

Is The Contracts Act 1950 (Malaysia) Suitable on The Internet : A Critical Evaluation

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ABSTRACT

The Contracts Act 1950 (Malaysia) is an old statute which basically provides postal rule to govern the formation of a contract made by sending letters through post office. It is silent about the emerging new issues on the Internet contracts. When technology advances the law lags behind. So, the old laws are usually modified to adapt to the new environment. At present time electronic commerce is expanding very rapidly everywhere on the globe including Malaysia. Millions of customers are buying goods and services on the Internet. As a result volumes of contracts are made on the Internet. Some of the disputes which are now arising out of the online contracts are new and the existing contract laws in Malaysia are unable to solve those problems, such as the validity of using data message to form a contract, the requirement of writing and signature on paper for certain contracts, time of dispatch and receipt of data message, time when an electronic acceptance is effective, whether postal rule or receipt rule will be applicable on the Internet contract and so forth. This article analyses the above issues with reference to the Malaysian contract law, UNCITRAL Model Law on Electronic Commerce and Electronic Transactions Act 2000 (Singapore).

ABSTRAK

Akta Kontrak 1950 (Malaysia) merupakan satu perundangan yang lama yang secara asasnya memperuntukkan peraturan postal terpakai kepada kontrak yang terbentuk dengan cara penghantaran surat melalui pos. Perundangan ini membisu tentang isu-isu baru mengenai kontrak melalui Internet. Apabila teknologi berkembang, undang-undang ketinggalan di belakang. Dengan itu, undang-undang lama perlu dipinda seiringan dengan persekitaran baru. Kini, perdagangan elektronik sedang berkembang dengan pesatnya di mana saja di dunia termasuk Malaysia. Berjuta manusia membeli barangan dan memperolehi perkhidmatan melalui Internet, mengakibatkan banyak kontrak terbentuk melalui Internet. Sebahagian daripada pertikaian yang timbul kini secara atas talian adalah permasalahan baru, seperti keesahan penggunaan mesej data untuk membentuk kontrak, keperluan bertulis dan tandatangan atas kertas bagi sesetengah kontrak, masa penghantaran dan penerimaan dan penerimaan secara elektronik menjadi efektif, sama ada peraturan postal atau peraturan penerimaan akan digunapakai bagi kontrak melalui Internet dan lain-lain. Undang-undang kontrak sedia ada di Malaysia tidak berupaya menangani pertikaian-pertikaian jenis ini. Dalam rencana ini, isu-isu di atas akan dikupas dengan merujuk pada undang-undang kontrak Malaysia, UNCITRAL Model Law on Electronic Commerce dan Electronic Transactions Act 2000 (Singapura).

propagates receipt rule as Mr. Christopher T. Poggi in his article said that UNCITRAL Model Law on Electronic Commerce rejects mailbox rule for electronic transactions.¹⁴

ACCEPTANCE RULE IN THE CONTRACTS ACT 1950 (MALAYSIA): AN ANALYSIS

The provisions of the Contracts Act 1950 (Malaysia) were taken from the Contract Act 1872 (India) which was in line with the UK contract law. The Contracts Act 1950 (Malaysia) was amended in 1974. If we read carefully the provisions of the Act related to the formation of contracts, we will find that the Act provides basically the postal rule (also known as 'mailbox rule') for the formation of a contract. It does not specifically mention which rule will be applicable for online contract: postal rule or receipt rule.

Section 4 of the Contracts Act 1950 (Malaysia) provides that:

1. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
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; and
 - b. as against the acceptor, when it comes to the knowledge of the proposer.

Illustrations (a) and (b) of section 4 of the Contracts Act 1950 provides:

- a. A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.
- b. B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete:
 - (i) As against A, when the letter is posted;
 - (ii) as against B, when the letter is received by A.

