VOLATILITY: IT'S IMPACT ON SUSTAINABILITY OF CONTRACTUAL OBLIGATIONS

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1.0 Introduction

Human beings, today, live in such volatile times that it is almost impossible to predict what is likely to happen tomorrow. According to David Rowan, editor of "WIRED" magazine, there is one thing certain about how the business will evolve within the next two decades. He reckons; frequent and disruptive upheaval will become the norm. Internet and transformative impact of software will re-write the structure of every organization. Rapid pace of change (volatility) that we witnessed during the last two to three decades, mainly on the backdrop of tremendous technological advancement has, hitherto, had a great impact on time honoured concepts such as Product Life Cycle, (Product) Adoption Process, Customer Loyalty etc,

The author, in this short article, attempts to focus on the impact of volatility on another subject matter that withstood the test of time, namely Contractual Obligations, i.e. Law of Contract, in the context of sustainability with particular reference to the Financial Services Industry.

From a time immemorial, various jurisdictions world over regarded certain important aspects as essential prerequisites in the formation of a Contract. Offer and Acceptance, Legal Intention, Consideration (including "*Justa Causa*"), Terms and Conditions of the Contract and Jurisdiction Applicable are some of those important aspects. In the context of advancement of Information Communication Technology (ICT) in this digital era, the very applicability of such time honoured procedures/practices need to be re-visited and re-assessed with a view to facilitating the expedient demands of the modern day Commerce. In that respect how the law-makers, world over, kept abreast with these constant changes makes interesting observations and study.

2.0 Sustainability and Contracts in the Digital Era

What is Sustainability? One of the simplest definitions of sustainability refers to the ability to withstand.[1]The most popular definition of sustainability, however, can be traced to a 1987 United Nations (UN) conference. The World Commission on Environment and Development, headed by Gro Brundtland, defined it as "*meeting the needs of the present without compromising the ability*

of future generations to meet their own needs" [2] Therefore, sustainability entails "stewardship" and "design with nature", well established goals of the design professions and "carrying capacity" which is a highly advanced modelling technique used by scientists and planners.

On the other hand, a simple definition of Volatility, according to the Oxford English dictionary is the changeability or fickleness. The Free Online Dictionary by Farlex chose to define volatility as tending to vary often or widely. A definition which is more in line with the Financial Services Industry is found in "Investopedia". Volatility is explained as a statistical measure of the dispersion which can either be measured by using the standard deviation or variance between returns of a financial product.[3]

Let's now proceed to examine as to how the fundamental principles of Contract Law evolved to sustain themselves in the face of drastic volatility in today's highly commercialized world.

Billions and billions of transactions are performed over millions and millions of computers world over on a 24-hours a day/7-days a week basis, today, mainly due to the advent of ICT. These transactions basically could be operated in two methods.

1) Transactions based on Electronic Data Exchange (EDI) method. It is very common nowadays to find many commercial transactions being carried out and concluded by means of EDI, though "e" mail itself could be part of this process.

2) Advertisements placed over the World Wide Web (W.W.W.) as "Invitations to Treat" which are also known as "Click and Wrap" transactions.

In the first category, it is quite likely that the transacting parties may enter into more informed customized contracts. Though not necessarily devoid of legal issues, the second category could pose bigger challenges to the legal profession in terms of traditional principles of Contract.

This short paper, therefore, focuses more on the latter whilst the issues discussed would still force valid applicability wherever so necessary to the former.

The traditional process of contracting is of utmost importance even in the case of Electronic Transactions when an advertisement is placed over the internet. As Ruwantissa Abeyratne points out "*the essence of this type of agreements is that when an offeree visits the web site of the advertiser and agrees to buy the goods indicating his assent by clicking on the button 'I agree', a contract is formed. There is no exchange of paper, signature etc*"[4]

"From the perspective of the vendor the advantage of the electronic offer is that he would have ample opportunities to hyper link conditions of contract on the web."[5] This enables him to rely on the defense in the event of a claim that the claimant would be presumed to have read the conditions of contrast before making the purchase, thereby being in a position to completely avoid the type of issues raised in cases such as "*Shoelane Parking Ltd."*[6]

In this particular landmark case, *the claimant was injured in a car park partly due to the defendant's negligence. The claimant was given a ticket on entering the car park after putting money into a machine. The ticket stated the contract of parking was subject to terms and conditions which were displayed on the inside of the car park. One of the terms excluded liability for personal injuries arising through negligence. The question for the court was whether the term was incorporated into the contract ie had the defendant brought it to the attention of the claimant before or at the time the contract was made. This question depended upon where the offer and acceptance took place in relation to the machine*. Finally, it was held: the machine itself constituted the offer. The acceptance was by putting the money into the machine. The ticket was dispensed after the acceptance took place and therefore the clause was not incorporated into the contract.[7]

Once again, in going back to the basics, even in an electronic transaction, what transpired during the negotiation stage is important. Abeyratne reckons "*The element of intention to contract and to conclude the process on the part of both the offeror and offeree is initial to the formation of the contract. Courts have insisted that proof on an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer."*[8] Therefore, the statements made by the parties in the process of negotiations are of extreme importance in the final determination of a concluded contract. The position of a counter offer seen in Re.Hyde[9] could offer valuable advice in the case of electronic transactions, more often than not.

