ELECTRONIC COMMERCE LEGAL FRAMEWORK: SOME LESSONS FROM MALAYSIA

By

Professor Abu Bakar Munir
Faculty of Law, University of Malaya
Kuala Lumpur, Malaysia.

And

Associate Professor Siti Hajar Mohd. Yasin
Faculty of Law, University Technology MARA
Shah Alam, Selangor, Malaysia.

INTRODUCTION:

Malaysia, like many other countries, wishes to benefit from electronic commerce. To facilitate and remove the barriers to electronic transactions, the country has enacted several pieces of legislation, namely, Electronic Commerce Act 2006 (ECA), Electronic Government Activities Act 2007 (EGAA), and Digital Signature Act 1997 (DSA).

This paper examines the ECA and EGAA. It argues that the latter is redundant, while the former requires improvement. The drafters of the ECA have not been successful to develop a good masterpiece. The legislature too did not manage to contribute to improve it. A number of provisions are found to be unclear. Several others contain additional requirements which are non-existent in the international instruments and the law of other jurisdictions. Some are confusing. The Act also failed to incorporate an important provision on electronic agent which is vital for e-commerce. This paper also shows how the EGAA is redundant.

APPLICATION:

Section 2(1) of the Electronic Commerce Act (ECA) provides that "Subject to section 3, this Act shall apply to any commercial transaction conducted through electronic means including commercial transactions by the Federal and State Governments."

The law applies only to commercial transactions. Commercial transaction is defined in section 5 to mean a single communication or multiple communications of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or

services, agency, investments, financing, banking and insurance. Why is it that the scope of the Act is to be confined to the communication of a commercial nature only? How to determine that a communication is of a commercial nature? What about the ordinary or unilateral communications without any commercial element such as statement, declaration and notice? The prudent and sensible approach is to allow the Act to be applied to any electronic communication. Then the term "communication" is to be defined as any statement, declaration, demand, notice, including an offer and acceptance to an offer. By so doing, the Act gives legal recognition to all and any electronic communication and at the same time provides legal recognition to electronic transaction/contract. This is the approach adopted by countries like Singapore, Australia, New Zealand, United States, European Union, Thailand and many other jurisdictions.

CONSENT TO USE ELECTRONIC COMMUJNICATIONS:

Section3(1) of the ECA provides that "nothing in this Act shall make it mandatory for a person to use, provide or accept any electronic message in any commercial transaction unless the person consents to the using, providing or accepting of the electronic message." Section 3(2) states that, "A person's consent to use, provide or accept any electronic message in any commercial transaction may be inferred from the person's conduct."

A person cannot be required to use, provide or accept information in an electronic form without that person's consent. The ECA makes it clear that a party to a transaction cannot be compelled to conduct such transaction in electronic form. The ECA is intended to make it possible for the people to use the electronic technology, but not to compel them to do so. The law aims at certainty, not compulsion. This is one of the common features of the electronic transaction legislation. The ECA, like many other similar legislation in other jurisdictions, is intended as a voluntary or an "opt-in" statute.[1]

[1] See e.g. section 101(b)(2) of the USA Electronic Signatures in Global and National Commerce Act and section 5(b) of the USA's Uniform Electronic Transactions Act, section 16 of the New Zealand Electronic Transaction Act and section 6 of the Canada Uniform Electronic Commerce Act. The United Nations Convention on the Use of Electronic Communications in International Contracts, in article 8, provides, "Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

Under section 3(2), a party or parties must agree to conduct a transaction by electronic mean. This section makes it clear that the consent may be inferred and need not be expressed in every case. A simple example would be where a government agency provides a website through which an application may be made. Other possible situations where consent may be inferred include: (a) previous course of dealing where electronic communication was used; (b) a person commenced correspondence or makes an offer via electronic communication and the other party responds in kind; (c) a person hands to another a business card with an e-mail address; and (d) placing an order through a website.