Section 4(2) of the Contracts Act 1950 (Malaysia) provides two types of rules for the communication of acceptance, such as postal rule and receipt rule. Section 4(2)(a) states that the communication of acceptance is complete against the proposer, when the letter (communicating the acceptance) is posted, no matter whether the proposer receives it or not; or he receives it very late. This is clearly postal rule. Section 4(2)(b) states that the communication of acceptance is

¹⁴ Christopher T. Poggi, *Electronic Commerce Legislation: An Analysis of European and American Approach to Contract Formation* (2000) 41 *Virginia Journal of International Law*, web page at 20. Web site: <http://web.lexis-nexis.com/universe/do...>

complete against the acceptor when the letter (communicating acceptance) is received by the offeror. This is clearly receipt rule.

In *Madam Loh Sai Nyah v. American International Assurance Co. Ltd.*,¹⁵ the Court of Appeal, Kuala Lumpur considered and explained the application of section 4 of the Contracts Act 1950.¹⁶ In this case the appellant's husband (the deceased) effected a personal accident insurance policy under the respondent insurance company. The premium for the insurance was paid on 24 June 1977 to an insurance agent of the respondent company. On 26 June 1977 the insured met with a fatal road accident and died. The premium was received by the respondent insurance company on 27 June, i.e., one day after the death of the insured, and the proposal form was received on 30 June, i.e., four days after the death of the insured.

When the appellant claimed the sum insured under the policy, the insurance company refused to pay saying that there was no insurance contract made binding the company and therefore the company was not bound to pay the money under the insurance contract. The High Court and Court of Appeal held that no valid insurance contract was made as the proposal form was received by the respondent insurance company four days after the death of the insured and there was no acceptance by the respondent company by issuing the insurance policy. To be a binding insurance contract the proposal form and premium should be received and accepted by the respondent and the acceptance should be communicated to the insured. The insurance company is only bound to pay under the insurance policy when the acceptance of the proposal comes to the knowledge of the insured or the insurance policy was received by the insured. The High Court observed as follows:

From the facts of this case, it is clear that the proposal had not come to the knowledge of the defendant, because the proposal was only received at the defendant's office on 30 June 1977, whereas the deceased had died on 26 June 1977. Furthermore, even if the proposal had come to the knowledge of the defendant (which in my judgment it had not) there would still be no contract as against the defendant until the acceptance had come to the knowledge of the deceased. Here, on the facts, the proposal did not reach the defendant until after the deceased had died, no acceptance was ever made, nor was it communicated and it could never had come to the knowledge of the deceased because the deceased had died earlier. So, according to the provisions of s. 4(1) and (2) of the Contracts Act 1950 no contract was formed as between the deceased and the defendant.

Section 4 of the Contracts Act and illustration under the section does not state anything for the situation when the acceptance is communicated by

¹⁵ [1998] 2 CLJ 327.

¹⁶ In this case the insurance contract made was not online contract, therefore the observation and explanation have not been of much help for our analysis here.

electronic way for example, e-mail, EDI (electronic data interchange), world wide web interfaces etc. As the Contracts Act 1950 is silent on this point, the postal rule will be applicable against the proposer and receipt rule against the acceptor in the formation of electronic contract. Now the issue is whether the postal rule is suitable for online contract which is instantaneous in nature.

The court applies postal rule when the contract is created by correspondence because the communication by correspondence is not instantaneous. Mr. N. Kasiraja in his article "Contracting by Correspondence: The Pitfalls and the Pointers" has elaborated in detail the formation of a contract by correspondence and its drawbacks. In this article he has argued for the adoption of receipt rule instead of postal rule which is exceptional to the general rule of making a contract. He has observed in this article that:

It is submitted that, in view of the above courses open to the offeror, it is much more sensible for the law to apply the receipt rule of acceptance, and so permit the offeror to retract his acceptance and to be free of any contract, in the circumstances just considered. To prevent him from doing so by applying, on some misguided notion of logical symmetry, the dispatch rule - a rule which had been seen to have been appropriately intended to protect the offeree from an unexpected revocation of the offer - will be to transform what had been intended to be a boon into a boomerang.¹⁷

WHY POSTAL RULE IS NOT SUITABLE FOR ONLINE CONTRACTS?

