

E-Commerce Consumer Contracts for Sale of Goods: Privacy Perspective

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E-commerce has changed conventional sale of goods through global access in an online marketplace. The borderless online marketplace provides a worldwide platform for sale of goods to consumers. A new group of tech-savvy consumers, also known as e-consumers has emerged and grown rapidly in recent years because e-commerce goods are cheaper, more accessible and convenient and offer greater variety and quality. E-commerce transactions for sale of goods involve many parties, among others the platform provider, the seller (either manufacturer, intermediary, wholesaler or retailer), the internet provider, the financial service provider that provides the transfer of money using data, the website, the logistics provider, the shipping company, the delivering company and the consumer as buyer at the end of the transaction. In some circumstances, consumers can even be the seller in e-commerce. It is essential to determine the rights and liabilities of the contracting parties in an e-commerce contract which raises the issue of privacy of contract and other related contract law issues. The nature and the complexity of e-commerce consumer contracts for sale of goods trigger many legal issues; from forming of the contract to the conclusion of the contract. This paper focuses on the emerging issue of e-commerce contract contractual rights and obligations for sale of goods. As pure doctrinal legal research which employs the content analysis method, this paper aims to map out the connection among the parties both directly and indirectly involved in the contract. This paper also seeks to identify and analyse the relationship of various parties involved in e-commerce consumer contracts for sale of goods. The relationship between the parties in an e-commerce contract, with regard to their rights and liabilities in the sale of goods, was examined and reviewed with the aim to ascertain coherence with the privacy of contract doctrine.

Key words: *E-commerce, consumer, sale of goods, contract, privacy.*

Introduction

A definition of e-commerce is the first step to understand what e-commerce entails and there are many definitions derived from different perspectives and concepts as the wide definition of e-commerce is derived from many sources, depending on the different concept and perspective of its users (Molla, A., & Licker, P.S., 2001). The World Trade Organisation (WTO) defined e-commerce comprising the internet and other network-based commerce including six main instruments of electronic commerce: the telephone, the fax, television, the electronic payment and money transfer systems, Electronic Data Interchange and the internet (Bacchetta, Marc et al, 1998). The European Union (EU) define e-commerce as “any business transaction concerning goods and services, where participants are not in the same physical location and communicate through electronic means.” (Lodder, A., & Kaspersen, H., 2002). According to Cheeseman, e-commerce is the sale and lease of goods, services, property and the licensing of software over the internet or by other electronic means (Cheeseman, 2011).

In the businesses field, e-commerce is viewed as business completed electronically or among others one of the business models listed above. Further it includes providing sale of goods or services through the internet and doing business electronically which also includes licensing software through the internet for the use of the techno-savvy consumers. For consumers, e-commerce is on-line shopping and payment made by transfer of money through the internet. E-commerce also refers to the transaction of goods and services through the internet. Also, ASEAN refers to e-commerce as cross-broader e-commerce transactions or electronic trade through the ASEAN Agreement on Electronic Commerce signed by ASEAN Economic Ministers on 12th November 2018 (<https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-commerce/>).

In recent years, e-commerce has become one of the growing business models that featuring e-retail sales that is considered favourable by consumers. Hence, e-commerce has become a major player in economic consumerism worldwide, contributing to global economic growth. With the advancement of information and communication technology, a generation of techno-savvy consumers, also known as e-consumers has emerged and contributes to e-commerce growth daily. According to Statista, an anticipated 1.8 billion e-consumers worldwide purchased goods online in 2018 (<https://www.statista.com/topics/871/online-shopping/>). In the same year, global e-retail sales achieved 2.8 trillion US dollars (<https://www.statista.com/topics/871/online-shopping/>). For the growing and developing ASEAN, based on the research conducted by Institute of Southeast Asian Studies, there is more than 50% of ASEAN’s population under 30 years old who have greater affinity with



technology and internet based transaction (<https://www.iseas.edu.sg/research/ssrtg>, Institute of Southeast Asian Studies, 2018). The rise of the current young middle class population further has increased the growth of ASEAN e-consumers, contributing to the growth of e-commerce in the region. Recently ASEAN members signed the ASEAN Agreement on Electronic Commerce clearly indicating the commitment of ASEAN in the growth of the e-commerce market.

