1.0 Introduction

The World Wide Web (WWW) has brought new opportunities and challenges to various people. The businesses utilize it for their benefit by expending their activities not only in physical space but also in virtual space in search of the potential customers. Thus contracting becomes a fundamental element in e-commerce world. The electronic contracting raises various new legal issues. The general inclination of the legislature and the legal profession is to apply the existing law to the new sets of virtual commerce problems without much change; even where modification is necessary or unavoidable to protect the interest of e-businesses and e-consumers.

This paper seeks to analyse, inter alia, general principle of contracts, forms of electronic contracts, moments of formation of contract, along with the applicability of principles of click wrap agreement and digital signature in an e-contract in comparison with the Hong Kong, UK, US statutes and European Union’s Directives on e-commerce.

2.0 Electronic Contracts

“Electronic contracts” may be said as legally enforceable promises or set of promises that are concluded using electronic medium.1 The UNICITRAL Model Law on Electronic Commerce, instead of defining an electronic contract, merely states that a contract can be made by exchanging data messages and when a data massage is used in the formation of contract, the validity of such contract should not be denied.2 However, the Article 2B of the US Uniform Commercial Code which was later incorporated into the Uniform Computer Information Transaction Act 1999 states that an electronic contract is a transaction formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as routine step in forming the contract. This explanation replaces the “writing” requirement with a “record” to equate electronic record with paper records and accepted electronically formed contract as valid. However, the

---


2 Article 11
US Act does not define electronic contract but only discusses the methods of forming a valid contract.\(^3\)

The electronic or e-contracts may take the form of e-mail contracts or web contracts.\(^4\) In the first type of contract the sender of an offer or acceptance types it including e-mail address and sends it to the recipient as it is done in an offline environment. The difference in e-mail related contract is that the e-mail requires the technical assistance of a third party who is called as Internet Service Provider (ISP). The ISP provides e-mail accounts and stores the message until the message is downloaded. A contract can be concluded exclusively by e-mail communication only or it can be mixture of web offer and e-mail acceptance.

A web contract is concluded by mouse click only. In a virtual shop the supplier will place an e-catalogue, the customer then has to tick a box to select particular item. In order to complete the order, the purchaser has to provide the credit card number and click “Pay” or “I Accept” or similar button.\(^5\)

According to the Organization for Economic Cooperation and Development\(^6\) Internet business will exceed $ 1 trillion by year 2003. The Forbes European Internet Survey 1999\(^7\) reveals that e-commerce revenues for year 2004 would be as follows:

<table>
<thead>
<tr>
<th>Region</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>North America</td>
<td>$ 3.5 Trillion</td>
</tr>
<tr>
<td>Asia Pacific</td>
<td>$ 1.6 Trillion</td>
</tr>
<tr>
<td>Western Europe</td>
<td>$1.5 Trillion</td>
</tr>
<tr>
<td>Latin America</td>
<td>$81.8 Billion</td>
</tr>
<tr>
<td>Rest of the World</td>
<td>$68.6 Billion</td>
</tr>
</tbody>
</table>

Similarly Forrester’s\(^8\) Global eCommerce Prediction to 2004 for North America is 3.5 trillion, Asia Pacific is 1.6 trillion and Western Europe is 1.5 trillion. According to IDC Internet Commerce Market Model, the Malaysian e-commerce is expected to grow from RM 1.27 million in 1999 to RM 3.91 million in year 2004.\(^9\) One simple conclusion from this report is that e-commerce is becoming one of the contributors in a nation’s business and economy and proliferation of e-commerce and will invoke contractual principles. Therefore, it is important to be acquainted with the applicable laws and prospective problems while contracting online.

---

\(^3\) Section 202.
\(^5\) Id.
\(^7\) Ibid.
\(^8\) Ibid.
Most countries have their national law to regulate contracts including e-contract. US, Singapore and a host of other countries had amended their existing contracts related legislation following the UNICITRAL Model Law on Electronic Commerce 1996. The Uniform Electronic Transaction Act and the Uniform Computer Information Transaction Act 1999 of USA were passed to regulate the contractual issues. Similarly Singapore has also passed the Electronic Transaction Act recently.

3.0 Elements of a Valid Contract and Challenges Caused by E-Commerce

For a contract to be valid, the essential ingredients of a contract must be present. The common requirements in most are offer, acceptance, consideration, and capacity to be present in an enforceable contract. The element of intention to create legal relation is not expressly required under the Act as on of the elements but the common law has added that it must be considered as one.\(^\text{10}\) The technology does not change the necessities of these elements to form an e-contract. However, it creates new problems and challenges. The applicability of the existing law to the new problems without modification is questionable. Turban\(^\text{11}\) points out that it is difficult to establish the elements of contract when the human elements in the processing of the transaction is removed and the contracting performed electronically. Realizing this US government had amended Article 2B of the Uniform Commercial Code to clarify that contract can be performed with intelligent agents without human involvement\(^\text{12}\).

