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A Relook at the Malaysian Law of Sale of Goods

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Abstract: The existing laws relating to the sale of goods in Malaysia are contained in the Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999. The Sale of Goods Act 1957 is an archaic piece of legislation. The Sale of Goods Act 1957 is outdated and needs to be revamped. The act cannot cope with problems experienced by a modernized and sophisticated society of the 21st century. Consumer protection calls for a review of the act. Defects in the present law relating to sale of goods existed based on two premises; dualism of law which leads to conflict of law issues and the deficiencies in its substantive laws, particularly relating to implied terms and its remedial scheme. Adopting the content analysis method, this study analyses the law of sale of goods in Malaysia, focusing mainly on the Sale of Goods Act 1957 and consumer protection.

Key words: Sale of goods, consumer protection, legal reform, Sale of Goods Act 1957, Malaysia

INTRODUCTION

In this globalization era, countries all over the world are shaping up in order to survive in the harsh climate of competition. One of the main contentions that these countries are really concerned with is the protection to the vulnerable group. Consumers are seen as a society in need of protection in this global economy. Inequality of economic power in marketplace contributes to economic inefficiency. In marketplace, there is inadequate information on product quality to enable informed choices to be made by consumers, inadequacy of resources on the part of the consumers and the disparity of bargaining power between traders and consumers. With the disparities that exist between consumers and traders, consumers are far from being the 'king' in trade and business management. Traders are now seen as the 'king' and consumers are now the helpless prey of the traders. All these coupled with the inadequacy of the institutional framework to meet challenges in the global market resulted in a high level of market exploitation. The aim of consumerism has now been thus to regulate and to intervene in the marketplace in order to put consumers in a better position than they would be without regulations. Thus, the real challenge for any developing economy of today is to develop products and marketing practices which are nothing but propounding and advocating consumerism (Nayak, 1991). These ethical practices have then to be safeguarded through the introduction of effective laws and effective enforcement of these relevant laws.

Law and justice are mutually interrelated. According to Wilhelmsson (1997), the relation between law and justice obviously varies, depending on the object of regulation. The meaning and position of justice are not the same within the different areas of law. In the law making process, justice calls for clear and effective rules; rules that do not lead to conflicts and confusions. However, the existing law of sale of goods in Malaysia as contained in the Sale of Goods Act 1957 is a cause for concern as it leads to injustices particularly in relation to consumer sale contracts. The status and the application of the 1957 Act which lead to problems of conflict of laws, its substantive and remedial provisions have caused several problems in resolving disputes in relation to consumer sale of goods in Malaysia. It is thus, the aim of this study to analyze these problems in light of consumer protection and shall then put forward suggestions for reform on the law of consumer sale of goods in Malaysia.

Problem statement of the study: The relations between individuals in a society are always based on the rules and regulations that respect by that society. Through legal rules, the law aims to govern the relations between people under its authority. The science of law guides individuals in establishing legal relations in a way which ensures that both or all of the parties benefit from such relations (Akrami, 2015). Rules governing the subject-matter of a contract for sale contracts should also be enacted in a manner that fulfills the aims of law. "Believers, do not

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Table 1: Sources of the law of sale of goods in Malaysia laws

Provinces	Description of goods
Malay states	Sale of Goods (Malay States) Ordinance (1957)
	Sale of Goods Act 1957 (1989-1999)
	Onwards Sale of Goods Act 1957+Consumer Protection Act 1999
Penang and Malacca	Pre 1979 Sale of Goods 1893 (United Kingdom)
	Sale of Goods Act 1979 (United Kingdom)
	Sale of Goods Act 1957 (1990-1999)
	Onwards Sale of Goods Act 1957+Consumer Protection Act 1999
Sabah and Sarawak	Pre 1979 Sale of Goods 1893 (United Kingdom)
	Sale of Goods Act 1979 (United Kingdom) (1979-1999)
	Onwards Sale of Goods Act 1979 (United Kingdom)+Consumer Protection Act 1999

consume your wealth among yourselves in falsehood, except there be trading by your mutual agreement and do not kill each other. Allah is the most merciful to you" (Al-Quran, An-Nisa 4:29). This is the most reliable text that may be referred in demonstrating how significant the sale agreement between parties can be. The description of a sale contract is somewhat similar in all legal systems. In the Malaysian Sale of Goods Act 1957, a sale of goods contract is defined as "a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price" (Section 4 (1)). Three important elements must exist in a sale of goods contract namely goods transfer of property and price.

