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Graduate Study Atma Jaya School of Law





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Journal of International Trade and Commerce Law (Lex Mercatoria) aims to promote research and thinking of legal scholars and practitioners from both South East Asia and another regions having its regional focus. The Journal is open to any international and comparative legal concerns and controversies regarding trade activities. All aspects of international and comparative law applicable to trade activities will be covered by the scope of this Journal. In addition, significant developments relating to trade and international law will be dealt with. The Journal tries to bring those topics on the discussion table from an independent viewpoint of legal scholars working in the ASEAN Trade Issues. The inter-regional character of the Journal is ensured by its Editorial and International Advisory Board drawn from outstanding lawyers from the countries in this region as well as from its global network. The articles and other materials contained in the Journal reflect the views of their authors and do not necessarily coincide with those of either Editor-in-Chief, or the Editorial Board of the Journal.

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#### D. Further Steps/Measures

In its efforts to improve legal principles and norms concerning international commercial contract in Indonesia, some systematic steps can be considered:

1. To conduct inventory and systematization of various international instruments relevant to international commercial activities, both in the forms of hard laws as well as soft laws;
2. To conduct analysis to each single instrument on the feasibility to ratify certain hard laws, or to adopt certain principles in various relevant soft laws as input in further legislation processes or in the formulation of relevant laws and regulations;
3. Paralelly to conduct study on scientific literature/references in order to sharpen analysis on the possibility to ratify or to adopt or at the minimum to use relevant international instruments as references in improving national legislation or regulation;
4. To conduct adjustment process of certain existing principles and norms of national commercial law with the principles and usages recognized as common practices and best practices in international sphere;
5. To seriously consider Indonesian participation as member at several important international organization (such as The Hague Conference on Private International Law) in order to catch up with the latest development of international trade/commercial law, particularly international commercial contract;
6. To conduct intensive consultation with the stakeholders regarding the whole process in order to maximize its benefits to support their international business transaction;
7. To conduct socialization and provide technical assistance regarding implementation of international principles and norms in the field of international commercial contract, particularly those which have been transformed into national law.

## Legal Framework on The Enforceability, Fairness and Data Protection Surrounding The Electronic Transaction: A Case of Malaysia

Sonny Zulhuda<sup>1</sup>

### Abstract

*More widely-connected people at both end of commerce facilitated by the Internet had formed a substantial global and regional marketplace. Malaysian business community is quickly grabbing this opportunity with an increasing popularity of electronic commerce and electronic transactions in the country. Legal and consumer issues submerge relating to issues of enforceability of electronic paperless contracts. The widespread unfair contractual terms quickly become another concern. Meanwhile, the massive use of personal data in e-transaction process has also presented new concerns in relation to the privacy and safety of the e-transaction. The Malaysian legal framework on enforceability of e-transaction, consumer protection over unfair terms and data privacy surrounding e-transaction has tremendously developed in the past few years with the enactment and amendment of relevant statutes. This paper discusses the development from legislative and judiciary perspectives and highlights some issues and concerns. It finds that the law in this area is arguably moving towards a right direction.*

### Keywords:

*Electronic transaction, consumer protection, personal data protection, Malaysia.*

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## 1. Introduction

Innovations on Information and Communications Technology (ICT) and the rise of interconnected network and big data have all revolutionized the way people live, work and think. Such information became a raw material of business, a vital economic input, used to create a new form of economic value (Mayer-Schonberger and Cukier, 2013). Business community is among the biggest beneficiary of this development. More merchants and consumers will be involved actively in e-commerce activities, which include pre-sale, sale and post-sale transactions. The widely-connected people at both end of commerce facilitated by the Internet had formed a substantial global and regional marketplace where everyone can meet each other, offer goods and services, build partnership, negotiate prices, and execute transaction between one and another bypassing the conventional restriction of time, distance or legal borders.

Malaysian business community is also quickly grabbing this opportunity. The increasing popularity of electronic commerce and electronic transactions in Malaysia is a natural consequence of the growth of Internet connectivity in the country. By the first quarter of 2014, over six out of ten households in the country are connected to the Internet and there is a staggering 143 percent connectivity over cellular network (MCMC, 2014). If access through public Wi-Fi is to be accounted too, Internet connectivity in Malaysia is already showing a tremendous improvement. With such development, hence the popularity of electronic commerce in Malaysia: Ninety-one percent of online users in Malaysia shop online. Over half of them shop online at least once a month, while 26% of them shop once a week online, and 7% shop almost every day (Wong, 2014).

