

"FORMATION OF E-CONTRACTS AND E-CONSUMER PROTECTION IN SRI LANKA"

Charindri Jayarathna,

Attorney-at-Law,
LL.B (Hons) University of London, Attorney-at-Law
LL.M (Distinction) University of Staffordshire

Introduction

Sri Lanka recorded a 29.3% of internet users of the total population and a 0.2% of involvement in the world in 2016¹. The engagement of locals in the internet and in electronic transactions have rapidly grown surpassing geographical boundaries in obtaining unlimited access to information, goods and services which were formerly limited to physical stores. The evolution of Information and Communication Technology ("ICT") in recent years have outdone human expectations, specially, in electronic commerce ("e-commerce") which has become ubiquitous. The internet has evolved in great strides and has become the most successful mode of communication between business-to-business (B2B),

business-to-consumer (B2C) and consumer-to-consumer (C2C) transactions.

Electronic contracts ("e-contracts") are advantageous mainly due to its instantaneous nature. It can however also be detrimental in terms of trust, reliability and security in contrast to traditional contracts. Consumer confidence is mainly based on 02 elements; the products meeting consumer expectations and if unmet, the availability of an expedited remedy². In consideration of a B2C transaction a local consumer may be more confident over a paper transaction in comparison to an autonomous online transaction in a website. As the entire transaction is made through the use of technology it is distant and impersonal. Sensitive information has to be shared in an

¹ Internet Live Stats, 'Sri Lanka Internet Users' (2016) <<http://www.internetlivestats.com/internet-users/sri-lanka/>> accessed 4 October 2019

² Ashok R Patil and Pratima Narayan, 'E-CONSUMER PROTECTION IN INDIA: TRENDS AND CHALLENGES', <

<https://webcache.googleusercontent.com/search?q=cache:OrkdKGEAQUYJ:https://revistas.unlp.edu.ar/R-eDIP/article/download/6354/5418/+&cd=1&hl=en&ct=clnk&gl=lk>> accessed 5 October 2019

open network infrastructure to facilitate payments. Whether the browser is secure or whether it encrypts the sensitive personal and financial information provided by the e-consumers, is questionable. Another concern is whether the browser provides a comprehensive privacy policy to enable data protection. A risk of involvement of hackers, fraud, exploitation of privacy and data prevails in e-contracts. False and misleading representations of products in respect of standards, quality, grade and the fitness for the purpose, misrepresentations in warranties and guarantees, after sale services are in question until receipt of products. Return policies may not be in place, thus limiting the bargaining power of an electronic consumer (“e-consumer”), exploiting the right to all information relating to the transaction and thereby the freedom of contract. This paper examines the Sri Lankan context of protection of e-consumerism with respect to e-contracts formed on websites.

³ The Act repealed the Consumer Protection Act No.01 of 1979, Fair Trading Commission Act No.01 of 1987 and the Control of Prices Act (Cap 173) as published in Consumer Affairs Authority Act No. 09 of 2003, Rules & Regulations, Consumer Affairs Authority,

Background

Sri Lanka established legislative enactments to address e-commerce by utilizing the functional equivalence and technology neutrality to traditional contract law. Based on United Nations Commission on International Trade Law (“UNCITRAL”) model the Electronic Transactions Act, No. 19 of 2006 (“ETA”) was enacted. The subsequent amendment, the Electronic Transactions (Amendment) Act, No. 25 of 2017 (“ETAA”) further aligned the Sri Lankan e-commerce spectrum to the United Nations Convention of on the Use of Electronic Communications in International Contacts. The Computer Crimes Act, No. 24 of 2007 addresses any violations committed in the cyberspace. With respect to consumer protection, the prevailing legislation is the Consumer Affairs Authority Act No. 09 of 2003 (“CAAA”)³, which was created to address physical commercial trade. The functional equivalency and the absolute

Ministry of Industry and Commerce, <http://www.caa.gov.lk/web/index.php?option=com_content&view=article&id=111&Itemid=560&language=en>, accessed 02 October 2019

application of the CAAA to e-contracts on websites, is however, arguable.

