



Emerging Challenges in Regulating E-Commerce: The Sri Lankan Context

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Abstract

The development of IT regime has significantly contributed to the transformation of traditional approaches towards the digitalized regime. Commercial engagements are not an exception on this regard. The e-commerce transactions are steadily growing in the modern world. The growth of e-commerce in Sri Lanka is posing significant legal and regulatory challenges. The paper attempts to study and highlight deficiencies in the present legal frameworks regulating e-commerce in Sri Lanka. Content analysis of Electronic Transaction Act No.19 of 2006 (as amended) and other relevant legislations revealed, the existing framework recognizes e-contract, e-signature, and e-documents. Still, certain drawbacks are unsettled in practice. In addition, areas like privacy and data protection, intermediary liability, security, and consumer protection are left unaddressed in the current regulatory frameworks. This study primarily intends to explore the pros and cons of the Legal Framework of Sri Lanka related to the electronic commerce regime. Further, the paper approaches international standards as a comparative perspective, finally the paper suggests key suggestions for policy and decision-makers to overcome challenges and strengthen the framework.

Keywords: *E-Commerce, Electronic Transaction Act, Sri Lanka.*

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Introduction

The advent of 'Information and Communication Technology' has an effect on almost all the spheres of human life and buying and selling of goods and services is not an exception to it. Electronic Commerce (E-Commerce) has gained popularity over traditional commerce because it offers versatility and advantages to businesses and customers. It can be simply defined as, 'the buying and selling of goods and services over the internet'. E-Commerce has transformed the traditional market into a digital market and the global business community is rapidly moving among Business-to-Business (B2B), Business-to-Consumer (B2C), and Consumer- to- Consumer (C2C) transactions².

Consumers of e-commerce have increased steadily since 2010 all over the world. In 2019, retail e-commerce sales worldwide amounted to 3.53 trillion US dollars and e-retail revenues are projected to grow to 6.54 trillion US dollars in 2022³. In Sri Lanka also, E-Commerce has been witnessed consistent growth. As Visa International suggested in 2018, the Sri Lankan e-commerce regime had significant growth of 34% for one year, as of July 2018⁴ and it's been expected that the Annual domestic e-commerce sales value is expected to grow up to \$400 million by 2022⁵.

Furthermore, due to the rapid growth in the e-commerce industry, many Sri Lankan businesses have converted their physical business platform to an online platform. For example, when considering the online shopping in 'Daraz', out of the total online shoppers in Sri Lanka, 85%⁶ claim to have

² Abdul Gaffar Khan (2016) ;, 'Electronic Commerce: A Study on Benefits and Challenges in an Emerging Economy', Global Journal of Management and Business Research: B Economics and Commerce Volume 16 Issue 1 Version 1.0 Year 2016, Pp.20

³ [online] Available: <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>

⁴ Daily News, 'Sri Lanka's e-commerce segment records 34% growth' (Daily News.lk, 26 November 2018) [online] Available:<https://www.dailynews.lk/2018/11/26/business/169414/%E2%80%98sri-lanka%E2%80%99s-e-commerce-segment-records-34-growth%E2%80%99> [Accessed on 9 June 2021].

⁵ Daily News, 'SL e-commerce to hit US\$ 400 mn by 2022', 7 September 2018

⁶ AdaderanaBiz; 'The trends and growth of Sri Lanka's e-commerce industry: an overview of Daraz e-commerce Index'; [online] Available:<http://bizenglish.adaderana.lk/the-trends-and-growth-of-sri-lankas-e-commerce-index/> [Accessed on 9 June 2021].

shopped on 'Daraz'⁷. Furthermore, domestic e-commerce websites⁸ have established global partnerships that accommodate the import of goods through websites to supply to the domestic market. For Example, 'Alibaba' bought the entire share capital of Rocket's South Asian e-commerce platform⁹.

Despite the development of e-commerce worldwide, it is always coupled with more challenges than a traditional commercial transaction due to the complex feature of the internet and e-commerce¹⁰. In addition, as cyberspace facilitates commercial transactions worldwide, the number of cross-border disputes has also increased¹¹. Due to these emerging challenges, many countries are grappling with finding effective mechanisms in regulating e-commerce regimes.

In recent times, global attention was drawn in making separate guidelines and policies for regulating e-commerce. Several threats, including information disclosure, online privacy, payment security, online fraud, and many more similar issues, have penetrated the digital sphere. In Sri Lanka, Electronic Transactions Act No.19 of 2006 (as amended) is the primary piece of legislation regulating the e-commerce sphere along with few other Laws¹². Though the Electronic Transactions Act was drafted with the international standards laid down by the UNCITRAL Model Law, many practical drawbacks were experienced in the last fifteen (15) years.

The paper primarily aims to critically analyze the emerging challenges to the Sri Lankan e-commerce regime and the adequacy of Legal responses in countering them. In doing so, the study inspects the Sri Lankan legal

⁷ The Western province owns the largest online order share with 50% whilst Central and North Western provinces follow with 10% and 9% order shares respectively. Colombo and Gampaha lead the District wise order share with 31% in the former and 15% in the latter. [online] Available at: <http://bizenglish.adaderana.lk/the-trends-and-growth-of-sri-lankas-e-commerce-industry-an-overview-of-daraz-e-commerce-index/> [Accessed 23 July. 2021].

⁸ Domestic e-commerce market is estimated to be around USD 40-7- million and is expected to grow by 3 percent in the near future. See Supra note 36.

⁹ See Supra note 36.

¹⁰ B.A.R. Ruwanthika Ariyaratna(2019), 'Are Consumers Safe in Online? A Critical Analysis of Sri Lankan Legal Regime on Online Consumer Protection'; The Junior Bar Law Journal (2019) ; Pp. 3-4.

¹¹ Aura Esther Vilalta (2011); 'ODR and E-Commerce'; Online Dispute Resolution Theory and Practice; Eleven International Publishing; Pp.125-126.