3.1 Offer

An offer is a proposal made on certain terms by the offeror together with a promise to be bound if the offeree accepts the stipulated terms. An offer can be made expressly: an employer writes to a prospective employee to offer him a job or impliedly, or by conduct: clicking a computer mouse\(^\text{13}\).

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 was made to public at large it is called unilateral offer. In \textit{Carlil v. The Carbolic Smoke Ball Company},\(^\text{14}\) the company advertised in a number of newspapers

\(^{10}\) Phiong Khon v. Chonh Chai Fah [1970] 2 MLJ 114


\(^{12}\) Article 2B states:

(a) Operations of one or more electronic agents which conform the existance of a contract or indicate agreement, form a contract even if no individual was aware of or reviewed the actions or results.

(b) In automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents.

(2) A contract may be formed by the interaction of an individual and an electronic agent.

\(^{13}\) Section 2(a) of the Malaysian Contracts Act

\(^{14}\) [1893] 1 QB 525
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. Carllill 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 in 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 toward and performed the required conditions.

An offer is to be distinguished from an invitation to treat. In invitation to treat, a person holds himself out as ready to receive offers, which he may then either accept or reject. This is not an offer but merely it is a preliminary communication while in negotiation. The display of goods with price tag attached, advertisement, and auction can be considered as examples of invitation to treat. In the case of Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors, the Sheriff of the Seremban High Court advertised a motor vessel at Port Dickson for sale. The appellant wanted to buy the vessel and made an offer. The offer was sent to the Sheriff, under cover of the appellant's letter dated 12 February 1998, together with a banker's draft for 10% of the purchase price. The letter made it clear that the offer was on the Sheriff's terms but subject to 2 conditions. The Sheriff accepted the appellant's offer. The Court of Appeal held that the advertisement is an invitation to treat and the subsequent offer from the appellant created a binding contract. Regarding the invitation to treat the learned judge Gopal Sri Ram JCA stated that:

“an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers”.

One may argue that usually the advertisement on the web site is considered as invitation to treat and not an offer. It is true that normal web advertisements which only receive the netizens’ offer can be considered as invitation to treat 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 provided the transaction is confirmed. Due to this type of webadvertisements, one impact of the Internet is that the line between advertisements and legal offers has been blurred. On the Internet, thousands of web sites 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. 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 they will make payment through credit card. With this

16 [2001] 3 CLJ 864
17 id.
a purchase is completed and the buyer merely wait 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 transactions.

In Re Argos, 19 case (unreported), Argos is a giant chain retailer. It mistakenly advertised
on its web site 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 1,700
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.

In another incident the Wstore offered 99% discount on Kinda PCs. They advertised PC
for just £ 12. The normal price of the PC was 1,200. Before the company rectified the
mistake 2 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. 20 In this case the company did not argue that the webvertishment is an
invitation to treat but had accepted that it was an offer but the parties were bound by the
terms and conditions.

The above cases show that the more specific the offer, however, the more likely the
courts will interpret an advertisement as an offer. To avoid this many online companies
make it clear that the web site advertisement is not meant to be an offer. For example the
Association of Bloodhound Breeders in their web site clearly stated the following under
the heading of Invitation to Treat:

“The information contained on this site constitutes an invitation to treat and not an offer.
The vendor reserves the right to decline orders received from this site. All products
 supplied and technical service given by THE ASSOCIATION OF BLOODHOUND
BREEDERS are subject to THE ASSOCIATION OF BLOODHOUND BREEDERS'
standard conditions of sale, copies of which are available on request”. 21

The above statements clearly shows that the party has reserved the right to accept or
reject any offers from a third party thereby excluding him from contractual liabilities.
The existing Malaysian law, be it the legislation or the case law does not provide any
assistance to determine whether certain advertisement on the Net is invitation to treat or
offer. In this regard the European Union Directive on E-Commerce 22 will be of great

19 Id.
20 Richardson, T, “Wstore offers 99% discount on PC- kinda, available at:
21 available at http://www.the-abb.net/textpage/treat.htm, p.1
22 Directive 2000/31/EC
assistance. The Directive in article 11 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. Cavanillas\textsuperscript{23} explains that the reason for this provision is to avoid giving the supplier or merchant a freehand to conclude the contract or not.

However, if the advertisers would like to treat the advertisements as invitation to treat, the invitation to treat and offer must be spelt out unequivocally. Before a customer is permitted to purport to make a purchase order, a statement should be made on a web site in a prominent place 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.

3.1.1 Termination of an offer

An offer can come to an end in a number of ways:
1. Once the offer is accepted by the offeree;
2. By rejection. It can be rejected if:
   a. the offeree informs the offeror that he is not accepting the offer;
   b. the offeree wants to accept but subject to certain conditions; and
   c. the offeree makes a counter-offer.
3. By lapse of prescribed or reasonable time of acceptance.
4. Failure to fulfil conditions required, death or mental disorder.\textsuperscript{24}

Revocation may be effective anytime before the offeree accepts the offer\textsuperscript{25} provided that the revocation is communicated to the offeree. If the acceptance is to be made by post like e-mail, the revocation must be communicated before posting.

