

**MALAYSIAN ELECTRONIC COMMERCE ACT 2006 AND EU DIRECTIVES:
A COMPARISON**

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ABSTRACT

European Union (EU) has given directives as a guiding framework for enactment of laws to facilitate the growth of e-commerce contract and transaction in that region. Malaysia has tabled Electronic Commerce Act 2006 to smooth the progress of e-commerce in Malaysia. This paper will seek to highlight the similarities and differences between the E-Commerce Act 2006 and the EU Directives on certain issues of online contracting.

INTRODUCTION

Dr. Terry Cutler (1997) who is the Managing Director of Cutler & Company who delivered a paper on E-Commerce at the ASEAN Round Table on Electronic Commerce held in Kuala Lumpur in October, 1997 said that electronic commerce (e-commerce) is the creation of commercial transactions between the parties, which are done electronically. It has also been described to mean the conduct of trade and commerce within the electronic environment of the global information economy. According to Forrester Research, the Internet retail will soar from €102Action in 2006 to €263Action in 2011. Based on the forecast, in the coming five years, the number of Europeans shopping online will grow from 100 million to 174 million. Their average yearly Net retail spending will grow from around €1,000 to €1,500, as UK Net consumers outspend even their US counterparts online. Overall, this will cause European eCommerce to surge to €263 Action in 2011 (www.forrester.com). In Asia, it was predicted in 2004 that wireless Internet users will reach close to 150 million, with e-commerce transaction exceed US \$40B which covers the countries like China, Hong Kong, Japan, Korea, Malaysia, Philippines, Singapore, Taiwan, Thailand (www.researchandmarkets.com).

As such, it is critical for the Asian nations, in particular Malaysia, to provide a conducive environment for e-commerce transaction, especially a comprehensive regulatory framework for the expansion of this kind of new way of dealings. Malaysia has leaped forward in this area with the establishment of Multimedia Super Corridor (MSC) and the introduction of cyberlaws in 1997 which inclusive of Computer Crimes Act, Digital Signature Act and Telemedicine Act. Recently, in 2006, Electronic Commerce Act (hereinafter referred to as "the Act") has been tabled in Malaysian Parliament, a clear sign of continuous effort by Government of Malaysia to lead the Information Technology advancement particularly within this region.

OVERVIEW OF E-COMMERCE ACT 2006 AND EU DIRECTIVES

The EU has created a coherent regulatory framework for electronic commerce. This framework includes the following Directives: Electronic Commerce Directive, the Distance Contracts Directives, Unfair Terms in Consumer Contracts Directive and the Community Framework for Electronic Signatures. The Malaysian Government introduced the Act to provide for legal recognition of electronic message, fulfillment of legal requirements by electronic means and communication of electronic message. In this paper, the writers only seek to

highlight the similarities and differences between the Act and the Directives on certain issues of online contracting.

LEGALITY OF ONLINE CONTRACT

Lau Kok Keng (2000) in his paper outlined the problem over Internet contract into:-

- authenticity
- confidentiality
- integrity
- non-repudiation

Article 1 of the E-Commerce Directive is designed to facilitate the provision of electronic commerce services. Articles 9, 10 and 11 deal with electronic contracts in business-to-consumer ("B2C") transactions. The E-Commerce Directive adopts a minimalist approach, requiring a service provider to set out all the necessary steps so that consumers can have no doubt as to the point at which they are committed to an electronic contract. Article 2(b) of the Directive defines a service provider as "any natural or legal person providing an information service." Electronic contracts are just as legal and enforceable as traditional paper contracts that are signed in ink within the EU.

As regard to the position in Malaysia, section 6(1) of the Act has similar effect where it provides that any information shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form. Section 6(2) further states that any information shall not be denied legal effect, validity or enforceability on the ground that the information is not contained in the electronic message that gives rise to such legal effect, but is merely referred to in that electronic message, provided that the information being referred to is accessible to the person against whom the referred information might be used. In section 7(1) of the Act, the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message and a contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation as mentioned under subsection (2).

