

Corporate Responsibility via Malaysian Contract Law: A Concern for Consumer Protection

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ABSTRACT

Corporate responsibility (CR) principles aim to make today's corporations responsible members of the community. Corporations in fulfilling their CR are anticipated to function within the framework of the laws and regulations as part of the legal responsibility. Having a good law that upholds human rights has been seen as a vital tool in promoting and improving the public image of a corporation in the eyes of their customers. In the area of consumer protection and contract law, the Malaysian contract law has not been a great champion of consumer rights *vis-à-vis* suppliers and manufacturers. Standard form contracts have come to dominate more than just routine transactions between suppliers and consumers. The increasing use of exemption clauses in consumer standard form contracts has now become a predominant feature of many consumer contracts. In view of increasing unethical conduct by manufacturers, consumer rights *vis-à-vis* manufacturers have also been a cause for concern. The absence of a contractual relationship between manufacturers and consumers has to an extent provided a good defence for escaping liability for defective goods by the manufacturers. The consumer rights, being the rights of third parties, have never been acknowledged under the Malaysian law of contract. Adopting the content analysis method, this paper aims at exploring CR *vis-à-vis* consumers in three selected areas of consumer and contract law, namely, the use of standard form contracts in consumer contracts, the exemption of liabilities for defective goods by traders and the rights of consumers against manufacturers under the Malaysian contract and consumer law regime.

Keywords: Corporate responsibility, contract law, consumer protection law, standard form contract, exemption clause, third party rights

INTRODUCTION

The concept of Corporate Responsibility (CR) has long been in practice by corporations in developed countries in gaining profits by taking into account the stakeholders' interest ethically or in a responsible manner. With the increasing awareness of consumer rights in Malaysia, corporations are required to be accountable to the relevant stakeholders, including the consumers. The growing market pressure has

forced the corporations to behave reasonably and responsibly while contributing to the economic development in adherence to their CR. The increase in legal responsibility in the realm consumer protection and contract law in the marketplace are also influenced by the growing trends of CR initiatives.

According to Carroll (1991), CR is divided into four conceptual levels, which are economic, legal, ethical and philanthropic responsibilities.

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‘Economic responsibility’ refers to the expectation of the corporations to maximise the profits; ‘legal responsibility’ is defined as the obligation of the corporations in compliance with laws while fulfilling their economic responsibility; ‘ethical responsibility’ suggests that corporations should behave ethically and morally; and ‘philanthropic responsibility’ refers to the ‘voluntariness’ of the corporation to be involved in charitable activities for the society (Carroll, 1991).

There is a strong link between CR and the law, as the law acts as a tool in regulating corporation activities in order to prevent them from abusing power (Cochius, 2006), especially in situations where there is imbalance in the bargaining power between two contracting parties; for example, the consumers and the traders in their contractual dealings. Besides that, the law also plays an important role in enforcing the formation of CR policies (McBarnet, 2009). This paper aims to explore CR in three selected areas of consumer and contract law, namely, the use of standard form contracts in consumer contracts, the exemption of traders’ liabilities and the rights of consumers as third parties.

CONSUMER PROTECTION: CORPORATE RESPONSIBILITY THROUGH CONTRACT LAW

Law has to be taken into account in defining CR in the sphere of private law, as legal responsibility involves relationships between parties to a contract and in businesses, relationships between corporations to their shareholders (Taylor, 2008). For Carroll (1991), legal responsibility is a partial fulfilment of the ‘social contract’ between business and society, whereby corporations are expected to pursue their economic mission within the framework of the law. This legal responsibility is also considered as a reflection of the ‘codified ethics’ in the sense that they embody the notion of fair and just operations as established by the lawmakers (Carroll, 1991). Corporations are regulated by their contractual relationship with the parties in commercial

transactions through contract law; for example, terms on product guarantees are incorporated in the contract of supply and directly affect the consumers. These terms are legally binding on the suppliers. In this instance, CR transforms into a legally binding commitment through contract law with the intervention of legislation (Boeger, 2008).

