

Consumer Supreme

INTRODUCTION

A new era in the Consumer Protection Law of India was ushered in with the recent enactment of the Consumer Protection Act, 2019 (the “*New Act*”) by the Indian Parliament¹, sweeping away the days where manufacturers, sellers or service providers, could shelter behind the old maxim, *Caveat Emptor* or ‘Buyer Beware’ in cases of claims of defects or deficiencies in the products or services from consumers. The new regime now places the onus completely on the manufacturers, sellers or service providers, to ensure that not only are their products or services free of any defects or deficiencies, but also to ensure that any warranties or advertisements made in relation to them are not misleading in any manner.

The erstwhile Consumer Protection Law, viz. the Consumer Protection Act, 1986 (the “*Old Act*”), was structured to cater to a time when consumers would obtain their goods from the “*Mom & Pop*” Stores, Family run businesses, etc., where the consumer would be face-to-face with the seller and quite often even the manufacturer of the product. Similar was the case of service providers – who were either door-to-door service providers or were based in ‘*Brick & Mortar*’ establishments, drawing their consumers to approach them in person. However, with the advent of new trends, modes, technologies and ever evolving media, and their use to facilitate and grow business and commerce, it was noticed that while these new methods have been a boon to business, it has also become easier for the ‘*unscrupulous entrepreneur*’ to take advantage of customers / consumers, who no longer always have direct contact with the manufacturer, producer or service provider, as used to be the case in the ‘good old days’.

Therefore, in this “electronic-age” where a large part of business is being conducted either electronically (online) or through myriad layers of dealerships and retailers, consumers of goods and services commonly face issues of refusal to take back defective goods and/or refusal of refunds, and are left running from pillar to post trying to seek redressal of their grievances.

With a view of addressing and keeping pace with these “electronic-age” problems, the New Act, as compared to the Old Act, has a far wider scope in that the protection

and attendant remedies available to consumers, have been substantially enhanced. In addition to the remedies already available under the Old Act, the New Act now brings within its purview e-commerce entities, product liability, unfair trade practices, misleading advertising claims, etc. as well as the means to facilitate faster disposal of cases. Pertinently, the addition of the concept of “product liability” makes a fundamental change in consumer protection laws by shifting the onus of responsibility from the consumer to ‘be aware’ of the product/service consumed by it, onto the manufacturer/service provider who must be mindful of the legislative changes and have the required consumer redressal mechanisms in place. While sector specific laws for faulty goods² do exist, no statute comprehensively dealt with product liability – a lacunae addressed under the New Act.

As we will see below, in order give teeth to these enhanced protections and remedies, the New Act also introduces a new and more robust process for dealing with consumer issues, including but not limited to, the enhancement of the pecuniary jurisdiction of the various consumer fora, in order to facilitate greater accessibility. In addition to the mechanical enhancements, the New Act provides for the establishment of a “*Central Consumer Protection Authority*” – a watchdog authority created to protect and enforce consumer rights.

HIGHLIGHTS

(I) Enhanced Scope:

Chief among the changes brought about by the New Act has been the widening of the definition of ‘consumer’³ itself which has now been enlarged to include transactions by any person who ‘buys any goods’ and ‘hires any services’ through all modes, including offline and online transactions, through electronic means, teleshopping, multi-level marketing or direct selling⁴ and to bring them within the scope of ‘buying goods’ and ‘hiring services’.

The New Act now also covers e-commerce entities to keep pace with the increasing consumer dependence on such platforms and online aggregators. The New Act categorically defines ‘e-commerce’⁵, ‘electronic

¹The Parliament passed the Consumer Protection Bill, 2019 on 06.08.2019 to replace the 1986 Act. The President of India gave its assent to the 2019 Act on 09.08.2019.

² Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Indian Penal Code, 1860 and the Drug and Cosmetics Act, 1940, etc.

³ Section 2(7)

⁴ “Direct selling” under Section 2(13) means the marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location

⁵ Section 2(16)

service provider⁶ and ‘misleading advertisement’⁷ while specifically addressing the most commonly faced issues such as refusal to take back defective goods and/or refusal to refund the amounts paid by the consumer. E-commerce entities have been specifically brought under the purview of product liability provisions in addition to the manufacturers or service providers, who avail of such digital or electronic modes to sell their products or services⁸.

