



INSURABILITY OF E-COMMERCE RISKS. WHAT INDIA CAN LEARN FROM USA?

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Abstract

The concept of Consumerism has witnessed a transitional shift from traditional commercial transaction of services to electronic mode of commercial transaction of services which has brought out a significant change in the dynamics of the business world. With the advent of technology, the commercial transaction of services conducted electronically on the internet has risen and has contributed abundantly in the growth of the E-Commerce Industry. The role played by the platforms who act as intermediaries in extending services to consumers often face many risks which in the long run may threaten their operation of business in the market. It is undeniable that there are a lot of insurance issues that crop up for third party liability risks in association with e-commerce activities. It has been a subject of debate among insurance professionals that the coverage of e-commerce risks for corporate insured's only includes a part of the coverages needed to answer affirmatively in relation to the liability risks associated with e-commerce activities. Moreover, there are gaps in traditional insurance policies with respect to e-commerce risks and this in turn poses a question for extension of insurance policies either in combination of standard commercial general liability and umbrella policy or a need for a separate policy for better outreach to the insured. Taking these things into

consideration, there is a necessity to evaluate and analyse the suitability of insurance policy models adopted in the United States and in India. This paper analyses on these aspects and evaluates the need to come up with special e-commerce insurance policies for improvement of the efficiency of the Insurance Sector.

Keywords: Third Party Liability, Commercial General Liability, Umbrella Policy, Traditional Insurance Policies.

I. Introduction

With the burgeoning of e-commerce space as a place of commercial transactions, there are multiple risks that e-commerce platforms face. Some of them are consumer related, product related, service related, intellectual property related and cyber theft related. A large part of these risks are being litigated in courts or arbitrated leaving these platforms looking for ways of risk mitigation. They turn to insurance companies to cover their risks. Insurance companies insure these risks either through a Traditional Commercial General Liability (CGL) policy and Umbrella Policy or through separate policies for each type of risk. Even then, there are gaps between their coverage and the platforms liabilities. The jurisprudence on this subject has evolved differently in USA and in India; the adequacy of law in India is also studied. Standard CGL policies and umbrella policies do not cover all the risks that e-commerce platforms face, there are many gaps in their coverage which force these platforms to adopt several insurance policies to cover their risks. The jurisprudence on the coverage of CGL in the USA has been quite contradictory as different cases state different interpretations. There is a need to adopt some of the liberal



interpretations in India. The adequacy of laws in India can be studied with reference to the IT act of 2000, and intermediary guidelines. Besides these, there are Intellectual property laws in India which lay down what constitute infringement. Contractual obligations are also part of the laws behind the risks in e-commerce contracts but they are not insurable. However, there is no recommendatory model insurance policy or law to govern CGL for e-commerce platforms, the need for such a guideline/law/recommendation is evaluated in India.

II. Gaps in Insurance Policies and Need For Special E-Commerce Insurance Policies

2.1 Standard Commercial General Liability or Umbrella Policy Coverage Is Not Sufficient For E-Commerce Risks and third party liability risks?

Yes, there exists a gap in Traditional Insurance policies in relation to e-commerce risks in India as these policies are not sufficient enough to include all the coverage's with regard to liability risks connected with e-commerce activities. In order to fill those gaps the integration of both Standard Commercial General Liability and Umbrella Policy is not enough for e-commerce risks as it only provides for the rights of privacy caused by the utterance of the publication of the information. There are various risks that are related with e-commerce platform that will prove problematic for coverage under the traditional Commercial General Liability and

umbrella policy. ¹Following are the risks which may be encountered by the e-commerce platform:-

Invasion of Privacy

E-commerce platform creates a risk of liability with regard to invasion, infringement, interference in relation with rights of privacy which may be controversial for the traditional CGL as well as umbrella Insurance policy. The reason behind this is that the traditional policy provides coverage for invasion of rights of privacy. A CGL or umbrella insurer of such a claim will face problems which will result in denial of coverage on the issue that the insured's liability has nothing to do with the disseminating information but rather to do with the gathering of information. There is a loophole in the fact that CGL policy language does not cover dissemination of information but e-commerce platform face such liability.

