

Consumer Protection Facing Globalisation: A Comparative Study Between United Kingdom and Malaysia

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ABSTRACT

Consumer protection law has always been relied on as a mechanism to safeguard consumer interest and generate economic activities. The need for a more reliable mechanism is inevitable especially more so in the present era of globalisation and flourishing E-Commerce activities. This article discusses the current trend of consumer protection laws, which has been embraced in the United Kingdom and the European Union. In the same tenor, the writer will address the current flaws and inadequacies of consumer protection laws in Malaysia in the face of globalisation. The writer also concurrently proposes reforms aimed at injecting the concept of consumer welfarism.

ABSTRAK

Undang-undang perlindungan pengguna kian dilihat sebagai mekanisme yang melindungi kepentingan pengguna dan membantu meningkatkan aktiviti ekonomi. Keperluan perundangan yang lebih kukuh tidak dapat dinafikan lebih-lebih lagi di era globalisasi dan E-Dagang yang kini semakin berkembang pesat. Rencana ini membincangkan kedudukan semasa dan perlindungan pengguna yang telah diterima pakai di United Kingdom serta Kesatuan Eropah. Dalam hal yang sama, penulis juga telah membentangkan kelemahan dan kekurangan undang-undang perlindungan pengguna di Malaysia dalam menghadapi cabaran globalisasi. Justeru, penulis mengengahkan cadangan dan pindaan yang sesuai dengan mengambil kira konsep 'consumer welfarism'.

INTRODUCTION

The advancement in technology and globalisation has moved consumers to a different platform of transactions. Today, over 214 countries which are wired up to the internet, each dominating and cashing-in on the concept of world without borders. Millions of dollars are transacted daily with consumers being the primary focus and target audience, in this multi-million dollar industry. With lack of protection, consumers are simply, reduced to a target for fraudulent or rouge merchant, who prey on the unequal bargaining power of the consumers world-wide.

Malaysia, like any other sovereign state must bear in mind that its laws and sovereignty is limited within its borders and not extra-territorially. Protection of Malaysian consumers in E-Commerce transactions depends largely on its existing laws. With the inherent problem of dualism of laws between East and

West Malaysia, the problem of consumer protection is far from settled and in reality non-existence. The Sales of Goods Act 1957 (which is a mirror of the UK Sales of Goods 1893), has since not been amended. On the contrary, the United Kingdom has to date since 1893 passed numerous legislations like the Sales of Goods Act 1979, Unfair Contract Terms Act 1977, Consumer Protection Act 1987, Unfair Contract Terms in Consumer Contracts Regulations 1999, Consumer Protection (Distance Selling) Regulations 2000, to keep up with consumer protection.

The recent enactment of the Consumer Protection Act 1999 (CPA) in Malaysia has no bearing whatsoever on consumer protection as section 2(4) of the CPA, clearly defines and curtailed its own ambit, as being only secondary (to the Sales of Goods Act 1957 and Contracts Act 1950) and that the CPA will not prejudice any other Act. Likewise, by virtue of section 2(g) of the same Act, the CPA does not extend its ambit to protect electronic commerce (e-commerce) transaction. Though plans have been in force to legislate laws, which will govern electronic transaction, the much sought after piece of legislation is still a dream.

The prime focus of this article is obviously not whether the existing Malaysian laws will survive the test of time to afford sufficient protection for its consumers (as previously mentioned the existing laws is far from enforceability in real sense) but instead we should look at alternative via an international medium and coming to a consensus with international community to find a common platform for consumer protection. If the sovereignty of one state is limited to its borders, how can one face a world without borders, especially more so in E-Commerce transactions.

ELECTRONIC COMMERCE

Transaction in E-Commerce¹ has been in existence for many years now but the primary concern in many recent surveys has been the building of consumer confidence in E-Commerce transaction. Due to the lack of consumer protection and easy excess to redress, this problem has account for only 20% of consumer confidence in E-Commerce transactions in the European Union.² This problem raises concern especially so when the EU has passed many legislations protecting consumer rights.

The main concern for consumer is centered on two basic issues namely:³

¹ WTO Declaration on Electronic Commerce dated 25th September 1998 defined e-commerce as 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'.

² E-Commerce@its.best.uk - A Performance and Innovation Unit Report 11 at <http://cabinet-office.gov.uk/innovation/1999/ecommerce/index.htm> (20 August 2005).

³ Recent surveys conducted by E-Commerce@its.best.uk.

