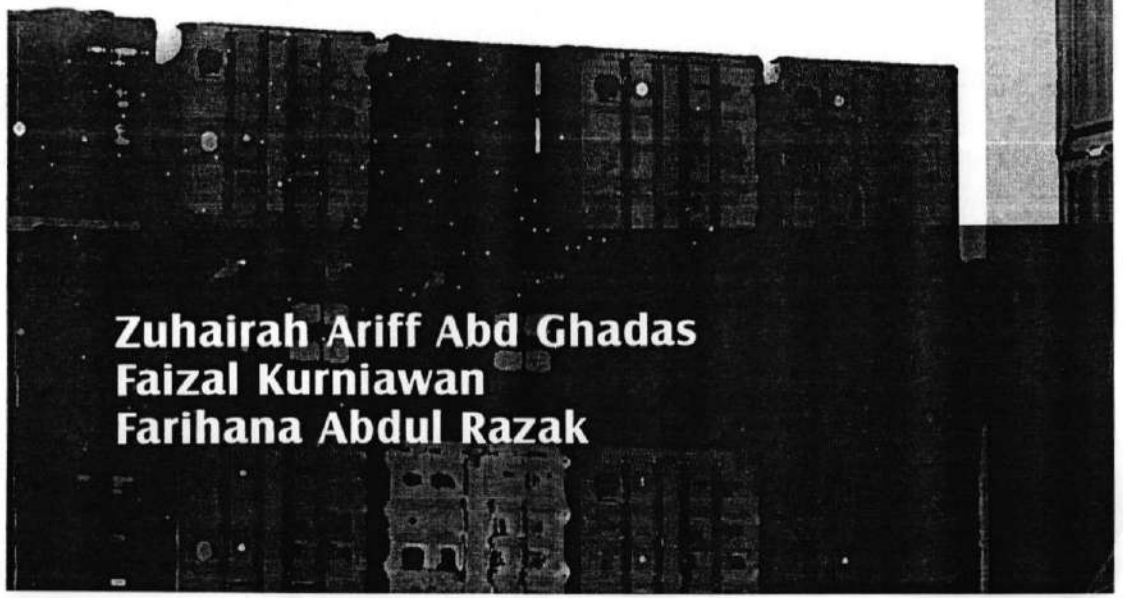
INTRODUCTION
TO COMMERCIAL LAW

in Comparative Perspective Indonesia and Malaysia



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PREFACE

Introduction to Commercial Laws in Indonesia and Malaysia offers an overview of relevant topics in commercial laws from a comparative perspective, to facilitate understanding of commercial laws in Indonesia and Malaysia. Both Indonesia and Malaysia legal systems have their own specific and detailed principles and rules on commercial laws, but the trans-nationalization of trade and legal practice means that businessmen and legal practitioners may need to apply a comparative approach.

Indonesia and Malaysia were once subjected to long periods of colonial rule and occupation of the British and Dutch, respectively. It was during these period that the English and Dutch laws were gradually introduced into Malaysia and Indonesia, respectively. In Indonesia, the private civil law is contained in the Kitab Undang-Undang Hukum Perdata (KUHPer) which is based on the Dutch Civil Code, *Burgelijk Wetboek* (BW). The principles of the law relating to agreements and contracts are contained in Book III of the *Burgellijk Wetboek* are applicable only to non-indigenous Indonesian while Hukum Perdata Adat (Adat Civil Law) applies to indigenous Indonesian. Much of the BW has been removed and re-enacted with modifications and amendments to satisfy local relevance. In Malaysia, English commercial laws found its way into the Malaysian legal system by way of gradual reception. Prior to 1948, Malaysia consisted of three separate political regions administered either directly by the British or indirectly through advisers. These were the straits settlements of Penang and Melaka, the Federated Malay States of Perak, Selangor, Pahang and Negeri Sembilan and the Unfederated Malay States of Johore, Kelantan, Kedah, Terengganu and Perlis. In 1963, Malaysia, was

formed incorporating within the former Malayan federation and the former crown colonies of Sabah and Sarawak, and Singapore. The English commercial laws application in Malaysia reflected the dualism in its extended form as it is still applicable in Sabah and Sarawak.

The principal objective of this book is to provide an overview of the important principles of commercial law in Indonesia and Malaysia. This book would be a reference for students and practitioners in Commercial laws and Comparative laws. Chapters in this book deal with specific topics and focuses on the comparison of laws in Indonesia and Malaysia. Chapter 1 covers introduction to legal system, which includes classification of law, sources of law, hierarchy of courts, doctrine of separation of powers and procedures for enactment of statutes. Chapter 2 discusses elements of contract, discharge and remedies under contracts law, whilst Chapter 3 prescribes important principles of bills of exchange with special reference to cheque. Chapter 4 highlights important elements for validity of transaction under Islamic law and Chapter 5 discusses principles of hire purchase contracts. Chapter 6 prescribes principles of sales of goods and Chapter 7 highlights important principles in employment laws. Chapter 8, highlight important principles in agency.

TABLE OF CONTENTS

TABLE OF FIGURES

CHAPTER 1

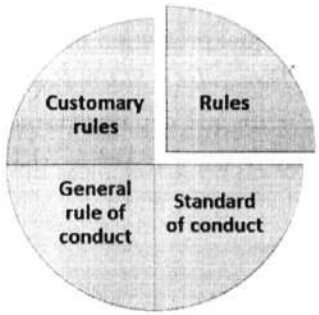
THE LEGAL SYSTEM IN MALAYSIA

Introduction

The law is important for society because it serves as a norm of conduct and it was also designed to lay down proper guidelines and order on behaviour for society as well as the Government of Malaysia. The law is important to govern the matters of society. Therefore, 'Law' can be defined as:

1. set of rules;
2. set of standards of conduct between individuals;
3. set of standards of conduct between individuals and the government and which are enforceable through sanction;
4. a general rule of conduct;
5. the body of enacted or customary rules recognized by a community as binding (Oxford English Dictionary);
6. article 160 of the Federal Constitution provides that:

> *"Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the force Federation of any part thereof."*



Classification of Law

In Malaysia, the law is classified into two categories: national law and international law. The figure below illustrates how Malaysian law classifies.