Infringement of Intellectual property Rights

E-commerce platforms face liability in infringement of intellectual property rights which are covered in some CGL policies and umbrella policy but some of these risks are excluded because of the following reasons. Firstly the coverage respond only to the injury which arises out of the insured's advertising activities. The coverage under CGL policy excludes the injury or liabilities faced because of third party advertisement on its website are denied under the coverage's.

Damage to third person's computer data, software, programs or computer network.

¹ Michael Rossi, "Cyber and Privacy Risk and Insurance" (2000)<
<https://www.irmi.com/articles/expert-commentary/third-party-liability-e-commerce-risks->

and-traditional-insurance-programs> accessed on 21 August, 2019



There is a risk of liability related to data, software, programs. The term damage as defined under CGL policy and umbrella policy whether the claimant is seeking damages because of the property damage. The interpretation of the term property damage is related to tangible property and will not apply to non- tangible property. So there exists a loophole in the interpretation of the definition and until it is resolved there exists a potential gap in traditional CGL and umbrella coverage for e-commerce risks.

Gaps in Traditional Insurance Policies with respect to First Party e-commerce risks

First party risks are the risks generally covered by commercial property policies which also provides liability coverage in relation to first party losses. When a third party imposes a liability on the insured for a loss that is recognised as a first party loss under the policy. There is a gap in traditional insurance policies in respect to the first party risk which all risks policies include that there must be a physical loss or damage to property to trigger both the property damage and time element.² But in some cases nonphysical event e-commerce loss in which the computer server hosting the website has been attacked.

Another gap occurs is by the indemnity period provisions.³ Legal liability and first party risks produced by e-commerce activities can be managed in part by indemnity and insurance provisions in contract.⁴ But some of the risks faced by

companies conducting e-commerce activities are unique to those activities, traditional indemnity and insurance provisions are not simply are not adequate for e-commerce activities. Indemnity period provisions of a commercial property policy which determine the time period from inception of a loss for which the insured gets to claim coverage. The indemnity provisions in standard commercial property policies are not well suited for all e-commerce risks even if the e-commerce event at Issue triggers coverage in the first instance. Regardless of the indemnity provisions inserted into the contract the person reviewing the contract must understand how the indemnification of third party claims for intellectual property infringement, privacy, pure financial loss, and bodily injury and property damage including data.⁵ These provisions must be reviewed and negotiated in order to ensure that the risks which company wants to be defended and indemnified by the service provides are properly addressed. Another gap for e-commerce risks has to deal with valuation issues for stolen computer data, software or programs. Whereas standard commercial property policies that have been slightly amended contain detailed valuation provisions for lost or damaged data, software or programs. Such policies typically provide coverage for the lesser of the actual cash value of the stolen property or replacement cost but it is not clear how much if any coverage will be provided for stolen electronic data processing media (EDP).

² Michael Rossi, "Cyber and Privacy Risk and Insurance" (2000) <<https://www.irmi.com/articles/expert-commentary/first-party-e-commerce-risks>> accessed on 20th August 2019

³ibid.

⁴Michael Rossi, "Cyber and Privacy Risk and Insurance" (2000) <[irmi.com/articles/expert-commentary/indemnity-and-insurance-provisions-in-e-business-contracts](https://www.irmi.com/articles/expert-commentary/indemnity-and-insurance-provisions-in-e-business-contracts)> accessed on 17th November, 2019

⁵Rossi (n 2).



In order to close the gaps the insured could amend one or more policies to cover the gap at issue the insured in express language to its commercial property policy describing all the different types of loss events it could experience with respect to its computer system, data, software, programs etc and then stating all of such events shall be deemed physical loss or damage for the purpose of coverage under the policy. Also in case of indemnity period the insured can also amend the indemnity provisions to such special physical loss or damage so that the time element coverage matches up with the e-commerce risks. An insured can also amend the valuation provisions in its commercial property policy. In this way, whether the property is stolen by a third person or by an employee of the insured the coverage provided by the different policies in the insured program should be the same.