- (a) that someone might use a consumer payment card information to make fraudulent purchases for which the consumer may be held liable; and
- (b) merchant having received payment will not perform their side of the contract or perform it defectively and consumers fear being left without a remedy or with a remedy that is difficult to enforce

This survey which was conducted in the United Kingdom does not only reflect European Union or United Kingdom consumer's outcry, but synonymously the voice of the consumers globally. As a Latin phrase goes *vox populi, vox dei* which means the voice of the people is the voice of God.

The need for a standard uniform law on internet transactions and simple recourse to justice for consumer will in turn instill consumer confidence and universal endorsement of online transactions by the community.

MODEL LAW ON CONSUMER PROTECTION IN THE UNITED KINGDOM AND EUROPEAN UNION

The advent issue of excluding liability has raised concern with among consumers as well as those in the academic field.⁴ Consumers with unequal bargaining power are always reduced into entering a standard form contract in which all terms, conditions and jurisdictional clause set by the merchant. Often, these carefully drafted clauses provides protection for the merchant in the event of dispute or litigation. Many unscrupulous merchant with their legal draftsmen will go to an extent of registering their company in a so called '*safe haven*' country whose laws provide little or no protection for consumers and include these countries as forum of choice or forum of convenience in the event of disputes.

Consumers, obviously being ignorant of laws foreign to them, will normally assume that consumer rights and protection is universally the same. At this juncture we will try to review and propose laws that should be universally incorporated in all e-commerce transactions relating to consumers, referring to the United Kingdom and European Union laws as model law. The European Union (EU) was chosen as a model law subject in this research is because of its ability to harmonize various laws in each of its 25 EU Member State and in the same tenor its adaptation of the UNICTRAL Model Law on Electronic Commerce 1996 and Organisation For Economic Co-operation and Development (OECD)

⁴ Tritel, 'Exclusion clauses - Possible reforms, (1967) *JBL* 200 at pg. 201-209; First Report, Law Com No 24, 1969 para 68 "...the Molony Committee [viewed] the practice of contracting out as a general threat to consumer interest [the working party] found an overriding argument in favour of prohibiting 'contracting out'. The mischief was that this practice enabled well organized commerce 'consistently to impose unfair terms on consumers, and to deny him what the law means him to have...".

Guidelines 1999 – Guidelines for Consumer Protection in the Context of Electronic Commerce dated 9th December 1999.

To date, the European Union has a comprehensive and extensive legal framework addressing almost all issues pertinent to E-Commerce. Among the few that is of important to consumers includes E-Commerce Directive (Transparency Directive 1998/34/EC of 22nd June 1998); Electronic Signature Directive (1999/93/EC of 13 December 1999); Distance Selling Directive (1997/7/EC of 20th May 1997); Data Protection Directive (1995/46/EC of 24th October 1995 and 1997/66/EC of 1st December 1997); and E-Commerce Directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce in the Internal Market dated 8th June 2000.

UNICTRAL MODEL LAW ON ELECTRONIC COMMERCE

This piece of guideline was developed to set out the parameters of legal framework for those engaging in E-Commerce. It is an important point of reference to facilitate E-Commerce and address legal significance on issues pertaining to electronic data messages, digital signatures, validity and performance of electronic contracts. This piece of reference is of a particular significance and importance for all countries especially for non EU nation, to assist them to set out the parameters in order to alleviate and prepare countries interested in engaging in E-Commerce transactions to be in par with international standards and commitment.

This piece of guidelines has great significance and impact leading to the passing of Digital Signature Act/s and/or Electronic Transactions Act/s in many countries particularly in the United Kingdom, EU, Singapore, United States of America and even Malaysia.

OECD GUIDELINES FOR CONSUMER PROTECTION IN E-COMMERCE

In December 1999, the OECD sets out various principles, guidelines and practice comparable with international standards with regard to business to consumers (B2C) E-Commerce transactions. It provides a level playing field with regard to transparency of consumer protection; fair business and marketing practices; transparent information about seller/vendor and its business; accurate and easily accessible information pertaining to goods and services on offer; information and details about transaction including terms and conditions including costs; transparent information on dispute resolution and excess to alternative dispute resolution (ADR).

Though the OECD guidelines act as platform for its member countries to develop their national law in tandem with the international standards, nevertheless these guidelines have great impact and have been used as a yardstick

particularly for non-member countries seeking to rise to international standards. The proposal and recommendations brought forward by the OECD has been widely accepted in many countries

In United Kingdom and the European Union, these guidelines have been assimilated into various laws and regulations giving birth to the Unfair Terms in Consumer Contract Regulations 1999 and Consumer Protection Distance Selling Regulations 2000, including a proposed online dispute resolution which was brought about in the European Union by Council resolution 7220/1/00 of 2000.

