

Rules on Advertisement in Malaysia

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Abstract: Advertisement plays an important role in the business activity as it is one of the effective ways in marketing strategy. The advertisement here does not only limit to the printed advertisement but also covers online advertisement. Position of advertisement in contract was highlighted in this article and its benefits as well as advantages were also laid down. The author also highlighted the major problems with advertisement such as false information and exploitation of certain target of people. Eventhough there is a lot of provisions in Malaysia dealing with advertisement, however none of the advertisement mention specifically and precisely on the detailed rule. None of the provision mentioned on the penalty for the bad advertisement as well. Thus, the customers' rights were left unattended. Another big issue is also on the part of enforcement since there are a lot of bad advertisements advertised without any limit.

Key words: Advertisement • Contract • Regulation

INTRODUCTION

Meriam-Webster Dictionary defines advertisement as a public notice; especially if it was made in the press or broadcast over the air. It also can be defined as making a thing known to the people commercially as it is normally designed to promote the particular interest of a definite person, caused, or the sale of product [1].

Advertisement as stated in The Communications And Multimedia Content Forum Of Malaysia Content Code has been defined an announcement of a public nature whether for the sale or purchase or provision of goods or services or constituting of an invitation to participate in an activity and conveyed by or through any signage, image or sound disseminated through electronic medium for advertising purposes.

Oral publicity, so far, is the most ancient form of advertisement. Today, however, printed publicity, internet and television media is more essential and extensive form of advertising. And as to the latest, the advertisement become very popular through media social such as Facebook, Instagram, Pin interest, Weechat, Telegram, Whatsapp and so on.

In the past, there was not much need of advertisement. Goods were taken to the market where the buyers and sellers met there. Goods were seen and were

bought and sold. Now with the advance of science, the whole world has become the market for business. The physical contact with direct customers is less as the customers are spread over long distances. A product can be viewed by non-limit customers over the world without any need for physical touch or meet.

Position of Advertisement in Contract Law: In Contract Law, an advertisement either in newspaper, magazine or any other medium is usually regarded as invitation to treat and not offer. The same goes to the goods display on the supermarket racks, auction sale as well as tenders. An offer is capable of being accepted by the offeree thereby bringing about contractual relations between the parties. An invitation to treat on the other hand, is an invitation to make an offer, negotiate or deal and hence has no legal consequences and cannot be accepted to become a contract [2].

In order to change an invitation to treat to an offer, the intention of the parties need to be interpreted while the person making of the statement and how the reasonable person to whom the statement is made interpreted it. In a very famous case *Carlil v Carbolic Smoke Ball Company* [1893] 1 QB 256, the judge has highlighted a very important principle in this case, where an invitation to treat can become an offer if there is

intention from the person made it. In this current case, Smoke Ball company had promised to pay the rewards when the parties have consumed the product as prescribed in the advertisement and the \$100 was deposited to the bank to show that the company was sincere in their advertisement. The court in this case held that, the company was liable to pay the reward to the customer. Similarly, in the case *Coelho v The Public Services Commission* [1946] MLJ 12, the High court ruled that the advertisement was an invitation to qualified persons to apply and the resulting application were offers. Such offers could either be accepted simply or with the imposition of conditions as terms of the contract additional to those set out in the advertisement. In this case, however, the letter to the applicant was unconditional; thus there was no question of his appointment being on probation. As a result, the purported termination applicable to officers on probation was invalid.

In contract law, the general rule is that an advertisement is an invitation to treat and not an offer. However, if there are any circumstances or language show that there is intention to make the invitation to treat as an offer, then the court will treat it as an offer.