In Malaysia, originally, two statutes of great significance in sale contracts are the Contracts Act 1950 and the Sale of Goods Act 1957 both are part of the private law regime in Malaysia. The roots of both statutes can be traced to the English 19th century ideal of equal bargaining power between the contracting parties and the doctrine of freedom of contract. In 1999, the Malaysian Parliament passed the Consumer Protection Act with the aims of providing legal protection to consumers, creating new rights against suppliers and manufacturers. However, the law on sale of goods in Sabah and Sarawak differs from Peninsular Malaysia. English law forms part of the law in these two states. Table 1 summarizes the law of sale of goods in Malaysia (Sakina *et al*., 2013).

In the realm of sale of goods in Malaysia, the Sale of Goods Act 1957 has not been a champion for consumer protection. In the area of sale of goods, freedom of contract and caveat emptor still remain predominantly the underlying concepts in Malaysia. The law of sale of goods in Malaysia as contained in the Sale of Goods Act 1957 is archaic. The Act applies to both Business to Business (B2B) as well as Business to Consumer (B2C) transactions. The sustainability of the Act is thus, questioned in this era as those rules in the 1957 Act assumed equality of economic power between parties. This is not the case in the B2C contracts. From a consumer viewpoint, the 1957 Act provides only minimal protection, in particular, when parties are of unequal bargaining strength.

The Sale of Goods Act 1957 applies only to Peninsular Malaysia. The issue on which laws govern Sabah and Sarawak in respect of the sale of goods has raised much concern (Sakina *et al*., 2013). The provision in Section 5 of the Civil Law Act 1956 raises the issue as to which law in England should be applied to Sabah and Sarawak in respect of sale contracts, whether the old law (Sale of Goods Act 1893) or the new law, the Sale of Goods Act 1979). The new law, Sale of Goods Act 1979 in England is a consolidating statute, replacing the old statute and parts of a number of other statutes such as the Misrepresentation Act 1967; the new act has also to be read together with the Unfair Contract Terms Act 1977. The adoption of the Sale of Goods Act 1979 (England) into Sabah and Sarawak raises a major issue of conflict of laws as many of the statutes replaced by the 1979 Act consisted of principles of law already in existence in Malaysia by virtue of the Contracts Act 1950 being the main statute regulating contractual dealings in Sabah and Sarawak. The scenario is worsened by the fact that some of the principles contained in the Contracts Act 1950 which form part of the law in Sabah and Sarawak are very different in its effect on contracts from those consolidated in the English Sale of Goods Act 1979. The issue of conflict of laws in Sabah and Sarawak is even now in a state of an urgent need for reform with the coming into force of Part IIIA of the Consumer Protection Act 1999.

The new Part IIIA introduces a new regime of controlling unfair terms in consumer contracts and this law forms part of the law of sale of goods in Sabah and Sarawak. The English Unfair Contract Terms Act 1977 is also part of the law of sale of goods in Sabah and Sarawak by virtue of the Sale of Goods Act 1979 being the governing law of sale of goods in those states. The Unfair Contract Terms Act 1977 (England) which is also the law in Sabah and Sarawak, contains a very different regime of protection for consumers as compared to Part IIIA of the Malaysian Consumer Protection Act 1999. Thus, this raises the issue of which law is to be applied in cases involving unfair terms in consumer contracts in Sabah and Sarawak.

As a consequence of this dualism of law in Malaysia, discrepancy, however slight in the application of the law relating to the sale of goods between Peninsular Malaysia on the one hand and the two states, Sabah and Sarawak on the other hand has the potential to raise complex conflict of law issues within the country. Parties trading between the two, West and East Malaysia may have to decide issues of jurisdictions and choice of law governing contracts of sale. As regards to the laws on sale of goods in Sabah and Sarawak, the issue of conflict of laws within its law on sale of goods should also be resolved to avoid confusion among practitioners, traders and consumers (Sakina *et al*., 2013). There is therefore a need for greater uniformity on the law of sale of goods in Malaysia in order to achieve commercial efficiency. The 1957 Act has also been criticized for its substantive deficiencies. The criticisms include (Sakina *et al*., 2015):

- The Act fails to provide for the interpretation of many key terms/phrases in its provisions on implied terms such as the phrase 'merchantable quality', 'sale by description' and others.
- Although, the 1957 Act provides for remedies for the unpaid seller and the buyer, it fails to provide for the measure of damages, i.e., the formulae. The classical approach adopted by the 1957 Act in its remedial scheme has also been criticized for its rigidity. The act fails to provide for appropriate remedies for defective goods in the consumer context such as repairs and replacement
- From a consumer viewpoint, the Act provides only minimal protection, in particular, when parties are of unequal bargaining strength. Section 62 of the act allows parties to a contract of sale to opt out of the implied terms contained in sections 14-17. This is one of the many examples illustrating the strong adherence of the act to the concepts of freedom of contract and caveat emptor which have now been seen by many other jurisdictions as having no relevance in B2C transactions

