

Evaluating Issues on Choice of Law in E-Commerce Consumer Transactions in Malaysia, Singapore and Thailand

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Abstract: Internet dissemination has led to a common practice for sale of goods and services to be conducted in a virtual manner. This revolution does not require the physical presence of an individual in a specific country, dismembers national boundaries and discards sovereignty. In considering this transformation, the issue on choice of law, i.e. which country's law is the proper law to govern dispute between parties who transacts through the virtual world, will be raised. It is significant to note that, the law on choice of law in conflict of laws disputes in the ASEAN countries has yet to be modified and developed to suit the infrastructure of the internet. This inadequacy, will lead to severe uncertainties to resolve a dispute which occurs in business to consumers (hereinafter referred to as "B2C") sale of goods and services transactions that are carried online. The European Union (hereinafter referred to as "EU") countries have harmonised their Private International Laws through the implementation of a uniform substantive law for a harmonised consumer protection. By adopting a doctrinal research approach, the discussions in this article focuses on the issue of choice of law in the perspective of e-commerce B2C sale of goods and services transactions in Malaysia, Singapore and Thailand. Reference to the EU efforts are made for the purpose of lesson to be learned.

Key words: E-commerce Conflict of Laws Choice of Law Rome I Regulations Harmonisation

INTRODUCTION

Conflict of laws is the private law of a particular country which deals with cases having a foreign element. Foreign element means that, the case involves contracts with some system of law other than that of the forum [1]. Conflict of laws jurisprudence recognises the application of foreign laws in deciding a case even though those laws are different from the law of the forum court where it is appropriate to do so [2]. More often than not, conflict of laws disputes elicits the issue on choice of law, jurisdiction of court and enforcement of foreign judgement.

A clear illustration on the meaning of conflict of laws could be viewed when, a contract was made in France between a Malaysian company and a French company and was to be performed in Belgium. In the event of dispute, the court will have to use its "choice of law" rules to decide whether to apply Malaysia, French or Belgian law. In doing so, the court will have to decide on whether,

the Malaysia, French or Belgian elements are the most significant [3].

The court will thereafter decide on the proper jurisdiction of court to hear the case. By referring to the example given above, if the court decides that the proper choice of law that governs the contract is Malaysian law, the court will then choose Malaysian court to hear the dispute. Thus, the parties will have to restart the process of litigation to enforce their rights in Belgium and France. Hence, the existence of clear law and rules on conflict of laws, specifically on the issue of choice of law is pertinent to avoid grave injustice to be done to the contracting parties.

The present world is an era of information technology, which allows any computer connected with the Internet to access into any websites. Businesses, through the use of the Internet, can enter into electronic contracts with consumers located in different countries [4]. This results to an immense figure of borderless contractual transactions engaged into by Malaysian and

other ASEAN regions [5], the increased amount of complaints received from dissatisfied Malaysian consumers who enters into online transactions [6], the growth of trade relations between Malaysia and EU [7] and evolution of the usage of e-commerce platform as a mean for traders to utilise and conduct sale transactions [8].

The legislature in Malaysia and other ASEAN regions have enacted several regulations to govern e-commerce transactions and ensure online sale activities are conducted in a safe and secured environment and to promote security in sale of goods and services via online. However, there has yet to be any legislations enacted by any of the ASEAN member countries which addresses the issues on conflict of laws in the context of consumer protection in B2C cross borders e-commerce transactions. Unlike in Malaysia and other ASEAN member states, various efforts and discussions had been carried out by the European Commission (hereinafter referred to as “the EC”) to protect the rights and built the confidence in consumers to enter into cross border contracts.

It is to be noted that, series of efforts have been made by the EU to provide solutions to the issues on conflict of laws by harmonising the laws on choice of law, jurisdiction of court and enforcement of foreign judgement into all EU member states. This includes the enforcement of Brussels Convention [9], Brussels I Regulation [10], the Rome Convention [11], and the Rome I Regulation [12].

Considering that Malaysia and other ASEAN regions do not possess law to protect e-consumers in dealing with conflict of laws issues, which includes the issue on choice of law. This article propounds to analyse the adequacy of methods employed by Malaysia, Singapore and Thailand in handling the issue on choice of law in cross borders e-commerce contracts. In addition, this article also provide analysis on the legislations passed and practice made by the EU on choice of law, i.e. Rome I Regulation for the purpose of lessons to be learned.

MATERIALS AND METHODS

Adopting doctrinal legal research, data collection of this article deliberates on the discovery of the laws on choice of law and its interpretations from various researchers.

The sources referred to consist of primary sources, such as statutes and the secondary sources, such as books and online articles.

Subsequent to analysing the laws and exertion of other researchers, the author of this article thereafter propound recommendations in solving the problem on choice of law in e-commerce B2C transactions.

