International Business Management 9 (4): 452-459, 2015
ISSN: 1993-5250

Consumer Protection and the Malaysian Sale of Goods Act 1957

[1]Sakina Shaik Ahmad Yusoff, [1]Rahmah Ismail, [1]Ruzian Markom and [2]Zeti Zuryani Mohd Zakuan
[1]Faculty of Law, Universiti Kebangsaan Malaysia, Selangor, Malaysia
[2]MARA Institute of Technology, Perlis, Malaysia

Abstract: The modern era is an ultra modern and complicated era with sophisticated industrial and commercial technologies invading production and distribution of goods. The advancement of technology has placed at the disposal of Malaysian consumers a range of complex and sophisticated products, consumable and non-consumable. Nevertheless, this phenomenon has led to severe problems of inequality between consumers and traders; inequality of knowledge, resources and bargaining power. To strike at the heart of inequality, efforts must be made to minimise the disparities between consumers and traders. Adopting the doctrinal perspective of data analysis this study, thus is an attempt to analyse the law of sale of goods in Malaysia as contained in the Sale of Goods Act 1957 from the consumer protection perspective. As consumers are always parties of weaker bargaining power, there is every need to protect them through effective laws. The present Sale of Goods Act 1957 is outdated. It needs to be completely revamped to reflect a more uniform and modernised approach. In its current state, the Malaysian Sale of Goods Act 1957 does not adequately protect consumers when entering into a sale of goods transaction.

Key words: Consumers, sale, goods, Sale of Goods Act 1957, Malaysia

INTRODUCTION

Since independence, Malaysia has made a significant stride in improving the economy and the quality of life of the people. In ensuring, these aims are achieved and sustained in the light of Vision 2020, the path will be fraught with difficulties as the local and global socio-economic landscapes continue to evolve and the global financial market is put to a test. To be successful within the increasingly competitive global marketplace, Malaysia must not only ensure economic growth but the rights of market players particularly the consumer, a significant contributor to economic growth must also be at the heart of the social, economic, political and legal development.

The complexities of modern industrialisation, mass production and mass distribution, the technology and the style of modern communications and advertising have accentuated the problems of a consumer in the present day market. The Malaysian market is neither free from the said modern invasion. To be successful within the increasingly competitive global marketplace, Malaysia must not only ensure economic growth but the rights of market players particularly the consumer, a significant contributor to economic growth must also be at the heart of the social, economic, political and legal development. To strike at the heart of inequality, efforts must be made to minimise the disparities between consumers and traders. This study, thus is an attempt to analyse the law in the area of sale of goods particularly the main source of the law of sale of goods in Malaysia, namely, the Sale of Goods Act 1957 with the aim of providing a better protection to the weaker party in a contract. As consumers are always parties of weaker bargaining power, there is every need to protect them through effective laws.

In the market place, the major issues revolve around inflation and the rising cost of living, marketing of poor quality, unsafe food and other products, frequent shortage of essential products, various forms of fraudulent practice, including false trade descriptions, unethical marketing and sales gimmicks. Technological advancement in the globalisation era has accentuated the problems faced by players of the market place. In Malaysia, the new market ideology, consumer welfarism has permeated through its consumer protection laws. Nevertheless in the area of supply of goods, freedom of contract and caveat emptor still remain predominantly the underlying concepts in consumer contracts in Malaysia. Thus, there is a cause for concern in this area of law in the light of liberalisation of trade. The main legislations governing supply of goods in Malaysia are the Sale of Goods Act 1957 and the Consumer Protection Act 1999. The law on sale of goods in Sabah and Sarawak, however differ from Peninsular Malaysia. English law forms part of the law in these two states. The Sale of Goods Act 1957 is not a consumer protection oriented piece of legislation. Many of its principles are based on the common law

Corresponding Author: Sakina Shaik Ahmad Yusoff, Faculty of Law, Universiti Kebangsaan Malaysia, Selangor, Malaysia

principles during the 18th and 19th centuries during which freedom of contract and laissez faire were widely practiced. Therefore, it is no surprise that this act, contains provisions which defeat consumer expectations and interests. With the coming into force of the Consumer Protection Act 1999, it has given hope to consumers but the nature of the act being supplemental and without prejudice to any other law regulating contractual relations has indeed reduces the effectiveness of this long awaited legislation (Yusoff *et al*., 2013). The significance of the scope of this study is perhaps reflected in the dilemma aptly captured by Rachagan (1992) in the following words:

> The present Sale of Gods Act is outdated and gives different rights to consumers located in different states in Malaysia. It needs to be completely revamped to reflect a more uniform and modernized approach

THE SALE OF GOODS ACT 1957: THE HISTORY

The primary legislations in Malaysia affecting content of a contract for the sale of goods is the Sale of Goods Act 1957. Modeled upon the Indian Sale of Goods Act 1930 which has its origin in the English Sale of Goods Act 1893, SOGA is a revision of the 1957 Sale of Goods (Malay States) Ordinance. SOGA in 1957 applies to contract for the sale of goods as defined in Section 4 of the act. Under the act, a contract of sale of goods has been defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. The act incorporates into statutory form important principles established in case law. As the 1957, act is not a consumer oriented piece of legislation, it thus governs dealings between Business and Business (B2B) as well as Business and Consumers (B2C). SOGA applies to all types of goods and makes no difference between commercial and private sales or between wholesale and retail. SOGA does not provide a comprehensive law for the sale of goods and as such it operates against the background of the law of contract. By virtue of Section 3 of SOGA, however, The Contracts Act 1950 in so far as they are not inconsistent with the express provisions of this act shall continue to apply to contracts for the sale of goods.

This act (its predecessor) was only applicable to the nine Malay States. In 1990 by the Sale of Goods (Amendment) Act 1990, the act was then extended to Penang and Malacca. The current act is a revision of the 1957 Ordinance with very few substantive amendments. As the 1957 Act takes its origin in the Sale of Goods Act 1893, this English Act herself has been subject to much criticism. The 1893 Act was drafted on the basis of the contracting parties in a sale of goods contract being economically equal as it was then. In this era, however the same is no longer true. The sustainability of the Act is thus questioned in this era by Goldring and Maher (1983); "those rules assumed equality of economic power between parties and the assumption was justified; merchants were generally aware and cautious and ordinary people who did most of their trading at fairs and markets were wary of their purchase. That is no longer the case". Commenting on the effectiveness of the 1893 Act, Atiyah (1995) opined that "the Sale of Goods Act has not proved one of the more successful pieces of codification undertaken by Parliament towards the end of the 19th century. The principal reason for this may well be that there has been a change in the type of sale of goods cases coming before the courts and the types of cases more generally, coming to legal attention. The 19th century cases on which the act was based were mainly cases between businesses. Now a days, however there are many sale of goods disputes which involved consumers. Thus, according to Atiyah in view of the very different social and economic nature of these transactions, both of which are in law sales of goods, it is not surprising that an act devised for principally for the one has not always worked satisfactorily for the other. It is now noticeable that one of the principal trends of modern legislative change is to discriminate between consumer and non-consumer transactions. The same dilemma of the Indian Sale of Goods Act 1930, the model for the Malaysian Act was aptly captured by Azmi (1992) as follows:

> The existing old laws relating to consumer protection, conditions and warranties under the Sale of Goods Act, 1930 which are based upon the English Sale of Goods Act 1893 can not cope with the problems experienced by a well organized and modernized society of today

The same is true with the position in Malaysia. SOGA in 1957 is applicable to both Business to Business (B2B) as well as to Business to Consumer (B2C) transactions. As such there is a need to discriminate between these two transactions in legislative drafting.

THE SUBSTANTIVE LAW ON SALE OF GOODS: THE IMPLIED TERMS

The law of sale of goods in Malaysia is still predominantly based on the doctrine of caveat emptor or let the buyer beware. In the realm of consumer sale, the

existence of this doctrine as the basis of the law of sale of goods is questionable. The change in the socio economics background of consumers coupled with the enhancement of technology affecting the trading environment has led to a need for review of this doctrine and thus a review of the law of sale of goods as contained in SOGA 1957. The most debatable provisions under the 1957 Act vis-a-vis consumer sales are as regards to the following statutory undertakings:

- Section 15: sale by description
- Section 16 (1): implied condition as to quality and fitness

Section 15-sale by description: This study has been regarded as the most difficult section as compared to other sections in the act. The difficulty lies in the failure of the act to provide for answers to the following questions:

- What is meant by the phrase sale by description?
- Are all words of description condition of the contract, breach of which entitles the buyer to repudiate the contract?

