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Consumer Protection for Sale of Goods under the Malaysian Sale of Goods Act 1957 and the Consumer Protection Act 1999: With Special Reference to Quality and Fitness of Goods

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ABSTRACT: Consumers enter into various types of contracts for supply of goods or services in their everyday lives. The consumer market is very lop-sided. Therefore, the call for consumer protection is unavoidable. Today's consumers need to be equipped with high consumerism knowledge and skills to be well-informed of market developments, necessary to empower them to be better able to act, make effective decisions and to ensure that they become more empowered, savvy and resilient. However, empowered consumers will not be created without the government intervening to protect consumers with adequate legislations. This paper aims to examine the existing Malaysian laws specifically the Sale of Goods Act 1957 and the Consumer Protection Act 1999 in protecting consumers in a sale of goods transaction and determine their adequacy. The paper focuses on two important protections namely; quality and fitness of goods. The paper adopts a legal library based research methodology focusing mainly on primary and secondary legal sources. Although the aforementioned Malaysian laws continue to protect consumers of goods, the paper concludes that there is a need to completely revamp these laws in order to reflect a more uniform and modernised approach.

Keywords: Consumers, consumer protection, Consumer Protection Act 1999, goods, Sale of Goods Act 1957

I. INTRODUCTION

Consumer protection is designed to promote and protect interests of consumers. As consumers always have a weak bargaining power, there is every need to protect them through adequate and effective laws [1]. In today's challenging environment, consumers have to deal with current technology, mass-marketing tactics, high-pressure salesmanship and sharp advertising [2]. Malaysian market is not free from these challenges. Government intervention is necessary to provide the best protection to consumers. Consumer protection is aimed at upholding justice and fairness in all commercial transactions between purchaser-consumers and sellers or manufacturers. Consumer protection seems to alleviate the sufferings of consumers who are at a disadvantage in the market place. In the era of globalisation and trade liberalisation, consumer protection is important in creating a good economic structure.

In view of the importance of protecting the basic rights of a consumer, the United Nations Assembly adopted the United Nations Guidelines for Consumer Protection on 9 April 1985 [3]. Since then, United Nations member countries have used these guidelines as their reference and have passed consumer protection or related legislations. In Malaysia, the main legislations governing the supply of goods are the Sale of Goods Act 1957 (SOGA) and the Consumer Protection Act 1999 (CPA). Despite the availability of such protection, 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.

The objective of this paper is to examine the existing Malaysian laws dealing with the sale of goods mainly the SOGA and the CPA, especially in terms of their adequacy in protecting consumers by paying attention to the issues of quality and fitness of such goods. The paper argues that the existing Malaysian laws, especially the SOGA is not a consumer protection oriented piece of legislation. Many of its principles are based on the common law principles during the 18th and 19th centuries during which freedom of contract and *laissez faire* were widely practiced [1]. Hence, this Act contains provisions which defeat consumer protection expectations and interests. On the other hand, the CPA being supplemental and without prejudice to any other law regulating contractual relations has indeed reduced the effectiveness of this long awaited legislation [4]. This paper is divided into four parts excluding the introduction. The first part deals with the sale of goods in Malaysia. This part also touches on the definitions of 'contract of sale of goods', 'goods', 'buyer' and 'seller' under the SOGA. Reference is also made to the CPA by way of defining the term 'consumer' since the SOGA uses the term 'buyer'. The second part deals with the protections accorded to buyers under both the SOGA and the CPA in terms of quality and fitness of goods purchased. The third part addresses the weaknesses surrounding the operation of these two Acts bearing in mind that as a general rule, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied in a contract of sale. This is because of the common law rule expressed in the phrase *caveat emptor* expecting the buyer to exercise care in making purchases. However, there are two exceptions to this rule i.e. goods must be reasonably fit for purpose for which the buyer wants them and goods must be of merchantable quality. Regardless of these two exceptions, what really matters is to address the adequacy of such protections. The fourth part focuses on the conclusion. This part embraces some of the recommendations by acknowledging the fact that the SOGA and the CPA are inadequate in terms of protecting buyers/consumers on the ground that there are some loopholes surrounding the discussion of implied condition or implied guarantee as to quality or fitness under both Acts.

