

Strengthening ICT Law Regime to facilitate E-Commerce and M-Commerce Transactions: A Sri Lankan Perspective

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Abstract-Information and Communication Technology (ICT) plays a vital role in our everyday lives. Particularly, it makes regular business transactions easy and fast in globalized information society. Accordingly, traditional commerce conducted on paper-based medium has been transferred into Electronic Commerce and Mobile Commerce which takes place over electronic medium (i.e. Internet). Therefore, information technology and business are becoming inextricably interwoven with development information and mobile phone technology. More alarmingly, Internet can be used to commit cyber crimes and offences relating to e-commerce or m-commerce. Under Sri Lanka's current legal regime, there are several pieces of legislation recently passed by Parliament to mitigate risks and issues regarding ICT. Yet, serious doubts as to effectiveness of ICT legal regime remain. Especially, there are several practical difficulties in implementation of law relating to e-Commerce and m-Commerce. This research's primary objective is to explore practical difficulties in implementation of ICT legal framework with special focus on e-Commerce and m-Commerce. It also aims to examine ways and means of further strengthening existing legal regime while incorporating international standards to harmonize ICT legal framework in line with more advance jurisdictions. Study is based on primary and secondary sources i.e. statutes, case law, text books, journals and electronic data bases. Analysis of selected jurisdictions has been carried out to have glimpse of comparative jurisprudence. To address above challenges, ICT-related legislation in Sri Lanka should be interpreted incorporating international standards and best practices followed in other advanced jurisdictions. Undoubtedly, prevailing ICT law has to go a long way to inculcate well-developed ICT legal framework in Sri Lanka. Unsurprisingly, our legal system and judiciary are helpless in terms of novel cyber issues.

Keywords— Information Technology Law, e-Commerce and m-Commerce, Strengthening

I. INTRODUCTION

The journey of human race and modern day commerce is interwoven. At first man has entered into commercial transactions using straightforward batter of goods system because of illiteracy. However with the advent of coins and other forms of money, the transactions became possible for literate man to provide various forms of services such as selling, hiring, leasing, and mortgaging in exchange for money. In recent time man has become e-literate with electronic and information technology revolution. Specifically the technology revolution has transformed the way man does business and it made law into great transformation. Also it has introduced the computer and now smart mobile phone and it has invaded almost all aspect of our lives during past few decades. As a result of this combination of the Internet with computers, mobile phones and other modern devices, 'e-commerce' which includes 'm-commerce' which is an off-shoot of 'e-commerce' has borne and interact with people to do business in way that could not have been imagined a centuries ago.

It is pointless as well as unrealistic to reach an exact definition of e-commerce with the rapid changes in the internet and continuously evolving technologies. However the notion of 'e-commerce', according to commentators has been generally defined as "the buying and selling of goods and services on the Internet, especially the World Wide Web",¹ which makes enable "the paperless exchange of business information using electronic data interchange (EDI), e-mail, electronic bulletin boards, fax transmission, electronic fund transfer and now mobile phones".² In fact e-commerce is intermediate supporter of man to enter into cyberspace as the big shopping center on earth and also the center which provides a world of opportunities. Therefore e-

¹ <http://searchcio.techtarget.com/definition/e-commerce> (accessed 06.06.2015)

² <http://www.businesstown.com/internet/ecommerce-definition.asp> (accessed 06.06.2015)

commercial transactions play major role of our day to day life.

According to global statistics published by e-Marketeer e-commerce sales exceeded USD 1 trillion for the first time in 2012. Also in 2013 e-commerce sales have grown 18.3% to USD 1.29 trillion worldwide.³ In domestic scenario too, it is visible that similar phenomenon occurs with the exponential intensification of the internet facilitated by the increasing usage of high speed mobile broadband greater than the traditional fixed broadband technologies, with mobile operators offering high speed 4G LTE technology. Due to a revision in the classification of active subscribers in January 2013 declined by Department of Posts Telecommunications Regulatory Commission of Sri Lanka and Department of Census and Statistics, it is estimated that the mobile phone usage penetration has exceeded 20 Million in Sri Lanka.⁴ Therefore it is evident that e-commerce and m-commerce have been boosted rapidly with the advancement of technologies in Sri Lanka. Further, there is a trend that Apple or Android devices and associated applications are increasingly being used by growing young population of the country and this technological advancement coupled with the introduction of internet and mobile payment systems have made better opportunities for growth of e-commerce and m-commerce.