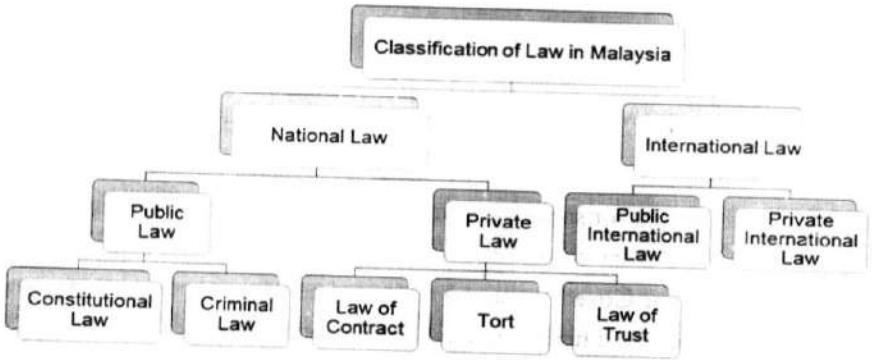


Figure 1.1 Classification of Law in Malaysia

Public and Private Law

National law is the law that governs a state. It is divided into two categories: public law and private law. The law that governs the relationship between individuals and the State is referred to as public law. Public law is divided into two categories: constitutional law and criminal law.

1. Constitutional Law

Constitutional law governs individual rights in the State and addresses issues including the supremacy of Parliament and citizen rights. For example, Article 8(1) of the Federal Constitution stipulates that all person is equal before the law and entitled equal protection of the law.

In the case of *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*[1], the issue was whether the terms and conditions under a collective agreement which required stewardess in Malaysian Airline, the national carrier, to resign on becoming pregnant. Applying a literal approach, the Federal Court ruled that the Constitution only dealt with infringements of rights committed by the Legislature or Executive. The court also held that a collective agreement which was between an employer and a trade union of workmen- was not "law" within the scope of Article 8. The court held that the judge's hands are tied and that Article 8 of the Federal Constitution "recognized that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment."

Furthermore, in the case of *Norfadilla Ahmad Saikin v. Chayed Basirun & Ors (NO 2)*[2], the plaintiff attended an interview conducted by the Kementerian Pelajaran (defendants) for the position of *Guru Sandaran Tak Terlatih ('GSTT')* whereupon she was required to collect a placement notice and attend a briefing. During the briefing, the defendants discovered the plaintiff was pregnant, a fact which was not divulged earlier in the interview and decided to retract her placement notice. Requests made by the plaintiff for reinstatement proved futile and this prompted her to commence an action for a declaration that the retraction of the GSTT position by the defendants was unlawful and an infringement of the plaintiff's constitutional rights entrenched in Article 8(2) of the Federal Constitution; compensation; and damages. In this case, the court finds valuable guidance from the Federal Court decision in the case of *Beatrice Fernandez v. Sistem Penerbangan Malaysia & Anor*[3] which is an eminent authority in the local chapter with regards to cases of discrimination against women for pregnancy. It was held that Article 8(2) of the Federal Constitution can only apply in cases where discrimination occurs between the nation's executives, or its agencies and not discrimination between a private individual against another private individual.

2. Criminal Law

Criminal law codifies the *various offences committed by individuals* as against the state. There are elements to be proven such as *actus reus*[4] and

[1] [2005] 4 AMR 1 & [2005] 2 CLJ 713.

[2] [2016] 3 CLJ 119.

[3] [2005] 2 CLJ 713; [2005] 3 MLJ 681.

[4] Means a conduct of a person or parties.

mens rea[5]. In the case of *Public Prosecutor v. Syarafi Abu*[6], the accused was charged with murder, an offence under section 302 of the Penal Code. His victim ('the deceased') was found slumped against a black Proton Perdana car in the middle of a highway. The prosecution's case revealed that the deceased told her university roommate that she was going to meet the accused. Her roommate then accompanied the deceased and waited at the gate. The accused came in the said car and her roommate saw the deceased going inside the car and going off towards the highway. While on his way to work, an eyewitness ('SP5') came across the said car parked on the emergency lane of the highway. SP5 saw the accused dragging the deceased, who was screaming and flailing her hands, out from the car by pulling her hair from behind. He continued to observe through his side mirror while on the move but decided to stop and returned back to the scene. SP5 saw the accused going over the guard rail and going down the slope adjoining the highway. The deceased was bleeding and lying on the road next to the car but still breathing. About forty minutes later, the accused came back, stepped over the deceased and took a mobile phone in the car. In this case, the cumulative effect of all the evidence leads to an irresistible conclusion that it was Syarafi, the accused who had stabbed Syuhada, causing her to suffer an injury which was sufficient in the ordinary course of nature to cause death under section 300(c) Penal Code. Therefore, Court held that Syarafi guilty of the murder of Syuhada under section 302 Penal Code and sentenced him to death by hanging.

3. Private Law

Private law is deals with matters that affect the rights and duties of individuals amongst themselves. Private or civil law is intended to give compensation to persons injured, to enable the property to be recovered from wrongdoers, and to enforce obligations. It includes the law of contract, tort, and the law of trust.

[5] Means the intention of a person or parties.

[6] [2018] 4 CLJ 110.

a. Contract Law

The contract law deals with the rights and obligation arose from an agreement between parties. It determines when a promise or a set of promises is legally enforceable. In the case of *Wrigglesworth v. Wilson Anthony*[7], the court remarked that English cases on restraint of trade were inapplicable because the Contract (Malay States) Ordinance 1950 was not based on the English law of contract. The court proceeded to decide the case solely on the interpretation of section 28 of the Contracts (Malay States) Ordinance 1950. The essential elements in a contract are as follows:

a. There must be an offer by the offeror.
b. Acceptance of that offer by the offeree.
c. Both parties making the contract must have the capacity (attained the age of majority and sound mind).
d. There should be free consent of the parties entering into the contract.
e. The object of the contract must be lawful.
f. Both parties must intend to enter into legal relations.
g. The contract must have a consideration (something in return).
h. The contract must be legal.
i. If the contract requires formalities, comply with the requirement (subject to the types of a contract).

b. Law of Trust

The law of trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property) for the benefit of persons (who are called beneficiaries) of whom he may himself be one and anyone of the beneficiaries may enforce the obligation. In the case of *Goh Koon Suan*

[7] [1964] MLJ 269.

v. Heng Gek Kiau[8], the court applied *dicta* in *Chua Cheow Tien v. Chua Geok Eng*[9], the settled law is that if A buys property in the name of B, who is no relative, B is held to be a trustee of that property for A but if B is the child or a wife of A no such trust is presumed and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father.