In this case *the defendant offered to sell a farm to the claimant for £1,000. The claimant in reply offered £950 which the defendant refused. The claimant then sought to accept the original offer of £1,000. The defendant refused to sell to the claimant and the claimant brought an action for specific performance*. It was held: *There was no contract. Where a counter offer is made this destroys the original offer so that it is no longer open to the offeree to accept.*[10]

Micheal Chissick and Alistair and Kelman point out that in the case of EDI contracts, based on same facts as in the "Hyde Case", there is likely to be a series of offers and counter offers which are termed "Battle of Forms."[11] They also point out the possibility of checking the internet protocol (I.P.) addresses of websites as well the site disclaimers.[12] With the universality of the W.W.W., the dangers of entering into illegal contracts due to political grounds (such as enemy countries) and contracts with minors for goods/services other than necessities should also be borne in mind. These issues, according to Abeyratne, could affect even an "Invitation to Treat" where there will be offers and counter offers, as has been the practice sometimes.[13]

Acceptance and how it is communicated and how it is brought to the knowledge of the vendor is another contentious issue. *"It is often not a trivial legal task to determine when and where, when either an offer, or an acceptance or both are sent by telegraph, telex, fax, EDI, email, or via the internet or are communicated by telephone."*[14]

Need for instantaneous communication was first recognized in the case of "Entores"[15] and subsequently ratified in "Brinkibon"[16] case. In the case of "*Entores v Miles Far East* **[1955] 2 QB**

327 Court of Appeal", *the claimant sent a telex message from England offering to purchase 100 tons of Cathodes from the defendants in Holland. The defendant sent back a telex from Holland to the London office accepting that offer. The question for the court was at what point the contract came into existence. If the acceptance was effective from the time the telex was sent the contract was made in Holland and Dutch law would apply. If the acceptance took place when the telex was received in London then the contract would be governed by English law. Court held: To amount to an effective acceptance the acceptance needed to be communicated to the offeror. Therefore the contract was made in England.*[17]

*In the case of "*Brinkibon Ltd v Stahag Stahl" which was decided based on the principles of "*Entores" case, the Judges decided that the contract was formed in Vienna, the city where the final acceptance was received by the offeror. They accepted where in the case of instantaneous communication, which included telex, the formation of the contract generally, occurs in the place where the acceptance is received.*[18]

It seems necessary that electronic transactions, too, should be based on "Instantaneous Rule". Yet, rules governing as to when the acceptance is brought to the notice of offeror become a contentious issue as it would be extremely difficult to determine when exactly an electronic message enters the recipient's location for the purposes of being recognized as legally effective.

There is also the issue of agents which are akin to the Postal Department in a traditional sense. "*The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach. The designated recipient immediately messages, may be sent out of office hours or at night, with the intention or on the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and or received through machines operated by a third person. And many other variations may occur. No universal rule can cover all such cases*." [19]

Use of standard auto-generated acknowledgment notices is another matter. While Chissik and Kelman are not in favor, Abeyratne, citing "Corinthian Pharmaceutical"[20] case, (where it was held that such auto-generated acknowledgement has not formed a contract) advocates the idea of acknowledgment.[21] Chissik and Kelman also argue that in the case of "e" mail based contracts, the moment it is sent out of the sender's computer system, it is deemed to have been sent and accepted which is similar to the "postal rule" whereas in the case of web based contracts (including EDI contracts) "instantaneous rule" should prevail.[22] These arguments appear to be in favour with the authorities. (See subsequent discussion on Statutory Provisions).Presence of specific agreements between the contracting parties, anyway, will nullify this requirement.

Issues of Jurisdiction are another critical aspect. For instance, a vendor domiciled in U.S.A. with his computer system located in India whilst holidaying in Sri Lanka may enter into a contract

with a person who is domiciled in France but currently in Hong-Kong on a business visit. Which jurisdiction should govern this transaction in case of a dispute resolution?