Further, a combined reading of the definitions of ‘goods’, ‘services’ and ‘e-commerce’ would also lead to the assumption that food delivery platforms, being food aggregators involved in the transportation of food, could be said to provide “services” under the New Act and will now come under the ambit of consumer protection laws.

Additionally, the pecuniary jurisdiction⁹ of the District, State and National Consumer Commission have been enhanced whereby the District Commission now has the jurisdiction to entertain complaints where the value of goods and services paid as consideration does not exceed Rs.1 Crore (as against the earlier limit of Rs. 20 Lakhs); the State Commission can entertain complaints valued above Rs.1 Crore till Rs.10 Crores (as against the earlier limit of upto Rs.1 Crore); and complaints valued above Rs.10 Crores will need to be filed before the National Commission (as against the earlier limit of Rs.1 Crore and above). Pertinently, the manner for determining the pecuniary jurisdiction for filing the Complaint has seen a change, in that, while under the Old Act, the pecuniary jurisdiction was determined as per the value of goods and services as well as compensation claimed, under the New Act, the pecuniary jurisdiction is to be determined on the basis of the value of goods or services paid as consideration. This would help in doing away the practice of inflating the compensation claimed so as to bring the complaint within the jurisdiction of State or National Commission.

Lastly, Consumers can now file complaints electronically¹⁰ from the comfort of their own homes and complaints can now be filed where the Complainant resides or personally works for gain. This new provision in contrast to the Old Act which only provided for filing of complaints where the opposite

party resided or carried on its business. Pertinently, another change brought about by the New Act is the admissibility of complaints made to Consumer Commissions which are to be decided within 21 days¹¹. Though such provision existed under the Old Act as well, the New Act gives it teeth by adding that if the issue of admissibility of the complaint is not decided within such time, the complaint shall be deemed to have been admitted¹².

(II) **New Concepts:**

- (a) **UNFAIR CONTRACTS**¹³: The concept of ‘unfair contracts’ has been introduced to allow consumers to challenge contracts which are unfair, unilateral and unreasonable to the consumer and unilaterally skewed – i.e. to protect the consumers who are placed in an unequal bargaining capacity. An unfair contract covers contracts between manufacturer/ trader and a consumer that causes significant changes in the rights of the consumer that the New Act explicitly recognizes, such as by way of – imposing unreasonable obligation or condition on the consumer which puts consumer to disadvantage; reserving right to unilateral termination (without reasonable cause) or assignment without consent (which is to the detriment of the consumer) in the contract; imposing a penalty for breach which is disproportionate to loss caused *etc.*

For instance, in 2018, homebuyers of a Developer’s residential project in Gurgaon had complained to the Competition Commission of India (“CCI”), alleging that the Developer had imposed unfair and arbitrary contractual terms in the buyer’s agreement. But the CCI had dismissed the complaint on grounds that the Developer was not dominant in the relevant market, and accordingly rejected the complaint. Such homebuyers can now seek relief under the New Act as it allows protection against unfair contracts. Cases relating to unfair contracts can only be heard by the State and National Commission. This provision was included with the aim to protect consumers from unilaterally skewed and unreasonable contracts which lean in favour of manufacturers or service providers. The New Act

⁶ Section 2(17)

⁷ Section 2(28)

⁸ Section 2(42)

⁹ Pecuniary Jurisdiction is the monetary limit or value of the dispute within which the Court in question can entertain and decide the matter.

¹⁰ Section 35(1) and (2); As per Notification No. NCDRC/OEF/2018-19 dated 07 September 2020, issued by the National Consumer Dispute Redressal

Commission, e-filing has commenced w.e.f 07 September 2020, through the online portal <https://edaakhil.nic.in>.

¹¹ Section 36(2)

¹² Section 36(3)

¹³Section 2(46)

now empowers¹⁴ both the State Commission and National Commission to declare any terms of a contract between a consumer and a service provider/manufacture as the case may be, which are unfair to any consumer, to be ineffective and void.