II. SALE OF GOODS IN MALAYSIA

Malaysia generally follows the British "*Caveat Emptor*" (let the buyer beware) principal. This means parties are allowed to conduct business dealings with each other on term agreeable between them. The parties are deemed to be knowledgeable and able to take care of their respective interests. Generally, the parties involved in the transaction do not owe any duty to look after the interest of the other party to the transaction i.e. the buyer takes care of himself. However, it is important to note that consumers are always parties of weaker bargaining power as far as the marketplace is concerned. For instance, with the emerging era of new computer technology, consumers need more protection. The complexity of goods produced as a result of technology advancement leads to weak consumers being unable to assess the quality of the goods while the traders on the other hand are in a better position because they have access to information on the goods produced [5]. This imbalance distorts the theoretically ideal model of the marketplace in which the actors are equal in bargaining power and knowledge, and in which individual terms can be negotiated and altered to suit the need and wants of the parties [6]. The result of this imbalance is that consumer transactions are overwhelmingly 'take it or leave it transactions' with terms unilaterally dictated by the seller or supplier.

Within this general concept, the Malaysian government has enacted several legislations and set up institutions to protect specific interests of consumers. Therefore, it is important to note that the statute applicable for sale of goods in Peninsular (West) Malaysia is the Sale of Goods Act 1957 (Revised 1990). There is no equivalent statute for the states of Sabah and Sarawak (East Malaysia) and the law in these two states is governed by section 5(2) of the Civil Law Act 1956 which provides, among others, that "the law to be administered shall be the same as would be administered in England in the like case at the corresponding period" [7]. Consequently, these two states are bound by statute to continue to apply principles of English law relating to the sale of goods [7]. This discrepancy in the application of the law on the sale of goods between West Malaysia on the one hand and East Malaysia, on the other, has the potential to raise difficult conflict of law issues within the country. Hence, it is highly desirable that a degree of uniformity should prevail and a simple method would be to extend the Sale of Goods Act 1957 to the other two states (East Malaysia) as had been done in the case of the Contracts Act 1950.

In Malaysia, there are a number of specific statutes dealing with some elements of consumer protection and these are administered by various Ministries. Among the statutes which are under the purview of the Ministry of Domestic Trade, Co-operatives and Consumerism are the Price Control Act 1946, the Trade Descriptions Act 1972, the Hire Purchase Act 1967, Weight and Measures Act 1972, the Consumer Protection Act 1999 etc. With all these statutes in place, there is no doubt that the consumer market or the supply of goods in Malaysia is regulated. Perhaps the issue to address in the context of this paper is that of the adequacy of these statutes, i.e. the SOGA 1957 and the CPA 1999 in terms of protecting buyers/consumers regarding the quality or fitness of goods purchased by them.

2.1 Contract of Sale of Goods

It is important to note that the SOGA applies to contract for the sale of goods as defined in section 4 of the Act: "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." In other words, a sale occurs when the ownership or property in goods passes to the buyer. This means that in addition to the ordinary elements of a contract, two other elements, goods and money consideration, must also be present in a contract of sale of goods.

2.2 Goods

Section 2 defines goods to mean 'every kind of movable property other than actionable claims and money', and includes stock and shares, growing crops, grass, and 'things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'. It follows from this definition that sales of land or chattels real (leaseholds) are not sales of goods. Also excluded are actionable claims, which are, rights to sue another person for a debt or for any other reason [7]-[8]-[9].

According to section 6(1), the 'goods which form the subject of a contract of sale may either be existing goods, owned or possessed by the seller, or future goods'. Existing goods may be either specific or unascertained goods. Goods are specific if they are 'identified and agreed upon at the time a contract of sale is made'. Unascertained goods is mentioned in section 18 but it is not expressly defined; by inference it means 'goods not identified and agreed upon at the time a contract of sale is made [7]-[8]-[9]'. Section 18 refers to unascertained goods becoming 'ascertained', and it is clear from this that the term 'ascertained goods' refers to unascertained goods which have been identified and appropriated to the contract after the contract has been made. SOGA does not address the issue of services. It only focuses on the sale of goods. However, the CPA covers both goods and services. This is by virtue of section 3 of the CPA, which covers both goods and services as far as the definition of a 'consumer' is concerned.