¹² Computer Crimes Act No. 24 of 2007; Consumers Affairs Authority Act No.9 of 2003 (CAAA); Unfair Contract Terms Act, No. 26 of 1997 (UCTA) ; Payment and Settlement Systems Act, No. 28 of 2005 and the Payment Devices Frauds Act, No. 30 of 2006.

frameworks that regulate the e-commerce sphere and examines to what extent the framework is effective in practice. Further, it explores the International standards and developments in facilitating electronic commerce, including international conventions. Finally, the objective of the paper is to suggest feasible recommendations for an effective legal framework that enables access, performance, and dispute resolution of e-commerce through a domestic legal framework.

1. International Legal Frameworks on E-Commerce

1.1 UNCITRAL model law on E-Commerce (1996).

The Information Technology regime compelled the nations to reform their Laws following the trends and challenges of the digital sphere. That includes the validity, enforceability, and admissibility of the electronic data messages¹³. Due to the challenges, nations have amended or supplemented existing laws to address these issues and facilitate the electronic commerce regime. Such upgrade encouraged enabling the use of paperless communication and fostering efficiency in international trade¹⁴.

The international frameworks and harmonization are essential in e-commerce due to the nature of the internet and e-contracts, frequently flowing cross-border. In achieving that, the initiatives of the United Nations Commission on International Trade Law (UNCITRAL) are remarkable¹⁵. After a series of attempts since 1984, In December 1996, the General Assembly of the United Nations endorsed a model law on electronic commerce developed by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law facilitated e-commerce by prescribing providing a set of internationally acceptable rules to the states and thereby contribute to removing legal obstacles and increasing legal predictability for electronic commerce¹⁶.

The Model Law has been divided into two parts. Part I relates to the general provisions¹⁷ relating to e-commerce, it addresses the three principles of non-discrimination, technological neutrality, and functional equivalence. The Part

¹³ United Nations (2006); 'United Nations Conference on Trade and Development'; Information Economy Report 2006; The Development Perspective; Pp.2-3; [online] Available at: https://unctad.org/system/files/official-document/sdteecb20061ch8_en.pdf [Accessed 03 July. 2021].

¹⁴ *ibid.* Page 299-300.

¹⁵ *Ibid.* Page 5-6.

¹⁶ [online] Available at: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce

¹⁷ Article 1 to 15 of the Model Law; [Accessed 13 July. 2021].

II of the Model Law deals with specific provisions for e-commerce in certain areas. Specifically, it prescribes the instances related to ‘Carriage of Goods’¹⁸. It furnishes and extends the application of the provision in contracts related to the ‘Carriage of Goods’ by specifying different situations¹⁹ and attributability of electronic communications as valid transport document²⁰.

Standards of rules laid down by the UNCITRAL model law are widely accepted and adopted by many member states. As UNESCAP suggested²¹, about Seventy (70) jurisdictions have enacted their national Laws in accordance with the standards of Model Laws. Sri Lanka incorporated the guidelines in the National context in 2006, with the Electronic Transaction Act No.19 of 2006 (as amended)²².

1.2. The UNCITRAL Model Law on Electronic Signatures (MLES) (2001).

Building on the success of the Model Law as a precedent for national law reform, UNCITRAL adopted The Model Law on Electronic Signatures (MLES) in 2001. The model Law primarily intended to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures. Primarily, it addressed the concerns on ‘e-signatures’ on authentication and integrity. In doing that, it proposed to assist States in establishing a modern, harmonized, and fair legislative framework to effectively address the legal treatment of electronic signatures and give certainty to their status²³. In facilitating ‘E-Signatures’, MLES addresses a concern raised in the Model Law on E-Commerce of 1996.

The article 7 of the Model Law on E-Commerce (1996) states,

‘(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and

¹⁸ Article 16 and Article 17 of the Model Law.

¹⁹ Article 16 of the Model Law.

²⁰ Article 17 of the Model Law.

²¹ UNESCAP; ‘UNCITRAL legal instruments for e-commerce and paperless trade’; [online] Available at: - https://www.unescap.org/sites/default/files/2_UNCITRAL%20texts%20for%20e-commerce%20and%20paperless%20trade_Luca_1.pdf [Accessed 03 July. 2021].

²² Electronic transactions (amendment) Act, no.25 of 2017.

²³ Article 1 to 12 of Model Law (MLES)

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.'

The MLES facilitated as a 'subsidiary piece of instrument' laying down specific criteria to be met by a particular form of an electronic signature to achieve the standard as reliable under Article 7. The MLES contributed in setting the standards for the electronic records' requirements of governments and regulatory authorities²⁴. The MLES contains provisions favoring the recognition of foreign electronic signatures based on a principle of substantive equivalence that does not take into account the place of origin²⁵. About Thirty (30) states adopted MLES in their domestic legal framework.

1.3. United Nations Convention on the Use of Electronic Communications in International Contracts (UN ECC) (2005).

The Electronic Communications Convention addresses the issues that remained unsolved even after two UNCITRAL Model Laws discussed above. The convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded, and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents²⁶.

It enables cross border paperless trade by:

- i. Validating the legal status of electronic transactions by ensuring functional equivalence of 'writing,' an 'original' document, and 'signature',
- ii. Preventing technology discrimination, enabling cross-border recognition of electronic signatures, and
- iii. Permitting automated message systems all forms of e-contracts with the ability to correct input errors²⁷.

In addition, the convention proposed specific standards and rules that were overlooked by the two model laws. That includes, rules related to

²⁴ Ibid.

²⁵ Jayantha Fernando (2020); 'Digital Transactions & Electronic Transactions Act & UN eCC'; E-Sri Lanka Project.

²⁶ [online] Available at: https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications

²⁷ United Nations Convention on the Use of Electronic Communications in International Contracts (UN ECC); Article 1 and 2.

the ‘invitation to make offers’ in a contract²⁸, use of automated message systems in the electronic communications²⁹, consequences of ‘Input errors’ in the automated message systems³⁰, etc.