The communication of a proposal is complete when it comes to the knowledge of the offeree.¹⁸ Similarly, an acceptance should be complete when it comes to the knowledge of the proposer or offeror. In *Powell v. Lee*¹⁹ the defendant decided to appoint the plaintiff as headmaster of a school. The terms of the appointment were never communicated to the plaintiff. The court held that there was no contract since the defendant's acceptance of the plaintiff's offer of service had not been communicated to him.

For the offeror to be bound by the contract he must receive the terms of the acceptance from the acceptor. There will be no contract if the offeror does not receive the acceptance message from the acceptor. This is general rule of contract. While explaining the principle of acceptance, Lord Denning in *Entores v. Miles Far East Corporation*²⁰ stated as an example that a situation may arise

¹⁷ N. Kasiraja, 'Contracting by Correspondence - The Pitfalls and The Pointers' [1981] 2 *MLJ* cxv, cxxxiii.

¹⁸ Section 4(1) of the Contracts Act 1950 (Malaysia).

¹⁹ (1908) 99 LT 284.

²⁰ [1955] 2 QB 327.

where A shouts an offer to B across a river and A does not hear the reply from B because of the noise of an aircraft flying overhead. In such a situation there is no contract.

The postal rule provides an exception to the general rule that an acceptance must be communicated to and received by the offeror to be a valid acceptance. Under postal rule an acceptance is complete and the offeror is bound by the contract at the moment the acceptance letter is posted at the post office or in a post box by the offeree no matter whether the offeror has received the acceptance letter or not. This rule favours the offeree and causes hardship to the offeror in certain situations. For example, the offeror has offered to sell his car MAP2046 to three persons by letters and all of them have accepted the offer and have posted the acceptance letter at the post office. Now, the offeror is bound to each of the three acceptors to sell his one car. How can the offeror sell one car to three customers? Postal rule says that he has to sell the car to each of the three acceptors otherwise he will be liable for damages for breach of contract to them. In receipt rule this problem might be solved by stipulating that the first acceptor will get priority over the others.

The court accepts postal rule because it is easier for the offeree to prove the posting of the acceptance letter than proving the receipt of the acceptance letter by the offeror. Now if we compare the postal system of communication with the communication on the Internet to form a contract, we find that the two types of communication are not the same. The communication on the internet is very fast and nearly instantaneous. So, the receipt rule should be applied on the Internet contract. Some commentators say that e-mail communication is like post office and so postal rule will be applicable on the online contracts.²¹ They say that e-mail is not instantaneous way of communication, because one cannot rule out non-delivery and delayed delivery of e-mail.²² They also say that in the course of contracting by e-mail the communication is not in real-time and the offeree is not sure that the offeror has successfully received its acceptance. They argue that in this regard e-mail is just like a normal letter. The outbox of the sender is equivalent to the post-box. They say the ISPs of both the sender and the recipient are like the post offices. The inbox of the recipient is like the mailbox.²³

But I cannot agree with this opinion. It is not difficult for the offeree to prove the receipt of acceptance message by the offeror on the Internet, because the modern computer technology has been designed in such a way that the

²¹ See Lilian Edward & Charlotte Waelde (ed.), *Law and the Internet: A Framework for Electronic Commerce*, Oxford: Hart Publishing, Second edition, 2001, pgs. 24-25.

²² Lilian, *ibid.* See also Sharon Christensen, 'Formation of Contract by Email—Is It Just the Same as the Post' (2000) 1 *QUTLJ* 22, 32-34.