2.2. Closing Gaps for Liability Risks with New E-Commerce Insurance Policies

The insurance companies in order to fill of close the gaps has come up with the e-commerce insurance policies which is “Net Advantage Internet Professional Liability Policy”, “Safety Net Internet Liability Policy”, “E-Risk protection policy” with increase of e-commerce products in order to respond to liability risk.⁶ The above mentioned e-commerce insurance policies are offered by United States to insure various types of liability risks faced by e-Commerce platforms. In case of companies having only Standard Commercial General Liability (CGL) policy can purchase one of the new e-commerce insurance policies is a suitable option. The companies while dealing with e-commerce liability risks need to consider following points. Firstly, the e-commerce

platform need to understand that at the time of buying the e-commerce insurance policies they are not limited to the aforementioned coverage. Secondly the insurance policies related to e-commerce must be properly checked to make sure that the coverage mentioned covers all the professional liability which would otherwise be covered in professional liability. Thirdly, regardless of the policies the ecommerce platform must amend its Standard CGL and Umbrella policies in order to fill the existing gaps in insurance policies to cover those risks.

2.3. Closing the Gaps for Liability Risks with Traditional Insurance Policies

In order to fill the existing gaps with regard to traditional insurance policies and to prevent liability risks. In case the insured’s who already have professional liability and multimedia coverage shall analyse their programs and come to an outcome that there is any gap and in case a gap is identified close it by further amending the policies. Regardless of the coverage’s built the insurer shall also consider that is there any adjustments that should be made to the CGL policy and Umbrella Policy in order to insure e-commerce risks which is covered by that coverage. Finally in order to minimise the overlapping of coverage’s it should be properly reviewed and if there is a further gap then amend the policies.

2.4. Need for New E-commerce Insurance Policies for closing the gaps.

There is a gap in the insurance policies to cover the e commerce risks. In order to close the gaps the insurance policies is not sufficient alone to cover all the issues. To fill those gaps following new e-commerce insurance policies have been introduced to

⁶ibid.



protect the e-commerce risks. Some of the policy includes marsh's Net Secure Program, underwritten by a consortium of insurers, E-Risk policy from Fidelity and Deposit companies; secure system policy and network policy. These programs provide for the first party coverage and liability coverage where the insurer can pick and choose the coverage's. These policy forms are in a state of flux, with the insurers apparently reviewing each other's forms to try the addressal of the same issues as much as possible. The policies above mentioned provide some form of coverages for each of the issues raised above. One way for the insured to close the gaps in coverage is simply buy one of these policies at least on a difference in conditions or difference in limits basis. If there is any falls in the e-commerce loss of the insured's program as constituted by traditional policies, the stand alone e-commerce policy should respond to loss. As there exists gaps in the traditional insurance policies and umbrella as discussed above. Following policies have been mentioned in order to fill those gaps. The liability risks are discussed in relation to first party liability and third party liability risks in this paper. For covering the e-commerce which is not covered under both the policies there is a need for establishment market for stand-alone e-commerce policies which will focus only on the e-commerce risks in order to fill those gaps which are not covered under the traditional insurance policies and umbrella policy. In contradiction some corporate insured's do have all the three of these coverage's either in stand-alone policies or liability policy at a primary or umbrella layer. In their opinion there is no

need for any of the new stand-alone e-commerce insurance policies.

III. Implementing USA's Jurisprudence on CGL Policies in India to cover E-commerce Risks

3.1. Where it all began in the USA

Commercial General Liability (CGL) Insurance has been in place in the insurance sector for a long time and is generally preferred by businesses to cover risks or losses arising out of bodily injury or damage to property. E-commerce businesses are a rather recent development which came much after the issuing of CGL policies. E-commerce companies, by the nature of their risk taking behaviour, realized the need to insure themselves. The problem of interpretation of the traditional insurances came up before the judiciary regarding risks that were never contemplated before the advent of the internet.

3.2. Issues

Most CGL Policies in the US contain two part of coverage. Coverage A deals with Bodily Injury and Property damage, whereas Coverage B deals with Personal and Advertising Injury Liability. Their positions for coverage of each risk are different for first-party (e-commerce platform) and third-party coverage (final consumer or person suing e-commerce platform). "Questions started to arise about:-

- Whether property damage included 'intangible property' or not?
- Whether business interruption is 'Personal Injury'?
- Whether Privacy is a "Personal and Advertising Injury"?"⁷

⁷ Douglas R Richmond, 'A Practical Look at E-Commerce and Liability Insurance' (2001) 8