RESULTS AND DISCUSSIONS

Choice of Law in Malaysia, Singapore and Thailand:

Absolute reliance on English law is placed onto in determining the issue on choice of law in Malaysia [13]. Similarly, the issue on choice of law in Singapore is to be decided by referring to English common law principle [14]. This means that, in ascertaining the proper choice of law in a contract, the courts shall analyse the terms of the contract and determine the existence of express choice of law, i.e. the choice of law which are explicitly stated in the contract, or implied choice of law. The court will allow the application of the express choice of law unless the selection was not bona fide and for legal purpose [15]. Implied choice of law is determine through sound ideas of business, convenience and sense to the language of the contract itself [16]. In the absence of both express and implied choice of law, the common law principle suggest that, the application of law which has the closest or most real connection to the transactions shall be made. Law which is closest and most real connected is the law of the country where there is a clear preponderance to the subject matter. This was stated by the court in *Citadel Insurance Co v Atlantic Union Insurance* [17].

Moreover, Thailand has made an effort in enacting the Thailand Conflict of Law Act B.E 2481 (hereinafter referred to as “TCLA”) to resolve the issue on choice of law in conflict of laws cases. Reference to express [18], or implied choice of law shall primarily be made [19] and thereafter the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract has been made [20].

Besides that, as Seomsit Sirijaroensuk states, few Thai scholars have suggested that, the implied choice of law could be viewed from the place to govern the contract, currency used in the contract, content of the contract and traditional trade and the nationality of the parties to the contract [21].

From the discussions above, it could be analysed that, though the courts in Malaysia and Singapore have relied on English common law principle in ascertaining the proper choice of law, nevertheless, the method provided

by the English common law is vague. This is because, there is no certainty drawn in determining implied choice and choice of law that has real and most closely connected to the contract.

On the other hand, in Thailand, where in the circumstance the express or implied intention of the parties could not be ascertained, the court is than obliged to analyse the nationality of the parties to the contract. If the parties acquire similar nationality, the court will be bound to choose the law of the parties' nationality [22], as the applicable law to govern the contract. Nevertheless, if the parties to the contract are not from the same nationality, the court is bound to choose the law of the place where the contract is made to govern the contract [23].

This requirement could be exercised without confusion, if the cross border transactions were entered into via physical presence by the parties to the contract. However, a confusion in ascertaining the 'place where the contract is made' will occur where the contract is entered into through internet as cyberspace is borderless in nature.

European Union Efforts in Governing Issues on Choice of Law: Rome Convention and Rome I Regulation: In the EU, internet jurisdiction is governed by Brussels I Regulations and Rome I Regulations. Hence, all the rules stated shall be analysed in order to understand the EU efforts in scrutinising the rules on conflict of laws pertaining to electronic commerce in EU.

In an ambitious effort to harmonise the conflict of laws rules of the member states of the European Community on contractual relations, the Rome Convention was negotiated [24]. The basic principle of the Rome Convention recognises the rights of contracting parties to select the legal system which will govern their contract [25]. The choice must be express and certain. Parties to the contract are allowed to choose a law applicable to the whole contract or part of it. The parties to the contract are also free at any time, even after the contract is concluded to agree to choose another law, than the one previously agreed [26]. In determining the validity of choice of law, Article 3(4) of the convention states that; Article 8(material validity), 9 (formal validity) and 11 (incapacity) shall be observed. Material validity means that, the validity of a contract is to be determined by reference to the law which would govern it under the convention if the contract was valid. However, the parties could rely on the law of his habitual residence to establish

his consent if it would not be reasonable to determine the effect of his conduct in accordance with the putative proper law [27].

If the parties to the contract are from the similar country, the formal validity could be determined from the law of the country with the closest connection or the law of the country where the parties are located. Nevertheless, if the parties are in different countries, the law of either of the countries where the parties are located will be applicable [28]. If both parties are from the same country, they could invoke an incapacity arising out of another law if the other party knew of the incapacity or unaware of it due to negligence [29].

Besides that, the convention limits the choices of the parties to select particular legal system for specific types of contract, which includes consumer contracts. According to the limitation on the consumer contract, a choice of law made by the parties to the contract shall not have the effect of depriving the consumer of the protection afforded to him by the rules of the law of the country in which he is habitually resident [30].

Where no express choice of law has been made, the contract shall be governed by the law of the country with which it is most closely connected [31]. Article 4(2) of the convention creates a presumption of closely connected. It states that;

“ it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration.”

The characteristic performance in a contract of sale, refers to the delivery of the goods which have been sold. In presumption of closest connection in the course of a party's trade is the country in which the principal place of business is situated [32].

The following cases exhibits the application of Article 4(2) by the courts in determining the most closely connected law that governs a contract. In *Egon Oldendorff v Liberia Corp*, there was no choice of law clause in a contract between German and Japanese companies, but their use of a well-known English standard form of charterparty and the presence of a clause specifying arbitration in England was held to demonstrate the choice of English law as the applicable law.