Parties to a contract are free to enter into a contractual relationship as long as it is not a void or voidable contract under the Contracts Act 1950 (CA 1950). However, this freedom of contract is subject to abuse as many contracts are entered into with the imbalance of bargaining power or absolute absence of the bargaining power. For instance, in maximising their profits, corporations have often neglected their legal responsibility in contract law. Hence, many contracts are drafted in such a way to circumvent the clear provision of the CA 1950 to render its application irrelevant (Yusfarizal, 2009). Corporations enter into such contracts so as to avoid their obligations under contract law. In order to avoid civil litigation, these unfair contracts are drafted in a confusing manner that no clear provision of CA 1950 could be referred to render the contracts void or voidable. The existence of these unfair contracts has indeed impacted upon the rights and interests of consumers and there is no law to regulate them in Malaysia. Corporations enter into such unfair contracts based on their anticipation of the inadequacy of contract law in this area.

Growing human rights issues, consumer rights in particular, have forced corporations to directly adopt the aspects of human rights in their corporate policies as part of their CR. Corporations routinely make commitments in their code of conduct to enhance consumer protection so as to comply with law which is obviously a legal obligation (McBarnet, 2009). As discussed above, law plays a central role in defining CR in private law. Private institutions, such as Consumers International, ERA Consumers and Federation of Malaysian Consumers Associations (FOMCA), use private law to drive CR while market forces are being stimulated and facilitated by legal measures

(McBarnet, 2009). It is undeniable that some of the legal interventions have also come from the CR movement itself and from the change of practice it reflects and promotes (McBarnet, 2009). Consequently, the development of the consumer protection law is greatly influenced by CR, either by the practice of the corporations or by the pressure of the consumers' movement.

Citing Shells International reports, corporate responsibility (CR) essentially involves a shift from 'profits' to 'people, planet and profits' or to 'profits and principles'. The focus on the welfare of a certain group of people, namely the 'consumers' as the beneficiary of a product or service, has called upon corporate bodies to re-examine their objectives in the production and distribution of goods and the supply of services. The legal regime of consumer protection in Malaysia has contributed to the realignment of this focus. Thus, consumer protection laws nowadays play an increasing role in enforcing CR policies. The legal development in this area of the law is directly and indirectly fostering CR; the soft laws by way of policies and codes of ethics and the hard laws by means of legislations and regulations are being evolved to stimulate and facilitate market forces. In the area of consumer protection, much of the momentum for legal protection has come from the CR movement and the paradigm shift it introduces in the supply of goods and services.

CR compliance gives rise to the protection of consumer rights. Legal conformity of statutorised consumer rights equates CR compliance of a company. In the realm of consumer protection, both the developed and developing nations have adopted measures to protect consumer rights and interests by establishing institutional and regulatory framework in strengthening and enhancing consumer protection policies and legislations, encouraging international co-operations and ensuring good business practices in view of liberalisation of trade and the advancement of technology. In the implementation of CR among corporations, legal regulation is seen as one of the routes to CR. Sir Chandler (2003), for example, calls for more legal regulation, seeing

voluntary CR as a 'curse' distracting from the need for effective external control. In the realm of consumer protection, the rights and interests of consumers are recognised through two forms of laws, namely, soft law and hard law.

AREA OF CONCERN I: CORPORATE RESPONSIBILITY AND EXCLUSION OF CONTRACTUAL LIABILITIES

The complexity in the trading environment with the advancement of technology has led to an increasing widespread business practices with important ramification for consumer contracts, and thus, questioning the legal and social responsibilities of corporate bodies. An area of much concern in contract law is the situation where traders attempt to exclude or limit their liability for breach of contract by including exemption or exclusion clauses in consumer contracts. Understanding the development in the area of contract law brings us to the two rivalry concepts, namely, the traditional concern for freedom of contract and the cardinal rule of contract law, while on the other hand, the concern to curb unfairness resulting from significant inequality of bargaining power, which in this context is known as the principles of consumer protection. In this context, consumer protection dictates that consumers are protected and the government is called upon to play their paternalistic role.

