

A critical analysis of e-commerce contracts with relevance to the UAE and the United Kingdom

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Abstract

Purpose – This paper aims to note how in-line the laws of each country are with the current best recommendations. The focus will be on the UAE and the UK for the purpose of creating a contrast between countries which have different regulations in general and between contrasting countries.

Design/methodology/approach – This paper seeks to critically analyze the state of e-commerce contract laws in terms of what forms a part of the law normally and to what extent the similarities have been enacted in the international laws. A critical analysis of the information derived through the search was undertaken. This methodology was to ascertain the viability of the information in terms of its consistency with the contemporary laws in each country relating to e-commerce. Comparisons were made on topic-by-topic basis within the searches.

Findings – It was clear through the information reviewed from both the UAE and the UK that both countries' laws are advanced in terms of being inclusive of the best common practices noted by the Organization for Economic Co-operation and Development (OECD). This shows that both countries, through their vastly different legal structures, have implemented similar laws with regard to e-commerce.

Originality/value – This report is original in its value to e-commerce laws, as it is the first to consider how different countries e-commerce contract laws lineup to the OECD-recommended rules related to it. The value of this research is to show to what degree is there cohesion within the e-commerce laws on an international level.

Keywords Law, UK, Consumer, UAE, Contract, International, E-commerce

Paper type Conceptual paper

1. Introduction

The Organization for Economic Co-operation and Development (OECD) recently published a paper entitled “Consumer Protection in Ecommerce” (2016) which will be used as a base to juxtapose the current standing with regard to e-commerce contracts in the UK and UAE against their recommendations. The two countries have been chosen as being representative of high e-commerce saturation points in different legal jurisdictions. The results of comparison will give rise to an understanding of the current state of e-commerce contracts in technologically advanced countries.

Although the focus on the UAE and the UK can only create a certain level of understanding on an international context, it has proven to be noteworthy in their lack of being jointly enforceable in all countries. The growth of the internet internationally has driven e-commerce to be a main point of life in the modern age. Within different countries, the method of e-commerce could differ with regard to the laws, which underpin the international trade that follows. This research seeks to understand the adoption of e-commerce contracts in the UK and in the UAE to discern if there is a consistent standard of application where focal legal points are concerned.



The areas of similarity and the differences which exist between e-commerce laws in both countries will be considered for the effect of analyzing the current state of international e-commerce contract laws through a review of the two of the most saturated e-commerce markets in the world.

The subject of e-commerce contracts in depth, as they relate to the UAE and the UK with a specific focus on the laws in each country, which govern the arena. Boolean searches were run with the key words to gain a representative selection of up-to-date information on the subject in both countries. Specific Boolean searches included “Ecommerce law in the UK”, “Ecommerce law in the UAE” “Ecommerce law in the UK and UAE” “Ecommerce laws in UK or UAE”, “Best practice for ecommerce”, “Laws regarding ecommerce and UAE” and “laws regarding ecommerce and UK”. Case laws in both countries were explored for in the context of breach of e-commerce contracts.

The question to be answered through this report is whether there is cohesion between e-commerce contracts in the UAE and the UK as a representation of global commonality in e-commerce laws.

2. E-commerce contracts best practices

Wherever there is trade between two parties that began over the internet, an e-commerce contract is not too far away. Whether it be for the service provision or for the lease or purchase of a new (or used) product, the inception of the e-commerce contract into the trade has facilitated the need to consider whether such contractual obligations are in fact enforceable on an international level (Turban *et al.*, 2006). Debenham (2016) noted that if a buyer signs an electronic contract to buy a product from a buyer in installment payments, what happens if the buyer is located in one country and the seller in another when it comes to enforceability? Do the laws of their own country allow the aggrieved party in the other country to recoup any losses that occur as the result of breach of contract?

It is not possible to categorically classify the laws surrounding e-commerce contracts on an international level, as all are dependent on the country in which the contract has a party (International Bar Association, 2015). In reviewing the UK and the UAE, in particular, it will be possible to glean two alternative methods of e-commerce application in relation to legal compliance. Through noting the differences and similarities between the application of e-commerce contract laws in both countries, it will become evident what the current state of cohesiveness in a global level exists in this regard.

3. The Organization for Economic Co-operation and Development-recommended e-commerce contract practices

The number one recommendation made by the OECD in relation to global countries' application of e-commerce terms and conditions is that they should be fair to the consumers. By putting the onus of fairness on the e-commerce business, a consistent approach to law can be gained through any of the national regulatory systems. Another aspect of e-commerce contracts that the OECD recommends to be covered is the area of monetary damages. The recommendation is that the monetary damages should be listed and be large enough to cover any eventuality from breach of contract.