E-commerce and e-transaction are popular both for merchants and consumers. From the merchant's perspective, he may have found a totally new and huge market base who are willing to pay with reasonably good price. From consumer's perspective, on the other hand, gone are the days of unreasonable pricing for having to satisfy many intermediaries. Buyers would be able to get customized goods or services at special prices that do not include other pre-purchase costs such as advertisements. In summary, both merchants and

consumers would find doing business more interesting than ever.

Be great and attractive as it may, some familiar concerns would yet reappear. Legal and consumer issues submerge relating to issues of enforceability of electronic paperless contracts. The widespread unfair contractual terms quickly become another concern. Meanwhile, the massive use of personal data in e-transaction process has also presented new concerns in relation to the privacy and safety of the e-transaction as a whole. Whither the consumer protection? This paper attempts to survey those legal issues and how ready is Malaysian laws address such challenges.

## 2. Enforceability of E-Transaction

Sellers and buyers who deal, negotiate and execute the contracts electronically may have never met physically. In a non-physical interaction it is rather difficult to create trust between two parties. Without human touch, often they will solely rely on the legal guarantee provided by the law that they agree to comply with. The institution of electronic contract thus requires necessary legal protection in terms of legality, enforceability and admissibility.

The main doubts that contracting parties have in e-transaction would normally be of two-fold, namely: (i) Whether or not the agreements which are executed electronically are legally valid and enforceable? And (ii) whether or not the electronic documents and messages used, and relied on, in the agreements between sellers and buyers would be legally admissible in the court of law?

This issue had at length been considered at the international community by the United Nations' Commission on International Trade Law ('UNCITRAL'). As a result, the Commission had in 1996 issued a model on electronic commerce law ('1996 Model Law') that reflects the legal doubts pertaining to the institution, legality and admissibility of electronic contract. This model law has since then inspired many UN member countries in adopting their own electronic commerce law.

In the European Community (EC), the legal redress provided for parties in electronic contracts can be found mainly in two instruments, i.e. the EC's Distant Selling Directive (DSD) and Electronic Commerce Directive (ECD).



Both Directives are adopted and implemented in the national laws of the United Kingdom (UK) by the Consumer Protection (Distance Selling) Regulations 2000 and the Electronic Commerce (EC Directive) Regulations 2002. The DSD is especially targeted towards the protection of consumers, i.e. those distant buyers a number of rights, including the right to receive clear information about goods and services before they buy, right to get confirmation in writing, right to withdraw from the contract within a stipulated period, and the right to be protected against credit card fraud. The ECD, on the other hand, deals with broader protection between parties in electronic transactions (consumers and businesses) including on issues of validity and enforceability of electronic message, e-signature and e-documents.

Malaysia is not an exception. In 2006 she passed the Electronic Commerce Act ('ECA') 2006 to finally put an end to many uncertainties. This Act aims to provide for the 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 related matters. The above hesitation about the legality and admissibility of the e-contract had been well addressed in this Act.

The ECA 2006 in section 5 defines 'electronic message' as information generated, sent, received or stored by electronic means. This would include all means using electronic gateway including the web-based transaction, mobile banking as well as electronic fund transfer gateway. And this will also cover all parties involved in the electronic transactions ranging from the end-user, the intermediaries and ultimately the payment service providers and vendors who are using the *electronic message in commercial transaction*.

But what kind of *commercial transaction*, one may wonder. This was further explained by the same section in the ECA 2006 by defining that 'commercial transaction' is 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. There is no difference between the commercial transaction done in the domain of private or public institutions, as the Act in section 2(1) provides that it applies to any commercial transaction

conducted through electronic means including commercial transactions by the Federal and State Governments, as long as such use of e-transaction was consented by the parties concerned. But on top of that, as excluded by section 2(2), there are certain types of documents which cannot be used electronically, namely (1) the power of attorney, (2) wills and codicils, (3) trusts, and (4) negotiable instruments such as travelers' check and bank draft. In other words, the creation of the above still requires the conventional way of documentation or instruments.