Fast growing e-commerce has changed business transactions from a physical action in a traditional retail store to purchase of goods by shopping online. E-consumers are satisfied with the convenience and easy accessibility of e-commerce as consumers can buy anything at anytime from anywhere without physically going to a store (Naemah Amin & Roshazlizawati Mohd Nor, 2011). The transaction of selling and buying, completed at the fingertips with the help of the internet has become a part of the modern life style. The concept of bringing stores to shoppers as compared to shoppers to the stores (Parsons, 2002) has been well received and e-consumers have adapted to this concept. The transaction of e-commerce, from the beginning of its formation to the completion of the online transaction has changed the traditional contract of sale.

The traditional legal theories that govern the elements of contract of sale have been challenged and forced to adapt to provide an appropriate explanation to the e-commerce environment. Many legal issues remain unanswered and there has been inappropriate discourse in the e-commerce context. This is because there is no clear applicable law in governing e-commerce consumer contracts for sale of goods, particularly among the developing ASEAN countries. The commitment of ASEAN member stated when signing the ASEAN Agreement on Electronic Commerce is to the effort in developing a conducive regulatory environment for e-commerce to flourish. At the same time, to maintain and adopt as soon as practicable, laws and regulations governing electronic transactions taking into account applicable international conventions or model laws relating to e-commerce (<https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-commerce/>).

This paper focuses on the issues arising from privacy of contract in consumer e-commerce contracts. This paper aims to identify the parties involved in the complicated and intertwined rights and liabilities of the parties in e-commerce consumer contracts for sale of goods. In the context of this paper, the parties involved are the commercial party of e-commerce on one side and the consumer on the other. The discussion mainly concentrates on e-commerce consumer contracts for sale of goods, which is a contract between the e-commerce business and consumers (B2C e-commerce). The commercial e-commerce contract that involves two commercial parties on both sides (B2B e-commerce) is not the focus of this paper.

Literature Review

The laws governing e-commerce consumer contracts for sale of goods are a complex area and the governing laws include contract law, the law on sale of goods, consumer protection law and the laws on e-commerce. Contract law is a private law which governs a contractual relationship between individuals. Contracts entered into by parties are based on mutual consent and voluntary participation of the parties in the private law domain. The doctrine of freedom of contract have long been rooted in the contract. According to Atiyah (1999) the rise of the prominence of freedom of contract, based on the liberalism of freedom of choice has gradually declined in many elements.

Government involvement through regulation has replaced free contract as paternalistic interference in balancing the unequal bargaining power of the contract parties. The market economy that is nominated by the monopoly and oligopoly structure of business has triggered government involvement in regulating various contracts, in particular consumer contracts for sale of goods.

The law of sale of goods is one of legislative interference in governing contract of sale of goods, a departure from the doctrine of *caveat-emptor* to ensure quality and fitness of the goods in the market (Atiyah et al, 2010). *Caveat-emptor* emphasized the notion of ‘*let the buyer beware*’ placing the burden on the buyer to examine the quality and fitness of the goods prior to the completion of the contract which originated from common law doctrine (Atiyah, 2010). Common law doctrine is the major source of the contract law based on the judicial precedent of the English courts and is derived from the *laissez-faire* principles of economics. The origins of common law are much more established and have been in use since as early as 1180. Common law is largely concerned with serious crime and land tenure (Furmston, 2012). The concept of contract law and its associated body of legal doctrine only developed around the mediaeval period and gained prominence in the early sixteen century (Stone, 2008).