Sri Lanka took part in the negotiation & drafting of the UN ECC (2001-05). While about Fifteen (15) countries are party to the convention, more than 15 states have enacted the substantive provisions of the Convention domestically³¹. Sri Lanka ratified the convention on 7th July 2015 as the first country in South Asia and the second country after Singapore in Asia and Pacific Region (APEC). It entered into force in Sri Lanka on 1st February 2016. Though the Electronic Transaction act of Sri Lanka is primarily based on the UNCITRAL Model Law of 1996, it was amended in October 2017, following the standard of the Electronic Communications Convention (UN ECC)³².

1.4. Summary.

The complex nature of e-commerce, which has no geographical limitations, compelled the upgrading of the legal systems. Initiatives of the United Nations Commission on International Trade Law (UNCITRAL) resulted in various international instruments that set out minimum standards in the international harmonization of e-commerce laws. Though those laws have no binding force over the states because of their ‘Soft’ nature, states reformed their legal systems, including Sri Lanka, ensuing those standards.

2. Legal frameworks on e-commerce in Sri Lanka

While e-commerce is remarked as a significant evolution of the business and commercial sectors, due to the unique features and involvement of technology, the wider community realizes the urge for new Laws to regulate the e-commerce sphere. The complexity of the spectrum, particularly on the mode of entering the contracts³³, payment methods, and dispute resolution arising out of e-commerce, are a few genres around which new Laws are required.

²⁸ UN ECC; Article 11.

²⁹ UNECC; Article 12.

³⁰ UNECC; Article 14.

³¹[online] Available at:https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status

³² Verite Research Sri Lanka (2019); ‘Challenges Faced by Sri Lankan e- Commerce Providers’; Country Update Sri Lanka. Pp.2-3.

³³ Special modes of entering into the contracts prescribed by different existing Laws. Such as Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840 (As amended) which mandates Deeds affecting immovable property should be executed before a notary and witnesses.

Although the technological advancement has been considered in the law making in Sri Lanka, the traditional or classic challenges remain redundant on many occasions. Scholars cite, reluctance of the courts in recognizing intangible rights as 'goods'³⁴, Precedents held intangible things cannot be the subject of theft or misappropriation³⁵ and unwillingness of the court in admitting 'Computer Evidence' in the proceedings³⁶ are few of the drawbacks in the recognition of the electronic commerce in the legal realm. These prompted the Sri Lankan legal system in refining the legal framework towards new laws to regulate the widespread e-commerce evolved with the expansion of the market. In Sri Lanka, the following legal frameworks are relevant in regulating e-commerce transactions.

2.1. Electronic Transaction Act No.19 of 2006 (As amended) (ETA).

The Electronic Transactions Act No.19 of 2006 is based on the standards established by United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (1996) and Model Law on Electronic Signatures (2001). The Act applies to all business and commercial transactions that are electronic in nature, other than those specific areas that have been excluded by the Act³⁷.

Electronic Transaction Act enacted in Sri Lanka with the prime objectives of,

- i. To facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty,
- ii. To encourage the use of reliable forms of electronic commerce,
- iii. To facilitate electronic filing of documents with government and to promote efficient delivery of government services by means of reliable forms of electronic communications, and
- iv. To promote public confidence in the authenticity, integrity and reliability of data messages and electronic communications³⁸.

³⁴ Justice Saleem Masroof (2007); E-Commerce & E-Governance Some Pertinent Issues; Bar Association Law Journal [2007] BALJ Vol. XIII at Pp.1.

³⁵ In *Nagaiya v Jayasekera* (28 NLR 467) it was held, 'The Electricity since it's intangible, it's not falling under the purview of the 'Property' to fulfil the 'Theft' as defined in Section 366 of Sri Lankan Penal Code'.

³⁶ Observed in *Benwell v Republic of Sri Lanka* (1978-79) 2 Sri LR 194.

³⁷ Section 23 of the Electronic Transaction Act (ETA) excluded the application of this Act to the wills or other testamentary dispositions, powers-of-attorney, sale or conveyance of immovable property, trusts (excluding constructive, implied, and resulting trusts), Bills of Exchange, telecommunication licenses, etc.

³⁸ ETA; Section 2.

The Act was enacted with VI chapters and twenty-six (26) sections to achieve the objectives mentioned above. Chapter I consisted of the General Provisions, Chapter II recognized the Legal Validity of the data messages and other Forms of e-communication. As a way forward step, Section 7 of the Act provides for the legal recognition of Electronic Signatures. Significantly, Section 7 to Section 10 laid down the foundation towards the Electronic Governance.

Chapter III is relevant to the context of e-commerce as it addresses Electronic Contracts. The Act recognized the legal validity of the e-contracts for the first time in Sri Lanka³⁹ as it stated,

'A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form'⁴⁰.

The provision expanded the application of the traditional rules related to the contract into the electronic environment. In applying the traditional rules related to the offer & acceptance and facilitating the application to the different parties to the contract, Provisions⁴¹ of Chapter III established specific rules.

Chapter IV lays-down the rules on Certification Service Providers (CSPs), and Chapter V prescribes Rules on Evidence.

The evidence related to the Contemporaneous Audio and Video Recording⁴² and Computer Evidence⁴³ in Sri Lanka is governed by the Evidence (Special Provisions) Act No.14 of 1995. However, the ETA expressly⁴⁴ excluded the application of the Evidence Ordinance (Special Provisions) Act to any transaction to which Electronic Transaction Act applies. ETA provides⁴⁵ a specific regime for the admissibility of any data message, electronic document, electronic record, or Communication under the act to avoid various shortcomings.

Though the act was commented as one of the comprehensive pieces of the

³⁹ ETA; Section 11.

⁴⁰ Ibid.

⁴¹ ETA; Section 12 to Section 17.

⁴² Section 4 of Evidence (Special Provisions) Act No.14 of 1995.

⁴³ Evidence (Special Provisions) Act; Section 5.

⁴⁴ ETA; Section 22.