### 1.1. *Legality and Enforceability of E-Transaction*

In anticipating the above issue, the UNCITRAL 1996 Model Law had outlined that the electronic commerce law should adopt the principle of functional equivalence. This means that the electronic commerce law should allow the transactions to operate as equally functional as possible, based on the electronic methods as if they were formed in the conventional, paper-based way (Quimbo, 2003). Therefore with this principle, the law shall accord legal recognition to the new concepts which were brought about by e-transaction, such as the e-signature, e-document, e-writing, e-seal and so on.

This functional equivalence is shown in many provisions of the Malaysian ECA 2006. For example, in section 6(1) of the ECA, it is stipulated 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. The words used in this provision, it is submitted, are strong enough to give an assurance that the electronic information exchanged between sellers and buyers (such as information on the pricing, product delivery, payment information, terms and conditions applied, as well as details of payment methods) would be recognized as having a legal effect which is binding upon the contracting parties. Therefore any misrepresentation, fraud or otherwise negligent statement of the electronic information could be met with legal redress in case there is any damage or loss suffered.

Such functional equivalence principle is also obvious on the use of electronic signature. Section 5 defines electronic signature means any letter, character,



number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature. Thus section 9(1) of the ECA 2006 stipulates that where any law requires a signature of a person on a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by an electronic signature. This is basically the recognition of electronic signatures accorded by the ECA.

The ECA also extends the concept of originality of document to the authentic electronic document. Thus in section 12(1), it provides that where any law requires any document to be in its original form, the requirement of the law is fulfilled by a document in the form of an electronic message. However some legal requirements stipulated in the same section are to be met; such electronic message will be considered "original" if there exists a reliable assurance as to the integrity of the information contained in the electronic message from the time it is first generated in its final form; and the electronic message is accessible and intelligible so as to be usable for subsequent reference.

The Malaysian High Court recently had a golden opportunity to apply this provision, but such opportunity was wasted. A preliminary issue of whether an electronic document of a contract can be considered as an "original document" was discussed in the case of *Food Ingredients LLC v Pacific Inter-Link Sdn. Bhd and another application* [2011] MLJU 1258. In a dispute pertaining to the recognition and enforcement of an arbitration award, the defendant contended that such recognition and enforcement cannot be proceeded because of non-fulfillment of the requirements of section 38(2)(b) of the Arbitration Act which requires the plaintiff to produce the "original arbitration agreement or a duly certified copy of the agreement." In that case, the plaintiff could not do so because the said agreement was made in an electronic form. "As such, it was impossible to produce the original copy."

The presiding judge Mary Lim J. directed the plaintiff to file an electronic copy of the said contract according to the Court Registry's "e-filing system". The learned judge held that "in the interest of justice, some relaxation and accommodation ought to be granted in this respect so that the more substantive and real issues on the recognition and enforcement of the Award

can be properly addressed. Practitioners and interested parties are still adjusting and responding to electronic data for use in relation to electronic court filing systems." In this case, the "functional equivalence" of an electronic message was given by the court by way of imposing the interest of justice, rather than by applying the clear statutory provisions that Malaysia already has. It is believed that such implementation is just a matter of time where the court will accordingly apply the obvious letters of law that already exist in the Malaysian legislation.

### 1.2. *The Admissibility of Electronic Documents*

It has been said in the above that the ECA aims to provide for the legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfil legal requirements and to enable and facilitate commercial transactions through the use of electronic means and other related matters. This objective can only be materialised if the court gives the full meaning of it when the case appears before them. In other words, the court as the enforcers of the law should allow electronic messages, as the main component of an electronic transaction, to be admitted as an evidence.

It is clearly provided in section 7(2) that a contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation. Therefore it is not an option for the court, given the fulfillment of all requirements, to ignore the contracts which use electronic message in the process. And to ensure that, section 7(1) provides that 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.

Traditionally, contracts are concluded by way of accepting an offer on certain subjects and terms. Concluding contracts electronically is in no way different, except that the formalities would have to be adjusted. The legal effect of section 7 above is clearly to eliminate any doubt in relation to the validity of offer and acceptance through electronic means such as those who communicate through electronic mails, ATM or any web-base services.



Not only the electronic information will be considered an authentic written document as far as the contract is concerned, but also the effect is as binding as contracts people used to do over traditional media or methods.