The abandonment of the doctrine of *caveat-emptor* to a *caveat-venditor* emphasis is based on the notion of ‘*let the seller beware*’ and is intended to provide protection to the weaker party, who is the buyer, in the sale of goods contract. The law on sale of goods imposes implied terms on the sale of goods contract with the aim of balancing the imbalance of bargaining powers in the sale contract. The law of sale of goods remains a private law governing the jurisdiction of the particular applicable law in the respective country. The law of sale of goods is different across jurisdictions and depends on the emphasis of the particular government.

In the United Kingdom (UK) the law on sale of goods has several sources, the most important legislation is the Sale of Goods Act 1979, subsequently amended by the Sale and Supply of Goods Act 1994, the Sale of Goods (Amendment) Act 1994 and the Sale of Goods (Amendment) Act 1995. In the United States of America (US) a uniform commercial law has been developed, the Uniform Commercial Code (UCC), governing contracts in the US jurisdiction. The UCC created uniform commercial law in 50 states across the US including the District of Columbia. UCC provisions override the common law of contracts and provide a uniformity of commercial law in contracts for sale of goods (Cheeseman, 2011).

In the global arena, a uniform international sales law was established under the United Nation Convention on Contracts for International Sale of Goods (CISG) governing the contract of international sale of goods. Although, CISG does not apply to goods bought for personal, family or household use unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use (Article 2 of the United Nation Convention on Contracts for International Sale of Goods). CISG is discussed here in order to provide some basic understanding of the law governing sale of goods contracts. The law of sale of goods is provided in Part III of the CISG. Article 35 states that the seller has the obligation to deliver goods, which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract (United Nation Convention on Contracts for International Sale of Goods, 2010). The requirements of the goods which must be satisfied in order to conform to the contract under CISG are that they are:

- (a) fit for the purposes for which goods of the same description would ordinarily be used;
- (b) fit for any particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- (c) of the quality of the which the seller has advertised to the buyer as a sample or model;
- (d) contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

With the recognition of the importance of consumer protection law in equalizing the differences between traders and consumers, the legislative intervention of consumer protection provision began globally. The United Nations Guidelines on Consumer Protection (UNGCP) is among the global initiatives in promoting and upholding consumer protection. UNGCP were originally adopted by the United Nations (UN) in 1985, after years of campaigning by consumer associations in many countries through Consumer International. In



1999, through the UN resolution E/1999/INF/2/Add.2, UNGCP were later expanded by the Economic and Social Council (ECOSOC) to further strengthen consumer protection law and policy globally.

Recently, in December 2015 UNGCP were again revised by the UN General Assembly in resolution 70/186 to address the challenges of the disparity of economic and market force in providing protection to consumers (<https://www.consumersinternational.org/what-we-do/consumer-protection/global-policy-cooperation/un-guidelines-for-consumer-protection/>). To further promote and enhance consumer protection worldwide, The UN Conference on Trade and Development (UNCTED) was held in October 2016. UNGCP adopted a set of principles to guide effective consumer protection legislation and enforcement institutions and to redress systems. UNGCP further assists UN Member States with diverse economic, social, and environmental circumstances in formulating and enforcing consumer protection through regional laws, rules and regulations. It is also the aim of UNGCP to promote international enforcement cooperation among Member States and encourage the sharing of experiences in the context of consumer protection (Preface UNCTAD/DITC/CPLP/MISC/2016/1).

Consumer protection law is more than just a private law governing businesses and consumers. It is a global effort in ensuring and encouraging the equal distribution of wealth in a civil society. However, many countries remain passive in adopting and implementing consumer protection law due to pressure exerted by various industries and businesses. Industries and businesses driven by profit maximization are the main source of the country's economic growth. Therefore, governments of many countries still face the challenge of balancing the interest of their civil society and economic growth. E-commerce is an up-and-coming industry with great potentials capable of driving economic growth and generating wealth. In light of the benefits that e-commerce generates, many governments choose to ignore the core concept of consumer protection and the rights of their civil society. E-commerce is a new industry to the 21st century and as yet is not governed by effective laws and regulations. Further, the nature of the internet and the web, which has no boundaries or limitations, is very difficult and non-enduring in terms of governance under existing current laws and regulations.