The OECD also recommends clarity in the offer that is listed on any e-commerce site so that consumers have the ability to accurately judge the product or service that they are agreeing to purchase. This must include the full terms and conditions that the consumer is agreeing to, the method of payment, duration of the contract, any charges that are set to reoccur must be listed in full and also how to end the subscription (refer to OECD Recommendations, 2016, for all recommendations listed above).

4. E-commerce practices in subject countries compared to the Organization for Economic Co-operation and Development recommendation

In the UK and in the UAE, the onus for a contracting party to go about the contract with the same type of obligations that they would have if they were signing the contract in a bricks-and-mortar store is absolute (Blythe, 2012). There are no revisions to contract law in either country as it plays out in e-commerce, but both countries recognize that the need for further clarification to contract law happens with regard to e-commerce to fully cover the nature of the contract as being virtual and across borders.

4.1 E-commerce in the UK

E-commerce regulations in the UK are set in law by the Electronic Commerce (EC Directive) Regulations 2002, which implemented the EU's Electronic Commerce Directive 2000 into the UK law. The Directive set out to mandate and synthesize the rules surrounding online commerce throughout Europe. The UK, as part of the European Union (EU) at the time of the inception of the law, has integrated the law into national regulation. Even with the UK now choosing to opt out of the EU, these laws have been enshrined into their national regulations and it is clear that they will not be changed for the reason of an exit from the EU (Lodder and Kaspersen 2002; Blythe, 2012).

Within the above regulations, it is virtually comprehensive of including every commercial website which trades in the UK. In the regulations write about an "information service" that is defined as any service normally provided for remuneration at a distance, by means of an electronic equipment for the processing (including digital compression) and storage of data at the individual request of a recipient of the service.

4.2 E-commerce case studies in the UK

In 2009 the High Court of the United Kingdom asked the European Union Court of Justice to provide a preliminary ruling on several questions as they related to L'Oréal v eBay (2011). L'Oréal sued eBay and sellers of their products on eBay for not gaining the previous permission of their company. One question was in respect to the liability that eBay might have in this case. The UK High Court ruled that eBay was liable for the European Court determined that they fit the basis for being categorized as an "information society service".

4.3 Missing from the regulations

Although the UK regulations are, comparatively speaking, on par with the most First World countries and especially within Europe, the regulations were missing any clarification as to where a person could sue or be sued in return (Lodder and Kaspersen 2002; Blythe, 2012).

The UK's regulations on e-commerce contracts use the "country of origin" principle. In the basic sense, it means that as long as the UK business is in compliance with the provisions and regulations of the UK, they cannot be held liable in a UK court for breach of contract to a party that is located elsewhere, if the laws in the other party's country do not comply with the UK's own perspective on it. In this regard, it is reasonable to recommend the full reading of the UK e-commerce laws whenever any e-commerce contract is entered into (Wang, 2010).

The law does take into consideration the possibility that avoidance of the law might be attempted by basing the company servers out of the jurisdiction of the UK. The regulation specifically notes where the business is established and not where the server is based and

considers the laws binding to apply to all businesses located within the UK, irrespectively. This would include any sales through sites such as eBay or Amazon.

With respect to consumer contracts, the regulations are not written to give allowance to the country of origin principle to be absolute. This means that if a UK business is selling products or services to consumers in countries where the laws and language is different than their own, they are obliged to carry translated terms in the language of the consumer's country and include the consideration and application of any contractual term that is required in the buyers' countries.

In the case of *eDate Advertising DMBH v X and Martinez v Mirror Group* (2011), the CJEU determined that only if there is a specific derogation provided for, can an e-commerce business be "made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established" (Lodder and Kaspersen, 2002).

Through this type of case law clarification, e-commerce contracts are made liable to the same contractual regulatory environment as any contracts and businesses that focus or split their trading between bricks-and-mortar and e-commerce sites, creating an obligation for the business to follow the same laws as they would if they existed in the physical world.

5. E-commerce business requirements in the UK

The UK e-commerce regulations set out minimum requirements for each business in the UK, which operates any type of e-commerce. The regulations include:

- the service provider's name must be easy to find on the site and may be an alternate name than the company is trading under;
- the geographical address of the company must be written on the website;
- details allowing contact to the company in more than one way. This can include an e-mail address and a "contact us" form or a telephone number and e-mail address;
- the company registration number;
- any trade member registration numbers if any applied;
- if the company is subject to any type of authority scheme, the relevant details of that authority must be included on the site;
- the value-added tax (VAT) number for the company;
- a requirement for clear pricing on the website that clearly states whether it includes tax and delivery; and
- the UK Companies Act requires that the business lists their registration number on websites in a specific format, particularly "XX Ltd. is a company registered in England and Wales with company number XX".

