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'WRITING' AS A FORM REQUIREMENT; IS OUR LAW E-COMMERCE – FRIENDLY AND SUSTAINABLE?

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Abstract: Developments in internet communication have set the pace for electronic innovation leading to electronic commerce. The emergence of internet medium offers many business entities new opportunities and challenges. However, with legal obstacles under the existing law, the opportunities could not be fully used and the issue, if it remains unresolved, could certainly impede the growth of electronic commerce. So far, the Malaysian courts have not had any opportunity to expound the application of the existing law pertaining to form requirements in the context of internet communication. An analytical evaluation is therefore required to examine the issues raised by internet communication relating to form requirements. This paper is designed to consider the extent to which the position under the Malaysian law in relation to the form requirement issues promotes electronic commerce environment. The paper also aspires to examine electronic commerce-related provisions enacted in response to the emergence of internet medium and the widespread use of electronic information for contract formation, and identify whether specific changes, if any, to the existing law are required to enable business to be transacted easily through electronic commerce. The results indicate that much has been achieved but more remains to be done if we are to create a facilitative environment for electronic-commerce development.

KEYWORDS: writing, electronic commerce, form requirement

Introduction

Malaysia has moved towards an industry-based economy in order to stand the challenge of the twenty-first century. The latest industrial initiative was to encourage firms to be more knowledge-intensive rather than production-intensive in order to transform Malaysia into a knowledge-economy. Despite the emergence of internet in the last two decades, some countries have been slow to adopt electronic-commerce technologies. The situation is particularly true in the case of Malaysia. In response to this scenario, the Malaysian Government has sought to implement an industrial initiative which promotes the introduction and use of electronic-commerce technologies (Alam, 2008). The efforts are creditable but would not yield the desired results if the legal infrastructure does not fully support electronic-commerce adoption. This paper hence seeks to examine problematic areas in relation to form requirement of writing.

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Certain laws require contracts to be made in writing, such as moneylending and hire purchase as well as agreements made on account of natural love. Predictably, these contracts such as moneylending and hire purchase will be provided online, and agreements made on account of natural love, such as a promise by a father to transfer land to his children, or arbitration agreements, for example, may be carried out via electronic mail. This will give rise to a question whether the writing requirement could be satisfied by the use of electronic communication. The application of these statutory provisions requiring contracts to be made in writing in the context of internet communication is not entirely possible if the requirement constitutes an obstacle to online contracting.

Scope of the Study, Methods and Literature Review

This paper examines the capability of internet communication to satisfy the writing requirements under the Malaysian law. The paper identifies the

statutory provisions requiring writing in relation to contract conclusion, and proceeds to state the meaning of writing under the Malaysian law. It analyses the capability of electronic communications to satisfy the writing requirement on the basis of the meanings identified.

The study employs the qualitative analysis of statutory provisions and decided cases. Materials consulted consist of primary sources in the form of relevant legislation, judicial decisions, as well as secondary sources.

The writing requirement has its origin in the English law. It was first introduced in the Statute of Frauds 1677, and the rationale underlying the writing requirement was to facilitate proof and guard against fraud[1]. Originally, the 1677 Statute applied to six different classes of contract, including contracts of guarantee, contracts in consideration of marriage, contracts for the sale or creation of interests in land[2] and contracts for the sale of goods for a price of £10 or more[3]. The writing requirement for the six contracts contained in the 1677 Statute was repealed, with the exception of contracts for the creation or disposition of interests in land and contracts of guarantee[4]. At present, the writing requirement is retained only in a number of statutes.

As with the English law, the Malaysian law currently provides for the writing requirement by means of an exception. Only a number of statutes require contracts to be made in writing. The requirement is illustrated in the Contracts Act 1950, the Moneylenders Act 1951, the Hire Purchase Act 1967, the Direct Sales and Anti-Pyramid Scheme Act 1993, the Arbitration Act 2005, the Employment Act 1955 and the Bills of Exchange Act 1949. Section 26 of the Contracts Act 1950 requires the form of writing in two instances; for agreements made on account of natural love and affection between near relations, and agreements to pay statute-barred debt. Section 26 also provides that the failure to comply with the writing requirement would render the agreement void. Section 2 of the Moneylenders Act 1951[5], section 4a of the Hire Purchase Act 1967[6], section 23 of the Direct Sales and Anti-Pyramid Scheme Act 1993[7] and section 10 of the Employment Act 1955[8] respectively require money-lending agreements, hire-purchase agreements, direct-sales contracts and contracts of service to be made in writing. Whilst the Employment Act 1955 is silent on the effect of the failure to comply with the writing requirement, agreements which are not made in writing under the Moneylenders

