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ORIGINAL ARTICLES

Issues on Essential Elements of Formation of E-Contract in Malaysia: E-Consumers' Perspective

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ABSTRACT

Although e-commerce is growing at a significant rate, a number of stumbling blocks continue to hamper its development. One stumbling block relates to formation of e-contract. There remains uncertainty whether the traditional principles of contract law can be adapted to the needs of electronic contracting. Consequently parties might disagree as to what point and in which country an e-contract is formed. This issue needs to be addressed to boost the integrity of electronic transactions especially in sale of goods since the subsequent rights and liabilities of the contracting parties will depend on whether an agreement has been reached between them. Undeniably, the electronic contract is significantly different from traditional contract which trigger various new legal issues even at the initial stage of the contract. Based on Malaysian legal practice and in comparison with United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce as well as United Kingdom law and European Union's Directives on e-commerce, this paper seeks to analyze and identify consumer issues concerning the formation of e-contracts. This includes the discussion on the creation of legally enforceable agreement, the appropriateness of the postal rule and its application to e-mail, the need of written contract as well as digital signature and the uncertainty of where and when the e-contract is formed. The paper also examines relevant Malaysian legislation on formation of e-contract including the Contracts Act 1950, Sale of Goods Act 195, Electronic Commerce Act 2006 and the Digital Signature Act 1997 and the adequacy of the existing law in protecting e-consumers.

Key words: E-consumers, sale of goods, e-contract, consumer protection.

Introduction

E-consumer is the purchaser of goods and services over electronic systems such as Internet and other computer networks (Fernando, 2001). This new group of consumers is increasing in number over the years as on-line shopping become a trend and manifestation of modern life style. A survey done by PayPal for the year 2010 on 400 customers who used it services to pay online indicates that Malaysian has spent RM1.8 billion to purchase goods and services online (Diyanah, 2011). Nowadays consumers can buy anything, at any time and from any part of the world without leaving their homes. This seems to be more fun, safer, quicker, cheaper and wider choices compared to conventional shopping. In fact, some e-consumers allure with the concept of "bringing stores to shoppers – not shoppers to stores" (Parsons, 2002). On the other hand, this paperless and borderless transaction exposes consumers to certain problems and challenges not raised by face to face transactions. One of major concerns is the fact that existing legal theories may no longer be applicable or may be unsuitable to resolve e-commerce disputes. Thus far, no consensus exists as to how contracts should be formed in an electronics environment. The legal problem may appear even at early stage of formation of e-contract itself. It is a matter of argument whether display of goods on the website is an offer or just an invitation to treat. Another unsettled issue is where, when and how e-contract is concluded. The creation of legally enforceable e-agreement may also be affected by other elements of formation of valid contract such as intention to create legal relation, consideration and capacity. E-consumers may also be facing with the problem of proving the existence of e-contract. With the growing numbers of e-consumers and proliferation of e-commerce, it is important the problems in this paperless environment be acquainted with the applicable laws.

Adopting the method of doctrinal analysis, this paper aims to identify and analyse consumer issues concerning the formation of e-contracts with special focus on a contract of sale of goods. All relevant laws on the formation of contracts in Malaysia are examined including the Contracts Act 1950 and the Sale of Goods Act 1957 (SOGA). Although both Acts have not been modified to suit the e-commerce, the applicability of certain basic principles of contract law cannot simply be disregarded. In addition, the Electronic Commerce Act

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2006 which was seen as an important step forward in resolving basic issues on e-commerce is analysed in order to determine the extent to which the Act fulfils this expectation. The reality of e-consumers problem in contracting on-line is illustrated by few reported English cases and the reference is also made to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce as well as United Kingdom law and European Union's Directives on e-commerce for the purpose of comparison. Arguing in favour of a comprehensive law on e-commerce, the study highlights the inadequacy of the existing law in dealing with basic issues of e-contracts which has resulted in an unjust disadvantage to e-consumers.

The Nature of Electronic Contracts and Legal Issues:

Electronic contracts (e-contracts) can be defined as legally enforceable promises or set of promises that are concluded using electronic medium (L.Kidd *et.al*., 2000). The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce merely states in Article 11 that a contract can be made by exchanging data messages and when a data message is used in the formation of contract, the validity of such contract should not be denied. In addition, the Electronic Commerce Act 2006, instead of defining an electronic contract, the Act provides legal recognition of electronic message in commercial transactions in section 6(1) and (2) and further reaffirms the validity and the legal effect of transactions by electronic means in section 7(2) of the Act. Therefore, it is crystal clear that the law recognises electronically formed contract as valid contract.

There are two main ways in which contract of sale of goods can be made via Internet. A common method is through the exchange of e-mail (Rebecca, 2004). Email can be used to make an offer and to communicate an acceptance of that offer. The email containing the offer or acceptance as the case may be can be sent through the offeror's (or offeree's) outbox to a server named Internet Service Provider (ISP) which provides email account and stores the message until the message is downloaded and then forwarded to the offeree's (or offeror's) inbox. The other method of contracting is by using the World Wide Web or also known as web contract. In this regards, a web site can operate as a shop window and it can act as a cashier (Nabarro, 1997). Normally, the vendor would provide a display of products on his website and indicate the cost of such products. A customer can scroll through the website previewing the items or products on offer in e-catalogue, click on the item for further information and if interested in the purchase, can place an order by filling in an order form and provides the credit card number. Then click "Pay" or "I accept" and clicking "Submit".