The law relating to e-commerce was first issued on 24th April 1996 at the United Nations Commission on International Trade Law (UNCITRAL) and called the Model Law on Electronic Commerce with Guide to Enactment. The UNCITRAL Model Law was later amended in 1998 with the aim to serve as a guideline for countries in formulating legislation to facilitate electronic commerce. The purpose of the UNCITRAL Model Law is to facilitate electronic commerce by providing equal treatment to paper-based and electronic information with no intention in governing electronic contracting (Sheela & Rahmah Ismail, 2017). The

UNCITRAL Model Law serves as a guideline for countries in formulating rules and basic structure to recognize electronic contracts in the relevant articles as follows:

- (a) Article 11 - Validity and formation of the contract
- (b) Article 12 - Recognition by parties of data messages
- (c) Article 13 - Attribution of data messages
- (d) Article 14 - Acknowledgement of receipt
- (e) Article 15 - Time and place of dispatch and receipt of data messages

Part II of the UNCITRAL Model Law provides for electronic commerce in specific areas, in particular, contract of carriage of goods. Article 16 of the UNCITRAL Model Law provides for the recognition in furnishing the marks, number, quantity or weight of goods; stating or declaring the nature or value of goods; issuing a receipt for goods and confirming that goods have been loaded. It also recognises the need to notify a potential customer of terms and conditions of contract and provide instructions to a carrier through electronic means. The recognition of e-commerce in claiming delivery of goods; authorizing release of goods and giving notice of loss of or damage to goods makes the e-commerce contract possible in delivery and through carriage without considering the other issues that might arise from the contract law. Article 16 of the UNCITRAL Model Law recognizes the formation of contract of carriage of goods through electronic means in performing the dispatch, delivery and transfer of ownership of the goods. The other issues with regard to consumer contracts for sale of goods, in particular, consumer protection in e-commerce, were not addressed in the UNCITRAL Model Law.

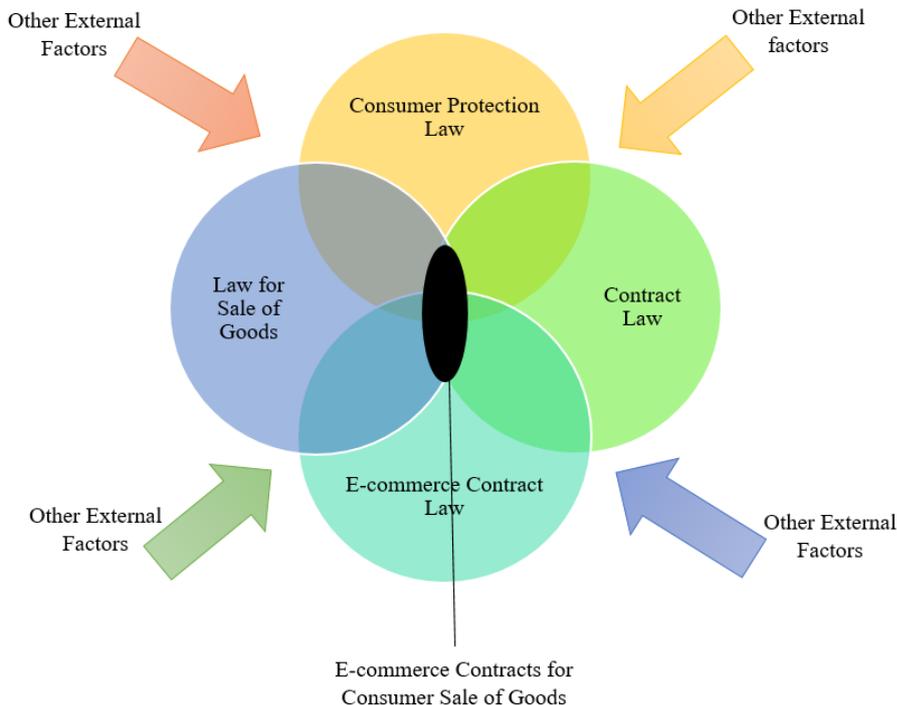
Besides the governing laws and international standard guidelines on e-commerce consumer contracts for sale of goods, there are many external factors affecting the vulnerability of consumer protection in e-commerce. External factors such as lack of appropriate information regarding the e-retailer, lack of information about the product and sale process and lack of information about the terms of the e-commerce consumer sale of goods contract (Svantesson & Clarke, 2010) must also be considered. Further, there are external factors in regard to cyberspace, for example the security of information in cyber space, privacy issues on the cyber space, the unauthorized access to consumers data and other IT related information (Naemah Amin & Roshazlizawati Mohd Nor, 2013). The behaviours and attitudes of the e-commerce industry that do not uphold the sanctity of contract are among the external factors that affected consumer protection in e-commerce contracts for sale of goods.

