

Malaysian Electronic Commerce Act 2006 and EU Directives: Consumer Protection Perspectives

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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 enacted Electronic Commerce Act 2006 to smoothen the progress of e-commerce in Malaysia. Though section 2(1)(g) of Consumer Protection Act 1999 has been deleted to include consumers' transaction electronically, Electronic Commerce Act is still important in governing the online contract as a whole. This article will seek to highlight the similarities and differences between the Electronic Commerce Act 2006 and the EU Directives on certain issues of online contracting which relate to consumer protection.

Keywords: *e-commerce contract, consumer protection, commercial transaction, cyberlaws*

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. In Malaysia, Malaysia's Inter-Agency Task Force on Electronic Commerce has adopted the definition of e-commerce by Inter Agency Task Force on Electronic Commerce (IATFEC) with modification which states:-

E-commerce is business transaction conducted over public and private computer networks. It is based on the electronic processing and transmission of data, text, sound and video. E-commerce includes transactions within global information economy such as electronic trading of goods and services, on-line delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions collaborative design and engineering, on-line sourcing, public procurement, direct consumer marketing and after-sale services. It includes both products (consumer goods, specialised medical equipment) and services (information services, financial and legal services); traditional services (healthcare, education) and new activities (virtual mall). It involves the application of multimedia technologies in the automation and re-design of transactions and workflows, aimed at increasing business competitiveness.¹

The emergence of e-commerce as the new mean of trading and business, including retail business is evident. According to Forrester Research, the Internet retail will soar from €102billion in 2006 to €263 billion 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 e-Commerce to surge to €263 billion in 2012. In Asia, it was predicted in 2004 that wireless Internet users will reach close to 150 million, with e-commerce transaction exceed US\$40 billion which covers the countries like China, Hong Kong, Japan, Korea, Malaysia, Philippines, Singapore, Taiwan, and Thailand.³

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 “ECA 2006”) 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.

To complement this effort, the Malaysian Data Protection Bill which has been withdrawn previously, is now in the process to be tabled again. Back in 1999, the Ministry of Energy, Communications and Multimedia⁴ has tabled a piece of legislation on Personal Data Protection Bill (hereinafter referred to as the Bill) where the aim of the Bill is to regulate the collection, possession, processing and use of personal data by any person or organization so as to provide protection to an individual’s personal data and safeguard the privacy of an individual and to establish a set of common rules and guidelines on handling and treatment of personal data by any person or organization.

CONSUMER PROTECTION AND E-COMMERCE IN MALAYSIA

Before the introduction of Consumer Protection Act 1999, there are various statutes which relate to consumer protection in Malaysia. Two statutes of great significance in consumer purchases are the Contracts Act 1950 and the Sale of Goods Act 1957. While the principal Act governing trade descriptions and advertising is the Trade Descriptions Act 1972. Apart from that, other early consumer protection laws are Price Control Act 1946, Control of Supplies Act 1961 Hire Purchase Act 1967 and Direct Sales Act 1993. There was no specific and comprehensive piece of legislation regulating the protection of consumer in Malaysia. Many of these 30 statutes pertaining to the sale of goods and provision of services were based on the caveat emptor principle which places the burden on the consumer not to be cheated in any transaction.⁵ For instance, under the Sale of Goods Act 1957, there are provisions of implied terms that the goods match the description, be of merchantable quality, and be fit for their purpose but it can be excluded by an express term of the contract.⁶ As for Trade Description Act 1972, the Act does not apply to immovable property including houses and is limited in its application to statements made in the course of a trade or business and does not include statements made by professionals.⁷

Besides, until the enactment of the Consumer Protection Act 1999, Malaysia did not have a comprehensive and general statute on product liability. The law on product liability was expressed in the law of contracts, the common law principles of the tort of negligence, and several statutes, the most important of which is the Sale of Goods Act 1957. Both common law and statute provide different rights of compensation for loss or damage caused by goods to different classes of people. For a claim based on contractual or statutory liability, only the immediate party to the contract can claim compensation and other affected persons such as the innocent bystander, a friend, or family member who uses or receives the product as a gift has no right to claim. Hence, unless privacy is established, no liability arises. These persons are required to base their claims under the tort of negligence. However, in view of the difficulty in proving fault, a claim based on tort would inevitably face insurmountable complexities.⁸ Malaysian law also does not regulate unfair contracts. Exclusion clauses are a feature of almost all consumer

contracts. Fortunately, with the introduction of the Consumer Protection Act 1999 which came into force on November 15, 1999, most of the issues have been largely cured. Furthermore, with the amendment of section 2 of Consumer Protection Act 1999, the CPA 1999 is now applied to e-commerce transaction by the consumer.⁹

OVERVIEW OF E-COMMERCE ACT 2006 AND EU DIRECTIVES

In one article, it is reported;

“one of the greatest stumbling blocks that prevents the flourishing of electronic commerce (e-commerce) in Malaysia is, perhaps, the sceptical attitude of the Malaysians towards on-line credit card transactions. Many Malaysians would prefer to transact over the counter than over the Internet anytime.”¹⁰

Contracts transacted over the internet posed several issues of concern. Consumer expected the transaction to be fully secured, reliable and fair, free from any kind of cheating and fraud. Undoubtedly, the concern of the consumer is not unfounded. Lau Kok Keng (2000) in his paper¹¹ outlined the problem over Internet contract into:-

- authenticity
- confidentiality
- integrity
- non-repudiation

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 ECA 2006 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 ECA 2006 and the Directives on certain issues of online contracting.

