Electronic Contracts, the Malaysian Perspective

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Electronic Contracts, the Malaysian Perspective

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Abstract- **Malaysia has provided numerous laws years ago to support the ICT developments. However, the adequacy of these laws are challenged.** **For instance, e-commerce law of Malaysia has been enacted many years back through different statutes. This study examines the adequacy of the Electronic Commerce Act of Malaysia as a case study to find out whether the present laws are comprehensive enough to support the new technologies, legal and commercial demands. For this purpose, the principles governing the formation of e-contract are analyzed and compared with international instruments. The results indicates that there are some silence features and lacuna under e-commerce Act of Malaysia. The study provides recommendations for future amendments of the Act with respect to time and place of receipt and dispatch of an electronic message.**

Index Terms - Electronic Contract, Law, Data Message, Electronic Message, Time of Dispatch, Place of Dispatch, Time of Receipt, Place of Receipt, Malaysia..

I. INTRODUCTION

With regard to the information and communications technology (ICT), Malaysia is one of the pioneers in the ASEAN region initiated infrastructural development and legal support. However, the rapid advancements in the area of ICT compelled the states to be updated legally and technically and Malaysia also is not an exception. Hence, the question of legislation adequacy status arose since the major cyber laws of Malaysia have been enacted years ago. Electronic commerce (e-commerce) is one of the main output and concern of the said technologies. E-commerce is associated with the buying and selling of information, products and services via computer networking and telecommunications technology. It offers flexibility to the commerce domain in terms of wide coverage, less cost, 24 hours business, competitiveness, accuracy and

speed in compare with the paper based trade. The e-commerce market size of Malaysia is admirable in compare with last years with an increase of 31% during 2010-2014 and is expected to reach US$3.1bil by 2018[1] affecting by the internet penetration of 67.5%.[1] However, with regard to e-commerce legislation there are serious challenges. Malaysia has enacted several Acts like Electronic Commerce Act, 2006 (ECA), Electronic Government Activities Act, 2007 (EGAA) and Digital Signature Act, 1997 (DSA) to regulate online transactions.

This study examines the ECA to evaluate the adequacy of the legal support associated with ICT development and especially online trade. Hence, the principles concerning the formation of an electronic contract (e-contract) under the ECA are selected as the case study. The analytical approach through comparative legal study is selected for the research methodology. The formation rules of the e-contract will examine and interpret considering the domestic legal and commercial interests. At the same time an adequacy test is accomplished using the comparative approach with the latest international instruments like the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (UNCUEC)[2] and the UNCITRAL Model Law, 1996 (MLEC).[3] The research aims to come up with

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[1] Internet users (per 100 people). (n.d.). Retrieved January 11, 2016, from http://data.worldbank.org/indicator/IT.NET.USER.P2
[2] The UNCUEC 2005 comprising of 25 Articles is the latest international convention regulating e-commerce. It was prepared by the UNCITRAL and finally adopted by the United Nations General Assembly on 23 November 2005.
[3] The UNCITRAL Model Law on Electronic Commerce (1996) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 12 June 1996 and Article 5 bis, on incorporation by reference was adopted by the by the Commission at its thirty-first session in June 1998. It is the first

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certain recommendations for future amendments and modification of the ECA in line with international practice and new technologies.

II. ECA

The Electronic Commerce Act (Act 658) was enacted by the Parliament of Malaysia in 2006 based on the MLEC and came into force on 19 October 2006. The ECA provided 25 Sections under 5 main Parts. The objectives of the Act are "to provide for 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 and other matters connected therewith".

Under Section 2(1), the Act applies to commercial transactions concluded by electronic meansincluding those accomplished by the Federal and State Government. Section 5 interpreted 'commercial transactions' as any communication with a commercial nature for supply or exchange of goods and services, banking, insurance,financing, investment and agency. However, four exceptions to Section 2 under the schedule of the Act are power of attorney, creation of wills and codicils, creation of trusts and negotiable instruments.