In \textit{Byne v. Tienhoven},\textsuperscript{26} the defendant, on 1 October, posted letter of offer to the plaintiff and the plaintiff received the offer on 11 October and accepted by telegram. But the defendant posted a revocation letter dated 8 October which was received by the plaintiff on 20 October. The court held that a binding contract is formed between the party because the revocation of the offer posted on 8 October was not effective until 20 October when it was received by the plaintiff (offeree). 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

\textsuperscript{24} Section 6 of the Malaysian Contracts Act 1950
\textsuperscript{25} Section 5.
\textsuperscript{26} (1880) 5 CPD, 344
quickly the revocation is produced and the convenient means of producing evidence on
the reception of the revocation.

3.2 Acceptance

Once a valid offer is made the next stage for formation of a valid agreement is an
acceptance of the offer. The acceptance must be made while the offer is still open.
Section 2(b) of the Contract Act states that when the person to whom the proposal is
made signifies his assent thereto, the proposal is said to have been accepted. A proposal,
when accepted, becomes a promise. The acceptance must be absolute and unqualified.
Meaning that the offeree agrees 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. The
question will be can an offeror introduce new terms to an offer after the original offer had
been accepted? In Caspi v. Microsoft Network, L.L.C., the U.S. court accepted the
validity of an additional clause after conclusion of a contract. Similarly, in Rich and Enza
Hill v. Gateway 2000 Inc., the plaintiffs purchased a Gateway 2000 computer based on
the telephone conversation. When the plaintiffs received the computer, the box contained
additional terms including arbitration clause. The plaintiffs were given option to accept
the additional terms within 30 days. When the computer did not function effectively the
plaintiffs filed a suit in the court arguing that they should not be bound by the terms of the
arbitration clause because they did not know about when they entered into the contract.
The court of Appeal held that the terms are enforceable because the plaintiffs were given
with an option of returning the items within a specified 30 days which they failed. By not
returning the item, the buyer implicitly accepted the seller’s conditions. Therefore, the
plaintiffs should refer the case to the arbitration.

Applying these decisions to an e-transaction if the e-retailer introduced new terms when
he delivered the good with an option of cancellation of contract, the acceptor can accept
the new terms or reject it by returning the goods within the specified period. If he fails to
comply with, the court may hold that a valid contract was formed on the seller’s term.

3.2.1 Method of Acceptance

An acceptance may take any form. It can be given orally or in writing but silence cannot
normally amount to an acceptance. It can also be implied from a person’s conduct. 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

27 In Hyde v. Wrench (1840) 3 Beav.334, the defendant offered to sell his estate to the plaintiff on June 6 for
£ 1000. On June 8 in reply, the plaintiff made a counter proposal to purchase at £ 950. When the defendant
refused to accept, the plaintiff wrote accept the original offer. The court held that there is no acceptance had
made because the counter offer rejected the original offer.
28 U.S. Court of Appeals for the Seventh Circuit 105 F. 3d 1147 (1997)
mentioned then it will lapse with a reasonable time. What is a reasonable time is a question of fact depending on the circumstance of each case.

The general rule is that an acceptance must be communicated to the offeror. The contract is formed at the place and time the acceptance is received by the offeror. If the post is used for acceptance the acceptance is effective immediately upon regardless the letter is delayed or lost provided it is properly stamped, addressed and posted. The postal rule is applicable to telegram too, but not to more instantaneous means of communication such as telex, telephone. As for the instantaneous means, the general principle will be applicable. The acceptance is effective only when it comes to the knowledge of the offeror.

With the advent of information technology, the issue of communication of acceptance needs to be revisited as regards to e-mails and web based acceptance. An e-mail communication is first sent to the Internet Service providers (ISP). The ISP will then send that message to the actual recipient, when the recipient sends a request to his ISP to download the messages that it has received and are 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. The offeror is bound by the acceptance once the acceptance is put in a course of transmission to the proposer 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 the control of the offeree.

One might also argue the e-mail communication should be considered as instantaneous, because, in post office, it is a manual work to send the letters to the addressee which may take long time and might be lost without any record being made. But in an e-mail system, the sender is notified if the e-mail could not be sent to the recipient and the sender also may know when the e-mail is received by the recipient by adopting updated technology in the e-mail system. This argument is always supported by 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 offeror’s information system. This provision implies that the data message communication is instantaneous.

However, it is to be noted that the notification of non-delivery of e-mails 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 e-mail 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 e-mail 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, neither at offeree’s server nor at location of the offeror.29

In addition, communication 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 and the acceptance will be complete upon knowledge of its acceptance.

