

ARE CONSUMERS SAFE IN ONLINE? A CRITICAL ANALYSIS OF SRI LANKAN LEGAL REGIME ON ONLINE CONSUMER PROTECTION

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Introduction

E-commerce is a rapidly growing phenomenon which has highly influenced the day to day life of the people all over the world. It has been able to transform the traditional market into a digital market and as a result the consumer-supplier relationship has also been subjected to a significant change. Through e-commerce and internet technology, the consumers, as well as traders, enjoy great benefits such as efficiency, low cost, more choices offered, convenience etc¹. However, it must be noted that, due to the complex nature of the internet, online consumers have to expose serious violations of their consumer rights other than offline consumers. In such a context, state intervention is very much

important to safeguard consumer rights in the digital environment².

Therefore, at international level, it is recommended that the State should regulate e-commerce activities in order to safeguard the rights of online consumers³. Accordingly, it is evident that many countries including the European Union, South Africa, United Kingdom, India etc. have developed legal mechanisms to protect online consumers. However, in the Sri Lankan context, the issue of online consumer rights protection has been subjected to minimum attention and the main IT and consumer-related legislation in the country provide a poor contribution to safeguard consumer rights in electronic contracts. Accordingly, this paper investigates the problem of inadequate

¹ Yuthayotin, *Access to Justice in Transnational B2C E-Commerce* (Springer International Publishing, 2015)

² UNCTAD. 'Manual on Consumer Protection' (United Nations, 2017) <http://unctad.org/en/PublicationsLibrary/webditcclp2016d1.pdf>. accessed 12th October 2017

³ See OECD Recommendation on Consumer protection in E-Commerce 2016 – Part 1 – General Protection

consumer rights protection in electronic contracts in Sri Lanka comparing with European Union (EU) South African and Indian jurisdictions.

Consumer Rights in E-commerce

In 1962, the former President of the United States (US), John F. Kennedy, declared a broad meaning for the term ‘consumer’ in a very progressive manner. According to his words;

Consumers by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision⁴.

Later, this idea was embodied in various international legal instruments. As mentioned in Guideline 3 of the United Nations Guidelines on Consumer Protection in 2016 (UNGCP) the term ‘consumer’ generally referred to as “natural person regardless of nationality, acting primarily for personal, family or household purposes”. The concept of consumer rights

was first highlighted by President Kennedy in his congressional speech. Accordingly, every consumer should have four basic rights and these rights include, right to safety, right to be informed, right to choose and right to be heard⁵.

In addition to the aforementioned four basic rights, the UNGCP unanimously adopted additional four rights including the right to satisfaction of basic needs, right to redress, right to consumer education and right to the healthy and sustainable environment⁶. Most importantly, in 2015, the revised UNGCP enlarged the boundaries of consumer rights further⁷. As a result, the Guideline 5 of the revised UNGCP additionally adopted another two important legitimate needs which the Guidelines are intended to meet with regard to e-commerce and consumer privacy. Accordingly, Guideline 5

⁵ G.Larsen, & R. Lawson, ‘Consumer Rights: An Assessment of Justice’ (2012) 112(3) Journal of Business Ethics 515,528. doi:10.1007/s10551-012-1275-9

⁶ Guideline 3 of the UNGCP, 1985

⁷ Yu Y and Galligan DJ, “Due Process of Consumer Protection: A Study of the United Nations Guidelines on Consumer Protection” [2015] FLJS <https://www.law.ox.ac.uk/sites/files/oxlaw/oxford_ungcp_due_process_w_fljs_logo.pdf. > accessed January 8, 2018

⁴ Supra n 2

recognizes the parity of treatments for online consumers, as well as the offline consumers as follows;

A level of protection for consumers using electronic commerce that is not less than that afforded in other forms of commerce⁸.

This Guideline indicates a progressive sign about the protection of consumer rights in an online context. Likewise, the OECD has adopted separate recommendations for consumer protection in the electronic environment and accordingly, the revised OECD Recommendation on Consumer protection in E-Commerce 2016 (OECD Recommendations), also emphasizes same protection for online consumers⁹.

Notably, all these international examples reveal that the concept of consumer rights is no longer limited to offline contracts. Therefore, it is evident that consumers who are engaging with electronic contracts are also entitled to the basic consumer rights protection afforded by the law. However, the complex nature of internet technology paves the way for more and more

⁸ Guideline 5 of the UNGCP, 2015

⁹ See Part 1-General Principles, OECD).

violations of consumer rights in an online environment.