III. E-CONTRACT UNDER ECA

Although 'Electronic contract' is defined by IT experts and lawyers, there is not a unique and comprehensive definition. ECA also kept silent to define e-contracts. However, the overall trend of the legislature in the Act along with specific provisions like Section 4, [4] indicates the similarity of e-contracts with ordinary one. Being substantially identical, the only difference between these two types of contracts are the means of conclusion. Hence, the universal trend is to apply the general principles of the law of contracts to e-contracts as well. Although ECA has provided certain principles to address the said electronic attribution, but the general principles of contracts under the Malaysian Contract Act, 1950 (MCA)[5] must read and consider. Section 2(h) of the MCA provides that, "an agreement enforceable by law is a

contract". Moreover, Section 2(e) considers an agreement as "every promise and every set of promises, forming the consideration for each other, is an agreement". Under Section 2, an agreement which being legally enforced by law, constitutes the essence of a contract. A contract to be valid under the MCA, must fulfil the following essential elements: offer and acceptance, consideration, intention to enter into legal relations, certainty and capacity[2][3]. An enforceable contract must satisfy specific conditions like free consent, competency of the parties, lawful consideration and lawful object under Section 10(1) of the MCA. [6] Although all agreements do not lead to a contract necessarily if they lack essential elements[4].

A contract can be form in writing or verbally unless based on special provisions, a contract must be in writing to be valid.[7]

Under Section 2(b) of the MCA, when the addressee clarifies his consent to the received offer, he is accepting that proposal (offer). [8] In the other word, by accepting, the proposal transforms into a promise.[9]In fact, the consent of the offeree is the main concluding element not the means of expression. In case of e-contract, it concludes when the electronic acceptance attach with the electronic offer. The means of conclusion in e-contracts is an electronic message (e-message) under the ECA or *data message*used under the MLEC. The UNICITRAL used the phrase 'electronic communication' instead of the data message in the UNCUEC. For instance, E-mail just like ordinary letters, can comprise an advertisement to sell, offer and acceptance and finally the original version of an e-contract. Another method of online contracting is through web pages. 'Click Warp Contracts' and 'Brows Wrap Contracts' are two types of online contracting using websites[5]. The company's websites include conditions and descriptions of goods and services, price, method of payment and method of delivery and privacy statement. If the consumer is interested to purchase, he can fill out the pre-prepared online forms and click on 'I Agree' or 'I Accept' button to finalize an e-contract. Hence, it has to be concluded that e-contracts have the same substance as ordinary one with the same legal effects

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non-descriptive international instrument served as a main reference for most of states legislating e-commerce laws. The text is available at: http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf

[4] Section 4 of the ECA impliedly affirms this view by providing: "The application of this Act shall be supplemental and without prejudice to any other laws regulating commercial transactions".

[5] Contracts Act 1950 was taken from the Indian Contract Act 1872.The Contracts Act 1950 was amended in 1974 and its provisions are more or less similar to contracts law of UK.

[6] Section 10(1) of the Malaysian Contracts Act provide that: "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void".

[7] Section 10(2) of the Malaysian Contracts Act specifies that: "Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents".

[8] Section 2(b) of the Malaysian Contracts Act states that: "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise".

[9] Beginning of Section 7 of the Malaysian Contracts Act.

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and are governing by the general law of contracts under the Malaysian legal system.

IV. VALIDITY OF E-CONTRACT

Section 6(1) on legal recognition of e-message provides that: "Any information shall not be denied legal effect, validityor enforceability on the ground that it is wholly or partly in anelectronic form". As stated in previous section, an e-message is recognized as means of contract's formation. Section 6(1) followed Article 5 of the MLEC and gave legal recognition and validity to e-message.

Section 7 of the ECA specifies that: "(1) In 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. (2) A contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation". Section 7 dealing with the formation and validity of an e-contract, was adopted from the MLEC. It legally recognizes the validity of e-message in the formation of an e-contract; i.e. the offer and acceptance can make in the form of e-message leading to conclusion of a valid e-contract. This provision is in line with Section 3 of the MCA in which any method of offering has been recognized.[10]The only condition under the discussed section is communication; i.e. the intention to communicate the proposal or which has the effect of communicating it. An offer may be made in any ways but it should come to the knowledge of the addressee.[11] Therefore the legal validity, effects and enforceability of an e-contract is the same as ordinary contracts under the Malaysian legal system.

