Chapter-7
Conclusion and Suggestions

Synopsis

7.1 Conclusion
7.2 Answers to The Research Questions
7.3 Suggestions
   7.3.1 Consumer Protection
      7.3.1.1 Suggestions for the Protection of the Consumers in Transactions over the Internet
      7.3.1.2 Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce
      7.3.1.3 Suggestions for the Protection of the Vendors/Suppliers in Transactions over the Internet
   7.3.2 Suggestions regarding Offer and Acceptance
   7.3.3 Jurisdiction
7.4 The Concluding Observations
After discussing the diverse facets of e-contracts all through the different chapters of this work, in first part of this chapter, the conclusion drawn from all the chapters is being presented. This will be followed by some suggestions put forth by the researcher.

7.1 CONCLUSION

Chapter-1 outlines the significance of communication and need for improved communication. In the modern world, the advanced means of communication (the computer, the internet, and the cyberspace) have collectively brought revolution in the field of information technology, which, in turn, has radically changed the life styles of people. Advancements in the field of IT have a deep impact on the economy of a country and also on the quality of human life. One of the chief areas wherein the information technology has made a tremendous impact is—‘business and commerce’. Information technology has created novel ways in which businesses can relate to their customers, suppliers, partners and investors.

Contract law, which forms the fundamental premise for any commercial or business enterprise, could not keep itself aloof from these developments. With the advent of information technology, companies and other business houses started using information technologies to prop up their trading relations. Consequently, there has been a shift from ‘paper-based transactions’ to ‘electronic transactions’. Accordingly, in trading relations, supported by modern information technology, traditional paper-based contracts are not found to be very efficient and effective instrument in so far as time and expenditure (transactional costs, etc) are concerned; and hence, electronic contracts have become a necessity. From the standpoint of contract law, it is the most appropriate time to understand the structural changes that are possible in this new world of business relationships and the emerging legal issues governing them. Some novel and exceedingly challenging questions have been posed. These questions are in relation to, ‘formation/ conclusion of e-contracts’, ‘validity and enforceability of such contracts’, ‘applicability of established principles of contract law to e-contract’, ‘jurisdictional issues in relation to e-contracts’, ‘consumer protection and standard form contracting in the electronic age’,
'resolution of disputes arising out of an e-contract', so on and so forth. It is this aspect, which has induced the researcher to pursue this research, in order to find the answer to these questions. This enterprise would, of course, need a detailed exploratory, critical, comparative, analytical and explanatory study. The researcher has attempted to find the answer to these questions/issues in different chapters of this thesis.

Chapter-1, after providing a brief introduction to the topic, sketches out the 'principle aims and objectives of the study', 'hypothesis' with which he commenced his research, 'scope and limitation' of the study, and 'methodology' adopted for the study. The first chapter concludes with a 'survey of literature' (of some important books and treaties, and a few research papers/articles).

**Chapter-2** deals with the general principles of contract. Traditionally, an offer and its valid acceptance are needed in order to form a contract. An offer is an indication of one party's willingness to get into a contract with the party to whom it is addressed as soon as the latter accepts its terms; while the acceptance is an agreement to the terms of the offer. In order to work out whether a statement amounts to an offer or acceptance, usually the court does not look at the intent of the person making the statement; instead, it looks at what his intention should have appeared to be to any reasonable person. To be brief, words are to be interpreted as they were reasonably understood by the person to whom they were spoken, not as they were understood by the person who spoke them. This is called as the principle of objective intention. A valid offer indicates that the offeror intends to be legally bound upon acceptance. Provided that the offeror demonstrates such an intention, it does not matter how many people he makes the offer to; so, an offer to the whole world is perfectly acceptable.

However, if the offeror's actions imply that he does not intend to be bound automatically upon acceptance, and that he makes no offer, (rather he makes) only an invitation to treat because his actions suggest that further negotiations will need to take place before a contract is concluded; then, the offeror is not legally bound. In
many day-to-day situations, it is unclear whether and, if so, at what stage each party intends to become legally bound.

The offeror can terminate his offer at any time but (he) must, in general, communicate this withdrawal to the offeree before the latter accepts the offer. Similarly, if the offeree rejects the offer, this will terminate the same. There are a variety of other ways by which an offer is terminated, such as by lapse of time.

To accept an offer, the offeree must demonstrate absolute and unqualified acceptance to its terms. It is said that as a general rule, a contract is only formed when the acceptance is communicated to the offeror, in addition to the satisfaction of other essentials. The acceptance will be taken to be ‘communicated’ when the offeree has taken all reasonable steps, using the prescribed mode of acceptance, to bring the acceptance to the notice of the offeror. In the case of acceptances by post, the common rule is that the communication of acceptance is complete when the letter is posted, not when it reaches the offeror. This rule, however, only applies where the parties contemplate that the acceptance might be posted, so this rule will not apply to the modern, quicker forms of communication (telephone, telex, e-mail, fax, etc). Even where a postal acceptance is contemplated, the postal rule will not apply where the offer expressly or impliedly requires actual communication of the acceptance.

After discussing the offer and acceptance rule, the chapter talks about other essential ingredients of contracts, such as, ‘competency of the parties’, ‘consideration’, ‘free-consent’, legality of object and consideration’ because these are also indispensable requisites of e-contracts.

Chapter-2 afterwards gives a brief survey of the different modes of discharge of a contract, and also provides a succinct appraisal of the diverse types of remedies available in the event of breach of contract. All these facets are, in general, applicable to all forms of contracts, including e-contracts.

Chapter-3 deals with the formation of an electronic contract. The wired world is impending. Electronic communications may soon become the most common method
of contracting. The way we live our lives will be changed forever by e-commerce, and to drive all this, the electronic contract has to be valued and respected in a similar manner as the oral or written contract. The above is, of course, gross hyperbole.¹ The internet is a remarkable communication tool, and indubitably, e-commerce will grow in importance; however, the internet is no more than a tool of communication like the telephone, telex or fax machine. Like these inventions and technologies, the internet communications have also been integrating into the laws and rules of contract. What is indisputably true is that electronic contracting is becoming commonplace, and in a few years’ time, a substantial percentage of both commercial and consumer contracts will be concluded in cyberspace. Although e-contracts do suffer some problems, not usually associated with oral or written contracts; yet these problems are easily surmountable, and, in most cases, by the simple application of existing rules. By asking three basic questions—when was the contract concluded? What are the terms of the contract? And where is the contract governed?—one can deal with most questions asked about a contract whether it is formed electronically or by more traditional means. There is nothing different in the eyes of the law a propos a contract formed in cyberspace. These questions are equally valid whether analyzing traditional contracts or electronic contracts. To answer these questions, it is pertinent to know the application of offer and acceptance rules to e-contracts. Chapter-3 discusses these issues in detail.

As soon as an offer is sent over the internet, the sender loses control over the route and delivery time of the message. In that sense, it is analogous to ordinary posting. Notwithstanding some real differences with posting, it could be argued cogently that the postal rule should apply to e-mail acceptances; in other words, that the acceptance is made the instant the acceptance is sent. There are, however, some sound reasons to argue against such a rule in favour of the recipient rule. It must be borne in mind that while the common law jurisdictions continue to wrestle over this vexed issue, most civil law jurisdictions lean towards the recipient rule. In support of the latter it could be argued that unlike a posting, e-mail communication takes place

in a relatively short time frame. The recipient rule is, for that reason, more convenient and relevant in the context of both instantaneous or near or virtually instantaneous communications. Notwithstanding rare failure, most e-mails arrive sooner rather than later. It may thus be concluded that contracts concluded through e-mail communications should also be subject to the same offer and acceptance rules as in the case of telephone or telex, i.e. the 'receipt/ recipient rule', and not the 'postal/ mail-box rule'.

The applicable rules in relation to transactions over the worldwide web seem to be clearer and less controversial. Transactions over websites are almost always instantaneous and/ or interactive. The sender usually receives a prompt response. The recipient rule seems to be the logical default rule. Application of such a rule may, though, result in contracts being formed outside the jurisdiction if not properly drafted. Web merchants must ensure that they either contract out of the receipt rule, or expressly insert salient terms within the contract to deal with issues such as a choice of law, jurisdiction and other essential terms relating to the passing of risk and payment. Failure to do so could also bring about calamitous repercussions. Merchants might find their contracts formed in foreign jurisdictions and, therefore, subject to foreign laws.