1. See the long title which stated that the Statute of Fraud was "An Act for prevention of frauds and perjuries. For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subordination of perjury; be it enacted…". See also Robert Bradgate, "Formation of Contracts" in Michael P. Furmston (ed), *Butterworths Common Law Series the Law of Contract*, second edition, LexisNexis UK, London, (2003) at p. 459.
2. Section 4 states: "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for sale of lands, tenements or heriditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the taking thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be *in writing* and signed by the parties to be charged therewith or some other person thereunto by him lawfully authorised."
3. Section 17 states: " No contract for The Sale of Goods, wares or merchandises for the price of £10 sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in *writing* of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised".
4. *Ibid*.
5. "moneylending agreement" means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender;
6. "(1) A hire-purchase agreement in respect of any goods specified in the First Schedule shall be in writing".
7. "(1) A contract in respect of a door-to-door sale for the supply of goods or services having such value as may be prescribed, and a contract in respect of a mail order sale—
(a) shall be in writing";
8. "(1) A contract of service for a specified period of time exceeding one month or for the performance of a specified piece of work, where the time reasonably required for the completion of the work exceeds or may exceed one month, shall be in writing".

Act 1951, the Hire Purchase Act 1967, and the Direct Sales and Anti-Pyramid Scheme Act 1993 will be void. Other statutory provisions define certain agreements or documents to be in written form. Section 9 of the Arbitration Act 2005 for example defines the arbitration agreement as a written agreement[9], and sections 3 and 88 of the Bills of Exchange Act 1949 define the bill of exchange as an unconditional order in writing and the promissory note as an unconditional promise in writing[10]. Some statutory provisions do not necessarily require the contracts to be made in writing, but provide that certain legal rights or undertakings may only be created by written contracts. Section 27 of the Bills of Exchange Act 1949, for example, provides that the assignment of copyright shall not take effect unless it is in writing.

Related to the writing requirement are the "under the hand", "seal" and "in ink" requirements. The "under the hand" and "seal" requirements can be seen in the National Land Code (Penang and Malacca Titles) Act 1963; section 89 states that "when the Director is satisfied that the title to any holding in the Interim Register has become indefeasible pursuant to this Part, he shall thereupon place upon the Interim Register a memorial *under his hand* and *seal* that such title is indefeasible"[11]**.** Section 13 in relation to proceedings of the land-titles appeal board also prescribes the "under the hand" requirement[12]. The requirement can also be seen in the Strata Titles Act 1985, which provides that the registration of the register documents of strata title shall consist of their authentication *under the hand* and *seal* of the Registrar; and the date of registration shall be inscribed by him on every document[13]. Sections 270 and 361 of the Companies Act 1965 also subscribe to this requirement in relation to the appointment of an arbitrator and the issuance of a certificate of incorporation[14]. As for the "in ink", the requirement can be seen in the Companies Act 1965, where section 34 provides that an alteration made in the memorandum or articles of association of the company has to be indicated *in ink on a printed copy* of the memorandum or articles. These requirements raise a question whether they necessitate the preparation of the document in paper form, and exclude the use of electronic document or the supply of the information via electronic communication.

9. "(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing".
10. Section 3: (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer.
Section 88. (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.
11. See also section 60.
12. Section 13: Proceedings of the Board.(1) The proceedings of the Board shall be open to the public and minutes thereof, including a note of any oral evidence given before the Board, shall be kept by the chairman or other member presiding. (2) Any person claiming to be interested in any proceedings before the Board may apply to the Board to be made a party thereto, and the Board may in its discretion allow any such application. (3) All summonses, orders and notices issued *under the hand* of the secretary of the Board shall be deemed to be issued by the Board.
13. Section 16.
14. Section 270(5): For the purposes of an arbitration under this section the Arbitration Act 1952 *(Act 93)*, shall apply as if there were a submission for reference to two arbitrators, one to be appointed by each party; and the appointment of an arbitrator may be made *under the hand* of the liquidator, or if there is more than one liquidator then under the hands of any two or more of the liquidators; and the Court may give any directions necessary for the initiation and conduct of the arbitration and any such directions shall be binding on the parties. Section 361: A certificate of incorporation *under the hand* and seal of the Registrar shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the company referred to therein is duly incorporated under this Act.