Based on the above provision, it is clearly seen that the electronic message like e-mail should be treated as traditional contract paper communication in any transaction. In other word, these two provisions extend the modes of communication in concluding a valid contract.

FORMATION OF ELECTRONIC CONTRACTS

Contract law requires an element of intent, but the E-Commerce Directive does not make any reference to "the intention to sign" in relation to an e-commerce transaction. Instead, it imposes an information obligation, in order to help consumers reach intent. By following the technical steps to conclude a contract, the consumer indicates his intent to enter into a contract as provided under Council Directive 2000/31 art. 10(1)(a). In most legal systems, a contract is formed through the exchange of offers and acceptance. However, the E-Commerce Directive introduces a third step in contract formation- confirmation. According to Article 11, "[i]n cases where the recipient of the service places his order through technological means, the service provider has to acknowledge the receipt of the recipients order without undue delay and by electronic means." Thus, a contract is concluded in B2C transactions only when the recipient of the service has received an electronic acknowledgement of the recipient's order from the service provider. Article 11 applies only in situations where the Service provider made the initial offer, not in situations where the customer is the one who makes the offer. However, the

"acknowledgment requirement" does not apply in contracts which is concluded exclusively by exchange of electronic mail or by equivalent individual communications.

The rationale for requiring an "acknowledgement of the receipt of the acceptance" is to provide protection from accidental contracts. The idea is to give the consumer a second chance to check whether he/she might have ordered a product that he/she did not want. It would also give a seller the opportunity to establish whether there were sufficient stocks available and whether the product has been offered at the right price.

In Malaysia, there is no such further requirement of confirmation to form a valid contract. The formation of a valid under the Act is only as what has been provided under section 7(1) of the Act. Section 7 also provides for the affirmation of the legal effect, validity or enforceability of contracts formed by the use of an electronic message.

Offers and Invitation to Treat

The Internet makes it possible to address specific information to an unlimited number of persons. EU legislation does not address the issue of what constitutes an offer and an invitation to treat. The determination of this issue is left to the individual member states. Similarly, this matter of invitation to treat is not been addressed at all under the Act.

Prior Information Requirements

The E-Commerce Directive stipulates extensive prior information requirements to enter a contract. Prior information requirements refer to information that must be provided by a service provider "prior to an order being placed by the recipient of the service." This requirement is applicable to B2C and business-to-business ("B2B") transactions, but the rule allows derogation from this obligation for B2B transactions. Under article 10(1) Council Directive 2000/31 the Service Provider must provide information on (a) the different technical steps that a consumer must follow to conclude a contract, (b) whether the contract will be filed by the service provider and whether it will be accessible, (c) the technical means for identifying and correcting input errors prior to the placing of the order, and (d) the languages offered for the conclusion of the contract. Contracts and general conditions must be made available in a way that would allow the consumer to store and reproduce them. The contractual terms should appear on the screen before making any purchase (Kierkegaard, 2007).

Again, article 10(1) Council Directive 2000/31 of the E-Commerce Directive, the Service Provider must also comply with prior information requirements established in the Community Law, such as those contained in the Distance Contracts Directives, and sectoral Directives such as insurance, travel packages, etc. For instance, the Distance Contracts Directives provide the rule on when and what information should be provided to the consumer before a distance contract is concluded. These prior information requirements supplement those in the E-Commerce Directive and extends the provisions of the distance selling directive by placing the obligation on the service provider to provide the information even where no contract is to be formed.

This is a big gap in the Act whereby this matter is not been addressed at all. The central principle behind the prior information requirement is to establish the confidence of consumers and enterprise in e-commerce. Information varied across the different member states and customers had no clear view of the contractual terms, or the genuineness and reliability of the seller. The existence of this provision alike will definitely help to advance the development of e-commerce in Malaysia as well as enhancing the confidence of e-commerce users.