2.3 Buyer

According to section 2 of the SOGA, the term 'buyer' means a person who buys or agrees to buy goods. Perhaps we have to make reference to the CPA as well since it uses the term 'consumer'. Section 3 of the CPA defines a 'consumer' as a person who 'acquires or uses goods and services of a kind ordinarily acquired for personal, domestic or household purposes, use or consumption; and does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of resupplying them in trade; consuming them in the course of a manufacturing process; or in the case of goods, repairing or treating, in trade, other goods or fixtures on land'. This paper argues that the terms 'buyer' and 'consumer' can be used interchangeably as far as the regime of consumer protection is concerned in Malaysia.

2.4 Seller

Section 2 of the SOGA defines the term 'seller' as a person who sells or agrees to sell the goods. Therefore, in order to perform a contract of sale, the seller must deliver the goods to the buyer, and the buyer must accept and pay for them. The seller must have a good title in order to pass the goods to the buyer. This is because the essence of a contract for a sale of goods is the transfer of property (ownership) in the goods from the seller to the buyer. Apart from defining the term 'seller', it is also important to take note of the fact that if the 'seller' also happens to be the manufacturer, this kind of scenario can be covered under the CPA. This is due to the fact that the CPA has brought some major changes towards improving consumers' right against manufacturers in cases of defective products.

III. PROTECTIONS ACCORDED TO BUYERS IN TERMS OF QUALITY AND FITNESS OF GOODS UNDER THE SOGA AND THE CPA

The SOGA and the CPA offer various forms of protection to a buyer/consumer. However, the paper focuses only on two forms of protection i.e. that of quality and fitness of such goods. For example, section 16 of the SOGA deals with implied conditions as to fitness and merchantable quality of goods purchased by a buyer/consumer. On the other hand, Part V of the CPA deals with Guarantees in Respect of Supply of Goods pertaining to title, acceptable quality, fitness for particular purpose, compliance with description, and sample.

3.1 The SOGA 1957

As a general rule, there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract of sale. This is by virtue of section 16(1) of the SOGA. In other words, the common law rule of 'let the buyer beware' commonly referred to as caveat emptor has been restated in section 16. A buyer must exercise care when he makes purchases. However, there are two exceptions to this general rule which are: (a) Goods must be reasonably fit for purposes for which the buyer wants them. (b) Goods must be of merchantable quality.

3.1.1 Goods must be Reasonably Fit for Purposes for which the Buyer wants them

Section 16(1)(a) of the SOGA deals with implied condition as to fitness. The section provides that where goods are sold in the course of a business and the buyer expressly or by implication makes known to the seller the purpose for which he is buying the goods, then there is an implied condition that the goods will be reasonably fit for that purpose, even if it is a purpose for which such goods are not commonly bought. This section may be invoked where the purpose for which the goods are required is made known to the seller unless it is implied, but where a buyer purchases goods without saying anything, the situation may be covered by section 16(1)(b). It appears that section 16(1)(a) excludes a private sale.