The Malaysian courts have however relied heavily on the English cases in providing an answer to the first question. Commenting on the lack of definition of the phrase in the English Act, Feltham (1969) opined that Sir McKenzie Chalmers in drafting the Sale of Goods Act may have intended a distinction between sales of specific, i.e., identified, goods and sales by description that sales by description should be limited to contracts of sale of unascertained goods, although this is by no means explicitly in the act. In deciding what amount to a sale by description writings in Benjamin's Sale of Personal Property has been heavily relied upon by many judges: sales by description may be divided into sales of unascertained or future goods as being of a certain kind or class or to which otherwise a description in the contract is applied of specific goods, bought by the buyer in reliance at least in part, upon the description given or to be tacitly inferred from the circumstances and which identifies the goods.

It is thus clear that all sales of unascertained goods are sales by description. Nevertheless ambiguity arises when one is dealing with specific goods. The issue came before the Court of Appeal in Harlingdon and Leinster Enterprise Ltd. v Christopher Hull Fine Art Ltd. (1990) 1 all ER 737. A stricter interpretation of the phrase was taken by their lordships. The Court of Appeal said that although a description was applied to the goods, it did not necessarily make the contract one for the sale of goods by description for the purpose of Section 15. For the sale to be by description the description had to be influential in the sale, so as to become an essential term or condition of the contract. The court had to be able to impute to the parties a common intention that it should be a term of the contract before the sale could be described as being by description. In the determination of the intention of the parties, majority of their Lordships held that the presence or absence of reliance on the part of the buyer was a relevant factor. Nevertheless, Stuart-Smith LJ in his dissenting judgment said that he had great difficulty in understanding how the concept of reliance fits into a sale of description. So far as he was concerned that if it is a term of the contract that it was a Munter painting, the buyer need not have to prove that he entered into the contract in reliance on this statement. To His Lordship, it would be a serious defect in the law if the effect of a condition implied by statute could be excluded by the vendor's saying that he was not an expert in what was being sold or that the purchaser was more expert than the vendor. That is not the law; it has long been held that conditions implied by statute can only be excluded by clear words.

Aun (1994) argued that from a consumer's point of view, Stuart-Smith's LJ view is to be preferred. Consumers on the whole have no clear appreciation of such legal intricacies. According to Mahmood (1993), the restrictive view taken by the court in Harlingdon has the potential of denying buyers of their contractual remedies under SOGA 1957. Not just one but two remedies provided under the act, namely breach of implied condition as to description and breach of implied condition as to merchantable quality. This is not the position in UK as the provision relating to merchantable quality is no longer restricted to cases where goods are bought by description, etc., until and unless the Malaysian legislature amends Section 16 (1) (b) to be in line with its parallel provision in the 1979 UK act, the Malaysian buyers has much more to lose compared to his English counterpart if the local courts were to adopt the test in Harlingdon.

The confusion on whether sale of specific goods would amount to sale by description could be settled by inserting into the act a clear definition of the phrase sale by description. As compared to the English 1979 Act, Section 13 of the act contains an additional provision as follows:

> A sale of goods is not prevented from being a sale by description by reason only that being exposed for sale or hire, they are selected by the buyer

This provision has partly resolved the problem associated with sale of specific goods and as such it is recommended for Malaysia.

On the second question for consideration, Section 15 does not apply to breaches of all words of description. It only applies to descriptive words which amount to conditions of the contract. On this note, SOGA 1957 fails to provide for the test of which words of description fall within the ambit of the section. Cases, however have provided the test for this. In the leading case of Reardon Smith Line v Yngvar Hansen-Tangen (1976) 1 WLR 989, Lord Wilberforce held that to be part of description, the term must identify the goods and it forms an essential element in the performance of the contract. Section 15 only applies to descriptive words which constitute the substantial ingredient of the identity of the thing sold. In Ashington Piggeries Ltd. v Christopher Hill Ltd. (1972) AC 441, Lord Diplock held that the key to (Section 15) is identification. It is thus proposed that the test be inserted in SOGA 1957.