3.3 Landmark Cases with evolving jurisprudence

Two landmark cases on the subject of Intellectual Property coverage are American Guaranty and Liability Insurance Co v Ingram Micro Inc⁸ and State Auto Property and Casualty Insurance Co v Midwest Computers and More⁹ that reflect contradictory views on the same subject in the same country by different courts.¹⁰ While in the former the US District Court for the District of Arizona ruled that property includes ‘intangible property’ in first party all risk coverage policy, in the latter the US District Court for the District of Oklahoma ruled that loss of property cannot be covered under a third party liability policy. Although CGL Policies today have explicit wording to exclude Intellectual Property infringements, a large part of the liability depends on the interpretation of the Courts. To avoid this uncertainty, insurance companies have started offering other specific policies which cover risks that standard CGL policies do not, such as Cyber Insurance Policy, Product Liability Insurance Policy etc.

Business interruption has been interpreted in certain cases to be included within ‘injury’ only when it relates to third party injury.

Invasion of privacy on the other hand requires proof of ‘publication’ of personal information to be covered under CGL.¹¹ In some cases even utterances to a third person is considered publication.¹² In other cases,

this requirement meant publication to a large number of persons.¹³

Similarly, advertising injury has had divergent views as to whether “true advertiser’s” advertising should be covered or whether even limited advertising on websites are covered.¹⁴

3.4. An argument for implementation in India

In India, the development of e-commerce sector is probably because the internet was introduced only later on in India than in the US and e-commerce business models operating in India are mostly Indian branches of foreign e-commerce companies. Even the ones established in India have borrowed the idea from the West. Learning lessons from the West and since the top general insurance companies in India are joint ventures between Indian and foreign insurance companies, they adopted the later models or templates of CGL insurance which explicitly excluded many of the risks that e-commerce companies face.

The reasoning used in Ingram’s case must be implemented in India to include intangible property in CGL coverage. Otherwise e-commerce platforms will have to buy several policies just to cover their unique risks. CGL policies must evolve over time; however it is going too far to expect that insurance companies will expand their scope of coverage especially toward businesses that are not risk-averse. In that case, the Indian judiciary must adopt liberal interpretation to

⁸ Civ. 99-185 TUC ACM, 2000 U.S. Dist. Lexis 7299 (D. Ariz., April 19, 2000)

⁹ Civ. 99-185 (D. Ariz. April 19, 2000)

¹⁰ Richmond (n 7)

¹¹Ratts v. Board of County Commissioners, 141 E Supp. 2d 1289, 1324 (D. Kan. 2001)

¹²Ratts v. Board of County Commissioners, 141 E Supp. 2d 1289, 1324 (D. Kan. 2001)

¹³Marleau v. Truck Ins. Exch., 37 P.3d 148, 153-54 (Or. 2001)

¹⁴ American Employers' Insurance Co. v. DeLorme Publication Co., Inc., 39 F. Supp. 2d 64 (D. Me. 1999).



accommodate these risks within the coverage.

Indian insurance companies have started to offer Cyber Risk Insurance, which is crucial for e-commerce platform considering the amount of data stored online; they still do not cover business related risks.

The other alternative is for insurance companies to issue e-commerce risk insurance; this development has already started taking place in the USA, but does not seem probable in India in the near future. With that being the case, the only solution is for CGL coverage to be expanded to encourage businesses in the e-commerce sector, in exchange for which the insurance company may charge a high premium.

IV. Inadequacy of Indian Laws to cover E-commerce Risks

E-Commerce has revolutionized the way businesses are functioning today across the globe. It has made the buying and selling of goods and services much easier than the traditional approach adopted by retailers to capture the market. Though at the periphery, it may seem non-complicated and an easy way of doing business, there are a variety of legal issues and factors that crop up which e-commerce businesses need to take into consideration once it's ready to takeoff and storm the market. In India, there is no specific or comprehensive legal framework that deals with e-commerce business however; relevance is placed on the Information Technology Act, 2000 and its amended act, The Trademarks Act of 1999, The Copyright Act of 1957, The Indian Contract Act of 1872 to regulate the e-commerce business. There

are certain discrepancies and issues in these legal provisions which need to be plugged in and there's a necessity to draft a separate comprehensive framework for the promotion and growth of ecommerce sector in India.