Another method that attracts e-consumers nowadays to buy goods on-line is through the chat services or social website. Among examples of chat services or social website are Internet Relay Chat (IRC), Yahoo Messenger (YM), Skype, Facebook, Twitter, MySpace, Where Are You Now (WAYN), Friendster, and many more. This method can be considered as a safe way to buy goods online because the goods being promoted and offered only among social friends that listed in one's account. Therefore, based on trust and know who the trader, some e-consumers prefer to use this kind of method. Among these three medium of contracting online, the most popular method amongst the e-consumer is via website (Adeline *et al*,2006), where the e-consumer can easily obtain the information of variety of goods, select and order just by browsing the e-catalogue. It is convenient and speedier compared to email. Meanwhile, chat services or social website is limited to friends only. Regardless of whatever medium used in concluding an e-contract, what is pertinent and should be noted is that contractual issues on the Internet been plagued by legal questions, as there are no specific provisions dealing with contract online especially in sale of goods transactions.

The discussion related to e-contractual formation began with the issue whether a computer was capable of making a contract. However, this issue is obsolete due to recent development of law where it is accepted globally that computers can be used to reach an agreement without any human involvement (C.C Nicol, 1998, Robin, 1996). The UNCITRAL Model Law in E-commerce and United Nations Convention on the International Sale of Goods (the Vienna Convention) as well as Article 2B of the US Uniform Commercial Code clarify that contract can be performed with intelligent agents without human involvement (Patrick & Jay, 2003). Nonetheless in a view to preserve the rights of e-consumers, the issue remains with regards to principles of formation of e-contract when the human element in the processing of the transaction is removed and the contract is performed electronically.

For a contract to be valid, the essential ingredients of a contract must be present. The common requirements to be present in an enforceable contract are offer, acceptance, consideration and capacity (Syed Ahmad Alsagoff, 2003, Treitel, 2003). The element of intention to create legal relation is not expressly required under the Contract Act 1950 as one of the elements but it has been added following the common law (*Phiong Khon v Chonh Chai Fah*). The technology does not change the necessities of these elements to form a valid e-contract of sale of goods but it creates new problems and challenges. However, the applicability of the existing law to the new problems without modification is questionable.

The requirement of offer:

For all contracts to exist in law there must have been an offer which is accepted. The law does not lend its weight to enforce the rights or liabilities of the parties if either one of these elements is not present (Lee & Ivan, 2009). An offer under section 2 (a) of the Contracts Act 1950 is the first element for the formation of a valid contract. An offer is when one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence. The offer can be made to a specific person or to a group of persons or to the public at large. When the offer is made to a specific person or a group of person it can be called as bilateral and when it is made to public at large it is called unilateral offer (Treitel, 2003).

In *Carlill v. The Carbolic Smoke Ball Company* (1893) the company advertised in a number of newspapers saying that it would pay £100 to anyone who caught flu after using its smoke ball for 14 days. The company further stated that it had deposited £1,000 at a bank to meet possible claims. Mrs. Carlill bought one of the smoke balls, used it as directed and still caught flu. She claimed the reward but it was refused, so she sued the company for breach of contract. The company put forward many arguments. One of such is that the offer was made with the whole world, which was clearly impossible. The court held that the company had made an offer with whole world and it would be liable to anyone who came forward and performed the required condition. In fact, this case is a good illustration of an offer made to the public and relevant to online situation due the nature of online is to make an offer to the entire world. However, in some cases, the offer is made confined to certain group of people depending on their locality or geographical boundaries. Therefore, in order to avoid confusion among the e-consumers and later difficulties regarding to whom actually the offer is made, the traders should be clear and certain in making their offer.

Offer v. Invitation to treat:

The offer is to be differentiated from an invitation to treat. While offer is an integral part of formation of a valid contract, invitation to treat does not have any legal recognition in contract law. In invitation to treat, a person holds himself out as ready to receive offers, which he may then either accept or reject. It is merely a preliminary communication while in negotiation (R.C. Henry, 2001). Thus, it is essential to know the stage of the proposal as it establishes when a contract is formed, so as to know exactly whether there is a right to sue. One impact of the Internet is that the line between advertisements and legal offers has been blurred. Thousands of websites advertise their products but they also make offer that are legally binding if a customer clicks the ‘Yes’ or ‘I Accept’ button, signifying the assent to the offer. The Internet advertisement may be considered as offers capable of creating a contract if a customer assents to the advertisement (Julian, 1999).

The existing Malaysian legislation does not provide any assistance to determine whether certain advertisement on the Net is invitation to treat or offer (Sarabdeen, 2004). One may argue that usually the advertisement on the web site is considered as an invitation to treat and not an offer. But there are other types of web advertisements that require positive action from the other party like providing with the credit card numbers and once the card number is provided the transaction is confirmed. For example, Amazon.com, a virtual bookstore advertises its books. Prospective buyers browse the web site of Amazon.com and select the books which they intend to purchase. Once selected the item, they will make payment through credit card. With this a purchase is completed and the buyer merely waits for the books to be delivered. If the web store is considered as not making an offer, there would be no contract until the store owner either informs the buyer his intention of performance or performs the contract by sending the books ordered which will eventually slow down the Internet transaction. If this occurs, it may frustrate the growth of e-commerce and it would deprive the reasons why consumers shop online. Based on the study conducted by ACNielsen in year 2004, saving time and convenience are most prominent factors that motivates consumers to shop online. Moreover, according to Rowley J. (2003), busy consumers prefer shopping via Internet in contrast to traditional bricks-and-mortar method of shopping due to speedier means and find shopping more convenient as online merchants serve their needs individually.

The issue of offer versus invitation to treat in online situation been discussed in several English cases. In *Re Argos* 1999 (unreported) (Sheriff L, 1999), Argos is a giant chain retailer. It mistakenly advertised on its web site argos.co.uk the 21-inch televisions as £3 instead of £3,299. Almost one million orders were made before the mistake was noticed. One buyer alone placed an order for 1700 television sets. Argos then alleged that the advertisement was simply an invitation to treat or a mistake and therefore, refused to honour the purchase order. Eventually, the case was settled out of court where the argument by Argos that the advertisement is not an offer by relying on the doctrine of mistake been accepted by the buyers without further contention. In addition, there is no automatic confirmation or acknowledgement of an order from Argos, as it could be deemed to be an acceptance.

