

Legal Issues in e-Commerce and e-Contracting – An Overview of Initiatives in Malaysia

Ayyappan Palanisamy

Abstract—Contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There was initially an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. Malaysia has enacted legislations on e-commerce in compliance with international organisations. This paper seeks to identify the recent trends and developments on electronic contracting globally and in Malaysia and an overview of e-commerce developments in the neighbouring land, Singapore, which was the first country to adopt the UNCITRAL model law on e-commerce. The paper also examines relevant Malaysian legislations on e-commerce and the adequacy of the existing law in protecting e-consumers.

Index Terms—E-commerce, e-contracting, e-transactions.

I. INTRODUCTION

The Internet has provided consumers with a powerful tool for searching for and buying goods and services. Benefits have included increased competition and lower prices, more choice in products and services, and the convenience of shopping for goods and services from vendors located around the world, from anywhere and at any time. It is the world's fastest growing commercial market place. Estimates of its growth show unprecedented development. E-commerce is an important empowerment tools for the economies of the developing countries [1]. The introduction of information technology in the contracting process is seen as a means to deal with the indicated problems in traditional paper contracting. E-contracting (electronic contracting) aims at the automation of contract establishment and enactment. E-contracting can be applied to solve cost, time, and complexity problems that occur in paper contracting. Furthermore, e-contracting provides new opportunities to the contracting parties, which can be used for the support of the emerging new business paradigms [2]. Many of the important legal issues raised by cross-border electronic commerce in the 1970s and 1980s have already been successfully addressed by law reform at the national level and by the work of international organizations undertaken in the 1990s. The focus of this paper is to provide the reader with an overview of the law relating to the development of E-commerce in Malaysia and Singapore and an overview of

recent global trends in electronic contracting and e-commerce developments.

II. LEGAL ISSUES IN E-COMMERCE AND E-CONTRACTING

Electronic commerce ("e-commerce") involves the buying, selling or exchanging of goods, services, and information through electronic networks. E-commerce has three basic forms: business-to-business transactions (B2B), business-to-consumer transactions (B2C), and consumer-to-consumer transactions (C2C). There are several different forms of electronic contracts, most commonly, "Click-Wrap" or "Web-Wrap" contracts are electronic contracts that require the user to scroll through terms and conditions (or multiple web pages on a web site) and to expressly confirm the user's agreement to the terms and conditions by taking some action, such as clicking on a button that states "I Accept" or "I Agree" or some similar statement prior to being able to complete the transaction. Click-Wrap contracts are often found in software products or on Web sites. "Browse-Wrap" contracts are terms and conditions of use that do not require the express agreement of a user. They are often located in software or are posted on a Web site and may make some statement that indicates use of the software or Web site constitutes the user's agreement to the terms. Often such terms may not have been brought to the attention of the user [3], [4]. As most researches were carried out with regard to formation of an e-contract and numerous studies have tried to clarify the issues of offer and acceptance and the essential elements of an enforceable e-contact [5]-[7], but still there are other issues like choice of law and jurisdiction for dispute resolution not well addressed. In this paper, my primary attention will be devoted to procedural or jurisdictional issues rather than substantive ones, that is, how should contracts be regulated, and which public legal institutions should be responsible for regulating them. I intend to discuss issues of choice of law, jurisdiction, etc., except in so far as these issues pose risks that can be allocated by the parties' contract. As electronic commerce becomes International commerce, the reality is that commercial disputes will occur creating such questions as: "Which country's court has the jurisdiction to hear the dispute?" and "Which country's law is to be applied to resolve disputes?" The response to these problems has a mix of legislation, self-regulation and international cooperation. Although e-contracts do suffer some problems not usually associated with oral or written contracts, these problems are easily surmountable, in most cases by the simple application of current rules. By asking three basic questions, when was the contract concluded? What are the terms of the contract?

Manuscript received March 15, 2013; revised April 30, 2013.

Ayyappan Palanisamy is with FBD, Swinburne University, Malaysia (e-mail: apalanissamy@swinburne.edu.my).