Section 16 (1)(a) implied condition as to fitness: This section has been criticized for the proviso contained in it. The proviso provides a defence to the seller in cases of a contract of sale of a specified article under its patent or other trade name. Thus, where a buyer buys goods under its trade name, there is no implied condition as to its fitness for any particular purpose. The test in the application of the proviso was formulated by Bankes LJ in Baldry v Marshall (1972) AC 441 as follows:

> Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly that it will answer his purpose and that he is not relying on the skill or judgment of the seller, however, great that skill or judgment may be?

In England, this proviso has been deleted. In recommending its deletion, the Law Commission in their Working Paper No. 18 explained further as:

> Certain English cases show that the proviso does not apply where the buyer can be regarded as having relied on the seller's skill and judgment. This is destructive of the meaning of the proviso, since the wording of s 14 (1) itself makes it clear that unless the buyer can be so regarded, the subsection has no application anyway. In the light of these cases, no useful purpose is served by the retention of the proviso. Quite apart from those decision, the Law Commission see no reason why when purchase is clearly relying on the seller's skill and judgment, the sale of an article under a patent or trade name should exclude the purchaser from the remedies which would otherwise be available to him

The proviso to Section 16 (1) (a) under SOGA (1957) should therefore, be deleted.

Section 16 (1) (b) implied condition as to quality: One of the most heavily criticized provision in SOGA 1957 is the provision on merchantability of goods in Section 16 (1) (b). The act provides for goods to be of merchantable quality but fails to provide the meaning of this key phrase. According to Sothi Rachagan, the implied condition of merchantable quality is inappropriate for consumer transactions. Consumer buys goods for use not for sale. The current test as appear in cases emphasizes fitness and usability, scant regard to be had for durability, minor defects and acceptability. Most criticism levied towards this provision surrounds the ambiguity in the phrase merchantable quality. Some commentators have regarded it as archaic, an anachronistic and confusing terminology. The UK Law Commission has regarded the word merchantable itself is outmoded and inappropriate in this context, etc. The word merchantable refers to transactions between merchants and is not suitable for consumer transactions, even in its dictionary meaning. In any even,t it is also a word of uncertain meaning which is largely obsolete. According to Lord Roskill in the Hansa Nord (1976) QB 44, the complications arose from the use of this phrase have arisen, since 1893 and not before. They would have arisen because of the gloss that lawyers in this century repeatedly sought to impose on this single and simple word by seeking to redefine it by the use of phrases which as the cases show, raise as many if not more problem than they solve. The phrase merchantable quality has always been a commercial man's notion. In his Lordship's deliberation on the meaning of the word, Ormrod LJ in The Hansa Nord opined that:

> …in the intervening period the word [merchantable] has fallen out of general use and largely lost its meaning, except to merchants and traders in some branches of commerce. Hence the difficulty today of finding a satisfactory formulation for a test of merchantability. No doubt people who are experienced in a particular trade can still look at a parcel of goods and say 'those goods are not merchantable' or 'those goods are merchantable but at a lower price', distinguishing them from 'job-lots' or 'seconds'.

> But in the absence of expert evidence of this kind it will be very difficult for a judge or jury to make the decision except in obvious cases.

The phenomenon in the use of the section was recognised by Benjamin, the Act of 1893 did not define the phrase merchantable quality, hence the words occasioned much litigation and uncertainty which, probably discouraged buyers from relying on the section. Nevertheless, the case law and legislative developments on the phrase has seen three tests formulated by judges and legislature. Table 1 contains the summary of the tests.

Due to uncertainties in the use of the phrase merchantable quality, the English 1979 Act has replaced the phrase with a different standard of quality. The recommendation was made by the Law Commission and was later implemented by the Sale and Supply of Goods Act 1994. The 1979 Act has replaced the phrase merchantable quality with satisfactory quality and the act contains factors to be taken into account in deciding whether goods are of satisfactory quality. Section 14 (2) of the English 1979 Act now reads as: (2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality. (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonableperson would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. (2B) For the purposes of this act, the quality of goods includes their state and condition and the following (amongothers) are in appropriate cases aspects of the quality of goods:

- Fitness for all the purposes for which goods of the kind in question are commonly supplied
- Appearance and finish
- Freedom from minor defects
- Safety and
- Durability