⁴⁵ ETA; Section 11.

statute when it was enacted, it was refined with an amendment⁴⁶ in 2017. This amendment was brought with the objectives to (i) provide greater legal certainty to e-commerce providers in the country, (ii) ensure the validity of electronic contracts, and (iii) facilitate cross-border trade⁴⁷.

However, the act is silent in relation to the 'Dispute Resolution and Settlement' procedures. Therefore, the traditional Resolution and Settlement process is adopted to resolve disputes arising from e-commerce Transactions. The procedure is regulated in Sri Lanka with the Judicature Act No.2 of 1978 (as amended) as Substantive Law and Civil Procedure Code No.2 of 1889 (as amended) & High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 as the primary Procedural Laws.

2.2. Computer Crimes Act No.24 of 2007 (CCA).

The Computer Crimes Act was enacted in 2007 to identify computer crimes and provide the procedures for the investigation and prevention of such crimes⁴⁸. Though the CCA does not apparently provide any e-contracts provisions, some of the provisions could be utilized to enhance protection and security around the electronic contracts. For an instance, the act recognizes the unauthorized disclosure of information as a computer crime⁴⁹.

While the illegal interception of data was first recognized as an offence in Sri Lanka under the Telecommunication Act in 1996, Section 8 of the CCA provides illegal interception of data as an offence. Likewise, CCA is relevant and closely connected with the e-contracts as it facilitates the protection of users in cyberspace with the basic privacy data protection arising out of the electronic transactions. Still, it is criticized that the protection granted under the CCA is insufficient to counter all the modern threats of cyberspace⁵⁰. In addition, as Sri Lanka has no consolidated or specific laws on data protection up to the date, a new Data Protection bill is in the process⁵¹.

⁴⁶ Electronic Transactions (Amendment) Act, No.25 of 2017.

⁴⁷ Ibid.

⁴⁸ Preamble of the Computer Crimes Act (CCA)

⁴⁹ CCA; Section 10

⁵⁰ Vishni Ganepola (2017). 'Effectiveness of the Existing Legal Framework governing Cyber-Crimes in Sri Lanka', Pp. 3-5.

⁵¹ Draft Bill for an Act to Provide for the Regulation of Processing of Personal Data (2019) [online] Available at: https://www.dataguidance.com/sites/default/files/data_protection_bill_3-10-2019_-_amended_draft_final_-_ld_release.pdf

2.3. Consumers Affairs Authority Act No.9 of 2003 (CAAA).

Consumers Affairs Authority Act was brought into the force with the main objectives of,

- i. Establishing the consumer affairs authority (CAA),
- ii. Promoting effective competition and the protection of consumers, and
- iii. Establishing consumer affairs council⁵².

It is the primary legal framework for consumer protection in Sri Lanka. Discussing the Consumer Affairs Authority Act is essential in an e-commerce sphere. Due to the nature of the higher complexity of the online environment and the 'weaker bargaining' power of the consumers, their rights are often challenged⁵³. Scholars pointed out that enhancing consumer confidence and safeguarding consumer rights are necessary for the sustainable digital commerce⁵⁴.

However, the Act defined the term 'Consumer' as,

'Any actual or potential user of any goods or services made available for consideration by any trader or manufacturer'⁵⁵.

Though the definition is 'broad and general', it's argued that the absence of specific reference to the 'online consumers' become redundant⁵⁶. Therefore, to expand the application of the Act in the online environment, the provisions should be refined accordingly with more clarity on this aspect.

The Part II of the act prescribes provisions related to the deals with the Regulation of trade; it is hardly found any provision, which confers any authority on CAA to regulate online trading⁵⁷. Therefore, it is apparent that though the CAA does have certain authority and powers in regulating, determining, and ordering trade practices in Sri Lanka. Due to the absence

⁵² Consumer Affairs Authority Act, No.9 of 2003; Long Title.

⁵³ OECD Recommendation (2016); 'Consumer Protection in E-commerce' [online] Available at: <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf> [Accessed 03 July. 2021].

⁵⁴ B.A.R. Ruwanthika Ariyaratna (2019); 'Are consumers safe in online? A critical analysis of Sri Lankan Legal Regime on Online consumer protection'; The Junior Bar Law Journal (2019).

⁵⁵ Consumer Affairs Authority Act, No.9 of 2003; Section 75.

⁵⁶ Perera WC (2018) , "Beware If You Are a 'Digital Consumer'- Intangible Digital Goods and Consumer Protection in Sri Lanka," 11th International Research Conference ; (General Sir Kotelawala Defence University - 2018); Conference Proceedings; Pp.19.

⁵⁷ Ibid.

of 'online trade regulations' it's futile to apply the provisions into the 'e-commerce' businesses.

The role of the CAA Act and Consumers Affairs Authority is duly essential in the e-commerce sphere. The scope of the act and the provisions should be refined accordingly to the expansion of the application in the digital platforms. Further, though the CAAA adopts its dispute resolution mechanism through Consumer Affairs Authority and Consumer Affairs Council, it seems redundant in applying them into the E-Commerce Disputes due to the previously mentioned shortcomings of the act.

2.4. Unfair Contract Terms Act, No.26 of 1997 (UCTA).

In the commercial transactions, Contractual terms are often set out in standard forms, which are used for all contracts of the same kind, and only varied so far circumstances of each contract require. But the use of standard terms has been exploitation or abuse of the superior bargaining power of commercial suppliers when contracting with such consumers⁵⁸. The supplier could draft the standard terms in ways highly favorable to himself, both through clauses that excluded or limited his liability for failure to perform or for defective performance and by provisions, which conferred right on him under the contract⁵⁹.

Therefore, a statutory intervention has become increasingly essential to protect the 'consumers' who have inferior bargaining power known as. Unfair Contract Terms Act, No.26 of 1997 is one of the outcomes satisfying this urge. The act was enacted incorporating similar standards laid down by the Unfair Contract Terms Act 1977 of the United Kingdom.

The objectives of the Act are pertinent in e-commerce since most of the contracts arising out of the e-commerce regime require the consumers to accept (By clicking on 'I accept') the terms of performance rather than a 'Mutual Bargaining of Contractual Terms.' Mostly, Terms of Contracts, including 'Exemption Clauses' are not adequately communicated to the consumers and understood by them.