Section 7 is criticized under several grounds. It uses the term *proposal* instead of offer following the MCA. It would be more appropriate to use the term offer in future amendments of the Act in accordance with international instruments. Furthermore, it didn't recognize e-message relating to performance of legal obligations, validity of unilateral expressions of the will, notices or statements, notice of defective goods, an offer to pay, place of performance, etc[6]. An amendatory provision however suggested by experts as: "between the originator and addressee, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of electronic message"[6]. Section 17(2)(b) of the Malaysian ECA on attribution of electronic message states that:

"As between the originator and the addressee, an electronic message is deemed to be that of the originator if it is sent by—
(b) An information processing system programmed by, or on behalf of, the originator to operate automatically".

The phrase 'information processing system' in this provision denotes electronic agent which operates on behalf of the originator in the process of sending, receiving and storing a data message.[12] Considering section 5 and 7 of the ECA along with section17, an e-contract made by e-agent is valid, but the Act does not have any specific provision to recognize and validate e-agents. This has to be added in future modification of ECA.

The MLEC recognizes the validity of the data message and subsequently e-contracts under Articles 11(1), 5 and 5 bis. Article 5 of the Act on legal recognition of data messages provides that: "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message". Article 11(1) of the MLEC specifies that: "… an offer and the acceptance of an offer may be expressed by means of data messages…". Art 5 bis, provides recognition of incorporation by reference. It means that the contracting parties can shorten the documents and in one document, they refer to another document by citing to that reference.Section 6(2) of the ECA also provided the same provision.[13] These perspicuous provisions of the MLEC indicate the necessity of legal recognition of data message and approve the legal validity and capacity of a data message leading to legal recognition of e-contract. Hence, data message may include an offer or acceptance sent by contracting parties.Article 8 of the UNCUEC also legally recognizes the electronic communications. The phrase 'electronic communications' is used in the UNCUEC instead of data message which is more appropriate with internet and the present technologies.

V. FORMATION OF E-CONTRACT

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[10] Section 3 of the Contracts Act 1950 clarifies that: "The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate the proposal, acceptance, or revocation, or which has the effect of communicating it". The word 'or' at the end of provision seems to be inappropriate and must replace with 'and'. For more information see: Alsagoff, Syed Ahmad SA. (2010). Principles of the Law of Contracts in Malaysia (Third ed). Kuala Lumpur: LexisNexis. p 43.
[11]Section 4(1) of the Malaysian Contracts Act 1950.

[12] Section 5 of the Malaysian ECA on interpretation of the Act clarifies that: "'information processing system' means an electronic system for generating, sending, receiving, storing or processing the electronic message".
[13] Section 6(2) of the Malaysian ECA 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.

A contract will create through certain due diligence, elements and conditions which is called formation. As soon as a contract is concluded, the performance rules will govern and it is binding upon the contracting parties till termination. Hence, determining the starting time and concluding place of a contract bears significant legal effects under each legal system. In case of e-contracts having special features, usually the legislations in line with the international instruments, do not determine the time and place but instead they do provide rules on determination of time and place of dispatch and receipt of an e-message. The dispatch and receipt rules are the criteria in order to determine the time and place of conclusion based on each country's domestic legal system.

The general rule is that the acceptance process will complete upon communication to the proposer; i.e. comes to the knowledge of offeror. However, to minimize doubts and disputes, most of legal systems adopted *postal rule* theory or *mailbox rule*[7]. It denotes the validity of acceptance when it has been sent or mailed which is an exception to the general rule. Postal rule is popular in common law legal system. Section 4(2) (a) of the MCA has adopted 'postal rule' in determination of time of acceptance in the following words: "(2) The communication of an acceptance is complete— (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor".

The rules governing the dispatch of a data message are including time of dispatch and the place of dispatch. Moreover, the governing rules of receipt of an e-message encompass the time of receipt and the place of receipt.

VI. TIME OF DISPATCH

According to Article 15(1) of the MLEC, "Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator". Under this provision, the time of dispatch of a data message is when it reaches to the information system of the addressee. The exception to this general rule is "Unless otherwise agreed ..." which recognizes any methods in contrary to the general rule if agreed by the originator and the addressee. It is provided under the principle of 'party autonomy'. The dispatch under Article 15(1) and receipt under 15(2) are simultaneous except if the data message has been sent to a non-designated address of the addressee.[14] Section 20 of the ECA provided rules to determine the time of dispatch of an e-message. It was drafted in line with Article 15(1). Section 20 specifies that: "Unless otherwise agreed between the

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[14]UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with Additional Article 5 bis as Adopted in 1998 (1999). p 55.

originator and the addressee, an electronic message is deemed sent when it enters an information processing system outside the control of the originator".