(2C) The term implied by Subsection (2) above does not extend to any matter making the quality of goods unsatisfactory:

Table 1: Summary of merchantable quality tests

Test	Formulation
Usability test	Henry Kendall and Sons v William Lillico and Sons Ltd. (1969) 2 AC 31 Lord Reid and Lord Morris (Judgement of Lord Wright in Cammell Laird and Co v Manganese Bronze and Brass Ltd. (1934) AC 402) Goods to be of merchantable quality must be usable for at least one use to which goods of that description are commonly put Lord Wright in Cammell Laird and Co v Manganese Bronze and Brass Ltd. (1934) AC 402 "Goods are unmerchantable if they are of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used"
Acceptability test	Farwell LJ Bristol Tramways v Fiat Motors (1910) 2 KB 831 "The goods should be in such a state that a buyer fully acquainted with the facts and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and condition and without special terms
Statutory definition	S.14 (6) Sale of Goods Act 1979 "Goods of any kind are of merchantable quality within the meaning of Sub-section (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought" as it is reasonable to expect having regard to any description applies to them, the price (if relevant) and all other relevant circumstance. Lord Denning in The Hansa Nord in 1975 "I should have thought a fair way of testing merchantability would be to ask a commercial man: Was the breach such that the buyer should be able to reject the goods" In answering that question the commercial man would have regard to the various matters mentioned in the new statutory definition. He would … have regard to the purpose for which goods of that nature are commonly bought. If a buyer … buys dates for food and they are no use for food, he can reject them: As far and Co. v Blundell in 1896. But if he buys groundnuts for cattle food and they can be reasonably used for cattle food, he may not be able to reject them, even though they are not suitable for poultry: Kendall v Lillico (1968). The commercial man would also ...have regard to the description applied to them. If motor horns are sold, expressly or impliedly as new and then the buyer finds that they are dented and scratched, he ought to be able to reject them: Jackson v Rotax Motor and Cycle Co. (1910). If they are sold as secondhand or shop spoiled, then he must take them as they are (Barlett v. Sidney Marcus Ltd. (1965), unless there is something radically wrong with them. He would have regard to the price. If they are sold at the market price, the buyer would expect them to be of good quality and condition and if they were not, he would be able to reject them: Brown v Craiks in 1970. But if they are sold at a cut price or bargain price at a lower price he would have to put up with something less. He will not be entitled to reject sample because there were not perfect. The commercial man would also have regard to any other relevant circumstance. If there was a clause, express or implied which would give the buyer an allowance off the price for the particular shortcomings such that a commercial man would say: The buyer is entitled to a price allowance but not to reject them-again the goods would be of merchantable quality. The buyer would be entitled to an allowance or damages in lieu but not entitled to reject the lot". Roskill LJ: As I have always said, price is but a factor which requires goods which are in fact merchantable to be held to be unmerchantable as a matter of law. The goods in the condition in which they arrived at Rotterdam were ... usable for used as cattle food. They were not in a condition in any way comparable with the state of the dates in as far v Blundell (1896) or of the motor horns in Jackson v Rotax Motor and Cycle Co in 1910. No doubt the goods in the state in which they arrived at Rotterdam and when the buyers bought them in were far from perfect but that is not to say that they were unmerchantable so that the sellers were in breach of their obligations under S.14 (2) of the 1893 Act. In the circumstances, related in the special case I am not prepared to hold that the price at which these damaged goods were bought in by the buyers can properly be said to be a throw-away price in the sense in which that phrase has been used in some of the cases

- Which is specifically drawn to the buyer's attention before the contract is made
- Where the buyer examines the goods before the contract is made which that examination ought to reveal
- In the case of a contract for sale by sample which would have been apparent on a reasonable examination of the sample

(2D) If the buyer deals as consumer or in Scotland, if a contract of sale is a consumer contract, the relevant circumstances mentioned in Subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. (2E) A public statement is not by virtue of Subsection (2D) above a relevant circumstance for the purposes of Subsection (2A) above in the case of a contract of sale if the seller shows that:

- At the time the contract was made, he was not and could not reasonably have been, aware of the statement
- Before the contract was made, the statement had been withdrawn in public or to the extent that it contained anything which was incorrect or misleading, it had been corrected in public
- The decision to buy the goods could not have been influenced by the statement

(2F) Subsections (2D and 2E) above do not prevent any public statement from being a relevant circumstance for the purposes of Subsection (2A) above (whether or not the buyer deals as consumer or in Scotland whether or not the contract of sale is a consumer contract) if the statement would have been such a circumstance apart from those subsections.