Results and Discussion

The expressions "under the hand", and "in ink" may pose a problem in relation to the usability of electronic communication. At a glance, the requirement of "under the hand" seems to allow the use of electronic communication, since the typing or pressing of the button is, literally, also made under the hand of the officer. Nevertheless a proper interpretation may be that the requirements anticipate paper documents. This is achieved by virtue of section 17A of the Interpretation Act 1948 and 1967 which envisages that the purposive rule be applied in construing any statutory provision. The provision states:

> "in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object".

The purpose of the writing requirement is mainly to record the intention of parties, provide permanent record of the information for future references, as well as to caution parties of rights or the consequences of their entering into a contract. The Guide to Enactment 1996 of the UNCITRAL Model laws on Electronic Commerce declares that the functions of the paper writing, *inter alia*, are to "(1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves and to (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction". The question which arises is whether these functions can equally be served by electronic documents.

Applied in the context of virtual environment, the lawmakers have two options in this regard. On the one hand, they may insist on the use of paper medium, where the utilisation of electronic medium for presenting this information may be considered inadequate, due to the importance of the information and the inherent fallibility of electronic communication. The policy may be justified on the basis of the essential quality of the information, in that it provides crucial information about legal status and rights under the statutes. On the other hand, the lawmakers may adopt a policy accepting the use of electronic communication on the basis that electronic medium is quite capable of satisfying the basic function of the writing requirement. An added precaution against forgery may be obtained through the use of a digital signature; digital signature to a large extent authenticates the message and the identity of the signatory, and digitally-signed information is legally recognised and the use of the signature is regulated under the Digital Signature Act 1997. The second option is a more laudable approach in the light of the recent measures pertaining to electronic conveyancing, electronic filing with regard to company matters, as well as the facilitative theme as enshrined in the electronic commerce-related legislation. The "under the hand" and "in ink" requirements should be reconsidered to pave the way for electronic conveyancing and enable the preparation or alteration of the memorandum or articles of association in electronic form. This may culminate with an amendment to the relevant statutes such as the National Land Code (Penang and Malacca Titles) Act 1963, the Strata Titles Act 1985 as well as the Companies Act 1965 which would be necessary to remove the barrier of the paper writing. Currently, Malaysia has started with the *e-tanah* project[15] with most states having a computerised system for registration of land dealings through the SPTB (*Sistem Pendaftaran Tanah Berkomputer/ Computerised Land Registration System*). Until the issue is resolved, a full implementation of electronic conveyancing may not be possible. The implementation of electronic conveyancing requires the government to develop a comprehensive system, including the transformation of the Land Office from the paper-based conveyancing practice to the electronic system as well as the creation of an electronic link between the Land Office, the conveyancers and the financial institutions[16]. The

15. The "etanah" project which is being tested in Penang offers online service for 9 areas (consisting of 85 transactions/ applications), but customers will have to go to the Land Office to request the service. See http://www.etanah.gov.my
16. See Sharon Christensen, "Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia" (2004) Available: http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114_text.html

seal requirement nevertheless has been resolved with the passing of the Electronic Commerce Act 2006, making an electronic document signed with a digital signature as satisfying such requirement. Section 10(1) declares that "where any law requires a seal to be affixed to a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by a digital signature as provided under the Digital Signature Act 1997"[17]. The 2007 Amendment to the Companies Act 1965 recognised the validity of electronic communication in corporate governance. The acceptability of electronic filing of documents as well as the conduct of shareholders' meeting via electronic mode has now been clarified. Section 11A(4) declares that a document electronically filed or lodged shall be deemed to have satisfied the requirement for filing or lodgement and clause (6C) removes the requirement of signature and attestation for electronically-filed documents. Section 145A allows a company to hold meetings of its members within Malaysia at more than one venue using any technology that provides all members a reasonable opportunity to participate. Whilst the 2007 Amendment has taken a clear approach with regard to the use of electronic communication for the purpose of documents filing etc, it is a missed opportunity that the paper requirement in relation to the alteration of the memorandum of association remains unaddressed. Needless to say, the retention of the ink requirement does not sit well with the landmark amendments promoting e-environment for corporate administration.