Benefits and Problems of Advertisement: Advertisement has great value in business where it gives many advantages and benefit to the advertiser and also advertisee. Among the benefits of advertisement are:

- **Product Knowledge:** customers often do not know the existence of particular goods until they saw or hear it from the advertisement. The advertisement normally contains the ingredients, the use and also the benefits of product advertised. Sometimes, the advertisement also contains the price of the product.
- **Sale Continuance:** even goods that are widely known and much used, advertisement are still a must. This is important to ensure that the sale is consistent with the production of the company. The customer also will have an idea that the company is still subsisting and continuing selling the same product.
- **Introduction of a New Product:** it is hard to make a new product known to the public in a very short time. The fastest way is by advertise the product using television since many people watch television compare to read newspaper. Other media social like Facebook, Instagram are also useful for the advertisement since the number of users is quite high.

- **Choice of Goods:** advertisement can also become an appeal to the customers to choose the goods. They have more choices to buy any brand of product since the advertisement gives them varieties of information on the product benefit, use and also price. They can just choose at their leisure time and comfy place.
- **Attract traders:** advertisement does not only limit to the end-user only, but it also attracts the trader to gain more money under the concept of dropship, agent, stockist and wholesaler. The prospective businessman who attract with the advertisement, can directly contact the company and deal with them on the sale and purchase contract.

Despite of all the benefits of advertisement, it also leads to some abuse by certain people [3]. The examples are listed as below:

- **Misleading information:** Some advertising agencies design advertisements to mislead the innocent public. They create artificial demand for useless stuffs and sell these items at huge prices. Thus, the innocent middleclass people are often mislead into buying unnecessary goods and wasting money.
- **Wrong information:** the exaggerated information provided in the advertisement lead the customer to enter into the transaction; when the product does not work as claimed, it become fraud in contract law. The wrong information here includes the wrong description of product, the wrong status of products (such as the status of halal, the status of registration with the authority and etc), the wrong use of product and the wrong testimony of product.
- **Manipulating certain target group of people:** woman are often become the victims of less honest advertisement, for example, in diet product or beauty products. Woman are the type of targeted group which easy to be influenced with, thus the advertisement normally works better for woman compare to man in a beauty or slimming product. Children are also being affected with extreme graphic advertisement that is not aligned with product attributes.

Example of abused of advertisement is the Barbie's advertisements which promote children's toys that can move or fly when in fact it is just a toy that still cannot afford to move. The advertisement is showed like everything is good and perfect but in real life, it is not [4].

While for men, their minds are influenced through the attraction element of sex. The advertiser here takes the advantage by using the sexy women on the product or service that does not make sense at all such as in the Magnum walls advertisement. The existence of women in the advertisement sometimes has no relation with the products at all but still woman was used in it.

Islamic Point of View: In Islamic law, any act of deception cannot be tolerated as it was specifically mentioned in the Quran “Give just measures and cause no loss. And weigh with scales true and upright and withhold not things justly due to men” (al-Shua’ra:181). It means that Islam emphasized so much on the honesty in all business practices and against the false trade. Islam does not promote any type of cheating and such act against Islamic practice [5].

There is also once Hadith where the Prophet Muhammad s.a.w was asked by a bedouin on when the dooms day take place, the Prophet Muhammed replied that “when honesty is lost, then wait for the doomsday”.

It proved that any misled information and any intended unethical behavior in advertising would be a disaster. It is because the main objective of Islam is to make sure that the business is safe, secure and no damage caused to the party involved, especially consumers. Thus, it is very important to describing all details of the product with full disclosure to consumers in an advertisement to avoid any ambiguity or any deception. It is the consumers’ right to have as much information as possible on the goods or services and make choices based on the information obtained [6].

Allah s.w.t. also said: And do not consume your wealth among yourselves in falsehood and (do not) you take (business) property to the judge so that you can take part of someone else's property with the (way of) sin, while you know. (Al-Baqarah:188).

Based on this reminder, the main Islamic advertising principles, among others, are as follows: [7]

- True information of the product or service must be provided: the advertiser must state the true fact of the product or service and avoid any false statement in advertising the product to attract the customers. When making any comparison with other competitors, the advertiser must be cautious not to make any false or misleading data either directly or indirectly.
- Clear stipulation on guarantee and warranty of product or service: guarantee and warranty must be

clearly stated with sufficient information and it must be stated in the contract itself. The ambiguous or vague warranty and guarantee should be avoided.