MATERIALS AND METHODS

It is important to recognise that every researcher brings some set of assumptions into the research paradigm which serves as a guidance in adopting an appropriate research approach to the study. According to Sarantakos (2013), research paradigm is a set of propositions which explains how the world is perceived by telling the researchers in general 'what is important what is legitimate and what is reasonable'. Upon examining the literatures, it has been decided that the appropriate research paradigm for this research falls under legal research or doctrinal research and as such legal method has been used to collect, discuss, explore, explain, test, verify, interpret and present the required data and findings. Legal research is "a fresh, diligent, systematic, inquiry or investigation of the factual data and/or theoretical concepts of the rules and principles of a particular legal issue in an attempt to discover, revise or improve the relevant concepts, theories, principles and application" (Zahraa, 1998). According to Amin (1992), legal research is "the exposition, the description, the explanation and justification of methods used in conducting research in the discipline of law." Walker defines legal method as "The body of knowledge of the methods which may be utilized to discover the principles and rules relevant to the determination of a particular problem or controversy". Legal research usually refers to any systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal instituttions, legal problems, issues or questions or a combination of some or all of these. According to Yaqin (2007), 'legal rules' is used here to refer to rules recognised and enforceable under any legal system or rules declared under any constitutional document or statutory provisions framed by lawmaking bodies or authorities. Like most legal research, this research is of library type. This research has adopted the qualitative research method whereby the research materials both primary and secondary sources were gathered through library and electronic resources. The primary sources of information are provisions of the Sale of Goods Act 1957 and case laws. This shall include the usage of the principle of stare decisis; references shall be made to binding precedents.

Although, it is sometimes referred to as 'old fashioned or legalistic', the method adopted by this research is the most widely used methods in legal research. It is "mainly concerned with stating, interpreting or clarifying the existing law in a given sphere of municipal or supranational jurisdiction" (Amin, 1992). Amin (1992) identifies four types of conventional legal research, namely:

- Producing conventional text books and articles
- Conducting research design to collect and organize legal data
- Attempting to expound legal rules
- Explicating or offering an exegesis upon authoritative legal sources

Following the levels involved in a doctrinal research, as stated by Mike and Chui (2007), the doctrinal type of research used in this study, also known as pure theoretical research, is directed as the first step, at finding the specific statements of the law. Following this, the next step is to perform an in-depth analysis of legal reasoning. This is a 'content analysis' that is explained in four steps. The fisrt is the identification of the relevant rules and principles through an examination of the cases and statutes. The next step is to analyse and explain those rules and principles by studying them and identifying their important elements. The relationship among the elements identified in each of the rules is then reviewed. The last step highlights the important points in the rules that form the focus of the study and arrives at the intended purpose (Zahraa, 1998). In the light of the above, this research involves the following activities:

- Identifying the relevant rules and principles by examining the primary source of the law of sale of goods in Malaysia, namely, the Sale of Goods Act 1957 and decided cases on sale of goods
- Describing such rules and principles by breaking down the rules and identifying their constituent elements
- Analysing the main problems of such rules and principles as provided by the Sale of Goods Act 1957
- Suggesting by way of reform for Malaysia, new rules and principles to overcome the problems highlighted

Data gathered has been analysed adopting the four legal research approaches; the historical, jurisprudence, comparative and analytical and critical approaches with a view of reforming the law on the given subject matter. These four major standpoints are explained by Walker as follows: these are the analytical, breaking them down the problem-situation and ascertaining what elements compose it and what rules are applicable to each part of the subject and its problems; the historical, ascertaining how and why these rules have come to be accepted and to take their modern form; the philosophical considering whether those rules are consistent with the needs of society and with accepted ideas of right and justice and the comparative, seeing how other societies at a similar stage of civilization face up to the same or corresponding problems. For proper appreciation, that is, one must find out what the rules are here and now, what they once were and how and why they come to be what they are whether they are satisfactory judged by an ideal standard and how they appear compared with the rules which are accepted elsewhere.