ICT based commercial activities has opened a gateway to numerous opportunities for emerging economies to participate in international trade which means faster growth, higher living standards and new opportunities through commerce. Also it is reliable avenue to join other forms of commercial activity and to be a part of global economic community. Internationally, there are several model laws governing the recognition and enforceability of modern, fair, and harmonized rules on electronic commercial transactions have been formulated by the United Nations Commission on International Trade Law ("UNCITRAL) Working group IV on Electronic Commerce. UNCITRAL successfully adopted its Model Law on Electronic Commerce with Guide to Enactment 1996, Model Law on Electronic Signatures in 2001 and assisted to formulate UN Convention on Electronic

Communications, adopted by the UN General Assembly in November 2005.⁵

Sri Lanka as a country, who became the first country in South Asia to sign the UN Electronic Communications Convention on 6th of July 2006, has enacted pieces of legislation to facilitate e-commerce and m-commerce and to meet challenges regarding electronic transactions.⁶ For instance, the Evidence (Special Provisions) Act No.14 of 1995, Information and Communication Technology Act No.27 of 2003, the Payment and Settlement Systems Act No.28 of 2005, the Electronic Transactions Act No.19 of 2006, the Payment Devices Frauds Act No.30 of 2006 and the Computer Crimes Act No.24 of 2007 were enacted as a step to meet challenge posed by technological evolution. Apart from becoming familiar with the provisions of the relevant laws, business man, lawyers, judges and policy makers should also be mindful of international conventions and model laws which could be of value in grappling with some of the problems posed by these developments and fill the gaps of domestic laws.

Prioritizing the practical difficulties in law as well as in implementation of law regarding e-commerce and m-commerce there are serious issues that we should especially focus to strength the effectiveness of ICT legal regime and mitigate the risk of trade and business.

II. RESEARCH METHODOLOGY

This research was carried out primarily as a library-based research. In so doing primary and secondary sources such as statutes, case law, text books, journals, electronic data bases etc were used. Furthermore, analysis of selected jurisdictions such as India, European Union, Singapore, and South Africa has been carried out because of the salient features of them.

III. RESULT/DISCUSSION

It is essential to understand the legal issues and probable risks arising from e-commerce to ensure a safe, secure environment for trading with customers and other business. In this context it is necessary to note that the Electronic Transaction Act No.19 of 2006 may also give rise to certain practical difficulties in its implementation. It is only possible in this paper to provide an overview of some of major issues that are relevant to e-commerce and m-commerce.

³ <http://www.emarketer.com/newsroom/index.php/emarketer-ecommerce-sales-topped-1-trillion-time-2012/> (accessed 06/06/01)

⁴ Sri Lanka Socio Economic Data 2014, Central Bank of Sri Lanka 2014, Volume XXXVII

⁵ http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html (accessed on 26/05/2015)

⁶ effect from 1st of October 2007, vide Gazette Extraordinary No.1516/25 of 27th September 2007

Under the Electronic Transaction Act of 2006 there are several difficulties regarding Certification Authority (CA) and Certification Service Providers (CSPs).⁷ Considering the interpretations expressed by the sections of the Act⁸, it does not insist on licence and even accreditation materializes to be optional while in other countries such as India⁹ and Singapore¹⁰ require to be licensed to fit into place in business of providing certification services. There is also a question arises as to whether the regulatory and supervisory provisions of the Act are adequate to maintain and actively participate to build up public confidence in authenticity, integrity and reliability of data messages, electronic documents, electronic records and other electronic communications because absence of any penal provision in this act to deal with badly behaved service providers who may occur serious loss or damage to general public due to fraudulent, inattentive or negligent conduct. In consequence of that the credibility of e-commerce and m-commerce transaction has become ambiguous. Though it is glaring that the Act reflects the establishment of a licensing regime through regulations to be made by the relevant Minister,¹¹ it has not provided any penal mechanism or sanctions to deal with CSPs who violate terms of any licence that may be issued. Therefore it important to note that the Act follows a technology neutral and minimalist approach regarding licensing and accreditations of CSPs while India is following more technology specific approach.¹² In present, it is common that people enter into contracts through automated systems which contained in