²³ Lilian Edward, *op. cit.*, at 18.

offeree can know whether the data message sent by him has been received by the offeror or not. For example, the parties may ask each other to acknowledge the receipt of offer and acceptance and thereby the offeree can be sure whether the offeror has received the acceptance or not. Hence, in e-mail communication the parties may stipulate that acknowledgement of receipt of the data message must be given by the addressee. Where the parties has agreed that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by the addressee, then, unless acknowledgement has been so received, the electronic record shall be deemed to have been never sent by the originator.²⁴

From the above argument, we may say that the receipt rule is suitable on the cyberspace contracts. Many legal scholars propose that receipt rule should be applicable on the cyberspace contract.²⁵ Section 215(a) of the Uniform Computer Information Transactions Act 1999 (Known as UCITA) (US) provides receipt rule to be applicable when a contract is created on the Internet. This section provides that an electronic message is effective at the time of its receipt even if no individual is aware of its receipt. Section 203(4) of UCITA clearly provides the time when an electronic contract is formed. This section provides that if an offer made in an electronic message evokes an electronic message accepting the offer, a contract is formed when an electronic acceptance is received.

Similarly, revised Article 2 of the Uniform Commercial Code (UCC) of US also provides receipt rule to be applicable on the cyberspace contract. However, the parties in an online contract may agree to apply postal rule rather than receipt rule. Revised Article 2-213 provides receipt rule to be applicable on the Internet contract. This Article provides that an electronic record is effective when received even if no individual is aware of its receipt. Revised Article 2-204 of UCC states that in an interaction between individuals, if an offer evokes an electronic record in response, a contract is formed when the message is received. If the offer may be accepted by performance, then a contract is formed when performance is received.

The manner and medium of communication of offer and acceptance on the cyberspace are different from offer and acceptance that are communicated through post office. For instantaneous method of communication such as oral and telephone communication, the court is applying receipt rule.²⁶ Hence, it is argued that the receipt rule should also be applicable on the Internet contracts as well. Postal rule is not suitable on the Internet contract because Internet contract is substantially instantaneous in nature. The postal system is slow and therefore it takes long time to communicate offer and acceptance through post

²⁴ Section 12(2) of the Information Technology Act 2000 (India).

²⁵ Ian Eagles et al, *op. cit.*, p. 355; David I. Bainbridge, *op. cit.*, at pg. 268.

²⁶ See *Entores v. Miles Far East Corporation* [1955] 2 QB 327.

office. Sometimes the letters might be missing on the way and never received by the addressee. Courts apply postal rule on contracts made by sending letters through post office because, it is easier for the offeree to prove the sending of acceptance letter than proving the receipt of the acceptance letter by the offeror. So, postal rule favours the offeree at the detriment of the offeror, as the offeror is bound by the contract when the offeror does not know whether his offer has been accepted or rejected by the offeree. But the situation is different on the Internet. On the Internet the communication is very fast and it is not difficult for the offeree to prove the receipt of the acceptance message by the offeror.

EMERGING LEGAL ISSUES RELATED TO THE ONLINE CONTRACT

Electronic contract is formed by way of e-mail, electronic data interchange (EDI), world wide web interfaces and listserv or chat services. Now the issue is whether postal rule will be compatible with cyberspace contract. If we look at the background of the postal rule we find that when an offer and the acceptance of the offer are communicated by post office, the post office service may take time from few days to few weeks to reach the letter to the acceptor or proposer. It may happen that the acceptance letter is posted but was not received at all by the proposer. It is easier to prove the posting of the letter than proving the receipt of the letter by the addressee. So, for the interest of commerce it has been decided that the contract will be binding on the proposer at the time when the acceptance letter is posted by the acceptor no matter the proposer has received the letter or not provided that the letter was properly addressed. This postal rule might not be suitable on the cyberspace because the communication on the cyberspace is very fast and substantially instantaneous.

It is very important to determine what kind of contract rule should be applicable on the formation of electronic contract. As millions of consumers are buying goods and services on the Internet, the international bodies have already made contract rules which will be applied on the cyberspace. Uniform Computer Information Transactions Act 1999 (UCITA) (US) provide receipt rule to be applicable on electronic contract. In postal rule, the acceptance of the offer is complete at the moment when the letter is posted by the acceptor no matter whether the proposer has received the letter or not. Unlike postal rule, the receipt rule which is applicable on the cyberspace contract provides that the acceptance of the offer is effective when the data message is received by the proposer. Here the time of receipt is when the data message enters an information system of the addressee.²⁷

²⁷ Article 15(3) of the UNCITRAL Model Law on Electronic Commerce.