⁵⁸ Steve Hedley (2009); 'The Unfair Contract Terms Act: Wider Still and Wider?'; Published online by Cambridge University Press: 16 January 2009. Pp 32-33.

⁵⁹ The Law Commission and The Scottish Law Commission (2002); Unfair Terms in Contracts: A Joint Consultation Paper; [online] Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp166_Unfair_Terms_In_Contracts_Consultation.pdf [Accessed 03 July. 2021].

On such occasions, the consumers are statutorily protected against unreasonable exclusion clauses through the provisions of the Unfair Contract Terms Act, No.26 of 1997 (the UCTA). The UCTA was enacted to impose limits on the extent to which civil liability for breach of contract, negligence or breach of duty can be avoided by means of contract terms and otherwise⁶⁰. While the scope of the Act extended to the e-commerce environment, Section 4 of the Act specifically refers to the 'Consumers'⁶¹. The provision provides, where a party relying on any term excluding liability with reference to a contract, valid to the extent such term satisfies the test of 'Reasonableness'⁶². Also, the Act protects 'Consumer' against a contract term imposes an obligation on a person dealing as a consumer to indemnify any other person, shall have effect only in so far as such contract term satisfies the requirement of reasonableness⁶³.

In determining whether a term is 'reasonable,' though Act doesn't define precisely what 'reasonable' means but sets out guidelines.

The UCTA provides, Courts will usually consider,

- a. The information available to both parties when the contract was drawn up.
- b. Whether the contract was negotiated or in standard form?
- c. Whether the buyer had the bargaining power to negotiate better terms?⁶⁴

In addition to these provisions, the Act regulates and prescribes the standard tests for the avoidance of liability for negligence⁶⁵ and 'Guarantees' which exclude or restrict liability arising out of the contractual obligations⁶⁶. Further, the Act attempts to secure the consumers against the contractual terms, which exclude or restrict liability for breach of obligations attached to the specific consequences arising from Sale and Hire Purchase⁶⁷.

⁶⁰ Long Title, Unfair Contract Terms Act, No.26 of 1997.

⁶¹ Section 4 of the Act Provides, (1) 'This section applies as between parties to a contract where one of the parties deals as consumer or on the other's written standard terms of businesses'.

⁶² Ibid.

⁶³ Unfair Contract Terms Act, No.26 of 1997 (the UCTA); Section 5.

⁶⁴ UCTA; Section 10.

⁶⁵ UCTA; Section 3.

⁶⁶ UCTA; Section 6.

⁶⁷ UCTA; Section 7.

2.5. Summary

In responding to the challenges of the e-commerce regime in Sri Lanka, Electronic Transaction Act plays a significant role. While the ETA predominantly applies to the e-commerce regime, few other Laws are also relevant to the context. It includes The Computer Crimes Act, which enshrines the protection and security of the digital platforms, The Consumers Affairs Authority Act enacted with the objective of protecting 'Consumers' and Unfair Contract Terms Act which set-out the standards on terms of contract. However, these number of pieces of Laws addressing the issues arising out electronic commerce sphere, the 'Dispute Resolution and Settlement' mechanisms are traditionally approached by the procedural and substantive laws that generally apply to the civil disputes in the Sri Lankan landscape. Few other laws such as the Payment and Settlement Systems Act, No.28 of 2005 and the Payment Devices Frauds Act, No.30 of 2006 are also related to e-commerce in Sri Lanka.

3. Emerging Challenges of E-Commerce

Though the expansion of electronic commerce in modern commercial transactions resulted in enacting modern laws to govern the e-commerce panorama, due to the rapid growth of the internet, it is still posed with significant challenges on the laws relating to electronic commerce. In the Sri Lankan context, though the Electronic Transaction Act No.19 of 2006 (amended) is one of the comprehensive pieces of legislation, still it gives rise to specific practical difficulties in its implementation⁶⁸. In addition, many scholars comment many of the loopholes of the act⁶⁹. These deficiencies in the legal system caused challenges in the e-commerce regime⁷⁰. Such as,

3.1. Threats to Privacy and Data protection.

Though the digital disruption is built into e-commerce's business model, as a grey side it has proved that mounting scrutiny of big data, which has fueled

⁶⁸ DMRA Dissanayake (2015); 'Strengthening ICT Law Regime to facilitate E-Commerce and M-Commerce Transactions: A Sri Lankan Perspective'; Proceedings of 8th International Research Conference, KDU, Published November 2015. Pp.28-29.

⁶⁹ K.A.A.N.Thilakarathna & Nisanka Jayarathne (2020) ; 'The Legal Regime Governing The Information Communication Technology In Sri Lanka' ; Manurawa Law Journal ISSN 1800-055X Vol. Iv.

⁷⁰ Justice Saleem Masroof (2006); 'Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation'; Law College Law Review 2006; Pp.110-112.

the industry's rapid growth⁷¹. Studies pointed out many data breaches⁷², including from the most prominent corporate portals.

Especially, numerous times Facebook⁷³ was subject to data breaches, including the data from 533 million people in 106 countries was published on a hacking forum in 2019⁷⁴. These incidents created certain shock waves among the e-commerce consumers since these platforms are involved with a significant amount of sensitive data. As Humby's quote says, 'Data is the new oil'⁷⁵, the demand for data is at its peak around the globe, particularly in the internet space.

Many of the businesses around e-commerce collect a variety of information regularly about their customers to understand their clients better, improve their business processes, and target special offers. It's not an alien practice because, before the arrival of the internet, companies used to track physically the purchases made by individuals. But now, on certain occasions, the company sells the data to third parties or uses it for other purposes other than what they collected⁷⁶. Sometimes, those data are subject to breaches such as hacking and fell into the wrong hands. For example, 'Ebay' one of the biggest global e-commerce platforms affected by a cyber-attack in 2014 in which 145 million customers' personal details were stolen by hackers⁷⁷. These bitter experiences mandated the consumers of e-commerce for better protection over their data and privacy.