Recent judicial decision had confirmed the admissibility of electronic messages so as to establish the validity and enforceability of electronic contracts. In the Kuala Lumpur High Court case of *CLR International Trading GmbH v Ng Khai Huat (t/a Lasting Impressions Marketing)* [2012] 7 MLJ 561, Mary Lim J. established the legality and enforceability of a contract between two parties who concluded their agreements through series of online messages: starting from an online advertisement by plaintiff company registered in Germany, followed by the exchange of emails between the plaintiff and Malaysian defendant confirming the contract about finding a suitor interested in buying plaintiff's machine. The learned judge held that "having carefully scrutinized the contemporaneous documentary evidence tendered at trial, in particular the emails exchanged between the parties; and not forgetting the conduct of the parties, specifically that of the defendant, I am convinced that there is indeed a properly concluded agreement between the parties of the nature described by the plaintiff."

It is rather unfortunate that the Court did not refer to and reinforce the provisions of ECA 2006 in establishing the legality of the electronic contract between the parties. It is submitted here nevertheless that the court's decision which relied heavily on the exchange of emails does indicate strongly the legality and enforceability of electronic contracts between transacting parties.

## 2. Legality of Unfair Terms In E-Transaction

While the Electronic Commerce Act (ECA) 2006 had eliminated doubts of sellers and buyers pertaining to the status and legality of their electronically executed transaction (both contractual and otherwise), there are still some hesitation standing in the way between them.

The distant and often less-personal relationship between seller and buyer using e-transaction and e-payment creates gap in their communications. This gap is prone to be manipulated by either party –albeit the fact that it

is more obvious at the seller– to take an advantage by providing ambiguous or otherwise imbalanced rights and obligations in the terms of contract. The fact that buyers or sellers seldom review the electronically written contract documents does not help the situation. The buyer may end up finding himself overburdened with the obligation while lacking protection over their rights.

To help ensure that buyers are not less protected in the electronic commerce practices than they are when they transact with sellers through their local store, the Organization of Economic Cooperation Development (OECD) Council had in 1999 approved the Guidelines for Consumer Protection in the Context of Electronic Commerce ('the Guidelines'). This important instrument aims at eliminating the uncertainties that both consumers and businesses encounter when buying and selling online. The ultimate objective of the Guidelines is to encourage:

- a. fair business, advertising and marketing practices;
- b. clear information about an online business's identity, the goods or services it offers and the terms and conditions of any transaction;
- c. a transparent process for the confirmation of transactions;
- d. secure payment mechanisms;
- e. fair, timely and affordable dispute resolution and redress;
- f. privacy protection; and
- g. consumer and business education.

Regarding "payment mechanism", it is noteworthy that the Guidelines provide that consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford. It goes on recommending that limitations of liability for un-authorized or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce.

In Malaysia, the problems of unfair contractual practices have been dealt with too. The law has put some safeguards so as to return some balances



between sellers and buyers. It is to be discussed in two main sub-issues, namely (i) the imposition of duties to the sellers by way of implied contractual terms; and (ii) the regulation of unfair contracts.

### 2.1. *Obligations of the Seller by Way of Implied Contractual Terms*

In Malaysia, this matter to some extent has been addressed by the Sales of Goods Act ('SOGA') 1957 which provides for implied terms that should exist between sellers and buyers over the sale of goods they are involved in. Section 2 of the Act defines "seller" as a person who sells or agrees to sell goods, while "buyer" means a person who buys or agrees to buy goods. Since it was silent about its applicability to electronic contract, thus it is taken to cover e-transactions too. Nevertheless, this Act only applies in so long the sale is on the "goods" as defined in the Act itself, namely every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

SOGA 1957 protects unaware and innocent buyers from various disadvantageous conditions that may be created or made use of by the sellers. It provides such protection by stipulating certain conditions and warranties to be implied though they were never agreed expressly between the parties. In summary, those implied terms are as follows:

- Implied condition that the seller has the right to sell the goods [section 14(a) SOGA 1957].
- Implied warranty that the buyer shall have and enjoy quiet possession of the goods after the sale [section 14(b)];
- Implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party not declared or known to the buyer before or at the time when the contract is made [section 14(c)];
- Implied condition that the goods sold by description shall correspond with the description itself [section 15];

- Implied condition that the goods shall be reasonably fit for the buyer's purpose [section 16(a)];
- Implied condition that the goods shall be of merchantable quality [section 16(a)];
- Implied condition that the goods corresponds with the sample which was relied upon [section 17(2)].