The mischief of exclusion clauses has been expressed by many authors. To Beale (1989), "... most customers faced with contract containing 'small print' do not know what it contains or understand the effect of the clauses, and they do not think it is worthwhile to spend the time and money necessary to find out or have the small print explained to them. Instead, they tend to ignore it and shop in terms of price." Several cases have demonstrated the court's increasing concern, particularly on the use of standard form exclusion clauses in consumer contracts. In dealing with the exclusion of liability clauses, the courts have developed and adapted formal rules. The main rules which are used are those of 'incorporation' and 'construction'. The lack

of legislative control over exclusion clauses in Malaysia has caused the courts to fall back on the common law principles in dealing with these clauses. In cases involving a consumer, however, it is difficult to ascertain the attitude of the Malaysian Courts towards exclusion clauses due to the scarcity of such cases. Nevertheless, granted that cases in this area have been very limited, the decisions in these cases have not been a great champion of consumer rights. In *Malaysian Airlines System Bhd v Malini Nathan & Anor* [1986] 1 MLJ 330, Malaysian Airlines was sued for breach of contract for failing to fly the first respondent, a fourteen year old pupil back to Kuala Lumpur. In denying liability, MAS relied on Condition 9 under the Conditions of Contract printed on the airline ticket. The Supreme Court held that MAS was entitled to rely on the clause and thus was not in breach of the contract.

However, cases involving damage due to a negligent act of one of the parties to the contract demonstrate strict attitude of the Malaysian courts towards exclusion clauses. In the case of *Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn. Bhd. & Anor* [1995] 2 MLJ 100, the court took a very strict interpretation of these types of clauses in cases involving damage caused by negligence. In allowing the plaintiff's claim, Siti Norma Yaakob J states that:

It is settled law that an exemption clause however wide and general does not exonerate the respondents from the burden of proving that the damages caused to the car were not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car.

However, the decision of Elizabeth Chapman JC in *Premier Hotel Sdn. Bhd. v Tang Ling Seng* [1995] 4 MLJ 229 in the Kuching High Court has caused some concern as it indicates the court's readiness to give effect to

a clearly worded exclusion clause in the event of negligence:

General words of exclusion clauses would not ordinarily protect a contracting party from liability for negligence. To protect him from liability for negligence, the words used must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'howsoever caused'.

The legal development in the area of fundamental breach and exclusion clauses has also caused concern, particularly in consumer contracts. Cases have evidenced that exclusion clauses carefully drafted would be able to relieve traders of their liabilities even though the breach goes to the very core of the contract and as such depriving consumers of their rights. In the light of the development in the area of consumer protection, Sinnadurai (1978) opines that in cases where an ordinary consumer's transaction is involved, the courts should take a stricter view of the exclusion clause and protect the consumer against onerous terms imposed by the stronger party. He further expressed the view that the courts should recognize that the notion of freedom to contract in one's own terms in most consumer transactions is nothing more than a fiction. To Sinnadurai (1978), the court should take a more active role in protecting the weaker party and not merely taking a strict constructionist approach, nor should they abdicate their responsibility by holding that in such matters it is best left to the legislature to intervene. The role of the judges should not be perceived as mere interpreters of the law, but also as developers of law.

In Malaysia prior to 2010, the legislative development in the area of exclusion of liability appeared to be minimal. The absence of appropriate legislation to curb the use of exclusion clauses in consumer contracts in Malaysia has led to the oppression of consumers and the spread of traders' unethical conducts. In

Malaysia, it is an area much left to the creativity of the judiciary. Nevertheless, as seen above, case law development in this area of contract law has shown grave concern for consumer protection. The current law of contract has not been a great champion of the rights of consumers. The Contracts Act 1950 contains no provision on the contents of an agreement and as such, does not govern the inclusion of exclusion clause. One of the legislations in Malaysia affecting exclusion clauses is the Sale of Goods Act 1957. The Sale of Goods Act 1957 applies to contract for the sale of goods as defined in Section 4 of the Act. The Act incorporates into statutory form important principles established in case law. The Sale of Goods Act 1957, which governs dealings between business and business and business and consumers, simultaneously accords no protection to consumers as far as exclusion clauses are concerned. Instead of regulating the use of exclusion clauses in sales, the 1957 Act by virtue of section 62 allows exclusion of the implied terms and conditions by 'express agreement'.