⁷¹ Chemi Katz (2019); 'How Data Privacy Will Reshape the Future of E-Commerce'; [online] Available at: <https://www.mytotalretail.com/article/how-data-privacy-will-reshape-the-future-of-e-commerce/#comments-container> [Accessed 03 July, 2021].

⁷² bbc.com.; 'British Airways breach: How did hackers get in?' [online] Available at: <https://www.bbc.com/news/technology-45446529> [Accessed 03 July, 2021].

⁷³ At the End of 2018 that Facebook, the one of the Major Social Media, which violated the privacy measurements and supplied large amount of data to some companies such as Amazon, Microsoft and Netflix. Facebook's announcement in late April of 2019 that it had set aside \$3 billion to \$5 billion to settle claims that it mishandled users' personal data suggested a strong consensus by federal regulators that the social media giant needed to be held accountable.

⁷⁴ See-'Facebook downplays data breach in internal email'; [online] Available at: <https://www.bbc.com/news/technology-56815478#:~:text=Data%20from%20533%20million%20people,previously%20reported%20leak%20in%202019> [Accessed 03 July, 2021].

⁷⁵ Arthur Charles & Editor- Technology (2013); 'Tech giants may be huge, but nothing matches big data'. The Guardian. ISSN 0261-3077. [online] Available at: <https://www.theguardian.com/technology/2013/aug/23/tech-giants-data> [Accessed 03 July, 2021].

⁷⁶ Peter P. Swire (2003); 'Trustwrap: The Importance Of Legal Rules To Electronic Commerce And Internet Privacy'; Hastings Law Journal (Vo.54) (2003) Pp.848-850.

⁷⁷ Independent.ie;'Seven things you need to know about the eBay cyber-attack'; [online] Available at: <https://www.independent.ie/business/technology/seven-things-you-need-to-know-about-the-eBay-cyber-attack-30301233.html> [Accessed 03 July, 2021].

As a response to this challenge, many countries around the world brought their own pieces of 'Data Protection Laws' to address this challenge. United Kingdom's General Data Protection Regulation (GDPR) is a good example.

Though many international instruments recognized the 'Right to Privacy'⁷⁸, it is not guaranteed as a fundamental right in the Sri Lankan constitution. Still, the amended⁷⁹ Article 14A the Constitution prescribes 'privacy considerations' as an exception against exercising the right of access to information⁸⁰. The exception can be presumed as the recognition of 'Privacy' in the Constitution. In addition, a number of cases⁸¹ address that the individual's right to personal space were respectively recognized as to be respected and secured.

There are no consolidated or specific laws on data protection in Sri Lanka other than a few industry-specific data protection-enabled legislations⁸². Still, since these legislations, including Electronic Transactions Act, have not adequately defined/addressed the term 'data', it further emphasizes the need for a law related to data protection to secure privacy in cyberspace.

The absence of the provisions leads to deleterious consequences, which threaten consumer privacy and data protection in Sri Lanka⁸³. In addition, in cross-border transactions, the contracting parties are reluctant to enter contracts due to the absence of 'Data Protection and Privacy Laws' in Sri

⁷⁸ Universal Declaration of Human Rights Article 12, United Nations Convention on Migrant Workers Article 14, UN Convention of the Protection of the Child Article 16, International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights Article 17; regional conventions including Article 10 of the African Charter on the Rights and Welfare of the Child, Article 11 of the American Convention on Human Rights, Article 4 of the African Union Principles on Freedom of Expression, Article 5 of the American Declaration of the Rights and Duties of Man, Article 21 of the Arab Charter on Human Rights, and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Johannesburg Principles on National Security, Free Expression and Access to Information, Camden Principles on Freedom of Expression and Equality.

⁷⁹ Section 2 of the Nineteenth Amendment to the Constitution.

⁸⁰ Article 14A (2) of the Constitution states, 'No restrictions shall be placed on the right declared and by Article, other than such prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary'.

⁸¹ See-Nadarajah v Obeysekera 52 NLR 76 (1971); Sinha Ratnatinga v The State, [2001] 2 SLR 172 ; Hewamana v Attorney General 1999 ICHRL 31:8 March 1999.

⁸² Manjula Sirimane & Nadine Puvimanasinghe (2021); ' Sri Lanka - Data Protection Overview'; [online] Available at: <https://www.dataguidance.com/notes/sri-lanka-data-protection-overview>[Accessed 10 June. 2021].

⁸³ Sumathi Dharmawardena; 'Privacy And Data Protection-Key To Development Of Electronic Commerce'; [online] Available at:<https://www.lawnet.gov.lk/privacy-and-data-protection-key-to-development-of-electronic-commerce/> [Accessed 10 June. 2021].

Lanka⁸⁴.

As given attention to this issue, The Data Protection Bill is in the process, with the objectives of,

- i. Safeguard the rights of individuals, and
- ii. Ensure consumer trust in information privacy in online transactions.

As a supplement to the Proposed Data Protection bill, A draft for the Cyber security bill is in the process and in final stage to provide a comprehensive framework to prevent and manage cyber security threats and incidents effectively and protect critical information infrastructure.

The proposed Bill of Data protection will aid in securing the data and privacy of the users through cyberspace. However, as the bill has not come into force, the practical difficulties and lacunas would be identified when it does. Particularly enforcement of the bill, compliance, and regulatory measures would be a few of the challenges the digital commerce platforms and consumers may face shortly.

3.2. Absence of E-Consumer protection.

Emerging Information and Technology rendered immense benefits to the consumers, especially when it comes Business to Consumer (B2C) transactions. On the other hand, due to the complex nature of the internet, online consumers are compelled to expose severe violations of their consumer rights other than offline consumers⁸⁵. Several international instruments stress down consumer protection in digital platforms.

Mainly, United Nations Guidelines on Consumer Protection in 2016 (UNGCP) prescribes as,

'A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce'⁸⁶

Those e-consumers should be adequately secured as equal to offline consumers.