The nature of the e-commerce contracts and the nature of cyber space resulted lack of enforcement and lack of effective governing laws are also the external factors that auxiliary deteriorate consumer protection in the e-commerce consumer contracts for sale of goods. Others external factors include lack of awareness about consumer protection, consumer

economic status, the extent of government intervention, cross-border issues, a fair and realistic dispute resolution structure between e-commerce and consumers, adequate remedies provided under the e-commerce consumer contracts for sale of goods, product liability and product safety among many others.

The theoretical framework of the literature review with regard to e-commerce consumer contracts for sale of goods is illustrated in Diagram 1 below:

Diagram 1. Theoretical Framework of E-commerce Contracts for Consumer Sale of Goods



The complexity of the laws governing e-commerce consumer contracts for sale of goods arising out of the doctrine of privacy of contract is the issue explored in this paper. The task is to identify the relationship and privacy of the various parties involved in the e-commerce consumer contracts for sale of goods by mapping the privacy of e-commerce consumer contracts for sale of goods.

Methodology

The methodology adopted in this paper is based on doctrinal or pure legal research and as such this is a content analysis based research paper written to fulfil the objective of mapping privacy of e-commerce consumer contracts for sale of goods. The paper concentrates on the legal issues involved, particularly the rights and liabilities of the parties involved in e-commerce consumer contracts for sale of goods. In order to identify and analyse e-commerce

consumer contracts for sale of goods, legal theories and principles are explained and analysed to achieve the objective. All relevant laws in governing e-commerce consumer contracts for sale of goods are examined to explore the legal issue of privacy of e-commerce consumer contracts and identify the rights and liabilities of parties involved in e-commerce. The distinct and autonomous nature of law as a discipline possesses its own unique legal analysis. This paper's doctrinal exposition and commentary provide authoritative statements of the meaning and scope of applicable substantive legal tests and requirements for the topic discussed in this paper (Salter & Mason, 2007).

In order to examine and analyse the laws governing e-commerce consumer contracts for sale of goods, content analysis was employed to systematically analyse the content of the legal documents (Chatterjee, 2000). To identify the characteristics of the laws involved, content analysis served to fulfil the objective in analysing the qualitative aspect of e-commerce consumer contracts for sale of goods. The approaches employed in this paper are descriptive, explanatory, analytical and critical. To seek to ascertain the legal issues involved in e-commerce consumer contracts for sale of goods, descriptive approach was employed to explain the doctrine of privacy of contract in e-commerce environment.