RESULTS AND DISCUSSION

In Malaysia, prior to 1999, in the area of supply of goods, freedom of contract and caveat emptor still remained predominantly the underlying concepts in consumer sale contracts in Malaysia. Two statutes were then of primary importance as the sources of the law of sale of goods in Malaysia. However, these statutes namely the Contracts Act 1950 and the Sale of Goods Act 1957 are not consumer oriented legislations and thus do not provide protection as such to consumers in sale contracts. The Contracts Act 1950 being the parent law governing contractual relationships is not an exhaustive legislation. It primarily contains provisions on the formation of contracts, discharge and remedies for breach of contracts. The Sale of Goods Act 1957 on the other hand as it is not a consumer protection oriented piece of legislation provides for both the buyer and the seller in a sale transaction. Many of the principles contained in the 1957 Act are based on the common law 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. In Malaysia then, what had become clear was the inadequacy of the current law on sale of goods to protect consumers. However, the year 1999 marked a change in the corpus of consumer protection measures in Malaysia. The Consumer Protection Act 1999 was enacted. The preamble expresses the purpose of the act is "to provide for the protection of consumers, the establishment of the National Consumer Advisory Council and the tribunal for consumer claims and for matters connected therewith". However, the status of the Consumer Protection Act 1999 is a major flaw of the act. The act is supplemental and without prejudice to any other law regulating contractual relations has indeed reduced the effectiveness of this long awaited legislation.

The primary legislations in the 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, the Sale of Goods Act 1957 is a revision of the 1957 Sale of Goods (Malay States) Ordinance. The 1957 Act applies to contract for the 'sale of goods' as defined in Section 4 of the Act. The act applies to all types of goods and makes no difference between commercial and private sales or between wholesale and retail. The Sale of Goods Act 1957 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 the act 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".

The 19th century cases on which the 1957 Act was based were mainly cases between businesses. Now a days, however, there are many sales of goods disputes which involved consumers. Thus, according to Atiyah *et al*. (2001). "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 Malaysian solution by enacting the Consumer Protection Act 1999 applicable only to B2C transactions and leaving the Sale of Goods Act 1957 intact has not resolved this problem. The matter is worsened by the fact that the 1999 Act is supplemental to the Sale of Goods Act 1957. The Malaysian solution has thus created a much more complex problem which requires an immediate solution.

The law of sale of goods applicable to Sabah and Sarawak has been a debate for quite some time (Sakina *et al*., 2013). The dilemma on which law is applicable to Sabah and Sarawak was ultimately settled in the case of Heng Leong Motor Trading Co. v Osman bin Abdullah (1994) 2 MLJ 456 where the United Kingdom Sale of Goods Act 1979 was held to apply to these two states. In 1996, the same decision was arrived at by the High Court of Sabah and Sarawak in the case of Low Hock Jee v Mayban Finance Berhad (1996) 2 CLJ 479. The SOGA 1957 being applicable to Peninsular Malaysia and the English Sale of Goods Act 1979 to Sabah and Sarawak as pointed out by Aun (1994) leads to dualism of law in Malaysia and, thus, has the potential of creating a number of legal problems.

The English 1979 Act applicable to Sabah and Sarawak, however, has to be read together with other relevant statutes, inter alia, the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977. As such these relevant statutes would also be the corpus of the sale of goods law in Sabah and Sarawak. However, the areas within the scope of these relevant statutes, for example, the Misrepresentation Act 1967 are already covered by the Contracts Act 1950 which is applicable to Sabah and Sarawak. The provisions on misrepresentations in the Contracts Act 1950 differ in substance with the provisions in the English Misrepresentation Act 1967. Provisions on unfair terms in consumer contracts are now contained in Part IIIA of the Consumer Protection Act 1999. The Consumer Protection Act 1999 is applicable to Sabah and Sarawak. As mentioned above, the English 1979 Act should be read together with the Unfair Contract Terms Act 1977 and as such the Unfair Contract Terms Act 1977 also forms part of the law in Sabah and Sarawak. Therefore, as far as unfair terms in consumer contracts are concerned, the laws applicable in Sabah and Sarawak are contained in Part IIIA of the Consumer Protection Act 1999 and the Unfair Contracts Terms Act 1977 (United Kingdom). Both these legislations provide for a very different regime of protection, with different consequences on contracts. This 'conflict' may lead to confusion and even to the grave 'mistake of law' when dealing with unfair terms in consumer contracts in Sabah and Sarawak.

In the realm of supply of goods, other legislation which is a source of law in Malaysia is the Consumer Protection Act 1999.