Occurrence of mistakes is inevitable in the course of electronic transmissions. This may result from human interphasing, machine-error or a combination of such factors. Examples of such mistakes could include (a) human error (b) programming of software errors and (c) transmission problems in the communication systems. Computer glitches may cause transmission failures, garbled information or even change the nature of the information transmitted. Such errors can be magnified more or less instantaneously and may be harder to detect than if made in a face to face transaction or through physical document exchanges. The question is as to who bear the risk of such mistakes. It is axiomatic that general contractual principles apply, but the contractual permutations will obviously be sometimes more complex and spread over a greater magnitude of transactions. The financial consequences could also be

2 Chwee Kin Keong v Digilandmall com Pte Ltd [2004] 2 SLR 594; [2004] SGHC 71 case is a paradigm example of an error on the human side.
substantial. The court has to be cautious and should adopt a pragmatic and judicious stance in resolving such issues.

The amalgam of factors a court will have to consider in risk allocation ought to include: ³

i. the need to observe the principle of upholding rather than destroying contracts,

ii. the need to facilitate the transacting of electronic commerce, and

iii. the need to reach commercially sensible solutions while respecting traditional principles applicable to instances of genuine error or mistake.

It is important that the law be perceived as embodying rationality and fairness while respecting the commercial imperative of certainty.

Chapter-4 deals with the validity and recognition of e-contracts. An e-contract is very-well suited to facilitate the business processes taking place at many firms, companies, and other business houses involving a composite of technologies, processes, and business strategies that aid the instant exchange of information. It has its own advantages and disadvantages. At the one end, it reduces costs, saves time, fastens customer response and improves service quality by reducing paper work. With the help of an e-contract, e-commerce is anticipated to improve the productivity and competitiveness of participating businesses by providing unprecedented access to an on-line global market place with millions of customers and thousands of products and services. At the other end, since, in e-contract, the proposal focuses not on humans who make decisions on specific transactions, but on how risk should be structured in an automated environment, therefore, the challenge before the legal community is to create default rules for attributing a message to a party so as to avoid any fraud and discrepancy in the contract.

Thus, in this cyber age, the legislature is under a duty to come up with a fool proof piece of legislation so as to accomplish three-fold objectives: firstly, to maintain pace

³ Ibid, at 103.
with the advanced technology in every sphere and not to hinder the swift pace with which the e-commerce is mounting; secondly, to provide necessary legal checks so as to counteract the vitiating factors in the formation and enforcement of a contract, and hence protect the party who is in an inferior bargaining position and; thirdly, to maintain the spirit of a contract.

When it is considered how the contract law has evolved over time to keep pace with contemporary economic realities, it is important not to take previous legal developments, such as the objective theory of acceptance, for granted. The sound principles of contract law already evolved and developed over time may need to be re-evaluated and adapted to ensure that the fundamental goals of contract law are upheld. While the internet and electronic environment has posed challenges to traditional contracts law, these developments can also be viewed as an opportunity to improve the law and get closer to fundamental contracting principles, such as consensum ad idem.

In this chapter, the researcher has dealt with those laws, rules and regulations, along with relevant amendments which have been made by India for governing e-contracts. And, of course, comparison has also been made with those found in the US, and the EU, and other common law countries. From the foregoing discussion, it is quite evident that e-contracts (with all the different types) are valid and enforceable. This proposition is duly backed by both, the judicial approach and the legislative actions. The enforceability of click-wrap, shrink-wrap and web-wrap agreements is a developing and growing matter. Practitioners should strictly monitor developments in this area and periodically review their clients’ practices.

The rationale behind the e-commerce legislations of the EU and the US is analogous in that they create legal certainty by validating electronic contracts. Yet, the US laws are broader in scope. UETA swathes all types of contracts, not just electronic contracts, and UCITA covers all types of computer information contracts. In contrast, the EU directives characteristically deal only with consumer contracts by exempting B2B transactions. The E-Commerce Directive contains wide-ranging information requirements prior to the conclusion of the contract and the mandatory requirement of 3-steps procedures for the formation of contract. UETA defers to the
other laws in providing the answer on what information must be provided and does not require 'confirmation' as a requisite to contract formation. UETA and UCITA offer more extensive guidelines on the issue of mistakes, contracts through electronic agents, and they elucidate the exact moment when a contract is concluded.

Following the UNCITRAL Model Law on E-Commerce, India has also enacted its IT Law which validates the formation of contracts electronically. In the IT Act, there are some provisions, in particular Ss. 10 A, 11, 12 and 13 which deal with 'validity of contracts formed through electronic means', 'attribution of electronic records', 'acknowledgment of receipt', and 'time and place of dispatch and receipt of electronic record' respectively. S. 10A recognizes the formation of contracts electronically. S. 11 says as to who would be the person making an offer or giving an acceptance in case of e-contracts. S.12 provides solution to the problem of communication of acceptance or rejection in case of e-contracts by specifying the form of acknowledgement of receipt. So, whenever there is a question as to the acceptance by a party to an e-contract, the same can be straight away answered by invoking S.12. In the same way, S. 13, at length, lays to rest any uncertainties regarding the time and the place of entering into an e-contract. By making the time of receipt of an electronic record dependent on the nature of computer resource, which it is entering, this section takes care of all contingencies/ possibilities that may arise in case of inconsistencies about the time of receipt in the course entering into an e-contract. Furthermore, by making the place of dispatch of an electronic record a function of the physical place of business or of residence, as the case may be, of a person, all doubts and uncertainties regarding the place entering into the contract are removed. Therefore, the jurisdictional problems associated with the enforcement of e-contracts are worked out to a great extent by S. 13 of the IT Act.

Further, in tune with the change brought about by the IT era, India has also amended its existing laws, such as Evidence Act, IPC, etc.

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282
One question that inevitably arises, after the conclusion of any contract (including e-contracts), is regarding the time ‘when’ and the place ‘where’ the contract was actually concluded. In Chapter-4, the questions of when and where a contract is said to have formed have been answered. In Chapter-5, the question regarding where it is governed and enforced is answered.

Imposing the traditional common law principles of jurisdiction to the borderless world of internet transactions has proved to be very challenging for the courts and has resulted in the application of a myriad of different tests and principles.

Is the internet necessitating an evolution or a revolution in legal thinking? The legal community disagrees about whether the internet is yet another breakthrough that can be incorporated into the classical legal principals or whether the medium is so inherently different from reality that an entirely new paradigm is necessary.\(^5\) The preceding notions of jurisdiction are based on a physical reality which does not exist in cyberspace. Actions in the virtual world of the internet, however, have legal ramifications in the tangible world.\(^6\) For that reason, and due to the undefined dangers involved in the wholesale creation of new legal principals, established norms should be used to regulate this new technology. Personal jurisdiction arising from internet contacts poses the most difficult application of traditional law. Lot of attention has been paid recently to jurisdictional issues arising from the maintenance of websites. There are, nevertheless, other methods by which persons can cross jurisdictional lines via the internet.

The decisions subsequent to CompuServe suggest a number of truths. Firstly, approach of giving huge significance to physical presence is gone. Even though the Court determined, in International Shoe\(^7\), that physical presence was not necessary in order to exercise jurisdiction, yet the Court did not hold that physical presence was irrelevant. Only in recent years has physical contact with the forum State been

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7 326 US 310 (1945).
viewed at par with the other factors that the court considers. In view of the nature of
the modern world, this change is reasonable and necessary. Physical presence was
indeed vital at a point in time when people had very little ability to affect anyone
from a distance. Modern technology has allowed the average person to travel farther
and faster more frequently. Greater mobility has increased the possibility that a
person's legal rights can be affected by someone who resides a great distance away.
Modern technology allows a person to diminish another's legal interests without ever
stepping foot in the same jurisdiction. For the reason that there are so many ways to
harm a person without physical presence, it has very little value when deciding
jurisdiction. Secondly, the application of the expansion of the traditional principles of
jurisdiction should be done only to the extent necessary to cover the facts of the
individual case, and not to cases where this expansion is not needed.