And where is the contract governed? There is nothing different in the eyes of the law about a contract formed in Cyberspace. These questions are equally valid when analyzing traditional or electronic contracts. **Transactions which may be legal within the sovereign territory of one party may be quite illegal in the other.** Let us assume that a website operator is based in Australia, which legal system will regulate his contracts with overseas customer residing in Hong Kong? At common law, the proper law of the contract, usually the *lex loci contractus* (law of the place where the contract is made), governed the contract. In reality the proper law of the contract will be interpreted in the light of the Vienna Convention on International sale of Goods (CISG) [8], as both the countries are the signatories to this convention. The convention provides rules to assist in the identification of the proper law of the contract, in effect replacing the common law in most areas. The Convention applies to choice of law issues in contract, and begins by identifying the law applicable to the contract [9]. **The general principle is that the parties are free to choose the law applicable to the contract.** This choice can be made expressly or can be implied from the circumstances [10]. This means that, generally, a Web site operator may include a choice of law clause in the terms and conditions of the Convention, the law of the place identified will govern the contract. If the parties to the contract choose no applicable law, the issue becomes more complicated. This means that, generally, a Web site operator may include a choice of law clause in the terms and conditions of the Convention, the law of the place identified will govern the contract. If the parties to the contract choose no applicable law, the issue becomes more complicated.

It is well evident that from the above discussions, the e-commerce and cross-border transactions rapidly increased, besides norms, **rules and customs in the real world are different from virtual communities, which must be considered in order to create an effective model of dispute resolution and rule enforcement in cyberspace.** Alternative Dispute Resolution (ADR) in dispute resolution, having observed its impact on international commerce, across the world was well appreciated as an effective commercial dispute resolution tool (Rao, 1996). Beside the growth of alternative dispute resolution, **the business world is speedily integrating information technology into its ways.** The two factors, dispute resolution and information technology have coalesced into a more effective, more flexible and less costly way for solving disputes, compared to traditional approaches. **Online Dispute Resolution (ODR) combines the efficiencies of Alternative Dispute Resolution with existence of the internet to save time and reduce costs** (Rule, 2002). According to the American Bar Association Task Force on E-commerce and ADR (the ABA Task Force) ODR has been defined as: **ODR is a broad term that encompasses many forms of alternative dispute resolution (ADR) that incorporate that use of the Internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process.** Parties may never meet face to face when practicing in ODR. Rather, they might communicate solely online (ABA Task, 2010). ODR is information technology

via the internet, together referred to as online technology applied to alternative dispute resolution (Hornle, 2003). ODR for small and medium sized disputes, such as those involving B2C is seen to be more effective than courts.

III. RECENT GLOBAL TRENDS: ROLE OF INTERNATIONAL ORGANIZATIONS IN E-CONTRACTING

UNCITRAL: **The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. Its general mandate is to progress the unification and harmonisation of the laws that govern international trade.** It began to work on its Model law on electronic commerce in 1992 with the express intention of producing a legal text that can be adopted by the states so as to harmonise the legal rules applicable to e-commerce. It has a number of working groups, including Working Group IV on electronic commerce. UNCITRAL has been responsible for a number of developments in the area of electronic transactions, including the preparation of the following Model Laws and recommendations: 2009 - Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods; 2005 - United Nations Convention on the Use of Electronic Communications in International Contracts; 2001 - UNCITRAL Model Law on Electronic Signatures with Guide to Enactment; 1996 - UNCITRAL Model Law on Electronic Commerce - This Model Law was designed to give national legislators a set of internationally acceptable rules to promote the use of electronic communications. **Malaysia has enacted a domestic legislation in the form of Electronic Commerce Act 2006 (Act 658).** The United Nations Convention on the Use of Electronic Communications in International Contracts entered into force on 1 March 2013. The Convention aims at enhancing legal certainty and commercial predictability where electronic communications are used in relation to international contracts.

International Chamber of Commerce (ICC): The Commission on Commercial Law and Practice (CLP) facilitates international trade and promotes a fair and balanced self-regulatory and regulatory legal framework for international business-to-business (B2B) transactions. The ICC has a number of different task forces, including task forces on jurisdiction and applicable law in electronic commerce, and electronic contracting.