Further, an explanatory approach was used to explain the e-commerce consumer contracts for sale of goods and the significance privacy of contract in identification of the rights and liabilities of the parties involved in e-commerce consumer contracts for sale of goods was investigated. To further examine and evaluate the rights and liabilities of the parties involved in e-commerce consumer contracts for sale of goods, an analytical approach was used to draw inference from the legal theories involved. The paper also employs a critical analysis approach to make judgments and form opinion regarding the inadequacies and drawbacks of the laws in governing e-commerce consumer contracts for sale of goods on a rational basis. Analytical and critical approaches were also engaged in forming a conclusion that achieves the objective of mapping privacy of e-commerce consumer contracts for sale of goods.

Discussion

The doctrine of privacy of contract originated in the middle of nineteenth century from a common law judicial decision that a non-party of the contract cannot bring an action on the contract (Furmston, 2012). In the decisive case of *Tweddle v Atkinson (1861)*, Wightman J based his judgement on the basis that no one can sue or be sued over a contract if they have not provided consideration under the contract (Turner, 2013). English common law acknowledges that consideration of contractual agreements had to move from a promise or a bargain upholding a contract. The doctrine of privacy of contract is based on the doctrine of consideration that a party who has not been considered in a contract cannot be burdened by the contractual obligations of that contract. Similarly, as Wightman J pointed out in his

judgement “...it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.” The doctrine of privacy was further reiterated in the House of Lords judgement of the case of *Dunlop v Selfridge (1915)*.

From the perspective of liberalism, Collins (2003) stressed that it would be a serious invasion of the liberty of the individual if the parties to a contract agreed that a third person should run the marathon. The doctrine of privacy raises many problems in the context of modern commercial transactions which involved more than two parties. Adams and Brownsword (1990) gave the example of multi-linked contracts regarded as ‘networks’ in construction contracts which would made the doctrine of privacy redundant and inappropriate in application. Besides construction contracts, there are many other contracts that involve multiple parties such as contracts for the carriage of goods and credit and financing arrangements. There are many arguments surrounding the issues of the appropriateness of the doctrine of privacy In 1991 the UK Law Commission produced a Consultative Paper which resulted in the enactment of the Contracts (Rights of Third Parties) Act 1999 in UK (Law Commission’s Report on Privacy of Contract (No. 242). However, the 1999 Act does not abolish the doctrine of privacy but merely provides a large exception to the doctrine of privacy (Furmston, 2012) and many countries, without legislature intervention still apply the doctrine of privacy extensively in contracts.

In the context of the e-commerce consumer contracts for sale of goods, the doctrine of privacy continues to play a part. In the e-commerce consumers’ sale of goods contract, the parties involved in the sales contract identify by way of seller as e-retailer and buyer as consumer, hence the doctrine of privacy remains appropriate. The lack of legislative intervention in the e-commerce consumer contracts for sale of goods persists as a private law contract issued despite the nature of e-commerce, which is borderless. Although e-commerce is a current and fashionable phenomena, affecting the traditional contracts for sale of goods, the UK House of Commons Select Committee on Trade and Industry warned policy makers not to be carried away by the hyperbola and exaggeration of the development of e-commerce (UK House of Commons Select Committee on Trade and Industry, Tenth Report). Atiyah (2010) is of the opinion that e-commerce that involves distribution of goods dependent on the existing delivery system is equated to traditional mail order. Therefore, it is of significance that this paper seeks to identify the doctrine of privacy in e-commerce consumer contracts for sale of goods by mapping of the chain of distribution of goods in a diagrammatic form.