⁸⁴ Supasini P & Soorya B (2019); 'The Necessity of the Cyber Privacy Law to Enhance the Economic Growth in Sri Lanka'; Proceedings of 12th International Research Conference, KDU, Published November 2019.

⁸⁵ Aijaj Ahmed Raj and Wazida Rahman (2016); 'E-commerce Laws and Regulations in India: Issues and Challenges'; Pp.3-4

⁸⁶ United Nations Guidelines on Consumer Protection (UNGCP) ; Guideline 5

Also, the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999 ensures the same⁸⁷.

But in Sri Lanka, as discussed in the previous chapter, there are no regulations or policies to foster consumer privacy and protection in the e-commerce sector. Due to the narrative definition of the 'Consumer' and the absence of express authority to regulate online trade and services, the Consumer Affairs Authority Act becomes futile in securing consumer's rights in the e-commerce sphere. Neither Sri Lankan consumer protection law and electronic transactions law, nor any other legislation has specifically addressed the online consumer rights in Sri Lanka⁸⁸. Therefore, on the other hand, from the consumer rights perspective, Sri Lanka E-Commerce is in great danger in cyberspace.

3.3. Challenges of implementing E-Signatures.

The e-signature was recognised and introduced⁸⁹ into Sri Lanka with the Electronic Transaction Act No.19 of 2006. Subsequently, Act No. 25 of 2017 amended it. Generally, it opens the door to the e-world, but in practice, it has failed to create a secure legal system⁹⁰.

The Act, as it is amended, defines the e-signature as,

*'data in electronic form, affixed to logically associated with a data message, electronic document, electronic record or communication which may be used to identify the signatory in relation to the data message, electronic document, electronic record or communication and to indicate the signatory's intention in respect of the information contained therein'*⁹¹.

While the act empowers⁹² the Certification Service Providers (CSPs) to issue various types of electronic signatures in accordance with such criteria and

⁸⁷ The principle 1 of the OECD Guidelines provides, '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'.

⁸⁸ R. N. K. Chandrawansa (2020); 'The Need for Reforming the Sale of Goods Ordinance of Sri Lanka: A Comparative Analysis'; Research Article OUSL Journal 2020 Vol. 15, No. 01, (pp. 67-82); DOI: <http://doi.org/10.4038/ouslj.v15i1.7487>

⁸⁹ ETA; Section 7

⁹⁰ Dilini T. Samayawardena & D.M. Thimalee M. Sachindrani (2018); 'Legal Issues On Electronic Transactions: SL Vs. EU'; Conference Proceedings; 3rd Interdisciplinary Conference of Management Researchers 23rd – 25th October 2018 – Sabaragamuwa University of Sri Lanka.

⁹¹ ETA; Section 26

⁹² ETA; Section 19

guidelines⁹³, there are several difficulties regarding Certification Authority (CA) and Certification Service Providers (CSPs) under this act. The act does not insist on license and even accreditation of Certification Service Providers (CSPs) and leaves them optional. In practice, regulating these CSPs would be challenging since there are no license mechanisms like India⁹⁴ under our act. These drawbacks lessen the public trust and confidence on authenticity of the 'e-signatures' in Sri Lanka⁹⁵. Thus, though the act itself recognises the electronic signatures, due to the owing practical barriers, it seems redundant. In Sri Lanka, all banks and legal institutes still request physical signatures even in the presence of e-signatures.

3.4. Challenges related to the Performance of Contracts.

While the e-contracts significantly vary from a traditional one as the buyer or consumer cannot feel and touch the product in real-time, many challenges arise from the electronic transactions. It may occur on quality, performance, brand, color, size, price, quantity, and many more⁹⁶. Rather than traditional commerce, the buyer primarily relies on the seller's contract terms in the e-contracts (as Unilateral Contracts). Therefore, the clauses are frequently in favor of the sellers. Due to the absence of any regulatory authority (such as Consumer Affairs Authority), they are unfair or restricted trade practices on most occasions. As a result of this, E-Commerce face numerous challenges, including Receiving goods not suitable for his purpose, inadequate cooling-off period, issues related to the return and refund, defective goods, and few more.

Dispute Resolution and Settlement measures.

As discussed above, because of the absence of any special dispute settlement mechanisms in the Electronic Transaction Act of Sri Lanka, traditional civil dispute settlement mechanisms were adopted to resolve the disputes arising from e-commerce transactions. More particularly, Dispute Resolution methods are primarily based on Traditional Litigation (Court Litigation) and Alternative

⁹³ ETA; Section 24

⁹⁴ In India, Section 21-26 of Indian Information Technology Act 2000 provides for procedure for licensing of service providers in India. There are several elaborating provisions for investigations of contraventions of the Act and also provides sanctions stringent penalties.

⁹⁵ Kariyawasam, K. (2008). The growth and development of e-commerce: an analysis of the electronic signature law of Sri Lanka. *Information & Communications Technology Law*, 17(1), 51-64. <https://doi.org/10.1080/1360083080188930>

⁹⁶ Alison S. Brehm & Cathy D. Lee, (2015) ; 'From the Chair: "Click Here to Accept the Terms of Service"', *American Bar Association* (Jan 2015), Vol. 31 No.1, [online] Available at: http://www.americanbar.org/publications/communications_lawyer/2015/january/click_here.html [Accessed 9 March. 2021].

Dispute Resolution (ADR) methods, including arbitration, mediation, collective Agreements, and Industrial Courts⁹⁷.

The traditional practice of Litigation has expanded the scope through recognition and enforcement of foreign judgment⁹⁸ and facilitating oral or documentary evidence for the proceedings in other jurisdictions⁹⁹ to promote international cooperation. Still, due to the reasons such as certain pecuniary limitations, time-consumption, inconvenience, and expenditures, traditional litigation practice has lost its paramount interest among the parties to settle-down disputes.