Consumer Rights Violations in the Online Context

The UNCTAD identifies three stages of a consumer-business relationship in e-commerce, namely pre-purchasing stage, purchasing stage and post purchasing stage, where consumer rights violations and consumer protection issues could be raised¹⁰.

The pre-purchase stage of an online transaction is the primary position where the consumer engages with the internet. As UNCTAD highlights, information asymmetry and misleading advertising are the major challenges faced by online consumers in this stage¹¹. After consumers have decided to purchase the products or services offered online, they may have to expose serious issues with regard to the

¹⁰ UNCTAD secretariat, "Consumer Protection in Electronic Commerce Note by the UNCTAD Secretariat "(United Nations Conference on Trade and Development 2017)

<https://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf. > accessed October 14, 2018

¹¹ ibid

terms of the contracts, security of the payments and privacy of the data they have entered.

Lack of dispute resolution and redress mechanism are the major problems which online consumers can be subjected to during post purchasing. As many scholars argue, conventional court system or other dispute resolution mechanisms are not effective in resolving online consumer disputes¹². Therefore, Liyanage emphasizes that Online Dispute Resolution (ODR) related regulatory approach is much more appropriate for protecting online consumer's rights¹³. However, most of the developing countries, including Sri Lanka are still having many obstacles to establishing proper ODR systems for online consumer dispute resolution¹⁴.

¹² Cortes P, "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers" (2010) 19 International Journal of Law and Information Technology 1.

¹³ Liyanage KC, "The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines" (2013) 17 Deakin Law Review 251

¹⁴ Weragoda T, "Gaps Exist in Digital Consumer and Data Protection Laws in Sri Lanka" Symposium conducted at Institute of Policy Studies of Sri Lanka (November 1, 2017)

The Guideline 64 of the UNGCP highlights the state responsibility for consumer protection in e-commerce and states that member states should review existing consumer protection policies to accommodate special features of e-commerce. Recently, many developed, as well as developing countries, have enacted separate legislation to accommodate e-commerce activities. However, in the Sri Lankan context, the main IT and consumer-related legislation provide a poor contribution to safeguard consumer rights in electronic contracts.

Analysis of the Sri Lankan Legal framework

When examine the existing Sri Lankan legal framework, it must be noted that both the Information Technology law and consumer law related legal frameworks are providing the legal basis for the online consumer protection. On the one hand, the IT law related legal framework primarily consists of Electronic Transaction Act No.19 of 2006 (the ETA), Computer Crime Act No.24 of

2007 (the CCA) and a few other legislation. On the other hand, the Consumer Affairs Authority Act No.9 of 2003 (the CAAA) is the main legislation which regulates the matters related to the consumer law legal framework in Sri Lanka. Thus, this paper mainly analyses whether the aforementioned legislation could be able to provide proper protection against the major consumer rights violations occur during an online transaction.

Electronic Transaction Act No.19 of 2006

The legislature of Sri Lanka introduced the ETA in order to eliminate legal barriers and establish legal certainty on electronic transactions and e-commerce sector¹⁵. Section 3 of the ETA recognizes the effect, validity or enforceability of data messages, electronic document, electronic records, and other communications¹⁶. Moreover,

Section 7 of the ETA admits the legal recognition of electronic signature. As Kariyawasam opines, the legal recognition and acknowledgment of electronic signature enhance the public confidence and use of e-commerce¹⁷.

Moreover, Section 11 of the ETA provides the legal validity for electronic contracts as same as the paper-based offline contracts¹⁸. On the one hand, this provision enshrines the applicability of traditional contract law principles in electronic contracts. On the other hand, it attempts to make confidence and reliability on the consumer's mind that their transactions are recognizable and accepted by the law¹⁹.

However, when examine the provisions of the ETA in general, any direct section, chapter or any provision in relating to online consumer protection is hardly found.

¹⁵ Marsoof S, "Electronic Transactions in the Modern World: An Analysis of Recent Sri Lankan Legislation" [2006] Law College Law Review 108

¹⁶ Section 26 provides broad definitions for the terms 'data messages', 'electronic documents' and 'electronic records'. So, the electronic documents include documents, records, information, communications or transactions in electronic form. Electronic record means a written document, or other

record created, stored, generated, received, or communicated by electronic means

¹⁷ Kariyawasam K, "The Growth and Development of e-Commerce: an Analysis of the Electronic Signature Law of Sri Lanka" (2008) 17 Information & Communications Technology Law 51

¹⁸ Goonetilleke S, "The Impact of Technological Advances on Contract Formation in Sri Lanka.," *Proceedings of the Open University Annual Academic Sessions*. (The Open University of Sri Lanka 2013)

¹⁹ Kariyawasam, *Supra* n 17

Kariyawasam also highlights this lacuna in the ETA as follows;

The Act recognizes that online transactions are valid, but contains no specific provision dealing with consumer protection. The Act is silent about online consumer protection in relation to, for example, information disclosure, delivery, transaction confirmation, cancellation, and refund policy²⁰.