The introduction of the Consumer Protection Act 1999 in Malaysia has to a certain extent enhanced consumer rights in contracts. However, the 1999 Act fails to address the use of exclusion clauses by traders. Although Section 6 of the 1999 Act prohibits contracting out of the provisions of the Act, it fails to cover the wide spectrum of exclusion clause which exists in consumer contracts. Despite the introduction of the 1999 Act, it nevertheless transpires that there are several major flaws. Although the 1999 Act is a long awaited statute by consumers and consumer movement groups, this hope has been set back by its very nature. The 1999 Act is very limited in its application. By virtue of Section 2(4):

The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

The introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010 has to some extent resolved the problems associated with the use of exclusion clauses in consumer contracts in Malaysia. Under this part, when a court or the Tribunal comes to the conclusion that a contract or term is procedurally or substantively unfair or both, the court or Tribunal may declare the contract or the term as unenforceable or void. Under section 24C, "A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and the supplier." A contract or a term of a contract is substantively unfair, under Section 24D, "if the contract or the term of the contract – (a) is in itself harsh; (b) is oppressive; (c) is unconscionable; (d) excludes or restricts liability for negligence; or (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification." In addition to the contract or the term being held unenforceable or void, Part IIIA provides for a criminal penalty for contravention of its provisions. Under Section 24I, if a body corporate contravenes any of the provisions in Part IIIA, the corporate body shall be liable to a fine not exceeding RM250,000; and if such person is not a body corporate, to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding three years or both.

The legal development in the area of exclusion clause in Malaysia, prior to the 2010 amendment, seems to lead to a conclusion that the courts in Malaysia do not seem to rise to the challenge of how such clauses could deprive the rights of a party to the contract and how such clauses, if carefully drafted, could enable one party to the contract to escape liability and leave the other party particularly the weaker and disadvantage with no recourse. Sinnadurai (1978) expresses his opinion that,

“the courts themselves have not been too bashful in expressing their contempt for such clauses.” As such, a legislative control over the use of exclusion clauses in consumer contracts in Malaysia, featured in the newly introduced Part IIIA of the Consumer Protection (Amendment) Act 2010, is a very much awaited reform in this area as it seems to address CR but it has yet to be tested.

AREA OF CONCERN II: STANDARD FORM CONTRACTS AND CORPORATE RESPONSIBILITY

Standard form contract has been the practice in almost every corner of corporate business activities. Since legal compliance is a part of CR, it cannot be denied that the fact that CR in the aspect of standard form contract has not been achieved due to the absence of specific legal provisions in this matter. Although the Contracts Act 1950 remains as the superior legal provisions in any business dealings or contracts, it contains no provision either on the content of a contract or on standard form. Perhaps the reason being, as pointed out by Nik Ramlah Mahmood (1993):

The Contracts Act 1950 attempts to codify only the basic principles of contract law. As such it does not have specific provisions dealing with contents or the terms of a contract. Hence no mention is made of clauses which limit or even exclude one party's liability, clauses which incorporate terms in other documents into the contract. It is perhaps for this reason that the Malaysian Judiciary has, hitherto, upheld the validity of clauses that seem to be unfair to consumers.

According to Parker (2006), the law is traditionally concerned with accountability – “holding people to threshold criteria of good conduct and performance”. The nature of the formation and the practice of standard form contract are indeed accepted as an evidence of unequal power of bargaining between two

parties. Thus, where the use of this type of contract is accompanied by inequality of bargaining power, there is a greater likelihood of them being used as an instrument of economic pressure because their terms can be weighted in favour of the interest of the stronger parties who prepared them. In this sense, the doctrine of freedom of contract is based on the premise that both parties to a contract are bargaining from position of equal strength, where each of them is free to accept or reject any term which is imposed on them in the contract. Oughton and Davis (2000) pointed out the typical features of it; a standardized, printed mode, used for all contracts of the same kind, with relatively little variation in a typical case, and with a general requirement to adhere to the terms, however one-sided, laid down by the stronger party. In Malaysia, most corporate traders use standard form contracts to dominate their routine transactions. The use of the standard form contracts, which are noticeably associated with the use of unfair terms, has, as Furmston (1991) puts it, “in the complex structure of modern society, the device of the standard form contract has become prevalent and pervasive.”

In its real sense, standard form of contract stands as the kind of contract with its special features. Although not in themselves novelties, the standard form contracts, as pointed out by Lord Diplock in *Shroeder Music Publishing Co Ltd v. Macaulay* [1974] 1 WLR 308, are of two kinds, namely, those which set out the terms on which mercantile transactions of common occurrence are to be carried out, such as bills of lading and policies of insurance. “The standard clause in these contracts has been settled over the years by negotiation by representatives of the commercial interests involved and has been widely adopted because experience has shown that they facilitate the conduct of trade.” On the other hand, as a result of the concentration of particular kinds of business in relatively few hands, another kind of standard form contract has emerged, “the terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organization representing the interests

of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say; 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'" Thus, in the context of corporate dealings with the public, namely their customers by way of standard form contracts, it has been an accepted practice that the corporate body will insert standard terms into their contract with their customers without any prior negotiation. The greater bargaining power of most corporate traders or suppliers has enabled them to impose terms in contracts by the use of this kind of contracts.