Apart from SOGA 1957, there is a massive legal legislative development in Malaysia on regulating unfair contracts introduced by recent amendments to the Consumer Protection Act ('CPA') 1999. This Act provides for the protection of consumers, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims, and for matters connected therewith.

This Act was initially not applicable "to any trade transactions effected by electronic means unless otherwise prescribed by the Minister." Such exclusion in section 2(2)(g) had clearly marginalised the electronic transactions. This 'discriminative' approach has been reinforced by the judiciary in the case of *Telekom Malaysia Bhd. v Tribunal Tuntutan Pengguna & Anor* [2007] 1 MLJ 626 that considered the applicability of CPA 1999 to a customer of telecommunications service. The learned judge Low Hop Bing J. reiterated that consumer protection in the telecommunication industry is not found in the CPA 1999, but rather in the Communications and Multimedia Act ('CMA') 1998.

This situation has now been largely improved after the Parliament amended the CPA 1999 so as to make it applicable to the electronic transactions. Thus the CPA 1999, section 2(1) now reads that '...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.'

By virtue of section 3 of the CPA 1999, a buyer is a consumer protected by this Act if such buyer: (a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and (b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the



purpose of (i) resupplying them in trade; (ii) consuming them in the course of a manufacturing process; or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

“Goods” in this Act is defined rather broader compared to that under SOGA 1957. By virtue of section 3 of the CPA 1999, “goods” means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes (a) goods attached to, or incorporated in, any real or personal property; (b) animals, including fish; (c) vessels and vehicles; (d) utilities; and (e) trees, plants and crops whether on, under or attached to land or not. However, this “goods” does not include *chooses in action*, including negotiable instruments, shares, debentures and money;

Furthermore, in a similar spirit with SOGA 1957, the CPA 1999 also provides for several rights and obligations that are outlined as implied guarantees in respect of supply of goods under Part V. Thus in section 30 it stipulates that such implied guarantees shall apply whether or not the goods are supplied in connection with services. The summary of those implied guarantees are as follows:

- Implied guarantee as to title (Section 31);
- Implied guarantee as to acceptable quality (section 32);
- Implied guarantee as to fitness for particular purpose (section 33);
- Implied guarantee that goods comply with description (section 34);
- Implied guarantee that goods comply with sample (section 35);
- Implied guarantee as to price (section 36); and
- Implied guarantee as to repairs and spare parts (section 37).

The above provisions on implied conditions and warranties had helped buyers in dealing with unfair terms of the contract such as reflected in the following recent cases.

In the Malaysian Court of Appeal case of *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27, implied guarantee under the CPA 1999 was discussed. The plaintiff (appellant) whose Mercedes Benz motor car, purchased

from the defendant (respondent), encountered fundamental problems in that it could not start. The defects occurred on seven occasions. Plaintiff then sued the defendant for a breach of term of contract. Abdul Malik Ishak, JCA, delivering the judgment of the Court of Appeal, decided in favor of the plaintiff. It was held that when the Benz car could not start, there was a breach of the implied conditions or guarantees which rendered the Benz car not to be of satisfactory or acceptable quality and unfit for its purpose. Based on the numerous fundamental problems encountered by the plaintiff it was found that the Benz car was not in fact and in law of an acceptable quality within the provisions of section 32 of the CPA 1999. It was thus held that the plaintiff was entitled to reject the Benz car.

The implied term in favour of the buyers was imposed by a Kuala Lumpur High Court in the case of *Perfect Kam Hung Sdn Bhd v Cheah Tai Hoe & Ors* [2011] MLJU 688. In this case, the plaintiff allegedly purchased a tipper lorry by looking at the sample provided by the defendants; the lorry that was delivered did not conform to the sample; it was delivered not in a roadworthy and good working order and condition; it was delivered four months later than contracted; and was wholly unfit for the purpose known or disclosed to the defendants, namely for the plaintiff’s construction work in relation to a water pipeline project. Plaintiff alleged there was a breach of the implied condition that the lorry supplied should correspond to the sample in quality, and the lorry should be free from any defect rendering it un-merchantable which would not be apparent on reasonable examination of the sample.