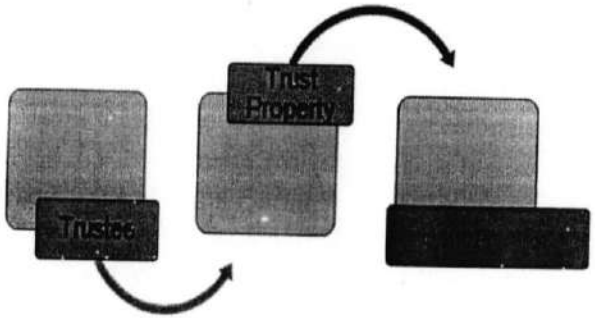


Figure 1.2 Law of trust

c. Law of Tort

Law of tort is primarily concerned with providing a remedy to persons who have been harmed by the conduct of others. A tort can be considered as an unlawful act or omission that is not permitted by law. The scope of tort is wide where includes trespass to person, trespass to land, and interference with goods, negligence, defamation, nuisance and strict liability. The elements of a tort are as follows:

a. wrongdoing or omission must have occurred; and
b. that the wrongful or unauthorised conduct or omission has affected others' interests or rights; and
c. the injured party or victim is entitled to compensation.

[8] [1999] 8 CLJ 218 at 229.

[9] [1968] 2 MLJ 180.

In the case of *Foo Fio Na v. Dr. Soo Fook Mun & Anor*[10], the appellant became totally paralysed after undergoing surgery for neck injuries (dislocated vertebrae) at the second respondent hospital. The appellant alleged that the paralysis was caused by the treatment procedure adopted by the first respondent, an orthopaedic surgeon at the hospital, and in the circumstances sued the respondents for medical negligence. High Court held that the respondents was liable however, the Court of Appeal reversed the High Court decision. The judges view that the *Rogers v Whitaker* test would be more appropriate and a viable test of this millennium than the Bolam test. The appeal was allowed and the orders of the High Court on quantum are to be restored.

In the case of *Letang v. Cooper*[11], the Court decided that in order to be charged with trespassing, the defendant must have intended to do so at the time of his act. The cause of action would be negligence rather than trespass if the defendant was careless in his actions. Thus, proving that the defendant acted intentionally is an essential element of establishing trespass.

In the case of *Basely v. Clarkson*[12], the defendant accidently mowed the plaintiff's grass whilst he was mowing his own grass. The court held the defendant liable as the act of mowing the grass was a voluntary act, and therefore done with intention. An act done under a mistake is not necessarily an involuntarily act. The mistake of fact was held to be no ground for non-liability.

International Law

International law includes both the private and public international law. It can be created in two main ways i.e. by treaty (a binding formal agreement, contract, or other written instrument that establishes obligations between two or more subjects of international law) and by custom. International law is a

[10] [2007] 1 MLJ 593.

[11] [1964] 2 All ER 929.

[12] [1682] 3 Lev 37.

body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and consequently commonly do observe, in their relations with each other.

1. Public International Law

Public International Law is the law that prevails between states e.g. border, territorial water. Public International Law also concerned with international organizations e.g. United Nations and its associated bodies. The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945.

In the case of *Tadic v. Prosecutor*[13], Tadic (Defendant) was prosecuted in Court for committing war crimes at a Serb-run concentration camp in Bosnia-Herzegovina. The jurisdiction of the tribunal was however challenged by the defendant on the ground that it exceeded the authority of the U.N. Security Council. The issue arose whether plea against the International Tribunal jurisdiction be examined by the International Tribunal based on the invalidity of its establishment by the Security Council? It was held that Plea against the International Tribunal jurisdiction can be examined by the International Tribunal based on the invalidity of its establishment by the Security Council. The criteria for establishing an International Tribunal includes the establishment in accordance with the proper international standards, the provision of guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognized human rights instruments. Hence, a tribunal like the one created in this case must be endowed with primacy over national courts.

2. Private International Law

Private International law is concerned with the application of various national laws in a particular case involving two or more countries e.g. the law applicable to a marriage between two different nationals in a third country.

[13] Appeals Chamber, Case No. IT-94-1-ar72, 35 I.L.M. 32 (1996).

Private International law consists of the rules that guide a judge when the laws of more than one country affect a case (conflict of interest).

In the case of *Jupiters Limited (Trading as Conrad International Treasury Casino) v. Lim Kin Tong*[14], the defendant in this case had opened a Cheque Cashing Facility in a casino in Queensland, Australia. He had issued two cheques which totalled approximately two million Malaysian Ringgit. He went on to incur losses and when the casino later presented the cheques, they discovered that the defendant had counter-manded them. He later made part-payment of his debt but there remained an outstanding balance. It is this outstanding sum that was being claimed. In this case, the plaintiff's claim against the defendant is dismissed with no order as to costs. Adopting the same reasoning given by Justice Ian Chin in the case of *The Ritz Hotel Casino Limited & Anor v. Dato' Seri Osu Haji Sukam (supra)*, "the Defendant is not deserving of costs as he had engaged in activity that his religion frowns upon and which it would be against public policy to assist him by way of awarding him costs."

Sources of Law

The word sources have several meanings which may include historical sources[15], legal source[16] and place where the law can be found.[17]

The main sources of Malaysian law are:

1. written law;
2. unwritten law; and
3. Islamic law.

[14] [2005] M.L.J. 534.

[15] It can be a religious beliefs, local customs and opinion of jurists.

[16] the legal rules that make up the law.

[17] Statutes, law reports, precious decisions of the court and text books.