Electronic Transaction Act 2006.¹³ According to the provisions, a contract formed by the interaction of an automated message system and a natural person or by the interaction of two or more automated message system shall not be denied validity or enforceability solely on the ground that there was no review by a natural person of the final contract or of each of the actions carried out by the automated message system.¹⁴ Due to the Act the automated system is defined as in an agent or tool of the person, who installed it, but the terminology of “electronic agent” used in certain other jurisdictions has been avoided in the Sri Lankan Act and it does not provide an answer when something goes wrong with the automated system. For instance, if an ATM machine which interacts with an individual such as a customer of a Bank becomes malfunction, is the transaction valid and enforceable? It is enlightening to note that in certain jurisdiction express provisions have been made to deal with problems of this nature. In South Africa, it is particularly provided that “a party interacting with an electronic agent to form an agreement is not bound by the term of agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.”¹⁵ In this respect the same solution was provided by the British Columbia legislation, Canada.¹⁶ Therefore it is useful to consider these salutary provisions cautiously with a view of making the necessary amendments to the Sri Lankan Act because said provisions consist with the fundamental purpose of our Act which is to remove barriers to electronic transactions. Also there is a case where there is no human review of or intervention in the final contract for the sale of goods in question. In view of the Act, the contract is valid despite the absence of human intervention in the making of final contract and question can be aroused as to whether this is a statutory repudiation of common law requirement of **Consensus ad idem**. Therefore provisions of Electronic Transaction Act only seek to negate any claim that the lack of human intent, at the time of contract formation and prevents contract formation. When there is contract which machines are involved, the required intention comes

⁷ Section 26 of the Electronic Transaction Act No 19 of 2006

⁸ Section 18 of the Electronic Transaction Act No 19 of 2006

⁹ 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.

¹⁰ Section 27-35 Singapore Electronic Transaction Act of 1998

¹¹ Section 18(2) the Electronic Transaction Act No 19 of 2006

¹² Section 21-26 of Indian Information Technology Act 2000

¹³ Section 17 of the Electronic Transaction Act No 19 of 2006

¹⁴ Ibid 17(d)

¹⁵ Section 20(d) of the South African Electronic Communication and Transaction Act 2002

¹⁶ Section 17 of the British Columbia (Canada) Electronic Transaction Act 2001

from the programming and use of the machines. But there is a question behind intention of machines, acceptability of the contract and remedy where there is an error that occurred due to the technical reason.

Due to the chapter V of Electronic Transaction Act the rules of evidence would not apply to wills or other testamentary dispositions, power of Attorney, sale or conveyance of immovable property, trusts, bills of exchange, telecommunication licences, and other acts transactions or documents that may be specified through regulations made under the Act by the Minister.¹⁷ In this regard it becomes indispensable to lead electronic or computer evidence relating to any fact coming within these excluded areas. Therefore if there is an issue set in these excluded area it will be the provisions of Evidence (Special Provisions) Act No 14 of 1995 that will be applicable.¹⁸ There would appear to existing two legal regimes in regard to electronic and computer evidence in Sri Lanka. One is governed by the Electronic Transactions Act, and the other governed by the Evidence (Special Provisions) Act No 14 of 1995, which could become complicated proof of electronic transactions. Consequently, while a transaction which involve a bill of lading would attach to the rules in the Electronic Transactions Act, a transaction involve a bill of exchange would be governed by the Evidence (Special Provisions) Act on the other hand, and the question would arise with reference to which of these regimes would apply if there is a complex transaction involves both kinds of bills.

“Although a very early draft of the Electronic Transactions Bill which was later enacted by the Parliament of Sri Lanka did contain some provisions relating to data protection and privacy, somehow they were dropped from the Bill that was ultimately enacted as law”¹⁹.According to the wordings of justice Saleem Marsoof who is the former Supreme Court judge, there are no provisions regarding issues of data protection and privacy in the Act. Though a Code of Conduct has now been prepared to deal with issues of privacy by the Information and Communication Technology Agency

(ICTA), it is uncertain whether such a Code will be adequate to deal with the anxieties of privacy. There is no hesitation that with technological development, and in particular the advent of cookies, attack of web bugs and net spies, incursion of privacy on a systematic basis has become a common occurrence.

The Common Law action of *Actio Injuriarum* as a remedy which may be maintained against invasions of privacy and degradations to dignity may not rather be adequate to deal with the invasions and degradations that take place in cyberspace. In view of the privacy and data protection relating to cyber space there is a serious gap and lack of concern in the Electronic Transactions Act .Therefore it is necessary to amend or enact supplementary legislation with the objective of protecting individuals against invasions of their privacy through electronic means. Also there must be proper implementation in law relating to e-transactions equivalent to said modifications otherwise it will not be useful to have effective laws which cannot be implemented practically. It is very necessary to establish statutory built Data Protection Authority which will ensure the recognition, promotion and protection of the privacy of individuals. Accordingly, there should be an assurance and conferment to all individuals on a right to access of information relating to them and to correct errors or inaccuracies therein. Privacy as a wealth of general public contains right to information privacy indeed. As a treasures right, information privacy adds great importance as well as a value to building confidence amongst traders, consumers and the public in regard to electronic transactions. Therefore it is also essential to provide remedies through necessary actions for unethical and unreasonable interferences with the information privacy of an individual.