Formation of e-contracts

An e-contract contains the identical elements to a contract in the traditional sense⁴. There are 03 types of websites which can form e-contracts with consumers; non-interactive websites which provides only information and any contact with the vendor is through other modes of communication; interactive websites where an e-consumer can log onto a site, select items for purchase, and enter payment details and lastly automated interactive websites which are similar in operation to interactive sites with the exception of automated systems in place⁵; and based on each type of website the time of formation of an e-contract can differ. An e-contract offer is similar to a traditional offer⁶. In

establishing an e-contract offer in websites, *Richards*⁷ is of the view that depending on the content made available to the buyers, websites can constitute offers. In such circumstances, the objective intention of the vendor is looked employing the objective test of a reasonable man. In *Fisher v Bell*⁸ an offer in a supermarket was held to be constituted when the buyer produced the goods at the cashier. Similarly, goods displayed in a website clicked 'into' a virtual shopping cart and proceeded to 'checkout' constitutes only to an offer. Another stance is that if order buttons are marked 'place order' instead of 'purchase' that there is likelihood of being considered an invitation to treat⁹. However, shedding light to the matter section 11A¹⁰ of the ETA, provides that advertisements accessible unilaterally on websites amounts merely to invitations to offer, unless the advertisement clearly

⁴ 'A legally binding agreement made between two or more persons, by which rights are acquired by one or more acts or forbearances on the part of the other on the part of the other or others' as published in Jack Beatson, *Anson's Law of Contract*, (28th edn, OUP 2002)

⁵ Christensen, Sharon, 'Formation of Contracts by Email -Is it Just the Same as the Post?' [2001] QUTLawJl 3; (2001) 1(1) Queensland University of Technology Law and Justice Journal 22

⁶ 'An expression of willingness to contract on certain terms made with the intention that a binding agreement

will exist once the offer is accepted' as published in Paul Richards, *Law of Contract*, (9th edn, Longman 2009)

⁷ Paul Richards, *Law of Contract*, (9th edn, Longman 2009)

⁸ *Fisher v Bell* [1961] 1 QB 394

⁹ Julia Hörnle, 'The European Union Takes Initiative in the Field of E-Commerce', *Journal of Information, Law and Technology*, 31 October 2000, <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/hornle>, accessed 02 October 2019.

¹⁰ Electronic Transactions (Amendment) Act, No. 25 of 2017, s8

indicates the intention of the party proposing the transaction to be bound if accepted.

Notwithstanding that an offer in a website is generated from the buyer and accepted by the vendor, web sites include click-wrap agreements which prior to acceptance of the buyers order form by the vendor, a dialogue box or a pop-up window will appear on screen to provide a series of set terms and conditions wherein the buyer has the opportunity to tick either 'OK', 'I Accept' or 'I Agree' to provide his assent or click the 'cancel' or close the window. Drawing a significant contrast between traditional contracts, the offeree dictates the terms and conditions and has the sole bargaining power in the transaction over the offeror. As the terms and conditions are curated solely by the vendor it refutes any bargaining powers with the offeror. Once cancelled or closed the window of the terms, the offeror is rendered incapable of using the said goods

or services. Click-wrap agreements are created for the benefit of the vendor to easily manage e-customers collectively and the ICT industry have also made these agreements a threshold to save digital signatures by utilizing clauses which are not consumer friendly or covered under cyber laws¹¹. This has created an unequal bargaining power between the parties, placing the vendor in a superior position compared to the purchaser, thereby creating a lack of freedom of contract.

Acceptance¹²; the final act of forming an e-contract, is similar to a traditional contract. Acceptance in a website is based upon the nature of a website. Upon an e-consumer placing an order on a non-interactive website, acceptance doesn't form until the owner communicates same through email or another mode. In an interactive website the owner is likely to communicate clearly what constitutes an offer or an invitation to treat which also applies to the moment a contract is formed. In automated interactive websites

¹¹ Alison S. Brehm & Cathy D. Lee, 'From the Chair: "Click Here to Accept the Terms of Service"', American Bar Association (Jan 2015), Vol. 31 No. 1, <<http://www.americanbar.org/publications/commu>