Model Law on Electronic Commerce of the United Nations Commission on International Trade Law which is known as 'UNCITRAL Model Law on Electronic Commerce' uses 'originator' and 'addressee' instead of 'proposer' and 'acceptor' and 'data message' instead of 'letter' used in traditional contract. Article 2 of the UNCITRAL Model Law on Electronic Commerce provides definition of the terms 'originator', 'addressee' and 'data message' as follows:

1. 'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
2. 'Originator' of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message.
3. 'Addressee' of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message.

LEGAL RECOGNITION OF DATA MESSAGE TO FORM A VALID CONTRACT

Electronic contract is made by using data message and the Contracts Act 1950 (Malaysia) is silent about the validity of the data message used to form an electronic contract.

Article 5 and 11 of the UNCITRAL Model Law on Electronic Commerce recognise the validity of 'data messages' used to make a valid electronic contract. Article 11 of UNCITRAL Model Law provides that an offer and the acceptance of that offer may be expressed by means of data messages to form an electronic contract and that contract is valid and enforceable by law. Section 11 of the Electronic Transactions Act 1998 (Singapore) also recognises the validity of 'electronic records' used to express an offer and the acceptance of an offer.

WRITING REQUIREMENT

Law may require certain contract to be made in writing on paper. Contracts Act (Malaysia) does not say anything how to meet this writing requirement when the contract is made by using data message on the Internet. UNCITRAL Model Law deals with this issue. Article 6 of the UNCITRAL Model Law provides that the writing requirement is met is met by data message under if the information contained therein is accessible so as to be usable for subsequent reference.

THE REQUIREMENT OF A SIGNATURE

Law requires certain contracts be in writing and signed by the parties. The Contract Act 1950 (Malaysia) is silent about the issue on how to meet the signature requirement. However, the Digital Signature Act 1997 (Malaysia) provides that the signature requirement may be met in an electronic transaction if cryptography technology is used to communicate the data message. Section 62 of the Digital Signature Act provides that where a rule of law requires a signature or provides for certain consequences in the absence of a signature, that rule shall be satisfied by a digital signature where:

1. The digital signature is verified by reference to the public key listed in a valid certificate issued by a licensed certification authority.
2. That digital signature was affixed by the signer with the intention of signing the message.
3. The recipient has no knowledge or notice that the signer has breached a duty as a subscriber; or does not rightfully hold the private key used to affix the digital signature.

Where the law requires a signature of the originator or the addressee of the data message that requirement is met under Article 7 of the UNCITRAL Model Law if a method is used to identify that person and to indicate that person's approval of the information contained in the data message. Here the method indicates encryption technology method where the data message is sent by using private key of the sender and the message is decrypt by using the public key of the sender.

TIME AND PLACE OF DISPATCH AND RECEIPT OF DATA MESSAGE

Article 15 of UNCITRAL Model Law on Electronic Commerce provides guidelines for the determination of time and place of dispatch and receipt of data message. The time of dispatch and receipt of data message is important to determine when a valid electronic contract is made. Under Article 15 of the Model Law 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. Receipt of data message occurs at the time when the data message enters the designated information system of the addressee.²⁸ If no information system is designated, receipt occurs at the time when the data message enters an information system of the addressee.²⁹ Regarding the time of

²⁸ Article 15(2)(a) of the UNCITRAL Model Law on Electronic Commerce.

²⁹ *Ibid*, Article 15(2)(b).

dispatch and receipt of data message there is no provision in the Contracts Act 1950 (Malaysia).

Regarding the place of dispatch and place of receipt Article 15 provides that 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.³⁰ If the originator or addressee does not have a place of business, reference is to be made to its habitual residence.³¹ Section 15 of the Electronic Transactions Act 1998 (Singapore) provides identical provisions with Article 15 of the UNCITRAL Model Law. What about the place of making an electronic contract? Is the place of the offeror or the acceptor will be taken into consideration to determine the place of making an electronic contract? It is a difficult question in a cross-border electronic transaction. In *Entores Ltd. v. Miles Far East Corporation*³², the contract was made by telex and Denning LJ held that the contract was made at the place where the acceptance of the offer was received.

