

Applicability of Conventional Contract Law Rules to Contracts Made Online: A Critical Analysis of Rules on Offer and Acceptance

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Abstract—

This research examines into the possibility of formulating legally valid and feasible contracts online, under the existing conventional rules of law of contract on offer and acceptance.

The research is carried out in the context of e-commerce, electronic transactions and virtual markets. In an era where the customers don't have to leave the comfort of their homes to shop and enter into ordinary contracts online, contract law plays a vital role. This role is largely different from its restrictive role in the conventional economy. In the absence of an exclusively dedicated set of laws/ rules applying to contracts made online, especially in terms of offer and acceptance, the paper evaluates critically, the existing conventional laws and rules governing contract law. This is a qualitative research primarily rooted in selected statutes in force, local and international, case law emanating from common law courts and courts of Sri Lanka. Secondary data such as commission reports, texts of authority and research studies have been used in seeking answers to the research problem. On a close scrutiny of online transactions and by applying the traditional and classical rules of law of contract, it becomes apparent that an online contract is in fact feasible within the existing framework.

The paper discusses the possibility of extending the traditional contract law rules to incorporate and facilitate online contracts. It also explores the possibility of expanding such rules, with reference to local and international legislation, in order to address their shortcomings in application to online transactions, with a view to law reform.

By way of a comparative analysis, reforms are suggested to Sri Lankan law on consumer protection and e-banking to enhance and safeguard the customer experience in online contracting.

Keywords— Contracts, Online Contracts, Offer, Acceptance

I. INTRODUCTION

The modern market place has come a long way from the conventional market place based on physical means of

transactions. All transactions now come into life on an online platform. This virtual market place is the common most platform of the century where contracts are entered into by parties, world over.

Since the market place or the medium of contracting is of virtual characteristics, it is apt to see if such modern contracts are perceivable through the existing legal framework.

Traditional and classical rules of law of contract are often criticized for posing obstacles to the development of online contracts at national, regional and international levels (Mambi 2010, p. 14). Therefore traditional rules of contract law, which still consist a large portion of the codified and non-codified law that govern contracts, have been challenged multiple times as hindering modern business transactions (See the Final Report on E-Commerce and Cyber Crimes by the Law Reform Commission of Tanzania 2006).

It is the contention of this paper that the traditional and classic rules of the law of contract, in its original form, may not fully accommodate a legally valid contract online. The same viewpoint has been adopted in multiple legal instruments that were enacted in the recent part, which deal with the area (See United Nations Convention on the Use of Electronic Communications in International Contracts [UNCUECIC] and Electronic Transactions Act No. 19 of 2006).

What is necessary is to evolve the traditional and classical rules of contract law into a change of the degree rather than a change of the kind, to meet the requirements of e-contracts, without dispensing with them altogether. In Preamble of United Nations Commission on International Trade Law [UNCITRAL] Model Law on Electronic Commerce (as adopted in 1998) and in which problems created by uncertainty as to the legal value of the use of electronic communications in international contracts has been identified as constituting an obstacle to international trade.

A. Evolution of the law of Contract

A contract can be generally defined as an agreement, between two or more parties, that is legally enforceable (Dobson 1997, p. 1). It may warrant doing or abstaining from an act with an intention of creating legal relations (Smith and Keens 2006, p. 85). In order to understand the dynamics of contracts online, it is of paramount importance that one comprehends how contracting evolved onto an online platform. It is also apt to remember that Sri Lankan law of contract is enriched by a combination of English law and Roman Dutch Law.

Contract evolved as the action of *assumpsit*, in the 16th century (Cheshire, Fifoot and Furmston 1991, p. 1). By the 19th century, contract emerged as a concurrence of intention or the outcome of the consenting minds, *consensus ad idem*. The contract is entered into voluntarily, by men of full age, with a clear eye to the own interests of the parties which once entered become binding on each other and beneficial alike to themselves and to the community at large (Printing and Numerical Registering Co. v. Sampson [1875]). The underlying golden thread in the concept of contract is freedom and sanctity of contract. However freedom of contract has led to the suggestion that contracts should be treated differently where there is inequality of bargaining power (See ss. 2-302 of Uniform Commercial Code 2012).