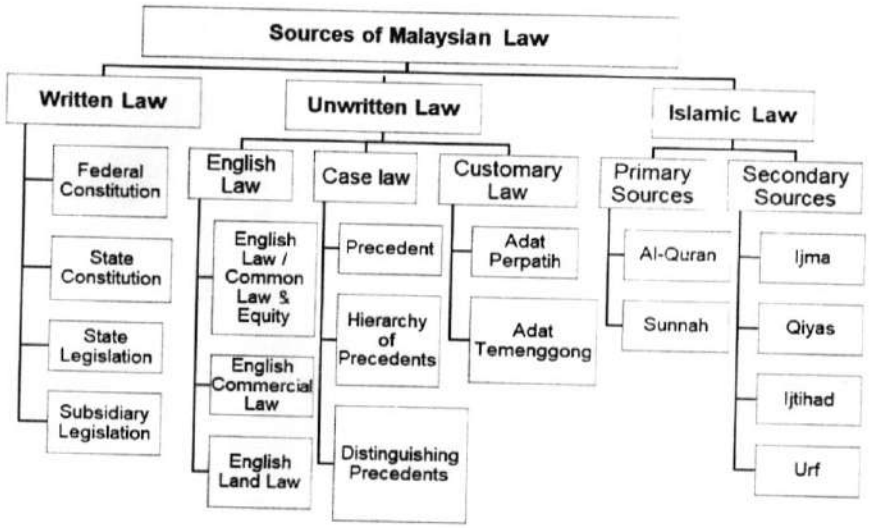


Figure 1.3 Sources of Malaysian Law

Written Law

Written law is known as law used in a written document and passed by a person or body with the authority to do so. Written law in Malaysia may be found in the following:

1. The Federal Constitution

In Malaysia, the supreme law is the Federal Constitution. Besides laying down the powers of the federal and state governments, the Federal Constitution enshrines the basic or fundamental rights of the individual.

Article 4(1) of the Federal Constitution provides:

"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Article 162(6) of the Federal Constitution states:

"Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."

However, the Federal Constitution bestows power to the states to administer Islamic law.

The table below shows the provisions of Malaysia's Federal Constitution concerning individual's fundamental rights.

Table 1.1 Fundamental rights in Malaysia

Article 5	Personal liberty
Article 6	Abolition of slavery and forced labour
Article 7(1)	Prohibition of retrospective criminal laws
Article 7(2)	Protection against double jeopardy
Article 8	Equality and non-discrimination
Article 9	Protection against banishment and freedom of movement
Article 10(1)(a)	Freedom of speech
Article 10(1)(b)	Freedom of assembly
Article 10(1)(c)	Freedom of association
Article 11	Freedom of religion
Article 12	Right in respect of education
Article 13	Right to property
Article 14 to Article 28	Right to citizenship
Article 119	Right to vote in elections

2. State Constitution

Each State in Malaysia possesses its own constitution regulating the government of that state. It contains provisions which are enumerated in the 8th schedule of the Federal Constitution.

The State Constitutions deal largely with land matters, agriculture, forestry, local government and Islamic law.

Article 71(4) of the Federal Constitution states:

"If at any time the Constitution of any State does not contain the provisions set out in Part I of the Eighth Schedule, with or without the modifications allowed under Clause (5) (hereinafter referred to as "the essential provisions") or provisions substantially to the same effect, or contains provisions inconsistent with the essential provisions, Parliament may, notwithstanding anything in this Constitution, by law make provision for giving effect in that State to the essential provisions or for removing the inconsistent provisions."

3. State Legislation

State legislation enacted by the Parliament at the federal level and by the various State Legislative Assemblies at the state level. It is increasingly used as a means of repealing, amending, enacting, or codifying the law. State Legislatures have the power to structure enactments on the subject as set out below.

Table 1.2 State and Concurrent list

No	State List	Concurrent List
1	Islamic law and personal and family law of persons professing the religion of Islam.	Social welfare, social services, protection of women, children and young persons.
2	Land	Scholarships
3	Agriculture and forestry	Protection of wild animals and wild birds; National Parks.
4	Local government	Animal husbandry, prevention of cruelty to animals; veterinary services; animal quarantine.
5	Local Services	Town and country planning except in the federal capital.
6	State infrastructure works and water management	Vagrancy and itinerant hawkers
7	Machinery of State Government	Public health, sanitation and prevention of diseases
8	State holidays	Drainage and irrigation
9	Offences against state law	Rehabilitation of mining land and land which has suffered soil erosion.
10	Inquiries for state purposes	
11	Indemnity	Fire safety measures and fire precautions in the construction and maintenance of buildings
12	Turtles and riverine fishing	

*** List IIA - Supplement to State List for State of Sabah and Sarawak

13. Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate or intestate; registration of adoptions under native law or custom; the determination of matters of native law or custom; the constitution, organization and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law.
14. Incorporation of authorities and other bodies set up by State law, if incorporated directly by State law, and regulation and winding up of corporations so created.
15. Ports and harbours, other than those declared to be federal by or under federal law; regulation of traffic by water in ports and harbours or on rivers wholly within the State, except traffic in federal ports or harbours; foreshores.
16. Cadastral land surveys.
17. Libraries, museums, ancient and historical monuments and records and archaeological sites and remains, other than those declared to be federal by or under federal law.
18. In Sabah, the Sabah Railway.

*** List IIIA - Supplement to Concurrent List for State of Sabah and Sarawak

10. Personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate and intestate.
11. Adulteration of foodstuffs and other goods.
12. Shipping under fifteen registered tons, including the carriage of passengers and goods by such shipping, maritime and estuarine fishing and fisheries.
13. The production, distribution and supply of water power and of electricity generated by water power.
14. Agricultural and forestry research, control of agricultural pests, and protection against such pests, prevention of plant diseases.

15. Charities and charitable trusts and institutions in the State (that is to say, operating wholly within, or created and operating in, the State) and their trustees, including the incorporation thereof and the regulation and winding-up of incorporated charities and charitable institutions in the State.
16. Theatres; cinemas; cinematograph films; places of public amusements.
17. Elections to the State Assembly held during the period of indirect elections.
18. In Sabah until the end of the year 1970 (but not in Sarawak), medicine and health, including the matters specified in items 14 (a) to (d) of the Federal List.

4. Subsidiary Legislation

Subsidiary legislation exists because laws made by Parliament are too general for the public to understand and it can be defined as any proclamation, rules, regulations, orders, notification, by-law or other instrument made under any Ordinance, Enactment or other lawful authority and having legislative effect.

Subsidiary Legislation made in contravention of either a Parent Act or the constitution is void. However, subsidiary legislation is flexible[18] and without the need for parliamentary procedures, subsidiary legislation can be enacted fast to handle a crisis. Method of controls over subsidiary legislation are judicial control[19], consultation[20], publication[21] and legislative control – laying procedure[22].

In the case of *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional*[23], the appellant obtained her LLB degree with the University of London after pursuing a course at a local college. She claimed that the exemption from repayment which was earlier offered to students who obtained

[18] Its flexibility in circumstances which demand flexibility e.g. currency control, import duties etc.

[19] Judicial review gives the courts authority over subsidiary legislation.