European Commission (EC): The European Parliament and the Council of the European Union have passed several directives that impact upon the process of e-contracting in the European Union. The Electronic Commerce Directive, adopted in 2000, sets up an Internal Market framework for electronic commerce, which provides legal certainty for business and consumers alike. It establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. The proper functioning of the Internal Market in electronic commerce is ensured by the Internal Market clause, which means that

information society services are, in principle, subject to the law of the Member State in which the service provider is established. In turn, the Member State in which the information society service is received cannot restrict incoming services. In addition, the Directive enhances administrative cooperation between the Member States and the role of self-regulation. In essence, EU Member States are bound to follow the objectives of the Directive on Electronic Signatures and the Directive on Electronic Commerce, but have the discretion to decide how and in what form the objectives are achieved when passing national legislation to give effect to them. The Electronic Commerce Directive (2000/31/EC) sets out rules which facilitate the provision of online services in the European Union and ensure that these services meet certain criteria. This text laid the foundations for cross-border online services. Because it is technologically neutral, it was recognised by the stakeholders at the public consultation held in 2010 as the cornerstone of the Digital Single Market. The aim is therefore to add to it, but not to amend it by way of an action plan for doubling the volume of e-commerce in Europe by 2015.

Organisation for Economic Co-operation and Development (OECD): The OECD has a Working Party on Information Security and Privacy that has investigated a range of issues relating to authentication and electronic signatures. Among other things, in 2005 the OECD published a report on the use of authentication across borders in OECD countries, examining the actual or potential barriers to the cross-border use of digital signatures as identified from survey responses provided by both government and the private sector in a number of OECD countries (OECD 2005).

IV. DEVELOPMENT OF E-COMMERCE AND E-CONTRACTING IN MALAYSIA

The e-commerce legal framework of a nation can play an important role in enabling and facilitating e-commerce transactions within the country and across its borders. In 2006, the Malaysian Government enacted the Electronic Commerce Act 2006 which provides legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfill legal requirements and to enable and facilitate commercial transactions through the use of electronic means. This Act is modelled to a great extent on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996. Certain legal principles adopted including the principles of functional equivalence and technology neutrality. As a member state the country has fulfilled the base requirement by enacting this law providing legal certainty as to the validity and legality of electronic transactions. Internet users and the owners of information assets ought to get some assurance that their activities are lawful, their communications and transactions valid and their transactions are protected. Commercial transactions such as banking transactions and the purchase of goods and services are now frequently performed over the internet and other computer networks [11]. The Act does not make it

mandatory for commercial transactions to be conducted electronically. It applies to situations whereby a person consents to using, providing or accepting an electronic message in a commercial transaction. Such consent may be inferred from the person's conduct. It also covers electronic commercial transactions carried out by the Federal and State Governments. 'Electronic' and 'electronic messages' are respectively defined under the Act as: "the technology of utilizing electrical, optical, magnetic, electromagnetic, biometric, photonic or other similar technology".

"Commercial transactions" mean "a single communication or multiple communications of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance". By virtue of the Act, information that is wholly and/or partly in electronic form is now legally recognised. Furthermore, information that is merely referred to in an electronic message has also been granted legal effect. Part II of ECA, 2006 sets out the provisions of legal recognition of electronic messages which includes formation and validity of e-contracts, while Part III sets out the legal requirements to be fulfilled by electronic means and Part IV deals with communication of electronic message. The Act is a step forward in the regulation of contracts effected by electronic means. It lays down the legal principles that apply to the formation of such contracts. The Act also lays down the requirements that have to be satisfied to establish the terms of these contracts, thereby enabling parties to put in place infrastructure that is capable of fulfilling these requirements. In addition, there are various other legislations which govern e-contracting. The enforcement of the Consumer Protection (Amendment) Act 2007 enables consumers who acquire goods or services through electronic means to file claims in the Tribunal for Consumer Claims under the Consumer Protection Act 1999. Section 2 of the Act "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". Hence, it can be concluded here consumers who conduct online transactions or e-commerce are now protected under this Act. Other statutory enactments include Digital Signature Act 1997; Direct Sales Act 1993; Sale of goods Act 1957 and Contracts Act 1950. Under the Digital Signature Act 1997, digital signatures are to be the equivalent of signatures in the traditional sense. The legal framework of the Act was strengthened to encourage future use, by way of the Digital Signature (Amendment) Act 2001. In addition, the Electronic Commerce Act 2006 contains broad (technology neutral) provisions on electronic signatures. Malaysia upgraded its electronic signature laws and electronic commerce laws by introducing new privacy law, Personal Data Protection Act, 2010 [12]. These measures provide a strong level of protection for the digital economy. The country is in the process of developing a website for ASEAN Cross-Border Consumer Redress Mechanism and the objectives of this includes, protecting ASEAN consumers with regard to: a) ensure Quality of Goods and Services; b) secure Retail Transactions; c) cross