But as an effective alternative, Alternative dispute resolution (ADR) practices are fairly approached by the parties because of the benefits such as not requiring a great deal of time, ease the duties, amicable settlements, Less formality in procedures, and a few more. Arbitration is the most common ADR method in Sri Lanka, significantly to resolve commercial disputes. Arbitration is one of the most successful ADR practices in both the National Level and International arena. Particularly after the New York Convention¹⁰⁰, which is one of the most successful¹⁰¹ commercial treaties in International Trade, it recognized the universal arbitration awards and thereby facilitated the development of the International Arbitration to a great extent. Sri Lanka has also been a signatory to the Convention since 1958. Thereby, it's able to validate foreign arbitral awards. Sri Lanka regulates the Arbitral procedures through the Arbitration Act No.11 of 1995.

It was the first Arbitration law in South Asia that was inspired by a draft of the Swedish Arbitration Act and the UNCITRAL¹⁰² Model Law on Model Law on international commercial arbitration¹⁰³. In addition, the procedural rules of the ICLP, Sri Lanka National Arbitration Centre, and International Chamber of Commerce are also used in arbitrations conducted in Sri Lanka¹⁰⁴.

However, in the present context, due to the reasons of a Limited number of

⁹⁷ Ariyaratna, Ruwanthika. (2020). 'Consumer Dispute Resolution in B2C E-commerce in Sri Lanka: A Comparative Legal Analysis'.

⁹⁸ Reciprocal Enforcement of Judgments Ordinance No.41 of 1921.

⁹⁹ Mutual Assistance in Civil and Commercial Matters Act No.39 of 2000.

¹⁰⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

¹⁰¹ For now, 165 countries are parties to the Convention as in August 2020 Ethiopia joined as 165th.

¹⁰² UNCITRAL Model Law on International Commercial Arbitration, 1985.

¹⁰³ Justice Saleem Marsoof; 'Arbitration Procedure, Law and Facilities in Sri Lanka' - Chapter 25; 'Arbitration in Commonwealth Countries - An Anthology'; published by Dr. Ashwinie Kumar Bansal of India; Pp. 780-781.

¹⁰⁴ D.L. & F. De Saram (2018); 'Litigation and enforcement in Sri Lanka: overview'. [Online] Available at:[https://uk.practicallaw.thomsonreuters.com/w-017-0989?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-017-0989?transitionType=Default&contextData=(sc.Default)&firstPage=true) [Accessed 03 June. 2021].

Arbitration centers¹⁰⁵, delays in the enforcement of arbitral awards¹⁰⁶, higher cost of Arbitration and reducing priority and interest of the Arbitrators, the Arbitration mechanism is losing the interest among the parties¹⁰⁷.

Therefore, it's observed as the Litigation and ADR mechanisms are futile in bringing adequate dispute settlement. Consequently, it can be suggested, the ADR method could be refined and developed as an Online Dispute Resolution (ODR) platform to overcome the struggle. Online dispute resolution undertakes disputes that are partially or fully settled over the Internet¹⁰⁸. While the E-Commerce is partially or fully entered and performed in the digital platform, resolving disputes from such a contract seems feasible at ODR platforms, as they are quicker and cheaper.

Summary

The transformation from paper to the digital screen is a giant leap in commerce. It's a combination of several small steps. However, Sri Lankan legal frameworks recognize and address various concerns about e-commerce, in practice, due to the complex nature of the internet and e-contracts, many challenges have arisen. In overcoming them, the Laws should address different aspects of the internet and regulate the access, performance, and dispute resolution of e-contracts more pragmatically.

4. Conclusion

This paper attempts to highlight the gap and further emphasizes the urge for adequate laws to respond to the emerging challenges in the e-commerce regime. The study demonstrates that due to the emerging challenges in the digital sphere, the Laws regulating the e-commerce sphere have become fruitless in facilitating and promoting electronic commerce in Sri Lanka. Adopting international standards in the national context through various pieces of legislation will boost the flow of the e-commerce sphere of the

¹⁰⁵ In Sri Lanka, there are Three major institutes functioning as arbitration centers-the Sri Lanka National Arbitration Centre (SLNAC), the Institute for the Development of Commercial Law and Practice (ICLP) and, CCC-ICLP Alternative Dispute Resolution (ADR) Centre.

¹⁰⁶ It takes an estimated enforcing a contract in Sri Lanka takes a protracted 1318 days via arbitration. See-https://data.worldbank.org/indicator/IC.LGL.DURS?year_high_desc=false

¹⁰⁷ Dr. Harsha Cabral (2019); Practice of Commercial Arbitration in Sri Lanka; Junior National Law Conference 2019.

¹⁰⁸ Mohamed S Abdel Wahab; M Ethan Katsh; Daniel Rainey (2012); 'Online dispute resolution: theory and practice: a treatise on technology and dispute resolution'. The Hague: Eleven International Publishing; 2012. Pp.357

country. Significantly, while the Data Protection Bill of Sri Lanka is almost finalized, once the act comes into force, the Privacy and Data Protection in the e-commerce sphere will be enhanced at least with a minimum standard.

Still, the online trading regulations should be brought up as a step forward to govern the e-commerce platforms registered in Sri Lanka. In addition, practical issues related to the e-signature and Certification Service Providers (CSPs) should be rectified with amendments and regulations. Finally, as a crucial point, Sri Lanka should rethink about the present dispute resolution mechanisms for e-commerce disputes. Since the public vastly prefers e-commerce as a platform where they can save much time, the paper suggests it is the right time to progressively step up into online dispute resolution (ODR) with the facilitation of technology. Due to the Covid'19 pandemic, Sri Lanka has successfully facilitated the first-ever virtual hybrid international arbitration via digital platforms¹⁰⁹. Therefore, it's not a massive challenge, and this is the right time to move forward. These suggestions will boost the e-commerce panorama in Sri Lanka and promote digital commerce with trust, authenticity, and reliability.

¹⁰⁹ Wtc.lk; 'Sri Lanka holds first hybrid international arbitration hearing' [online] Available at:<https://wtc.lk/2020/09/16/sri-lanka-holds-first-hybrid-international-arbitration-hearing/> [Accessed 18 May 2021].