- No false testimony: advertisement which contains witness testimony must be limited to the true testimony of the person in the testimony only. Any attempt to mislead the information in the testimony is totally ban by Islamic Law. If the customer uses a product but give testimony to another product, it is clearly against Islamic teaching and haram in Islam.
- No exploitation of certain targeted group: Islam never tolerates with any kind of exploitation to children, women and the disadvantaged people in order to promote sales of any products or services. Abusive advertisement is never being approved in Islam. Thus, advertisement using certain targeted group to promote product is illegal in Islam.
- Preserve the moral values: no abusive or sexy advertisement is allowed as well as selling any illegal goods or engaging with any illegal services. Promoting prostitution by advertising it at any type of media is totally prohibited.
- Comply with the local law: the advertisement must also comply with the law either in the form of ethics, policies or certificates prescribed by the government in connection with the use and enjoyment of the public.

Laws Regulating Advertisement in Malaysia: Since it is very difficult to control a huge industry of advertisement, in Malaysia certain laws was introduced to govern the advertisement activity. However, it is important to be note here that no specific Act was codified to regulate advertisement in Malaysia [8].

The Communications and Multimedia Act 1998: It is the principal legislation that regulates online activities in Malaysia, but the Act only regulates online advertisements licensed under it. Pursuant to the Act, the Malaysian Communication and Multimedia Commission (MCMC) was established as a self-regulatory body with the responsibility to enforce the communications and multimedia laws in Malaysia. The MCMC promotes self-regulation through the establishment of industry forums and codes. The principal code is the Malaysian Communications and Multimedia Content Code (Content Code) [9].

The Content Code sets out the guidelines and procedures for good practice and standards of content disseminated to audiences by service providers. It seeks

to identify what is regarded as offensive and objectionable while spelling out the obligations of content providers within the context of social values in this country.

However, as compliance with the codes is merely voluntary, no sanctions can be imposed for poor compliance. The Content Code also does not specifically deal with online advertising but deals generally with indecent or offensive content. Another main code set up by the MCMC is the General Consumer Code of Practice for the Communications and Multimedia Industry Malaysia (Consumer Code) which deals only with customer service in the communications and multimedia industry.

The Code has been drawn up by organisations representing advertisers, advertising agencies and media and administered by the Advertising Standards Authority Malaysia (ASA) whose members are drawn from the Malaysian Newspaper Publishers Association, Association of Accredited Advertising Agents, Malaysia, Malaysian Advertisers Association and the Media Specialists Association.

The responsibility to observe the Code rests primarily with the advertiser and not the advertisee. In this respect, Malaysia has no specific code dealing with online advertising, to afford consumers a reliable way of challenging unacceptable online advertisements[10].

Trade Description Act 1972: The Act provides the guidelines used in the field of advertising. It is a criminal statute which deals specifically with the false or misleading statements in the supply of goods and services. It was stated that no limitation as to provide information in the advertisement as long as it is a true information.

According to section 7A, a person who directly or indirectly offers to supply the goods or services and/or the person on whose behalf the advertisement is made is deemed to have applied a trade description. Therefore, in the case of a third-party website, liability can arise on both the owner of the website and the marketer.

Other than false trade description, the Act by virtue of Section 15 which stated that "any person in the trade, business or provide through any means any direct or indirect indication that any goods or services rendered or in any manner that falsely took... including the government department has committed an offense ", also prohibits false representation relating to the supply or approval of goods or services.

There are two elements to be proved. First, a person must be in the course of trade or business and second, there is a false indication that any goods or services supplied are of a kind supplied to or approved by any person. The application of this kind of Act is limited to the consumer only if the supplier is in the course of business. If, however, the supplier is a private supplier, the consumer is left unattended.

Contracts Act 1950: The Contracts Act 1950 governs principles relating to the formation of a contract. Part II of the Act provides for additional consumer protection with respect to online transactions. The Act lists down all the four requirements to form a binding contract which are offer, acceptance, consideration and an intention to create a legal relation. The law on electronic transactions is clearly highlighted in the Electronic Commerce Act 2006. Thus, the principles relating to the formation of contracts set out in this Act are also applicable to online contracts.

