LANDMARK DEVELOPMENTS IN SINGAPORE’S ELECTRONIC COMMERCE LAWS

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Abstract
This Paper examines Singapore’s development of Electronic Commerce laws, particularly in the areas of electronic contracting and spam control. It focuses on two important practical issues in e-contracting: the legal effect of online pricing errors on contracts and whether email correspondence can lead to the formation of valid, binding contracts. The other major development concerns the multi-faceted strategy against spam, including proposed spam-specific legislation. The contributions that these developments make to Electronic Commerce Law and their practical and commercial implications will be assessed.


1 Introduction
The benefits offered by electronic commerce in the opening up of new markets and trading opportunities and the lowering of transactional costs are well-recognized. In order to reap these benefits and to become the regional media centre and regional hub for electronic commerce in the Asia-Pacific, Singapore has taken pro-active measures in the form of infrastructure and support services, e-commerce promotion and a new legal and regulatory framework that supports e-commerce. In keeping with these aspirations, Singapore became the first country to adopt UNCITRAL’s Model Law on Electronic Commerce in 1998. On the other hand, Singapore’s concern about cyberspace abuse prompted attempts to regulate the Internet, again the first country to do so the same year the US Federal Court rejected the Communications Decency Act in June 1996. To attempt such control, a Class Licence Scheme and an Internet Code of Practice were introduced to encourage responsible use of the Internet by imposing minimum standards in cyberspace. The policy was not to regulate the whole of the Internet but to focus on certain objectionable content which undermined public morals, political stability and religious harmony in the country.¹

More recent attempts to promote an international profile and reputation as an IT hub are the: (a) proposed adoption of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts 2005 (b) proposed Spam Control legislation and (c) development of case law in the area of electronic contracting.

2 Proposed Adoption of the UNCITRAL Convention 2005
The legal obstacles to international trading activities are disharmony between national legal systems and gaps in the law. Singapore is therefore proposing to adopt the UNCITRAL Convention² to remove legal obstacles to electronic commerce, enhance legal certainty and commercial predictability...
by establishing uniform legal rules in the
use of electronic communications in
international contracts. These changes
relate to the location of parties, legal
recognition of e-communications,
functional equivalence between
electronic and paper documents, time
and place of dispatch and receipt of e-
communications, automated message
systems and errors in e-
communications.  

3 Case Law Developments on
Electronic Contracting
While enacting e-commerce laws drawn
from the best features of international
models, Singapore courts have also
embarked on gap-filling by resolving key
issues in e-contracting which have created
uncertainty for businesses. Legal uncertainty
increases business risks and costs. These
developments are discussed below.

4 Online Pricing Errors
Mistakes will inevitably occur in the course
e of electronic transmissions resulting from
human error, programming errors or
transmission problems. The first case of its
kind to come before the Singapore court is a
“paradigm example” of human error. In
Chwee Kin Keong & Others v
Digilandmall.com Pte Ltd [2004] SGHC 71
(decided on 12 April 2004), one of the
plaintiffs was trawling the Internet in the
early hours of the morning when he stumbled
upon an incredible bargain - an offer of
sophisticated HP commercial laser printers
for just Singapore $66 each. The market
price was $3854. He notified his friends and
they each snapped up a hundred or more
printers. Other Internet users also pounced
upon the offer and the total number of
purchase orders soared to 1,008, before the
unfortunate seller found out the drastic error.
It is interesting to note the source of the
error. The seller was conducting hands-on
training which used a new template designed
to facilitate instantaneous price changes
which could be simultaneously reflected in
the relevant Internet Web pages. During the
training, an employee inadvertently
uploaded the contents of the training
template onto the Digilandmall.com Website
in place of the test website allocated for the
training. The programme trigger on that
Website automatically initiated the insertion
of similar contents onto all the Websites.
Thus the description of the laser printer
“HPC 9660A Color LaserJet 4600” was, as a
result of the accident, replaced by the
numerals “55” while the numerals “66”
replaced the correct price of the laser printer
priced at $3854.

The plaintiff buyers insisted on
enforcing the sale at the ridiculously low
price but interestingly, none of the other 778
buyers followed suit. Naturally, the
defendant seller resisted the claim on the
ground that the law should not penalize a
seller who had genuinely made a unilateral
mistake which was known or ought to have
been known to the buyers. They were
university graduates conversant with
commercial practices and the workings of
the Internet.

