

Contracting in Cyber Space: A Comparative Analysis of Electronic Transaction Law in Sri Lanka

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Abstract— *In the last few decades the means and methods of traditional face to face contracts have been changed significantly. The most influential factor for this drastic change is the rapid development of information technology as well as the internet. As a result of that, contracting in cyberspace has become more familiar than paper based contracts. However, due to medium differences and other complications there are various difficulties of applicability of traditional contract law principles in electronic contracts as it is. Therefore, it has been recognized that there should be a separate law to address these issues in electronic transactions in both international and domestic levels. Sri Lanka has become one of the foremost country in South Asian region, which enacted separate piece of legislation to govern the e-transaction related issues. As a result of that, the Electronic Transaction Act No 19 of 2006 has been enacted by our Parliament. Primarily, this Act has followed the UNCITRAL Model Law on Electronic Commerce as well as the United Nations Convention on the Use of Electronic Communications in International Contracts. Even though the Sri Lankan law has demonstrated a progressive approach towards introducing a legal framework for electronic transactions, there are some gaps in relating to data protection, privacy and consumer protection. For an example, South African Electronic Communication and Transaction Act in 2002 has particularly addressed some typical problems of consumer protection such as data protection, privacy, trust redress and jurisdictions. Thus, based on that research problem this paper aims to analyze the existing Sri Lankan law, particularly the scope of the Electronic Transaction Act and its compatibility with traditional contract law principles comparing to Indian and South African legal approaches . As well, this paper attempts to emphasize the existing gaps in our legal framework with regards to electronic contracts, in order to suggest the appropriate recommendations . Accordingly, this research has been followed normative approach to collect data from both primary and secondary sources.*

Keywords— **traditional contract law principles, electronic contracts, Electronic Transaction Act.**

I. INTRODUCTION

“Thus, in the future, instead of buying bananas in a grocery store, you could go pick them off a tree in a virtual jungle...”

- Yasuhiro Fukushima, Japanese business executive (Kidd and Daughtrey, 2000)

The evolution of information and electronic technology has made tremendous impact on day to day life of the people in all over the world as mentioned in the above statement. It has brought many capabilities and changes to the world in various aspects. On the one hand the growth of scientific innovations increased and at the same time commercial and economic sectors rapidly developed due to the impact of electronic media.

Thus, emergence of ‘electronic commerce’ or ‘internet commerce’ has drastically changed the patterns and practices of business world by opening new pathways. According to the Chissick and Kelman (2000, p.1), ‘electronic commerce has started to revolutionize spending habits and will change the way everyone does business. The reasons for this are many and varied; globalization and dismantling of trade barriers, the deployment of smart cards and the internet...’

Admittedly, the growth of e-commerce has made significant changes in traditional contractual relationships as well. The internet has been identified as an effective medium not only for advertising and distributing product information but also for doing business transactions in more efficiency. In this scenario, the traditional face to face, paper based contracts turn into less important and instead of that the electronic contracts become an essential part of our day to day life.

However, the application of traditional contract law principles in e-contracts seems to be controversial in some extent. As Abeyratne (2008) correctly pointed out, ‘there are number of similarities and practical difficulties of applicability of basic contract law principles on e-Commerce as it is. There may be instances in which some modifications for traditional principles would need for electronic transactions’.

Accordingly, the need of new law, to address the gap between traditional commercial transactions and e-transactions as well as to make uniformity of the rules governing e-transaction has been recognized by the global community. In this context, the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) is a useful legislative tool for many developing countries.(Fernando, 2014) On the other hand the United Nation's Commission on International Trade law has introduced UNCITRAL Model Law to maintain equal status on e-transaction in the world.(Abeyratne, 2008)

Based on the aforementioned international instruments, many countries adopted domestic legislations to address the emerging issues of e-transactions. Sri Lanka has become one of the foremost country in South Asian region, which enacted separate piece of legislation to govern the e-transaction related issues. As a result of that, the Electronic Transaction Act No 19 of 2006 was enacted by our Parliament. Primarily, this Act has followed the UNCITRAL Model Law on Electronic Commerce as well as the ECC.

This paper mainly attempts to highlights the applicability of traditional contract law principles on e-contracts in the light of international instruments and domestic legislations. Particularly, this paper analyses the Sri Lankan legislation comparatively with South African, Indian and other relevant laws pertaining to e-transactions. Finally, this paper will suggest possible solutions for improving Sri Lankan e- transaction laws further.