This may be compared with *Kodak's case* (unreported) in early 2002. During a sale, Kodak advertised its digital camera on their web site for £100. Customers who placed an order will receive an automated response, confirming their orders. The price was a mistake. It should have been £329. Kodak refused to honour the orders, based on several reasons. One of the reasons was that the display of price-marked goods on their web site is not an offer to sell, but is merely an invitation to treat. That is, an invitation to the customer to make an offer to buy. However, after a month long-dispute, Kodak bowed to pressure and honoured the agreement. Its argument that there was no binding contract is not valid. This is because the customers' orders were accepted and confirmed. In other words, the moment the confirmation was sent by Kodak, it indicated the acceptance on Kodak's behalf and a contract was created. Furthermore, the automated response had acknowledged the order and referred to it as the "contract" (Izura *et al*., 2004).

In another incident, the *Wstore* offered 99% discount on Kinda PC's. They advertised PC for just £12. The normal price of the PC was £1200. Before the company rectified the mistake two customers placed their order. But the company insisted that they were not bound by the contract even if an automatic message of acceptance had been sent out to the customers. The company further argued that the parties are bound by the terms and conditions. One of the terms said that the company reserves the right to remedy any obvious mistakes in the listed prices by charging a proper commercial value price to rectify the error and the argument been accepted by the court (Richardson, 2000). The above cases show that the more specific the offer, the more likely it can be interpreted as an offer. To avoid this many online companies make it clear that the website advertisement is not meant to be an offer.

If the advertisers would like to treat the advertisements as invitation to treat, it must be spelt out unequivocally. Before a customer is permitted to make a purchase order, a statement should be made on a web site in a prominent pace that the holding out of the goods or services on such web site constitutes an invitation to treat only and is not an offer. Further safeguards may be installed by creating a "checkout counter" icon on the web page and by making it mandatory for the customers to click onto the icon before the offer of the purchase procedure can be completed and also clearly stating that the client will conclude the contract (Sarabdeen & Noor Raihan, 2003). Therefore, in order to be just to the e-consumers, it is the duty and responsibility of the e-merchants to be very clear in putting the offer in the Net especially in sale of goods transactions.

In Malaysia, neither the Contracts Act 1950 nor the Sale of Goods Act 1957 deals with an online advertisement or auction. However, the case of *M&J Frozen Food Sdn Bhd* (1994) suggests that the court may treat offline advertisement as invitation to treat. On the other hand, treating the web advertisements as invitation to treat will be of disadvantage to consumers, as the consequence is that the merchant is given the freedom to accept or reject the conclusion of contract even after the consumers had paid for the items. Thus, it would be considered as unfair and unjust to the e-consumers. In comparison, the EU Directive on Electronic Commerce 2000 (Directive 2000/31/EC) provides solution to this issue in favour of e-consumers. Article 11 of the EU Directive states that a consumer who is accepting a service provider's offer is a real offer and not an invitation to treat from the provider to make offers, and a real acceptance, and not an offer from the consumer. It has been argued that the reason for this provision is to avoid giving the supplier or merchant a freehand to conclude the contract or not (Cavanillas, 2001). It may also be argued that common law cases on invitation to treat were primarily dealing with the enforcement of a criminal statute (*Fisher v Bell)* and thus should no longer be relied upon as the basis for the creation of legal rights of parties in e-commerce. Therefore, it is submitted that in preserving the rights of e-consumers, it is necessary for the courts to consider that in a virtual world, the advertisements by web site owners or content providers to the world at large, would amount to proposals and further it would be indicative of the fact that they are makers of the proposals. If the proposals are accepted, then the makers of the proposals will then become promisors.

The Requirement of Acceptance:

After a valid offer is made, the next stage for formation of a valid agreement is an acceptance of the offer. While the offer is still open, the acceptance must be made. Thus, under section 2(b) of the Contracts Act 1950, the proposal is said to have been accepted when the person to whom the proposal is made signifies his assent thereto. The acceptance must be absolute and unqualified (Andrew Phang Boon Leong, 1998). It means that the offeree must agree to each and every term in the offer and does not add additional terms. If the offeree adds additional terms in the acceptance or requests a change in the offer, the offeree has made a counter offer and becomes the offeror. Counter offer does not bind the parties involved. Therefore, the same rule may apply in the context of e-contract.

An acceptance can be in any form; orally or in writing or impliedly from a person's conduct as stated in section 9 of the Contracts Act 1950. However, silence cannot normally amount to an acceptance. No special formalities are prescribed under the Contracts Act 1950 as well as under the SOGA 1957. The acceptance must be made within prescribed time or within a reasonable time from the date of offer. An offer will lapse with the passage of prescribed time and if no time is mentioned then it will lapse with a reasonable time as stated under

section 6(b). What is a reasonable time is a question of fact depending on the circumstance of each case. Similarly, under the SOGA a contract of sale comes into being by the acceptance of an offer to buy or sell goods for a price. However the SOGA does not detail out the way an acceptance can be made and thus the general principles of acceptance under contract law apply to a contract of sale of goods be it off line or on-line. What important is that both Acts agree on the essence of the contract is the acceptance of the offer on terms mutually agreed between contracting parties as an agreement is a consensus ad idem or a meeting of minds.