4.1.1 Formation of Online Contracts
Online contracts between buyers and sellers
can be made as follows: The website
prompts each buyer to go through a
sequence: shopping cart, checkout-order
particulars, checkout-order confirmation,
check-out payment details and payment
(cash on delivery or credit card). After the
payment mode is indicated, each buyer is
notified “successful transaction…your order
and payment transaction has been
processed”. Upon completing this sequence,
each order is confirmed by automated
responses from the website stating
“successful purchase confirmation from HP
online”. Such an automated response is
binding on both parties. This was the exact
sequence in the Digilandmall case.

4.1.2 Effect of Unilateral Mistake on
Online Contracts
Normally the court takes an objective
approach in determining the existence of a
The court will depart from this approach and treat the purported contract as a nullity if (a) one party [the buyers] knew that the other party [seller] did not intend the offer to be made according to its literal terms [the offer price at $66] or (b) the non-mistaken party ought reasonably to have known of the mistake [because the offer price is so ridiculous]. The contract will be nullified because there is no consensus ad idem. This is also to prevent the non-mistaken party from taking advantage of the other party’s error by “snapping up” the offer before the mistaken party discovers his error. This concept of unconscionability has been applied by Australian and Canadian courts in other contexts. In such “snapping up” cases, it has been held unconscionable to enforce the bargain and equity will set aside the contract.

It is clear from the common law authorities that the following characteristics will nullify a contract for unilateral mistake: (a) the terms of offer are clear and unambiguous (b) the offeree accepts the offer according to its literal sense but it must have been obvious (and known) that the offer was not intended to be made in those terms (c) actual knowledge of the mistake is not necessary. One is presumed to know what would have been obvious to a reasonable person in the light of the surrounding circumstances (d) the haste or urgency “indecent alacrity” with which the offeree seeks to conclude the contract before the mistake becomes known (e) behaviour that any fair-minded commercial person in a similar position would regard as a patent affront to commercial fair play or morality (f) the mistaken party’s negligence, if any, in contributing to the mistake is not relevant. The court will not enforce a contract in the absence of consensus ad idem nor allow a non-mistaken party to gain an improper advantage in such circumstances.

4.1.3 The Decision – Who Bears the Risk of Mistake?
Incorrect online pricing is a common occurrence and some merchants have simply honoured the posted price out of business goodwill or legal ignorance. The court’s decision to nullify the contract on the ground of unilateral mistake is significant. It means that the buyers cannot enforce the sale against the seller at the incorrectly posted price.

4.1.4 Commercial implications
The case offers a solution to a practical problem often encountered in electronic contracting: the posting of wrong prices. It creates a clear precedent that buyers with actual or presumed knowledge of the pricing error cannot take advantage by hurriedly “snapping up” very huge orders at the expense of the mistaken seller. The legal solution is just and fair, pragmatic and commercially sensible. The financial consequences for a seller could be astronomical if it were compelled to honour each and every transaction at the ridiculously low price. It could lead to financial ruin. The court’s decision is a signal to businesses and consumers alike that the law will deter unethical conduct and sharp practice and act as guardian of commercial morality. This will in turn create legal certainty for businesses and foster confidence in e-Commerce.

However, the decision should not be taken to its extreme as implying that in every case of wrong pricing, the seller will be let off. It will depend on the state of knowledge of the buyer, the price discrepancy and other relevant circumstances of the case.

In any event, merchants should consider taking risk management steps against unintended liability, for example (a) whether to make online offers or merely to invite offers and how to express such intention online (b) how to acknowledge orders or confirm acceptance of orders, (c) how to provide online procedures on when seller and buyer become legally committed and (d) regularly checking the accuracy of information posted online.

5. Contracts Formed by E-mail
In another first case of its kind, the Singapore High Court upheld a lease that was formed purely by e-mail communication without any follow-up paper correspondence. The case of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58 [decided on 30 March 2005], involved two companies providing logistics services. SM owned a warehouse which it leased to Schenker for a two year period but shortly before the lease commenced, Schenker withdrew because it no longer needed the warehouse for storage purposes. When sued for the lost rentals for the period of the lease, Schenker raised the defence that even if the lease had been concluded, it was unenforceable by virtue of section 6(d) of the Civil Law Act (CLA) and section 4(1)(d) of the Electronic Transactions Act (ETA). The CLA provides that for a lease to be enforceable, there must be a sufficient note or memorandum in writing and signed by the party to be charged [Schenker].