[nications_lawyer/2015/january/click_here.html](http://www.americanbar.org/publications/commu)>, accessed 12 September 2019

¹² "[T]he final unqualified expression of assent to all the terms of an offer" as published in G. H Treitel, *The Law of Contract* (11th edn, Sweet & Maxwell 2003)

acceptance is instantaneous, and is effective upon receipt of confirmation by the e-consumer¹³. To avoid unnecessary liability, as Amazon.com utilizes acceptance of an order as a buffer and establishes acceptance only upon an e-consumer receiving a confirmation that the goods have been shipped¹⁴. The postal rule¹⁵ which was created to remedy the time and distance delay in traditional contracts is applicable for interactive and non-interactive websites depending on their mode of communicating acceptance, excluding automated interactive websites, where acceptance occurs instantaneously.

Among the key significances of e-contracts is its instantaneous nature, which was initially addressed by Denning J where a demarcation was made against the postal rule, **'[T]he rule about instantaneous communications between parties is**

different from the rule about post. The contract is only complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received'¹⁶. Hill¹⁷ further provides that unlike in post the likelihood of the letter of acceptance being lost in the system in email communication is a rarity. Any error in the system would indicate to the sender as a 'delivery failure' notification or the email would 'bounce back', unlike in the postal system, where status of letter would remain unknown until received by the receiver. A similar stance can be taken with respect to websites where an automated message will appear with an error notice in the event of any default in the system. However, to ensure that instantaneity does not place the e-consumers in a disadvantageous position over e-mistakes as provided in ETA section

¹³ Al Ibrahim M, Ababneh A & Tahat H, The Postal Acceptance Rule in the Digital Age, Journal of International Commercial Law and Technology, Vol. 2, Issue 1, 2007, <<http://www.jiclt.com/index.php/JICLT/article/viewFile/33/20>>

¹⁴ Benjamin Groebner, 'OOPS! THE LEGAL CONSEQUENCES OF AND SOLUTIONS TO ONLINE PRICING ERRORS', 1 Shidler J. L. Com. & Tech. 2 (2004), < http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/354/vol1_no1_art2.pdf?sequence=1>, accessed 26 September 2019

¹⁵ The postal rule provides that acceptance is effective when it is posted and a contract is considered to be formed even if the acceptance fails to reach the offeror.

¹⁶ *Entores v Miles East Corporation* [1955] 2 QB 327

¹⁷ Simone W. B Hill, 'Email Contracts - When is the Contract Formed?', [2001] JILawInfoSci 4; (2001) 12(1) Journal of Law, Information and Science 46, <<http://www.austlii.edu.au/au/journals/JILawInfoSci/2001/4.html>>, accessed 3 October 2019

14A (1) (a) and (b)¹⁸ has been enacted by which an input error made in an automated message system in forming or performing an e-contract can be rectified if the vendors' attention is immediately brought to the error and no material benefit has been gained from such transaction by the e-consumer.

In paper contracts revocation can be communicated any time prior acceptance¹⁹. In *Payne v Cave*²⁰ it was decided that until acceptance is communicated an offer can be revoked and no legal obligation exists. Any revocation subsequent to acceptance is *prima facie* a breach of contract. Revocation with respect to non-interactive websites and interactive websites can be made prior to the website owner communicating his acceptance. However, the stance is different in terms of an automated interactive website, if the confirmation of acceptance is instantaneous. In such instances the model utilized by Amazon.com can be considered e-consumer friendly in terms of revocation.

As mentioned previously, the vendor exercises an unlimited bargaining power over an e-consumer. E-consumer are easy prey to scrupulous vendors on e-commerce platforms, who misrepresent the nature of products and services and acts fraudulently by providing ambiguous information about the products instead of providing transparency to all pertinent information. In the Indian case of *Rediff.com India Ltd. v Urmil Munjal*²¹ it was held that the online platform was liable for deficiency of service in not providing sufficient information for the e-consumer to return a deficient product to the supplier connected through the platform.