UNFAIR CONTRACT TERMS ACT 1977

In United Kingdom, by virtue of section 6 of the Unfair Contract Terms Act 1977, that any attempt by the merchant to exclude liability is void, where the buyer is dealing as a consumer.⁵ This incorporates attempting to exclude liability for breach of implied terms in section 13, 14 or 15 of Sales of Goods Act 1979.⁶ Similarly, this sort of protection is also made available in section 9, 10 or 11 of the Supply of Goods (Implied Terms) Act 1973.⁷ Likewise similar protection is also available via sections 3, 4, 8 and 9 of the Supply of Goods and Services Act 1982, which should be read cross-reference to sections 6 and 7 of Unfair Contract Terms Act 1977.⁸ This is extended by section 5 of the Unfair Contract Terms Act 1977 where manufacturer guarantee is concern. By virtue of section 2 of the Unfair Contract Terms Act 1977, any attempt by the merchant to exclude liability for death or personal injury is void.⁹

Thus, we can fairly conclude that the law in the United Kingdom is very comprehensive and total with regard to consumer protection, where each act complements to gap any loopholes or weaknesses that are present in the other, in order to further strengthen consumer protection. This is contrary to Malaysian CPA as previously mentioned which curtailed its own ambit.¹⁰

⁵ UCTA 1977, section 6(1) - liability for breach of the obligations arising from (a) and (b) cannot be excluded or restricted by reference to any contract terms.

⁶ *Ibid.*, section 6(2)(a) ... (seller's implied undertaking as to conformity with description or sample, or as to their quality or fitness for a particular purpose)...cannot be restricted by reference to any contract term.

⁷ *Ibid.*, section 6(2)(b) (corresponding things in relation to hire purchase)... cannot be restricted by reference to any contract term.

⁸ *Ibid.*, section 6(1)(a) and (b) and section 7(1), (2) and (3A).

⁹ *Ibid.*, section 2 " A person cannot by reference to any contract term or to a notice given to persons generally or to a particular persons exclude or restrict his liability for death or personal injury resulting from negligence".

¹⁰ See section 6 of the Malaysian CPA (Act 599) which prohibits exclusion clause nevertheless section 2(4) of the same Act state the application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations. See section 62 of

STANDARDIZATION OF CONSUMER LAWS ACROSS EU AND UK

The attempt to standardize law with regard to consumer protection within the EU was the passing of the EU Directive on Unfair Terms in Consumer Contracts Regulations, which was incorporated in 1994 in the United Kingdom by statutory instrument – Unfair Terms in Consumer Contract Regulations (SI 1994/3159). This piece of instrument was replaced in 1999 (SI 1999/2083) with a view of greater protection for consumers. The main focus of the Regulations is defined as follows;

- (a) it clearly provides the definition of a ‘consumer’;¹¹
- (b) it clearly defines the ambit of the Act – it is not applicable to contract made between two businesses;¹²
- (c) provides a definition of Individually Negotiated Terms and Standard Form Contract;¹³
- (d) termed as ‘UNFAIR’ where there is a contract detrimental to the consumer with regard to imbalance of rights and obligation;¹⁴
- (e) test of ‘FAIRNESS’ and ‘GOOD FAITH’;¹⁵
- (f) define a non-exhaustive list of terms which is probably unfair – Schedule 2 of the Regulations;¹⁶
- (g) that a contract should be drafted in a plain and intelligible language;¹⁷

SOGA 1957 (Act 382) which permits exclusion clause to be negated or varied by express agreement. Thus CPA, section 6 can be invalidated by section 62 SOGA 1957 due to its supplemental nature under section 2(4).

- ¹¹ Interpretation 3(1) ‘consumer’ means any natural person who is in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.
- ¹² Unfair Terms in Consumer Contract Regulations 1999, regulation 4(1) provides that these Regulations apply in relation to unfair terms in contracts concluded between a seller and a supplier and a consumer.
- ¹³ Ibid., regulation 5(2) provides that a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
- ¹⁴ Ibid., regulation 5(1) provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.
- ¹⁵ *Interfoto Picture Library v. Stiletto Visual Programmes Ltd.* (1983) QB 433; see regulation 6(1) and (2) of Unfair Terms in Consumer Contract Regulations 1999.
- ¹⁶ See Unfair Terms in Consumer Contract Regulations 1999, Schedule 2 (1)(a) to (q) of which contains Indicative and Non-Exhaustive List of Terms which may be regarded as Unfair.
- ¹⁷ See *ibid.*, regulation 7(1) which provides that a seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language and regulation 7(2) If there is any doubt the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

- (h) the ability of the consumer association and Director General of Fair Trading to hear complaints of unfair terms in a contract drawn up for general use and ability to obtain High Court Injunction – in *Falco Finance Limited v. Michael Gough* (1999) a clause is declared as unfair and unenforceable against the consumer under the regulations;¹⁸ and
- (i) power of Director General of Fair Trading and Consumer Association to review Standard Form Contract.¹⁹

CONSUMER PROTECTION (DISTANCE SELLING) REGULATIONS 2000

With consumer protection being the paramount cause in internet shopping and the issue of absence of “face to face” dealing at the time a contract is concluded has led to the passing of Consumer Protection (Distance Selling) Regulations 2000 (hereinafter referred as CPDS) came into force on the 31st October 2000.