If it falls under instantaneous rule, the question is when was a contract formed? In the case of Schelde Delta Shipping v. Astarte Shipping Ltd,30 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 pointed out that there is a possibility of holding an offeror liable if the e-mail 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 e-mail is downloaded off server onto the computer.31

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 along as the message is retrieved the message is received regardless the message is read or not. However, the Hong Kong Electronic Ordinance32 departed from the Model Law where it elaborates that when there was a designated information system but the message was sent to another system, the address of the electronic record would only be bound at the time it “comes to the knowledge of the addressee”.33

Under the common law the communication of acceptance and the moment of formation of contract are issues only when the parties failed to agree explicitly on the method of acceptance. In Manchester Diocesan Council for Education v. Commercial and General

31 Chissick, M, & Kelman A, p.82
32 Section 19(2)(a)(ii)
33 Stephenson, P et.al, 2001, Cyberlaw in Kong Kong, p265
Buckley J insisted that if an offeror insists that he shall be bound only if his offer is accepted on some particular, he must make it clear. This decision and other similar decisions show that it is possible to determine the mode of acceptance. This will help the online merchants to select the mode of acceptance and thereby can select the choice of applicable law and the jurisdiction.

Online contracting can also take place through Electronic Data Interchange (EDI). This method of online contracting enables the transfer of information and legally relevant documents electronically to another for direct processing in the other party’s information system. This computer–to-computer communication is broadly defined as the exchange of coded electronic mail messages which originate in the sender’s computer and travel to the recipient’s computer. EDI enables the sellers and purchasers to electronically exchange information within a second. EDI is currently conducted between trading partners who have a prior negotiated trading agreement governing the relationship. Since prior agreements are reached computer-to-computer contracts are considered valid and effective.

When some countries passed legislation on electronic transaction, they include provisions to legalise the EDI transaction. Examples of such countries are US, European Union countries, Hong Kong and Singapore. The Uniform Computer Information Transaction Act 1999 states that “A contract may be formed by the interaction of electronic agents. If the interaction results in the electronic agents engaging in operations that confirm or indicate the existence of a contract by commencing performance, a contract is formed unless the operation resulted from fraud, electronic mistake, or the like.”

This provision recognizes a contract totally formed by electronic agents as valid. However, it does not address the liability of an electronic agent whose programming or lack of security causes loss. However, the section makes it clear that to avoid fraud, abuse and clearly unexpected result the contract must be free from electronic mistakes, fraud, or the like. To be safe, the agreeing parties may agree to reallocate the risk of mistake or fraud in their EDI contract.

The recommendation on the European Model EDI Agreement only accepts the validity of EDI contracts but also in Article 3.3 states that a contract effected by the use of EDI shall be concluded at the time and place where the EDI message constituting acceptance of an offer reaches the computer system of the offeror. Cavanillas mentions that a majority of member states approve application of “instantaneous / receipt” rule in

---

34 [1969] 3 All ER 1593.
37 S.206 (a)
39 94/820/EC
cases of EDI. According to him this will ensure that acceptance takes place at the place and at the time of receipt of such acceptance.\textsuperscript{40}

In \textit{Thornton v. Shoe Lane Parking},\textsuperscript{41} the plaintiff drove his car into an automatic car park where he had never been before. A notice on the outside prescribed the charges and stated that all cars were ‘parked at owner’s risk’. A traffic light on the entrance lane showed red and a machine produced a ticket when the car drew up beside it. The plaintiff took the ticket and, the light having turned green, he drove on into the garage where his car was parked by mechanical means to a floor above. On the plaintiff’s return to collect the car there was an accident and he was severely injured. The plaintiff claimed damages from the defendant garage. The defendant contended, \textit{inter alia}, that the ticket incorporated a condition exempting them from the liability. The ticket stated the car’s time of arrival and that it was to be presented when the car was claimed. In the bottom left hand corner in small print it was said to be ‘issued subject to conditions… displayed on the premises’. On a pillar opposite to the ticket machine a set of eight printed “conditions” was displayed in a panel. In the second condition it was stated that the garage would not be liable for any injury to the customer occurring when his car was on the premises.

In this case the learned Lord Denning M.R. concluded that when the proprietor of the machine holds it out as being ready to receive the money there was an offer is made and acceptance takes place when the customer puts the money into the slot. Therefore, the exemption clauses are not binding. From this decision one can presume that the court recognizes that the machine functions as equivalent to human function even if this was not expressly dealt with.

Hong Kong legislators realizing that relying on the common law principle will be very difficult to address this challenge posed by the information technology in formation of contracts included provisions accepts the contracts formed by the computers or machines as that of human. Section 18 (1) of the Electronic Transaction Ordinance enunciates that “unless otherwise agreed, an electronic record is attributable to the originator of an electronic record if it was sent by him; sent under his authentication; or sent by an information system programmed by or on behalf of him to operate and to send the electronic message”. This provision clears up the issue of whether computer generated contracts are binding or not.\textsuperscript{42} Malaysia also may follow the footstep of Hong Kong and amend the existing law to address the issue of communication of acceptance, the moment of formation of contract plus the validity of EDI contracts.

The acceptance can be revoked before the acceptance comes to the knowledge of the offeror. According to section 5 (2) of the Contracts Act “an acceptance may be revoked at

\textsuperscript{40} Cavanillas, S, “Research Paper on Contract Law”, p.2
\textsuperscript{41} (1973) 2 QB 163
\textsuperscript{42} Stephenson, P et.al.p.265
any time before the communication of the acceptance is complete as against the acceptor, but not afterwards”. If the acceptor used the post 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. For example, B e-mailed his acceptance of the offer made by A. B can revoke his acceptance before the mail reaches A. not afterwards.