Finally, contacts made through internet contacts, different from those made through
websites, are conceptually easier to deal with than trying to find jurisdiction based
solely on website activity. For that reason, the courts have separated the two kinds
of cases and applied differing analysis. When the court looks at internet contacts
arising from more than the maintenance of a website, the facts can easily fit within
the traditional jurisdiction analysis.

Thus, the US courts have been successful in interpreting the personal jurisdiction
principles in online setting. In fact, their case-law is growing and courts have
introduced novel measures to resolve disputes, like nature of website, sliding-scale
method, geographical location of users, website owner and web server. Even the
traditional measures, such as, the terms of service-agreements, disclaimers, choice of
law or forum clauses are playing an important role. Across Atlantic, in Europe the
approach is more convention and directive based and the Brussels Regulation is one
stride to harmonize e-commerce rules and regulations at least in EU countries.

The Indian legal system is in harmony with other legal systems, and the Indian legal
system definitely gives due credence to the conflict of law approaches. If in the US,
the emphasis is on 'minimum contacts' and 'purpose availment' to establish personal

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9 Cheryl L Conner, *supra*, n 5.
jurisdiction, then in India, the emphasis is on 'cause of action'. In India, as the case law on e-commerce dispute resolution is still almost non-existent, it would be prudent on the part of the judges to take cognizance of the US and EU case laws; however, not at the cost of already established 'Indian' principles. Indeed, it is necessary to understand the technology issues involved while deciding the question of personal jurisdiction, but law should not be made subservient to technology.

The questions regarding the legality of e-contracts have been satisfactorily resolved, to a great extent, both on a national and international basis. This has been primarily discussed in Chapter-4. Electronic contracting is now in the second phase, where newer, or some would say older, issues have surfaced.\footnote{Amelia H Boss, 'Electronic Contracting: Legal Problem or Legal Solution?', Available at <http://www.unescap.org/tid/publication/tipub2348jiart2iv pdf> (accessed: 24 December 2011).} Chapter-6 discusses these relatively new issues. The current issues are not necessarily unique to electronic commerce, but are critically important in the evolution of electronic market places. These issues concern a few significant areas. The first issue is concerning assent, although it is clear that one can validly assent electronically. However, it is still not clear what substantive rules will govern the issues relating to assent in e-contracts. In particular, the question relates to what rules apply to the characteristic modes of contract formation in an electronic environment (shrink-wrap, click-wrap, and browse-wrap). In that context, a key issue is to what extent would there be policing of the terms of the resulting agreement.

A second set of correlated issues is concerned with the degree of consumer protection which exists/ does not exist in an electronic environment. The third set of issues lays emphasis on the occurrence of error in the contracting process. The fourth set of issues is in relation to the question: how does the law accommodate negotiable transfer documents that are paperless?

Contractual terms may consist of express terms, such as those embodied in a standard form pre-printed contract (or its electronic equivalent agreements); implied terms, which are incorporated on the basis of the circumstances, e.g. advertisements that are deemed to constitute an offer, or part of an offer, or terms that are
incorporated by consumer protection legislation; and finally, the terms that are incorporated by reference to another document.

The rise of ‘terms of use’ has drawn a great deal of attention because of the mass-market nature of the resulting agreements. Terms of use are drafted keeping consumers or other small end users in mind. Commentators have blitzed the impact of this new form of contract on consumers. But in the long run, terms of use may have their most significant impact not on consumers, but on businesses.11 The law has paid some attention to the impact of terms of use on consumers: virtually all of the courts that have refused to enforce a browse-wrap license have done so to protect consumers.12 Conversely, virtually all the courts that have enforced browse-wrap licenses have done so against a commercial entity, generally one that competes with the drafter of the license.13 Further, those courts that have enforced shrink-wrap and click-wrap licenses against consumers have protected consumers against certain clauses considered unreasonable.14 The problems ‘terms of use’ pose originate from a combination of factors: judicial willingness to weaken or even eliminate the notion of assent when presented with a form that purports to be a contract, and the ease with which technology allows companies (and perhaps even individuals) to present forms that purport to be contracts. All contracts need not be look like the prototypical

12 See, e.g., Campbell v Gen. Dynamics Gov’t Sys. Corp., 407 F.3d 546, 556–57 (1st Cir. 2005) (noting that an employer could not make a policy a provision of an employment agreement merely by posting it on the employee intranet); Waters v Earthlink, Inc., 91 F.App’x 697, 698 (1st Cir. 2003) (refusing to enforce an arbitration clause posted on a Web site in the absence of proof the consumer had seen the clause); Specht v Netscape Commun’ns Corp., 305 F.3d 17, 35–38 (2d Cir. 2002) (refusing to enforce browse-wrap against consumers). One partial exception to this statement is Dyer v Northwest Airlines, 334 F. Supp. 2d 1196, 1199–1200 (D.N.D. 2004), which held that a privacy policy posted on a Web site was not enforceable as a contract against the posting company. It is worth noting that in Dyer the plaintiffs brought a consumer class action suit and could not demonstrate even that their members had accessed the site in question. Cited in Mark A Lemley, ‘Terms of Use’, supra, n 11.
14 For example, courts have been unwilling to enforce onerous arbitration and choice of forum clauses against consumers, even when the consumer agreed to a standard form imposing such requirements. And the Uniform Computer Information Transactions Act (UCITA) forbids the use of electronic self-help in mass market transactions, even if the parties agree otherwise. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 816 (2001).
model of sophisticated parties bargaining over terms. But as the notion moves further and further from that model, it introduces problems into contract law analysis, because the principles of contract law fit less and less well with the things we call contracts. At some point it makes little sense to talk of parties agreeing at all, and people need to fall back on substantive law to govern disputed conduct.

Electronic contracting has experienced a sea change in the last decade. Shifting from the world of paper contracting to electronic contracting presents something of a mixed bag for courts and lawmakers concerned about standard forms.\textsuperscript{15} The internet has created new procedures, and so obviously, should affect how courts assess the procedural aspects of unconscionability. By and large, the electronic environment enhances consumers' abilities to investigate products and businesses, thereby making it easier for consumers to protect themselves from exploitation.

However, it is also true that several new features of the electronic environment suggest novel means by which businesses using standard forms might exploit consumers. Also, many important factors, including all of the cognitive considerations, suggest that courts maintain the same level of vigilance about electronic standard-form contracting that they have applied to the paper world.\textsuperscript{16}

Notwithstanding the rational benefits to the consumer of the electronic world, and the elimination of social pressures, in the main, e-consumers are as unlikely to investigate and to understand the importance of the standard terms as their paper-world counterparts. Therefore, courts must continue to be concerned that consumers will unwittingly enter into standard-form agreements that are primarily exploitative rather than mutually beneficial.

All the same, for lawmakers the issue of the enforceability of electronic standard terms will not go away. It is believed that e-consumers, in general, fail to use the extra time and resources provided by the electronic environment to understand and


\textsuperscript{16} Ibid.
weigh the importance of standard terms. At most, consumers use this time to comparison shop over prices, quality of the goods or services, and perhaps businesses’ reputations.\textsuperscript{17}

The internet contracting is not essentially different from the paper world. Consequently, major changes in the approach of contract law are not imperative. The era of e-standard form contracting does not require a major overhaul of contract law, and hence, does not necessitate a fundamental change of mind. Standard-form transactions thus remain within the sphere of contract, which itself serves the symbolic purpose of substantiating society’s freedom.\textsuperscript{18} However, it does suggest the need for lawmakers to refine their approaches to take into account new opportunities for both businesses and consumers to enhance their positions in the e-world.

Although the electronic environment is in fact a novel advance in the history of consumerism, existing contract law is up to the challenge. The influences that affect the judicial approach to the enforcement of standard terms in the paper world also inclined to affect the electronic world or have close parallels in the electronic world. The fundamental economics of the two kinds of commerce are identical. In both the paper and the electronic worlds, businesses choose between adopting a set of boilerplate terms that are mutually beneficial or exploitative.\textsuperscript{19} In both worlds, these business houses know more than consumers about the contractual risks, thereby creating an opportunity to exploit consumers. At the same time, in both worlds, consumers can defend themselves by investigating these terms or by making their purchasing decision based on a business’s reputation.