The issue of concern is the moment of e-contract formation. Generally, a contract is formed the moment the communication of acceptance is complete. The acceptance is effective only when it comes to the knowledge of the offeror. Postal rule and instantaneous means of communications like fax, telex are generally used to communicate acceptance. If the postal rule (*Herthorn v Fraser)* is used the contract is formed the moment the letter had been put in the post box or handed it over to the post office. When the instantaneous means (*Entores Ltd v Miles Far East Corporation*) of communication is used the contract is formed when the acceptance came to the knowledge of the offeror. However, the issue of communication of acceptance needs to be revisited as regards to e-mails and web based acceptance. The question arises as to which rule applies when dealing with contracts made via email? Would it be postal rule or is it regarded as instantaneous communication? In order to determine which rule is applicable, it is necessary to understand the manner in which an email is sent. An e-mail communication is first sent to the Internet Service Providers (ISP). Since there are various ISPs, essentially, a message travels between one ISP to another, irrespective of whether it is within the same country or going to other countries. The ISP will then sent that message to the actual recipient, when the recipient sends a request to his ISP to download the message that it has received and were addressed to the recipient only. Once the downloading is completed, the message actually will reach the recipient. Looking at the manner in which an e-mail communication operates one may say that e-mail is akin to postal rule as stated in section 4(2)(a) and 4(2)(b) of the Contracts Act 1950. The offeror is bound by the acceptance once the acceptance is put in a course of transmission to the offeror so as to be out of the power of the acceptor. Thus once the message is sent by the acceptor to his ISP, the message can be considered out of control of the offeree (Lar Davies, 1997).

This argument is supported by the article 15 of the UNCITRAL Model Law on Electronic Commerce which states that an offer and acceptance will be effective at the moment the message enters an information system outside the control of the originator. Accordingly, the message is to be effective against the other party when the message was received and entered by the addressee's information system. The acceptance will be effective once the acceptance is entered into the offerer's information system. This provision implies that the data message communication is similar to postal rule. On the other hand, if the instantaneous rule is applied, then the next question would be 'is there a contract when the acceptance is received by the server or when it is actually received and read by the offeror?' This is akin to the situation where the telex or fax is received by the telex or facsimile machine but has not been read by the offeree or when the message is received by the offeree but has to be translated to a language understood by the offeree. It has been argued that if the parties are in closed network and have entrusted their communications to a trusted third party such as common server over which they have control, then the postal rule could apply to such communications. This would require the parties to ensure they have been connected to that common server and their messages have been successfully transmitted. In the case of an open network such as the Internet, a better approach would be for the offeror to exclude the operation of the postal rule and to assert that a contract exists only upon receipt of acceptance (Chris, 2004).

One who claims that email communication should be considered as instantaneous will cling to the argument that post office will send the letters to the addressee manually and the letter is exposed to possibilities of being lost or taking a long duration to be delivered. On top of that, the letter could be missing or cannot be traced as it is unrecorded. But in email system, the sender is notified if the email could not be sent to the recipient and the sender also may know when the email is received by the recipient by adopting updated technology in the email system. However, it is to be noted that the notification of non-delivery of emails and return receipt confirmation are not always common. One may receive or may not receive depending on the network and server. There are so many instances where the mails were lost in the cyberspace. Therefore, it is safe to argue that email communications can be considered as postal because there is an ISP as a third party who may delay the delivery or the mails may get lost without notifying the sender. If the email communication is considered as postal the contract is concluded once the offeree sent the acceptance message. Thus the place of formation of contract would be the location of the offeree and not at offeree's server nor at location of the offeror (Chissick & Kelman, 2000). In fact, the applicability of postal rule in an email contract gives advantage to the e-consumers in sale of goods contract, especially if the consumer is an offeree. If the offeree posting his acceptance via email, he is able at that point to enforce the agreement with the proposer and before it comes to the knowledge of the offeror, he is able to revoke his acceptance by speedier means of communication.

Meanwhile, in a web based contract the communication of acceptance with a server using a program that makes offers and receives acceptances will likely be considered as instantaneous. Many web sites employ forms to receive comments and sometimes commercial orders from browsers. These sites allow browsers to fill in the forms and submit them by clicking on a submit button. An instant reply will appear stating that the form has

been received. As such the nature of this transaction is instantaneous, as either party will know whether the link has been broken (Geraint & Stephen, 2006) and the acceptance will be complete upon knowledge of its acceptance. Nonetheless, the question arises as to when was a contract formed if it falls under instantaneous rule? In the case of *Schelde Delta Shipping v. Astartte Shipping Ltd* (1995) the House of Lords held that if an acceptance is sent outside the normal business hours receipts are not effective until the opening of business the next day. This case implies that an acceptance is not effective until the offeror downloads the message from the server. Whether he reads it or not is immaterial. Chissick (2000) pointed out that there is a possibility of holding an offeror liable if the email acceptance arrives at a computer under the offeror's control provided he is acting as an ISP. However, if he uses an ISP, the acceptance will be effective only after the email is downloaded off server onto the computer. This goes contrary to the Model Law which states in Article 15 that unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is when the message has "entered the information system of the addressee". Article 15 imposes greater degree of responsibility on the offeror to make sure that the message had entered the system. As long as it entered the system the contract is effective regardless the message was downloaded or not. The Model Law further states that if there is a designated information system but the message was sent to another system the data message is received when it was retrieved. The Article gives the impression that as long as the message is retrieved, the message is received regardless the message is read or not.

As the Malaysian Contracts Act has not yet been amended to cater the need of innovative consumers, there is no provision on the legal effect of e-mail communication or web based contract. However, the Electronic Commerce Act 2006 under section 7(2) states that a contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation. In addition, section 7(1) of the same Act also states that in the formation of contract, the communication, acceptance and revocation of proposals and acceptances or any related communication may be expressed by an electronic message. Therefore, e-mail communication or web based contract is legally enforceable. However, both Acts do not provide an answer as to when and where the e-contract is concluded (Naemah, 2008). In fact if the mode of acceptance is clearly determined, then this will help the online merchants to select the mode of acceptance and thereby can select the choice of applicable law and the jurisdiction.