II. WHAT IS ELECTRONIC COMMERCE?

Electronic Commerce or e-commerce is not an unknown term in this globalization era. E-commerce simply denotes the idea of commercial transactions carrying through the electronic media. Through the glimpse of scholars, "Electronic Commerce is the current term used to describe a certain range of commercial activities involving computers and telecommunication network".(Fernando, 2014)

Indeed, the major difference between traditional commerce and e-commerce is the medium of transaction. While, Traditional commerce takes places using paper based medium, e-commerce has obtained more attraction by using combination of Internet technology, mobile commerce, electronic funds transfers, Electronic Data interchange, and many other technologies and innovative business systems.

Therefore it is noteworthy that, aforementioned forms of e-commerce are able to make enormous impact on our commercial life. It has exposed the boundaries of traditional commerce by substituting more speedy, low

cost, efficient and simple transactions instead of paper based, high cost, time wasted traditional transactions.

Likewise, electronic contracts are playing a major role in e-commerce. It has widened the margins of paper based contracts by introducing many changes. Particularly, legal framework of traditional contracts become inadequate to address some newly emerged issues of electronic contracts. Therefore, it is very much useful to analyze the applicability of traditional contract law principles in the case of electronic contracts

III APPLICABILITY OF TRADITIONAL CONTRACT LAW PRINCIPLES IN ELECTRONIC CONTRACTS

The transformation of contracts from paper based medium to electronic medium has stimulated the scholar's arguments about whether traditional contract law principles are able to address the underpinning characteristic of e-contracts as well?

Pollute (no date) argues on this basis as, 'the process by which an electronic contract is drawn up cannot be considered identical to that of a paper contract, and the jurist, the lawyer must adapt the procedure to the medium'. Therefore, it is necessary to compare and contrast the role of traditional contract law principles in the context of electronic contracts.

Contracts are legally enforceable agreements (Downes, 1987). There are few elements which can be considered as the fundamentals of a valid contract, such as offer, acceptance, intention, consideration and capacity to make a contract. In addition to that, meetings of mind of parties or '*consensus ad idem*' is considered as the golden thread of a valid contract. Basically, electronic contracts distinguish from traditional contracts on the basis of medium of the transaction. As well, the elements of traditional contracts are vitally used in the context of e-contracts in a different way.

In any contract whether traditional or online, an offer and an acceptance are the essentials of making a contract. An **offer** is an expression of willingness to contract on specified terms.(Downes, 1987) Comparing the applicability of offer in paper based and e-contracts, there is no major difference instead of the medium. In *Pharmaceutical Society of Great Britain v. Boots Cash Chemist* (1953 1 QB 401) it was held that display of goods in a shop window or supermarket shelves did not amount to an offer. The same principle applies in cyber space contracting as well. Therefore, when the e-tailors advertise their goods or services on websites, it is merely considered as an

invitation to treat and not an offer to sell the same. (Abeyratne, 2008)

Nevertheless, the way of **acceptance** in e-contracts is slightly different and it has made some debatable issues because the offeror and offeree are distanced with each other at the time of acceptance. Thus, it is controversial about where is the contract actually formed? and how the acceptance communicated?

Acceptance is the unconditional agreement to the presented offer. (Chissick and Kelman, 2000) In cyber space, contracts can be accepted by a 'click - wrap', by asking the customer to click on 'offer' or 'I accept' button. According to the general contract law principles, it is an established rule that the acceptance of an offer is effective at the time it is communicated. (Downes, 1987) Traditionally, the postal rule has applied for determine the moment of acceptance.

As Lindley J. pointed out in *Byrne v. Van Tienhoven* (1818, 160 ER 250), postal rule denotes that, where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reaches its destination. Accordingly, the controversial question is whether postal rule can be applied to e-contracts as same as traditional contracts?

The answer for this question is uncertain. The application of postal rule in e-contracts has been discussed by Singapore High Court in *ChweeKin Keong v Digilandmall.com Pvt. Ltd* (2004 2 SLR 594) case and suggested that in the case of emails, it may be inappropriate for the postal rule to apply. Abeyratne (2008) supports this opinion and argues that, the mechanism involved in sending mails under normal post is different from sending of electronic mail. In contrast, e-mails are not instantaneous and once the offeree clicks the 'send' button, he does not have any control over it further. So, one can argue that based on the controlling factor it is same as sending a letter through the post.

On the other hand, some argues that the **receipt rule** is more appropriate in the context of e-contracts other than the postal rule. As Abeyratne (2008) pointed out, 'most of the countries accept that when the message received by the service provider of the receiver, it is presumed that the receiver received the message'. However, the applicability of receipt rule raises some other issues like, where does receipt actually occur? At the offeror's mail server or when it is downloaded on to the computer or when the offeror read it?

