

E-commerce and Consumer Protection in Malaysia: Advertisement and False Description

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Abstract. One of the common and popular practices in any transaction or business endeavour is the act of advertising. These practices are already well known in traditional or non-electronic businesses. The purpose of advertisement is to inform and at the same time allure consumers to the products as advertised by the sellers. In many instances, customers are attracted to the content of the advertisement and make their decisions to buy the products as advertised. The role of the law here is to protect the consumers from misleading or false advertisements. Advertising is also widely used on the Internet either to promote goods sold or to entice consumer towards a particular web site, especially in e-commerce relating to business to consumer (B2C). The common drawbacks of advertising in e-commerce, as in traditional businesses, are misleading and false advertisements. One recurring issue regarding e-commerce is the inadequacy of legal provisions regulating advertisements and false descriptions. How does the law in Malaysia address this issue? This article will discuss the relevant legislation i.e. the Trade Description Act 1972 and its applicability to e-commerce.

Keywords: E-commerce, Malaysia, consumer protection, trade description

1. Introduction

The scope of the law of consumer protection in the sphere of e-commerce activities is very wide. One can see many aspects that concern the consumers in almost every activity and practice of e-commerce. For example, in matters of security, privacy, dispute resolution, sale of goods and so forth; all of them have effect on consumers. However, in this paper the author will not discuss all those each and every part of e-commerce activities and practices. Here, the emphasis is more on dealings or acts that are directly related to consumers, an act of the seller, which misleads or injures the consumers. The focal point is on the consumers. This paper will deal with what we call 'the narrower rights' of consumer protection as opposed to its counterpart, 'the wider rights'. By 'narrower rights', we refer to activities of the merchants or sellers in the Internet such as advertisement, fair dealings, information disclosure, conditions and warranty of goods and so forth. Regulations dealing with these activities are to ensure that the goods sold and bought are as described on the web sites by the seller and the goods received are of good quality. In addition, the advertisement displayed on the web sites must not deceive the consumers.

However to say that legal protection in Malaysia pertaining to e-commerce is of non-existence would not be completely true. There are various legislations in existence, which can govern all sorts of transactions, conventional or otherwise. After all electronic transactions are just different in terms of its manner; the practice of selling and buying things is still the same. Hence, the legal implications of such practice must also be the same. The myriad of convention laws in existence may be argued as also applicable to e-commerce. Therefore, explanations on the practice of e-commerce vis-à-vis the law of consumer protection in Malaysia has to be based on a number of statutes. To do so we have to canvass various statutes; those related to consumer protection generally as well as those related to business transactions such as sales of

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goods. From there we will argue whether the whole Act can be applied to e-commerce or otherwise, or whether some provisions of the Act can be invoked or not. This can be considered as an exercise of looking into a general or conventional law and determine whether it is applicable to a specific practice such as e-commerce. This can also be taken as an attempt to apply a traditional law to a modern law, the latter refers to the law of e-commerce.

2. The legislation

There are several statutes that relate to consumer protection generally that may be applied to e-commerce in Malaysia. There are a host of statutes, which are applicable to conventional transactions that can also be applied to e-commerce dealings, but for the purpose of this paper I will focus on the Trade Descriptions Act 1972. It is also pertinent to reiterate that the Consumer Protection Act 1999 does not apply to electronic transactions. Section 2(g) of the Act specifically excludes such transactions, unless the Minister by a Gazette declared otherwise. It looks that there is a beacon of hope for electronic transactions to be included within the ambit of the Act as its possible implementation under the Act can be made just through Ministerial declaration, not through legislative amendment. One can only guess the reason for e-commerce present exclusion of the Act: it could be that the Tribunal concerned dealing with consumers complaints is not yet ready to arbitrate disputes on electronic transactions. Because of the legal uncertainties surrounding e-commerce, a host of problems are very likely to crop up emanating from such transactions if the Tribunal were to arbitrate the disputes. Simply said, the authorities and perhaps the litigants themselves are not ready to enforce consumer rights transacting in e-commerce under the Consumer Protection Act.

The requirement of legal protection on e-commerce transactions stems from several underlying principles[1]; [2]:

“a) Transparency and the right to receive sufficient and reliable information before and, where appropriate, after the transaction including, in particular, the authenticated identity of the supplier and the provision of information necessary to prove the authenticity of each element of a transaction;

b) The protection of consumers from unsolicited, misleading and unfair marketing practices, including advertising, and the support for the provision of reliable means to enable the consumer to filter the content in communication system;

c) The protection of a consumer’s economic interests taking account of a fair distribution of risk and liability that reflects in particular the responsibility of the supplier in choosing electronic means of trading and including, in particular, the conditions necessary for the consumer to take well-considered decisions”.

Thus it is pertinent to examine whether Malaysian law ensure the existence of all elements of legal protection mentioned above such as pertaining to transparency, the right to reliable information, protection against unfair marketing practices and responsibility and liability of suppliers or sellers. I will examine the provisions of local statutes in the context of such elements.

3. Advertisement and false description

One of the common and popular practices in any transaction or business endeavour is the act of advertising[3]. These practices are already well known in traditional or non-electronically businesses [4]. The purpose of advertisement is to inform and at the same time allure consumers to the products as advertised by the sellers. In many instances, customers are attracted to the content of the advertisement and make their decisions to buy the products as advertised. The role of the law here is to protect the consumers from misleading or false advertisement. In electronic commerce, advertising is also widely used on the Internet, either to promote goods sold or to entice consumer towards a particular web site, especially in e-commerce relating to business to consumer (B2C). The common drawbacks of advertising in e-commerce as in traditional businesses are misleading and false advertisements. The rapid and quick method of displaying products over the Internet make advertising on it even more prone to misleading or deceitful acts.