4.1 Legal issues in E-commerce

With the extension of online business space in India, new issues are developing. These issues are regular to all the legal provisions referenced over that regulate e-commerce businesses and present a hazard to the e-commerce platforms. The primary issue is that of privacy and security as tended to under section 3 of the Information Technology Act, 2000 and 3A of IT Amendment Act, 2008 and section 67&72 of IT Act, 2000 and sections 66E, 67,67A, 67B and 72A of IT Act, 2008 separately. The personal data of the customers goes through different degrees of interface which compromises the delicate private subtleties of customers. Another issue that endures in e-commerce business is consumer protection. It is not clear whether online trading and business amounts to providing service as defined under CPA and would it include service online and delivered offline.¹⁵ Thirdly, data protection is another issue which has developed to a significant extent because of access to technology where there is a constant threat to tentative users who divulge certain data on e-commerce platforms for consumption of services. Fourthly, Content Regulation is another issue that online businesses face as they are the sole host or distribute third party data/content. This is tended to under section 79 of IT Amendment Act of 2008 and is prevalently known as the "Safe Harbor Rules" where these platforms go about as "intermediaries"

¹⁵ P.T. Joseph, S.J., E-Commerce: An Indian Perspective (3rd edn, PHI Learning Private Limited 2009) 27



while dealing with third party information. Intellectual Property issues additionally crop up and present an extraordinary risk to e-commerce platforms. The IT Act, 2000 deals with certain parts of copyright violations on the internet except sections 43 and 65 of the Act which covers some aspects of copyright. Additionally, the Trademarks Act of 1999 doesn't give enough protection to domain names and is along these lines not extra-territorial in nature. The IT Act 2008 does not address the jurisdictional issues.¹⁶

4.2. Need for a comprehensive Legal Framework

A comprehensive legal framework is required for the development and better addressal of issues that e-commerce companies deal with. In India, the Information Technology Act deals with e-commerce activities and with the amended act of 2008, the government has come with a legislation that would reduce the punishment in most cases, reduces the power of police, providing compounding at executive level even for criminal offences without consent of the victim, makes it difficult to apply penal provisions, provides immunity from vicarious liabilities for intermediaries against any law in the country.¹⁷ The Act does not create rebuttal presumptions of confidentiality of trade secrets and information. In the absence of strong protection of data theft and privacy nothing is left for Indian outsourcing industry and the absence of an effective remedy for corporations is likely to further erode the confidence of the Indian industries in the new e-commerce legal regime.¹⁸ Thus, with the above issues and gaps in the IT Act, there is

a dire need to come up with a sound and comprehensive legal framework that specifically deals with e-commerce activities which would plug in the reasons to barriers and promote growth of the e-commerce sector in India.

There can also be a setup of a separate body or a coordination platform carved out by the Ministry of Electronics & Information Technology which specifically drafts and recommends policies, standards for insurance companies which address varied legal issues and coverage policies touching upon the e-commerce sector. Moreover, a proper establishment of a common information pooling platform is needed wherein all e-commerce transactions could be recorded and reported by law to better understand and fulfill the gaps in coverage policies.

V. Conclusion

E-Commerce sector is the most booming sector in the country, and given the number of transactions it undertakes of million numbers of people, it is something which is growing at a tremendous rate in India. The amount of goods and services that the consumers buy or sell or get into contact with e-commerce platforms every day or each hour or minute of the day gives rise to contractual obligations which can be violated by the sellers or by third persons, here referred to e-commerce platforms/companies. Thus, it is imperative in such cases to understand in detail the insurance framework which covers e-commerce risks. The research undertaken in this paper points that there are certain gaps in the traditional insurance policies being offered and moreover, there is a need to adopt

¹⁶ Dr. Sumanjeet, The State of E-Commerce Laws in India: A review of Information Technology Act (2010) 1, 273

¹⁷ *ibid.*

¹⁸ Sumanjeet (n 15).



the way CGL policies are interpreted by the US Courts in India. Moreover, there is also a pressing need to introduce a separate and a comprehensive law for e-commerce activities in order to plug in the forthcoming in the Information Technology Act, 2000 and 2008 and other provisions loosely governing e-commerce activities in India.