E-commerce brings novel weapons and defences to both businesses and consumers, but the basic structure remains intact. Courts in both worlds should either trust the market and enforce the standard terms, or decide that the market has failed and refuse

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{17} Ibid. They (authors) also believe that any incentives to avoid unfair terms based on reputational concerns that businesses might face are likely to be fleeting.
\item \textsuperscript{18} See James J. White, ‘Contracting Under Amended’ 2-207, 2004 Wis. L. Rev. 723 (2004). ‘Perhaps we would have a more just society if relations between consumer and merchants appeared more honest, even if there is no change in consumer behavior or consumer transactions.’ William C. Whitford, ‘The Functions of Disclosure Regulation in Consumer Transactions’, 1973 Wis. L. Rev. 400, 404, 439.
\item \textsuperscript{19} Hillman, Robert A & Rachlinski, Jeffrey J., supra, n 15.
\end{enumerate}
\end{footnotesize}
to enforce them. Therefore, the careful judicial balancing of caution at interfering with contracts and of concern about exploitation that courts have developed in the paper world applies equally well to the electronic world. Furthermore, at present, the relative balance of suspicion and deference with which courts approach paper boilerplate is probably the same balance with which they should approach electronic boilerplate. Some may even argue that the electronic environment gives consumers more opportunity to protect themselves. Yet, the cognitive perspective that consumers tend to adopt with respect to contractual risks makes it unlikely that many will take advantage of these new tools. In the same way, it can very well be argued that the electronic environment gives businesses new opportunities to exploit consumers.

Chapter-7 is the last chapter of this thesis. Over here, the researcher is presenting the conclusion on the basis of the critical study of the preceding chapters and also putting forth some suggestions and recommendations.

This chapter provides, in nutshell, the answer to various research questions, how the existing Indian laws (IT Act, Contract Act, etc) have facilitated, and regulated e-commerce, and have provided a legal framework for smooth conduct of business through electronic means. Besides, this chapter also points out the grey areas where Parliament should pay immediate attention, and (the chapter) also offers some thoughts on what is needed to improve upon the practice of electronic contracting for the future.

7.2 ANSWERS TO THE RESEARCH QUESTIONS

At this juncture, the researcher wishes to summarize the answers to his research questions:

1. What is an e-contract, and what are the different modes by which electronic contracts are formed/ concluded?

**Answer:** An e-contract is the computerized facilitation or automation of a contract in a cross-organizational business progression. It is the most recent mechanism to govern and facilitate electronic trading relationships between

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20 Ibid.
business parties, and is modeled, specified, executed, enacted, controlled, monitored and deployed (fully or partially) by a software system. Theoretically, an e-contract is very similar to traditional (paper-based) commercial contract. In an e-contract, all or some of the activities are carried out by electronic means. Therefore, as the name suggests, an e-contract means a contract formed in electronic form, fully or partially.

There are various ways in which online contracts can be concluded. The important ones are as follows:

i. Contract Formation through Electronic Communications (such as, e-mails)
ii. By Acceptance of Orders Entered/ Placed on E-Commerce Websites
iii. Online Agreements
iv. The Electronic Data Interchange (EDI)
v. Through Electronic Agents

Broadly, e-contracts may be classified into following three types:

i. Click-wrap Agreements
ii. Shrink-wrap Agreements
iii. Browse-wrap/ Web-wrap Contracts

2. Is the requirement of ‘offer and acceptance’ in contract formation with new modes of communication as much essential as it is (essential) in contract formation through postal communication?

Answer: Yes, the fundamental principles of contract law apply to all contracts notwithstanding whether they are formed electronically, orally or through paper based communications. Many of the issues that arise for consideration relate to how these conventional contract law principles will apply to modern forms of technology. However, the requirement of ‘offer and acceptance’ in contract formation with new modes of communication is as much essential as it is (essential) in contract formation through other means (postal, face-to-face communication, etc). The application of the offer and
acceptance rules to these more recent electronic technologies will go on with to operate effectively. The practical importance of the offer and acceptance rules is beyond question. There are quite a few reasons why are the offer and acceptance rules important in practice. Firstly, the offer and acceptance rules provide the answer to the question whether or not a contract is formed, at all; secondly, they also tell us when a contract is formed; and thirdly, they tell us where the contract is formed. The answers to these questions decide different issues, such as, ‘whether an online retailer is bound by an apparent agreement to sell goods at a significant undervalue arising out of a pricing error on its website’, the precise moment at which an offer is held to have been communicated will decide ‘when, the period within which, the offer must be accepted begins’, ‘the place where a contract is formed’ may still be of importance for the purposes of ‘jurisdiction’, so on and so forth.

3. **Whether or not an e-contract is a ‘valid’ / ‘enforceable’ contract?**

**Answer:** The simple answer to this question is—‘yes’, provided it satisfies all the essentials of a contract. Different types of e-contracts have been held valid and enforceable in a catena of judgments. Art 11 of the UNCITRAL Model Law on Electronic Commerce sets about the formation and validity of e-contracts. It provides that ‘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; and 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.’ This has been duly accepted by India in form of S. 10 A of the IT Act which validates the formation of contracts electronically. Further, in tune with the change brought about by the IT era, India has also amended its existing laws, such as Evidence Act, IPC, etc.

4. **Whether or not a supplier, making available details of goods and services with prices on a website, is deemed to have made an ‘offer’; or such act amounts to mere ‘invitation to make offer’?**
**Answer:** Several commentators like Chitty\(^2\), Simon P Haigh\(^2\), have pointed out that the principle (of *Pharmaceutical Society of Great Britain* and *Fisher v Bell*) would also seem to apply to the display of goods or services on a website, with the result that the offer is not made by the retailer, but by the customer when he places his order. Rajah JC, expressed a similar view in *Chwee Kin Keong v Digilandmall.com*, in the following words:\(^3\)

Website advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical. The reach of and potential response(s) to such an advertisement are however radically different. Placing an advertisement on the Internet is essentially advertising or holding out to the world at large. A viewer from any part of the world may want to enter into a contract to purchase a product as advertised. Websites often provide a service where online purchases may be made. In effect the Internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical shopping.

Certainly, like shop displays and advertisements, there may be exceptional cases where an online display of goods or services is construed as a binding offer; for example, where the retailer states unequivocally that an item will be sold to the first ten customers whose orders are processed.\(^4\) In these circumstances, the placing of the order by such customers will amount to acceptance of the offer, and the contract will be formed at that time. In *Chwee Kin Keong*\(^5\), Rajah, JC, observed that ‘...pertaining to a display of goods for sale. The goods are not an offer but are said to be an invitation to treat. The prospective buyer has to make an offer to purchase which is then accepted by the merchant. While this is the general principle for shop displays, it is open to a merchant to offer by way of an advertisement the mechanics of a unilateral or bilateral contract. This is essentially a matter of language and intention, objectively ascertained. As with any normal contract, internet merchants have to be cautious how they present an advertisement, since this determines


\(^4\) [2004] 2 SLR 594; [2004] SGHC 71, at [93].

\(^5\) *Chitty on Contracts*, supra, n 21, para 2-015.
whether the advertisement will be construed as an invitation to treat or a unilateral contract. Loose language may result in inadvertently establishing contractual liability to a much wider range of purchasers than resources permit.'

5. *Whether or not an e-contract satisfies the legal requirements of reduction of agreements to signed documents?*

**Answer:** The World Wide Web (WWW) is an open trading environment, so one of the primary concerns of the costumers and traders is—the security in e-commerce. One solution that has been acquiring popular support is the electronic signature. Electronic signature means authentication of any electronic record by a subscriber by means of an electronic technique specified in the Second Schedule and includes digital signature. An electronically signed document is as much authentic as actually signed document (in paper-based world).

Evidence recorded or stored by availing the electronic devices has been granted the evidentiary status. For example, the voice recorded with the help of a tape recorder, the digital voice recorder, digital cameras, digital video cameras, video conferencing have been added to new evidentiary assets. The position of video conferencing, call records relating to cellular phones and e-documents in the form of SMS, MMS and e-mail in India is well demonstrated under the law and the interpretation provided in various cases. In *State of Delhi v Mohd Afzal*²⁶, it was held that electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it has to prove the same beyond reasonable doubt. The Court made an observation that mere theoretical and general apprehensions cannot make clear evidence defective and inadmissible. This case has very well demonstrated the admissibility of electronic evidence in various forms in Indian courts.