Based on section 16(1)(a), it would suffice to note that goods must be reasonably fit for purposes for which the buyer/consumer wants them. This protection which is accorded to a buyer/consumer can be illustrated by way of making reference to the case of *Deutz Far East (Pte) Ltd v Pacific Navigation Co Pte Ltd* [10], where the plaintiffs were the manufacturers and suppliers of Deutz marine engines and spare parts. They claimed for the sum being the price of a new top part of the injector pump ('NTP') supplied to be used on the main engine of the defendants' ship. The defendants maintained that the NTP was defective as it had four oversized springs. The main engine was badly damaged and the vessel was crippled and was repaired at considerable expense. The defendants counterclaimed that the equipment supplied by the plaintiffs for the engine of their ship was not fit for the purpose and was not of merchantable quality. The court held that the defendants relied entirely on the plaintiffs to supply the NTP which could be used with the engine on the ship. Section 14(3) of the UK Sale of Goods Act 1979 (which is materially the same as section 16(1)(a) of the Malaysian SOGA 1957) provides that where the seller sell goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill and judgment of the seller. Further, by section 14(2) of the Sale of Goods Act (UK) which is materially the same as section 16(1)(b) of its Malaysian equivalent, in the case of a seller who sells goods in the course of business, there is an implied condition that the goods are supplied under the contract are of merchantable quality, except that there is no condition as regards defects specifically drawn to the buyer's attention before the contract is made; or if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal. As the plaintiffs in this case are both the sellers and manufacturers of the NTP supplied to the defendants, they are liable to the defendants both in contract for breach of contract and in tort for negligence in the manufacture of the NTP.

In another case of *Sunrise Bhd & Anor v L & M Agencies Sdn Bhd* [11], where the first plaintiff was a developer and the second plaintiff was the main contractor for the construction of a condominium. The second plaintiff acquired two new tower cranes from the defendant for the construction of two condominium towers. The tower cranes were manufactured in China under licence from the French Potain Company. It was alleged that the cranes frequently broke down. The plaintiffs contended, *inter alia*, that the tower cranes were not reasonably fit for the said purpose nor were they of merchantable quality, relying on section 16(1)(a), SOGA 1957. The court held *inter alia* that section 16(1)(a), SOGA 1957 imposes an implied condition that the goods purchased shall be reasonably fit for the purpose for which it was acquired. The particular purpose for which the goods were required could be implied by the plaintiffs making known to the defendants either expressly or by implication the particular purpose for which the cranes were needed. The court accepted the evidence of the plaintiff's witnesses that they had at all times during the negotiations informed the defendant that the tower cranes were required for the construction of the condominium towers at the project.

Apart from the two cases cited above, reference can also be made to the case of *Grant v Australian Knitting Mills* [12]-where Grant bought cellophane-packaged, woolen underwear from a shop that specialised in selling goods of that description. After wearing the garments for a short time he developed severe dermatitis because the garments contained chemicals left over from processing the wool. The issue was whether there was reliance on the retailer's choice of a quality product such that there was a breach of the implied condition of fitness for purpose. The court held that the goods were not reasonably fit for their only proper use. The plaintiff relied on the retailer's choice of a quality product that could be worn without being washed first. As this was not the case, there was a breach of the implied condition of fitness for purpose.

Based on the cases cited above, it is evident that for a buyer/consumer to invoke section 16(1)(a) of the SOGA 1957, he needs to satisfy four requirements. The four requirements are: (a) The buyer/consumer must make known, either expressly or implied, to the seller at or before the time when the contract is made, the particular purpose for which the goods are required. (b) The buyer/consumer is relying on the seller's skill or judgment. (c) The goods are of a description which it is in the course of the seller's business to supply. (d) If the goods are specific, they must not be bought under their patent or trade name. Hence, the cases cited above have demonstrated there was reliance on the seller's skill and judgment, either expressly or by implication and the test is objective.

3.1.2 Goods must be of Merchantable Quality

Generally, 'merchantable quality' means the goods sold are fit for the particular use to which they were sold [7]. If they are defective for the purpose, they are unmerchantable [7]. For example, a pair of shoes whose heels came off on the third occasion was held unmerchantable in *David Jones v Willis* [13]. Basically the test of 'merchantable quality' needs to be examined in relation to the description of the goods sold. Having said that, it is important to make reference to section 16(1)(b) of the SOGA. The section provides the other exception to the general rule that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. In order to understand the operation of this section, reference can further be made to the case of *Reveex International S.A v MacLaine Watson Trading (M) Sdn Bhd* [14], where the plaintiffs sold various pharmaceutical veterinary products to the defendants. The defendants did not honour the bill of exchange used to pay for the goods. The plaintiffs claimed as holders in due course of the bill. The defendants counterclaimed against the plaintiffs contending that the goods were not reasonably fit for the purpose for which they were intended and were not merchantable, therefore breaching a condition of the contract as statutorily implied by section 16 of the SOGA 1957. The court ruled in favour of the defendants. In other words, the defendants succeeded in their counter-claim.