Border Response to Consumer Complaints; d) redress Mechanism Network, e) facilitate greater trade. The Malaysian government is always been a big supporter of internet technology. There are a number of policies that intend to promote investment in online ventures. One of the major supporting initiatives by Malaysian government is 8th Malaysian plan that aims to increase the usage of technology and build a strong infrastructure ICT both for private and public sector. Some of the main goals of Malaysia 8th plan are: a) to ensure national information security; b) to create Emergency Response center to address regulatory and technical issues; c) to ensure high level of internet security. Apart from Malaysian 8th plan, there is a specified ministry which is working for the growth of information and communication technology in collaboration with other organizations such as Malaysian Institute of Microelectronic Systems, Multimedia Development Corporation and Malaysian Communications & Multimedia Commission. Moreover, Malaysia is also participating in Asia Pacific Economic Cooperation's (APEC) to collaborate in devising E-commerce laws, regulations and policies. With all these policies and initiatives, e-commerce in Malaysia will soon be one of the most growing industries [13]. Recently, a news agency [14] reported that effective 1 July 2013, all businesses and services conducted online will have to abide by the Consumer Protection (Electronic Trade Transactions) Regulations 2012 to protect the interest of consumers. The size of Malaysian e-commerce market is anticipated to be increased to RM 5 billion by 2014 [15].

V. RECENT DEVELOPMENTS IN SINGAPORE

The main legislation in Singapore governing electronic contracts is the Electronic Transactions Act (ETA) [16] the ETA fills the gaps where rules governing contracts in the physical world need to be supplemented to deal with the environment enabled by new technologies. In July 1998, the Electronic Transactions Act (the "ETA") was enacted to provide a legal foundation for the rights and obligations of parties transacting electronically and to address issues arising in the context of e-commerce. At that time, Singapore was the first country in the world to implement the UNCITRAL Model Law on E-Commerce (the "UNCITRAL Model Law"). In the ensuing decade, the country experienced an unprecedented proliferation of goods and services provided online by both private and public bodies. The legislative framework of the ETA needed to be updated in order to remain robust in an evolving marketplace. In 2010, the Electronic Transactions Bill was introduced in the Parliament. One of the main aims of the Bill is to align the law on electronic transactions with the United Nations Convention on the Use of Electronic Communications in International Contracts (the "UN Convention") which was adopted by the General Assembly on 23 November 2005. The Bill also makes amendments to the ETA in order to facilitate the delivery of e-Government services in Singapore and to adopt a new accreditation framework for the regulation of certification authorities [17]. The new ETA [18] addresses the following issues: a) Commercial code for e-commerce transactions; b) Use of

electronic applications for public sector; c) Liability of network service providers; d) Provision for the development of security procedures such as Public Key Infrastructure (PKI) and biometrics. The Singapore ETA follows closely the UN Convention, which is an update to the UNCITRAL Model Law on Electronic Commerce, to better fit the current Internet environment. It seeks to promote the wider adoption of electronic transactions in the marketplace. The UN Convention sets a new global standard for national electronic commerce legislation.

