Presentation made at the Book Launch of Dr. Kamardeen

at the University of Colombo

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Dr. Naazima Kamardeen

Members of the Academic Staff, Ladies & Gentlemen,

At the outset, I must thank Dr.Naazima Kamardeen for inviting me for this important event. It gives me great pleasure to be with you this evening, more so because it reminds me of my university days. When I go down memory lane, I recall the day I came to the "College House" on the other side of Thurstan Road, to register myself as a student. That was on the 22nd of May 1972. It was the day on which this country became a Republic under the 1972 Constitution. On that same day, my friends Mrs. Sharya De Zoysa and Mr. Selvakumaran who were the former Deans of the Faculty also entered the University. We were in the same batch. There was another Dean whom I knew from the day she entered the University. She is Prof. Shirani Bandaranayake, former Chief Justice whom I had the opportunity of teaching when she was in the first year.

In those days, the faculty of Law was restricted to one small building which comprised of one large room, commonly known as C 26, and another small room adjacent to that large Room. Present students in the Faculty that way, are very fortunate to have these buildings with many other facilities.

During our University days, we had no responsibilities to shoulder. At the same time, we were not under the direct control of our parents and were almost independent. It was the period that I enjoyed my life to the maximum. There had been many events and incidents by which, we enjoyed our life in the University. This is not the time to relate all that.

Many of the students whom I came to know during my University stint are now holding high positions in society. One of them is your Vice Chancellor Professor Lakshman Dissanayake. He was one of my contemporaries. We used to meet very often then, even though we were following two different disciplines. So, I am happy to be here with those whom I associated during my University days once again, at the same place where we had our higher education which paved the way for us to be in the positions that we are holding today.

I would be failing in my duty, if I do not share with you of my thoughts on the book titled **"Global Trade and Sri Lanka; Which Way Forward?"** authored by Dr.Naazima Kamardeen. Material found therein is very educative

and also very much useful to teachers as well as to students and also to practitioners and particularly to the business community who are involved in international trade. The author has dealt with:

- the Sri Lankan perspective on Global Trade;
- the Structure & the Organization and the Conceptual Framework of the World Trade Organization;
- its services and relationship as to the Intellectual Property Concepts;
- WTO Dispute Settlement System; and
- the manner in which Global Trade is being carried out in Sri Lanka.

Finally, she has discussed the Sri Lankan involvement in Global Trade and its impact on us. So, you would realize that Dr. Kamardeen in her book has covered many important aspects in relation to world trade. I take this opportunity to congratulate her for having produced such a valuable and useful book.

Having said that, I must mention that, a major part of business activities including world trade are now being done electronically. We also see that the persons, who engage in world trade, seek the assistance of courts, and any other tribunals, to resolve the disputes they face while implementing the trade agreements that they enter into when doing business. Therefore, I thought it fit to mention briefly at this occasion, the laws that are in place, in relation to the admissibility of electronically generated evidence in court proceedings.

As you are aware, until the recent past trading was basically done through agreements, reduced to writing. With the development of technology that we experience now, most of the business activities are being done through the internet. Many other methods such as short messages, digital photographs, audio or video recordings, ATM transactions, Word Processing documents also play a vital role in doing business. Therefore, the question arises whether the available laws are sufficient enough to resolve disputes arising out of commercial transactions that are being completed electronically.

In the Evidence Ordinance, we see two categories of evidence; they are basically oral and documentary evidence. One other category is Real evidence such as productions in court proceedings. In the case of **Benwell vs. Republic of Sri Lanka (1978-1979) 2 SLR at 194, Justice Colin Thome** held that:

> ***"Under the laws of Sri Lanka computer evidence is not admissible under any Section of the Evidence Ordinance".***

In view of this decision of the Supreme Court, Sri Lankan Courts could not allow the evidence generated through an electronic device, to go in as evidence. However, due to the laws that were brought into the statute book thereafter, our courts are now capable of admitting electronic evidence in most of the proceedings.

From among those statutes, Evidence [Special Provisions] Act No.14 of 1995 and Electronic Transactions Act No.19 of 2006 are the two major enactments

that opened the doors to admit electronically generated evidence in court proceedings. In addition to those two Acts;

1. Intellectual Property Act No.36 of 2003,
2. Payment Devices Frauds Act No. 30 of 2006,
3. Computer Crimes Act No. 24 of 2007,
4. Information and Communication Technology Act No. 27 of 2003,
5. Payment and Settlement Systems Act No. 28 of 2005,
6. Evidence (Amendment) Act No.29 of 2005;

also play a vital role in admitting electronic evidence in court.

Today, I will confine myself to refer only to those two important enactments; i e Evidence Special Provisions Act No.14 of 1995 and Electronic Transactions Act No, 19 of 2006. By the Evidence Special Provisions Act, audio visual recordings and the information contained in statements produced through computers are permitted to admit in evidence both in civil and criminal proceedings. In the case of **Abeygunawardane v. Samoon and others (2007) 1 SLR 276,** it was held that "admission of video recordings is governed solely under the Evidence [Special Provisions] Act No.14 of 1995".