Without the above requirements pertaining to "under the hand", "in ink" etc, and where the statute in question is silent on the definition or meaning of writing, the capability of electronic communication to satisfy the writing requirement would have to be determined with reference to section 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989). Section 3 provides the general meaning of writing under the Malaysian law. Under section 3, the use of electronic medium would present no difficulty to the satisfaction of the writing requirement; hence, contracts with the form requirement of writing can be concluded via the web or electronic mail.

The old section 3 defines writing to:

> "include[s] typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly".

The definition was amended by virtue of the Interpretation (Amendment) Act 1997 which defines "writing" or "written" to:

> "include[s] typewriting, printing, lithography, photography, *electronic storage or transmission* or any other method of recording information or fixing information in a form capable of being preserved".

Before the 1997 (Amendment) Act, internet medium can constitute writing under the general phrase "other modes of representing or reproducing words in a visible form" of section 3. The capability of electronic medium in satisfying the requirement rests on visibility feature of the media. This test produces different results; communication with a screen display such as electronic mail and the web would satisfy the requirement of writing under section 3, given their visibility feature. The visibility test would pose a problem to communication without a screen display, such as a fully-automated transaction between computers in Electronic Data Interchange (EDI). Thus there may be difficulty in the use of EDI to conclude a contract with a requirement that it be in written form.

The court in Singapore has had a chance to address the issue of the satisfaction of the writing requirement by electronic mail on the basis of the visibility test. In *SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd*[18], referring to the English law Commission, Judith Prakash J confirmed that electronic mail was writing. She

17. See also clause (2) to section 10 which gives the power to the Minister to make order to prescribe any other electronic signature that fulfills the requirement of affixing a seal in an electronic message.
18. [2005] SGHC 58.

observed that:

> "the definition of "writing" under s 2 of the Interpretation Act (2002) could be extended to include modes that were not in existence at the time the Interpretation Act 2002 was enacted but were available at the date of interpretation. *In any case, electronic mails could be classified as falling within the meaning of "other modes of representing or reproducing words in visible form"*. This was because although electronic mails were files of binary (digital) information in their transmitted or stored form, they also had another form when they were displayed on the monitor screen. At that stage, they were "words in a visible form". The sender of an electronic mail is able to see the text that he has created on the screen of his computer monitor before the message is sent. Similarly, the recipient is able to view the message on his own screen. A visible representation of the words which form the message is therefore available to both the sender and the recipient. The same is true of any attachment that is sent, opened and read".

The 1997 (Amendment) Act resolved any ambiguity arising from "visibility" as the test of writing. Web, electronic mail or EDI can easily fit "electronic storage or transmission", and the emphasis is no longer on visibility but on the ability of the medium to preserve the information. With this definition, information saved in an external disk may also qualify as writing.

The Electronic Commerce Act 2006 enhances the capability of internet medium in satisfying the form requirement. Section 8 provides that "where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference". Section 8 confirms that the contracts in the above-quoted statutory provisions would be capable of being concluded electronically. Thus, for example, agreements made on account of natural love and affection between near relations, and agreements to pay statute-barred debt under the Contracts Act 1950 will be acceptable as far as the writing requirements are concerned if made via electronic mail. This is the likely position under the Malaysian law, despite the fact that the statutes enumerated above were not drafted with electronic communication in mind.

The ability of electronic communication to constitute writing under section 8 of the Electronic Commerce Act 2006 is determined by the accessibility test. Section 8 would clear all electronic communication as writing provided that the information is "accessible and intelligible so as to be usable for subsequent reference". The provision establishes a number of points. First, the information in the recipient's mail box in electronic mail and the information in the web server would all be acceptable as writing if it could be accessed by the recipient. In this regard, the Guide to the Enactment of the UNCITRAL Model Law on Electronic Commerce 1996 provides that "Article 6 focuses upon the basic notion of the information being reproduced and read"[19]. Secondly, the definition appears to be applicable to EDI. To this effect, the Guide confirms that "the word "usable" is intended to cover not only human use but also computer processing"[20]. Finally, the notion of "subsequent reference" in Article 6 reflects a degree of flexibility. The Guide explains that "the notion of "subsequent reference"…was preferred to such notions as "durability" or "non-alterability", which would have established too harsh standards"[21]. Thus, the information would satisfy the definition of writing under Article 6 although the information may have been changed in the next retrieval. Article 6 is not concerned with the function of providing permanent records for future reference.