Revocation of Offer and Acceptance:

An offer can come to an end in a number of ways as stated under the section 6 of the Contracts Act 1950. Revocation is one of the ways to terminate an offer. It may be effective anytime before the offeree accepts the offer as stated under section 5(1) of the Contract Act 1950 provided that the revocation is communicated to the offeree. If the acceptance is to be made by post (*Byne v. Tienhoven)* like an e-mail, the revocation of an offer must be communicated before the offeree posting the acceptance. On the Internet, the offeror can revoke an offer using e-mail, but whether it can be revoked by placing a notice on a web site is doubtful. Since the revocation notice needs to be actually received by the offeree, a web display will probably not suffice. The offeror's freedom in revoking an offer depends on how quickly the revocation is produced and the convenient means of producing evidence on the reception of the revocation.

It is a well established principle of law as stated under section 4(3) and 5(2) of the Contracts Act 1950 that the acceptance can be revoked at any time before the acceptance comes to the knowledge of the offeror, but not afterwards. If the acceptor used the postal rule then he has to inform the revocation before the acceptance reaches the offeror. However, if he uses instantaneous mode of communication, he will have no opportunity to revoke the acceptance as it is only effective after it comes to the knowledge of the offeror. Therefore, if the e-mails are not considered as instantaneous means of communication, the consumer may revoke the acceptance to his advantage if after clicking the 'accept' button, he changes his minds and he is able to use some speedier means such as phone calls, faxes or telexes the vendor. Although it may be seen as impracticable, it is arguably possible and acceptable. In fact, the postal mode gives the power and advantages to the e-consumer to accept and revoke the acceptance at anytime they intent to, as long as the acceptance has not reached the offeror.

Intention to Create Legal Relation:

An agreement itself does not create a binding contract. It must be shown that the parties had the intention to be legally bound. The general presumption is that the business agreements are intended to face the legal consequences unless the parties specify otherwise. In the context of online contract, the existence of intent is normally automatic and the rebuttable presumption is that legal relationships are intended. Generally, it is up to the courts to ascertain the intentions of the parties from the language used and the context in which they are used. However, a deceptive website may dupe a consumer into making an unwanted contract. For example, an online merchant offering a range of free trial goods with a set of survey questionnaire in order to obtain the opinion from the e-consumer whether the goods can be marketable or not. The online merchant may construct a

web site which gives no purchasing information and merely displays the products which the e-consumer may choose for trial and a "Save" or "Download Now" button. An unsuspecting customer will assume that the good is free and has no intention of creating a contract when the customer clicks the button. After the good has been delivered, under the law the online merchant cannot demand payment because of the consumer's absence of intention to create legal relation. But in reality, an ignorant consumer may think they are bound to pay when the bill is issued to them.

To avoid this, the law should ensure that commercial web sites explicitly state the prices and terms of their products. At the same time, the consumer should go through a subsequence of web pages detailing the terms and conditions of the transaction before making a purchase. Therefore, the e-consumer should be aware the tactics and traps used by the unscrupulous trader in inducing them to enter into an unwanted e-contract. On the other hand, the e-merchant also should be transparent in making an online contract with the e-consumer in order to build trust in them. In addition, for preserving the rights of e-consumer, the EU Council Directive on E-commerce (87/102/EEC) requires three steps to be taken by the e-shop owner as a contractual process before concluding the contract. They are offer, acceptance and acknowledgement of receipt. This will ensure that the acceptor knows that he is entering into a contract and there will be legal consequences when there is a breach.

One may argue that e-commerce lack contractual expressiveness like pushing of a button or shaking hands. The Directive under article 10.2 considering this type of situation specifically requires the Member States to provide with ways to ensure that the parties can give their full and informed consent. It further requires the trader to provide an opportunity to e-consumers or buyers to detect and correct mistakes and errors as stated under article 10.1. In other words, there is requirement to take measures like "double clicks" in the e-commerce web site to ensure complete consent. A double click entails the first click ('I agree') which expresses the consumer's consent to purchase and a second click ('I confirm') confirming the purchase after the acknowledgement of receipt of the purchase order is sent by the seller to the consumer. The contract is formed upon the consumer's second 'I confirm' click (Vincent, 2000). The application of this method is much awaited in Malaysia to make the consumers to be well informed and to avoid consumer grievances in purchasing goods over the Internet.

Consideration:

The existence of offer and acceptance and intention to create a legal relation does not make a contract. There is a need for consideration. Consideration may consist of either actual performance, such as delivery of goods or services or payment for them or a return promise (R.K. Suri *et al.*2001). The element of exchange is known as consideration. A contract without consideration is void as per section 26 of the Contracts Act 1950. Consideration is an act or abstinence or promise by a promisee or by any other person at the desire of a promisor. In online web based contract the position is likely to be straight-forward between contracting parties in buying goods or services over the Internet and very often the consideration is executed in nature. The customer has to do some positive act like paying by credit card or e-cash and the retailer will promise to perform his part. The issue on consideration in online contract will be on "click-wrap" agreements. A web site which offers range of free products for trial requires a customer to agree to certain terms and conditions, which exclude the liability or prohibit commercial use. The concern is whether a click-wrap agreement of such nature has any consideration. Since free goods or access to a web site represents a benefit there is a possibility to hold that there is a consideration. On the side of e-consumers, obtaining goods without having to pay even a single cent is a bonus. However, the applicability of section 26 of the Contracts Act to decide on the availability of consideration to solve the issue of free goods is not clear.