In traditional contracts, the terms and conditions cannot be amended without the express written agreement between the parties. Nonetheless, terms and conditions of e-contracts are updated at the sole discretion of the vendor and without any prior notice to the e-consumer. While in the traditional sense the contract would be rendered null and void it doesn't generally

¹⁸ Electronic Transactions (Amendment) Act, No. 25 of 2017, s10
¹⁹ Ibid

²⁰ *Payne v Cave*, (1789) 3 Term Rep 148
²¹ *Rediff.com India Ltd. v/s Urmil Munjal* RPN0.4656 of 2012

apply to e-contracts thereby placing e-consumers in an unfavorable position with lack of bargaining power and freedom of contract. In the US case of *Briceno v. Sprint Spectrum, L.P.*,²² it was held that a customer who was informed of yet did not read the updated terms and conditions were bound to such updates. The judgment further provided that it was sufficient for the vendor to display in its invoices that the terms and conditions were subject to periodic updates and the mode of access to such. The principal feature in consumer protection is to ensure good business practices while protecting the interest of consumers. Due to the anonymity of e-contracts there is a greater need for an e-consumer to be well informed of the terms and conditions, technical steps for the conclusion of an e-contract of a transaction²³.

In comparison to a traditional contract where the parties physically meet prior contracting e-contracts can be entered in

anonymity. In such circumstances a growing concern is the involvement of minors, who are in law incapacitated to enter into agreements due to lack of maturity and the inability to comprehend the depth of contractual duties and liabilities. With the popularity of smartphones the engagement of minors in e-contracts are commonly seen. In the US case of *I.B. v. Facebook, Inc*²⁴ a minor unknown to his parents utilized their credit cards to purchase Facebook credit for gaming purposes. It was argued in court that the e-contract was voidable as the minor lacked capacity to enter into a legally enforceable contract. However, the case was dismissed due to the lack of derogatory claim sought. Having noted the significant number of minors involving in e-contracts without guardians, it was provided for in the California Family Code s 6710 that minors are capable of entering into contracts which can however, be disaffirmed subsequently by minors or parents despite rendering a

²² *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176 (Fla. Ct. App. 2005), cited in Seth A Drucker, 'Online Terms and Conditions: Are They Enforceable, Can They Be Changed, and What Should You Look Out For in Your Contractual Relationships?', Foster Swift Business & Corporate Law Report, (2014), <<http://www.fosterswift.com/communications->

[Online-Terms-Conditions-For-Contractual-Relationships.html](#)>, accessed 11 September 2019

²³ Ibid (n2)

²⁴ *I.B. v. Facebook, Inc*, No. C-12-1894 CW (Northern Dist. Ct. of California 2012)

service in such respect, as per *Arias*²⁵. The Distance Selling Directive in Article 4(2) provides for the protection of minors engaged in e-contracts²⁶. The Sri Lankan laws are yet to address the protection of minors engaged in e-contracts.

In the event of dispute the jurisdiction is referred to ascertain where the cause of action arose. The parties to a contract prefer to include their country of residence in a contract due to the familiarity of laws and access to courts. Jurisdiction is however, a grey area in e-contracts as the parties to an e-contract prefer their own respective jurisdictions, to which the other may be completely ignorant of. It has become a challenge in e-commerce to locate the exact geographical location of online vendors. E-mail domains, designation of websites, electronic addresses or home pages do not necessarily relate to the place of business of the vendor or supplier²⁷. Even though, domain names may provide possible

indications, there is no guarantee that the undertaking was established in such country. This aspect however, is rendered irregular due to the geographical disparities, languages and variations in jurisdictions. In the Indian case of *Rajinder Singh Chawla v. makemytrip.com*²⁸ the court rejected entertaining the matter due to lack of jurisdiction. However, in a subsequent instance in the Indian case of *National Commission in Marwar Engineering College and Research Centre v. Hanwant Singh*²⁹ it was held that the consumer's place of e-commerce transaction is the jurisdiction valid for filing a complaint.