In relation to the requirement for a geographical address to be listed, the address is only to show where the established service provider is headquartered. In addition to the specific e-commerce laws, UK companies must follow all distance selling regulations (Kidd and Daugherty, 1999/2000).

5.1 E-commerce in the UAE

The UAE can be seen to be at the highest level of internet saturation among Islamic countries. With the introduction of the internet to the country in the early 90s, with Dubai still being considered as in where the latest technological initiatives and conventions are

conducted over any other place. It is noteworthy that the level of saturation of mobile phones in the UAE per 1,000 people is more than that of the UK, which means that the UAE has the ability to number in the top leaders of the world concerning internet understanding (Aljneibi, 2015).

The decision to partake in e-commerce is much higher in the UAE than in other Islamic countries owing to many factors, but most reports note the high level of English comprehension among residents of the UAE and the lack of integrated translations available online in e-commerce situations. This shows that there is a focus on English with regard to e-commerce wherever the website might be located, and this will extend to the comprehension of the e-commerce contract as well. It is reasonable to conclude that if e-commerce sites were to give full translation options to other languages, which included the translation of the terms and conditions, uptake on e-commerce would rise in other Islamic countries in-line with that seen in the UAE.

5.2 Reasons for lower e-commerce levels in the UAE

Part of the reason why the levels of e-commerce could be different between the countries could also be down to the fact that in the UAE there is still an Arab consumer base who may not understand how to use the internet or computers well enough to engage in e-commerce.

It is also relevant that in the Arab countries there has always been an emphasis on trading face-to-face, so this belies the desire to buy something through an e-commerce transaction that could otherwise be bought from a local trader. It is as well noteworthy that there is a segment of the Arab society that would look at the internet as a Western invention and as such would look at it as propagating Western culture or values, which would have the effect of avoiding using it for e-commerce purposes. Most of the popular e-commerce sites do not run Arab software for language translations, thus this inability to grasp in full what was being agreed can be seen as a deterrent (UNCAD, 2015).

Prior use of the internet and e-commerce particularly is seen to be a guiding factor in whether or not the UAE consumer is likely to make secondary and future e-commerce trades. It is noteworthy that within the Gulf Cooperation Council (GCC) region, the UAE can be seen to have a great extension of bricks-and-mortar businesses who have begun to include an ability to also order products online (Inam, 2015).

In the UAE, the Electronic Transactions and E-Commerce Law (Federal Law No 1 of 2006) in general allows electronic contracts to be entered into. The e-commerce law also specifically requires that both the consent and acceptance of contracts may be expressed via electronic communications (Edwards and Waelde, 2009).

In addition to the above regulations, the UAE regulatory regime which governs content (including digital content). Primary laws include the Publications and Publishing Law – the UAE Federal Law No 15 of 1980, the Cyber Crimes Law – the UAE Federal Decree No 5 of 2012 on Combating Cybercrimes and the National Media Council Resolution No. 20 of 2010 on the Criteria for Media Content. Any company that was set up in the TECOM in Dubai and any that setup in 2454 in Abu Dhabi also have to consider the TECOM Codes of Guidance 2003 and the Media Zone Authority Content Code.

Regardless of whether or not the business selling online is based in the UAE or not, if they are targeting customers in the UAE, they must follow all the laws that are set out in the UAE. The penalty for breach includes high monetary fines. It is important to ensure that within the terms and conditions, stipulations must be made that the delivery of service or product to the customer in itself creates the scope for the customer to be able to enter a dispute that any agreement ever occurred. In this regard, certain measures should be taken

to ensure that there is as little scope as possible for there to be any dispute as to whether or not the terms and conditions of the contract have been considered and accepted by the customer.

One thing that can be done to get the understanding that both parties understand all the terms and conditions is if the terms require an agreement of it before they are allowed to continue the purchase. If the UAE business owner is operating a website, they must also collect data in-line with the regulations relating to data protection, specifically the UAE Penal Code Article 379. Because the basis of the e-commerce contract is an online transaction, the ability to make the buyer confirm they understand and agree electronically is an acceptable means.

5.2.1 Promotional e-commerce contracts. In the UAE, if a company runs any type of promotional advertisement to increase their consumer market they have to also consider the e-commerce contract. In the UAE, if a promotional campaign offers any type of instantly gained prize, it is considered a competition (Billah, 2008). It is important to note that sales promotions are regulated on an emirate-by-emirate basis by the relevant Department of Economic Development. (The relevant authority in Dubai is the Dubai Department of Economic Development, for example.)