²⁶ 2003(3) 11 JCC 1669.
The information technology era and the IT Act have brought with them some changes in some statutes, including the Indian Evidence Act 1872. These amendments were necessary in view of the evidentiary value of electronic record, electronic signature, and, of course, electronic contracts. The evidentiary value of e-contracts can be well appreciated in the light of the following provisions (discussed below) of the Indian Evidence Act. Ss 85A, 85B, 85C, 88A, and 90A deal with the presumptions as to electronic records, while Ss 65A and 65B are related to the admissibility of electronic record.

There are several methods to sign documents electronically. These electronic signatures range from very simple method (for example, inserting a scanned image of handwritten signature in a word processing document) to very advanced methods (for example, using cryptography). Akin to the signature used on written documents, electronic signatures are now being used to identify authors of e-mail or other information objects of electronic data.

It is worth-mentioning that the IT Act explicitly excludes its applicability with regard to the following documents and transactions [First Schedule to the IT Act 2000 (as amended in 2008)]:

i. A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act 1881.

ii. A power-of-attorney as defined in section 1A the Powers-of-Attorney Act 1882.

iii. A trust as defined in section 3 of the Indian Trusts Act 1882.

iv. A will as defined in clause (h) of section 2 of the Indian Succession Act 1925, including any other testamentary disposition by whatever named called.

v. Any contract for the sale or conveyance of immovable property or any interest in such property.
6. How does an e-contract manage and coordinate the activities performed by different parties?

Answer: From the answers to the above questions, it is evident that electronic contracts are almost same as other hard copy contracts in so far as its evidentiary value is concerned. All electronic contracts are valid contracts as they are legalized by the IT Act alongwith the amendment (effected in the year 2008), and, therefore, one could be made liable if there is any infringement with the terms and conditions. An e-contract is also discharged (managed and coordinated) in the same way like a contract concluded otherwise.

Nevertheless, owing to the nature of the internet as a world wide web of linked networks and computers, e-contracts could give rise to some unique issues pertaining to jurisdictions.

7. How is the jurisdiction of courts in relation to an e-contract determined? How are the disputes arising out of an e-contract settled in a court of law?

Answer: Indian law, on the assumption of jurisdiction in internet disputes is theoretically close to the position in the United States. Section 20 of the Civil Procedure Code 1908 (CPC) deals with jurisdictional aspects, and states that a court may assume jurisdiction in a case, when the cause of action arises within its sphere. This section, although more relevant to domestic courts and is essentially the domestic law of a country, yet it can be interpreted so as to apply to transnational issues as well as private international law. This provision for jurisdiction based on the cause of action is quite wide in its ambit, enabling the court to assume jurisdiction over a dispute regardless of where the principles are resident or the situs of the business, so long as a portion of the cause of action takes place within the local jurisdiction, while still having an implied standard set, in a way similar to the US long-arm jurisdiction provisions.

S. 13 of the IT Act addresses the issues of the time and place of dispatch and receipt of an electronic record, thus, addresses the issue of jurisdiction.
in electronic contracts. Clause (1) provides that the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator. With regard to receipt of the record, the law distinguishes between whether the originator has sent the message to a computer resource designated by the recipient to receive communications or a non-designated computer resource. Receipt takes effect at the time the electronic record enters the designated computer resource unless the record was sent to a non-designated computer resource, in which case it occurs at the time when the electronic record is retrieved by the addressee. Hence, it would seem that when the acceptance of an offer is emailed to a computer system designated by the offeror, the mailbox rule would not apply. Ultimately, the location of the computer resource is irrelevant. S. 13(3) states that an electronic record is deemed to be dispatched from the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

Thus, the US courts have been successful in interpreting the personal jurisdiction principles in online setting. In fact, their case-law is growing and courts have introduced novel measures to resolve disputes, like nature of website, sliding-scale method, geographical location of users, website owner and web server. Even the traditional measures, such as, the terms of service-agreements, disclaimers, choice of law or forum clauses are playing an important role. Across Atlantic, in Europe the approach is more convention and directive based and the Brussels Regulation is one stride to harmonize e-commerce rules and regulations at least in EU countries.

The Indian legal system is in harmony with other legal systems, and the Indian legal system definitely gives due credence to the conflict of law approaches. If in the US, the emphasis is on ‘minimum contacts’ and ‘purpose availment’ to establish personal jurisdiction, then in India, the emphasis is on ‘cause of action’. In India, as the case law on e-commerce dispute resolution is still almost non-existent, it would be prudent on the part of the judges to take cognizance of the US and EU case laws;
however, not at the cost of already established ‘Indian’ principles. Indeed, it is necessary to understand the technology issues involved while deciding the question of personal jurisdiction, but law should not be made subservient to technology.

8. *What are the statutes, regulations, etc in place regulating e-contract?*

**Answer:** In India, an e-contract is governed primarily by the Indian Contract Act 1872, the IT Act 2000, and the Indian Evidence Act 1872. Besides these, it has bearing with all those statutes and regulations with which any ordinary contract would have correlation, such as, CPC 1908, Sale of Goods Act 1932 (where the subject matter of the contract is ‘goods’), etc, for different purposes (e.g. enforcement, specific essentials, etc).

On the basis of the detailed discussion in the various chapters of this thesis, in general, and the afore-stated answers to the research questions, in particular: in the conclusion, the researcher finds that his hypothesis, on the premise of which he started his research, stands correct. Indubitably, there have been some good initiatives in view of the UNCITRAL Model Law on Electronic Commerce 1996, and other international developments. The best example of this is the IT Act 2000, which provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as ‘electronic commerce’, which involve the use of alternatives to paper based methods of communication. The IT Act has made consequential amendments in a range of statues, such as, the Indian Penal Code 1860, the Indian Evidence Act 1872, the RBI Act, 1934 and the Banker’s Books Evidence Act 1891.

The above developments are encouraging to a great extent; however, there are some other issues which have posed challenges, such as, ‘cross-border jurisdictional issues’ (however, on this issue, initiative has to be taken by all the countries at international level; one country cannot effect a material change), ‘ascertainment of intention (assent) in web-wrap contracts’, ‘standard form contracting and consumer protection in electronic environment’. It is worth-mentioning that India does not have
any particular law or an exhaustive chapter in any law (say ‘Contract Act’) to deal with standard form contracts. Nonetheless, standard form contracts are valid and have been enforced by the courts. The two important sections of the Contract Act 1872 which have been repeatedly invoked in such cases so as to help the weaker consumers are Ss 16 (3) and 23. The standard form contracts are presenting unique challenges in the electronic world.

Law has to grow according to the changed circumstances, and has to match the advancement. Therefore, the urgent need of the hour is to strike a balance between the advanced technology, augmented urbanization, amplified liberalization, privatization and globalization—on the one hand and the protection of the weaker party, the consumers/customers—on the other. There is, therefore, an urgent need of either a separate law or a complete chapter in any existing law (maybe in Indian Contract Act 1872) dealing with all the aspects of standard form contracts, else the courts will face new-fangled challenges in future.

Thus, the existing laws of India are not sufficient to deal with and tackle some aspects of e-contracts adequately.

7.3 SUGGESTIONS

The differences in regulatory approaches are important to bear in mind when future of international developments in the law of electronic contracting is considered. Bridging the gap between protectionists versus free market ideals is neither politically attainable nor desirable in light of the benefits each end of the spectrum has to offer.27

The best course of action is to mull over legislative reform with a formalistic approach, in keeping with the UN initiatives. In particular, by focusing on the manner of disclosure of B2C online contract terms, it is possible to achieve a desirable substantive result—the return to consensus ad idem. The instantaneous nature of electronic transactions also attracts and provokes a re-conceptualization of

the mailbox rule of contract formation, and this is reflected in both case-laws and provisions of the IT Act 2000 (based upon UNCITRAL Model Law on E-Commerce).

It is common knowledge that in today’s click-wrap world, consumers hardly ever *actually* read online terms and conditions, or for that matter print or save them for subsequent reference. Courts have nonetheless continued to apply the objective test for standard form contracts on the premise that a ‘reasonable person’ ought to have read the online terms. This interpretation of traditional contract law in the online contract environment sometimes disregards actual practices and the pace at which online transactions are concluded. Unlike the ticket cases of the olden days (although they are still relevant today), consumers purchasing online are usually alone at their computer, and often their only interaction with the business is via an automated agent. In these circumstances, the consumer is not prone or even able to ask questions, like an individual purchasing a railway ticket. Moreover, unlike the paper based standard forms, online consumers are much less likely to actually print or retain the terms for future reference, notwithstanding having the ability to do so.