Besides that, in Ennstone Building Products Ltd v Stanger Ltd, the plaintiff, an English company supplied stone for use in building work. Defendant also an English company provided testing and consultancy services through office in England (its head office), Wales and Scotland. Plaintiff supplied stone for a building in Edinburgh, but technical problems arose. A member of plaintiff's staff visited defendant's Scottish office and it was agreed that Defendant would conduct tests and report. A dispute arose and plaintiff brought a claim against Defendant in England. The issue in this case was whether Scottish or English law applied. The Court Appeal held that, the parties had anticipated performance of the contract through the defendant's Scottish office, but there was no contractual requirement to that effect. Article 4(2) therefore pointed to the country of the defendant's principal place of business, namely England.

In addition, the case of *Societe Nouvelle des Papeteries de l'Aa v BV Maschinefabrieke BOA* involves the supply of machinery by a Dutch company, which clearly provided the characteristic performance. Delivery was to a French company in France, payment was in French francs; the contract was negotiated in France. The Dutch court held that; presumption in Article 4(2) should be disapplied only if, in the light of special factors, the country of habitual residence (or principal place of business) of the party carrying out the characteristic performance had "no real" value as a connecting factor. [33].

After six years and many rounds of consultations and political debates, the Rome Convention on the Law Applicable to Contractual Obligations has been finally converted into a Community instrument known as the Rome I Regulation. This Regulation entered into force on July 24, 2008 and shall apply EU-widely. This Regulations has made several amendments to the Rome Convention.

Under the Rome Convention, an implicit choice must be demonstrated "with reasonable certainty" by the terms of the contracts or the circumstances of the case, however, the Regulation states that, this choice must be demonstrated "clearly." Hence, the Regulation embodies a preference for certainty over flexibility, limiting the courts' discretion to determine whether the parties have made an implied choice of law [34].

Moreover, the Regulation determine choice of law, through a choice of court, or tribunal of a member state that has been agreed by the parties to the contract, when there is an absence of choice of law. In the absence of express or implied choice of law, the Regulations provides for a bright-line approach in respect of eight categories of

contracts, stating for each category the determinative connecting factor to designate the applicable law. Included in this list of categories are, for example, contracts for the sale of goods, contracts for the provision of services, franchise contracts and distribution contracts. According to the Regulation, the aforementioned contracts are governed by the law of the country where the seller, service provider, franchisee, or distributor, respectively, has his habitual residence. This bright line approach contrasts with that of the Rome Convention, under which the main rule for every contract is that the contract shall be governed by the law of the country "with which it is most closely connected," subject to certain presumptions regarding, most importantly, "characteristic performance" [35].

The contracts which fall outside the categories shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. Besides that, where the applicable law cannot be determined pursuant to the two main rules of the Regulation mentioned above, the contract shall be governed by the law of the country with which it is most closely connected. However, the Regulation leaves some discretion to the courts in determining the applicable law in the absence of choice, by providing that the two main rules mentioned above (the "categories" rule and the "characteristic performance" rule) shall not apply where it is clear from all the circumstances of the case that the contract is "manifestly" more closely connected with a country other than that indicated by either of these two main rules. In such a case, the law of that other country shall apply [36].

The discussions above exhibited that, the Rome I Regulation has successfully laid down the categories rule and characteristic performance rule.

Nevertheless, the Rome I Regulation leaves some discretion to the courts in determining the applicable law in the absence of choice, by providing that the two main rules mentioned above shall not apply where it is clear from all the circumstances of the case that the contract is more closely connected with a country other than that indicated by either of these two main rules. In this situation, the law which is more closely connected with that country shall apply. This shows that, the rules, which were initially enacted to ease the application of the proper choice of law in the event of its absence, has peculiarly been taken away through a vague application of the rule on the law which is more closely connected with the contract, that were primarily introduced in the Rome Convention.

CONCLUSION

Based from the discussions above, it could be viewed that, the law concerning choice of law in cross borders e-commerce B2C transactions in Malaysia, Singapore and Thailand are still inadequate to protect the rights of e-consumers who wishes to purchase goods and services online. This is because, Malaysia and Singapore apply the English Law principles in dealing with the issue on choice of law in conflict of laws disputes, Although Thailand has its own law to govern the issue on conflict of law, nevertheless, the TCLA is not suitable to be applied in cross borders e-commerce B2C transactions.

EU has set an example by successfully harmonising laws on conflict of laws, including the rule on choice of law in Rome I Regulation. Despite its success, improvements on the issue on choice of law highlighted above shall be made to Rome I Regulations. Nonetheless, generally, e-consumers from EU member states are secured from being abused by online businesses. This protection is a source of motivational factor to lead consumers in EU member countries to purchase online products and services and thereafter, encourage economic growth in EU.

Due to this, the author of this article suggest that, laws on conflict of laws, especially on choice of law shall be harmonised at the ASEAN level in order to protect e-consumers in cross borders B2C transactions. The author of this article propound that, an effective harmonisation could only be made through the production of a harmonised model law that governs the issues on conflict of laws in cross borders e-commerce B2C transactions.

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