As mentioned above, the law of sale of goods in Malaysia is primarily contained in the Sale of Goods Act 1957 and the Consumer Protection Act 1999. The question arises as to which law shall prevail in cases of conflict of laws. As the aim of the 1999 Act is to provide for the protection of consumers, one may argue that in situations when one of the disputants is a consumer, the Consumer Protection Act 1999 shall be given the prevailing effect. Nevertheless, Section 2(4) hinders the effectiveness of the 1999 Act in relation to consumer protection, since the nature of the 1999 Act is only supplemental and shall not prejudice any other laws relating to contractual relations. The literal interpretation of this provision leads to a conclusion that in a situation where there is a conflict between the Consumer Protection Act 1999 and any other legislation regulating contractual relations for example the Contracts Act 1950 or the Sale of Goods Act 1957, these other acts shall be given priority even though one of the parties involved in the transaction is a consumer. An example of a conflict between the 1999 Act and the Sale of Goods Act 1957 can be seen in the provisions on exclusion of trader's liability. Part IIIA of the Consumer Protection Act 1999 prohibits the use of terms which are procedurally or substantively unfair in consumer contracts (Aziz *et al*., 2012). On the other hand, Section 62 of the Sale of Goods Act allows the use of exclusion clauses in contracts. It is thus proposed that the Consumer Protection Act 1999 be given the prevailing effect in cases involving consumers. Section 62 of the 1957 Act should therefore be deleted.

May 2, 2016, the 1957 Act has also been criticized for its substantive deficiencies, particularly relating to implied terms in sale contracts. The criticisms have been levied

towards the failure of the 1957 Act to provide definitions of many key words and phrases contained in sections governing implied terms. Phrases such as 'right to sell' and 'sale by description' should be accompanied by explanations or illustrations. 'Right to sell' under Section 14 should be defined in accordance with the decisions in several leading cases. Opinions of several authors on the meaning of 'sale by description' under Section 15 should be considered in providing for a definition of the phrase. The phrase 'merchantable quality' in Section 16(1)(b) 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.

The remedial scheme provided by the Sale of Goods Act 1957 has adopted the classical approach in terms as opposed to the Consumer Protection Act 1999 which has adopted the intermediate term approach. The 1957 Act provides for automatic right of rejection for breach of a condition and as such is beneficial to consumers. However, the act fails to provide for other consumer remedies such as repair and replacement. Its provisions on remedies for breach of a contract of sale of goods, the act however, fails to provide for clear principles on three 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, the Sale of Goods Act 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 (United Kingdom) be adopted in Malaysia.

CONCLUSION

The focus of this study is the law on the sale of goods as contained in the Sale of Goods Act 1957. Only selected provisions of the Sale of Goods Act 1957 have been the focus of this study. The first vital issue surrounds the problem of dualism and conflict of laws on sale of goods in Malaysia. Primarily, the law applicable in Peninsular Malaysia is the Sale of Goods Act 1957. On the other hand, after much debate in strings of cases, by virtue of the Civil Law Act 1956, the law applicable in Sabah and Sarawak is the Sale of Goods Act 1979 (United Kingdom). This dualism of law may lead to conflict of laws and as such there is an urgent need to resolve this problem of lack of uniformity in the law. It is thus proposed that the Sale of Goods Act 1957 be extended to Sabah and Sarawak.

The Consumer Protection Act 1999 also forms part of the law on the sale of goods in Malaysia. However, the act is only supplemental and shall not prejudice any other law on contractual relations. Some of the provisions in the 1999 Act are, however, in conflict with the Sale of Goods Act 1957. An example of a conflict between the Sale of Goods Act 1957 and the Consumer Protection Act 1999 can be seen in their treatment of unfair terms in the form of an exclusion clause. The 1999 Act seems to be prejudicial to the 1957 Act in its treatment of unfair terms in Part IIIA. The Sale of Goods Act 1957, by virtue of Section 62 allows the use of exclusion of liability by traders whereas the Consumer Protection Act 1999, by the introduction of the new Part IIIA renders the contract or the term unenforceable and void.

The provisions on implied terms of the Sale of Goods Act 1957 should also be reviewed due to lack of definition and interpretation of key phrases. The act, thus, requires an immediate attention. Key phrases such as 'right to sell', 'sale by description' and the phrase 'merchantable quality' have been left undefined. Thus, the provisions on implied terms as contained in the Sale of Goods Act 1957 have to be reviewed providing explanations and illustrations in clarifying certain key terms used in the act. The law of sale of goods in Malaysia as contained in the Sale of Goods Act 1957 fails to provide for a comprehensive protection in sale contracts particularly in consumer contracts of sale of goods. The act is in need of amendments in light of the development and changes that are taking place in the trading world and in other jurisdictions. These changes call upon a comprehensive review of the present Malaysian Law on Sale of Goods as contained in the Sale of Goods Act 1957.

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