Legality of online contract

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 ECA 2006 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 ECA 2006, 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 ECA 2006 is only as what has been provided under section 7(1) of ECA 2006. 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 ECA 2006.

Early in 2002, Kodak refused to honour orders for digital camera advertised on their retail website at £100, denying that an automated response to customers confirming confirmation of their orders constituted an acceptance of their £100 offer. Kodak claimed the price was a mistake and should have been £329. Several hundred consumers were believed to be affected and had been threatening legal actions against Kodak unless their contract were honoured.

The case is reminiscent of a similar error by Argos in 1999. In that case, televisions were offered on argos.co.uk for the sum of £2.99. The price should have been £299. The company refused to honour the orders placed and legal action was threatened, although it did not materialise. In the Argos case, the £2.99 price tag on the televisions was probably an invitation to treat. Although the web site sales process was automated, the site did not “confirm” the customer’s order. In the Kodak case, the order was confirmed. This confirmation is likely to be deemed “acceptance” in the legal sense, i.e. the point when the contract was formed, in the absence of anything to the contrary in the terms and conditions of the site.

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 ECA 2006 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 silence 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*¹² 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 mean 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*

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*¹⁴ 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*¹⁵) 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*¹⁶), 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*¹⁷) and to adopt customs which are peculiar to a particular transaction (*Cheng Keng Hong v Government of Federation of Malaya*¹⁸), 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*¹⁹).

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 ECA 2006 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 ECA 2006 provides that electronic signature that meets the criteria in section 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 ECA 2006 further provides that a digital signature fulfills the legal requirement for a seal to be affixed to a document. Besides, section 11 of ECA 2006 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.

Privacy and data protection

Dealing with the protection of consumer in e-commerce, the concern amongst them is the aspect of privacy and data security. Bakers highlighted five rights of consumers over the computers:-²⁰

- i) everybody has the right to know what information is stored about him/her.
- ii) everybody has the right to know and to control who has entry to his/her stocked data.
- iii) everybody has the right to seize inaccurate or irrelevant information.
- iv) everybody has the right to compensation if private or incorrect information has been used improperly.
- v) everybody has the right to claim the removal of information concerning his/her private habits, religious conviction and ideals.

Under EU Directive on Privacy and Electronic Communications 2002/58/EC, provides for the processing of personal data and the protection of privacy in the electronic communications sector. Further, European Union (EU) member countries must follow strict and specific regulations that protect consumer privacy in accordance with the Directive on Data Protection of 1998. This privacy directive guarantees individual control over consumer data and insists that foreign trading partners adhere to the same level of equal protection.²¹

In Malaysia, the Government is in the process of legislating Personal Data Protection Act. Previously, under the 1998 Bill, any type of processing of personal data will have to be in compliance with all the data principles. Here, the term process is defined widely to mean, 'the carrying out of any operation or set of operation on any personal data and includes recording, amendment, deletion, organization, adaptation,

alteration, retrieval, consultation, alignment, combination, blocking, erasure, destruction or dissemination of the personal data'.²² This means that where files are only retrieved, it is already considered as being processed, and therefore is subjected to the data principles. Section 4 of the Bill requires that all the data principles in the schedule is to be complied with whenever any personal data is collected, held, processed or used by data user. It provides that personal data must not to be disclosed unless in relation to the purpose in which it is collected. In relation to this, section 42 contains certain exceptions such as, the data subject or relevant person has consented to the disclosure, the disclosure is necessary for the purpose of preventing or detecting crime, the disclosure is required under the law, or the disclosure is justified as being in the public interest. The data subject may withdraw his consent for the disclosure of his personal data. In this instance, the data user has a duty to cease to hold, process or use, the personal data.

Again, the issue of data protection is not addressed by ECA 2006, though, it is hoped that the matter being addressed under Personal Data Protection Act which is much waited.

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. Moreover, the protection of consumers’ data and the privacy of consumer are well protected by the law.

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 ECA 2006 are silent on this matter. There are similar provisions of EU Directives and ECA 2006 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 ECA 2006 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. Besides, the protection of privacy and consumers’ data are still vague.

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- ⁹Section 2(1) of Consumer Protection Act 1999 provides “Subject to subsection (2), this Act shall apply in respect of all goods and services that are offered or supplied to one or more consumers in trade including any trade transaction conducted through electronic means.” Inserted by Consumer Protection (Amendment) Act 2007 (Act A1298) – which takes effect on 15.8.2007.
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