It is undeniable that the use of standard form contract is extensively widespread in the era of globalisation. It has now become a predominant feature of many business contracts. The development of standard form contract in this modern society emphasises on the fact that the making of a contract is no longer a purely private act. It may be controlled or even dictated by legislative or economic pressure, and it may involve the courts in feats of construction akin to or borrowed from the technique of statutory interpretation (Phang, 1994). The use of standard form contracts undeniably has several advantages to traders engaging in numerous transactions. Standard form contracts, as Macleod (2007) explains, "First...saves the cost of individual drafting and hence time and money. ... Second, the standard form contract has been used to exploit economic advantage." The widespread of the standard form contract shows that although its use has the advantages of saving time, trouble and expense in any bargaining over terms, its practice in market transaction has now become a major problem due to its characteristics. Macleod (2007) points out that the use of a standard form contract to disadvantage the weaker party is particularly the case in respect of those enterprises doing business with public at large: the terms and price are rigidly laid down, and the only choice available to the individual public is whether or not to contract at all. By looking at the nature of the

formation of this particular type of contract, the obvious disadvantage to consumers can be seen from the drafting aspect where the terms of the contract have been drafted by one party without any negotiation with consumers. Furthermore, standard form contract is known for its formality in using small print which gives difficulties for any person to read. It is undeniable that most standard form of contracts are using small print which, as one of its characteristics, gives the perception that the effect of the small print is to undermine or even to contradict the terms expressly agreed between them. Generally, the party using such standard terms does not want or intend the other to be aware of their contents, so long as they are incorporated into the contract (Thorpe & Bailey, 1999).

Although it was initially formed as an agent to facilitate market transactions, it is now seen as hindering the business process and increasing the cost of goods. Its practice in the daily business transaction has drawn attention due to its nature and characteristics. Standard form contracts are not a result of a negotiation process; they are offered on a 'take it or leave it' basis, and they do not require a meeting of minds and are usually not read by each individual public. Its contents often consist of unfair terms and exclusion clauses which usually give benefits and advantages to the one who prepares the contract. In this new era, the practice of standard form contract reflects a new dimension of oppression of the strong and powerful corporate body towards the vulnerable public at large. Therefore, since CR is part of compliance to the legal regulations, there is unfortunately no CR reflected in the area of standard form contract due to the loopholes of the law.

AREA OF CONCERN III: RIGHTS OF CONSUMERS AS THIRD PARTIES UNDER THE MALAYSIAN CONTRACT LAW

Third party rights relate to the doctrine of privity of contract. It is this very doctrine that prevents third parties from obtaining any rights under a contract. In terms of consumers as the third

parties, their rights in relation to claims against manufacturers are hampered by the doctrine of privity since there is no direct contractual relationship between them. It is this lacuna in the law of contract that the CR compliance of companies has been seen as lacking and in need of review.

The Law Commission of United Kingdom (1991) states that the doctrine of privity refers to the principle, in which:

...as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. There are several different aspects of the doctrine: (i) a person cannot enforce rights under a contract to which he is not a party; (ii) a person who is not a party to the contract cannot have contractual liabilities imposed on him; (iii) contractual remedies are designed to compensate parties to the contract, not third parties.

Viscount Haldane explained the importance of this particular principle in *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge* [1915] AC 847:

...in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of property, as, for example under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.

PN Leigh-Jones (1969) further explained the difference between 'vertical privity' and 'horizontal privity' in the context of trade:

...the manufactured product descends down the chain of distribution from the maker through various middlemen (wholesalers, distributors, etc) to the retailer who sells to the public;

'vertical privity' is the privity which each of these persons has with his predecessor and successor in the chain. 'Horizontal privity' is the ensuing privity of contract between the retailer and the first domestic consumer who buys from him, and then between that consumer and any sub-consumer, if such there be.