It is thus proposed that the phrase merchantable quality in the Malaysian SOGA 1957 be replaced with the phrase satisfactory quality. The act should also provide for the test and factors to be taken into account in deciding whether the goods sold by the seller are of satisfactory quality. The English provision could serve as a guide to the Malaysian reform.

Section 62-exclusion of implied terms and conditions: SOGA 1957 allows sellers to exclude any right, duty or liability which would arise under a contract of sale by implication of law. This may be done by express agreement or by the course of dealing between the parties or by usage. According to Rachagan (1992), consumer protection calls for the repeal of Section 62. The English Sale of Goods Act 1979 does not contain a similar provision. The Engish 1979 Act is now subject to the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. In light of the above argument, it is thus proposed that Section 62 of SOGA 1957 be deleted.

THE REMEDIAL SCHEME

SOGA 1957 provides for a remedial scheme which is based on the classical approach of terms. Under the classical approach, terms are divided into conditions and warranties. According to Section 12 (2), a condition being an essential stipulation to the main purpose of the contract, breach of it gives rise to a right to treat the contract as repudiated. On the other hand, Section 12 (3) provides for a warranty being a stipulation collateral to the main purpose of the contract, the breach of which gives rise only to a claim for damages but not a right to reject the goods and treat the contract as repudiated. The criticisms on the remedial scheme provided by SOGA 1957 have been focused mainly on three major failures of the act.

Section 13 when condition to be treated as warranty: This is an important area and has given rise to some controversy. Section 13 (2) provides for where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated. It should be emphasised at the outset that by virtue of Section 13 (2), the passing of property in the goods to the buyer affects his right to reject the goods. In cases of specific goods, Section 20 provides for the property in the goods to pass to the buyer when the contract is made. A good example of this is a contract entered into for the purchase of goods in a supermarket. Property in the goods in this situation would pass to the buyer at the cash till when the buyer tenders payment and the cashier accepts it. At this juncture (the cashier's desk), according to Section 13(2), the buyer automatically losses his right to reject the goods even though he has not had the opportunity to use the goods. This principle creates injustices to the buyer as he would not have had the opportunity to use the goods and consequently discover the defect in the goods at the time the contract is made. This provision is no longer a feature of the 1979 English Act. It is thus proposed that this part of Section 13 (2) be deleted.

Acceptance of goods as a bar to rejection: Situations in which the buyer will be deemed to have accepted the

goods and thus lost his right to reject the goods are set out in Section 42. Section 42 provides for three ways of acceptance by the buyer:

- When the buyer intimates that he has accepted the goods
- When the goods have been delivered to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller
- When after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected the goods

The second category of acceptance has been a source of some confusion. There is of course a theoretical difficulty in Section 42 because it is a possible and indeed common situation for the property already to have passed to the buyer, especially after delivery of the goods. What then is the meaning of an act inconsistent with the ownership of the seller when the property in the goods may already be with the buyer? It is proposed that examples of the second category be given in the act as a guide to its application. The English provision as contained in the Sale of Goods Act 1979 below could also serve as a guide in amending section 42 of the Malaysian SOGA 1957. Section 35 acceptance:

- The buyer is deemed to have accepted the goods subject to Subsection 2:
  - When he intimates to the seller that he has accepted them
  - When the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller
- Where goods are delivered to the buyer and he has not previously examined them he is not deemed to have accepted them under Subsection 1 above until he has had a reasonable opportunity of examining them for the purpose:
  - Of ascertaining whether they are in conformity with the contract
  - In the case of a contract for sale by sample of comparing the bulk with the sample
- Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection 2 above by agreement, waiver or otherwise
- The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them
- The questions that are material in determining for the purposes of Subsection 4 above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in Subsection 2 above
- The buyer is not by virtue of this section deemed to have accepted the goods merely because:
  - He asks for or agrees to their repair by or under an arrangement with the seller
  - The goods are delivered to another under a sub-sale or other disposition
- Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit and in this subsection commercial unit means a unit division of which would materially impair the value of the goods or the character of the unit

Method of calculating damages: Section 56 of SOGA 1957 provides for damages for non-acceptance as one of the personal remedies of an unpaid seller. Section 57 provides for damages for non-delivery as one of the buyer's personal remedies. Unlike the English 1979 Act, SOGA 1957, however, fails to provide for the method of calculating both these damages. Sections 50 and 51 of the Sale of Goods Act 1979 (UK) provide as follows.