REQUIREMENT OF ACKNOWLEDGEMENT OF RECEIPT

Article 14 of the UNCITRAL Model Law on Electronic Commerce deals with the requirement of acknowledgement of receipt of a data message. Where the originator of data message has requested or agreed with the addressee that receipt of the data message be acknowledge, it must be acknowledged by both parties in a particular manner as has been agreed. Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by (a) any communication by the addressee, automated or otherwise; or (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.

Now, what will be the effect of a data message which was received but was not acknowledged? Article 14(3) provides that where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received. Where the data message is conditional on receipt of the acknowledgement, it is up to the parties to determine the time as to the completion of the offer and acceptance. They may determine the time as to the completion of offer and acceptance based on the time of receipt of the acknowledgement or the time of receipt of the data message.

³⁰ Ibid, Article 15(4).

³¹ Ibid, Article 15(4)(b).

³² [1955] 2 QB 327; [1955] 2 All ER 493.

WHEN IS AN ELECTRONIC MESSAGE EFFECTIVE?

The Contracts Act 1950 does have any provision to determine when an electronic message is effective. Is the electronic message effective when it is sent or when it is received by the addressee? UCITA and UCC provide that an electronic message is effective at the time of its receipt even if no individual is aware of its receipt.³³

WHEN IS AN ELECTRONIC CONTRACT CREATED?

The Contracts Act 1950 does not provide any provision to determine the time when an electronic contract is created. It only provides the time when a postal contract is created. Section 203(4) of UCITA and article 2-204 of UCC provides that if an offer made in an electronic message evokes an electronic message accepting the offer, a contract is formed when an electronic acceptance is received.

The above two statutes provide that an electronic contract may be created even if no party in the contract was aware of the receipt of the acceptance. So, human interaction is not required to create an electronic contract. Electronic records exchanged in an electronic transaction are effective when received in a form and at a location capable of processing the record even if no individual is aware of their receipt.

CONCLUSION

It is very much necessary to amend the Contracts Act 1950 (Malaysia) to address the above issues on the cyberspace contract. The Act should be amended in light of the UNCITRAL Model Law on Electronic Commerce 1996 and Uniform Computer Information Transactions Act 1999 (US). Singapore and India have already enacted new statutes such as Electronic Transactions Act 1998 and The Information Technology Act 2000 respectively on the basis of UNCITRAL Model Law. Uniform Computer Information Transactions Act 1999 (US) clearly states that an electronic message is only effective when it is received. The Act also states that an electronic contract is created when the acceptance is received by the offeror. However, UNCITRAL Model Law on Electronic Commerce is silent on these important points.

To adopt the benefit of new information and communication technology (ICT) the contract law of Malaysia needs to be updated to accommodate electronic contractual issues. To accommodate electronic contracting rules in the Contracts

³³ See section 215(a) of UCITA and article 2-213 of UCC.

Act 1950 (Malaysia), Parliament may amend the Act or may legislate another statute to address the following issues:

1. The new law must expressly validate the use of electronic message in the formation of an electronic contract.
2. The electronic message meets the requirement of written contacts if the message is capable of storage in the computer for longer period and if the information contained therein is accessible so as to be usable for subsequent reference.
3. The new law should provide the place and time of dispatch and receipt of electronic message. The communication of proposal and acceptance on the Internet is complete at the moment when the designated information system of the addressee receives the electronic message.
4. If the parties apply digital encryption technology approved by the Certification Authority under the Digital Signature Act 1997, then the electronic message meets the requirement of signature.
5. The new law should provide that an electronic message is effective when it is received by the addressee.
6. The new law should provide that an electronic contract is created when the acceptance message is received by the offeror.
7. And other related provisions on electronic transaction.

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