Apart from two cases cited above, the paper argues that the issue of 'merchantable quality' as a form of protection accorded to a buyer/consumer under the SOGA needs to be approached carefully due to the fact that quality of goods refers to their state or condition. Hence, this implied condition as to 'merchantable quality' applies even where goods are sold under their patent or trade name. This point can be illustrated by citing the English case of *Wilson v Rickett, Cockerall & Co Ltd* [15], where a lady ordered fuel by its trade name 'Coalite' from a fuel merchant. The consignment included a piece of coal in which a detonator was embedded, resulting in an explosion in the fireplace. The court held that the consignment as a whole was unmerchantable. It had defects making it unfit for burning.

In addition, 'merchantable quality' has been taken to mean that the goods must be reasonable for the purpose described [8]. This requirement must be satisfied even where the article is sold under its trade or patent name. Therefore, it is important to note that if the description in the contract is so general that the goods sold under it can normally be used for several purposes, the goods would be 'merchantable' under that description if they were fit for any one of the purposes. This point is illustrated in *Henry Kendell & Sons v William Lillico & Sons Ltd* [16], where Brazilian groundnut extract was sold to manufacturers of cattle and poultry foods all over England. The ultimate buyers of a large quantity of meal containing the extract lost a large number of young poultry. It was discovered that this was due to a high concentration of a poisonous substance in the extract which, while suitable for cattle and older poultry, was deadly to young poultry. The suppliers had known from their previous dealings with the manufacturers of the meal in question that they only made poultry foods, and for this purpose the extract was obviously unsuitable. The court held that as the extract was suitable for compounding into meal for cattle and older poultry, there was no breach of an implied condition of merchantable quality.

Regardless of the court's decision in *Henry Kendell & Sons case* above, it is still important to point out that if the description is so limited that the goods sold under the contract could only be used for one purpose, then the goods would be 'unmerchantable' if they were of no use for that purpose. This point is illustrated in *Wren v Holt* [17], where Wren went into a hotel and asked for a beer. The beer contained arsenic as a result of the keg not being properly washed out. As a result of drinking it, Wren fell ill. The court held that there was an implied condition that the beer would be of 'merchantable quality'. That is, it would be fit to drink.

Based on the cases addressed above illustrating the operation of section 16(1)(a) & (b) of the SOGA 1957 as an exception to the general rule that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, it would suffice to note that sometimes there can be a breach of both of the conditions or fitness for purpose and merchantable quality on the same set of facts. In other words, the two exceptions that 'goods must be reasonably fit for purposes for which the buyer/consumer wants them' and 'goods must be of merchantable quality' seem to overlap with each other. For example, goods which are said to be reasonably fit for purposes for which the buyer wants them, could also be viewed as of merchantable quality and vice versa. Apart from that, it is equally important to note that as a general rule, a breach of condition (i.e. implied condition as to quality or fitness for that matter) entitles the innocent party to repudiate the contract. However, there are instances where the innocent party cannot repudiate the contract but merely claim damages i.e. where the buyer waves the condition; where the buyer elects to treat the breach of condition as a breach of warranty and claims damages only etc.

3.2 The CPA 1999

The aim of the CPA, which is based on consumerism, is to provide a better legal protection to consumers by introducing the concept of strict liability for defective product. Although the term "strict liability" does not appear anywhere under the Act, inference to it can be made by virtue of section 68(1) which clearly

provides that amongst the person who shall be liable where any damage is caused wholly or partly by a defect in the product is the manufacturer [18]. Hence, the enactment of the CPA has brought some major changes towards improving consumers' right against manufacturers in cases of defective products. In the context of this paper, it is important to make reference to Part V of the CPA which deals with Guarantees in Respect of Supply of Goods pertaining to title, acceptable quality, fitness for particular purpose, compliance with description, and sample.