When considering contract related principles under Roman Dutch Law, Weeramantry complements the Roman Dutch law system as of more flexible nature, adaptable to practical realities of the time; therefore there is less need of radical alteration. (Weeramantry 1967). Over the 18th and 19th centuries, economic and legal institutions underwent an institutional revolution consequent to the industrial revolution and innovation. The market place completely transformed. Laws in most countries were developed over a long period of time during which physical actors and physical media were the only, or at least the primary, mechanisms by which transactions with legal consequences could be effected (Reed 2000, p. 148). Hence the concepts such as physical documents and signatures were considered as mandatory pre-conditions for entering into contracts (Meyappan v Manchanayake [1961]).

II. E-COMMERCE, VIRTUAL MARKETS AND THE DESTINY OF THE LAW OF CONTRACT

In the 20th and 21st centuries, marketplace has undergone further changes and the modes and methods of contracting in business have substantially altered (Friedmann 1959, p. 101). The market place no longer has physical actors functioning via physical media. It is transformed to a virtual market place functioning on an online platform (Ryder 2002). Much of the pressure and

strain on the framework of law by modern age is taken by the law of contract, for it is one of the spheres in which the expanding economies of today make their greatest impact on the law (Weeramantry 1967 p. 67). The question is whether these changes could be perceived by the existing framework of economics and law.

Currently, most of the countries have adopted laws to recognize electronic transactions and give equal status to traditional contracts (Abeyratne 2008, p. 41). The world is contemplating on abrogating jurisdictional boundaries in internet related service providers (The Public Prosecutor v. Yahoo! Inc. 2012). Therefore, there is a challenge faced by law, on the face of e-commerce, to strike a balance in facilitation and regulation of online based contracts taking account of principles such as technological neutrality, functional equivalence, commercial flexibility and freedom of contracting.

In furtherance of the above purposes, world has collectively passed UNCITRAL Model Law on Electronic Commerce, United Nations Convention on the Use of Electronic Communications in International Contracts and locally the Electronic Transactions Act of 2006. The analysis also focuses on the Directives on E-Commerce applicable in the European Union (Directive 2000/31/EC).

Expansion of Traditional Contract Law rules to Facilitate Online Contracts

The contention of this paper is already a reality since the countries of the world have contemplated on a horizontal development of traditional rules of contract law. The below analysis of the usage of classic rules on contract law, giving effect to contracts made online, substantiate that online contracts could be accommodated within the same legal framework that is already in place. The areas that need further development are also critiqued in the discussion along with suggestion for development.

A. Paper based methods v. online contracting

As a result of the emergence of e-commerce, electronic medium has taken the place of tangible, paper based medium. Contract formation and performance, can be conducted over electronic media and can occur without using a single sheet of paper or a drop of ink (Harding 1996, p. 512).

Until recently, Sri Lankan courts were unwilling to act upon a computer generated document as it is "neither original evidence nor derivative evidence." (See *Benwell v. Republic of Sri Lanka* (1978-79). Furthermore, the traditional requirement of a signature as described in *Meyappan v Manchanayake*, was strictly adhered to as "When a person's signature is required on a document, the

person's name should be written by hand with a pen or pencil."

It is a general principle that is highlighted by the modern legislation that there should be no discrimination between paper based and contracts made online. Non-discrimination between paper-based contracts and online contracts is an underlying principle in all international instruments. They provide that "the legal requirements applicable to the contractual process neither prevent the effective use of e-contracts nor result in such contracts being deprived of legal effect and validity on account of their having been online" (See Preamble of UNCITRAL Model Law).

Multiple countries in the world have grappled with this situation successfully along with Sri Lanka. In section 11 to the Electronic Transactions Act, it is expressly stated that "A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form."