A question may arise in relation to situation stated in (a). If a party has entered a transaction by electronic means, whether this would mean that he/she has given consent for the subsequent transaction to be conducted by electronic means. It is interesting to note that the Uniform Electronic Transactions Act (UETA) of the USA provides that notwithstanding the fact that a party has given consent to conduct one transaction by electronic means, it may refuse to conduct other transactions by electronic means. Moreover, this provision requiring consent may not be waived by an agreement. This, of course, can have significant implications for a long-term business relationship involving multiple transactions.[2] Presumably, either party has the right, at any time, to refuse to continue to conduct future transactions in electronic form, and to require the other party to revert back to a paper-based model.[3] For a one-off transaction, this provision may offer some protection to the buyer.

Here, the loophole is not so obvious. Under section 3, a consumer who does not own a computer could sign a piece of paper in a person-to-person transaction and later find all notices, disclosures, and records relating to that transaction are to be sent electronically to an e-mail address set up for the consumer by the salesperson.[4] Imagine a consumer sitting at home who is visited by a salesman. The salesman talks the consumer into

---

[2] Thomas J. Smedinghoff, "Creating Enforceable Electronic Transactions", at p.7

[3] *Ibid.*

[4] Similar criticism has been made against the UETA, see Margot Saunders, "E-Sign and UETA: What Should States Do Now?" available at http://www.ncsl.org/programs/lis/cip/cipcomm/saunders00.htm, at p. 7.

agreeing to a contract for some products. The documents state that the consumer "agrees" that all information relating to the transaction will be provided electronically. The salesman takes out a laptop, connects to the Internet through the consumer's telephone line, and asks the consumer to type her name and creates an e-mail address for the consumer. When the salesman left the premise, the consumer is left with no paper copies of these documents and she would be receiving communications by electronic mean from the salesman. The ECA permits this process and procedure.

Many of the nation's households are not yet online, and many more cannot afford to own a computer, yet the ECA would allow crucial notices which are required to be physically handed to the consumers to be e-mailed instead.[5] The ECA should offer some protection to the consumers. This can be done by requiring that the consumer's consent must be either given or confirmed electronically. Alternatively, by requiring that it is "reasonably demonstrated" that the consumer can receive notice or can access information in the electronic form.

LEGAL RECOGNITION OF ELECTRONIC MESSAGE AND INCORPORATION BY REFERENCE:

Section 6(1) of the ECA provides, "Any information shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form." It is argued that the use of the word "information" is inappropriate in relation to validity and enforceability. Not all and every information can be related to the issue of validity and enforceability. Information, generally, does relate to legal effect. The options for the drafters are, either use the word "transaction" in replace of the word "information" or alternatively, if the word "information" is to be used it must only in relation to legal effect only. It is difficult not to accept this argument as the Australia Electronic Transactions Act uses the word "transaction" in relation to legal effect, validity and enforceability while the New Zealand law uses the word "information", but in relation to legal effect only. Section 8 (a) of the New Zealand Electronic Transactions Act provides that; "To avoid doubt, information is not denied *legal effect*

[5] Although section 16(2) excludes certain kind of documents which cannot be sent by an electronic means.

solely because it is in electronic form or is in electronic communication." Meanwhile, the United Nations Convention on the Use of Electronic Communications in International Contract 2005 (UNCUEC 2005) chose the word "communication" in relation to validity and enforceability.

Section of 6(2) of the ECA provides, "Any information shall not be denied legal effect, validity or enforceability on the ground that the information *is not* contained in the electronic message that give rise to such effect, but is merely referred to in that electronic message provided that the information being referred to is accessible to the person against whom the referred information might be used."

This section addresses the related issue of incorporation by reference, one contractual tool, useful for the electronic environment. It is regarded as essential to the widespread use of electronic data interchange, e-mail, digital certificates and other form of electronic commerce. The expression "incorporation by reference" is often used as a concise means of describing situations where a document refers generically to provisions which are detailed elsewhere, rather than reproducing them in full.[6] It is so important for e-commerce because it permits parties to shorten contracts and other documents, while retaining a comprehensive coverage of legal issues.[7] To make incorporation by reference, the contracting parties can set forth an agreement or other information on paper and use words in the document incorporating another document by reference.[8]

The aim of section 6(b) is to facilitate incorporation by reference in electronic context by removing the uncertainty as to whether the provisions dealing with traditional incorporation by reference are applicable to incorporation by reference in an electronic environment. This provision of incorporation by reference is another common feature of electronic commerce legislation. The UNCITRAL Model Law on Electronic Commerce 1996 (Model Law), in article 5 *bis* provides that, "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message

[6] See the United Nations Commission on International Trade Law, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, p. 22.