3.2.1 Fitness of Goods for a Particular Purpose

Section 33 of the CPA deals with the issue of implied guarantee as to fitness for particular purpose. The section provides that (1) Subject to subsection (2), the following guarantees shall be implied where goods are supplied to a consumer: (a) that the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and (b) that the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.

Based on section 33(1) of the CPA above, it would suffice to the note that the cases cited earlier as part of the explanation on the operation of the SOGA could be used as well as a source of reference in dissecting the section. Hence, a buyer/consumer could invoke section 33(1) if he is able to show that he has made known, either expressly or impliedly, to the supplier at or before the contract is made, the particular purpose for which the goods are required. The other aspect is that of the goods being reasonably fit for any particular purpose for which the supplier represents that they are or will be fit. For example, if John wants to buy fertilizer for his mango trees, and the supplier dealing with the fertilizers would have breached an implied guarantee that the fertilizers would be fit for mango trees if John was sold some weed-killer instead.

Regardless of the argument presented above, it is important to note that the implied guarantees shall not apply where the circumstances show that - (a) the consumer does not rely on the supplier's skill or judgment; or (b) it is unreasonable for the consumer to rely on the supplier's skill or judgment. This is by virtue of section 33(2) of the CPA. It is also important to point out that the 'implied guarantee' would apply whether or not the purpose is a purpose as to which the goods are commonly supplied. Again, this is by virtue of section 33(3) of the CPA.

3.2.2 Goods are of Acceptable Quality

Section 32 of the CPA guarantees that the goods purchased by a consumer shall have an "acceptable quality". The meaning of acceptable quality may be considered as a reworking of the 'merchantable quality' under SOGA [18]. In order to have a better understanding of section 32(1) of the CPA, reference can be made to the case of *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [19], where a new luxury car (Mercedes Benz) kept breaking down. The court held that the car was not of satisfactory or acceptable quality and was unfit for its purpose. When the Benz car could not start there was a breach of implied conditions or guarantees which rendered the Benz car not to be of satisfactory or acceptable quality and unfit for its purpose. Based on the numerous fundamental problems encountered by the plaintiff it was found that the Benz car was not in fact and in law of an acceptable quality within the provisions of the CPA. The facts were clear and undisputed and there were no triable issues. Under section 12(2) of the Act, the breach of a condition gives the plaintiff the right to treat the contract as repudiated. It was thus held that the plaintiff was entitled to reject the Benz car, which it did when it left it in the first defendant's workshop on 21 May 2007.

According to section 32(2)(b) of the CPA, acceptable quality is tested not only by reference to the goods, but also to the consumer's expectation: whether "a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defect, would regard the goods as acceptable". In addressing the issue of acceptable quality, the following factors are taken into consideration: the nature of the goods; the price of the goods; any statement made about the goods on any packaging or on label; any representation about the goods by the supply or the manufacturer; and all other relevant circumstances. Again, this is by virtue of section 32(2)(b) of the CPA.

Based on the discussion of the relevant provisions of the CPA above, it is inevitable to point out that to a certain extent the enactment of the Act has brought some major changes towards improving consumers' right against manufacturers in cases of defective products. The promulgation of the Act has brought some light to consumers in Malaysia. Prior to that, consumers had "countless" obstacles to bring action against manufacturers for defective products under common law of tort [18]. Similarly, it was also almost impossible to impose direct liability on manufacturer based on contract due to the doctrine of privity of contract, which necessitates a claimant to have a pre-existing contractual relationship with the manufacturer of the product in question [18]. The main objective of the Act is to provide greater protection for consumers and its provisions cover areas that are not covered by the other prevailing laws [2].

IV. INADEQUACY OF THE PROTECTIONS ACCORDED TO BUYERS IN TERMS OF QUALITY AND FITNESS OF GOODS UNDER THE SOGA AND THE CPA

Despite the SOGA and the CPA seem to offer protection to buyers/consumers in terms of quality and fitness of goods purchased as discussed above, it is of paramount importance to point out that these protections are not adequate enough due to the weaknesses of these two Acts.