5.1 Was there a sufficient memorandum in writing?
The High Court held that the e-mail relied upon, together with its attachment, the draft Logistics Service Agreement and the acceptance of its terms together constituted the necessary memorandum. The online correspondence satisfied the statutory requirements as it contained the identities of the parties, the description of the subject matter and the consideration [rental]. A similar conclusion was reached in the case of *Nilesh Mehta v J Pereira Fernandes SA* [2006] EWHC 813 (Ch) where the English High Court held that the e-mail correspondence there was capable of being a sufficient memorandum in writing of the alleged guarantee.

5.1.1 Is e-mail the functional equivalent of writing?
Notwithstanding the existence of a memorandum, Schenker argued that the electronic record of a lease could not be treated as the functional equivalent of writing by virtue of section 4(1)(d) of the ETA. This is reflective of the conservative approach that was taken in 1998 when electronic commerce in Singapore was still in its infancy. Since then, IT and fraud control have progressed so far that the law should not “place obstacles in the way of adopting practical and commercially viable electronic means as they become available”.

The High Court agreed with SM’s submission that the requirement of writing and signature should not be construed so as to exclude the use of electronic forms. Section 4(1)(d) of the ETA did not automatically exclude, as a matter of law, electronic records from satisfying the requirements of writing and signature. It was a matter of legal interpretation whether or not an e-mail could satisfy the requirements and it was for the court to decide. The court referred to the Interpretation Act which defines writing to include “printing…typewriting, photography and other modes of representing or reproducing words or figures in visible form”. The e-mail messages are “words…in visible form” when displayed on the monitor screen, although the underlying digital information will not be “writing” for the purposes of the Interpretation Act. The e-mail messages and attachments could also be printed out. Furthermore, the natural meaning of the term “writing” should be extended to include technological developments as there is a presumption that “Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act [CLA] was initially framed [an updating construction]”: Bennion, *Statutory Interpretation*, Butterworths, 4th Ed, 2002, 762.

The requirement of written evidence in certain contracts such as leases is to protect against fraud and sharp practice. The recognition of electronic correspondence as writing will serve the same purpose as long as the existence of the electronic record could be proved. This was not a problem in the present case as the parties readily admitted sending and receiving the relevant
e-mail messages. It was also not disputed that the hard copies in the agreed bundle of documents were true copies of the e-mail correspondence. The Singapore High Court also referred to two American cases. In \textit{Wilkens v Iowa Insurance Commissioner} 457 NW2d 1, (Iowa App 1990), it was held that a “written record” was kept by keeping records in a computer. In \textit{Clyburn v Allstate Insurance Company} 826 F Supp 955 (DSC 1993), it was held that information in a computer floppy diskette could constitute “written notice”. The information could be printed out as “hard copy” and in today’s paperless society, the court was not prepared to hold that such a diskette would not constitute the requisite “written” notice.

5.1.2 The issue of “signature” in electronic transactions

Although there was no e-mail or any hard copy containing a “signature”, SM argued that the common law takes a pragmatic approach. It looks to the function of a signature as authentication, rather than to its form. The “signature” requirement has been liberally construed so that it need not be a signature in the conventional sense. A printed slip containing the name of the defendant may suffice. It followed that the typed names in the e-mail would satisfy the “signature” requirement because the intention was clearly to authenticate the e-mail correspondence. This is consistent with the Australian and American approach that the typing of a name in an e-mail or the presence of the sender’s name was capable of satisfying a statutory “signature” requirement. In the present case, no signature was appended to the bottom of any e-mail. The only name appeared in the head of the e-mail in the line reading: \textit{From……}” Schenker confirmed that it had sent out the relevant messages and did not dispute the authenticity of any of these. The court therefore concluded that the email contained a “signature”.

5.1.3 Final Outcome

Based on the e-mail correspondence, the court concluded that the parties had entered into a valid lease, duly evidenced by a “written” memorandum and “signed” by Schenker. SM was therefore entitled to the damages claimed for breach of contract.