When considering the traditional contract law principle of **mutual assent or 'meeting of minds'** in contract, one can be asked a reasonable question whether e-contracts are

able to achieve this requirement in cyber dealings? For an example, In a click-wrap agreement buyer accepts all provisions of the seller by clicking on an 'accept' button before opening the good. In this kind of contract often contains numerous detailed provisions that many consumers may not read or may misunderstand (Kidd and Daughtrey, 2000). This situation is more similar to standard form of contract. On the other hand, when an e-contracts are formed through EDI system, the contract occurs without any human intervention as well as meeting of minds. So, it is questionable that the meetings of the minds of contracting parties in e-contracts.

As well, when examine the **writing and signature requirement** of traditional contract law, *pima facie* one can argue that e-contracts have failed to meet that requirement. As Marsoof (2006) pointed out, 'the main obstacle in regard to the proof and enforcement of an electronic transaction was the requirement that certain contracts must be made in writing or should be in writing and signed by the parties thereto'. Hence, the court in *Derby & Co Ltd. v. Weldon* (1991 1 WLR 652) held that computer databases are valid document for discovery. As well, the electronic or digital signatures are substituting that gap of signature requirement in e-contracts.

Based on the all aforementioned arguments, it is noteworthy that there are similarities as well as varieties exist when the traditional contract law principles are applying in the context of e-contracts. Therefore, it is important to analyze that, whether the international and domestic laws relating to electronic contracts are capable enough to address these issues?

IV OVERVIEW OF INTERNATIONAL AND DOMESTIC LEGAL REGIME OF ELECTRONIC TRANSACTION

Admittedly, the application of traditional contract law principles in electronic context demonstrate the need of some modification for traditional legal framework. Even though, some countries adopted new laws to address these issues, there were lack of uniformity among those laws. However, in the international level, UNCITRAL Model Laws and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) are playing a significant role to introduce uniform legal framework.

Sri Lanka has introduced the Electronic Transaction Act No.19 of 2006 as a significant piece of legislation which broadly addresses the issues in electronic transactions in the country. The Act closely follows the UNCITRAL Model Law on e-commerce and electronic signatures (Kariyawasam, 2008). However, Fernando (2014) argues

that, the Convention have also made a tremendous impact on the Act.

A. Core Principles of the Electronic Transaction Act

Nevertheless, when considering the Sri Lankan law in a broad perspective, there are three principles can be identified as the basis of our Electronic Transaction Act (ETA), such as technology neutrality, functional equivalence and party autonomy. (Fernando, 2014) The principle of **technology neutrality** enshrines that technology would not be given preference when applying the law. For an instance, according to the definition of “electronic signature” in Section 26 of the ETA, it means ‘any letters, numbersincorporates in or logically associated with an electronic document, with the intention of authenticating and, or approving the same, in order to establish authenticity or integrity, or both .’ So, it emphasizes that the Act only focused on the signing parties intention, instead of particular electronic methods by combining the Article 9 (3)(a) of ECC and Article 7 of the Model law. This approach is more compatible with the signing requirement of traditional paper based contracts.

Secondly, the principle of **functional equivalence** is envisaged under sections 3, 4, 5, 6 and 11 of the Act. ‘This principle removes artificial barriers to the recognition of electronic commerce establishing the manner in which electronic equivalents of paper based could be used without impediments.’ (Fernando, 2014)

Thirdly, the principles of **party autonomy** enshrines in the Section 11 to 14 of the Act. This principles allows the contracting parties to determine the rules and conditions of their dealing as same as the traditional paper based contracts. For an instance, Section 11 of the Act use the words ‘ Unless otherwise agreed to between an originator and the addressee...’

Hence, It is evident that, Sri Lankan legislature has intended to create some compatibility between traditional transactions and electronic transactions by including aforementioned core principles as the essence of the Act.

B. Electronic Contracts under ETA

The preamble to the ETA states that it is ‘an Act to facilitate the formation of contracts....in electronic form’. As well, Section 2 of the Act ensures that, establishing legal certainty, reliability and public confidence with regard to electronic transactions as the main objectives of the Act. These provisions simply align with the objectives of UNCITRAL Model law as well as ECC.

Section 11 of the Act expressly provides that ‘unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed in electronic form. A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form.’ Hence, it is clear that, in that provision the Act has recognized same legal validity to electronic contracts as well.

However, the Act does not deal with the legal status of an online invitation to treat. As Fernando (2014) correctly pointed out, could a web site advertising product in Sri Lanka be treated similar to shop-front or advertisement? Article 11 of the ECC enshrines this principle and our law need to pay an attention in this regard.