4.1 The SOGA 1957

Section 16(1)(a) of the SOGA provides a defence to the seller in cases of a contract of sale of specified article under its patent or other trade name. This has been interpreted to mean that if a buyer asks for specific goods under a patent or trade name with the impression that he is not relying on the seller's skill and judgment, then he cannot later complain if the goods bought are not fit for the purpose which he requires them. Courts are prepared to accept that the requirement of reliance is satisfied if the reliance is a matter of reasonable inference from the circumstances of the case. That which is far from clear is the question of how far disclosure of the purpose for which the goods are required will raise a presumption that reliance is being placed upon the seller's skill and judgment. It would suffice to note that mere disclosure of the particular purpose for which goods are required is not of itself sufficient to raise a presumption of reliance in all cases.

Section 16(1)(b) of the SOGA provides for goods to be of 'merchantable quality' but fails to provide the meaning of this key phrase. The implied condition of merchantable quality is inappropriate for consumer transactions [19]. Consumer buys goods for use not for sale. The current test emphasizes on fitness and usability, scant regard is given to durability, minor defects and acceptability [1]. Due to uncertainties in the use of the phrase 'merchantable quality', the English Sale of Goods Act 1979 has replaced the phrase with satisfactory quality [1].

Section 62 of the SOGA allows the exclusion of implied terms and conditions by 'express agreement' or by previous dealings or by usage. Courts have made various efforts to read down exclusion clauses by construing them strictly *contra proferentem*, particularly those in contracts where the parties are not of equal bargaining strength [7]. Despite this judicial approach, the average consumers faced with a wide variety of standard contracts are disadvantaged by exclusion clauses hidden in fine print.

Another inadequacy of the SOGA can be seen from section 42. The section provides for three ways of acceptance by the buyer: (i) when the buyer intimates that he has accepted the goods (ii) 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 (iii) when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected the goods. It is pertinent to note that the second category of acceptance has been a source of confusion. There is of course a theoretical difficulty in section 42 because it is possible and indeed common situation for the property already to have passed to the buyer, especially after delivery of the goods [1]. It defeats logic to use the phrase 'an act inconsistent with the ownership of the seller' when the property in the goods may have passed to the buyer from the very beginning based on the act of delivery itself as a form of acceptance.

4.2 THE CPA 1999

One of the inadequacies of the CPA rests on the supplementary nature of the Act itself. Section 2(4) provides that 'the application of this Act shall be supplemental in nature and without prejudice to any other law relating to contractual relations. What happens in the event of a conflict between the Act and the Contract Act 1950 or the Sale of Goods Act 1957 in a consumer contract, which legislation shall prevail? There are obvious discrepancies between the CPA and the SOGA with regards to privity and the application of exclusion clause, which can only be resolved after litigation. Due to these discrepancies, it is not clear whether the CPA can really achieve its principal objective to provide better protection to consumers.

Section 51 of the CPA provides that no right of redress against the manufacturer if the goods fail to comply with the implied guarantee under section 50 due to (a) a default or omission of, or any representation made by, a person other than the manufacturer; or (b) a cause independent of human control, occurring after the goods have left the control of the manufacturer. If these things occur, by virtue of section 51, the consumer will be left without any contractual remedies. The operation of this exclusion clause is seen as a tool of oppression as it enables manufacturers to escape liability.

The other inadequacy of the CPA lies on the issue of interpretation. For instance, the test of defectiveness under Part X of the Act is based on a vague safety concept provided under Part III. There will always be a scope for a debate over questions of fact, degree and standard in deciding whether or not a particular product was unsafe and therefore defective [18]. Apart from that, it is even more problematic when safety is to be judged according to what 'a person is generally entitled to expect (section 67(2)). On the surface, the test appears to be objective since it is based on a particular person's expectation. However, it is the general expectation that will be taken into account and not an actual expectation of a consumer [20].