When there is a dispute over a contract, the parties must have an opportunity to seek assistance through dispute resolution mechanism to get matter resolved whether medium of contact is electronic based or using paper based medium, online or otherwise. Online transactions bring numerous uncertainties especially about the place where a defendant resides. Sometimes the person who advertised on web cannot be easily found out. Especially, it is silent on jurisdiction for transactions over internet or electronic contracts. Further there is also another matter to identify the jurisdiction of courts or forums regarding e-commerce contract to bring alternate dispute resolution. Sri Lanka has a capacity to follow section 9 of the Code of Civil Procedure to decide the jurisdiction of court. International principles governing the jurisdiction of cyber may be incorporated where there is no uniform law regarding that. Countries such as United State of

¹⁷ Section 24 of the Electronic Transaction Act No 19 of 2006

¹⁸ Section 5 of the Evidence (Special Provisions) Act No 14 of 1995

¹⁹ S.Marsoof, Legal Issues Relating to E-Commerce, The Chartered Accountant (50th Commemorative Issue of the Journal of Chartered Accountants) Volume 44 page 38

America²⁰, European Union²¹ are following different and own principles to decide jurisdiction relating to e-commerce transactions. These transactions always flow through the cross border of countries and a serious question arises if different countries treat a similar issue at different level? It makes parties confuse and they will have to do another shopping to find out the jurisdiction. It means that uncertainty of law regarding jurisdiction would lose the confidence of general public on e-commerce and m-commerce transactions.

Under the advancement of ICT literacy many citizen used to buy and sell goods through the internet and mobile applications using several e-markets such as eBay etc. However there are several questions behind these goods and transactions. In traditional commerce, people have a choice in accepting goods and services, way to make payment or select mode of payment and refuse to make payments after accepting goods or services where there is no due quality and standards in the goods. When it comes to the e-commerce and m-commerce there are some practical difficulties involved in because customer or consumer does not have ability to check the due quality of good. Even the selection of mode of payment and specifically remedies for bad behaviour of traders are limited. In modern era, countries like UK²², European Union²³ have introduced number of directions to face these kinds of practical difficulties under e-commerce and m-commerce. Unfortunately, a country like Sri Lanka does not have such direction or uniform law than common methods like complaining before Consumer Fair Authority, Fair Trade Commissioner and institutional actions against unlawful enrichment to get rid of said difficulties.

IV. CONCLUSION

As has been observed there are lack of uniformity and uncertainty in the law relating to e-commerce and m-commerce. In point of my view, this is due to the advancement of technology per se and not a matter regarding law. The information era in which we live is updating day by day and posing challengers continuously. Therefore litigations relating to manipulation and violation of ICT law including law relating to e-commerce and m-commerce to own advantages and commercial

purposes have increased. Sri Lanka as a country who is having same experience because of these practical difficulties has to be committed in ICT knowledge as well as the laws especially to face challengers regarding e-commerce and m-commerce. Nevertheless Electronic Transaction Act No 19 of 2006 as the ground breaking law in Sri Lanka relating to e-commerce and m-commerce is being implementing with other related laws, there are several difficulties that would not address properly. In view of mine, ICT law does not have any common boundaries which other laws face such as cultural boundaries. Therefore Sri Lanka or any other country does not need to think twice to incorporate salient features of ICT laws of other jurisdictions or international conventions into domestic law to mitigate the practical difficulties and risk relating to e-commerce and m-commerce. Further, law makers, judges focus to maintain functional equivalence for electronic communication in their decisions making. It means that it is essential to have functional equivalence between the papers based transaction and electronic transaction through the law and judicial decisions relating to e-commerce and m-commerce.

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²⁰ Cybersell, Inc vs Cybersell 1997 U.S.App.LEXIS 33871 (9th Cir.December 2,1997)

²¹ Brussels and Lugarno Conventions, Brussels Regulations (44/2001), Rome Convention 1980

²² Distant Selling Regulations of United Kingdom 2000

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