Capacity:

The next issue worth mentioning in formation of e-contract is on capacity. It is assumed that everyone is capable of entering into a contract. However, minors, mental patients and drunks are in need of legal protection because of their age or inability to appreciate their own actions. Therefore, they are generally not competent to enter into a contract. All agreements are contract if they are made by free consent of the parties competent to contract. Under section 11 of the Contracts act 1950 every person is competent if he is major, of sound mind and not disqualified from contracting by any of the existing law. The main concern in an online contract is the possibility of minors entering into commercial contracts as a common saying is that "on the Internet, no one knows you are a dog; neither anyone can tell if the other parties are drunk, insane, bankrupt or a child". 'Minors' refer to individuals who have yet to attain the status of an 'adult'. A minor is regarded as incapable of entering into a contract as he or she is unable to fully comprehend the seriousness of the contract and only adults who are mentally capable can make legally binding contracts. A person who is below 18 years old is a minor in Malaysia as stated under section 2 of the Age of Majority Act 1971. In other words, one has attained the age of majority at

the age of 18. However, one has to be careful when dealing with the Internet. Different countries have different laws, and thus, different age of majority.

Generally, if a minor did make a contract, the contract is regarded as void. In fact, neither the Contracts Act 1950 nor the Sale of Goods Act 1957 provide expressly for the effect of an agreement that has been made by parties who are not competent to contract. The Privy Council in the Indian case of *Mohori Bibee's* held that the combined effects of sections 10 & 11 of the Indian Contract Act, which correspond to the local provision rendered such contracts void (Wu Min Aun, 1994). Essentially, this means that in the eyes of the law, a minor cannot sue or be sued upon under such void contract. In the Contracts Act 1950 under section 69, the contracting party can ask for reimbursement if the contract with a minor was entered into for necessaries. The word "necessaries" is neither defined in the Contracts Act 1950 nor under the Sale of Goods Act 1957. All that is said under section 69 of the Act is that what is supplied must be suited to the minor's condition in life. However, "necessary goods" been defined under section 2 the English Sales of Goods Act 1893 as good suitable to the condition in life of such an infant and to his actual requirement at the date of sale and delivery. Thus the person claiming that he had supplied goods for necessaries has to prove the condition of the life of the minor and the need at the time it was delivered (*Chapple v. Cooper*). Like contract for necessary goods, a contract for delivery of necessary services to a minor will also be enforceable.

In the contact of on-line shopping, one of main concerns is the ability of minors to access both information and products which may not be sold to minors. The ability of minors to make binding contracts is limited to what is termed as necessaries. If it is for necessaries, then the supplier is entitled to be reimbursed from the minor's property as provided under section 69 of the Contracts Act 1950. However, purchases of goods by minors which are not necessaries do not create any liability for minors. As in case of *Leha binte Jusoh v Awang Johari bin Hashim*, the Federal Court held that the effect of a minor making a transaction is that no legally enforceable contract comes into being as the minors is considered as incompetent to enter into contracts which are not necessaries. This means that a minor may be able to recover from the vendor the price pursuant to section 66 of the Contracts Act. In an online contract if the minor had purchased unnecessary goods like entertainment CDs, he can claim the purchase money as in section 66. Similarly, had a minor purchased goods online using his parent's credit card, the minor or his next friend will be able to recover any money paid, even though the contract is discovered to be void (*Yong Mok Hin v United Malay States Sugar Industries*). As a precautionary measure, the vendor should obtain as much information on the person clicking the "Accept" button as possible for evidentiary purposes in case enforcement of the terms of the license is required. The vendor also should take opportunity to obtain specific information from the purchaser, such as his/her name, address, age, etc.

The only possibility for an e-business to enforce a contract entered into by a minor is where the minor misrepresented or cheated the other party of his age. However, in the case of *Mohamed Syedol Ariffin v. Yeoh Ooi Gark* , the plaintiff action to enforce a contract entered into by a minor failed because the plaintiff failed to prove that there was a misrepresentation. Thus the court held that the contract is void. If the misrepresentation had been proven in this case the court might have ordered the defendant to restore the benefit received. In UK the courts developed an equitable principle of restitution which requires the infant to return the benefits received which are still in his possession as decided in *R Leslie Ltd v. Sheill*. This is based on the principle that a minor should not be allowed to unjustly retain a benefit received under a contract. In the words of Turner LJ in case of *Nelson v Stocker* [1895] 45 AER 178 "the privilege of infancy … cannot be used by infants for the purposes of fraud". However, authorities suggest that equitable relief is given to recover only so much of the money or property as is still identifiable in the possession of the minor (*Stock v Wilson*). Therefore, the equitable principle of restitution is a possible solution that can be applied to preserve the right of e-consumer in the situation where the e-consumer is a buyer of a good offered online and the minor is a seller who makes false representation that he is a major.

Looking in the context of e-consumer protection by viewing the case of a minor that had used his or her parents' credit card to do online purchase, what are the parents right as the third party against both minor and the trader? It may be argued that as long as the minor can claim back the monies from the trader due to a void contract that would not cause a problem to e-consumer. However, if the trader put the liability on the e-consumer to pay on the action did by his minor, then the e-consumer may contend that the person who purported to do the transaction is not authorized to do so. Besides, another way to further protect the identity of an e-consumer in e-contract, the contract should be in written form and there should be a third party to verify the status of each contracting parties upon signing the contract. This can be done by the use of digital signatures which are verified by a certification authority. Therefore, the writing and signature requirement will be analyzed in the next part of this discussion.

Writing Requirement:

According to the Malaysian Interpretation Act 1967, "writing" or "written" may include typing, printing, lithography, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved. The definition may be interpreted widely to cover electronic records. Meanwhile, the UK Interpretation Act 1978, schedule 1 defines 'writing' includes typing, printing, lithography, photography and other modes of representing or reproducing word in a visible form. However, the UK Act does not include electronic records as writing. But one may argue that the phrase "other modes of representing or reproducing word in a visible form" is wide enough to cover electronic records. Writing preserves the agreement in a tangible medium and protects against any sort of oral promises that goes contrary to the intention of the parties (Paul, 2005).