The area of on-line sales a promotion is also regulated under this requirement, and raises an interesting issue, specifically in the area of offline promotions. In the end, however, for any entity based outside of the UAE that targets consumers who are based in the UAE, the full compliance with the local regulatory regime must not be discounted and requires case-by-case consideration.

5.3 Gateway providers to e-commerce in the UAE

No e-commerce transaction can be completed without the thorough involvement of a payment processor to effect the payment. The business has to agree a contract first with the payment processor (Zhang, 2009).

5.3.1 Case example. With regard to the e-commerce contracts that are created in the UAE, they have been shown to be valid on an international level through ongoing acceptance and through a recent case which was heard in the New York, United States, and which was taken by the Al Maya Trading, a food distributor and retailer. The case centered on the fact that Al Maya Trading held a distribution agreement with Gemco, an international company based in New York. Al Maya was able to gain a sizable settlement of \$5.7m against Gemco for breach of the distribution agreement clause. It is in cases such as these that faith in the belief of an internationally acceptable standard can be gained, and it is most often the case that if both parties agree to certain points they will be held accountable for those points.

5.3.2 Critical analysis. In 2014, the value of e-commerce in the UAE was valued at \$2.5bn with a total retail turnover of sales of \$66.14bn, as estimated by Kearney (2015). This represented a growth of 20 per cent by the UAE from the previous year, with expectations that the value of the market will double in the next year. The level of internet penetrations within the MENA region is at its highest in the UAE with a 94 per cent reach. This can be compared to the UK and their reach of 89.9 per cent. The global average is 41 per cent, so it is clear that while that the UAE and the UK are both well-ahead of the global average, the UAE tops the saturation levels.

A study titled MasterCard's Online Behavior (2015) found that a full 83 per cent of the population of the UAE had purchased a product or service online over the three months previous to the study being compiled. The major online-spending categories in the UAE include clothing, home appliances, travel and motels. Although the UK and the UAE have

clearly shown their capacity for e-commerce trading, the laws which govern such transactions are more defined in the UK than the UAE at present. It is noted that the trajectory of law in the UAE is continuing to gain in the area of creating comprehensive e-commerce trading laws (Nair, 2014).

The way in which e-commerce contracts have been created make it necessary for consumers to be aware of the laws at the point of origin of the e-commerce business. It would be different laws that would be affected for a consumer buying from an e-commerce site located in the UK at present than it would be if the consumer purchased something through an e-commerce site in the UAE (Al Ghaifri, 2014). This is only one example of how currently there is not a set global standard for e-commerce contract laws. It is possible for a signing party not to have the same validity to a contract in their own country if a breach of contract occurs and legal action must be taken.

For these reasons, it is important that consumers fully read the e-commerce contract that they are agreeing to and if there is no mention of jurisdictional law, then it will be possible for the consumer to take a court case from their own country. Most often, however, there is jurisdiction listed on e-commerce sites and it will be in the country of the website's origin to protect their interests (United Nations Conference on Trade and Development, UNCTAD).

5.4 Information economy report (2015)

It might also be the case that if a consumer makes a purchase through an e-commerce site and there are ongoing payments agreed that are broken, the contracting party could effectively gain a legal order in their own country which is unenforceable in the consumer's country. Risks are associated with such commerce, and each case will be considered in a new context until such time as a formal international precedent is enacted (Siassios, 2013).

6. Conclusion

In light of the OECD guidelines for e-commerce contract laws, both the UAE and the UK have aligned to this standard. For the differences that exist between the obligations and rights of consumers in one country's legal context as compared to the other, it is important to fully read the terms and conditions of every website where an e-commerce contract is going to be affected. Within the terms and conditions of the site will be the definitive laws clarified, which the consumer will be held accountable for. It should simply be assumed that any contract entered into between two parties, whether it is in-person or over the internet, will have the regulation involved to make it binding.

Although there may be the possibility that such a contract's terms will not be held binding in a court that is located outside the jurisdiction which the site is located in, it could not be counted on. As well as this, the nature of the contract should at all times be sacrosanct, i.e. parties should be held accountable for the agreements that they make regardless of whether the individual laws of their own country may allow them to forego doing so.

Overall, the way in which e-commerce sites gain their reputations means that they will, by default, by good on their word and abide by their own terms and conditions. In doing so, the e-commerce business can create a good name in the market place and grow custom base as a result. It is this trust that is inherent in any successful e-commerce contract. E-commerce sites that do not contain comprehensive sets of terms and conditions may find themselves open to loss when an e-commerce contractual breach is not upheld.

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