3.3. 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. Even if the Contract Act is silent, the case law (legal precedent) had shown the necessity of this element to form a valid contract\(^4\). 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. However, an unclear or deceptive web site may dupe a consumer into making an unwanted contract. For example, an online merchant offering a digitised service may construct a web site which gives no purchasing information and merely displays the product and a “Save” or “Download Now” button. An unsuspecting customer will assume that the service is free and has no intention of creating a contract when the customer clicks the button. After the digitised service has been delivered, the online merchant cannot demand payment because of the customer’s absence of intention to create legal relation.

To avoid this, the law should ensure that commercial web sites explicitly state the prices and terms of their digitalised services. The customer should go through a sub-sequence of web pages detailing the terms and conditions of the transaction before making a purchase.

The EU Council Directive on E-Commerce\(^5\) requires 3 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 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.\(^6\) It further requires providing an opportunity to e-consumers or buyers to detect and correct mistakes and errors. In other words there is requirement to take

\(^{43}\) in Phiong Khon v. Chonh Chai Fah [1970] 2 MLJ 114, FC, A Chinese lady, who had a daughter and a son (respondent), lived together with the appellant after her first husband death. The respondent had executed a document which the appellant alleged was a transfer of land to him. The respondent denied. The Federal Court held that the appellant has to prove that the transfer was on his name which he failed. The Court further held the terms of the document creates doubt that shows that there was no intention to create a legal relationship.

\(^{44}\) 87/102/EEC

\(^{45}\) article 10.2
measures like “double clicks” in the e-commerce web site to ensure complete consent.\textsuperscript{46} In case of e-mail exchanges, even if it is less formal than written still can be considered binding if the parties can prove that they had the intention to be bound by law. This type of law is needed in Malaysia to make the consumers to be informed and to void consumer grievance in purchasing over the Internet.

3.4 Consideration

The agreement by offer and acceptance and intention to create a legal relation does not make a contract. There is a need for consideration. Each party must promise to do or give something for the other side. The element of exchange is known as consideration. Section 26 of the Contracts Act says that a contract without consideration is void. Consideration as an act or abstinence or promise by a promisee or by any other person at the desire of a promisor. The consideration is of three types. They are executory, executed and past consideration. In executory consideration the parties exchange promises to perform acts in the future.

\begin{tabular}{ll}
PROMISE & PROMISE \\
to pay RM 300,000 & to deliver the car in few days. \\
for a car & \\
\end{tabular}

The promise to pay for the car and the promise to deliver the car are considered as valid considerations.

In \textit{Wong Hon Leong David v. Noorazman bin Adnan},\textsuperscript{47} the respondent promised the appellant to help him in conversion and subdivision of the appellant land. The appellant promised to pay him. These mutual promises were held as valid consideration. Executed consideration is where one party promises to do something in return for an act of the other party.

\begin{tabular}{ll}
PROMISE & ACT \\
RM 100 reward offer for & Mala returns the pet and \\
returning the lost pet & claims the reward \\
\end{tabular}

Mala can rightfully claim the reward because she does an act based on the promise for reward. The act of finding the camera is a valid consideration for the promise.\textsuperscript{48}

Past consideration is where one party voluntarily performs an act and the other party then makes a promise. The consideration for the promise is said to be in the past.

\begin{tabular}{ll}
ACT & PROMISE \\
& \\
\end{tabular}

\textsuperscript{46} article 10.1 \textsuperscript{47}[1995] 3 MLJ 283

\textsuperscript{48} refer to \textit{Carlill v. Carbolic Smoke Ball Company}, supra
A saved B from an accident. B promised to pay RM1,000 to A for saving his life.

B must pay the promised money since his promise is a valid consideration for A’s voluntary action. Section 26 (b) states that an agreement made without consideration is void unless it is a promise to compensate a person who has already voluntarily done something for the promisor.

In *Kepong Prospecting Ltd. v. Schmidt*,49 Tan applied for permit for iron ore. Schmidt had assisted him in his application. The application was granted and Tan had promised to Schmidt to pay 1% of the selling price of the iron ore. Later Tan’s business was incorporated as company and the company had undertaken to pay that 1% as agreed between Tan and Schmidt. The company later did not pay Schmidt and he sued the company for the money. The court held that the action of assisting the company and the subsequent promise by the company are valid considerations. It is to be noted that some countries do not recognize past consideration as valid consideration.

In an 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 *ecash* and the retailer will promise to perform his part.

Another possible situation on consideration in online contract will be on “click-wrap” agreements. A web site which offers free of charge services requires a customer to agree to certain terms and conditions, which exclude the liability or prohibit commercial use, before allowing, the customer to download the digitized service. The concern is whether a click-wrap agreement of such nature has any consideration. Since free software or access to a web site represents a benefit there is a possibility to hold that there is a consideration.50 Whether section 26 of the Contracts Act is applicable to decide the availability of consideration to solve the issue of free software is not clear.

