in the matter…"

Whereas Chapter X pertaining to interlocutory application provides that:

> *"2. (ii) Where an advance copy of the application has been served on the non-applicant or his Advocate, the Court shall proceed to hear the application and pass such orders as may be considered appropriate on the application without issuing any notice to the non-applicant or his Advocate, unless it directs otherwise. The applicant shall be bound to intimate the opposite parties by any or all modes including SMS/ e-mail/ fax or any other recorded delivery of the date on which the application is scheduled to be listed. Non-appearance of the non-applicant on the said date may result in adverse orders being passed against the non-applicant."*

Furthermore, Chapter XI pertaining to evidence and witnesses provides that:

> *"21. Court to ascertain time.-Before fixing a date for evidence or allotting time, the Court/ Registrar will ascertain from all the Advocates of parties, the estimate of the likely time that may be required in examination/cross-examination of witnesses by them."*

Chapter XIII that relates to adjournments provides that:

> *"1. Adjournments to be to a day certain. – All adjournments shall be to a day certain. No suit or matter shall be adjourned sine die except for reasons recorded in writing. No adjournment shall be granted except on good cause and in exceptional and unavoidable circumstances. Consent of parties by itself shall not be a good cause for seeking adjournment. An adjournment shall be on*

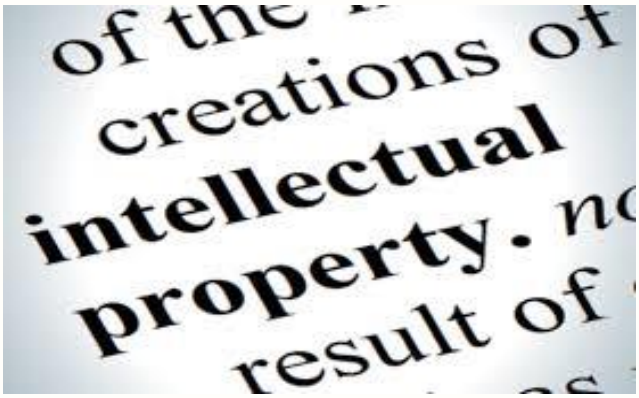
such terms as ordered by the Court/ Registrar, including imposition of exemplary costs as provided in Chapter XXIII of these Rules."

The above examples are only few of the new set of rules that help demonstrate the new approach towards faster yet efficacious disposal of ordinary civil suits envisaged and implemented through the Delhi High Court (Original Side) Rules, 2018, and engender some optimism. The working of the new rules and their application in practice will of course be a continuous exercise undertaken by the Bar and the Bench.

We are of the opinion that the Delhi High Court (Original Side) Rules, 2018 along with the Commercial Courts Act, 2015 (that is already in force) mark the beginning of a new era in the practice of civil litigation before the High Court of Delhi, and are to the great benefit of practitioners and above all to the benefit of the numerous litigants who approach the High Court of Delhi seeking justice in their causes.

IPAB Gets a New Chairman

-Kumar Sudeep[9]



In a recent development that touches upon the working of intellectual property rights regime in India, the Intellectual Property Appellate Board (IPAB) has got a new Chairman.

The Ministry of Commerce and Industry (Department of Industrial Policy and passed order no. P-24017/44/2017-IPR-I dated 29.12.2017 appointing Mr. Justice Manmohan Singh as the new Chairman of the IPAB. Mr. Justice Manmohan Singh was appointed as Additional Judge of the High Court of Delhi on 11.04.2008 and retired on 21.09.2016.

Mr. Justice Manmohan Singh has assumed charge as Chairman, IPAB from 01.01.2018. Trademark related hearings have subsequently commenced before the IPAB Bench comprising of the Chairman along with Mr. Sanjeev Kr. Chaswal (Technical Member - Trademarks).

It appears that at present the post for Technical Member -Patents at the IPAB is still vacant. With the appointment of a new Chairman, the intellectual property community is looking forward to and hoping for an early appointment of a Technical Member -Patents for patent related hearings to also begin in full earnest before the IPAB.

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Thank you

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