[20] There is no general statutory provision requiring earlier consultation in the formation of subsidiary legislation.

[21] In Malaysia, there is no general statutory requirement for the publishing of subsidiary laws.

[22] A parent Act or enabling statute made provision to confer the rights of making law to be vested on the executive, and then subsidiary legislation is made.

[23] [2015] 3 MLRA 73.

a first-class honours degree, amongst whom the appellant was one, was affected through a 2003 Circular issued by the respondent, and that the respondent subsequently issued a 2005 Circular depriving her of the benefit of the full exemption in the earlier 2003 Circular. Malaysia's court had a constitutional duty to strike a parliament act if it breached the constitutional framework and, more importantly the constitutional guarantees offered in the Federal Constitution. In this case, Teh Guat Hong won her appeal in challenging the decision on the ground of discrimination to student.

Unwritten Law

Unwritten law refers to the law that is not being legislated and not contained in the Federal and State Constitutions. The following is the unwritten law.

1. English Law

English law, common law, and equity; English commercial law; and English land law are the three types of English law.

a. English Law, Common Law and Equity

Section 3(1) of the Civil Law Act 1956 (Revised 1972) provides that, in Peninsular Malaysia, the court shall apply the common law of England and the rules of equity as administered in England on 7 April 1956. In Sabah and Sarawak, the courts shall apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951 and 12 December 1949 respectively.

The application of the law of England throughout Malaysia is subject to two limitations.

a) It is applied only in the absence of local statutes on the particular subjects. Local law takes precedence over English Law as the latter is only meant to fill in the *lacuna* in the legal system in Malaysia.

b) Only that part of the English law that is suited to local circumstances will be applied.

In the case of *Karpal Singh & Anor v. Public Prosecutor*[24], the Supreme Court held to the effect that English Law cannot be applied in criminal procedure, which in Malaysia, is governed by the Criminal Procedure Code.

b. English Commercial Law

In the absence of local law, section 5(1) of the Civil Law Act 1956 applies principles of English Commercial Law into Peninsular Malaysia (excluding the states of Penang and Malacca). Section 5 is applicable only if a particular question or issue with respect to those matters enumerated in it have arisen. In *Kon Thean Soong v. Tan Eng Nam*[25], the court held that English partnership law was not applicable in Malaysia since a local statute, the Contracts (Malay States) Ordinance, was in effect.

c. English Land Law

Land law applicable in Malaysia is essentially the Torrens system of South Australia as enacted in the National Land Code and the Sarawak Land Code (Cap 8). Section 6 of the Civil Law Act 1956 provide:

> *"Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprising therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any estate, right or interest therein."*

In the case of *Wan Naimah v. Wan Mohamad Nawawai*[26], the land had been sold to the parties' father, but the land was transferred to the brother-in-law of the purchaser. Subsequently the whole land was transferred to the appellant, the daughter. The respondent, the son of the purchaser, was then still an infant. There was evidence to show that the father intended to create a

[24] [1961] 2 MLJ 544.

[25] [1982] 1 MLJ 323.

[26] [1972] 1 MLRA 47.

trust of an undivided half share in the land in favour of his son, the respondent. The learned trial judge found that the appellant held the half-share in the land in trust for the respondent. The appellant appealed. In dismissing the appeal, the Federal Court held that on the facts the learned trial judge was right in holding that the half-share in the land was held by the appellant, the registered proprietress, in trust for the respondent. Court held that the English Statute of Frauds did not apply to Malaysia. Suffian CJ meant was that since a trust in respect of land may be created in Kelantan also on parole evidence, therefore the English Statute of Frauds which required some memorandum or note in writing was inapplicable.

2. Case law/Judicial Decision

There are three types of case law or judicial decisions: precedent, hierarchy of precedents, and distinguishing precedents.

a. Precedent

Decision of the High Court, Court of Appeal, the Federal Court, the Supreme Court and the Judicial Committee of the Privy Council were made and still are being made is called the *'doctrine of binding precedent.'* Case law or precedent may comprise *res judicata*[27], *ratio decidendi*[28] and *obiter dictum*[29].

b. Hierarchy of Precedents

The general rule regulating the hierarchy of precedents is based on the principle that decisions of higher courts bind lower courts and

[27] Applies only to the immediate parties to the case. The doctrine is the final order of the court binding the immediate parties to the decision. It means that the decision and final order of the court binds the parties to the proceedings.

[28] The reason for the decision. in a case, in addition to the res judicata the legal reasoning upon which the decision in that case was based may be used by judges in future cases when confronted with similar facts.

[29] Saying by the way - Anything else said about the law while a judgment that does not form part of the matters at issue.

some courts are bound by their own decisions. The present system of court in Malaysia is illustrated as Figure 1.4 and Figure 1.5.

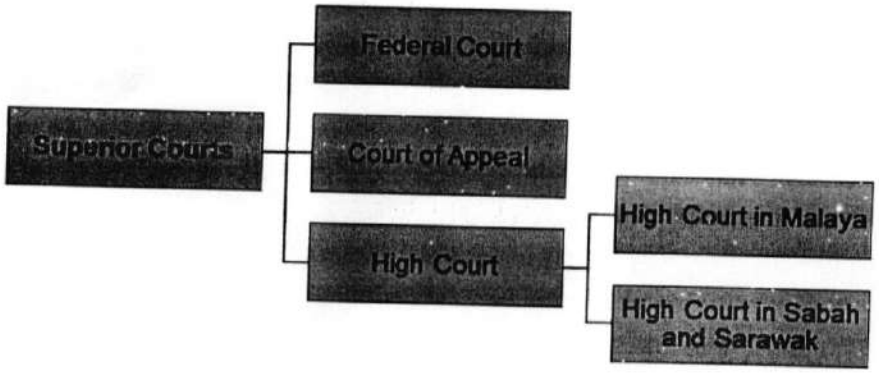


Figure 1.4 Superior Courts

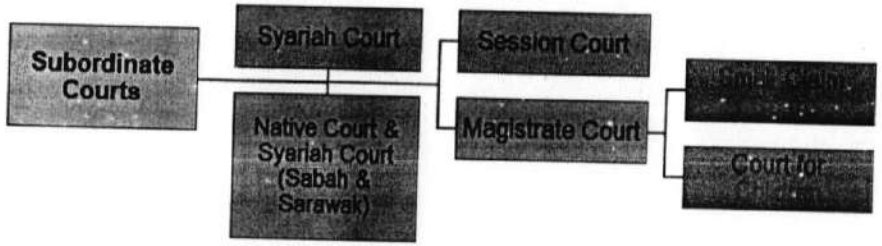


Figure 1.5 Subordinate Courts

c. *Distinguishing Precedents*

A judge may not wish to apply precedents in the following circumstances.

a) Judges may ignore or overrule a precedent laid down by a lower court, where the case is on appeal.

b) They may refuse to apply the earlier precedent if it is arrived at *per incuriam* (i.e. made in ignorance of a statute or a binding precedent.)

c) They may distinguish the case when they find there are material differences in facts between the case before them and the case laying down the precedent.