[7] See Earl Gray and Samitha De Silva, "New Zealand's Proposed Electronic Transactions Legislation: A Summary" [2001] C.T.L.R 49, at p. 49.

[8] *Ibid.*

purporting to give rise to such legal effect, but is merely referred to in that data message." Section 8(b) of the New Zealand Electronic Transactions Act (ETA) states; "To avoid doubt, information is not denied legal effect solely because it is referred to in an electronic communication that is intended to give rise to that legal effect".

There are two factors that distinguish the New Zealand law and Model Law with the Malaysia ECA. Firstly, the drafters of the Model Law and New Zealand Act adopted a clear, simple and precise construction. Secondly and more importantly, the Model Law and the New Zealand law do not attach any condition for the electronic incorporation by reference. The UNCITRAL reminded the legislatures around the globe that "in enacting article 5 *bis*, attention should be given to avoid introducing more restrictive requirements with respect to incorporation by reference in electronic commerce than might already apply in paper-based trade."[9]

FORMATION AND VALIDITY OF CONTRACT:

Section 7 (1) provides; "In the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message." Section 7 (2) provides "A contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation."

Section 7 uses the term "proposals" instead of "offer". Perhaps, the rationale is to show a consistency with the Contracts Act 1950 which employs the word "proposal". It has been accepted that "proposal" and "offer" carry the same meaning and this is in line with the English law.[10] Nevertheless, the promulgation of the ECA is an opportunity that should not be missed for the legislature to make it clearer. This can be done by preferring the term "offer" and "acceptance" as adopted in the Model Law.[11] It would be better if section 7 (1) is to be constructed such as this: "In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means

[9] *Supra* n. 7 at p. 21.

[10] See Visu Sinnadurai, *The Law of Contract in Malaysia and Singapore: Cases and Commentary*, (1979), pp. 25-26.

[11] Article 11.

of electronic message". The expression "unless otherwise agreed by the parties" intended to make it clearer that the purpose of the Act is not to impose the use of electronic means in making the contract, reinforcing section 3(1) of the ECA.

Section 7 allows an offer and acceptance to be made by electronic means. It gives legal recognition to the offer and acceptance made by electronic message as well as to the contract formed. Section 7(1) begins with the phrase, "In the formation of a contract", which gives rise to a question as to the interpretation that should be given to the phrase "any related communication" provided for in the same section. Should this expression be confined to communication which relates only to the formation of a contract? What about communications between the contracting parties concerning the performance of contractual obligations, for examples, notice of defective goods, an offer to pay, notice of place where a contract would be performed, recognition of debt, etc.? Section 6 of the ECA may cater for this as it states that *any information* shall not de denied legal effect, validity and enforceability. Nevertheless, the ECA, if it is to remove uncertainty, it should be clearer. Confusions should be avoided. We suggest that the phrase "any related communication" to be deleted as it serves no purpose and confusing.

Section 7 is very much geared to the formation and conclusion of a contract. The ECA does not have a specific provision on electronic message that relates to the performance of contractual obligations. Since modern means of communications are used in a context of legal uncertainty, in the absence of specific legislation in the country, the promulgation of this electronic commerce law is the opportunity not to be missed to remove the uncertainty and barriers. Thus, there is a need for the ECA not only to establish the general principle that the use of electronic communications should not be discriminated against, as expressed in section 6, but also to include specific illustrations of that principle. Contract formation is but one of the areas where such an illustration is useful. The legal validity of unilateral expressions of will, as well as other notices or statements that may be issued in the form of electronic message also needs to be mentioned. These include, as mentioned earlier, communications concerning the performance of contractual obligations, such as notice of defective goods, an offer to pay, notice of place where a

contract would be performed, etc. It is suggested that the ECA incorporates a provision that gives legal recognition to such communications. The provision could be drafted in the following manner; "As between the originator and the addressee, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of electronic message."