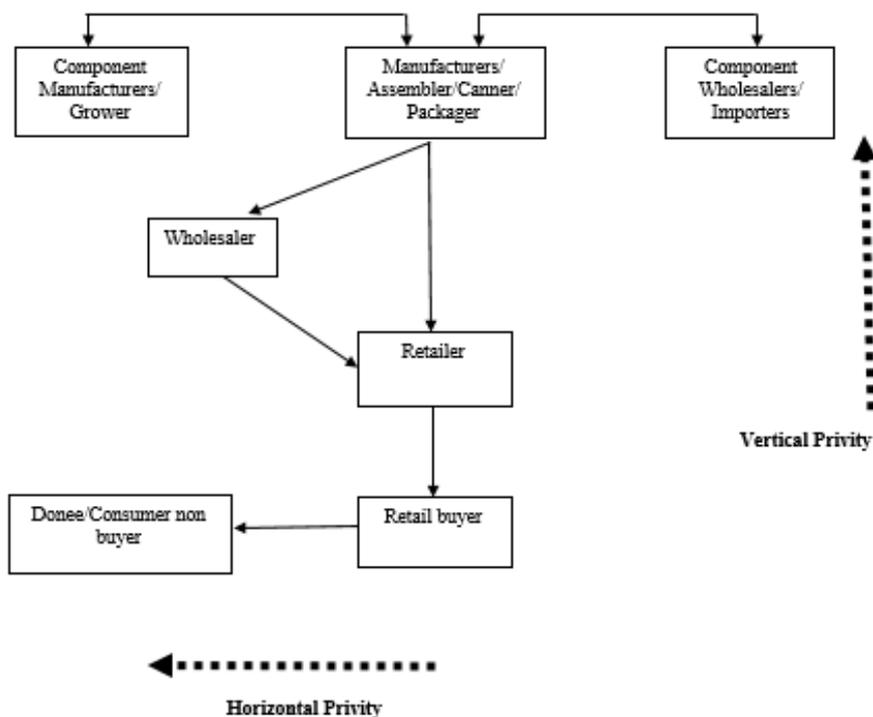
The traditional chain of distribution of goods is explained through doctrine of privacy by Legh-Johes (1969) as:

“...the manufactured product descends down the chain of distribution from the maker through various middlemen (wholesalers, distributors, etc) to the retailer who sells to the public; ‘vertical privacy’ is the privacy which each of these persons has with his

predecessor and successor in the chain. 'Horizontal privacy' is the ensuring privacy of contract between the retailer and the first domestic consumer who buys from him, and then between that consumer and any sub-consumer, if such there be."

The doctrine of privacy in the context of traditional sales of goods contract in the chain of distribution of goods is demonstrated in Diagram 2 below (Legh-Johes, 1969):

Diagram 2. Chain of Privacy



Source: Legh-Jones (1969)

Findings

The doctrine of privacy in e-commerce consumer contracts for sale of goods differs from the traditional doctrine of privacy. As illustrated by Diagram 3 below, the chain of distribution of goods in e-commerce consumer contracts for sale of goods has changed significantly. The initial stages of horizontal privacy have not been affected however with the e-commerce platform that replaces the middleman, it appears that more parties are involved in the distribution chain. These parties include the e-commerce platform, the internet provider, the data centre provider, the shipping companies (either by air or by sea and the delivery services. This paper excludes the credit providers and the financial institutions because other issues of consumer credit are involved which are outside the scope of this paper. The vertical