We need to examine the law that governs trade description over sale on the Internet. Is the Trade Descriptions Act (TDA) 1972 [5] applied to advertising on the Internet? We need to look at the Preamble of the Act, which states:

“An Act to consolidate and amend the laws relating to merchandise marks with new provisions prohibiting misdescription of goods provided in the course of trade and false or misleading indications as to the price of goods; to confer power to assign the meaning of any expression or indication used in relation to the prices of goods, charges or rates of services, accommodation or facilities and to regulate, control or prohibit the use thereof in the course of trade and business; to prohibit the making of false or misleading statements as to any services, accommodation or facilities provided in the course of trade or business; to confer power to require information or instructions relating to goods to be marked on or to accompany the goods or to be included in advertisements; and for related purposes”.

The preamble represents the objectives of the statute. The preamble above is very wide in its scope and it can be argued that transactions in e-commerce apply too under the Act. Although there is no specific expression that refers to e-commerce in it, there is no expression that excludes it either. Thus, e-commerce transactions should be governed too by this Act. As indicated above, the main purpose of this Act is to punish offenders who commit acts of misleading and falsehood descriptions in their businesses or trading. The goods that they sold or services rendered must correspond to the descriptions displayed on the label of the goods or the brochures or other documents related to the services advertised. In short, the labels or advertisements shall not give misleading or false descriptions that induce the customers to purchase the goods or hire the services.

The representations made by the seller are usually by way of advertisement. Advertisement is capable of informing the consumers of the benefits and beauty of a product but at the same time it may also mislead the consumers. Advertisement is a powerful medium in today's businesses. Thus the law has to regulate advertisement otherwise consumers will be subject to the mercy of the sellers. First we look at the definition of advertisement under section 2 of the TDA 1972. A question arises here whether the section refers and hence covers advertisement on the Internet. The act and forms of advertising described in section 2 such as those that refer to writing, sound, photograph, film etc are all synonymous with the Internet. Although there is no mention of the word Internet in the section 2 of the Act, the words 'by any other means' is wide enough to cover advertisement on the Internet. Advertisement on the Internet is usually posted on the sellers own website or posted on other websites. The purpose is still the same that is to entice consumers to the goods or services displayed in the advertisement. The TDA 1972 applies to the trade descriptions of the goods or services displayed as well as to all goods of the same class as those goods or services. This means that the Act protects the consumers from any false description in an advertisement for goods already in existence but also to goods of the same class, which are yet to be manufactured or produced. This protection applies to non-electronic as well as to electronic commercial transactions.

It is an offence under the TDA 1972 for any person to use (s.3 (1) (a)) or to supply or offer any goods (s.3 (1)(b)) which contain false description. For false description made through advertisement, the presumption of liability is on the person who, directly or indirectly, offers to supply goods or services. (s.7A). It means that for any false description of goods placed in an advertisement, action can be instituted against the manufacturer or seller of the goods.

The TDA 1972 is a statute of criminal application. In other words, the Act provides mechanism of enforcement by the public authorities to ensure that no party resorts to false trade descriptions on any goods manufactured, supplied or sold. It carries penal sanction whereby offenders will be punished - imprisonment or penalty or both - for any offence committed under the Act. The Act does provide any civil remedy or cause of action. An aggrieved person cannot institute any civil action against the villain for the purpose of obtaining a remedy or compensation. To obtain remedy he has to institute a civil action or other statutes.

False description of goods in and by advertisement is also provided under the Direct Sales Act (DSA) 1993. Advertisement under the Act is defined as any form of advertisement (whether or not it is oral or written or sound) published or otherwise through display of notice, card-label or documents or cinematography film or picture or photo or through television or radio or by any other means. It is provided under section 20(1) of DSA that any seller who supplies goods or services by mail order services and at the same time advertises the goods or services, the advertisement shall observe or contain the following information:

- The name and licence number of such person;
- The address of such person, which shall not be a postal box number;
- The telephone number of such person;
- A detailed description of goods offered or services to be provided;
- The places and times where a sample of the goods may be inspected;
- The price of such goods or services;
- The cost of delivery, if any, and the manner of delivery, of the goods; and
- The time when the goods or services could be expected to be delivered or performed.

And any violation of the above conditions is an offence under section 20(2) of the DSA.

4. Conclusion

There has been no single legislation in Malaysia until to date that protects consumers dealing in e-commerce. Even the Consumers Protection Act 1999 (Act 599) that is the principal legislation for the protection of consumers has not been extended to e-commerce. This has given rise to a perception by consumers that legal protection of e-commerce in Malaysia as almost non-existence. Even if a consumer were to take action under the normal law of contract, questions of proving it in court would certainly arise. How would a consumer buying goods over the Internet would, under the law of evidence, prove it to the court? This is, among others, an array of legal questions potentially asked by the litigants. The legal hurdle seems insurmountable, especially pertaining to B to C transactions. The same problem would occur in the case of false advertisement and description in e-commerce. The consumer will face big problem in proving such false advertisement and description in court even by referring to the Trade Description Act 1971. It will be more difficult when advertisement and description on the internet can be easily changed or erased.

5. References

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