Under this provision, the time of dispatch is when the e-message enters the information processing system outside the control of the offeror. Although ECA was drafted base on the MLEC, the second situation predicted under Article 15(1), i.e. 'person who sent the data message on behalf of the originator' was omitted by ignorance or any other reason in Section 20. Section 20 similarly to the MLEC, has predicted the counter agreement by the contracting parties to the general principle. ECA used the phrase 'information processing system' instead of 'information system' intercalated in the MLEC and subsequently the UNCUEC.

Sometimes it may happen that the originator sends a data message but it does not leave the information system under his control for any reason. In this situation the dispatch will not take place. However, if the data message enters another information system out of the originator's control but with delay, the time of dispatch is the time of entrance.

The UNCITRAL changed the rules governing the time of dispatch under the UNCUEC which is the latest instrument. Under Article 10(1) of the UNCUEC on time of dispatch: "The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received".

Under Article 10(1), the general rule on time of dispatch is the time when the electronic communication has left the information system of the originator or his agent. The general rule under Article 15(1) of the MLEC is regarded as an exception under Article 10(1). The exception has predicted the situation wherein an electronic communication did not leave the information system for any reason, the time of dispatch is when it enters the addressee's information system. Section 20 of the ECA did not consider the said situation.

In case the dispatched electronic communication reaches to the addressee but in a format of an incomprehensible data message for any reason, the ECA following the MLEC is silent. The recent document, UNCUEC also did not provide for this situation.

The general trend of the UNCUEC indicates the will of drafters to make it more practical and in line with the new technologies like internet rather than EDI[8] and also mobile devices.

VII. PLACE OF DISPATCH

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In online contracting, it is sometimes difficult to determine the place where the data message has been sent or received. In the other word, it is difficult to determine the place of information system since it may move frequently. Hence, the e-commerce laws tried to provide an objective standard.

Section 22 of the ECA on place of dispatch clarifies that: "Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent from the originator's place of business, and—
(a) where the originator has more than one place of business, from the place of business that has the closest relationship with the transaction or where there is no place of business that has the closest relationship with the transaction, from the originator's principal place of business; or
(b) Where the originator does not have a place of business, from the originator's ordinary place of residence".

Section 22 is in line with Article 15(4) of the MLEC. Article 15(4) has considered the place of business of originator as a criterion to determine the place of dispatch of a data message. In case the originator has more than one place of business, then the place with the closest relationship with the transaction is the place of business otherwise the originator's principal place of business. In case there is no place of business, the place of residence will consider as the place of dispatch. [15] Although, the contracting parties can agree on determination of place of dispatch.So under Section 22 of the ECA, the offeror'splace of business is considered as the place of dispatch of an e-message.

The UNCUEC also followed the MLEC and considered the place of business as the place of dispatch of an electronic communication. Article 10(3) of the UNCUEC provides that: "An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6".

Article 6 of the UNCUEC provided rules for the situation that may arise similarly like Article 15(4). Under Article 6, the parties have right to determine their place of business based on the principle of party autonomy. The irrelevancy of the place

of information, a domain name or electronic address in determination of place of business are emphasized under Article 6 which is an improvement in compare with the MLEC.

VIII. TIME OF RECEIPT

Section 21 of the ECA provides that: "Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received—
(a) where the addressee has designated an information processing system for the purpose of receiving electronic messages, when the electronic message enters the designated information processing system; or
(b) Where the addressee has not designated an information processing system for the purpose of receiving electronic messages, when the electronic message comes to the knowledge of the addressee".

Section 21 was designed based on Article 15(2) of the MLEC but not properly. Under Section 21, if the addressee has designated an information processing system for the purpose of receipt of ane-message and it sent to the same address by the originator, the time of receipt is when the e-message enters to that information system.This presumption is similar to the MLEC, but if the addressee has designated the address, but the data sent to other information system of the addressee rather the designated one for any reason, the ECA is silent like UNCUEC. However, the MLEC under Article 2(a)(ii) addressed this issue as "the time when the data message is retrieved by the addressee" which seems to be fair.