CONTRACTS REGULATED BY CPDS

CPDS govern and regulate all contracts relating to goods and supply of services where one party is acting in a capacity of a consumer while the other is a vendor/seller. Although the CPDS do not apply to matters relating to property, financial services, contract concluded by auction, contract for the provision of accommodation, transport, catering or leisure services nevertheless it managed to address many issues on e-commerce transaction including all purchases made over the telephone, mail order, fax or digital television.²⁰

REQUIREMENT OF INFORMATION

Article 4 and article 10(1) and (3) of the Distance Selling Regulations require consumers being given detailed information of their purchases including details of the vendor/seller in a clear and comprehensible manner before any contract is deemed concluded. This includes the followings:

- (a) name and address of the vendor;
- (b) description of goods or services being sold, the total price of those goods or services (including all taxes) and details of arrangements for payment, delivery and performance;

¹⁸ *Falco Finance Limited v. Michael Gough* (1999).

¹⁹ Unfair Terms in Consumer Contract Regulations 1999, regulation 12 and 13 of Schedule 1 grant equivalent powers of intervention (Office of Fair Trading has since 1999 alone challenged more than 1200 contract terms).

²⁰ See CPDS 2000; see also Baker & McKenzie, *Doing E-Commerce in Europe*, London, 2001 at pg 196. www.bakernet.com/ecommerce.

- (c) the period of which the offer will remain open; and
- (d) details of the consumer's legal right to cancel the contract (if applicable).²¹

REQUIREMENT OF CONFIRMATION IN WRITING

A seller/vendor is required under article 5 of CPDS to give confirmation in writing or another durable medium as required under CPDS. The Department of Trade and Industry is in a view that e-mail may constitute a durable medium for confirmation in writing.²² Apart from this requirement a vendor must provide the details prior to the conclusion of a contract or at the least at the time of delivery, which includes:

- (a) information about any after sales services, guarantee and complaint mechanism including its address; and
- (b) information regarding as to who is responsible for the cost of returning or recovering goods in the event of cancellation by consumers.²³

RIGHT TO CANCEL

The regulations provides under article 6(1) what is called the 'cooling-off period', a period to cancel amounting to seven (7) days, from the day the goods are received. With reference to other than goods, services in particular, the regulation provides seven (7) working days from the day the buyer agree to proceed with the contract, a right to cancel. Similarly, consumers can be assured of reimbursement within thirty (30) days from the day notice of cancellation is given to the vendor and likewise, in a contract relating to credit services/agreement the contract will be automatically cancelled.

PERFORMANCE OF CONTRACT

A vendor must perform his part of the contract under article 7 within thirty (30) days upon receipt of the orders from the consumers. In the event the vendor is unable to fulfill the orders, he must substitute goods or services of equivalent quality or price if such terms are provided under the terms of the contract. Failure on the part of the vendor will be subjected to rights or remedies under non-performance by the consumers.

²¹ Ibid.

²² See UK Electronic Communications Act 2000; *ibid.*, at pg. 196.

²³ CPDS 2000; *ibid.*, at pg. 197.

NON-COMPLIANCE OF CPDS

The Department of Trade and Industry (DTI) considers a contract in contravention of the regulations where a vendor fails to comply with CPDS Regulations. The DTI in its duty to secure compliance is empowered to consider genuine complaints and apply for an injunction against any vendor responsible for the breach. The DTI in administering consumer protection at its best has ensured consumers that it will from time to time review the need for additional sanctions which includes both criminal and consumer compensation where necessary.

CONSUMER PROTECTION IN E-COMMERCE – REGULATING FINANCIAL INSTITUTION

The use of credit card has long existed to facilitate mail order or telephone order purchases. In fact in E-Commerce transactions over the internet, credit card has been the primary mode of payment for consumers. The protection afforded to consumers from fraudulent use of credit card existed even before the E-Commerce existed.