Clearly, it can be seen here that the doctrine of privity negates recognition of third party rights in contract under common law.

It is very unfortunate that the Contracts Act 1950 does not provide for either one of these principles. Conforming to common law tradition, reference is made to cases. In Malaysia, the landmark case on privity is *Kepong Prospecting Ltd. v Schmidt* [1968] AC 810. In this case, Thomson L.P. indicated the doctrine of privity applied in Malaysia was similar to that approved in *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge* [1915] AC 847. Quoting Viscount Simonds in *Scruttons Ltd. v Midlands Silicones Ltd.* [1926] AC 446, the court also agreed that any changes in the law should be left to the Legislature. In considering the application of doctrine of privity at the Privy Council, several stipulations under the Contracts Act 1950 were referred. One important section is section 2(d). This particular provision shows the possibility of a third party being given the task of providing or furnishing consideration in a contract. This is indeed ironic considering the true application of the doctrine of privity would negate such occurrence. The Privy Council held that only parties to the contract could initiate proceedings or be sued under a contract. Lord Wilberforce when delivering judgement on behalf of the Board said:

...Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contract differs in so important a respect from English law. It is true that section 2(d) of the Contracts

(Malay States) Ordinance gives a wider definition of “consideration” than that which applies in England, particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to the enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary, paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement which only the parties to it can sue.

Koh (1968) respectfully criticises the decision by the Privy Council. It was argued that sections 2(a), (b), (c) and (e) only provided definitions to offer/promise, acceptance, promisor, promisee and agreement. The relevant section that should have been referred to was section 2(i), which reads: “an agreement which is enforceable by law at the option of one or more of the parties thereto, *but not at the option of the other or others*, is a voidable contract.” Another scholar who was of the same opinion was Furmston (1999) who points out that the decision of *Kepong* gives the impression that the doctrine of privity exists separately from the rule of consideration that a consideration must move from the promisee. It can also be noted here that there is a lack of paternalism and formalism by the courts. Perhaps more importantly, the courts in the subsequent cases on privity, such as *Fima Palmbulk Services Sdn. Bhd. v Suruhanjaya Pelabuhan Pulau Pinang* [1988] 1 MLJ 269, *Overseas Chinese Banking Corporation Ltd. v Woo Hing Brothers (M) Sdn. Bhd.* [1992] 2 MLJ 86 and *Sulisen Sdn. Bhd. v Kerajaan Malaysia* [2006] MLJU 341 have failed to recognise the criticisms by the two writers. The courts in these cases have embraced the application of the doctrine of privity without giving any elaboration on privity. Thus, it can clearly be seen here that the doctrine of privity prevails in Malaysia, and this is similar to the position in the United Kingdom pre-1999. In fact, the applied

principle is derived from the unforgettable case of *Tweddle v Atkinson* (1861) 1 B&S 393 that was later applied in *Dunlop Pneumatic Tyre* and *Midland Silicones*. Apparently, there is a lacuna in Malaysian law with regard to third party rights or *jus quaesitum tertio* in contract.

It was indeed fortunate that some breakthrough in this matter was achieved with the coming into force of the Consumer Protection Act 1999 in Malaysia, especially for contracts involving consumers. The issue of third party rights appears more dominantly in consumer contracts as it prevents suits against retailer and manufacturer. Sakina (2000) notes that in instances involving horizontal privity, such as that in *Donoghue v Stevenson* [1932] AC 562, *Preist v Last* [1903] 2 KB 148 and *Frost v Aylesbury Dairy* [1905] 1 KB 609, only contractual parties can claim any benefit from the contract. Other consumers, for example a guest or spouse who are not the contracting party, do not have any contractual remedy even in instances in which they suffer personal injury due to the defective products. Section 3 of the Consumer Protection Act 1999 defines ‘consumer’ as *inter alia*, i.e. “a person who acquires or uses goods or services for personal, domestic or household purpose, use or consumption”. The same section also defines ‘manufacturer’ to include, “in cases where goods are manufactured outside Malaysia and the foreign manufacturer of the goods does not have an ordinary place of business in Malaysia, a person who imports or distributes those goods”. Upon reading these definitions with the provisions stipulated in Part V on guarantees in respect of supply of goods, it appears that a sub-consumer or a consumer who is not a buyer can bring a claim against a supplier even if there are no contractual relations between them. With regard to consideration as an element in establishing rights under a contract, it is asserted here that the consumer is a beneficiary of the product and provides the necessary consideration upon purchasing the goods. Thus, within the chain of distribution, the consumer has provided the necessary consideration to the manufacturer when the purchase price travels indirectly to them (Suzanna *et al.*, 2008). In