In delivering the judgment, Mohamad Ariff bin Md Yusof J. held that by failing to do the necessary overhaul, maintenance and repairs, the defendants had thus repudiated the contract, for which the plaintiff would be entitled to claim for damages. The facts here establish on a balance of probabilities that the second-hand tipper lorry in the present case was not safe and roadworthy and fit for the purpose intended. Therefore, the necessary elements to establish liability under Section 16(1)(a) of the SOGA 1957 are therefore established, and judgment was entered in favor of the plaintiff including the return of the lorry and refund of partial payment made by the plaintiff to the defendant.



## 2.2. Regulation on Unfair Contractual Terms in Malaysia

Unfair contractual terms basically occurs in two ways: Firstly, the use of standard form of contract, where consumers or buyers would normally have no opportunity to negotiate those terms. It is a situation of “take it or leave it.” Secondly, a contract has been largely seen unfair due to a unilateral insertion of exemption or exclusion clauses. In normal situations, it is obviously the seller or suppliers who seek some protection through these clauses.

Prior to the new introduction of provisions on unfair contract to the CPA 1999 in 2011, there is lacuna of law on this area (Amin, 2013). The nearest courts could refer to was the Contracts Act 1950. The Act contains no provision directly and precisely dealing with exemption clauses. The Malaysian courts have followed English common law when considering this aspect of the law. Thus the courts have tried to protect the position of the recipient of documents containing exemption clauses by requiring certain standards of notice in respect of the onerous terms; and by construing the document, whenever possible, in favour of the party receiving it.

In some occasions, the courts have evolved certain canons of construction in construing the meaning of the exemption clauses. These normally work in favour of the recipient of the document. The reason for this is that the party putting forward the document is normally able to impose onerous or unfair terms exempting himself wholly or partially from his liability under the contract. Therefore the courts will apply the “contra proferentum” rule. This rule means that the court will construe forcibly the words of a written document against the party putting forward the document. However, this rule is only applied if there is any doubt or ambiguity in the meaning and scope of the exclusion clause used. Such approach has been used by the court in the case of *Sharikat Lee Heng Sdn. Bhd. v Port Swettenham Authority* [1971] 2 MLJ 27, FC.

Pertaining to the exclusion of liability, the Malaysian courts seem to adopt the view that no matter how wide a clause is, it cannot exclude liability if there is negligence. Thus in *Sekawan Guards Sdn Bhd v Thong Guan Sdn Bhd* [1995] 1 MLJ 811, the appellant security company was held liable for the theft occurred

at the premises of the respondent due to the negligence of the employee of the security company, although there was a clause in the contract excluding the liability of the appellant. In another similar issue, the court had strongly outlined that the law on the exemption clause in Malaysia is quite settled in that an exemption clause however wide and general does not exonerate the defendant from the liability arising out of negligence and misconduct (see *Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor* [1995] 2 MLJ).

The legal protection on buyers had further got more reinforcement by the more recent amendment to the Consumer Protection Act (‘CPA’) 1999. The previous law on implied conditions and warranties in favor of the buyers can be defeated by any express terms agreed between the parties to the contrary. This is evident in the practice of provision of standard contracts or exclusion clauses that become all-time favorite by sellers. This is more evident in terms of electronic transactions too, as there appears no practical way where buyers or consumers can resort to negotiating the terms before concluding any contracts.

In the year 2010, the Parliament had amended the CPA 1999 by introducing new Part IIIA with several sections. The new Part is dedicated to regulate unfair terms that may exist in a contract. It is meant to regulate those terms in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer. In Naemah Amin’s words, this amendment represents a major legislative intervention in contractual settings necessary to curb a widespread use of unfair terms in consumer contracts, especially those found in standard form of contracts (Amin, 2013).

It is noteworthy that section 24B made it very clear that these provisions on unfair terms would apply to all contract. Therefore it would be safe to also argue that such provisions would be helpful in protecting consumers in online environment.

## 2.3. Procedural and Substantive Unfairness

The CPA 1999 outlines that there could be two types of unfair contract: one is procedurally unfair, and the other is substantially unfair. According to section



24C of the Act, a contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct or the manner in which the contract has been entered into.