UNFAIR CONTRACT TERMS

The EU's Unfair Contract Terms Directive provides a comprehensive set of rules and an Annex containing an illustrative list of 17 contract terms that may be regarded as presumptively unfair. The terms have the effect of altering the position which would exist under the ordinary rules of contract as they would either protect the supplier from certain sorts of claims in law which the consumer might otherwise make, or give rights against the consumer that the supplier would not otherwise enjoy. The Unfair Contract Terms Directive applies to all consumer contracts - and thus extends to electronic or lone contracting terms as well.

On the other hand, the Act is silent on this matter. In dealing with unfair terms in Malaysian consumer contracts, the existing legislative infrastructure may not be the most ideal for consumer protection. Provided we are willing to see the provisions of the Contracts Act 1950 for what they are, uninfluenced by the social, economic and political climate at the time of its conception, it will be realized that in spite of its origins, the Act has unexplored and unexploited potential in checking unfair terms in consumer contracts.

The Contracts Act 1950 attempts to codify only the basic principles of contract law. As such it does not have specific provisions dealing with the contents or the terms of a contract. However, even in the absence of such provisions there is at present devices available under the Act in dealing with unfair contract terms. An inventory of such devices is provided under section 16 of the Contract Act. Under the said provision, consent to an agreement is said to be free, when *inter alia*, it is not caused by undue influence. Clause (1) provides that a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Clause (3) links the concept of undue influence to the concept of unconscionability in the following terms.

Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

As observed by Lord Shaw in *Ragunath Prasad v Sarju Prasad* when dealing with identical provision in the Indian Contract Act, an appeal to Privy Council from India, it is submitted that these provisions provide the court with a means to strike off unfair consumer contracts without being stifled by common law precedents and interpretations. A positive development in this area can be seen in a case pertaining to certain guarantees given in favour of a bank as decided in *Malaysian French v Abdullah bin Mohd Yusof & Ors*.

Other provisions of the Contracts Act which provide the court with yet another means to strike off unfair consumer contracts are those related to fraud and misrepresentation. Fraud under section 17 of the Contracts Act includes certain acts which are carried out with intent to induce another party to enter into a contract. In fact the explanation to section 17 seems to provide that silence can amount to fraud when 'it is the duty of the person keeping silence to speak'. Fraudulent misrepresentation is also a variety of fraud under section 17.

However, in *Datuk Jaginder Singh & Ors v Tara Rajaratnam* it has to be noted that in spite of the seemingly wide scope of fraud under the Contracts Act, parties seldom succeed in setting aside a contract on this ground as a high standard of proof is required in case where fraud is alleged.

Misrepresentation as provided under section 19 of the Act covers only innocent misrepresentation. Although the standard of proof for misrepresentation is not as high as for fraud, it must still be shown that the consent of the party was caused by the misrepresentation because it is only in such a situation that a contract is voidable for misrepresentation.

In addition, while increased judicial creativity may not be the cure-all for unfair terms in Malaysian consumer contracts, such creativity however, can and will in fact go a long way in checking and controlling the use of such unfair terms. Under the rules of construction for instance, various interpretative devices are frequently used by courts as a device to protect the interest of consumers in unfair contracts. These include the strict interpretation of clauses which exempt or limit a party's contractual liability (*Tan Chong & Sons Motor Co (Sdn) Bhd v Alan Mcknight*) the use of the *contra proferentem* rule when the words used in a contract are vague or ambiguous (see *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud*), and other general rules of construction of contractual terms.

Beside such devices mentioned above, the courts have also used the device of implied terms in dealing with certain types of contracts although there are no provisions in the Contracts Act which empower a Malaysian court to imply such term into a contract. It is most heartening to note that the device of implied term has, on numerous occasions been used by the Malaysian courts not only to give effect to the intention of the parties (*Yong Ung Kai v Enting*) and to adopt customs which are peculiar to a particular transaction (*Cheng Keng Hong v Government of Federation of Malaya*), but, more significantly perhaps, to insist on good faith and fair dealings in contracts between a supplier and consumer of goods (*Pasuma Pharmacal Corporation v McAlister & Co Ltd*).