### 3.5 Capacity

It is assumed that everyone is capable of entering into a contract. However, minors, mental patients and drunks are in need of the law’s protection because of their age or inability to appreciate their own actions. Therefore, they are not competent to enter into a contract.

All agreements are contract if they are made by free consent of the parties competent to contract. Every person is competent if he is major, of sound mind and not disqualified from contracting by any of the existing law.51 The main concern in an online contract is the possibility of minors entering into commercial contracts. Before going into details of

---

49 [1968] 1 MLJ 170
50 Chissick, M, p.85
51 section 11 of the Malaysian Contract Act 1950
liabilities of minors and e-commerce companies there is a need to look at the definition of a minor.

Generally a contract entered by a minor is void. In the often cited Indian case of Mohori Bibee v. Dhurmodas Ghose, the Judicial Committee of the Privy Council held that all agreement entered into by the minors are void. This case had been followed in the Government of Malaysia v. Gurcharan Singh. In this case learned judge Chan Min Tat held that an infant is totally incompetent and incapable of entering into a contract and thus there is no contract on which he can be sued. The decision implies that section 65 of the contract will not be applicable to contracts entered by minors. This section gives right to parties in a voidable contract who have received any benefit thereunder must restore benefit.

However, the contracting party can only ask for reimbursement if the contract with a minor when a contract was entered into for necessaries, insurance and scholarship. “necessary goods” under section 2 of the English Sales of Goods Act 1893 defines as goods 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. Like contract for necessary goods, a contract for delivery of necessary services to a minor will also be enforceable. If the contract is void 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 retain the CDs and also 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. 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. For example, the online book shop Barnes and Noble in its part VII of terms and conditions specifically mentions that

“barnesandnoble.com cannot prohibit minors from visiting this site. barnesandnoble.com must rely on parents, guardians and those responsible for supervising children under 13 to decide which materials are appropriate for such children to view and/or purchase (whether in our Kids! department or our other departments). barnesandnoble.com requires that EACH TIME YOU PURCHASE A PRODUCT AT BARNESANDNOBLE.COM,

52 (1903) 30 Cal 539; 30 I a114, PC (India)
53 (1971) 1 MLJ 211
54 Also refer to Tan Hee Juan v. Teh Boon Kiat [1943] MLJ 96
55 section 4 of Contracts (Amendment) Act 1971 provides that the a scholarship or loan agreement entered into by a minor is valid notwithstanding of any provision to the contrary in the Contracts Act 1950.
56 Chapple v. Cooper (1844) 13 M & W 252; 153 ER 105
57 Syed Ahmad Alsagoff, p.124.
YOU ARE REPRESENTING TO BARNESANDNOBLE.COM THAT YOU ARE EITHER (I) AN INDIVIDUAL 13 YEARS OF AGE OR OLDER, OR (II) A MINOR UNDER 13 WHO IS PURCHASING THROUGH A BARNESANDNOBLE.COM AUTHORIZED AFFILIATED PROGRAM WHICH PERMITS PARENTS AND OTHER GUARDIANS TO BOTH PAY FOR THE PURCHASES OF MINORS, AND GIVE VERIFIABLE PERMISSION FOR SUCH MINORS TO PURCHASE ITEMS ON OUR SITE AND FOR THE COLLECTION BY US OF CERTAIN INFORMATION IN ACCORDANCE WITH THE TERMS OF OUR PRIVACY POLICY”.  

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 Mahomed 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. Has the misrepresentation been proven in this case the court might have ordered the defendant to restore the benefit received as in UK. 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.  

4.0 Standard Forms of Contracts and Exemption Clauses

Standard forms of contracts are drawn by one party in a contract, normally by a strong party like a vendor or a bank or an insurance company are accepted as valid provided that it is conscionable. The validity of such terms may be depended on the following elements:
(a) the respective bargaining powers of the contracting parties,
(b) whether the purchaser is being required to comply with regulations which are unnecessary,
(c) whether the purchaser duly understand the terms,
(d) whether undue influence or unfair tactic is being exercised, and
(e) whether the purchaser or consumer has any chance to get a similar service elsewhere.

If all the conditions are fulfilled the court may enforce a standard form of contract. In UK the Unfair Contract Terms Act 1976 regulates the standard terms of contract. Usually, the court will not enforce a standard form of contract if the terms are not reasonable and the customers or purchasers are not aware of such terms. In Olley v. Meriborough Court Ltd, the court refused to accept the terms displayed in the bedroom after signing a contract at hotel’s reception desk. This is because when a contract was signed the terms and conditions were not disclosed and therefore there was no information about the additional terms. In addition, the contracting party must be given enough notice of the

---

58 available at www.bn.com
59 [1916] 2 AC 575, PC (Penang)
60 R Leslie Ltd v. Sheil [1914] 3 KB 607
61 Section 6 the Unconscionable Contract ordinance of Hong Kong 1995 and section 111 of the Uniform Computer Information Transaction Act of USA 1999.
62 [1949] 1 KB 532
additional terms. Mere displaying of terms will not be sufficient. However, in *Parker v. Southern Railway Co.*, it was held that the terms and conditions stated in the train ticket are effective. In coming to such a conclusion the court considered three questions:

1. Did the passenger know that there was printing on the railway ticket?
2. Did he know that the ticket contained or referred to conditions?
3. Did the railway company do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where the terms might be considered?