3. Customs

Customs related to family law are given legal force by the courts in Malaysia. In Sabah and Sarawak, native customary laws apply in land dealings over native customary lands and family matters where natives subject themselves to native customary laws. In Peninsular Malaysia there are two main varieties of Malay customary law which are *Adat Perpatih* and *Adat Temenggong.*

a. Adat Perpatih

Adat Perpatih is well noted for its matrilineal system. This *adat* is prevalent among Malays in Negeri Sembilan and Naning in Malacca and is effective in matters such as land tenure, lineage and the election of *lembaga, undang* and the *Yang di-Pertua Besar.* Generally, the customary land is inherited by women solely under *Adat Perpatih.* Man, in most cases, lived on his wife's land, cultivated the property, and was entitled to his share of the profits. The owner of ancestral land would ratify 'customary law' on the title of ancestral land, which would limit the transferability of ancestral property and ensure that every clan member gets land.

In *Munah v. Isam*[30] the court ordered the return of *tanah pesaka*, which had been transferred to a person outside the clan in exchange for a monetary payment. Unfortunately, the males do not have the legal right or ownership to the properties. In other words, only female tribal members can own customary land.

b. Adat Temenggong

Adat Temenggong is originated form Palembang, Sumatra expends a patrilineal system of law. The others state in Peninsular Malaysia

[30] (1936) MLJ 42.

(other than Negeri Sembilan and Naning in Malacca) practice the *Adat Temenggong. Adat Temenggong* is generally a combination of the customs of the Malay communities and Islamic law. It also involves the administrative system, inheritance and division of property, criminal law and family matters.

In the case of *Laton v. Rahmah*[31], the Chief Kadhi of Selangor gave evidence in the Supreme Court stated that when a husband and wife acquire property and one of them dies, the property is divided equally between the survivors and heirs of the dead.

Islamic Law

Islam is not merely a religion. It embraces the whole life, encompassing a legal, social and moral order. Islamic law as practised in Malaysia has undergone a gradual evolution over several hundred years and it has taken a common law system.

Islamic law as a personal law does not apply to non-Muslims. It is applicable only to those professing the religion regardless of race despite the status of Islam as a religion of the Federation.

There are two primary sources of Islamic law which are the Quran, and the Hadiths[32]. Meanwhile, the secondary sources under Islamic law are consist of Ijma[33], Qiyas[34], Ijtihad[35] and Urf[36]. Thus, Islamic law can be written and unwritten. The establishment of a hierarchy of *Syariah* Court further reinforces this legacy and ensured that precedent will become increasingly important.

[31] [1927] 6 FMSLR 128.

[32] Opinions and life example of Prophet Muhammad SAW.

[33] Usually the consensus of Prophet Muhammad's companions.

[34] Analogy derived from the primary sources.

[35] The independent reasoning by a qualified jurist leading to new legal rules.

[36] Customs.

System of Courts in Malaysia

The Malaysian legal system hierarchy is mainly centred despite Federal Constitution of Malaysia. British Common Law has a great influence over this system and the Islamic law but to a lesser extent and no political interference is there in this system.

In the Malaysian legal system hierarchy, there are usually two kinds of trials, namely civil and criminal. Article 121 of the Federal Constitution presents two High Courts of equivalent jurisdiction, the Malaysian High Court and the High Court in Sarawak and Sabah. Hence, this forms two different local jurisdictions of courts for the Peninsular Malaysia and for the East Malaysia.

The Superior Courts

Malaysian legal system hierarchy comprises Two High Court – High Court of Malaya and the High Court in Sarawak and Sabah, the Court of Appeal, the Federal Court.

1. High Court

The High Court has general revisionary and supervisory jurisdiction over all Subordinate Courts and hears appeals related to criminal and civil cases from Subordinate Courts (Magistrates' and Sessions Court).

The High Courts have rights to hear cases concerning all the criminal matters. In criminal cases, no case may be brought to the High court unless an offender has been properly committed for trial after a preliminary hearing in a Magistrates' Court.

The jurisdiction of the High Court is original, appellate and supervisory. The High Courts have unlimited civil jurisdiction, and generally hears actions where the claim exceeds RM 1, 000,000-00 other than actions involving motor vehicle accidents, landlord and tenant dispute and distress.

The High Court has the jurisdiction to try all civil proceedings where:

a. The cause of action arose within Malaysia.

b. Any land the ownership of which is disputed is situated within Malaysia.
c. The defendant(s) resides or has his place of business within Malaysia.
d. The facts on which the proceedings are based, exist or are alleged to have occurred within Malaysia.

The Sabah and Sarawak Court only hears appeals on matters of their native customs and laws. Generally, the High Court has the jurisdiction to hear cases which carry the death penalty. Specifically, the jurisdiction of the High Court in criminal cases is provided in sections 22, 26, 31 and 35 of the Courts of Judicature Act, 1964.

The High Court has the jurisdiction to hear civil cases[37] in respect of:

a. divorce and matrimonial causes;
b. admiralty;
c. bankruptcy and company cases;
d. appointment and control of guardians of infants and their property;
e. appointment and control of guardians of disabled persons and their estate; and
f. grant of probates of wills and letters of administration.

2. Court of Appeal

The Court of Appeal hears all the civil and criminal cases against the judgments of High Court. Where an appeal has been heard and disposed of by the Court of Appeal, the Court of Appeal has no power to review the case.

3. Federal Court

Federal court is the highest court in Malaysia. All civil cases from Court of Appeal come to the Federal Court only after the Federal Court grants leave. The criminal cases are also heard by the Federal Court from Court of Appeal only the issues which are heard by High Court in its jurisdiction. Every proceeding in the Federal Court shall be heard and disposed of by three judges or such greater uneven number of judges as the Chief Justice may in any particular case determine.