There are considerable advantages to the internet economy which translate to monetary savings for consumers, ease of comparative shopping, and the inherent convenience of online purchasing. New legislative initiatives need to continue to promote and accommodate an electronic world that is growing at an exponential rate.

The fundamental problem lies with the imposition of an objective standard of acceptance in a context where the vast majority of people are not being ‘reasonable’ and reading click-wrap or browse-wrap terms; which begs the question, if 99% of people are not doing something, is it really justifiable to hold the remaining 1% as the standard of what is considered reasonable?28 According to Justice Oliver Wendell Holmes, the reasonable-person standard originated from the necessity that life in an organized society mandated ‘a certain average of conduct’, saying that ‘a sacrifice of

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individual peculiarities going beyond a certain point, is necessary to the general welfare.\textsuperscript{29} One solution would be to create a standard layout for abridged B2C internet contract terms, somewhat akin to food-labeling requirements which set out a table of nutritional information on the packaging of all food products.\textsuperscript{30} The summary should be made available at the same time, place and form as the full contract terms, but would be a quick readable version of the full terms. This would amplify the likelihood (and reasonableness) of consumers being aware of the agreement they are entering into and would help getting closer to the original concept of consensus ad idem. By focusing on disclosure, a universal structure may be imposed that benefits both ends of the free market/protectionist spectrum. From the free market perspective, consumers are enabled to base their choices on actual knowledge of their bargain, and from the protectionist standpoint, increased disclosure promotes consumer awareness of less favourable contract terms.\textsuperscript{31} It is significant that the form of the contract summary be universal in nature, so that consumers could gain familiarity with the format and quickly find the information they are looking for. As people have become accustomed to the nutritional information tables, and know where to look to see the saturated fat content, so too, would a standard layout benefit consumers by always listing the terms in the same order. With a quick glimpse, a consumer would be able to determine whether he is receiving the benefit of any return rights, or whether he would be bound to future payment obligations. The summary could be hyperlinked to the full terms where he could get added information if interested. A good example of a summary format is the Microsoft.com privacy policy, which highlights important points from the policy with hyperlinks to the full terms.\textsuperscript{32}

All sorts of e-contracts ought to be made as conspicuous as possible to satisfy legal standards of notice of terms. Its binding legal nature must be impressed upon the end-user, and browse-wrap notices must ideally only be supplemental to a contract

\textsuperscript{29} Oliver Wendell Holmes Jr., The Common Law (Boston: Little, Brown & Co., 1881), at 108.
\textsuperscript{30} Ruth Orpwood, supra, n 27, at 465.
\textsuperscript{31} Ibid.
\textsuperscript{32} Available at <http://privacy.microsoft.com/>.
that the user has already manifested his assent to. The determination of which elements of B2C contract terms are most deserving of disclosure would best be left to an international body such as UNCITRAL, though the researcher wishes to propose a table that would include, at a minimum, the following information:

- Description and quantity of the product or service
- Price, total payable (including all taxes, surcharges, etc.)
- Return or rescission rights
- Length of the contract
- Future payment obligations
- Survival clause
- Jurisdiction clause
- Arbitration

Inclusion of additional categories of information should have to be weighed against the counterbalancing interest that the document be succinct enough to be actually read by consumers.

Another caveat is that enabling legislation would need to provide businesses with the comfort that the provision of the summary would not have a negative impact on the enforceability of the full contract terms. The legislation should also make it obvious that the summary would need to be in plain language, understandable to an ordinary consumer.

Finally, when it is considered how the law of contracts has evolved over time to keep pace with modern economic realities, it is important that not to take previous legal developments, such as the objective theory of acceptance, for granted. Already established sound principles of contract law may need to be re-evaluated and adapted so as to ensure that the fundamental goals of contract law are upheld. While the internet and electronic environment has posed challenges to traditional contracts law principles, these developments can also be seen as opportunities to improve the law and get closer to fundamental contracting principles, such as consensum ad idem.

33 Rutli Orpwood, supra, n 27, at 466.
7.3.1 Consumer Protection

Without effective consumer protection on the internet, the B2C and C2C marketplaces would not possibly attain its full potential in the following years, and the number of consumers transacting online or using the internet would likely reduce if they do not enjoy the same level of protection and confidence as in the offline world. In order to provide an satisfactory level of protection, and enhance consumer trust in the electronic marketplace, consumers need to rely on: (i) an adequate consumer regulatory framework; (ii) the consumer protection principles, related documents and recommendations issued by international organizations and cross-border consumer networks; (iii) industry standards and best practices; (iv) educative and preventive online tools; and (v) international cooperation in the enforcement of laws among government agencies and consumer networks to curb fraudulent, misleading and unfair commercial practices occurring on the internet.

The researcher firmly believes that in order to achieve these goals, academic groups, civil society and consumer protection groups can play an important role apropos the protection and awareness of the consumer interest by creating necessary mechanisms and online tools to inform, educate and prevent consumers from the current dangers of the internet that in combination with government legislation, enforcement and international cooperation efforts among consumer protection agencies and networks could help enhance consumer confidence and prevent the most vulnerable party on the internet 'the final user'.

7.3.1.1 Suggestions for the Protection of the Consumers in Transactions over the Internet

Along the lines of the Report on 'Approaches to Consumer Protection within the APEC Region' of the Electronic Commerce Steering Group (October 2002),

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34 This report collates the responses provided by 15 member economies to two surveys conducted during 2000 and 2001. Based on detailed information provided, it provides an overview of existing frameworks for consumer protection in business to consumer (B2C) online transactions, including the roles of national agencies and their interaction with business and NGOs. It also gives an overview of aspects of consumer protection statutes, their application to Internet transactions, enforcement mechanisms and limitations on jurisdiction.
following suggestions may be put forth for the consumer protection in the electronic world:\footnote{Available at <http://www.nacpec.org/docs/Approaches_to_consumer_protection.pdf> accessed 5 June 2012.}

1. Enforcement:

Besides consumer protection laws having some application in the electronic environment, enforcement is an important element of a consumer protection regime. Enforcement can serve a number of purposes, which tend to be interrelated. It can be used to educate businesses as to the boundaries of consumer-appropriate practices, and it can help consumers understand their rights. Penalties, publicity, and enforcement action can deter businesses from non-compliance. Enforcement can also be an avenue of redress for consumers so they can recoup their losses or be compensated for loss and inconvenience.

Consumer protection laws must be implemented and enforced in letter and spirit using a variety of tools, ranging from consumer and business education to criminal sanctions, with coercive and/or punitive powers. In India, the provisions of the Consumer Protection Act 1986 and the IT Act 2000 must be enforced in spirit with a view to afford protection to the consumers. Education should also be used as an important means of improving compliance.

Taking action before the courts is only one approach of enforcing compliance. Some countries have found that naming non-compliant businesses can have a deterrent effect and serve to educate consumers. This tool has been built into some enforcement processes.\footnote{For instance:}

\begin{itemize}
\item In Hong Kong, the Consumer Council can investigate consumer complaints and publicly ‘name’ traders to alert consumers of malpractice. This Council attends to consumer complaints relating to e-commerce where there is no other law applying to the conduct.
\item In Mexico, PROFECO has a ‘black record’ of suppliers which have had more than 10 complaints lodged against them. Before being named on the black record, suppliers are invited to join PROFECO’s program for the Improvement of the Quality on Goods and Services, which aims to help suppliers to improve. The ten with the worst performance will be named on the black record if their conduct continues
\end{itemize}
2. Dispute resolution and consumer redress:
An important issue for consumers is to get their money back, or obtain compensation for their loss. Consumer protection laws and general contract laws may allow consumers to bring actions seeking remedies (such as, compensation, or recession of the contract, or variation of contractual terms, restitution, or specific performance. These remedies may also be supported by interim relief, such as freezing assets, to ensure that compensation orders can result in tangible relief.