WRITING REQUIREMENT:

On the requirement of writing, section 8 of the ECA states, "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."

For the electronic message to satisfy the requirement of writing, the drafters of the ECA have included an additional requirement that the message must not only be accessible but also *intelligible*. This additional requirement of intelligibility is non-existent elsewhere. For examples, the Model Law[12], laws in New Zealand[13], Canada[14] and Singapore[15] require the electronic communication or information to be accessible only. Interestingly, the law of New Zealand uses the term "readily accessible" and once again, it is drafted in a simple manner. The Singapore Electronic Transaction Act (ETA) is elaborative and broader covering the requirement of presentation in writing and the consequences if the information is not in writing. The words "rule of law" is used instead of just "law".

The questions here are; first, why is the additional requirement of "intelligible" being imposed? Second, how is the term to be interpreted? The UNCITRAL justifies the choosing of certain words and not others:

The use of the word "accessible" is meant to imply that information in the computer data should be interpretable, and that the software that might be necessary to render such information readable should be retained… . As to the notion of "subsequent reference," it was preferred to such notions as "durability" or "non-alterability", which would have established too harsh

[12] Article 6
[13] Section 18, ETA 2002.
[14] Article 7, UECA
[15] Section 7, ETA.

standards, and to such notions as "readability" or "intelligibility", which might constitute too subjective a criteria.[16]

"Accessible" or "readily accessible" means that the information must be able to be accessed, retrieved and read and also be capable of being interpreted. It is our argument; therefore, that the term "intelligible" in the ECA is redundant and unnecessary.

RETENTION OF ELECTRONIC MESSAGES:

Section 13 of the ECA provides for the rules concerning the retention of electronic messages. It provides:

Where any law requires any document to be retained, the requirement of the law is fulfilled by retaining the document in the form of an electronic message if the electronic message-

(a) is retained in the format in which it is generated, sent or received, or in a format that does not materially change the information contained in the electronic message that was originally generated, sent or received;

(b) is accessible and intelligible so as to be usable for subsequent reference; and

(c) identifies the origin and destination of the electronic message and the date and time it is sent or received.

The heading of section 13 under the Bill is the retention of document. We are of the view that it is quite inappropriate to use the word "document" as it is too general a word for it can mean a document in both, the online and offline world. Whereas the ECA is specifically on electronic communication and the law is concerning electronic message, the terminology used throughout the Bill.

There are several other issues that may arise. First, how are conditions (a) and (b) to be read? Should it be conjunctively or disjunctively? The word "and" is missing in between the two conditions. It should be there after the word "received" in paragraph (a). This cannot be wrong because all the three conditions will have to be satisfied for an electronic message to satisfy the retention requirement. This is also clearly the position in the Model Law and the laws of other jurisdictions. Second, paragraph (b) has

[16] See the Model Law, *loc cit*, para 50.

placed an additional requirement of "intelligible". It is, again, unnecessary and redundant. Third, section 13(a), second limb, requires electronic message to be retained "in a format that does not materially change the information contained in the electronic message that was originally generated, sent or received". What does the expression "materially change" mean? The drafters should have adopted a clearer provision. The Model Law and the Singapore Law, for examples, use the expression, "in a format which can be demonstrated to represent accurately the information originally generated, sent or received."[17]

ELECTRONIC AGENT: FORGOTTEN?

New technologies have introduced new ways in business transactions where online contracting is complementing and even substituting traditional paper-based transactions. One of the major recent innovations of online contracting is the use of intelligent or electronic agents to make contracts among users and business around the globe.[18] Software has been developed as a new tool to simplify e-commerce by automating it. There exists an industry known as intelligent or electronic agent technology. The entire industry capitalises on the desire of consumers and merchants to automate online transactions.[19] Intelligent agent technology has numerous applications in e-commerce. One very interesting application makes it possible for electronic agents to interact, exchange information and engage in operations that, from all outward appearances, look very much like the negotiation and creation of contractual agreements.[20] The technology allows commercial transactions to take place without any need for human traders to review, or even be aware of, particular transaction. The use of electronic agent has developed rapidly on the Internet.