Factors that can contribute to this procedural unfairness include:

- (a) the knowledge and understanding of the consumer in relation to the meaning of the terms of the contract or their effect;
- (b) the bargaining strength of the parties to the contract relative to each other;
- (c) reasonable standards of fair dealing;
- (d) whether or not the terms of the contract were subject to negotiation or were part of a standard form contract;
- (e) whether or not it was reasonably practicable for the consumer to negotiate for the alteration or rejection of the term of the contract;
- (f) whether expressions contained in the contract are in fine print or are difficult to read or understand;
- (g) whether or not the consumer was physically or mentally fit;
- (h) whether or not independent legal or other expert advice was obtained by the consumer;
- (i) the extent, if any, to which the provisions of the contract or a term of the contract or its legal or practical effect was accurately explained by any person to the consumer who entered into the contract;
- (j) the conduct of the parties who entered into the contract in relation to similar contracts between them; and
- (k) whether the consumer relied on the skill, care or advice of the supplier or a person connected with the supplier in entering into the contract.

Furthermore, a contract or a term of a contract is substantively unfair if the contract or the term of the contract is in itself harsh, oppressive,

unconscionable, excluding/restricting liability for negligence, or excluding/restricting liability for breach of terms without adequate justification. These qualifications as prescribed in section 24D also comes up with several factors to be taken into account, among others;

- (a) whether or not the contract or a term of the contract imposes conditions which are unreasonably difficult to comply with; or unreasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract;
- (b) whether the contract is oral or wholly or partly in writing;
- (c) whether the contract is in standard form;
- (d) whether the contract or a term of the contract is contrary to reasonable standards of fair dealing;
- (e) whether the contract or a term of the contract has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;
- (f) whether the benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to his or her circumstances;
- (g) whether the consumer who entered into the contract was in a fiduciary relationship with the supplier; and
- (h) whether the contract or a term of the contract requires manifestly excessive security, imposes disproportionate penalties, denies or penalizes the early repayment of debts, entitles the supplier to terminate the contract unilaterally without good reason, or entitles the supplier to modify the terms of the contract unilaterally.

If a contract or its term is found to be either procedurally or substantively unfair, a court or Tribunal may declare the contract or the term of the contract as unenforceable or void. Subsequently, any person who contravenes any of the provisions on unfair contract in this Part commits an offence punishable with a fine, or imprisonment, or both.



It is argued that this amendment is another major breakthrough for electronic commerce in Malaysia, too. Firstly it was settled that the CPA 1999 has now been made applicable to the electronic contracts. Next, the Consumer Protection Act has been further equipped with more rules in safeguarding consumer's interest against the massive use of unfair terms in standard contracts often found in electronic-based commercial activities.

### 3. Data Protection in Electronic Transactions

Personal data abuse and misuses have been long cited as among the primary legal barriers to the participation in electronic commerce and e-transaction (See, Quimbo, 2003; Clinton and Al-Gore, 1997; Munir, 2010). This is because personal information has not only been used as a supplementary data for completing transactions, but it has been kept and further exploited as a strategic tools for further business processes, marketing as well as product development. In short, personal data is now upgraded from secondary to primary business materials.

In order to eliminate this barrier, many countries had outlined and enacted personal data protection legal regime to protect consumers' personal data from being abused. The most significant early effort was in 1980 by the Organization for Economic Co-operation and Development in the form of OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data and in 1995 by the European Parliament in the form of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ('Directive 1995').

In a prolonged and delayed response to this development, Malaysian Parliament has finally in 2010 enacted the Personal Data Protection Act (PDPA) 2010 to "regulate the processing of personal data in commercial transactions and to provide for matters connected therewith." Under section 4, "personal data" refers to any "data that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data user, including any sensitive personal data and expression of opinion about the data subject."

Meanwhile, "commercial transactions" mean "any transaction 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."

The enactment of the PDPA is arguably another legal milestone for the development of e-commerce in Malaysia, considering that a massive and increasingly valuable amount of personal information are being stored, processed and exploited. However, there is a cause for concern here that the Parliament has expressly excluded the application of PDPA to the Federal Government and State Governments in section 3. Commentators opined that this exclusion would have a far-reaching implication in terms of the development of data protection law in Malaysia (Munir, 2010).