[37] https://judiciary.kehakiman.gov.my/portals/web/home/court_jurisdiction.

The Subordinate Courts in Malaysia

A subordinate court is any of the courts formed pursuant to Section 3(2) of the Subordinate Courts Act 1948 (Revised 1972). However, the Rules of Court 2012 repealed the Subordinate Courts Rules of 1980. In Peninsular Malaysia, the Malaysian legal system hierarchy under Subordinate Court consists of Sessions Courts and Magistrates' Courts.

1. Magistrates' Court

The Magistrates' Courts hear all the civil issues in which the claim is not more than RM 100, 000-00 [Section 11, Subordinate Courts (Amendment) Act 2010]. Magistrates are divided into First Class and Second-Class Magistrates.

The monetary jurisdiction of First-Class Magistrate was RM 100, 000-00 whilst the monetary jurisdiction of a Second-Class Magistrate was RM 10, 000-00.

For criminal offences, a First-Class Magistrate possesses jurisdiction to try all offences for which the maximum term of punishment provided by law does not exceed ten years' imprisonment, or all offences punishable by fines only, as well as offences under sections 392 (*Robbery*) and 457 (*lurking, house trespass or housebreaking at night*) of the Penal Code. A second-class magistrate has jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed twelve months' imprisonment or offences punishable with by fines only.

The Small Claims Court was established to hear claims for the recovery of debts or liquidated demands in money, with or without interest, up to RM 5000-00 at the time of filing. Furthermore, there is no legal representation

is allowed in this court. Order 93, rules 2 of the Rules of Court 2012 states "this Order shall apply to claims where the amount in dispute or the value of the subject matter of the claim does not exceed five thousand ringgit."

The Court for Children was established to hear cases involving minors under the age of eighteen. Previously known as the Juvenile Court, this court hears all issues involving minors except those requiring the death sentence, which is adjudicated in the High Court instead. Courts for Children are established pursuant to the Child Act of 2001. The purpose of Act 611 is to consolidate and amend the laws relating to the care, protection and rehabilitation of children and to provide for matters connected therewith and incidental thereto.

2. Session Court

The Sessions Courts hear all the issues of a civil nature in which the amount in dispute or value of subject matter does not exceed RM 1 Million. However, matters relating to land, specific performance or rescission of contracts, injunction, probate and administration of estate, divorce, bankruptcy, trusts and accounts are excluded from its jurisdiction.

The Session Court has the jurisdiction to hear and decide on any action for the recovery of immovable property, as well as to issue writs or warrants of distress for rent. It also hears criminal cases, with the exception of those involving the death sentence. Its criminal jurisdiction extends to all offences other than offences punishable with death.

Other Courts in Malaysia

1. Native Court

Native Courts in the western region of Malaysia (Sabah and Sarawak) have jurisdiction over disputes involving 'native customs' between natives. A native court has the authority to hear civil and criminal cases, including the following:

a. cases involving breaches of native law or customs,
b. land cases in which no title has been given by the land office and all parties are subject to the same native system of personal law,
c. civil proceedings (excluding land) in which the subject matter is valued at less than RM 50-00 and all parties are subject to the same native systems of personal law.

2. Special Court of Children

This court would handle cases involving sexual crimes against children. The Special Court will hear cases from Selangor, Kuala Lumpur and Putrajaya where underage children are victimized. The Special Court is set up under the Sexual Offences against Children Act 2017 which also provides imprisonment for a maximum of 30 years, a fine up to RM 20, 000-00 plus a minimum of six laches of the cane.

3. Industrial Court

The Industrial Court has jurisdiction over employers, employees, and trade unions dealing with trade disputes. The court has the authority to make an award after hearing a dispute.

4. Special Court

This Court was established in 1993 to hear cases of offences or wrongdoings made by a Ruler. The Special Court has exclusive jurisdiction to try all offences committed in the Federation by the *Yang di Pertuan Agong* or the Ruler of a State and all civil cases by or against the *Yang di Pertuan Agong* or the Ruler of a State, notwithstanding where the cause of action arose.

5. Martial Court

Martial Court is a military court. The Court-Martial has jurisdiction over any member of the various military forces in the country. It consists of a President and at least two officers who must be present during a trial. A court martial is an adjudicating body in respect of offences in the Armed Forces

Act 1972, which are committed by military personnel. The Armed Forces are dealt with simply as an entity in their own right[38].

In the case of *Majlis Angkatan Tentera v. Mohd Nurul Ami Mohd Basri*[39], the question that arose was whether the procedure to be followed was the Kementerian Kesihatan Malaysia Guideline or the Army Guideline. The appellant also raised the issue that the respondent's application for declaratory reliefs was premature as his case before the court-martial was ongoing. Court of Appeal allowed the appeal by setting aside decision of High Court and held that the court-martial must be allowed to complete its hearing, and if the respondent was dissatisfied with the decision at the conclusion of the proceedings, his remedy was to apply for a review under s. 128 of the AFA. By filing the originating summons in the midst of the court-martial, the respondent was clearly abusing the process.

6. The Syariah Courts

The jurisdiction of the *Syariah* Court is divided into both, criminal and civil. Different procedures apply in both jurisdictions. Only a Muslim, either by birth or by way of conversion, can go to the *Syariah* Court. *Syariah* courts have jurisdiction only over persons *"who profess the religion of Islam."*

A non-Muslim is not subject to the syariah court. His acquiescence is irrelevant. Jurisdiction comes from law, not from consent. *Syariah* courts do not have a general power to try all issues of Islamic law.

The *Syariah* Court is classified into:

a. *Syariah* Subordinate (lower) Court,
b. *Syariah* High Court,
c. *Syariah* Appeal Court.

[38] By virtue of Section 103 (1) of the Armed Forces Act 1972, subject to the provisions of this section a court-martial shall have the power to try any person subject to service law under this Act for any offence which, under this Act, is triable by court-martial and to award for any such offence any punishment authorized by this Act for that offence.

[39] [2019] 2 CLJ 772.

Most subject matters begin in the *Syariah* Subordinate Court, except on matters pertaining to custody of children and the division of matrimonial assets *('harta sepencarian')*. These are under the jurisdiction of the *Syariah* High Court. The *Syariah* High Court hears appeals from the Syariah Subordinate Court and it may revise decisions of the lower court. In addition, the *Syariah* Appeal Court hears appeals from the *Syariah* High Court.