The law may require certain contracts to be made in writing on paper, for example a hire purchase contract as per section 4(a) and (b) of the Hire Purchase Act 1967 must be in writing and signed by the parties, and if this requirement is not complied, the agreement will be void. Other types of contracts which specifically required by the statutes to be put in writing and signed are leases for over three years, consumer credit, certain forms of insurance, deeds, wills and the transfer of shares (Md. Abd Jalil & Leo, 2004). It is clear that there are only few instances where a contract is required by law to be in writing and signed and that most of the online contracts will not be affected. Nevertheless, it is always advisable to have a contract explicitly written and signed for it increases certainty, provides evidence and prevents the creation of hasty or careless contracts. Furthermore, different jurisdiction may have different and far more stringent contract requirements. In the global context of e-commerce, online business may need to comply with foreign requirements to ensure enforceability (Roy, 2002).

The issue is whether the courts will consider online or other digital contracts as "writing". The UK Court in *Derby & Co Ltd. V. Weldon (No 6)*, held that computer databases (files) are valid documents and admissible in courts. The Malaysian Evidence Act 1950, under section 90A to 90C also admits a document that is produced by a computer (an electronic record), if the computer which produced the document was used in the course of its ordinary use and the document was tendered in court by a person who is responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used.

The Contracts Act 1950 is silent on how to meet the writing requirement when the contract is made by using a data message on the Internet. The Contracts Act therefore produces uncertainty regarding a writing requirement in respect of e-contracts. However, this uncertainty over the writing requirement may be removed by the Digital Signature Act 1997 (DSA) where section 64(1) of the Act states that a digitally signed message is deemed to be a written document. In addition, section 8 and 9 of the Electronic Commerce Act 2006 also contains provisions mentioning that where the any law requires information in writing and a signature, then the requirement of the law must be fulfilled. In fact, if the online contract is available in writing, whenever the conflict arises, it could help the e-consumer later in preparing the evidence.

Signature Requirement:

Other issues of e-contracts entail validity of digital signature and authentication of contracting parties. A signature is the writing of some name or identifying mark on a document. However, a digital signature is not a signature but a process that uses encryption and algorithms to encode documents. The process creates a product that identifies the person who uses the process. As the person using that particular process is only one or his agent, the other party can safely rely on that process or digital signature.

In fact, digital signature legislation is becoming of increasing importance to modern transactions, particularly those conducted on the Internet. The Malaysian Digital Signature Act 1997 is no exception. The Act ensures authenticity and integrity of data messages communicated through the Internet to make online contracts, and thus ensures security of communication through the Internet. A digital signature may be likened to a house with open doors and windows through which anybody can peep or view what is happening inside the house. As a result, users suffer from insecurity of communication. Since other Internet users, legitimate or not, may view messages, alter them, or copy them. This panic of uncertainty and insecurity is removed by applying encryption technology. The recipient can effectively determine the identity of the sender and the authenticity as well as integrity of the message sent, by decrypting the message, using the sender's public key listed in a valid certificate of the sender issued by the licensed certification authority. The recipient also can effectively determine whether the message has been altered in the course of transmission (Chong, 2000).

The Act also ensures the evidential value of digitally signed message. This will not be denied for the only reason that a data message was used to make a contract. Further, it will be deemed to be an original document for evidential purpose to be used in court. In *Re a Debtor* (No 2021 of 1995), it was held that a faxed copy of a signature satisfied a relevant statutory signature requirement. The judge suggested that if the signature was digitalized and later appended to the fax, the document should be regarded as signed. In addition, in section 65 of the Act provides that a copy of a digitally signed message shall be as valid, enforceable and effective as the

original of the message. Meanwhile, the Evidence Act 1950 (Malaysia) (amended in 1997) under section 90A also recognizes a computer document for evidential purpose in the court.

To provide digital signature certificates to the subscribers, the Digital Signature Act has established certification authorities who issue certificates to subscribers to send messages using digital signature technology. The certification authority provides a key pair to subscribers. The private key is a secret key and it is the duty of the subscriber to keep this key secret at all times. The public key is made public and listed in the certificate issued by the certification authorities. At present the Malaysian Government has licensed Digicert and Msctrusgate as certification authorities (Zinatul, 2000). Beside of the all the benefits offered by digital signature to the world of e-commerce, there are several problems raised by the use of it, namely the digital signature capabilities or facilities are not free and it is costly to train representative. Nevertheless, in most cases the company will provides the e-consumer with the authentication signatures for free which reveal the identity of e-consumer while regularly transacting online with that particular company. Some also argue that, since there is no uniform of digital signature system, the use of such system may have limited application. However, in fact, the application of digital signature in e-commerce has given great contribution on promoting e-commerce in Malaysia because it creates greater certainty to online contracts.

Conclusion:

This article addresses the issues of e-contract which is the fundamental of forming an e-transaction. Despite regulations that have been promulgated by international organizations either by UNCITRAL Model Law or EU Directive, the uncertainty continues to exist as to when an electronic contract is treated as being concluded. On the whole, e-commerce seems simply to require the application of traditional legal rules to the new context of Internet selling. Since online contracting is becoming commonplace, the law must change to keep up with the technology where the law must see e-consumer protection as an urgent item to be dealt with in the near future. Therefore, the amendment of existing Malaysian law on contract generally and a sale of goods contract in particular is timely and very much needed for the protection of e-consumers to increase consumer confidence in e-commerce as well as making them comfortable in utilizing the information dossier for transaction purposes. In the wider context, some of the sections in the existing contract formation principle might be better addressed by a new set of principles specifically designed for on-line transactions. Thus, the idea of having a comprehensive law on e-commerce should be seen as a way forward for this dynamic industry which ultimately benefit all parties involved including e-consumers.

References

Adeline Chua Phaik Harn, Ali Khatibi, Hishamuddin Ismail, 2006. E-commerce: A Study on Online Shopping in Malaysia. Journal of Social Science, 13(3): 231-242.

Andrew Phang Boon Leong, 1998. Chesire, Fifoot and Furmston's The Law of Contract (Singapore and Malaysian Edition). (2nd ed). Butterworth Asia. *Byne v. Tienhoven* [1880] 5 CPD 34.

