

GOING THE DOT COM WAY

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The thought of concluding a contract electronically might never exist in the mind of our forefathers. At present, living in this digital world, it is no longer a mere idea, but can now be materialized, thanks to the tremendous growth of the ICT industry and the emergence of e-commerce that follows. According to the study done by IDC in November 2006, the Malaysia e-commerce market is expected to maintain a healthy growth rate of 70.1% in 2006. Astounding development of the ICT industry in the past few years is one of the factors that support this contention. The Internet has brought its positive impact into the country and Malaysia is preparing to venture into the world of electronic transactions.

Gradually, people start to have faith in online environment which permits the parties to enter into a valid contract, notwithstanding the fact that they are not physically present before each other. An easy example would be buying a book through mphonline.com, or buying an mp3 player from Sony Style online, where the exchange of offer, acceptance and consideration between the parties happens entirely on the internet without the offeror and offeree having to physically meet with each other to conclude the contract.

Electronic contracts may appear in various forms. The most common are the 'click-wrap' agreements and the 'browse-wrap' agreements. Analogous to 'shrink-wrap' agreements, a 'click-wrap' agreements are entered via the click of a box. It suggests the user to click on a button if he agrees with the terms of the contract. On the other hand, 'browse-wrap' or 'web-wrap' agreements locate a button or a link in the webpage to direct the user to the terms of the

contract. Its hidden and inconvenient location might render the terms and provision not to be read by the user.

In Malaysia, to constitute a valid contract, certain basic elements need to be fulfilled, namely offer, acceptance, consideration and intention to create legal relations. No matter how the contract is concluded, the traditional way or online, it must observe these requirements. An offer is said to be made when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence. An acceptance is where the person to whom the offer is made signifies his agreement to the matter and once accepted it becomes a promise. A consideration is anything of a certain value that is exchanged between the parties on the subject matter of the contract. A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Intention to create legal relations refers to the intention of the contracting party to enter into a legally binding contract.

With regards to when the contract will become effective, each contract usually specifies its own terms on when the contract is considered to have been concluded. For example, mphonline.com stipulates:

"If you purchase any product on MPH.COM.MY sites, you agree to be legally bound by an additional and separate electronic contract of sale ("the Conditions of Sale") which shall be concluded when MPH.COM.MY accepts your order by mail confirming that it has shipped our product"
<<http://www.mph.com.my/disclaimer/t&c.cfm>>

Based on the abovementioned terms, MPH considers a contract to be concluded when they accept the customer's order by mail, confirming that the product has been sent to the customer. The terms clearly state that by purchasing any

product from MPH, the customer is bound by an additional and separate electronic contract of sale. This is where the customer should be aware of the existing additional terms that regulate the contract between both parties.

Another example is from Sony Malaysia <http://www.sony.com.my/sonystyle/customer_service/terms_sale.asp> where the terms enumerated in the contract are as follows:

“These terms and conditions shall become the Contract only when notice of acceptance by Sony of an order by Customer is sent to Customer”.

According to Sony, when a customer places an order from their website, a reference number will be given to the customer. However, Sony clearly mentioned in the contract that this is not considered as an acceptance of Sony to the order. Acceptance takes place only when notice of acceptance of the particular order is sent to the customer.

The payment made by the customer will constitute a consideration for the contract, and based on the parties interactions between each other; intention to create a legal relation will be inferred. It is quintessential to note that although these elements are the foundation of a valid contract, there are also other ancillary matters that need to be considered along with the aforesaid ingredients before a contract is effectively formed.

In promoting the rise of electronic commerce, the country has passed a new legislation, namely the Electronic Commerce Act 2006. With the Act, any information in electronic form shall not be denied legal effect, validity or enforceability. Section 7 of the Act, state clearly as follows:

(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.

The Act came at the right moment where there is a voracious need for a legislation to regulate and facilitate the rapidly used commercial transactions, concluded through the use of electronic means.

Be that as it may, the Electronic Commerce Act 2006 does not mention any provision relating to consumer protection. Therefore, reference has to be made to the Consumer Protection Act 1999 (CPA 1999) to safeguard consumer's interest. Due to the recent amendment to the Consumer Protection Act 1999 in August 2007, the consumer is protected under this Act for transactions involving online matters. According to 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*".

To sum up, electronic contracts have the same effect as traditional contract. The means of concluding the contract is an immaterial consideration. Once all elements are fulfilled, it will be a binding document. Ergo, it is essential to read and understand the terms before clicking the button on the webpage. Further, the amendment to include "any transactions conducted through electronic means" should be seen as a positive move by the Act to provide better protection to consumer in order to sustain the positive development of e-commerce in the country.

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