At the heart of the PDPA is a set of duties under the data protection principles from which stemming all the rights, duties and liabilities of each of data user and data subject ("data user" is those who use, collect, process, etc. the personal data that belong to certain individuals, i.e. the "data subject". There are generally seven categories of the duty spelled out as follows:

1. General principle: No process of personal data which is excessive and/or without the consent of data subject (Section 6 of the PDPA 2010);
2. Notice and Choice: Proper notification on the purpose of that data collection/ processing (section 7);
3. Disclosure: Prohibits unauthorized disclosure or sharing of personal data (section 8);
4. Security: Imposes security measures by data users that commensurate the risk of security breach (section 9);
5. Retention: Personal data shall not be kept unnecessarily (section 10);
6. Data Integrity: Right of data subjects to correct and update their personal data (section 11);
7. Data Access: Right of data subject to have an access to his own personal data the at the user's database (section 12).



By virtue of these data protection principles, there are some breakthroughs for the consumers in Malaysia. Firstly, the parties involved in electronic commerce are duty-bound to protect the quality, integrity, security and confidentiality of personal data throughout the whole lifecycle of such data: from collection right to the disposal of the data.

Secondly, the consumers who execute online transaction shall be protected by some sets of rights including right to know what information is obtained by online merchants and for what purpose; right to make updates and correction on personal data, and right to withdraw from data processing at any time in future as long as it does not affect the substantial agreement established between the consumer and the merchant.

Thirdly, the PDPA gives online consumers some peace of mind; that any wrongdoing committed by merchants would meet legal consequences such as sanctions and punishment. The PDPA makes it an offence for anyone who contravenes any of the data protection principles with a fine not exceeding MYR 300,000 or to imprisonment for a term not exceeding two years or to both. Besides, the PDPA also provides for several other offences directly related to the issues of information theft, though the phrase information theft itself is absent in the PDPA.

The most obvious provision under this heading would be the offence of unlawful collecting or disclosing of personal data (section 130). If any person is found to have knowingly or recklessly collected or disclosed personal data that is held by the data user without the consent of the latter commits an offence punishable with a fine of maximum MYR500,000 or with imprisonment for a maximum term of three years or with both. The same penalties await those who sell personal data under the same circumstances of the above. There is no specification as to the manner of such collection, disclosure or selling of the personal data. Instead PDPA leaves it open so as to be able to catch offenders in various ways or modus operandi. In digital data environment such as the electronic government, fraud has used to cheat people so as to surrender their personal data. This provision, it is argued is useful in addressing those situations.

Given the above assessment, it can be said that the PDPA can lend a hand for the legal protection and sustainability of electronic commerce in Malaysia,

albeit the fact that government is excluded from its application. However it remains to be seen how this piece of legislation can really help in practice. As the Act is only recently enforced (November 2013), there is not yet a test-case ever produced by Malaysian courts to check if the law is efficiently used.

But the late increase of data-privacy related case laws in the past five years in Malaysian courts strongly shows that it is only about time that the PDPA will be tested by the judges. Various industries had recently been taken to courts for their alleged abuse of people's personal information: from banks to hospitals, from telecommunications to schools, and so on (Zulhuda, 2013). In most of those cases, there is a strong message for business players in Malaysia that consumers' personal data is no longer a lawless subject capable of being exploited for illegitimate gains (See: Lee Ewe Poh's case and Mohd Zaid's case).

#### 4. Conclusion

The preceding discussions had demonstrated that electronic commerce and e-transactions are faced with many legal issues and challenges. If not addressed, these issues will provide as barriers to the growth of e-commerce and e-economy. The Malaysian legal framework on enforceability of e-transaction, consumer protection over unfair terms and data privacy surrounding e-transaction has tremendously developed in the past few years with the enactment and amendment of relevant statutes.

Questions about enforceability of e-transaction and legality of e-document have been answered by the passing of the Electronic Commerce Act 2006 which reflects in many ways the provisions of the UNCITRAL Model Law on Electronic Commerce. Meanwhile, the Consumer Protection Act 1999 has also been further strengthened to include protecting consumers in online and electronic transactions and by introducing rules on unfair terms that are commonly used by merchants including those in e-transactions. On top of that, the preservation of security and privacy of personal information which is commonly used in e-transaction has now been made obligation for merchants and commercial players in Malaysia by virtue of the Personal Data Protection



Act 2010. As all these laws are relatively new, it remains to be seen if they are being efficiently used in practice by individuals and courts.

From the above discussion too, one can argue that the law in Malaysia on these areas are dynamically moving forward. It is important to ensure that law should keep track of the growth of technologies and how they affect people. On commercial sectors, law need to be a carrier, not a barrier to the growth and dynamic, capable of creating the environment of trust between all the stakeholders.

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