Thus, Section 14 of the Act is concerning about debatable point of traditional contracts and e-contracts ;the time and place of dispatch and receipt of electronic records similar to Article 15 of UNCITRAL Model Law. Accordingly, the electronic information is deemed to be dispatched at 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. This provision has eliminated the doubt of communication of offer and acceptance in e-contracts. So, Marsoof (2006) comments on that provision as ‘these rules are of great significance not only for making a decision in regard to the existence of a contract from an offer and acceptance made electronically, but for also deciding knotty questions of jurisdiction that could arise in cyberspace’.

The Act also satisfies the requirement of writing and signature in traditional paper based contracts. According to the Section 18 of the Prevention of Frauds Ordinance ‘any type of promise, contract, bargain or agreement is of no force or avail in law “unless it be in writing and signed by the party’. Likewise, Section 3 of the ETA enshrines the legal recognition of e-records and Section 4 states that the writing requirement shall be satisfied by a data message....any other communication in electronic form... The Section 7 of the Act recognizes the legal validity of an electronic signature as same as a written signature.

However, Section 17 (d) of the Act embodies some critical point about the requirement of ‘meeting of the mind’ in traditional contracts. Accordingly, a contract shall not be denied validity solely on the ground that there was no review or intervention by a natural person or actions carried out by the automated message. This provision impliedly deals with the use of ‘electronic agents’ to form a contract. But the question is whether a contract between two electronic agents without human intervention can meet the requirement of *consensus ad idem*? Nevertheless, many countries like South Africa, S.20(d) of the South

African Electronic Communications and Transactions Act, 2002 expressly provided that in such a situation the agreement are not bound unless those terms were being capable of reviewed by a natural person to avoid this issue.

However, according to the analysis of above provisions it is evident that our Act intends to compatible with the traditional contract law principles in larger extent. This is very much highlighted when comparing the Sri Lanka law with the Indian legal approach to e-transaction .

C. Comparing Sri Lankan legal approach with Indian e-transaction law.

The Information Technology Act No.21of 2000 (ITA)is the law governing e-transactions in India. The main factor which make Indian IT Act differ from the ETA in Sri Lanka is, the Indian act envisage a ‘prescriptive approach’ instead of technology neutral ‘minimalist approach’ in Sri Lanka. (Fernando,2014) Accordingly, technological standards are specifically prescribed in the Act. Therefore, as Fernando pointed out, one of the underlying feature of the Convention namely, technology neutrality is not present in the Indian ITA. For an example, Section 5 of the ITA gives legal recognition to digital signatures which is based on asymmetric cryptography. This is not aligned with the Article 9(3)of the ECC. In this point, it can be argued that the Indian approach is lagging behind the compatibility of traditional contract law principles.

V . CONCLUSION

Contract formation and performance can be conducted over electronic media and can occur without using a single sheet of paper or a drop of ink.(Marsoof, 2006)

So, it is noteworthy that, the revolution of internet has made numerous changes to the way of traditional contract formation. However, the interesting point is, the electronic contracts somehow maintain the capability of applying traditional contract law principles to form a valid contract as discussed above.

As a developing country in Asian region, the Sri Lankan approach to the e-transaction is more progressive and closely reflects the international standards as well. Sri Lankan ETA has followed both UNCITRAL Model laws and ECC as well. Comparing to Indian approach, Sri Lanka has incorporated technology neutrality principle to more align with traditional contract law principles.

However, still there are some gaps can be found in Sri Lankan law in relating to right to privacy and consumer protection in e-contracts. In contrast, many countries have adopted relevant measurement for data protection and

consumer protection. For example Article 5 of the E-Commerce Directive 2000/31/EC in European Union (EU) has expressly provided that, the e-tailer shall provide information like the name, geographical address, e-mail address and etc to the consumer. Comparatively, the South African Electronic Communication and Transaction Act in 2002 also provides very strong protection through the provisions of protecting personal information, cryptography service and etc.

In contrast, the ETA in Sri Lanka is silent in regarding the consumer protection and right to privacy. As, Kariyawasam (2008) rightly pointed out, ‘the Act recognizes that online transactions are valid, but contains no specific provisions dealing with consumer protection’. Even though, the Consumer Affairs Authority Act No 9 of 2003 and Unfair Contract Terms Act No.26 of 1997 afford consumer protection for faced to faced contracts in some extent, those Acts also neglect to provide same protection for online contracts.

Therefore, as a concluding remarks it is apparent that, Sri Lanka has developed a legal regime in relating to electronic contracts , but it need to improve further by incorporating relevant consumer protection laws in cyber space.

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