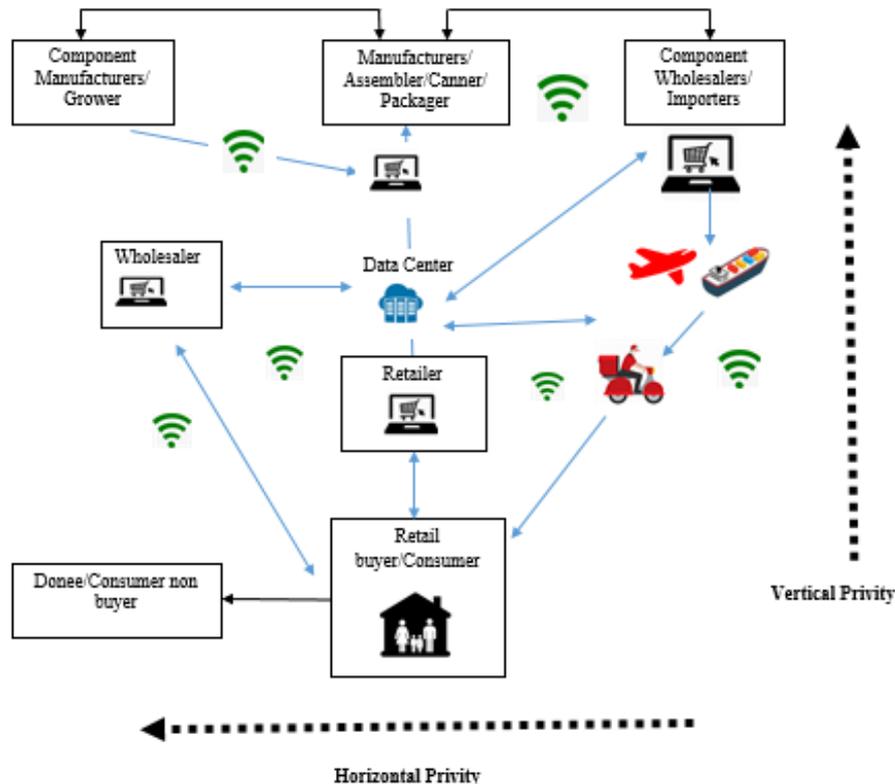
privacy of the consumer contracts for sale of goods experience changes tremendously with increased number of parties and where the respective privacy is intertwined within many parties.

Consequently, the issue of liabilities and the obligations of the parties involved in e-commerce consumers' sale of goods have been affected immensely because of the increased number of parties involved in the consumer e-commerce sale of goods transaction. The sellers in e-commerce easily escape liabilities and obligations by pushing the blame on either the logistic, the importer, e-retail or even the consumers for not being aware of the terms of the e-commerce. Further, there is a lack of governing laws on the platform provider in e-commerce and the e-consumer claim and consequently consumer protection in e-commerce is left in the hands of the platform provider and e-retailer. E-commerce consumer sale of goods has brought consumer sale law backward to *caveat-emptor*, that which offers little or no protection for consumers.

Furthermore, the traditional laws governing contract for consumers' sale of goods, which upheld the sanctity of contract are not able to provide any protection to the consumer. The findings of this paper clearly indicate the need for a comprehensive integrated consumer protection law in globally to govern e-commerce consumer contracts for sale of goods. The rise of e-commerce triggers the phenomena that increases disadvantage for the consumers and hence widens the disparity of wealth between the e-commerce as industry player and the consumers. E-commerce further divides the techno-savvy e-consumers with the under privileged consumers who do not have access to the internet, credit card services, e-banking and e-payment that have since been created and initiated by e-commerce directly or indirectly.

Consumer protection in e-commerce had been widely discussed and is of serious concern among academic, however surprisingly, the issue of privacy has yet to be comprehensively studied. In order to provide some insight on the parties involved in e-commerce consumer sale of goods, this paper took the initiative to map out the privacy of the parties involved that are directly and indirectly involved in e-commerce consumer sale of goods to understand the intertwined relationship of the e-commerce consumer sale of goods, see Diagram 3 *Chain of privacy in e-commerce consumer contracts for sale of goods* below.

Diagram 3. Chain of Privacy in E-Commerce Consumer Contracts for Sale of Goods



Conclusion

There are many challenges faced by consumers in e-commerce consumer contracts for sale of goods in the current economy of borderless trading. The major challenge remains the absence of a regulative framework that provides consumer protection in the world of the digital age. The complexity of intertwined laws and interventions from various parties resulted in minimum and limited protection for the consumer in e-commerce consumer contracts for sale of goods. In the context of e-commerce, consumers are defenceless against the industry and the advancement of technology. Therefore, consumer protection measures are of paramount importance to protect consumer interests in e-commerce consumer contracts for sale of goods. This paper mapped the issue of privacy in e-commerce consumer contracts for sale of goods and serves a small role in identifying the doctrine of privacy governing e-commerce. The findings of this paper serve to aid legislative policy makers in understanding contractual parties' privacy in e-commerce consumer contracts for sale of goods.



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