ELECTRONIC SIGNATURE

The E-Signature Directive recognizes the validity of two types of signatures: an electronic signature and an advanced electronic signature. The former should not be denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form. Article 5 of the Council Directive 99/93 provides the advanced electronic signature satisfies the legal requirements of a signature in relation to data in electronic form in the same manner as a hand-written signature satisfies those requirements in relation to paper-based data and is admissible as evidence in legal proceedings.

In Malaysia, Digital Signature Act 1997 has been enacted in 1997 to cater the issue of electronic signature, mainly in e-commerce. Section 9(3) of the Act provides for the application of Digital Signature Act 1997 whereby it shall continue to apply to any digital signature used as an electronic signature in any commercial transaction. Section 9 of the Act provides that electronic signature that meets the criteria in s.9(1) fulfills any legal requirement for signature. Section 9 also states the criteria to be considered in assessing the reliability of an electronic signature. Section 10 of the Act further provides that a digital signature fulfills the legal requirement for a seal to be affixed to a document. Besides, section 11 of the Act provides that a witness may use an electronic signature to fulfill any legal requirement for the signature of a witness to a signing of a document or to a transaction.

CONCLUSION

The legislations of the EU create legal certainty by validating electronic contracts. In EU directives, it typically deals only with consumer contracts by exempting B2B transactions. The E-Commerce Directive contains extensive information requirements prior to the conclusion of the contract and the mandatory requirement of 3-steps procedures for the formation of contract which includes "confirmation" as a requisite to a contract formation. In Malaysia, as a comparison, we do not have any provisions on prior information requirements to enter into a contract and a third step in online contract formation that is confirmation. As regards to the issues on online advertisements, both EU Directives and the Act are silent on this matter. There are similar provisions of EU Directives and the Act on legality of online contract, formation of the contract and electronic signature. To sum up, EU Directives approach is more towards "B2C" as well as consumer protection, whilst the Act is aimed to provide for legal recognition of electronic messages in commercial transactions either "B2B" or "B2C", the use of the electronic messages to fulfill legal requirements and to enable and facilitate commercial transactions through the use of electronic means.

REFERENCES

- Cheng Keng Hong v Government of Federation of Malaya* [1966] 2 MLJ 33. Contracts Act 1950
 Council Directive 2000/31, Directive on Electronic Commerce 2000 O.J. (L 178) (EC) available at
<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML> (accessed on 3/7/07)
- Datuk Jaginder Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105.
<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32005L0029:EN:HTML> (accessed on 3/7/07)
<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML> (accessed on 3/7/07)
<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:EN:HTML> (accessed on 3/7/07)
<http://www.forrester.com/Research/Document/Excerpt/0,7211,38297,00.html> (accessed on 5/7/07)
http://www.researchandmarkets.com/reportinfo.asp?report_id=39772 (accessed on 5/7/07)
- Kierkegaard, S. M. *E-contract formation: U.S. and EU perspectives*. (2007) 3 *Shidler J. L. Com. & Tech.* 12
- Lau Kok Keng. (2000). *Legal Framework for E-Commerce in Singapore*. Working paper IQPC Conference On Internet Regulation, Singapore, 28-29 August
- Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29
- Malaysian French v Abdullah bin Mohd Yusof & Ors* [1991] 2 MLJ 475
- Pasuma Pharmacal Corporation v McAlister & Co Ltd* [1963] MLJ 221.
- Ragunath Prasad v Sarju Prasad*, AIR 1924 PC 60, Privy Council
- Tan Chong & Sons Motor Co (Sdn) Bhd v Alan Mcknight* [1983] 1 MLJ 226.
- Terry Cutler. (1997). *E-Commerce - ASEAN Round Table on Electronic Commerce*. Kuala Lumpur.
- Yong Ung Kai v Enting* [1965] 2 MLJ 98.