Can the act of a computer (without human involvement) create a contract? The answer should be yes, depending on the circumstances. A computer can certainly generate an offer. For example, an inventory system can

[17] See section 9 of the Singapore ETA and Article 10 of the Model Law.

[18] See Dickson K.W.Chiu, Irene Kafeza, Changjie Wang, Ho-fung Leung and Eleanna Kafeza, "Supporting the Legal Identities of Contracting Agents with an Agent Authorization Platform", p. 721.

[19] Ian R. Kerr, "Ensuring the Success of Contract Formation in Agent-Mediated Electronic Commerce" Electronic Commerce Research, (2001), p.184.

[20] Chavez et al., cited in Ian R. Kerr.

calculate when supplies are low, and automatically generate an electronic purchase order to the vendor. Would such an order be a binding offer?[21] There are cases in the U.S on fully automated contract formation.

If e-commerce is to reach its full potential, the barriers to it must be removed, which is one of the objectives of the Bill. Hence, the use of electronic agent in the formation of a contract should be given legal recognition. Both the Electronic Signatures in Global and National Commerce Act (E-SIGN) and Uniform Electronic Transaction Act (UETA) of the USA specifically recognise the validity of contracts formed by electronic agents. E-SIGN provides that a contract or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such agent is legally attributable to the person to be bound.[22] Likewise, the UETA recognises that a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agent's actions or the resulting terms and agreements.[23] In addition, UETA recognises that a contract may be formed by the interaction of electronic agent and an individual.[24] Similarly, the law in Canada recognises contracts by electronic agents.[25]

One of the most recent legislative initiatives to give legal recognition to contracts by electronic agents is the UNCUEC 2005. Article 13 provides that, "A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract." This covers contract entered into between electronic agent and human being as well as contract between electronic agents without human intervention.

---

[21] See Thomas J. Smedinghoff, "The Legal Requirements for Creating Secure and Enforceable Electronic Transactions", p. 26.

[22] E-SIGN, section 101(h).

[23] UETA, section 14(1)

[24] UETA, section 14(2)

[25] Section 27 of the Uniform Electronic Commerce Act

The drafters of the Act adopted the Model Law in dealing with the issue of attribution.[26] Section 17(2) of the Bill provides that:

As between the originator and the addressee, an electronic message is deemed to be that of the originator if it is sent by-

(a) a person who has the authority to act on behalf of the originator in respect of that electronic message; or

(b) an information processing system programmed by, on behalf of, the originator to operate automatically.

Section 17(2) contemplates the fact that many communications and contractual offers are transacted by electronic agents as intermediaries. Where the intermediary is another person, section 17(2)(a) states that the communications made by that person is attributed to the originator on the basis of the common law notion of *authority*. Section 17(2)(b) attributes the operations of an "information processing system" to its originator. According to the definition sets out in section 5, an "information processing system" means an electronic system for generating, sending, receiving, storing or processing the electronic message. The legal effect of section 17(2)(b) is that each operation of an electronic agent employed as an intermediary in an electronic transaction will be attributed to the person who originated its use.

Do the drafters of the Act really contemplate the use of electronic agents as intermediaries in e-commerce? Or is this a case of simply copying from the Model Law? If they really contemplate e-commerce by electronic agents, why is it that there is no provision that gives legal recognition to such a contract? Perhaps, they have forgotten. Admittedly, section 7(2) covers all contracts, entered into between human beings, human and electronic agent as well as between electronic agents. However, arguably, the ECA would be better with a provision giving legal recognition to contracts by electronic agents.

TIME OF DISPATCH AND RECEIPT OF ELECTRONIC MESSAGE:

Section 20 on time of dispatch states, "Unless otherwise agreed between the originator and the addressee, an electronic message is deemed sent when it enters an information processing system outside the control of the

[26] See Model Law, Article 13.

originator." The ECA adopted the Model Law partly and ignored some parts. Article 15 of the Model Law provides that the dispatch of a data message occurs when it enters an information system outside the control of the originator or *of the person who sent the data message on behalf of the originator*.