Section 50 damages for non-acceptance:

- Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance
- The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contrac
- Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept

Section 51 damages for non-delivery:

- Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery
- The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract

- Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver

The formulae contained in both sections are similar to the method of calculating damages adopted by the Malaysian courts (Lee Heng and Co. v Melchers and Co. (1963) 1 MLJ 47). It is thus proposed that the above formulae be inserted in Sections 56 and 57 of the Malaysian Act.

CONCLUSION

Sections 15, 16 (1)(a) and (b) of the Sale of Goods Act 1957 should be reviewed in light of the development which has taken place in England. Lack of definition and interpretation of key phrases in the provisions of the Act requires an immediate attention. Phrases such as description and sale by description should be accompanied by explanations or illustrations. Opinions of several resaerchers on the meaning of sale by description should be considered in providing for a definition to the phrase. The phrase merchantable quality is an archaic phrase and has led to much confusion. It is thus proposed that this phrase be replaced with a more realistic standard of quality. The English standard of satisfactory quality may be an alternative in reforming Section 16 (1) (b).

The remedial scheme contained in the Sale of Goods Act 1957 has adopted the classical approach to terms. It provides for automatic right of rejection for breach of a condition and as such is beneficial to consumers. The act, however fails to provide for clear principles on 3 major issues related to remedy. Section 13 (2) of the Act has caused grave injustices to buyers of specific goods in which property passes at the time when the contract is made. This part of Section 13 (2), thus has to be deleted. The rule on acceptance as a bar to rejection of goods by the buyer as contained in Section 42 has to be clearly defined. Although, damages have been provided for under the Act SOGA 1957 fails to provide for the method of calculating the amount of damages. It is thus proposed that the provisions in Sections 50 and 51 of the Sale of Goods Act 1979 (UK) be adopted in Malaysia.

The law of sale of goods in Malaysia as contained in the Sale of Goods Act 1957 is archaic. It predominantly reflects the provisions in the Sale of Goods Act 1893 (United Kingdom). The change in the trading world has caused major concern for the law of sale of goods in Malaysia. As at this date, the provisions contained in the 1957 Act do not adequately protect consumers in a sale of goods transaction. Changes in the way business is now being conducted call upon a review of the present law of sale of goods as contained in the Sale of Goods Act 1957.

ACKNOWLEDGEMENTS

This study is part of the findings of the FRGS Project Code: FRGS/1/2012/SSI10/UKM/02/10 and the ERGS Project Code: ERGS/1/2013/SSI10/UKM/02/4.

REFERENCES

Atiyah, P.S., 1995. The Sale of Goods. Pitman Publishing, London, UK.

Aun, W.M., 1994. Legal Aspects of Sale of Goods. Longman, Malaysia.

Azmi, S.S.H., 1992. Sale of Goods and Consumer Protection in India. Deep and Deep Publications, India, ISBN-13: 9788171004065, Pages: 332.

Feltham, J.D., 1969. The sale by description of specific goods. J. Bus. Law, 1969: 16-25.

Goldring, J. and L.W. Maher, 1983. Consumer Protection in Australia. Butterworths, Australia.

Mahmood, N.R., 1993. Case law developments relating to sale by description: A Malaysian perspective. Malayan Law J., 3: 1-11.

Rachagan, S.S., 1992. Consumer law reform-A report. Universiti Malaya Press, Kuala Lumpur, Malaysia.

Yusoff, S.S.A., R. Ismail, A.A. Aziz, S.M. Isa and K.A. Talib, 2013. Consumer contracts of sale of goods: The legal dilemma in Malaysia. Malay. J. Consumer Family Econ., 16: 29-42.