Given the capability of electronic communication to satisfy the writing requirement as shown in the above discussion, the statutory

19. Para 50.
20. *Ibid*
21. *Ibid*

requirement of writing under many statutes has been resolved. The forms of electronic communication under consideration, i.e. the web, electronic mail and EDI, would qualify as writing. It is not clear whether any of the contracts for which writing is required will be made via EDI, i.e. a fully-automated system. However, section 8 has conclusively resolved the issue as the definition of writing in the provision is broad enough to cover the EDI. Notwithstanding the similar results produced, section 8 provides a better test and was not a mere reiteration of the amended section 3 of the 1997 (Amendment) Act. As the definition of writing under section 8 hinges on the ability of the information to be accessed, the satisfaction of the writing requirement under the provision could be impeded when access to the information is unsuccessful. This may happen in a number of circumstances, such as where the server of the electronic-mail service-provider is not functioning, or the web user is notified with the 500 error which indicates 'internal server error' etc. The writing requirement is also not met if the message received cannot be opened by the recipient due to the lack of necessary software. The Guide declares that "the use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained"[22]. For this reason, the accessibility test of writing under section 8 of the Electronic Commerce Act 2006 may be seen as a better answer than the "electronic storage or transmission" test introduced under the 1997 Amendment as far as the functions of writing are concerned. A message must be successfully retrieved in order to constitute writing.

Section 8 has added the word "intelligible" in the definition of writing[23]. The insertion of the word may have been made because of the possibility of a message being received in illegible form. Garbled electronic mail happens due to the inclusion of non-Roman characters or the attachment of images in the text. It may also be due to the disruption in the computer of the sender or the computer of the intermediary, and while the message is in the course of transmission. In practice, however, the problem happens very rarely[24]. It may be thought that the inclusion of the word is not highly necessary given the width of the meaning of the word accessibility as stated in the Guide.

It may be observed that the concept of accessibility bears some resemblance to the requirement of visibility under the Interpretation Acts 1948 and 1967. In terms of the point when the writing requirement is satisfied, the information available in the recipient's mail box for example could be said to be both being 'accessible' and 'visible' to the electronic-mail recipient. This is on the assumption that there is no problem of internet connection or the server of the electronic-mail service-provider being inoperative at the time the retrieval is made. If there is a failure of retrieval or connection problem, the writing requirement could not be satisfied under either the accessibility or the visibility definitions. Nonetheless, although both concepts produce similar results, at least in relation to these two aspects, it may be thought that accessibility as the underlying test in the definition of writing is more appropriate than visibility in the context of the data message. The term visibility, on the other hand, envisages the physical feature of the document, which is not relevant to digital information.

Conclusion

The foregoing discussion indicates that the existing laws are not totally free from impediments and are not fully sustainable for electronic-commerce development. The paper discovers that, in many statutes, the issue of the capability of the electronic communication to

22. Para 50.
23. Note that Article 6 does not have the word "intelligible" in its provision. Article 6 reads: "1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference".
24. See http://help.yahoo.com/help/us/sbc/bizmail/general/general-15.html

satisfy the writing requirement to a large extent has been resolved under the Interpretation Acts 1948 and 1967 and the 2006 Act. The paper also unearths that not all impediments have been overcome. There are statutes which specifically provide that certain documents are to be prepared under the hand of the officer concerned or in ink, and these requirements cannot be satisfied by the use of electronic communication. This can have repercussion in electronic commerce. Businesses would be precluded from using electronic communication to carry out transactions or activities which fall within those statutory provisions, and the implementation of a full electronic system might not be possible. The issue has to be heeded if the authorities are serious to create sustainable legal infrastructure which in return can lead to an increase in electronic-commerce adoption. The position might also impact negatively on initiatives towards electronic conveyancing and corporate governance, which are already under way. The difficulty raised by the provisions of the National Land Code ((Penang and Malacca Titles) Act 1963, the Strata Titles Act 1985 and the Companies Act 1965 may have to be addressed to facilitate a more conducive environment for electronic commerce. The paper also established that the amended section 3 of the Interpretation Acts 1948 and 1967 resolved the difficulty with the earlier version of the provision and the amendment yielded a desirable result as it accommodates for the usability of electronic communication including those without a screen-display feature. The adoption of the concept of accessibility under the 2006 Act is certainly more appropriate in the context of electronic communication than the concept of visibility as provided under the Interpretation Acts 1948 and 1967. The accessibility test produces a more satisfactory outcome as it requires successful access to the information in order for the document to constitute writing and hence better satisfies the functions the writing requirement seeks to accomplish.

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