VI. CONCLUSIONS AND IMPLICATIONS

Electronic commerce is gaining acceptability throughout the globe because of its ease, flexibility and speed. E-commercial transactions cannot be addressed simply in terms of mechanical changes. Rather, they have engaged a fundamental change in relationships, expectations and subject matter, which challenge contract law and contract scholars to come to grips with the nature of their doctrines, practices, and presumptions as they are applied to fundamentally new and different relationships. Malaysia has responded to technological changes by way of enacting of the Electronic Commerce Act 2006 in Malaysia modelled on UNCITRAL's Model Law, though it departs in many respects from the spirit of the Model Law. It was found that certain significant provisions are missing in this enactment; its provisions lack harmony and above all many legal issues have not been properly spelt out. There is no doubt that Malaysian government is stepping forward to enact new laws and regulations which supports the information & communication technologies and e-commerce industries in Malaysia which is growing tremendously. Even though protection is afforded to online consumers under various pieces of legislations which governs e-contracting, it does not comprehensively deal with adequate and sufficient protection. Malaysia needs to relook into its provisions regarding digital signature. It must be noted that there are two approaches which can be used to give absolute protection to online consumers' i.e. legislative and self-regulatory approach. There is a need to draft and enact a comprehensive legislation on consumer protection in e-commerce, as in Singapore, in compliance with the guidelines of various international organisations addressing all the legal issues covering e-commerce. This initial study will be further continued so as to provide a comprehensive e-commerce framework which will include provisions covering various e-commerce issues.

REFERENCES

- [1] P. Bagheri and K. H. Hassan, "Electronic Commerce, Law and Consumer Protection," in *Proc. IPEDR*, vol. 10, 2011, pp. 379-383.
- [2] D. M. Andrew, *Entering into contracts electronically: the real W.W.W.*, Oxford, UK: Hart Publishing, 2000, pp. 17-36.
- [3] C. L. Kunz, H. Thayer, M. F. Duca, and J. Debrow, "Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent," *Social Science Research Network, Business Lawyer*, vol. 57, no. 1, pp. 231-260, November 2001.
- [4] C. L. Kunz, H. Thayer, M. F. Duca, and J. Debrow, "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements," *Social Science Research Network, Business Lawyer*, vol. 59, no. 1, pp. 279-314, November 2003.

- [5] N. Amin, "Issues on Essential Elements of Formation of E-Contract in Malaysia: E-Consumers Perspective," *Journal of Applied Sciences Research*, vol. 7, no. 13, pp. 2219-2229, 2011.
- [6] M. A. Jalil, "Clarification of Rules of Acceptance in Making Business Contracts," *Journal of Politics and Law*, vol. 3, no. 1, pp. 109 -122, 2011.
- [7] L. Xu, "E-contracting Challenges," *Encyclopaedia of Information Science and Technology*, 2nd Ed., pp. 1620 -1629, 2010.
- [8] United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980.
- [9] Art.9 of Vienna Convention.
- [10] Art.4 (a) of Vienna Convention. An example of circumstances which would allow choice of law to be implied would be where the contract fails to comply with the formalities of one of the possible jurisdictions interpreting the contract.
- [11] E-Commerce Act 2006, E-Security Bulletin vol. 18 (Q1-2009), Cyber Security Malaysia.
- [12] Malaysia's Personal Data Protection Act, 2010, was due to take effect on January 1, 2013, but the law is still not in force due to legal formalities.
- [13] M. A. Jalil, "Development in Electronic Contract Laws: A Malaysian Perspective," *Computer Law and Security Reports*, vol. 20, no. 2, pp. 174 -177, 2004.
- [14] Consumer Protection (Electronic Trade Transactions) Regulations. (2012). [Online]. Available: www.digitalnewsasia.com.
- [15] *Country report Business Software Alliance*, Malaysia, pp.1-3, 2012.
- [16] Electronic Transactions Act (Singapore). (1999). [Online]. ch. 88. Available: <http://www.cca.gov.sg>.
- [17] Electronic Transactions (Certification Authority) Regulations (Singapore), Regulation 1, 2001.
- [18] Electronic Transactions Act (Act 16 of 2010) (the "ETA 2010"), 1 July 2010.



Ayyappan Palanisamy has obtained two post-graduate degrees (LL.M & MHRM), two under-graduate degrees (LL.B & Psychology) from Pondicherry University, India. Currently, he is a lecturer at Faculty of Business & Design at Swinburne University, Sarawak, Malaysia. His research interests include intellectual property laws, Artificial Intelligence and law, and cyber laws. He is a professional member of Bar Council of Tamilnadu, India; member of International Association of Computer Science and Information Technology (IACSIT); member of International Economics Development and Research Centre (IEDRC).