It could, then, be argued that a uniform set of regulations could not be easily introduced to a market place of over seven billion customers. Besides any effort at such regulation will inhibit the mechanisms of free market forces, the dream of an Economist. Therefore, according to both Chissik/Kelman and Abeyratne, the parties are well advised to determine the issue of jurisdiction at the negotiation stage. Alternatively, it is also suggested that courts should look at the nature and intention of the contract rather than the location, per se. This issue was discussed in cases such as "*US vs Thomas*"[23] and "Minnosota vs Granite Gate Resorts"[24]

In the former case, upon receiving a complaint about the Bulletin Board System(BBS) from a resident of the Western District of Tennessee, a United States Postal Inspector became a member of BBS by the submitting the appropriate fee and application revealing his Memphis, Tennessee address and downloaded various files containing sexually explicit photos. The Thomases were indicted by a grand jury in the Western District of Tennessee and were convicted under, among other federal statutes.[25]

One of the defenses brought forward on their behalf that the relevant community standards were not those of Memphis, where the defendants had been prosecuted, but rather a new definition of community was needed, i.e., one that was based on cyberspatial, rather than the geographical connections among people.[26]

The court rejected this argument, first holding that "obscenity is determined by the standards of the community where the trial takes place" and that "it is not unconstitutional to subject interstate distributors of obscenity to varying community standards."[27]

Whereas in the latter, involving a resident of Nevada, USA who was being prosecuted in Minnesota, for false advertising and consumer fraud on the Internet by advertising that gambling on the Internet is legal even though the specific on-line gambling service associated with the defendant was not yet operational. His defence was that, as a Nevada resident, he was not subject to personal jurisdiction by the Minnesota courts; this case illustrates the extent to which consumer protection laws are being used by the states to prosecute fraud - even prospective fraud - on the Internet. In October 1998, the Minnesota Supreme Court agreed to review the case.[28]

3.0 Statutory Provisions and Applicability to Financial Services Industry

It is perhaps in this light that United Nations Commission on International Trade Law (UNICITRAL) introduced a model Law which proposes ways and means of executing electronic transactions in an expedient and legally acceptable manner. An important feature of the model is the acceptance of electronic data storage and acceptance of such data as evidence in dispute resolution.

Sri Lanka has adopted the model through "Electronic Transactions Act, No 19 of 2006 [29]which encourages the use of reliable forms of electronic commerce and also strengthens the growth of electronic commerce in the county.[30]

The objectives of the Act are as follows;

- *facilitate domestic and international electronic commerce by eliminating legal barriers to establishing legal certainty*
- *to encourage the use of reliable forms of electronic commerce*
- *to facilitate electronic filing of documents with government and to promote efficient delivery of government services by means of reliable forms of electronic communication*
- *to promote public confidence in the authenticity, integrity in electronic commerce*

and

- *reliability of data message, electronic documents, electronic records or other communications.*[31]

A vital aspect of the Act is found in Section 11: "*In the context of Contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed in electronic form. A contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form."*[32]

Readers would, justifiably, agree that this is another creditable instant where Sri Lanka has, once again, acted as a trendsetter in the SAARC region. In giving effect to modern legislative practices, the Lawmakers have, in this instance, clearly, stepped outside the ambit of the Evidence Ordinance of the country which was enacted way back in the year 1895, more than one hundred years ago.

Another important area is Section 14 which specifically deals with "*time and place of despatch and receipt of electronic records. First condition here is the absence of any other agreement. If it is so, the next question asked is whether the addressee has designated an information system or not. If former is the case there could be two more scenarios:*

1) the receipt occurs at the time the data message enters the designated information system

2) if the message is sent not to the designated information system but some other system of the addressee, receipt occurs at the time of retrieval of the message by the addressee."[33]

Heralding a clear and distinctive message that Sri Lanka needs to be at the forefront of innovation and accordingly should embrace and introduce modern legislation in the field of Commerce and Industry, the lawmakers under Section 21 of the Act, thus, provided;

Section 21: sub-section (2): "Any information contained in a data message, or any electronic document, electronic record or other communication –

(a) touching any fact in issue or relevant fact ;

and

(b) compiled , received or obtained during the course of any business, trade or profession or other regularly conducted activity, shall be admissible in any proceedings...(continued)"[34]

First meaningful interpretation and test of this Act was observed in the money recovery case of Marine Star (Pvt) Ltd. vs Amanda Foods Lanka (Pvt) Ltd when Justice K. T. Chitrasiri of the Commercial High Court of Colombo accepted Short Message Services (SMS) as valid evidence before a Court of law. In this case the Plaintiff Company produced to the Court photocopies of several SMSs sent by the Defendant Company, to prove the liability or the Defendant. Despite objections raised by the Counsel for the Defendant, after a careful consideration of the matter Justice Chitrasiri delivered his judgment justifying the reasons for admitting SMSs as valid evidence in law. *"As it concerned an important issue on rules of evidence, especially at a time when there is a rapid development in technology taking place, Court decided to consider the issue carefully", the judgment states.*[35]

This judgment could be commended for making an effort to achieve the stated objectives of the Act. It has been welcomed by a number of scholars in the legal field as well as by the general public.