As the above statement clearly points out, the ETA contains no direct provision to address consumer protection issues. Similarly, Goonetilleke denotes that presently, Sri Lankan electronic transaction legislation does not have any regulatory mechanism to protect consumers from entering into electronic contracts²¹. Therefore it can be argued that the ETA provides a very poor contribution to develop consumer trust in e-commerce because consumers are anticipating clear and efficient protection before they engage with electronic contracts.

When comparing the ETA with the South African legal framework, the Electronic

Communication and Transaction Act No.25 of 2002 (ECTA) of the South African law contains a separate chapter which entirely deals with consumer protection in electronic transactions. The Chapter VII of the ECTA enshrines many legislative mechanisms to safeguard online consumers such as information requirement²², opportunity to review the transaction²³, supplier's liability on utilizing secure payment system²⁴ and withdrawal rights²⁵. Accordingly, it is evident that, as the main IT law legislation of the country, lack of proper consumer protection mechanism is a major drawback of the ETA in Sri Lanka.

Furthermore, the ETA does not facilitate privacy or personal data protection in electronic transactions²⁶. However, Chapter VII of the ECTA in South Africa has provided specific legal protection for personal data and privacy of online users. In the EU legal framework as well, there

²² Section 43 (1) of the ECTA

²³ Section 43 (2) of the ECTA

²⁴ Section 43 (5) (6) of the ECTA

²⁵ Section 44 of the ECTA

²⁶ Madugalla KK, "Right to Privacy in Cyberspace: Comparative Perspectives from Sri Lanka and Other Jurisdictions," *Kelaniya International Conference on Information and Technology* (University of Kelaniya 2016); Marsoof A, "The Right to Privacy in the Information Era: A South Asian Perspective" (2008) 5 SCRIPT-ed 553

²⁰ *ibid*

²¹ Goonetilleke, *Supra* n 28

are several separate directives and mechanisms to safeguard consumer privacy in an electronic environment. Therefore, the lack of privacy and data protection provision in the ETA can be criticized as another disadvantage for consumer protection in electronic contracts.

Computer Crime Act No.24 of 2007

The CCA was enacted in 2007 to provide for identification of computer crimes and to provide the procedures for the investigation and prevention of such crimes²⁷. Even though the CCA does not provide separate protection for online consumers, some major provisions of the Act can be utilized to enhance consumer protection in electronic contracts.

Most importantly, Section 10 of the CCA recognizes the unauthorized disclosure of information as a computer crime²⁸. In addition to Section 10, Section 8 of the CCA

²⁷ See the Preamble of the CCA

²⁸ Section 10 - Any person who, being entrusted with information which enables him to access any service provided by means of a computer, discloses such information without any express authority to do so or in breach of any contract expressed or implied, shall be guilty of an offence ..

provides illegal interception of data as an offence. The illegal interception of data was first recognized as an offence in Sri Lanka under the Telecommunication Act in 1996.

So, it is apparent that the CCA make some attempts to safeguard privacy and personal data in the electronic environment. However, the contentious issue is whether the basic privacy protection provides by the CCA is adequate to address the overall privacy and data protection issues in the online transactions. Particularly, as scholars point out, this protection is not sufficient when dealing with some technological applications like cookies, net spies, web bugs and spams in cyberspace²⁹.

Consumer Affairs Authority Act No,9 of 2003

As mentioned earlier, the CAAA provides the main legal framework for consumer protection in Sri Lanka. The CAAA intends to afford general protection for consumers

²⁹ Marsoof A, "Privacy Related Computer Crimes;A Critical Review of the Computer Crimes Act of Sri Lanka" (2007) 5 Law College Law Review 1

and traders by establishing consumer Affairs Authority (CAA).

Nevertheless, according to Section 75, the interpretation section of the CAAA, the term consumer defines as “any actual or potential user of any goods or services made available for consideration by any trader or manufacturer”. When examining this definition it is *prima facie* evidence that there is no specific reference to the consumers who are dealing with online traders³⁰.