Nicol, C.C., 1998. Can Computers Make Contracts?. Journal of Business Law, January Issue, 35-49. *Carlill v. The Carbolic Smoke Ball Company* [1893] 1 QB 256. *Chapple v. Cooper* [1844] 153 ER 105).

Chissick, M., A. Kelman, 2000. Electronic Commerce: Law and Practice. London: Sweet & Maxwell.

Chong John, 2000. A Primer on Digital Signatures and Malaysia's Digital Signature Act 1997. Computer Law & Security Report, 14(5).

Chris Reed, 2004. Internet Law: Text & Materials. (2nd ed). Cambridge University Press. *Derby & Co Ltd. V. Weldon (No 6)* [1991] 1 W.L.R. 652.

Diyanah Anuar, 2011. RM1.8b dibelanja beli barang, khidmat online. Berita Harian, 22 April 2011 at www.berita harian.com.my accessed on 22 April 2011. *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327.

Fernando, 2001. International Electronic Commerce: Legal framework at the beginning of the XXI century. IO Current International Trade Journal 10. *Fisher v Bell* [1960] 3 All ER 731.

Geraint Howells, Stephen Weatherill, 2006. Consumer Protection Law. (2nd ed.) Ashgate Publishing Ltd.

Izura Masdina Zakri, Tay Pek San, Chew Li Hua, 2004. Introduction to Cyberlaw of Malaysia. Kuala Lumpur: Advanced Professional Courses.

Julian Ding, 1999. E-commerce Law & Practice. Sweet Maxwell Asia.

Kidd, L., Donnie, Jr., H. Daughtery, Jr., 2000. Adapting Contract Law to Accommodate Electronic Contracts: Over view and Suggestions. Rutgers Computer and Tech L.J, 12: 225.

Lar Davies. 1997. Contract Formation on the Internet: Shattering a Few Myths. In Edwards and Waelde, Law and the Internet: Regulating Cyberspace. Hart Publishing, 1997, pp: 106.

Lee Mei Peng, Ivan Jeron Detta, 2009. Business Law. Oxford University Press. *Leha binte Jusoh v Awang Johari bin Hashim*[1978] 1 MLJ 202. *M&J Frozen Food Sdn Bhd* [1994] 1 MLJ 303.

Md. Abdul Jalil, Leo D Pointon, 2004. Developments in Electronic Contract Laws: A Malaysian Perspective. Computer Law & Security Report, 20(2). *Mohamed Syedol Ariffin v. Yeoh Ooi Gark* [1916] 2 AC 575.

Nabarro Nathanson, 1997. Laws of Internet. Butterworths Asia.

Naemah Amin, 2008. Legal Protection for Consumers in Distance Selling Transactions. In the proceeding of the12th National M ACFEA Conference 2008, Residence Hotel, UNITEN, 12th August 2008.

Parsons, A.G., 2002. Non-functional Motives for Online Shoppers: Why We Click. Journal of Consumer Marketing, 19(5), 25-39.

Patrick Quirk, Jay Forder, 2003. Electronic Commerce and the Law. (2nd ed.). John Wiley & Sons Australia Ltd.

Paul Todd, 2005. E-commerce Law. Cavendish Publishing Ltd. *Phiong Khon v Chonh Chai Fah [1970] 2 MLJ 114. R Leslie Ltd v. Sheill* [1914] 3 KB 607.

Henry, R.C., 2001. Business Law: Ethical, International & E-commerce Environment. (4th ed.). London: Prentice Hall.

Suri, R.K., Parag Diwan, Shammi Kapoor, 2001. Information Technology Laws: Laws Relating to Cyber and E-commerce. ILBS.

Rebecca Ong, 2004. Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong. International Journal of Law and Information Technology, 12(1): 101-122.

Richardson, T., 2000. "Wstore offers 99% discount on PC-kinda, available at: http://www.theregister.co.uk/content/archive/9153.html.

Rowley, J., 2003. Product Search in e-shopping: A review and research proposition. Journal of Consumer Marketing, 20(1): 124-135.

Roy J. Girasa, 2002. Cyberlaw: National and International Perspectives. London: Prentice Hall.

Sarabdeen Jawahitha, 2004. Consumer Protection in E-commerce: Analyzing the Statutes in Malaysia. Journal of American Academy of Business, 14 Issue March.

Sarabdeen Jawahitha, Noor Raihan Ab. Hamid, 2003. Electronic Contract and the Legal Environment. International Research Foundation for Development (IRFD) Virtual Conference World, Forum on Information Society (WFIS), 1-21. *Schelde Delta Shipping v. Astartte Shipping Ltd* (1995).

Sherriff, L., 1999. "Argos £3 TV fiasco provokes test-case lawsuit", available at http://www.theregister.co.uk/content/archive/6684.html. *Stock v Wilson* [1913] 2 KB 235.

Syed Ahmad Alsagoff, 2003. Principles of the Law of Contract in Malaysia. (2nd ed.). Lexis Nexis.

Tom Allen, Robin Widdison, 1996. Can Computers Make Contracts?. Harvard Journal of Law and Technology, 9(1): 25-52.

Treitel Guenter Heinz, 2003. The Law of Contract. (11th ed.) London:Sweet & Maxwell.

Vincent Alain, 2000. Commentary of Formation and Enforceability of Contracts: The UNCITRAL Model Law on E-commerce and the EU Directive. World Internet Law Report 01/02. *Yong Mok Hin v United Malay States Sugar Industries* [1976] 2 MLJ 9.

Zinatul A. Zainol, 2000. Electronic Commerce: A Comparative Analysis of the Malaysian Digital Signature Act 1997 and the Singapore Electronic Transactions Act 1998 at www.bileta.ac.uk/00papers.htm.