Furthermore, the traditional requirement of a signature has been dispensed with. Deviating from the conventional position, the Act asserts that "such requirement shall be deemed to be satisfied, if such information or matter is authenticated by means of an electronic signature."

This Act was commended to make vast strides not only in electronic commerce but also in electronic governance (United Kingdom Department of Business Innovation and Skills, Electronic Signatures Guide [September 2014]). However, the Act doesn't entirely encompass a mechanism to test the authenticity of such document. A recent judgment in *People's Leasing Company v. Muthuthantrige Iran Fernando and others* [1998] of the High Court of Colombo laid down a criteria of three rebuttable presumptions for acceptance of e-documents, filling a void in the system for authentication of electronic document.

B. 'Invitation to treat' or 'offer'?

Advertising is a prevalent trend in the modern virtual markets. Web space is excessively used for promotion of products. Why advertising is relevant for this discussion on contracts is because it is often argued to be misleading as to whether offer or mere invitation to treat.

The basis of any contract is the intention driven agreement entered into by the parties (Furmston, p. 30). It is first reasonable to infer the existence of an offer, in any given case, before inferring the existence of an agreement. The same goes to contracts made online. An offer is capable of being converted into an agreement by acceptance, it must

consist a definite promise to be bound provided that certain specified terms are accepted.

However appearance of an invitation to treat may often mislead parties giving an impression of an offer. Since online advertising is carried on an elaborative fashion, the line that demarcates offer and invitation to treat in contract law is depleting to a very thin, non-recognisable line of demarcation.

An invitation to treat is quite distinct to offer and defining it Bowen LJ in *Carlill v. Carbolic Smoke Ball* [1983] stated, "It is not (emphasis mine) like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or house to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate- offers to receive offers-offers to chaffer."

The vital question of at what point the offer is made for sale was addressed in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd* [1952]. In the case it was examined whether the display of the goods with the prices attached was an offer or an invitation to treat. Lord Goddard illustrated this incident with an example,

"In in my opinion the mere fact that the customer picks up a bottle of medicine from the shelves in this case doesn't amount to an acceptance of an offer to sell. It is an offer by the customer to buy is accepted by the acceptance of the price."

In *Fisher v. Bell* [1961] Lord Parker settled the matter once and for all. "It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract."

When it comes to an online contract, of sale specifically, the same principles could be applied. The buyer is required to choose from the displayed goods on the website and manifest his choice by intentionally clicking on "add to card". Therefore, it is not too difficult to argue that an offer online is made by a customer of a product once he chooses and selects an item to buy, by an affirmative action like "adding it to the cart" or making the payment online.

C. Cyber Auctions and contracting

Online Auction websites such as e-Bay use internet as a tool to create a virtual venue where no parties would meet physically and the buyers would not have opportunity to physically examine the item they intend to purchase. When it comes to physical auctions, they have the goods physically stored for sale. Online Auction Websites do not

take title to or handle the goods bought. They merely provide the online platform for auctioneers (sellers) to interact with potential buyers. In such cases customers are exposed to some risks resulting from the anonymity and borderlessness of the transaction.

Furthermore it is the general principle that a sale by auction is complete on the fall of the auctioneer's hammer" (Payne v. Cave 1979). There's a practical difficulty in meeting all these physical requirements of conventional contracting when it comes to contracts online.

Postal Rule and its Application and Validity in Online Contracts

The rules of conventional contracting requires acceptance to be "communicated", and must be in the right mode. Furthermore it is acknowledged that only the person to whom the offer is directed can accept the offer. These three criteria are particularly difficult to meet when it comes to online contracting.

Postal rule is deemed to apply where it is reasonable to use post. The postal rule concerns contracts formed by the use of the postal rule and stipulates that the contract is concluded when the offeree posts his acceptance. In *Adamas v. Lindsell* (1818) and *Household Fire and Carriage Accident Insurance v. Grant* (1879). Acceptance was completed when the letter of acceptance is posted, whether or not the letter was received by the offeror.