Conclusion

The digital world is rapidly evolving and expanding and has become an essential mode of commercial transactions. In comparison to the previous decade, e-commerce plays a pivotal role in daily human lives, with the increase number of

²⁵ Martha L. Arias, 'INTERNET LAW - Can Children Enter into Legally Binding Online Contracts Using their Parents' Credit Cards?', <https://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2548>, accessed 2 October 2019

²⁶ Distance Selling Directive, Article 4(2)

²⁷ Ibid (n2)

²⁸ *Rajinder Singh Chawla v. makemytrip. Com*, First Appeal 355/2013, SCDRC Chandigarh

²⁹ *National Commission in Marwar Engineering College and Research Centre v. Hanwant Singh*, IV (2014) CPJ 582 (NC)

smart phones and internet penetration. The internet has made the globe a one digital market space and among other things, by giving opportunity for entrepreneurs to reach a wider market and consumers an unlimited affordable choices. However, the full potential of e-commerce can only be achieved by providing stability, trust, reliance and security for e-consumers to be comfortable and e-literate in cyberspace.

An informed consumer is an asset of the nation and considerably better equipped to look after his interests than is an uninformed consumer³⁰. E-consumers should be afforded the opportunity of freedom of contract with access to comprehensive information of products and the technicalities in completing e-contracts. Transparency in information and transaction is pivotal in gaining e-consumer trust. Another aspect is to provide for a set of standard terms and conditions in e-contracts termed in simple language instead of legalese for the better understanding by e-consumers.

E-consumers require to be educated in e-commerce and e-contracts through multimedia to ensure trust is established. Most of all e-consumers require to be facilitated with remedies with respect to product defaults, delivery of wrong products, return of products etc. and ensure their grievances are heard and expeditiously remedied. E-commerce businesses must establish self-regulatory policies and procedures to gain consumer confidence. As an e-consumer lacks opportunity to physically examine a product purchased online an adequate grace period should be afforded to return products, if required. Digital platforms which facilitate market space for various suppliers should ensure the credibility of such suppliers. To avoid unauthorized data-harvesting, data protection laws must be enacted. Minors must be supervised and protected by their guardians and take necessary action to refrain minors from engaging in e-contracts.

³⁰ Shashi Nath Mandal, 'E-Consumers' Protection in India', Global Journal of Management and Business Research: E Marketing Volume 16 Issue 5 Version 1.0 Year 2016, <

file:///C:/Users/ASUS/Desktop/Law%20Journal%202019/India/2142-1-2121-1-10-20170301.pdf>, accessed 4 October 2019

As viewed, the existing consumer law in Sri Lanka is inefficient in providing adequate protection to e-consumers and requires reforms to address the growing legal and social concerns. The use of the functional equivalent approach to CAAA in e-consumer protection and welfare within the domestic parameters is inefficient and at times, impractical. While the businesses have a significant role in providing due protection to the customers and thereby gaining trust and loyalty of consumers, the Sri Lankan government should play the crucial role to update consumer laws to address the growing concerns of e-contracts and e-consumers. A common grievance of e-consumers in Sri Lanka is lack of regulatory authority with online presence to raise grievances or to provide online alternate-dispute-resolution platforms. With respect to digital platforms and vendors located in various jurisdictions, the State requires to co-operate with other jurisdictions to streamline procedures and to safeguard the interests of local e-consumers. As provided

³¹ Charles, Clark, 'The Answer to the Machine is in the Machine', in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague: Kluwer Law International, p. 139

by Charles Clarke, "the answer to the machine is in the machine"³¹; the modern day problems require modern day solutions.

Sri Lanka being a developing nation is yet to reach its full potential in e-commerce. While it is a universal fact that law cannot surpass the pace of technological innovations, in a world of 'haves' and 'have-nots' Sri Lankan consumers should not be placed with the 'have-nots', specially in providing cross-border dispute resolution mechanisms merely due to the lacuna of relevant laws. With the use of the new UN Guidelines on Consumer Protection of 2015³² on e-contracts which facilitates fair and equitable treatment, ethical commercial practices, transparency, disclosure, awareness and education, secure payment systems, fair affordable and speedy dispute resolution, consumer privacy and data security; Sri Lanka requires to take steps to prioritize e-consumer protection simultaneously with the development of e-commerce.

³² United Nations, 'United Nations Guidelines for Consumer Protection', <https://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf>, accessed 5 October 2019