The Model Law defines the time of dispatch of a data message as the time when the message enters an information system outside the control of the originator. In the case of a data message sent by someone on behalf of the originator, the time of dispatch takes place when it enters an information system *outside the control of that person*. The ECA ignores the latter, for reasons only known to the drafters. It is important to recognise that in reality, an originator, for instance, a director of a company, normally would ask his secretary to send electronic messages. This would normally be done by using the secretary's computer. It is also not unusual for someone to ask someone else (friends, relatives, neighbours, etc) to send electronic messages by using that someone's computer. The ECA, however, does not address this issue. Undoubtedly, the latest international instrument, the UNCUEC 2005, has clearly provides for this. Article 10 provides that the time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator.

On the time of receipt, section 21 of the ECA provides, "Unless otherwise agreed between the originator and the addressee, an electronic message is deemed received-

(a) where the addressee has designated an information processing system for the purpose of receiving electronic messages, when the electronic message enters the designated information processing system; or

(b) where the addressee has not designated an information processing system for the purpose of receiving electronic messages, when electronic message comes to the knowledge of the addressee.

It has been argued that when considering appropriate rules of delivery and receipt for electronic communications, as with offline provisions both the efficiency of the rule and justice to the recipient have to be taken into account and an appropriate balance achieved.[27] Arguments have also been

[27] Graham Smith, "Legislating For Electronic Transactions," [2002] C.T.L.R 61

put forward that the rule such as in section 21 (a) may be practicable where two large companies with IT departments are communicating electronically with each other on a pre-agreed basis. If necessary, the two companies can keep gateway logs that can examine to determine when the relevant event occurred. However, a rule such as this is wholly unrealistic for a home PC user.[28]

In the offline world, rules about service and delivery of documents tend to provide for a presumption of service or delivery after the expiry of a conventional period after, for instance, posting, and do not investigate when the post office actually delivered the item. Such a factual investigation tends to take place only if the alleged recipient wishes to challenge actual receipt, if at all.[29]

The Model Law provides for three different situations for the rule on the time of receipt. First, if the addressee has designated an information system to receive the communication, the receipt occurs when the message enters the designated system. Second, when the message is sent to the information system of the addressee that is not the designated information system, the time of receipt is when the message is retrieved by the addressee. This may occur when the message was sent to the other electronic address of the addressee, instead of the designated electronic address as requested by the addressee. Third, when the addressee has not designated an information system, receipt occurs when the electronic message enters an information system of the addressee.

Section 21 of the ECA provides only for two situations. It does not provide for the second situation as in the Model Law. It is difficult to understand the reason/s, if any, for not having it. The reality is that the situation as such may occur. The other difference between the Model Law and ECA is regarding the rule on time of receipt in relation to the situation when the addressee has not designated an information system. Under the Model Law, receipt occurs when the message enters an information system of the addressee, whereas under the ECA, receipt occurs when the message comes to the knowledge of the addressee. The question is, what amounts to the knowledge of the addressee? Does it mean the actual knowledge of the contents of the message or the existence of the message?

---

[28] *Ibid.*

[29] *Ibid.*

The UNCUEC 2005 provides a clearer provision and better approach. Article 10 (2) provides that the time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address. It is to be noted that the emphasis is on "capable of being retrieved".

INTERPRETATION:

Originator and addressee

According to the ECA "Originator" means a person by whom or on whose behalf, the electronic message is generated or sent. For the purposes of making it clearer, someone who is acting on behalf of the originator should be explicitly excluded by the definition. The Model Law, for example, states, "Originator" means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage…but it does not include a person acting as an intermediary…"The UNCUEC 2005 adopted a similar approach and same expression. The "addressee" is defined by the ECA to mean a person who is intended by the originator to receive the electronic message. Again, it is important for a person who is acting as an intermediary to be excluded.[30]

Electronic signature

Section 5 defines electronic signature to mean any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature. This definition is too general, lacks of any nexus with electronic message, which is the focus of the ECA. Electronic signature must be defined in the context of electronic message.

[30] See article 2 of the Model Law and section 4 of the UNCUEC 2005.