However, we do not see many applications being made under the said Evidence Special Provisions Act. It may be due to the cumbersome procedure that is to be followed in making such an application. In terms of this Act, the party who intends to tender computer evidence must give notice of tendering

such evidence, to the opposing party, not later than 45 days before the trial date. A list of such evidence with a copy or sufficient particulars also should be given within 15 days before the commencement of the trial. The opposite party can apply to have access and also for inspection of the computers or the devices through which the information was retrieved.

However, under the Electronic Transactions Act No.19 of 2016, there is no such difficult task, to admit electronically generated evidence in a civil suit. One of the main objects of the Electronic Transaction Act is to facilitate domestic and international electronic commerce by eliminating legal barriers and to give legal certainty to those commercial transactions. Section 3 of the Electronic Transactions Act ensures the admissibility of contents of electronic documents and it stipulates that no data message, electronic document, electronic record or other communication shall be denied its legal recognition, effect, validity or enforceability on the ground that it is in the electronic form. Section 7 of the Act provides for the legal recognition of electronic signatures, as well. Sections 11 to 17 in chapter III of the Electronic Transactions Act specifically deals with electronic contracts. Section 11 in that Act stipulates that a contract shall not be denied legal validity or enforceability on the sole ground that it is in electronic form. Also, Section 17, specifically states that if a contract is based on an electronic record (wholly or partly) with an electronic signature, such electronic record shall not be denied legal effect solely on the ground of electronic signature. Those provisions contained in the Electronic

Transactions Act are applicable notwithstanding anything contrary to the provisions in the Evidence Ordinance or any other written law.

At this stage, with humility, may I be permitted to state that my decision which I made relying upon the Electronic Transaction Act, in the case of **Marine Star (Pvt) Ltd. Vs. Amanda Foods Lanka (Pvt) Ltd**. [HC (Civil) 181/2007 MR] commonly known as SMS case, has greatly influenced the development of the law on the admissibility of electronic evidence in court proceedings. Thereafter, in the case of **Millennium Information Technologies Limited Vs. DPJ Holdings (Private) Limited** [HC (Civil) 257/2009/MR], Commercial High Court has allowed printouts of a webpage to be produced in evidence, having decided that Web Pages are created by using markup languages such as HTML.

Unfortunately, those decisions are not authoritative. I hope the Supreme Court will soon make a decision in this regard developing the law to suit the present day context so that the law could keep pace with the development in the other sectors such as medicine and engineering.

I also must mention that in a recent decision, the Civil Appellate High Court in Colombo has made order preventing those provisions in the Electronic Transactions Act, being applied to proceedings when it comes to Family matters.

Having discussed the important statutory provisions relating to the admissibility of electronically generated evidence, I thought it is relevant to refer to the applicability of the matters contained in the Budapest Convention in our court proceedings since it covers; the changes brought about by the digitalization, convergence and continuing globalization of computer net-works and the evidence related thereto. The Convention is also mindful of the right for the protection of personal data. It further provides for preservation of stored computer data, search and seizure of computer data, real time collection of data, interception of content data, the manner in which production orders are to be made and more importantly the issue of jurisdiction.

At this stage, it is important to note that we became the first in South Asia to accede to the Budapest convention and it was so done in the month of May 2015 and it was made legally effective from 01st September 2015. We became the second in acceding to this Convention for the entire Asian Region after it was ratified by Japan. As mentioned before, very important aspects have been brought into existence by that Convention, enabling the convention parties to adopt and to follow.

One may argue that we are not in a position to adopt and implement the matters in the Budapest Convention in view of the Supreme Court decision in the **Singarasa** case. In that case, the Supreme Court held that Sri Lanka should have domestic laws, keeping in line with the Articles of International

Conventions, if we are to exercise the powers and duties found in those Articles in Conventions. It is because, we follow the Dualist System.

I am not going to speak on that issue at this stage, but it comes to my mind that; why our courts do not rely on Section 3 of the Civil Law Ordinance which was enacted in 1853,to follow English law when resolving commercial disputes. If courts do rely on Section 3 of the Civil Law Ordinance, then I am sure, it may be possible to apply the law contained in the Budapest Convention. Section 3 of the Civil Law Ordinance stipulates that:

> *"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Sri Lanka or hereafter to be enacted".*

So, it is high time, for the courts in Sri Lanka to develop the law in the right direction to keep pace with the development of technology. In such an exercise, I believe eminent Counsel like Mr.Kanag-Isvaran who is here at the head-table is in a better position to assist our courts in various ways.

Having said that I also need to stress the fact, that it is insufficient, to have sound laws in place, but we also must have strong legal institutions and good regulatory processes, if people are to engage in trade or business in a sustainable manner. At this moment, I do not have enough time to elaborate on those issues. So, I will conclude my speech now. I thank all of you for listening to me patiently.

Thank You

23.11.2016

Justice K.T.CHITRASIRI

Judge of the Supreme Court

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