However, civil proceedings before the courts are not always an optimal solution for consumer disputes, particularly those arising out of online consumer transactions, which tend to be high-volume and low-value. The cost of initiating proceedings and enforcing the outcome may outweigh the amount in dispute. Therefore, alternative dispute resolution (ADR) mechanisms in the private sector should be encouraged which will provide consumers with low cost, accessible dispute resolution that crosses national borders more easily than court ordered remedies. The private sector can play a key role in developing and implementing ADR mechanisms to facilitate dispute resolution for consumers.

Class Actions: While some consumer protection laws may provide for consumers to seek civil remedies through the courts, the costs involved in taking legal action can deter consumers from doing so. However, class actions can reduce this cost barrier, as the cost of legal fees can be paid out of a settlement or cost award and will be shared between the plaintiffs.37

Public sector dispute resolution bodies: Attempts should be made to facilitate dispute resolution for consumers by providing for publicly funded consumer protection bodies to conciliate disputes.38

37 Few economies have indicated that class actions are permitted in their jurisdictions. Those that do allow them include Australia, Mexico, the Philippines, Russia, Chinese Taipei, and the United States. Brunei’s Supreme Court Rules allow for representative proceedings to be brought in certain circumstances. New Zealand permits class actions where the person initiating the action does so with the consent of other interested parties, or at the direction of the Court.

38 For instance:
ADR procedures specifically for foreign consumers (who have a dispute with a domestic business) may be developed.39

3. Dealing with cross-border transactions:
The growth in e-commerce is posing challenges for regulators, consumers, and businesses as consumers increasingly transact across borders. As consumers are increasingly buying goods from foreign websites, consumer protection agencies are seeing a rise in the number of problems, particularly with fraudulent and deceptive marketing practices taking place across borders. In view of this, answers to questions—whether consumer protection agencies have jurisdiction to protect domestic consumers from foreign businesses; and whether they have jurisdiction to take action against domestic businesses injuring foreign consumers—must be found at the earliest, so as to deal with the issue effectively and in a timely manner.

Cross-border co-operation: Cross-border co-operation by enforcement agencies can enhance enforcement of consumer protection laws. It can also help

- In Mexico, consumers may file claims arising out of consumer contracts to PROFECO, which may seek to resolve those claims through conciliation. Conciliation services are provided free of charge to the parties concerned. If a settlement agreement is approved by PROFECO and is consistent with the law, it is final and conclusive. If a claim cannot be resolved through conciliation, the parties may appoint PROFECO to arbitrate the claim free of charge. The arbitration award is binding on the parties.
- In Hong Kong, China, the Consumer Council uses conciliation, mediation, and public naming of businesses to obtain consumer remedies and encourage compliance.
- In New Zealand and Australia, most privacy-related consumer complaints are resolved through conciliation by the Privacy Commissioner, who is required by statute to attempt to conciliate complaints. In New Zealand, while other consumer protection statutes do not require conciliation to be attempted, in many cases consumers will be able to access the Disputes Tribunals, which provide low-cost and low-level dispute resolution for a variety of disputes.
- In the Philippines, attempts are made to settle consumer complaints. If settlement cannot be achieved, the case is scheduled for formal hearing by the Consumer Arbitration Officer. If, after the hearing, the respondent is found guilty of the charge, appropriate penalties are imposed, including administrative fines.

39 In Mexico, the Foreigners Conciliation Board has been established within PROFECO, the Federal Consumers Attorney’s Office. Foreign consumers can submit complaints against a domestic business via PROFECO’s website. The Board will then attempt to conciliate the dispute with the business concerned, and represents the consumer’s interest in that process.
enforcement agencies to identify trends in cross-border scams, and to target investigations in the most appropriate jurisdictions.

4. Building consumer protection in the online environment:
The success of e-commerce depends on the participation of both the private sector and governments in all economies. The role of governments is to promote and facilitate the development and uptake of e-commerce by 'providing an environment which promotes trust and confidence among e-commerce participants'. That environment can be fostered by giving guidance and assistance to business and by allowing self-regulation to flourish. The environment is enhanced by the presence of NGOs fulfilling a variety of roles.

One way in which countries can promote the uptake of e-commerce is to encourage the development of private sector self-regulation focused on consumer protection. Some APEC economies have developed principles or codes of conduct to assist industry associations in developing self-regulatory schemes.

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40 Some of the APEC countries’ enforcement agencies have entered into co-operation agreements: Australia, China, Japan, Korea, Mexico, New Zealand, Russia and the United States of America. Six economies participate in the International Marketing Supervision Network (IMSN) and, more specifically, in econsumer.gov, which is a pilot project run by the IMSN (http://www.econsumer.gov). The six economies are Australia, Japan, Korea, Mexico, New Zealand, and the United States of America. Econsumer.gov focuses on cross-border e-commerce B2C transactions, and provides an online portal for consumers to obtain information about the approaches to enforcement of consumer protection law within the participating countries, and on how to make a complaint online. Consumers consent to this information being viewed and used by the law enforcement agencies which participate in econsumer.gov. The consumer web page is supported by a secure database accessible only by participating agencies. The project is intended to facilitate dialogue between agencies and to streamline investigations of complaints with an international dimension. The project is also intended to provide better information about the types and effects of cross-border frauds, which may help enforcement agencies to target their resources more effectively.

41 For instance, Australia has developed a best practice model: Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business. The Model is underpinned by Commonwealth consumer protection laws. New Zealand followed Australia by issuing the New Zealand Model Code on Consumer Protection in Electronic Commerce. The Model Code is underpinned by domestic consumer protection and privacy laws. These models are intended to be the foundation for self-regulatory systems for industry associations and individual businesses. In addition, Australia has developed an Electronic Funds Transfer Code of Conduct, which was developed by a working group of government, industry and consumer representatives.

In Mexico, the Federal Law of Economic Competence can be used to support the development of private sector schemes.

In 2001, Thailand’s Electronic Commerce Resource Center (under the National Electronics and Computer Technology Center) proposed the Guidelines on Consumer Protection for the Sale and
7.3.1.2 Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce

These guidelines represent a recommendation to governments, businesses, consumers, and their representatives as to the core characteristics of effective consumer protection for electronic commerce. However, nothing mentioned/discussed herein should restrict any party from exceeding these guidelines nor preclude. Moreover, these Guidelines apply only to B2C electronic commerce and not to B2B transactions. India should also, with appropriate modifications, adopt these guidelines to govern and afford protection to the consumers. In brief the general principles are as follows:

1. **Transparent and Effective Protection:**
   
   Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.

2. **Fair Business, Advertising and Marketing Practices:**
   
   Businesses engaged in electronic commerce should pay due regard to the interests of consumers and act in accordance with fair business, advertising and marketing practices.

3. **Online Disclosures:**
   
   A. Information about the Business
   
   Businesses engaged in electronic commerce with consumers should provide accurate, clear and easily accessible information about themselves sufficient to allow, at a minimum:
   
   i. Identification of the business—including the legal name of the business and the name under which the business trades; the principal

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42 Twenty countries originally signed the Convention on the Organisation for Economic Co-operation and Development on 14 December 1960. Since then fourteen countries have become members of the Organisation.

geographic address of the business; e-mail address or other electronic means of contact, or telephone number; and, where applicable, an address for registration purposes and any relevant government registration or license numbers;

ii. Prompt, easy and effective consumer communication with the business;

iii. Appropriate and effective resolution of disputes;

iv. Service of legal process; and

v. Location of the business and its principals by law enforcement and regulatory officials

Where a business publicises its membership in any relevant self-regulatory scheme, business association, dispute resolution organisation or other certification body, the business should provide consumers with appropriate contact details and an easy method of verifying that membership and of accessing the relevant codes and practices of the certification body.

B. Information about the Goods or Services

Businesses engaged in electronic commerce with consumers should provide accurate and easily accessible information describing the goods or services offered; sufficient to enable consumers to make an informed decision about whether to enter into the transaction and in a manner that makes it possible for consumers to maintain an adequate record of such information.

C. Information about the Transaction

Businesses engaged in electronic commerce should provide sufficient information about the terms, conditions and costs associated with a transaction to enable consumers to make an informed decision about whether to enter into the transaction.
Such information should be clear, accurate, easily accessible, and provided in manner that gives consumers an adequate opportunity for review before entering into the transaction.

Where more than one language is available to conduct a transaction, businesses should make available in those languages all information necessary for consumers to make an informed decision about the transaction.