The United Kingdom Consumer Credit Act 1974 (hereinafter referred as CCA) affords and extends consumer protection via section 83 and section 84 of the Act. Today consumers making purchases over the internet are confident of the guarantee extended to them by financial institution over fraud and sham sites which might be operating in cyberspace.

Section 83(1) of the CCA provides much sought after assurance to consumers with credit card facilities, from full liability resulting from loss or unauthorized use of their credit card. Though the above section must be read in conjunction with section 84(1), nevertheless the liability of consumers is only for the first 50.00 pounds of the 25,000.00 pounds credit limit, thus limiting statutory ceiling for claims from financial institution. Likewise, for consumers, protection are afforded via article 8 of the European Union Distance Directive (Dir 97/7/EC) which makes it mandatory for financial institution to re-credit the full sum arising from fraudulent use of their credit card. Many writers like Browns and Howells are in the view that such duty are not likely to be defeated by challenge under UCTA 1977.²⁴

Similarly, under section 75 of the Consumer Credit Act 1974, a consumer has equal right of action against the supplier or the creditor (bank – credit card issuer) arising from contract or misrepresentation.²⁵ The protection afforded by

²⁴ Brownsford & Howells, 'When surfers starts to shop: internet commerce and contract law' (1999) 19 *Legal Studies* 307.

²⁵ Jones A Sally, *Law relating to credit cards*, Blackwell Science, United Kingdom, 1989, pg. 210; Howell & Weatherhill, *Consumer protection law*, Avebury Technical, London, 1995, pg. 268.

section 75 of the CCA provides consumer on the internet with an alternative cause of action against the bank (credit card issuer) especially so where the consumers are faced with sham sites or in the event the overseas merchant is untraceable or has gone bankrupt.²⁶ Though financial institution are adamant against them bearing the action especially so where there is no 'pre existing arrangement' or 'contemplation of future arrangement' with the overseas merchant, nevertheless, the DTI has in its 10th Report by the Select Committee of Trade and Industry, gave further assurance to consumers, that should the courts interpret section 75 CCA to exclude contracting with overseas merchant, the DTI will speedily bring forward legislation to fill the gap.²⁷

Thus, the law afforded to consumers in the UK is so comprehensive that it is enough to act as a shield or a sword as against card issuer.²⁸ This is contrary to the Malaysian current consumer credit arrangement, which is in a haphazard state.²⁹

CONSUMER PROTECTION IN SOME NATIONS OF THE EUROPEAN UNION

BELGIUM

The Belgian Act on Fair Trade Practices Information and Protection for the Consumers governs the contract between a vendor and a consumer thus, giving an overriding effect independently of the laws chosen by the parties. Generally a vendor cannot limit its liability in matters relating to defective goods and liability for death or personal injury. Similarly, a clause which simply purports to exclude liability for 'indirect or consequential loss' will be deemed void and unenforceable less such exclusion clause is precisely drafted to mention and set out the matters need to be excluded. In similar note to the United Kingdom, a vendor trading in Belgium using standard terms and conditions will only be binding on consumers if such terms or conditions are spelt out in a clear and precise manner, accessible to a consumer prior to the conclusion of a contract.

Further to the above, under article 32 of the Belgian Act on Fair Trade Practices, a consumer is further afforded with adequate protection when legislators list out trade practices which are commonly referred as 'black clauses'

²⁶ Ibid.

²⁷ 10th Report by Select Committee of Trade and Industry (UK) 1998/1999 para 123.

²⁸ Jones A Sally, *Law relating to credit cards*, pg. 211.

²⁹ Sakina Shaik Ahmad Yusoff, 'Consumer protection in Malaysia' (2000) 5 *HUKUM* 322; Sakina Shaik Ahmad Yusoff & Azimon Abdul Aziz. *Dasar Pengguna Negara. Kerangka Kerja Pelaksanaan Strategi Perundangan. Projek Penyelidikan Jangka Pandek UKM, Kod Projek 7/005/2002, Fakulti Undang-undang, pg. 135.*

or 'unfair' terms and conditions which are prevalent in a consumer contract. Among others, include:

- (a) a term that provides that a buyer (being a consumer) is bound to comply with its obligations under that contract on signing the contract, whilst the vendor is only bound to carry out its obligations under a contract if it is willing to do so;
- (b) the vendor's right to vary the price in a contract at the vendor's will;
- (c) the vendor's right to modify the essential characteristics of the goods or services to be delivered;
- (d) the vendor's right unilaterally to determine or modify the terms of the delivery;
- (e) the vendor's right unilaterally to determine whether the goods or services delivered conform to the contract;
- (f) the terms that prohibits a buyer from canceling the contract in the event of the vendor's breach of contract;
- (g) limitation of liability clause that does not provide both vendor and buyer with equal rights;
- (h) a term that limits the means of proof which can be used by the buyer;
- (i) a term that limits the level of damages to be paid by the buyer or to the vendor and which does not relate to, or exceeds, the amount of loss or damage suffered by the vendor;
- (j) a term that excludes or limits the vendor's liability for death or bodily injury of the buyer caused by negligent act or omission of the vendor; and
- (k) a term that cancels or diminishes the statutory warranty in relation to hidden defects as set out in article 1641 to article 1649 of the Belgian Civil Code (this applies exclusively to sales contract).³⁰