This Act however only deals with the basic requirement to form a valid contract. But no detail on the issue of advertisement itself eventhough advertisement can be regarded as a valid offer in contract law.

Electronic Commerce Act 2006: The Act basically provides for the legal recognition of electronic messages to facilitate commercial transactions via electronic media. '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." From the definition given, we can conclude that an advertisement can be regarded as a commercial transaction eventhough it is non-contractual.

This Act is only an application of the basic principle of contract as laid down in Contracts Act 1950 into an online contract. This can be seen in the Singapore case of *Chwee Kin Keong v. Digilandmall.com Pte Ltd* by virtue of the Singapore Electronic Transactions Act 1998. This is in fact the first case in the ASEAN region concerning mistake in online contracts. The defendant had wrongly advertised the price of laser printers on their website at \$66 each, instead of the actual price of \$3854. A total of 4086 printers were ordered before the defendant realized the mistake. The defendant swiftly removed the advertisement from its website and informed all the purchasers that the price was a regrettable mistake and that no orders will be met. Out of 784 persons who placed the orders, six plaintiffs attempted to enforce their alleged contractual rights.

His Lordship Rajah J. confirmed that basic principles of contract law applies equally to online contracts and found that executory contracts had been entered into by the parties. However, invoking the doctrine of unilateral mistake, he emphasized that a court would not allow a contract where there was no consensus ad idem and where a non-mistaken party took advantage of an error which he was or ought to have been aware of. For instance, in cases where the consumer purchases goods of low price because of certain discount or promotion, it shall be an injustice if the courts apply the defense of price mistake. In unison, the seller must prove that he has acted in good faith. His Lordship in the instant case had indeed arrived at a just decision by refusing the contracts based on the fact that whilst the defendant had made a mistake, the plaintiffs had actually attempted to take advantage of the mistake, which was unethical.

As regards to the status of website advertisements, the situation is not entirely clear. It was accepted by His Lordship that advertisements are generally invitations to treat. In the words of Rajah J., "website advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical". A better approach is to include a default rule within the Singapore Electronic Transactions Act 1998 that website advertisements are invitation to treat except with regard to digital products where the stock is limitless, advertisements should be construed as offers.

The authors are of the opinion that, by examine the decision of this particular case; the court took a strict approach by deciding the status of the advertisement as mere invitation trout and not an offer. This is because, the advertisement actually, can be regarded as an offer if the circumstances or languages used allow it.

Medicines (Advertisement And Sale) Act 1956: The Act which was empowered by the Pharmaceutical Services Division of the Ministry of Health, specifically enforced to set out guidelines for the advertiser when dealing with medicine advertisement. The Act in its Schedule lists down all the diseases which is prohibited to be advertised by the Act, which are; diseases or defects of the kidney, diseases or defects of the heart, diabetes, epilepsy or fits, paralysis, tuberculosis, asthma, leprosy, cancer, deafness, drug addiction, hernia or rupture, diseases of the eye, hypertension, mental disorder, infertility, frigidity, impairment of the sexual function or impotency, venereal disease and nervous debility, or other complaint or infirmity, arising from or relating to sexual intercourse. Section 4 of the Act prohibits the advertisement relating to abortion. Besides that, there is also prohibition to

advertise any skill or service relating to the treatment, prevention or diagnosis of any ailment, disease, injury, infirmity or condition affecting the human body, unless with the approval of the minister, or any professional medical body.

Under the Act, all advertisements regardless of whether it contains medical claims or not, must be evaluated and given approval by the Medicine Advertisements Board (MAB) before being published. However, the Act just generally regulates online advertising. There are also regulatory guidelines dealing with online advertising, namely; the Advertising Guidelines for Medical Products and Appliances and the Advertising Guidelines for Healthcare Facilities and Services, both issued by the MAB under the power given by the Act. The Guidelines aim at helping advertisers and medical practitioners to develop advertisement formats which are deemed suitable and acceptable for publication in Malaysia. In the context of online advertising, however, the application of the Guidelines does not cover the worldwide advertisement but limited to advertisements on websites registered in Malaysia only.