Recognition of Electronic Signatures and Certification Service Providers who could assist in ascertaining confidentiality, authenticity and integrity of electronic data are dealt within Sections 16, 18, 19 and 20. [36]

Section 23 which is of paramount importance to players of the Financial Services Industry, specifically excludes the application of the Act in areas such as "**Bills of Exchange**", "**Trusts**", "**Powers of Attorney**" among other matters.

Section 26 of the Act on interpretation defines, among other things, *communication*, *data message* and *electronic document* as follows:

"communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer that a person is required to make or chooses to make in connection with an electronic transaction within the meaning of this Act ;

"data message" means information generated, sent, received or stored by electronic, magnetic, optical or other similar means ;

"electronic document" includes documents, records, information, communications or transactions in electronic form ; "

Based on the foregoing, Justice Chithrasiri, held the view that SMSs definitely come under the purview of the Act. *"It is my opinion that a short message commonly described as SMS falls within the scope of the Electronic Transaction Act and therefore the evidence sought to be produced by the plaintiff could easily be admitted in evidence under Section 21 of the said Act No. 19 of 2006"* he stated in the judgment.[37]

Sri Lanka has also enacted the "*Payment and Settlement Act, No 28 of 2005*" with a view to enabling and facilitating payment mechanisms over electronic media. Some of the major objectives of the statute are:

(1) To provide for regulation, supervision and monitoring of payments, clearing and settlement system

(2) To provide for disposition of securities in securities accounts maintained at the Central Bank

(3) To provide for the regulation, supervision and monitoring of providers of money services and to facilitate the electronic presentments of cheques.

Not only that Sri Lanka has introduced that enabling environment for electronic transactions particularly the payment systems but it has also introduced in a timely manner other statutes such as the "*Payment Devices Frauds Act, No. 30 of 2006.*" This Act aims to deal with offences connected with the possession or use of unauthorized payment devices and to protect persons lawfully issuing and using such payment devices.

Another statute is the Computer Crimes Act, No. 24 of 2007 which also supplements the above Act in mitigating payment card frauds related to electronic payment systems.

Earlier the "*Evidence (Special Provisions) Act No 14 of 1995"*enabled the acceptance of electronic and computer evidence as admissible in a dispute before court of law. However, with the advent of Section 22 of the Electronic Transactions Act, the importance of this provision was drastically reduced.

Conclusion

It could be observed that legal system in the country has been flexible enough to accommodate necessities of modern day Commerce. In doing so, authorities have not only been flexible but also was quicker than all of our neighbors. It should also be noted that the fundamental

principles such as the exigencies of transactions (instantaneousness) to jurisdiction concerning the formation of a contract have been duly preserved.

It is superfluous to suggest that Commerce and Industry work hand in glove with the Financial Services Industry where co-habitation of each other is essential for the very survival of a robust economic climate. Importance, therefore, of such legislative enactments that affect some of the prime movers of the economy need not be emphasized any further. Today, we live in times of unprecedented levels of volatility in the global economy, starting from the "Sub-prime Crisis" of 2008 to more current European Union upheaval which demands an array of "bail-out packages" as well as severe "austerity measures," sometimes resulting in regime changes due to political unpopularity. To this could be added the impact of the so called "Arab Spring" as well as well as flip side of scandals such as the highly publicized Barclays Bank effort to rig the LIBOR(London Inter-bank Offered Rate)[38]and the infamous Mexican scandal of supermarket giant Wal-Mart's subsidiary in that country.[39]

It is, indeed, admirable that the Contract Law has taken giant steps in introducing relevant changes and modifications to existing law without compromising on fundamental principles. It is the flexibility and rapidity with which the lawmakers swiftly moved that paved the way for this sustenance amidst highly turbulent and volatile times. Readers undoubtedly would agree with such connotations.

Legal Systems would be, continuously, called upon to resolve issues such as the manner, time and place of the formation of a Contract. In that context, in the modern day world that we live, today, challenges to the stakeholders could be many folds. Ever disappearing difference between goods and services placed over the World Wide Web as an "Invitation to Treat" and the presence of a so called "Perfect Market" could augur well for the benefit of the ultimate consumer. Abeyratne suggests that one way to overcome the issue of jurisdiction is to analyse the terms of negotiations and the nature of the matter instead of mere physical location. He calls for a uniform set of regulations without nullifying or stifling the positive effects of "W.W.W.".

In conclusion, Digital Era being the order of the day, with the increasing possibility of ICT embracing the lifestyles of even rural villagers, task ahead for bodies such as United Nations Commission on International Trade Law (UNCITRAL) and World Trade Organization (WTO) would be to continue with the good work carried out hitherto.

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