Postal rule was applied in New Zealand (*Wenkheim v. Arndt* 1 JR 73) and South Africa (*A to Z Bazaars (Pty) Ltd v. Minister of Agriculture* [1974]) and the judges were of the view that once acceptance has been put in the post, there is no possibility of altering the effect of a letter of acceptance. The bottom line of using and applying the postal rule is that the mode of acceptance should not cause any prejudice to the offeror (*Yates v. Puleyn* [1975]).

When it comes to instantaneous modes of communication, the postal rule is not used. In *Brinkibon v. Stahag Stahl GmbH* [1983] Lord Fraser held "Once a message has been received on the offeror's Telex machine, it is not unreasonable to treat it as delivered to the principal offeror because it is his responsibility to arrange for prompt handling of messages within his own office."

In Contracts made online scholars argue that the postal rule can be applied to e mail, in the manner that it is applied to ordinary mail.

It is said that e-mail messages/ offers are of a unique character. It is not equivalent to any instantaneous form of communication because there can be a gap between dispatch and deemed receipt. Therefore it has to be

viewed as a digital version of the normal post and thus the postal rule should apply to this kind of contracting (Ibrahim 2007, p. 47). The unique character of e-mail was further highlighted in *Chwee Kin Keong v. Sigilandmall.com Pte Ltd* [2005]. "Unlike a fax or a telephone call, it is not instantaneous. E-mails are processed through servers. Routers and internet service providers. Different protocols may result in messages arriving in an incomprehensible form. Arrival can also be immaterial unless a recipient access the e mail. But in this respect email doesn't differ from mail that has not been opened."

Usually acceptance is considered as having been sent at the time the acceptance went out of the possession of the offeree and into the possession of the third party. The third party is neither an agent of the offeree nor of the offeror. In the situation of e-mail, it is the Internet Service Provider. The message is to be considered to have gone out of the possession of the offeree at the time the offeree connects to the internet and presses 'send' button (Ibrahim, p. 49). Offeree will also receive the acknowledgment of the mail being sent.

U.S legislation reject the application of the postal acceptance rule for electronic transactions and adopt the general receipt rule.

Notably there is a division between scholars about the benchmark for acceptance. Some assume that e mail is deemed to have received at the time when it enters the offeror's ISP in a study on e-contracts (Dickie 1998). While others consider that an e mail is received, at the time the email enters the mailbox of the offeror, even if he doesn't log into read the e mail (Fiascano 1966).

In Sri Lanka Section 13 of the Electronic Transactions Act has replaced the usage of postal rule. The position has been influenced by Article 14 of the UNCITRAL Model Law. According to the section, the electronic message or communication shall be binding on the originator only on "the receipt of an acknowledgement of receipt of such data message or e-communication." Therefore unless acknowledged, at the least by conduct of the addressee, it will be deemed that the communication has never been sent by the originator. Although the rule sounds fairly comprehensive, it is imperative that the addressee must acknowledge the receipt of the information in a "reasonable manner", as discussed above under the postal rule. That way it will not cause prejudice to the interests of the originator.

D. Online Contracts and Consumer Protection

As discussed above, the classical rules of contract law can fairly be extended to facilitate contracts online, at times with slight modifications. However these traditional rules

have blatantly failed to address one aspect which is of paramount importance when it comes to modern day contracting. The party whose interests have been overlooked by the traditional rules applying to contract law are the consumers.

Consumers, mostly individual consumers who shop online, are a group of important market players in online contracting. However much the freedom of contract is assured, their bargaining powers is less. It is easier for imposters to trick customers online unlike in a traditional market where the parties are physically present and dealing with each other in their presence. There is a risk involved in selling substandard products, imposter products, operation of shell companies and tricking customers into various other things through contracts made online.