5.1.4 A Different Approach

With regard to the “signature” issue, it is interesting to note that an English court has taken a different approach in the \textit{Mehta} case (above). The court considered the issue to be whether the document had been “signed” at all, not with what intention the party had signed the relevant document. The e-mail address which was relied upon as constituting the signature (as in the Singapore case) was treated as equivalent to a fax or telex number and it could not be sensibly suggested that this was a signature. The appearance of the name of the party to be bound must be “intended for a signature”. In the \textit{Mehta} case, there was no evidence that the e-mail address was intended to be a signature.

5.1.5 Commercial Impact

To the extent that there are divergent views in the common law courts on the signature issue, it creates uncertainty for businesses. In this event, the use of electronic signatures to authenticate the electronic correspondence would probably be the most effective way of satisfying the signature requirement.

On the other hand, the approach taken by Australian, American and Singapore courts recognizes the commercial practice of e-mail exchanges and gives effect to the intention to enter into a valid contract. This is a pragmatic and progressive approach which has far-reaching implications for e-commerce. It interprets legal requirements in a manner compatible with the advent of paperless electronic transactions. It also recognizes that the traditional protection against fraud secured by writing and signature may be overtaken by technological tools to provide the necessary online security. However, this may have the effect of catching the unwary
off-guard. Parties may find themselves contractually bound by the e-mail correspondence without having signed any agreement in the conventional sense. A safeguard is to make the electronic correspondence “subject to contract” to indicate that a binding contract is yet to be formed.

6 Proposed Spam Control
With the exponential growth of spam, it has become the international trend to adopt a multi-faceted strategy. Similarly, Singapore is proposing to enact spam-specific legislation along with public education, industry self-regulation and international cooperation. The proposed legislation will draw upon the experience of the UK, USA, Australia, Japan and South Korea. Singapore’s policy in relation to spam control is not to eradicate all unsolicited commercial electronic messages but only those falling within the definition of spam. This is intended to balance the legitimate use of e-mail as a cost-effective tool for commercial marketing and electronic commerce with the protection of end users and Internet Service Providers (ISPs).

6.1 An “opt-out” approach
A pro-marketer “opt-out” approach is proposed, consistent with welcoming the responsible use of electronic communication. This is similar to the approach in the United States, Japan and South Korea. An “opt-out” mechanism will allow unsolicited bulk commercial e-messages to be sent so long as there are instructions on how to “opt-out” of future spam messaging. Minimum requirements must be met and legitimate commercial e-marketing is allowed within such limits. The “opt-out” regime has been criticized, for example in the United States, as legitimizing spam. To “opt out”, recipients have to reply to the e-mail which allows spammers to confirm which e-mail addresses are “live”, resulting in even more spamming. This puts the burden on the recipient to stop unsolicited e-messages. Any marketer may initiate the junk mail until told by the victim to stop (“opt-out”). An “opt-in” approach is viewed as being pro-consumer. It respects privacy and gives recipients more control over the e-mail they receive and in this way, builds online consumer confidence.

6.1.1 Liability for spamming
The proposed spam legislation imposes liability on the sender as well as on the business which commissions or procures the spamming. Internet service providers, mobile phone operators and other network service providers will not be liable as they are mere conduits for the sending of e-mail or mere providers of access or routing services. Civil redress will be available to any recipient or person suffering loss as a result of the spamming. The victim will have a statutory right to claim: (a) damages usually for pure economic loss or (b) prescribed statutory damages (c)an injunction to stop the unlawful spamming (d)costs and expenses of the action. However, it is not proposed to criminalize spamming as such.

6.1.2 Commercial implications
As long as spamming continues to be a lucrative industry and raises jurisdictional and enforcement issues, any multi-faceted strategy can at best only manage but not completely eliminate spam. The view taken is that at the end of the day, “there is no silver bullet to eradicate spam… Spam, like viruses, may become a permanent feature of the Internet, but a judicious combination of the multi-pronged approach is the best way forward”.

7 Conclusion
The recent developments in Singapore’s Electronic Commerce laws reflect a pro-business approach and significant efforts to align the law with global legal trends and technological developments. Together with the adoption of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts, the proposed Spam Control legislation and further developments...
in case law, Singapore should be sufficiently well positioned to become the regional electronic commerce hub.


7. The Act defines spam as “unsolicited commercial communication transmitted by e-mail or by text or multi-media messages to mobile phones” (electronic messages). Spam has four distinctive features: (1) it is unsolicited communication (2) commercial in content (3) consists of e-mail and text messages eg text or multi-media messages and (4) is transmitted in bulk.