Businesses should provide consumers with a clear and full text of the relevant terms and conditions of the transaction in a manner that makes it possible for consumers to access and maintain an adequate record of such information. Where applicable and appropriate given the transaction, such information should include the following:

i. an itemisation of total costs collected and/or imposed by the business;
ii. notice of the existence of other routinely applicable costs to the consumer that are not collected and/or imposed by the business;
iii. terms of delivery or performance;
iv. terms, conditions, and methods of payment;
v. restrictions, limitations or conditions of purchase, such as parental/guardian approval requirements, geographic or time restrictions;
vi. instructions for proper use including safety and health care warnings;
vii. information relating to available after-sales service;
viii. details of and conditions related to withdrawal, termination, return, exchange, cancellation and/or refund policy information; and
ix. available warranties and guarantees.

All information that refers to costs should indicate the applicable currency.
4. Confirmation Process:

To avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services he or she wishes to purchase; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and retain a complete and accurate record of the transaction.

The consumer should be able to cancel the transaction before concluding the purchase.

5. Payment:

Consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford.

Limitations of liability for unauthorised or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce.

6. Dispute Resolution and Redress:

A. Applicable Law and Jurisdiction

Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing framework on applicable law and jurisdiction.

Electronic commerce poses challenges to this existing framework. Therefore, consideration should be given to whether the existing framework for applicable law and jurisdiction should be modified, or applied differently, to ensure effective and transparent consumer protection in the context of the continued growth of electronic commerce.

B. Alternative Dispute Resolution and Redress
Consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden.

Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.

7. Privacy:

Business-to-consumer electronic commerce should be conducted in accordance with the recognized privacy principles set out in the OECD Guidelines Governing the Protection of Privacy and Trans-border Flow of Personal Data (1980), and taking into account the OECD Ministerial Declaration on the Protection of Privacy on Global Networks (1998), to provide appropriate and effective protection for consumers.

8. Education and Awareness:

Governments, business and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision-making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.

The above guidelines are designed to help ensure that consumers are no less protected when shopping online than they are when they buy from their local store or order from a catalogue. By setting out the core characteristics of effective consumer protection for online business-to-consumer transactions, the guidelines are intended to help eliminate some of the uncertainties that both consumers and businesses encounter when buying and selling online.
Summing this section, it may be said that the businesses engaged in e-commerce must not make any misrepresentation or omission or engage in any practice that is likely to be deceptive, misleading, fraudulent or unfair to consumers, and would be encouraged to join transparent and effective self-regulatory schemes that promote fair and ethical business practices. They should give consumers sufficient information to identify the business and to enable prompt and effective consumer communication with the business. They must provide accurate, clear and easily accessible information about the goods or services they offer and information about terms, conditions, and costs relevant to the transaction sufficient to enable consumers to make an informed decision; and should make available information in all appropriate languages.

In their relations with customers, businesses should offer consumers with measures that provide an opportunity for review before entering into a transaction. Businesses should provide consumers with reasonable and timely means to settle disputes and obtain redress without undue cost or burden. Dispute resolution mechanisms should include internal mechanisms to deal with consumer complaints and participation by the business in third party dispute resolution programmes.

Consumers’ personal information must be private, and businesses should take reasonable steps to ensure the security of consumers’ information. Consumers should also be provided with user-friendly, secure payment mechanisms and information on the level of security such mechanisms afford.

### 7.3.1.3 Suggestions for the Protection of the Vendors/ Suppliers in Transactions over the Internet

There is also an urgent need to protect vendors/ suppliers from rogue purchasers. For this, the provision of ‘charge-back clauses’ and encouragement of ‘pre-payment by buyers’ could be recommended.

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44 Chargeback is, generally, generated when a cardholder disputes a transaction because of one of the following criteria:
- Non fulfillment of product or Service
- Unauthorized purchase
- Product/service expectations not met.
By implementing the above recommendations, the rights of the consumers against unknown vendors/suppliers, and vendors/suppliers against unknown purchasers can be, to a considerable extent, protected.

### 7.3.2 Suggestions regarding Offer and Acceptance

**Online Offers:**
Vendors, doing business via the internet, should ensure that the terms of their online offers are clear and understandable. Besides other clauses, following important clauses should be included in an online offer:

- A term specifying the remedies available to the vendee if the goods turn out to be defective or if the contract is otherwise breached (broken); also limitations of remedies, if any, should be clearly stated.
- The law governing the transactions.
- A stipulation that clearly indicates what constitutes the vendee's agreement to the terms of the offer. That is to say, an online offer should also include some procedure by which the customer may accept the offer, for example, 'I agree' or 'I accept the terms of this offer', etc.
- A stipulation specifying how payment for the goods and of any applicable taxes is to be made.

The vendor's website should explicitly include a hypertext link to a page containing the full contract (if full contract cannot be presented on the same page) so that prospective and potential vendees can review the contract-terms prior to purchasing.

**Acceptance**
In this cyber world, everyday people express their assent to some terms. In case of surfing the internet, it is generally done by clicking on some icon like 'I Agree'; and in cases of installing any software, assent is generally made known by the conduct of tearing the CD package and using it. These actions may appear to be very casual and informal but are of immense legal importance because they lead to a valid and enforceable contract, and those terms, that people hardly even bother to read, can be strictly enforced against them.
So, the researcher suggests that people should not click on an ‘I agree’ button without caring to see the terms; similarly not to tear the wrap of software CD and start using in haste, being least interested about the terms typed on it. It is because these are all are valid and enforceable contracts and they could be made liable for the terms and conditions stipulated therein. On the basis of the cases discussed in the various chapters of this work, businesses would do well to keep some best practices in mind while deploying e-contracts:

- Online agreements must be as conspicuous as possible.
- As far as possible, click-wrap mechanism should be used rather than browsewrap, and the viewing of the terms should be made mandatory. This may be accomplished by graying out ‘accept’ until the user has scrolled to the bottom of the agreement.
- A notice must be included near the ‘Accept’ button to make the user grasp the significance of his actions, such as ‘By clicking Accept, you are entering into a legally binding agreement’.
- A record of the moment that the user clicked Accept must be kept.

7.3.3 Jurisdiction
In the end, e-contracting greatly reduces geographical barriers and increases the probability of consumers entering into transnational contracts. This raises quite a few issues of private international law, and the legal regime here is quite obscure. There is no precision or uniformity, since countries tend to apply their own domestic laws on jurisdiction, recognition and enforcement, and determination of the applicable law. Nevertheless, one viable suggestion would be to frame an international convention for the recognition, enforcement, and determination of the substantive laws of a contract that would solve various problems relating to e-contracts at a practical level. The need of the hour is, therefore, an international convention that would afford a holistic basis for the development of substantive and procedural aspects of e-contracts with international elements.

7.4 THE CONCLUDING OBSERVATIONS
On the whole, a separate and independent piece of law on e-contracts would be redundant, in as much as e-contract is not a new type of contract, but a novel way of
entering into contracts which are governed, more or less, essentially by the same traditional fundamental principles of contract law. Addressing the challenges presented by technology to contract law just involves refashioning existing principles. This thesis has addressed the entire gamut of legal issues that arise in the context of e-contracts—from breaking down its myriad forms to a few archetypes, to a note on consumer protection in national and international transactions. Since infallibility is not a characteristic of human being, it is unlikely that any legislative enactment can be completely free of blemishes. This is especially true in the case of cyberspace which in its present form is barely a few decades old. The problems which it poses will have to be dealt with slowly and cautiously. Lessons will have to be learnt and legislators will have to be ever aware of the new challenges thrown up by cyberspace. At the national level, an expert committee should be constituted (or alternatively, the job may be undertaken by the Law Commission of India) to review all the laws related to diverse aspects of contracts (including e-contracts), and to make recommendations for amendments in those laws so as to address the grey areas and (to) solve all the unsolved problems concerning e-contracts. Furthermore, the enforcement machinery will have to gear up to answer the challenges thrown by the new technology. Lastly, in the field of e-commerce and e-contracts, at international level, a lasting and effective IT regulation can take place only by international consensus and harmonization. It is only when the legislators worldwide appreciate that the global nature of cyberspace makes it imperative that any successful attempt in regulating it has to be but global, only then can one achieve real regulation of IT.45