In addition, the consumer expectation test seems to offer inadequate protection to consumers in the event of patent danger. Also, the time of supply is relevant in deciding defectiveness. This is by virtue of section 67(2)(f) of the CPA. For example, the relevant time would be the time of supply by the producer and not the subsequent time of supply to the ultimate consumer.

The CPA does not provide for public interest groups to bring an action on behalf of an aggrieved consumer [21]. Unlike the novel feature seen in many other jurisdictions such as in Thailand, India and China that provide for consumers in obtaining legal aid and representation by consumer organizations, the Act does not provide for it [21].

V. CONCLUSION AND RECOMMENDATIONS

It is evident from the above discussions that the protections accorded to consumers in terms of quality and fitness of goods under the SOGA and the CPA are inadequate. The SOGA 1957 is archaic. It predominantly reflects the provisions in the Sale of Goods Act 1893 (United Kingdom). Hence, the provisions contained in the Malaysian SOGA 1957 do not adequately protect consumers in a sale of goods transaction. On the other hand, the CPA 1999 being supplemental and without prejudice to any other law regulating contractual relations has indeed reduced the effectiveness of this long awaited legislation. Therefore, the existence of the CPA 1999 may still be perceived as inadequate in terms of protecting consumers until and unless the weaknesses of the Act (as mentioned above) are remedied. In order to have a better regime for consumer protection, the paper recommends that the following initiatives have to be implemented in addressing the weaknesses of the two Acts in the context of quality and fitness of goods purchased by buyers/consumers.

First, there is an urgent need to delete the proviso to section 16(1)(a) of the SOGA in order to have an adequate regime for consumer protection. In England, this proviso has been deleted following the recommendation by the Law Commission in their Working Paper No. 18.

Second, the phrase 'merchantable quality' appearing in section 16(1)(b) of the SOGA should be replaced with the phrase satisfactory quality. This would be in line with the position in England i.e. the English Sale of Goods Act 1979 has replaced the phrase with 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. As mentioned earlier, the current test emphasizes on fitness and usability, scant regard is given to durability, minor defects and acceptability.

Third, section 62 of the SOGA which allows the exclusion of implied terms and conditions by 'express agreement' or by previous dealings or by usage should be repealed. The English Sale of Goods Act 1979 does not contain a similar provision.

Fourth, section 42 of the SOGA which provides for three ways of acceptance by a buyer needs to be amended in order to offer adequate consumer protection. Perhaps section 35 of the English Sale of Goods Act 1979 could be used as a guide in amending section 42 of the SOGA. Section 35 of the English Sale of Goods Act 1975 is an important section addressing the issue of acceptance by a buyer at length.

Fifth, the paper recommends that in order for the CPA to achieve its principal objective, the Act has to be of a general application instead of limiting its application to that of a supplementary nature only.

Sixth, section 51 of the CPA should be abolished altogether since it is not in line with the main objective of the CPA. The existence of section 51 impairs the rights conferred by the Act to the consumers in obtaining redress against the manufacturers.

Seventh, in dealing with the test of 'defectiveness' under Part X of the CPA, it is important to note that instead of taking into account the general expectation, the focus should be more on actual expectation of a consumer. By taking into account the general expectation, it may preclude a consumer's claim.

Eighth, the CPA should be amended in order to provide for public interest groups to bring an action on behalf of an aggrieved consumer. Hence, the concept of *locus standi* or 'standing in courts' as the term is commonly understood, being a procedural barrier created to prevent abuse of legal process should perhaps be done away with in instances involving consumer disputes.

All in all, there is no doubt that consumer protection in Malaysia is carried out in a variety of ways including the enforcement of existing laws related to consumer protection as well as formulation of new laws and amending old laws. There is no harm to re-look into our current SOGA 1957 and the CPA 1999 in order to amend or abolish altogether some of the relevant sections addressed in this paper. As mentioned earlier, government intervention is necessary to provide the best protection to the consumers. We ought to bear in mind that defective goods in terms of quality or fitness impose various direct and indirect costs on buyers/consumers and the broader community. Consumer complaints on quality and fitness of goods purchased in Malaysia are no different from those of other countries.

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