FRANCE

Although the French implemented "Turbon Law" on 4th August 1994, a practice which requires all contractual relations entered into France must be drafted in French, nevertheless it provides similar protection to consumers as those adopted by other EU member states including making exclusion clause in relation to warranty and liability be made void and unenforceable. Similarly in addressing matters relating to standard form contract, the French Consumer Rules requires a vendor to expressly state any exclusion clause for latent defect should they intent to rely it as against a consumer.

³⁰ Baker & McKenzie, *Doing E-Commerce in Europe*, pg. 42. Baker & McKenzie. www.bakernet.com/ecommerce (20 August 2005).

Likewise, in the interest of consumer protection in E-Commerce transaction, the French Consumer Code and Distance Selling Directive requires standard form contract, as against a consumer or otherwise to comply with mandatory requirements which includes providing consumers with the followings;

- (a) the identity of the supplier;
- (b) the significant feature of goods or services being offered, the price and manner of payment;
- (c) the term and validity of the offer;
- (d) the procedure of delivery;
- (e) any right of withdrawal;
- (f) the existence of any legal warranties; and
- (g) the existence of any limitations of liability.³¹

KEY REFORM IN MALAYSIA

At this juncture, it can be safely concluded that United Kingdom and EU has to date, a comprehensive and effective mechanism in relation to consumer protection, including safe guard mechanism for online purchasers. The CCA, which instill greater consumer confidence against unlawful or misuse of credit card further facilitate and enhances the concept of cashless society without the risk attached to online buyer. The fact that merchants/vendors are unable to exclude liabilities when dealing with a consumer and the current trend of trade association involvement opens the ambit of consumer protection on a larger scale than one can ever imagine.

Malaysia has in fact enacted the Digital Signature Act 1997 (hereinafter referred as DSA) ahead of its neighbour Singapore, but unfortunately the later legislation, CPA, did not address the issue of consumer interest in e-transactions via section 2(g). While it takes two to tango, the writer is of the opinion that *ironically* the DSA merely authenticate among others (as admissibility of evidence into courts) – the lack of consumer protection in Malaysia. This is because even though electronic transactions which complies with the DSA requirements maybe construed as admissible evidence by the judiciary as an acceptable form of contracting with regard to the fundamental formation of contract under the Contracts Act 1950, unfortunately the later legislation, the CPA expressly excludes electronic means of contracting while Sales Of Goods Act 1957 (SOGA) which maybe the only consumer alternative recourse too did not address the ambit of consumer protection so as to limit the use of *exclusion clause*.

Malaysia current situation affords no protection whatsoever since a merchant has by section 62 of SOGA the right to negative or vary an express agreement. Thus, the underlying doctrine of protecting consumer via the CPA in

³¹ Ibid., pg. 58.

Malaysia does not conform to the protection it should have afforded, since the insertion of section 2(4) of the CPA clearly define its ambit such that the application of this Act shall be supplemental in nature and without prejudice to any other act regulating contractual relations.

At this point of time we should review the effect of this section and those of section 2(g) of CPA which restricts protection by electronic means, which in turn defeats consumer protection as a whole in this global era of online consumers. Furthermore, this is contrary to the Malaysian National Consumer Policy of 2002 which propagate electronic commerce.³² The writer is of the opinion that in order to provide and widens the ambit of consumer protection section 2(4) of CPA should be amended or repealed. If otherwise amended the section should be read as - the application of this Act shall be supplemental in nature and without prejudice to any other act regulating contractual relations.