terms of vertical privity, section 50 of the Act provides for consumers' rights of redress against manufacturers and section 38 on manufacturer's express guarantee, including warranty card. Nevertheless, it is most unfortunate that section 2(4) of the Act states that the application of the Act is supplemental in nature and without prejudice to any other law regulating contractual relation. Sakina (2000) opines that section 2(4) arouses the question whether the deposition of doctrine of privity in the application of implied guarantees in supplying of goods under the 1999 Act is in itself impliedly contrary to Contracts Act 1950 in light of the Privy Council's decision in *Kepong* where the court brought in the application of doctrine of privity into Malaysian contract law. In light of this observation by Sakina (2000), Malaysian legislators should give due regard to the matter. Thus, it would be a good place to begin formulating a more coherent and concrete law on the third party rights.

For Malaysia, it is argued here that perhaps the better solution would be to enact a statutory mechanism as this ensures clarity and the ability to tackle the matter head-on. In addition, it is also asserted here that two principles should be the underlying tones of the Malaysian statutory solution, which is similar to the approach taken by the Law Commission of United Kingdom (Adams *et al.*, 1997) when proposing the *Contracts (Rights of Third Parties) Act 1999*. The first principle is respect for the intention of parties to the contract and the second is respect for the reasonable expectation of the third party as regards the possible benefit. The Commission observed that it is an axiom in the law of contract that intentions of the contracting parties are of utmost importance. Therefore, in cases where they have provided for such intention to confer enforceable benefit upon a third party, such stipulation must be respected and given effect. In general, the proposed Act for Malaysia would confer rights and impose a limited liability upon a third party. Such proposal, however, does not in any way acknowledge a third party as a party to the contract, nor does it enable the third party to enforce the whole contract; only to the extend of terms conferring benefit and imposes

liability on the third party. It is hoped that this approach will reconcile the current provision under section 2(d) of the Contracts Act 1950 which provides that a third party may furnish a consideration to a contract. This section is a unique feature of the Malaysian contract law that needs to be addressed to ensure a coherent contractual regime. Naturally this will relegate the decision of *Kepong*. The Act should also provide that any other devices that are currently utilised to circumvent the strictness of privity can still be applied by the courts, such as trust, tort, indemnity or any other statutory devices. In conclusion, the current contractual regime in Malaysia still lacks a more cohesive method in addressing third party rights under contract. It is contended that a detailed statutory mechanism would be the best solution as it is more definite and lucid, thus providing better assistance to the third party in enforcing benefits conferred.

CONCLUSION

CR is a concept whereby corporations not only consider their profitability and growth, but also the interests of the society and the environment by taking responsibility for the impact of their activities on stakeholders, employees, shareholders, customers and many more interested groups. Law has been seen as a route to ensuring CR among the corporations. In the realm of consumer contracts, however, the law has not developed in a manner warranted to protect consumers against abuses by traders. In the area of exclusion of contractual liabilities of traders, standard form contracts and rights of third parties, the law of contract is not the champion of consumer rights. As such, in these areas of contract law, there is a need for a legal control of the conduct of corporations in their dealings with consumers. Nevertheless, it is not justifiable to change certain principles simply to tackle the needs of a group of people, i.e. the consumers. Therefore, the focus of amendment should be on the Consumer Protection Act 1999 being the main consumer statute in this respect. The prime object of any legal protection regime is to protect the weak from the strong.

Therefore, the law intervenes to particularly confer protection on the weak in order to provide some balance. Law, by its very nature, provides for CR among corporations. In conferring protection, a society is, by law, setting standards on how corporations should behave in upholding the tranquillity of the society. The same applies to the legal protection for the consumers through contract law. This kind of legal protection does not work in a vacuum. It must relate to the reality of the market in which it operates. In light of the current development in the market place and the importance of CR, the protection of modern consumer should focus on ensuring fair and balanced consumer legislation which protects both consumers and ethical businesses from exploitation of unscrupulous persons.

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