Notably, the Consumer Protection Act, 2019 of India also provides a much similar definition for the consumer like “any person who buys any goods or hires or avail any services for a consideration not for resale of goods or any commercial purposes”. This definition is general and does not have any reference for the online consumers. However, unlike the CAAA in Sri Lanka, the Indian Act provides an

³⁰ In contrast, based on the words ‘any’ user and ‘any’ trader, it can be argued that this definition can be applied for any kind of transaction online or offline.

explanation to this general definition as follows;

The expressions “buys any goods” and “hires or avails any services” includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing³¹.

Thus, it is apparent that this explanation clears all the doubts and it directly includes online consumers into the purview of the general definition of the term ‘consumer’. Therefore, it can be argued that, Sri Lankan law needs more clarification with regard to this definition in order to provide protection for the online consumers as same as the offline consumers.

In addition to aforementioned major drawback, the CAAA fail to provide proper online trade regulation mechanism. Even though, Part II of the CAAA extensively deals with the regulation of trade, it is hardly found any provision which confers any authority on CAA to regulate online trade. Moreover, the CAAA does not contain any provision regarding the

³¹ Explanation (b) of the Section 2 (8) , CCA 2019

information obligation³² and cooling off period³³. In contrast, the Consumer Rights Directive (CRD) in EU law and Consumer Protection provisions of the ECTA in South African law specifically require traders to provide relevant information like identity of the seller, geographical address, price, main characteristics of the goods or services, arrangement of payment, delivery performance, etc before entering into the contract³⁴. Most importantly, the CRD provide 14 days cooling off period for online consumers to withdraw their contact without any penalty.

Similarly, novel concepts like contracts relating to digital contents are also not facilitated under the scope of the CAAA. As Perera argues Sri Lankan consumers are not in a secure place in respect of defective intangible goods purchased³⁵. When

comparing to EU legal framework under the CRD, it is revealed that the CRD provides specific protection for the consumers who are engaging with the contracts on digital contents.

Although the CAAA utilizes dispute resolution mechanism through Consumer Affairs Authority and Consumer Affairs Council, Weragoda criticized that, “the CAAA is not adequate as a dispute resolution mechanism in the current digital era where transactions take place in online trading platforms”³⁶. Conversely, the EU legal framework facilitates effective ADR and ODR mechanism in order to resolve the cross border consumer disputes in electronic contracts. These dispute resolution platforms are user-friendly out of court solutions which provide more efficient settlement options for both traders and consumers. Therefore, as Liyanage suggests, the CAAA in Sri Lanka also needs to be amended, ensuring the legal validity of online consumer arbitration clauses³⁷.

³² Information obligation means the obligation on sellers to provide necessary details before entering into the contract

³³ According to the withdrawal rights the consumer would get an opportunity to leave the contract without paying any compensation within a certain time period. This particular time period is called as ‘cooling off period’

³⁴ See CRD Article 6 of the EU law and Section 43 (1) of the ECTA in South African law for the information obligation

³⁵ Perera WC, “Beware If You Are a 'Digital Consumer'- Intangible Digital Goods and Consumer Protection in Sri Lanka,” *11th International Research*

Conference (General Sir John Kothalawala Defence University 2018)

³⁶ Weragoda, *Supra* n 14

³⁷ Liyanage *Supra* n 13

Conclusion

As one of the fast developing economy of South Asia, it is obvious that Sri Lanka needs to move forward with the technological and commercial advancements. Consumer engagement in e-commerce is one of the turning factors which directly affect the growth of e-commerce in a country. Therefore, state intervention is very important to enhance the consumer confidence and safeguard the consumer rights in electronic contracts.

After analysing the main IT law and consumer law related legislations, several drawbacks and lacunas have been identified in the Sri Lankan legal system. When comparing with the EU, South African and Indian legal approaches, it can be highlighted that lack of direct legal provisions for online consumer protection, lack of proper definition for the term online consumer, lack of privacy and data protection mechanism, lack of information obligation on online traders, lack of proper dispute resolution mechanism etc. as major pitfalls in Sri Lankan law.

It is obvious that the absence of a proper legal framework will negatively impact on the development of the e-commerce sector in Sri Lanka. Therefore, in conclusion this paper emphasizes that Sri Lankan IT law and consumer law should be changed and expanded to address this emerging issues in order to safeguard consumer rights in online context.