In this case the company provided a notice of “see back” in the front of a railway ticket which contains terms and conditions of using the train. As such the court enforced the standard terms in that particular contact.

In the standard forms of contract, exclusion clauses are normal. The exclusion clauses are express terms which seek to exclude or limit the liability that might belong to one party in the event of a breach of contract. The clauses are valid provided they are fair on the other party usually a weaker party. In an online environment the shrink-wrap and click wrap contracts (licenses) are common. They may be considered as standard forms of contracts. When e-retailers include standard forms of contracts and its exclusion clauses they have to take measures to notify the customers or purchasers of the existence of such terms and make them agree on those terms.

Software sold on discs in retail stores frequently comes with a contractual license that can be viewed by opening the plastic wrapper in which the disc is enclosed. Commonly, the purchaser does not open the package until after paying for the software and taking it home. Have the parties in such a case really entered into a contract governed by the terms of the shrink-wrap license? Although the enforceability of such agreements has been in doubt, software vendors have continued to use them for number of reasons:

1. to limit or disclaim warranties, remedies and liability as permitted by law;  
2. to impose other limitations on the transaction, such as use limitations on the software, prohibitions on choice of law, forum, shortened limitations, etc; and  
3. to negate the copyright law which provides that once a copy of a copyrighted work has been sold, the copyright holder’s rights in that copy are exhausted, and the copy may be freely resold, leased and rented.

Before 1996, there were three cases on the enforceability of shrink-wrap licences in US. The U.S. courts held that shrink-wrap licences were unenforceable. The contractual relationship was formed upon acceptance of orders for software by the vendor, and that the shrink-wrap licence, which the purchaser saw for the first time when it received the software, was ineffective.

---

63 (1877)2 CPD 416  
However, the *ProCD v. Zeidenberg’s* decision made a twist in this issue. The court decided that the shrink-wrap license should be allowed unless their terms are objectionable on grounds applicable to contracts in general. The court pointed to several different types of transactions in which money is exchanged before the terms of the contract are disclosed to the purchaser such as insurance contracts, airline tickets, and concert tickets. The court also cited other instances of consumer goods transactions (such as purchase of a radio), in which a warranty is contained inside the packing and the consumer does not know it until opening the box after the purchase. In addition, the shrink-wrap license is to be accepted because the license allowed the purchaser to return the software if the terms of the license were unacceptable. The uncertainty concerning the enforceability of shrink-wrap license was overcome when the concept of license moves “online”. Online distribution lends itself quite naturally to the use of a license agreement form. Such a license appears on the screen of the purchaser’s monitor the first time the software is being installed and the purchaser is asked to accept the terms of the license before installing the software. The vendor can ensure that a contract has been formed prior to the acceptance of payment or the downloading of the software.

By requiring the user to review and accept the license agreement before payment and delivery, the problem of formation of contract can be solved. The terms of the license agreement will then form an integral part of the transaction and likely be held enforceable. According to D. Scott a click-wrap license to be an integral part of the transaction it should:

1. notify the purchaser of the purchase price for the software;
2. notify the purchaser that the use of the software will be subject to the terms of a license agreement, and that the vendor will not enter into the transaction unless the terms are accepted;
3. require that the purchaser review the entire license agreement before accepting the order and that he/she expressly assent to the terms by taking some affirmative action, such as by clicking on an “Accept” button before the software can be downloaded; and
4. provide the purchaser with the ability to reject the terms of the agreement and terminate the transaction.

The legality of click-wrap agreement was discussed in *Crispi v. The Microsoft, L.L.C.* The New Jersey appellate court upheld the trial court’s determination that such a consent by a user becomes a binding contract. The court also upheld the forum selection clause contained in the agreement that compels all lawsuits arising out of the contract to take place in the state of Washington. A similar result took place in *Geoff v. America Online*

---

66 86 F. 3d 1447 (7th Cir.) rev’g 908 F.Supp. 640 (W.D. Wis. 1996)
67 D.Scott, Michael, ___, “Electronic Contracting: The Use of “Clickwrap” Licences” available at:http://www.perinscoie.com/resources/ecomm/clickwrap.html, p. 3
68 ibid
where the court upheld the validity of the forum selection clause requiring all litigation to take place in Virginia.

However, if the terms of the agreements are not clear, and ambiguous, the court may refuse to enforce a click-wrap licence. In Specht v. Netscape Communications Corp., several individual consumers filed suit against Netscape and its parent company, America Online in New York. The consumers alleged that Netscape’s smart Download software transmits private information to Netscape about the user’s Internet activities in violation of law. Netscape sought to immediately stay the proceedings, arguing that the consumers were bound to arbitrate the dispute in California based on the terms of the Smart Download’s online software. The court ruled that license terms were not enforceable against users who downloaded free software from a web site principally because the users were not required to affirmatively agree to the terms or were otherwise not aware that the license terms applied to the act of downloading. This case demonstrates that online businesses must protect themselves by carefully evaluating their practices in light of the requirement that they provide users with clear notice of, and obtain user’s consent to, their license or site terms.