In this manner the writer is of the opinion that without much confusion, the courts are able to:

- (a) apply the latest intention of Parliament – CPA in relation to consumer contract;
- (b) fill the gaps and flaws of the Contracts Act 1950 and SOGA in relation to consumer to business contracts; and
- (c) “supplemental” meaning to “add” or “insert” the CPA expressly (as intended by legislators to protect consumers) in area where there are inconsistencies with SOGA and Contracts Act 1950

The writer is also of the view that should there be a discourse in maintaining the word supplemental in the proposed amendment to section 2(4), the word “supplemental” could be replaced with the word “overriding” in order to give priority to CPA over any other Act/s governing contractual relations. And that section 2(g) should be repealed in its entirety to accommodate sufficient protection for online consumers

In the same premises, the writer is also of the opinion that should legislators are unwilling to amend or repealed section 2(4) of the CPA, the least the Law Commission should do is to insert either the word “reasonable” or “fair and reasonable” under section 62 of the Sales of Goods Act 1957 which should be read as follows, (since the 1957 Act take precedence over the application of CPA via section 2(4)):

Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is (reasonable) or (fair and reasonable) such as to bind both parties to the contract.

³² Malaysia National Consumer Policy 2002, para 5.3.3.

This seemingly minor insertion in section 62 of the above Act (SOGA) would mean:

- (a) that businesses could still maintain a concept of *laissez faire* in relation to B2B contractual dealing;
- (b) that the courts are able to protect consumers interest in relation to B2C contractual dealings subject to fair and reasonable use of exclusion clause; and
- (c) open more rooms for judicial interpretation and development in case law.

The writer in his own opinion favours the insertion of the concept of “fair and reasonable” under section 62 SOGA, because conclusively the writer believes what is fair is always reasonable but what is reasonable is not necessarily fair.

Though we realize that the judiciary could do only much to protect consumers,³³ the effect of these seemingly, minor changes (if accepted by legislators) will have a positive impact in the eyes of the consumers’ while concurrently coming to a consensus with international community with regard to consumer protection. Although this insertion might seem minor, nevertheless the changes signify the much sought after move towards the assimilation of the concept of ‘consumer welfarism’³⁴ in Malaysia.

In the same premises, the acceptance of the above amendment would mean bringing and bridging the concept of consumer protection between West Malaysia and East Malaysia to a new frontier of similarity. Since to date the application of SOGA 1957 in West Malaysia has not addressed the issue of exclusion clause being subjected to the requirement of reasonableness whereas the application of English Mercantile Law in Sabah and Sarawak by virtue of Civil Law Act 1956³⁵ provides for its application.

At this point of time, we realize that although protection for consumers online are subjected to consensus of contracting parties and the differing laws effecting consumers across the globe, it is hope that the effect of these interim changes for Malaysia will assist a large number of consumers including those

³³ Atiyah P S, *The rise and fall of freedom of contract*, Oxford Clarendon Press, London, 1979 pg. 404 -*The courts function [on the classical view] is to ensure procedural fair play; the Court is the umpire to be appealed when a foul is alleged*, but the Court has no substantive function beyond this. It is not the Court’s business to ensure that the bargain is fair or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of a superior bargaining over. Any superiority is itself a matter to rectify (meaning the Parliament duty to rectify the laws).

³⁴ Sakina Shaik Ahmad Yusoff, ‘Akta Jualan Barang-Barang lwn Akta Perlindungan Pengguna 1999. Ke Arah Perlindungan Pengguna Di Malaysia’, *Persidangan Kebangsaan Undang-Undang Perniagaan 2001: Peranan dan Cabaran*, 14 Julai 2001, Kuala Lumpur.

online consumers who are contracting in the same county (East and West) or otherwise, dealing as a direct consumer.

Thus, the effect of these interim changes will in turn attract, instill and increase foreign consumers to shop on Malaysian web-sites. What we would hope to avoid is that the current laws in Malaysia is being used as a “safe haven” for unscrupulous merchant to find solace and shelter. The writer is also of the opinion that codifying the laws governing contractual relations between East and West Malaysia would bring great certainty to the laws applicable and to standardized consumer protection on a wider scale than ever before. In similar note, the author is also of the opinion that such codification is not impossible since the EU with its 25 member states of differing legal background has managed to come to a consensus on many aspect of laws among others, matters relating to contractual relations. The recent landmark achievement by the Malaysian Law Commission in codifying Syariah Laws in Malaysia among its 13 states asserts a ray of hope and anticipation for consumers’ both in East and West Malaysia alike.