- (b) **UNFAIR TRADE PRACTICES**¹⁵: Though the concept of ‘unfair trade practices’ was comprehensively dealt with under the Old Act, the scope of the term under the New Act has been widened to not only make it an inclusive clause to cover various types of unfair trade practices, but also to keep in line with the statutory data protection requirements¹⁶, under which personal information of an individual cannot be disclosed without prior consent, except if required by law.

Now under the New Act, a consumer can file a complaint with the *Central Consumer Protection Authority* (“CCPA”) against any advertisement which gives or conveys false description of a product or service or contains a representation constituting an unfair trade practice etc. The CCPA can direct the Director General to investigate complaints against misleading advertisement by any person if a prima facie case is established against the advertiser. In a complaint for misleading advertisement for an unfair trade practice that involves false guarantee or warranties, the burden of proof now lies upon the person raising a defense that the guarantees were based on adequate and proper test.

Further, the New Act now includes within its ambit online misleading advertisements, the practice of not issuing bill/memo for the goods and services, failing to take back defective goods or deactivate defective services and refund the amount within the stipulated time mentioned in the bill or memo or within 30 days in the absence of such stipulation. Additionally, unilateral termination of a contract without any prior intimation to the consumer could also possibly be an unfair trade practice. Pertinently, a consumer can also file a complaint with the CCPA against any advertisement which gives or conveys a false description of a product or service or contains a representation constituting an unfair trade practice etc.

The concept of what constitutes an ‘unfair contract’ or an ‘unfair trade practice’, in addition to the duties and liabilities of product manufactures, sellers and service providers are drawn from the E-commerce Rules, 2020.

- (c) **CONSUMER WATCHDOG**: Pertinently, one of the most significant additions to the New Act is the establishment of the CCPA¹⁷ which is empowered to inquire and investigate into 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 rights of consumers as a class*”, through a dedicated investigative wing set-up headed by a Director-General, analogous to the CCI. The CCPA can also itself file complaints and intervene in matters before the Consumer Commissions. The CCPA is empowered to order for recall of goods, reimburse price paid for goods and services, as well as issue directions and penalize manufacturers and endorsers for misleading advertisements. Appeals against such orders can only be preferred before the National Commission.
- (d) **PRODUCT LIABILITY**: While the Old Act enabled a person to seek redressal for any harm caused on account of defective goods, there were no comprehensive provisions relating to product liability. Earlier, the Consumer Commissions could allow claims of mental agony, however, what qualified as ‘harm’ was not specified. The New Act introduces “product liability”¹⁸ whereby product manufacturers¹⁹, product sellers²⁰ or product service providers²¹ will be held liable in case a consumer of any product or service, suffers any harm²² or injury²³ resulting from a defective products manufactured, sold or deficiency in the services provided, by the product manufacturer, product service provider and the product seller. ‘Harm’ now includes damage to property/ personal injury, illness or death/ mental agony or emotional distress.

The New Act clearly spells out the instances where each of (i) Product Manufacturer, (ii) Product Service Provider, or (iii) Product Seller would be liable:

¹⁴ Sections 49(2) and 59(2)

¹⁵ Section 2(47)

¹⁶ Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011

¹⁷ The CCPA is yet to be set up

¹⁸ Section 2(34)

¹⁹ Section 2(36)

²⁰ Section 2(37)

²¹ Section 2(38)

²² Section 2(22)

²³ Section 2(23)

Product Manufacturer ²⁴	Product Service Provider ²⁵	Product Seller ²⁶ (who is not a Product Manufacturer)
(a) manufacturing defect; or (b) defective goods; or (c) deviation from manufacturing specifications; or (d) product does not conform to express warranty; or (e) product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.	(a) service provided was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or pursuant to any contract or otherwise; or (b) any omission or commission or negligence or conscious withholding any information which caused harm; or (c) service provider did not issue adequate instructions or warnings to prevent any harm; or (d) service did not conform to express warranty or the terms and conditions of the contract.	(a) exercises substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or (b) alters or modifies the product and such alteration or modification was the substantial factor in causing the harm; or (c) makes an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or (d) identity of the product manufacturer of product sold is not known, or if known, the service of notice or process or warrant cannot be effected on him or he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or (e) failure to exercise reasonable care in assembling, inspecting or maintaining such product or for not passing on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product while selling such product and such failure was the proximate cause of the harm.