When the addressee did not determine any information system, he impliedly accepted the risk of checking all of his information systems.Under Section 21(b), in case there is no designated address by the addressee to receive an e-message, then when it comes to the knowledge of addressee which is ambiguous. The ECA kept silent to interpret the term 'knowledge'. Whether the addressee can claim any time that e-message came to his knowledge? Under the MLEC, when the addressee has not designed any information system, the time of receipt is when the data message enters to the information system of addressee. It indicates that the data message can send to any information system of the addressee.

Article 15(2) (b) of the MLEC provided a more objective criterion as at the time "when the data message enters an information system of the addressee". It has to be emphasized that the parties are allowed to decide on the time of receipt.Although there are few differences between the time of dispatch and the time of receipt under Sections 20 and 21 of the ECA, however the general rule is the time when an electronic message enters the addressee's information processing system.Under Section 24 of the ECA on

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[15] Article 15(4) of the MLEC provides that: "Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence".

acknowledgement of receipt, the parties can agree to acknowledge the receipt of the electronic message.

Article 10(2) of the UNCUEC is close to Article 15(2) of the MLEC. Under Article 10(2),[16] the time of receipt of an electronic communication is when it becomes capable of being retrieved at an electronic address designated by the addressee. In case if it was sent to another electronic address, the time of receipt is when it becomes capable of being retrieved by the addressee and he/she becomes aware that it has been sent to that address. The convention interpreted the phrase "capable of being retrieved" as when the electronic communication enters to the electronic address of the addressee.

In case the originator has sent the electronic commination to a non-designed address of the addressee for any reason, then there must be 2 conditions by which the time of receipt will determine. Firstly, the electronic message must be retrievable and secondly, the addressee become aware that the message has been sent to his electronic address. This seems to be more fair and suitable with new electronic technologies in compare with the rule of Model Law. However, the UNCUEC kept silent to address the situation provided under Article 2(a)(ii) of the MLEC. Moreover, the UNCUEC used the phrase 'electronic addresses instead of information system which is more inclined with ICT developments. The electronic address depending upon the tools used by parties can determine such as e-mail box, a telecopy, inside a communication network or any designed special place in an information system.

IX. PLACE OF RECEIPT

Section 23 of the ECA has provided the rules for place of receipt of e-message: "Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received at the addressee's place of business, and—
(a) where the addressee has more than one place of business, at the place of business that has the closest relationship with the transaction or where there is no place of business that has the closest relationship with the underlying transaction, at the addressee's principal place of business; or

(b) Where the addressee does not have a place of business, at the addressee's ordinary place of residence".

Section 23 of the ECA is adopted from Article 15(4) of the MLEC. The determination and conditions of place of business and habitual residence under the place of receipt are similar to the rules governing place of dispatch of a data message. Article 10(3) of the UNCUEC also provided the same rules on the place of receipt of the electronic communication.

X. CONCLUSION

Malaysia has provided different laws to support ICT developments in the country. However, these laws need urgent improvement in line with the rapid changes and advancements in the area of ICT. Electronic Commerce Act of Malaysia is one of main Acts in this area which must update in accordance with new technologies. E-contracts as one of the unique begotten of the e-commerce technology, bears significant role in legal and commercial developments. The Malaysian ECA has recognized the validity and enforceability of e-contracts. However, legal analysis of the laws governing the formation of e-contracts under the ECA indicates that the Act bears some unclear and confusing provisions which challenge its adequacy.

With respect to dispatch and receipt of an e-message, the ECA lacks adequate provisions. ECA also did not provide for cross border transactions and electronic agent.

Although ECA was drafted in line with the MLEC as the main international source at the time of drafting, however, the drafters copied the MLEC principles partly and disregarded some parts. Moreover, the MLEC was drafted based on the developed technologies on that time like EDI. Subsequently, affecting by later technological advancements, the UNICITRAL changed his view in many issues while drafting the UNCUEC.

Although Malaysia has followed the MLEC like many other states, but there is an urgent need to modify the Act to cope with domestic needs and international practice. The modification of ECA may accomplish base on the UNCUEC like Singapore which replaced the old electronic commerce law based on the UNCUEC approach. This legal amendments apart from domestic effects, will support the economic integration scheme of the ASEAN region like ASEAN Economic Community. Furthermore, it provides a reference for other ASEAN members to provide the updated harmonize law.

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[16] Article 10(2) of the UNCUEC on time of receipt of an electronic communications indicates that: "time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address".

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