In the same tenor, the European Commission has addressed similar proposal in a paper entitled “Review of the Acquis” and in a report entitled - Competition Act and Consumer Rights Synovate of April 2004, prepared by Office of Fair Trading (UK) which highlighted the need to *simply and rationalize legislation* pertaining to consumer protection while concurrently consolidating statutes, iron-out-anomalies and introduce new definitions

In order to stand in par with international community, it is submitted that consumer legislation should move a step further by empowering Ministry of Domestic Trade and Consumer Affairs (hereinafter referred as KPDNHEP) to challenge unfair practices similar to those advocated in the UK and EU. This would mean among others a need for a KPDNHEP to list out practices or standard form contract, which are regarded as unfair practices in consumer contract.³⁶

In a recent paper entitled “Regulatory Impact Assessment” – Extending Competitive Markets: Empowered Consumers, Successful Business of 5th June 2005 based on the result of a survey conducted in 2000 by the DTI (UK) reflects the issues of consumer detriment and losses amounting to 9.3 billion pounds. This encompasses loss of value of goods and services (including costs of use

³⁵ *Heng Leong Motor Trading Co v. Osman bin Abdullah* [1994] 2 MLJ 456; *Tan Chong & Sons Sdn Bhd v. Allan McKnight* [1983] 1 MLJ 220; see Halsbury’s Law of Malaysia, MLJ, Kuala Lumpur, 2004, Vol. 24, pg. 192.

³⁶ See CPA, section 141 – Although this section provides the Controller with Power to Order Compliance (unfortunately it has not provided a specific *List* or *Schedule* of what amounts to contravening the Act comparable to UTCCR Schedule 2 which specifically defines contravening in the Regulations to include unfair terms as those listed in Schedule 2 (1)(a) to (q) UTCCR 1999. The UTCCR 1999 empowers the DTI to obtain HC injunction against unfair clause/terms in consumer standard form contract).

of personal time, travel, legal, advice and telephone bills) in order to put things right. In the same tenor consumer complaints and dissatisfaction record to the region of 854, 135 in 2003/2004 in comparison to Malaysia which stands at only 4150 claims for year ending 2003.³⁷

In relation to the above statistics consumers in the United Kingdom are fully aware of their rights which have been clearly entrenched through various laws and consumer awareness program undertaken by the DTI, On the other hand, Malaysian consumers are lacking the knowledge coupled with flaws in the legislation which in turn deters complainant from ensuing legal rights since, in reality it does not exist, based on technicalities of the provision/s as discussed in the earlier.

CONCLUSION

The drawback of the current consumer protection laws in Malaysia albeit in e-commerce, is the failure of the Commission to carefully review its terms of reference on the proposed legislation and pre-existing legislations concurrently, thus causing conflict of laws within Malaysia. This compromises and reduces consumer protection as a whole.

If only the Commission had reviewed its terms of reference in *context and essence*, in relation to the enactment of CPA, which is aimed at empowering consumers, they would not have drafted an Act which is *restitutio in integrum*. Contrary to the benefit of legislating retrospective laws,³⁸ Malaysia enacted the CPA 1999, which (due to its secondary in nature to SOGA – which provides for application to exclusion clause via supplemental nature of CPA) only brings consumer protection a century back in time to the era where market individualism still persist. In a similar paper presented at the National Conference of Trade Law of 14th July 2001 in Kuala Lumpur, Assoc. Prof. Dr. Sakina, addresses the need to amend section 62 while maintaining the concept of consumer *welfarism in toto* which is read as follows;

As such the limitation posed by the Sale of Goods Act 1957 needs to be amended, limiting the freedom of contract by both parties, vendors and consumers; To exhibit a limitation that is firm and effective in realizing consumer protection. The Sale of Goods Act 1957 needs to absorb/instill the ideology of consumer welfarism in toto in its amendment. In absorbing/instilling this ideology the Sale of Goods Act 1957 “needs to find a concept with an underlying alternative.” (researcher’s translated version)

³⁷ Rahmah Ismail & Sakina Shaik Ahmad Yusoff, ‘The development of consumer law in Malaysia: With special emphasis on defective product provisions under the Consumer Protection Act 1999, Asian Law Institute Inaugural Conference 2004, pg. 500.

³⁸ *Burma Oil Co Ltd v. Lord Advocate* [1965] AC 75.

The effect of finding a common platform in laws across the globe for consumer protection is much sought after, since it is the basic tool for generating and improving e-commerce economy. We hope that the international community will take a closer look into the possibility of coming to a consensus for a uniform law for consumers, while eradicating and eliminating the vast disparities of unequal bargaining power that exists between contracting parties. The maxim of *ignorance of the law is no excuse* has little or no basis in this global era where consumers are exposed to differing laws and flaws in many jurisdictions.

Malaysian as well as the international community should constantly take into consideration excerpts of the fundamental principles behind consumer protection from the standpoint of OECD in their recommendation paper entitled *Guidelines for Consumer Protection in the Context of Electronic Commerce* of 9th December 1999 which is read as follows:

Consumer law, policies and protection limit fraudulent, misleading and unfair commercial conduct. Such protection are indispensable in building consumer confidence and establishing a more balanced relationship between businesses and consumers in commercial transactions.

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