It is relevant to note that under the New Act, a Product Manufacturer would be liable even if it proves it was not negligent or fraudulent in making the express warranty of the product. This puts a higher degree of liability on the Product Manufacturer, who can no longer take the defense that the warranty was made in good faith and without any negligence or fraud.

EXCEPTIONS TO PRODUCT LIABILITY CLAIMS:

While the New Act contains fairly broad heads for foisting Product Liability, the exceptions in Product Liability cases are rather narrow. The carve-out to Product Liability claims created under the New Act, insofar as Product Sellers are concerned, is that a product liability action cannot be brought against a Product Seller if the product is misused, modified or altered by the user.

Product Manufacturers are protected, in cases involving to claims based on a failure to provide adequate warnings, if : (a) the product was purchased by an employer for use by its employees at the workplace and the Product Manufacturer had provided warnings or instructions to the employer; (b) the product forms a component of an end product where harm is caused by the use of the end product and the Product Manufacturer had provided warnings or instructions to the purchaser of the component; (c) the product was meant to be used by experts and the Product Manufacturer had provided warnings or instructions to the experts; (d) the product is used under the influence of alcohol or unprescribed drug. In addition, a Product Manufacturer will not be liable for failure to provide a warning of danger, associated with a product, which is obvious or commonly known. It therefore appears that there are increased liability risks for Manufacturers as compared to Service Providers and Product Sellers.

The aforesaid concepts may pose compliance difficulties for Product Manufacturers, Product Sellers and Product Service Providers as these definitions are now much wider and impose liability on any person involved in any manner in the sale or re-sale of the product, including importers, marketers and repairers. The inclusion of electronic service providers as product sellers clarifies that e-commerce aggregators are responsible for the products sold on their online marketplaces.

CONCLUSION

While the New Act brings about many welcome changes for consumers, these are likely to cause compliance and liability issues for Product Manufacturers, Product Sellers, Service Providers, who will now have to rethink their marketing strategies, including but not limited to the kind

²⁴ Section 84

²⁵ Section 85

²⁶ Section 86

and quality of warranties given by them and advertisements made to promote their products and services. Pertinently, celebrity endorsements are likely to undergo a sea-change with celebrity endorsers being saddled with increased liability and responsibility to make sure no product or service advertised by them is in any way in contravention of the New Act. These changes brought about by the New Act which make endorsers personally liable are likely to beckon endorsers to seek protection by way of indemnity clauses, if not already incorporated in their endorsement deals.

Pertinently, with the introduction of the concept of 'Product Liability', manufactures, service providers, etc will now have to check and re-evaluate the compliance requirements under the New Act to ensure their full compliance and which may very well pose difficulties for them. As the manufacturers, sellers or service providers, are brought within the scope of the New Act for a claim for compensation by the consumer if their goods or services cause 'harm' which includes damage to property/ personal injury, illness or death/ mental agony or emotional distress, it is all the more imperative for such entities, including e-commerce entities, to ensure compliance with the New Act, such as ensuring clear and

unambiguous instruction manuals and warranties; fair return policies; display of correct contact information of the manufacturers, sellers or service providers, as the case may be, on the relevant website; non-misleading advertisements; and ensuring contracts with consumers are not unfair or constitute unfair trade practices. These new compliance requirements may require Manufacturers, Sellers and Service providers to take a re-look and carry out necessary modifications (or in some cases even a complete overhaul!) of their customer / consumer contracts and labelling / packaging information. The more focused and enhanced liability provisions may also lead to an increase in product or service liability insurance taken by manufacturers, sellers or service providers, to cover any damages suffered by them on account of product liability or other claims made against them under the New Act.

However, given that the New Act is a fairly new enactment, being only a few weeks old, the interpretation of the new provisions remains judicially untested. It would also be reasonable to expect stakeholder feedback to seek clarifications / modifications on certain provisions.

For any questions, please feel free to reach out to Kuber Dewan at kuber.dewan@dumeds.com.

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