In New Zealand, section 5 of the ETA, states, "Electronic signature, *in relation to information in electronic form*, means… ." Similarly, the Model Law on Electronic Signature 2001 defines electronic signature in relation to data message, provides, "Electronic signature means data in electronic form in, affixed to or logically associated with, *a data message*…."

EGAA IS REDUNDANT:

Basically, the electronic government is the e-business of the state. It enables the public to deal with the government electronically and vice versa. The bottom line is the use of the electronic communications in dealing with the government entities. The legal principles are similar as in the electronic communications/ transactions involving non-governmental entities. It is argued that there is not a need to have a separate law governing the electronic communications between the government and the general public. Firstly, already the government has enacted the Electronic Commerce Act 2006 (ECA 2006). Now, the EGAA 2007 exists, with the same principles. Why the duplicity? The ECA should have been developed as the Electronic Transactions Act or Electronic Communications Act tailored towards providing the rules and principles on the electronic communications conducted by the individuals, government as well as business entities. In short, a single Act covering the electronic communications of all would be the most sensible approach.

Countries like Singapore, Hong Kong, Thailand and many more have incorporated the government transactions under their respective electronic transactions act without having a separate law for the government entities. To our knowledge, there is no other country in the world that is having what Malaysia has; a separate law for the government electronic communications. The U.S has the Electronic Government Act though, but it relates more to the access to information and data protection.

Secondly, most of the important and fundamental provisions of the EGAA are the same as in the ECA. Many of them are in *pari materia.* These provisions are found in sections 10, 11, 12, 13, 14, 15, 16, 18, 20, 22, 24, 28, 29, 30, 31, 32, 33, 34 and 35. In fact, section 3 of the EGAA and the ECA contain more or less a similar provision. This proves that we are not

wrong in arguing that the principles involved are the same. Therefore, what is actually needed is only one and not two legislation, to govern all parties who may want to communicate and do business electronically.

SECTIONS 13, 14, 15 and 23: MISSINGS WORDS:

Sections 13, 14 and 15, respectively, deal with signature, seal and witness's signature. They are similar and identical. Section 13 provides;

"Where any law requires a signature of a person on a document, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by an electronic signature which…"

Section 14 states;

"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…"

Finally, section 15 states,

"Where any law requires the signature of a witness on a document, the requirement of the law is fulfilled, if the document is in the form of electronic message, by an electronic signature…"

Note that in sections 13 and 15, there is missing word/s in between the words "electronic message" and the words "by an electronic signature" in line 3 of both the provisions. As for section 14, the missing word is in between the words "electronic message" and the words "by a digital signature". In all the three sections, to our mind, these are errors. These errors make the provisions meaningless. These errors too, made the law fails to carry the intended purpose. These are similar errors that have occurred in the earlier Act[31]. The same mistakes are repeated in this new Act. Could these be mere typo errors or what? We have brought this to the attention of an MP, whom raised the issue during the debate of this new Act. Sadly to say, the Minister in the Prime Minister's Department, however, in response to the question, refused to acknowledge these errors. A more serious and glaring mistake which may have far-reaching implications are found in section 23 of the EGAA. This section provides:

"Where any law requires a register to be established, operated and maintained, the requirement of the law is fulfilled if the register is in the

form of an electronic message and its contents **cannot be altered by any means by any person administering the register who has the power by law to alter the register".**

This section seems to suggest that the content of electronic register cannot be altered at all. Not even by the person who has the power by law. How about the alteration for the correction of any errors or for updating the data? Would this mean that the electronic electorate register cannot be altered? Students' record at the schools and universities cannot be altered? Patients register at the hospitals cannot be altered? Worse still, the births and deaths register of the nations cannot be altered?

CONCLUSIONS:

The ECA and EGAA are the end products, resulted from of the work of many parties; the consultant, Attorney General's Chambers, Prime Minister's Office, Parliamentarians and Senators. Perhaps, it is not an exaggeration to argue that the ECA and EGAA very much relates to knowledge, thoroughness and quality. The ECA suffers from defects and weaknesses. Meanwhile, the EGAA is clearly redundant and unnecessary. These are some of the lessons to be learned from Malaysia. Avoid from making the same mistakes.