5.0 Writing and Signature Requirements

The general rule of contract is that contracts can be made quiet informally, that is to say that no writing or signature is necessary. Nowadays, only a few types of contracts are specifically required by statutes to be in writing and signed. For example, leases for over three years, consumer credit, certain forms of insurance, deeds, wills, and the transfer of shares require contract to be in writing and signed. 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. different jurisdictions may have different and far more stringent contract requirements. In the global context of e-commerce, online businesses may need to comply with foreign requirements to ensure enforceability.

Writing may be defined as any “intentional reduction to tangible form”. 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 Act may recognize online or electronic contracts by recognizing electronic records. However, the UK Interpretation Act 1978 includes typing, printing, lithography,

---

150 F.Supp. 2d 585 (S.D.N.Y July 3, 2001)
photography and other modes of representing or reproducing word in a visible form.\textsuperscript{73} 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 too wide 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.

One of the issues in e-commerce is that whether the courts will consider online or other digital contracts as “writing”. The UK court in Derby\& Co.Ltd v. Weldon (No.6),\textsuperscript{74} held that computer databases (files) are valid documents and admissible in court. The US courts also attempted to extend writing to include digital forms. These trends suggest that the courts will probably deem forms of online and other digital contracts as “writing”. Malaysian courts also can follow this trend under sections 90A to 90C of the Evidence Act 1950 which allow the courts to admit 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.

However, there is much concern that that whether electronic form of contracts can be considered as “writing”. The electronic or online contracts exist only in computer memories or screens. They are not a deduction to a tangible form but are intangible composite of electronic, computer code, and algorithms that lack any “fixed” status. The US Uniform Computer Information Act in section 201 avoids the usage of word “writing”, and uses “records” instead. The term “record” is more appropriate to online contracts as it retains the tangible form and it includes any information that is stored in an electronic or other medium which is retrievable in perceivable form. When it is retrieved the information may be temporary but capable of being recalled from a computer memory.\textsuperscript{75} The initiative taken by the US legislature will smooth the concerns of the e-consumers and the retailers and eventually boost the confidence of doing e-commerce. This step can be a model to be followed by the Malaysian legislatures.

Other issues of electronic 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.\textsuperscript{76} However, a digital signature is not a signature but a process that uses encryption and algorithms to encode a document.\textsuperscript{77} 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.

\textsuperscript{73} Schedule 1
\textsuperscript{74} [1991] 1 W.L.R. 652
\textsuperscript{75} L.Kidd, Donnie & H.Daughtrey, p.229
\textsuperscript{76} Id
\textsuperscript{77} Section 201(a)(6) of US UCITA 1999
Just as the definition of writing is extended to online and digital documents, signature also was broadened to include “digital signature”. In Re a Debtor, it was held that a faxed copy of a signature satisfied a relevant statutory signature requirement. The judge suggested that if the signature was digitalised and later appended to the fax, the document should be regarded as signed.

As the key concept of signature is the authentication, the digital signature serves its purpose very well, as it is very difficult to forge. The digital signature provides a process to determine who sends a communication and determine the identity of the sender. If a digital signature provides information about whether the message has not been altered and identifies the sender, the sender will be unable to repudiate either the contents of the message or that it was sent by him. This will solve the problems of authentication and verification of the electronic contracts. However, there are problems raised by the use of digital signature:

1. The digital signature capabilities/facilities are not free.
2. It is costly to train representatives.
3. Since there is no uniform digital signature system, the use of such system may have limited application. The United Nations Commission on International Trade Law (UNCITRAL)’s model Law on e-commerce 1996 has attempted to remove writing and signature requirements to provide greater certainty to online contracts in its effort to promote e-commerce.

2.6 Conclusion

This paper addresses the issue of electronic or online contract which is the fundamental of forming an e-transaction. When contracts are formed online without human interaction there are possibilities of having been encountered with new problems and grievances. The contract formation issues are likely to arise every time one purchases goods or services online. Purchasers may question whether a particular advertisement on a vendor’s home page constitutes an offer or an invitation to treat; whether the consumer is the offeror or the offeree, when an offer is deemed to have been accepted. One could assume that the vendor is the offeror, and the purchaser would thus be the offeree, accepting to purchase the goods and services under terms dictated by the vendor in the name of standard form contracts and exclusion clauses. There will also be questions as to what constitutes consideration, how to determine the intention of parties and who can enter into an electronic contract together with validity of digital signature.

These issues are not dealt with either in national laws or UN Model Law or EU Directive. There is a need to adequately address these issues so that the businesses as well as the consumers will be comfortable in utilizing the information dossier for transaction purposes.

78 (No.2021 of 1995)