Especially with regard to the contractual terms, some of the websites don't stipulate them in a manner that draws the attention of an ordinary person contracting (Olley v. Marlborough Court Hotel [1949]). It is important to see if the consumers at least get a warrantee for the product or money-back. There are no contract documents involved. Therefore the situation of the consumers is rather vulnerable.

The European E-Commerce Directive has a disclaimer to prevent the facilitating law being exploited to cause prejudice to public health and consumer interests, as established by Community acts. Protection of consumers, in respect of distance contracts, forms a vital element for protecting consumers in contractual matters, as stipulated by Article 11 of the Directive.

Furthermore as implemented in the United Kingdom following the Distance Selling Directive Sri Lanka can also introduce the fourfold mechanism of protecting customers, provision of adequate information, rights to withdrawal, protection against fraudulent card misusers and prohibiting sellers from prejudicial activities.

The protection of the interests of consumers on online forums is not an area addressed by the Sri Lankan legal framework. Neither Electronic Transactions Act, nor the Consumer Protection Act (1979) contains provisions to adequately tackle issues pertaining to online consumers. Hence, as a nation embarking on e-commerce, it is of paramount importance that Sri Lanka contemplates on a model for consumer protection, especially with regard to consumers entering into online contracts.

III. OF "OLD WINE IN NEW BOTTLES" AND FINAL REMARKS

The contention of this paper is that the degree of application of the traditional rules of contract law would

suffice for the existing legal framework to accommodate online contracts that are legally valid. New kinds of rules that would outlaw the existing traditional rules would be too drastic a measure, which is both practically and economically challenging. However, it must be accepted that the contractual implications of online transactions test the boundaries of traditional contract law principles, especially in relation to rules pertaining to offer and acceptance, and thus these need to be appropriately and adequately tailored for contracts made online.

Leaving the wine inside the bottle as it is now is the time Sri Lanka contemplates on improving the quality of the bottle and better presentation of it. Therefore the core legal framework for online contracting may remain as it is but the modern usage of them needs to be done in a more elaborate context where there are protection mechanisms to safeguard the interests of all parties to contracting, just as new and apt bottles which adequately shape and protect the wine inside and make it more appealing.

REFERENCES

- Abeyratne S. (2008) Introduction to Information and Communication Technology Law (Published by the Author).
 Dobson P. (1997) Charlesworth's Business Law, Sixteenth Edition, Sweet & Maxwell, London.
 Friedmann (1959) Law in a Changing Society.
 Furmston M.P. (1991) Cheshire, Fifoot and Furmston's Law of Contract, Twelfth Edition, Butterworths.
 Harding C. W. (1996) Trends in Electronic Commerce: Doing Business over the Internet (PLI Pat., Copyrights, Trademarks & Literary Property Course Handbook Series No. G43988).
 Mambi A. J. (2010) ICT Law Book- A Source Book for Information & Communication Technologies and Cyber Law, Mkukina Nyota Ltd.
 Ryder R.D. (2002) Intellectual Property and the Internet.
 Reed C. (2000) Internet Law; Text and Materials
 Smith and Keens (2006) Law for Business, 13th Edition.
 Weeramantry C.G. (1967) The Law of Contracts, Vol. 1.
 Dickie, (1998) When and Where are Electronic Contracts Concluded? *Northern Ireland Legal Quarterly* 49(3).
 Deveci H. (2007) Consent in Online Contracts: Old Wine in New Bottles, 13 *CTLR*, 223.
 Marsoof S. (2006) Electronic Transactions in the Modern World': An Analysis of Recent Sri Lankan Legislation, *Law College Law Review*, 108.
 Marwan A. I., Ababneh A., Tahat H. (2007) The Postal Acceptance Rule in the Digital Age, *Journal of International Commercial Law and Technology*, 2.
 Fiascano P. (1966) Internet Electronic Mail: A Last Bastian for the Mailbox Rule *Hofstra Law Review*, 25, 1542.
 Law Reform Commission of Tanzania (2006), Final Report on E- Commerce and Cyber Crimes.

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