Penal Code: The Penal Code provides for the law on the offense of publication of obscene materials. It does not only deals with obscene materials in the physical medium such as books and pamphlets, but the words "any other obscene object whatsoever" in section 292 shall include obscene materials in intangible medium as well such as the Internet.

Nonetheless, the Penal Code does not define the term 'obscene', but merely provides the circumstances in which 'obscenity' is an offence. Clearly, to avoid any misinterpretation and ambiguity among the public, the term 'obscene' must be defined and understood at the outset in order to constitute an offence under the Penal Code.

Indecent Advertisement Act 1953: It is a specific legislation prohibiting advertisements that are indecent or obscene. However, the scope of the Act is only limited to the non-printed advertisement only. Thus, online advertisement is totally excluded from the Act. Besides that, the Act is only applicable to advertisement in Peninsular Malaysia only and exclude the advertisement from other area.

Food Act 1983 and the Food Regulations 1985: Both are the principal legislations regulating various aspects of food safety in Malaysia including food advertising. The implementation and enforcement of the law rest with

the Food Safety and Quality Division of the Ministry of Health. Even though the legislations do not directly deal with online advertising, they are particularly useful to highlight on the issue of false and misleading advertising as to the various aspects of food.

Section 15 of the Food Act 1983 stated that a person is prohibited from advertising any food that does not comply with the standard prescribed, that it is likely to be mistaken for food of the prescribed standard. Meanwhile Regulation 9 of the Food Regulations 1985 lays down requirements for advertising of food in a package. A person may only advertise if the package has a label that includes all the particulars required by the Regulations and does not have any label that includes particulars prohibited by the Regulations.

CONCLUSION AND SUGGESTION

It is important to note here that there are a lot of rules and regulations on the advertisement in Malaysia. The guidelines as to what should be done and what should be prohibited in advertising was extensively touched. However, still, there are a lot of improvement should be done especially in protecting consumers against bad advertisement and the section for penalty should also be highlighted in each Act and Regulation. Another part which is also important to be emphasized here is on the part of enforcement whereby; there are still a lot of bad advertisement are still publicly advertised in Malaysia and the numbers are increasing day by day.

As an example, a news article titled 'Media Prima pulls out racist Ramadan ads' which was featured on The Malaysian Insider on 2nd August 2011, Media Prima had been criticized by the public for broadcasting a controversial series of Ramadan commercials on 8TV channel. All three ads, which can be viewed through YouTube [11], which run for 30 seconds each, showed the same Chinese girl acting 'inappropriately', with three different scenarios, at a Ramadan bazaar [12]. The first scenario showed the girl shouting at one stall owner and asking another for a discount while the second scenario showed the same girl eating greedily in front of the stall, with Muslim customers watching her and the third scenario showed the girl wearing a sleeveless blouse, with her shoulders and arm-pits pixelated. All the scenes are then followed by messages urging viewers to not be loud and obnoxious; not be greedy nor eat in public; and not wear revealing clothes.

Some audiences claimed that the advertisement is offensive to the non-Muslims since it showed that non-Muslims did not show respects to the month of

Ramadan though it is aimed to promote the good values in respecting the month of Ramadan. Media Prima was then forced to axe the controversial series of advertisement. This kind of advertisement has violated the principle of cultural sensitivities. In order to maintain and promote racial harmony in the country, the content code stated that "no advertisement should contain statements or suggestions which may offend the religious, political, sentimental or racial susceptibilities of any community".

Another advertisement which became controversial is advertisement on September 2010 regarding the Aidilfitri advertisement by TV3. The video can be viewed at You Tube as well. It was criticised by the public especially the Muslims as it appeared to be influenced by Christmas and Santa Clause [13].

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