In the case of *Habibullah Bin Mahmood v. Faridah Bte Dato Talib*[40], the Supreme Court ended a dispute concerning whether the *Syariah* court or the High Court had jurisdiction to decide an application where both parties were Muslims, but an action was commenced in the High Court. This was an application by a wife for damages for assault and battery and an injunction against her husband. The majority rejected the argument that civil law should apply and held that the matter fell within the jurisdiction of the *Syariah* Court.

In the case of *Kamariah Bte Ali Dan Lain-Lain v. Kerajaan Negeri Kelantan, Malaysia Dan Satu Lagi*[41], the four appellants were convicted in 1992 by the *Syariah* High Court of Kelantan on conducting matters contrary to Islamic law charges and sentenced to imprisonment. They appealed to the *Syariah* Court of Appeal which substituted the sentence of imprisonment with one of bail for good behavior between three and five years during the relevant period for each, they were required to present themselves every month to the Kadi to profess repentance and seek forgiveness. In 2000, they brought before the *Syariah* High Court for failure to comply with the order of the *Syariah* Court of Appeal. They were convicted and sentenced to three years' imprisonment. They applied to civil court (High Court) for an order of habeas corpus so that they need not continue to serve the term of imprisonment imposed. The High court dismissed their application. The decision was affirmed by the Court of Appeal which held that the issue of apostate was one of Islamic law and not civil law.

[40] [1992] 2 MLJ 793.

[41] [2002] 3 MLJ 657.

Doctrine of Separation of Power

The separation of powers is a political doctrine of constitutional law, generally represented by the three main government branches i.e. executive, legislative, and judiciary, and is meant to represent a system of checks and balances in which each component has separate and distinct powers.

Executive

Articles 39 to 43C of the Federal Constitution provide that the executive authority shall refer to the power to govern the country.

Articles 39 of the Federal Constitution provide:

"The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons."

Legislative

The legislative power is to enact the laws applicable to the Federation as a whole.

Article 66(1) of the Federal Constitution states:

"the power of Parliament to make laws shall be exercised by Bills passed by both Houses (or, in the cases mentioned in Article 68, the House of Representatives) and, except as otherwise provided in this Article, assented to by the Yang di-Pertuan Agong."

Judiciary

Article 122B (1) of the Federal Constitution provides:

"the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122c) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers."

Procedure for Enactment of an Act

In Malaysia, the law is enacted by Parliament. According to Article 44 of the Federal Constitution, legislative powers will be granted. In Parliament, the Senate and the House of Representatives hold an important role in the legislative process.

A law-making procedure can be used to implement a bill. The legislature's responsibilities include amending the constitution, approving new legislation, repealing existing legislation, and verifying new legislation. The Bill will become law after it has been approved. The enactment of an Act of Parliament involves the following procedures.

Pre-Parliamentary Stage

The Bill must be approved by the executive before it can become an Act of Parliament. Therefore, the following steps need to be taken:

1. proposal submitted;
2. meetings between relevant authorities;
3. drafting of bills by attorney general chambers;
4. cabinet approval.

Parliamentary Stage

The House of Representatives and House of Senate have to debate and voted on the bill passed by the parliament. In this stage, the Bill has to go through four processes in each House: (a) First Reading, (b) Second Reading, (c) Committee Stage, and (d) Third Reading.

a. First Reading: At the First Reading stage, only the long title will be read. This is a formality when the Bill is first introduced to the House.
b. Second Reading: The most important stage for enact of an act is the Second Reading. The contents of the Bill are debated at length and discussed by all members of the House.

c. Committee Stage: In this stage, the committees are normally the Committee of the whole House as opposed to special select committees. Special technical details of the Bill may be discussed at this stage.
d. Third Reading: Finally, the Bill is returned to the House for its Third Reading as a formality.

Royal Assent

When the Bill is passed by both Houses (*Dewan Rakyat & Dewan Negara*), it is presented to the *Yang di-Pertuan Agong* for his assent. By virtue of Article 66(4) of the Federal Constitution, the *Yang di-Pertuan Agong* must assent to the Bill by causing the Public Seal to be affixed thereto. This must be done within 30 days from the date a Bill is being presented to him.

The nation Constitution provides that a Bill will become law at the expiration of the 30 days period specified in the like manner as if he had assented thereto, should the *Yang di-Pertuan Agong*, for whatever reason, and fails to give his assent to the Bill within the specified period.

Publication

An Act of Parliament cannot come into force until it is published. The publication will include the commencement date of the law. A Bill assented by the *Yang di-Pertuan Agong* shall become Law.

However, no laws shall come into force until it has been gazetted or published under the Article 66(5) of the Federal Constitution. Pursuant to Article 66(5) of the Federal Constitution, a law shall not come into force until it is published.

The date a law comes into force may be evident from any one of the following:

1. the date which is stated in the Act itself;
2. on the date appointed by the Minister as stated in the PU(B)[42] Gazette;
3. one day after the gazette date;
4. on the gazette date.

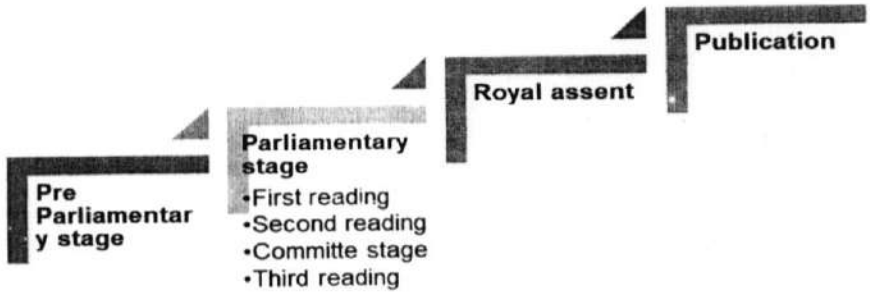


Figure 1.6 Procedure for enactment of an Act

Comparison with Indonesia

The Indonesian legal system differs from the Malaysian legal system due to the adoption of civil law. Therefore, this part discusses on the Indonesian legal system.

Indonesian Legal System

1. Characteristics of the Indonesian legal system

The legal system which Indonesia imposes is the civil law legal system, this legal system was initially developed in European Continental. This system was first applied in Indonesia through colonialism by the Dutch on Indonesian. Since then, Indonesian legal habits have followed the laws passed down by the Dutch. This legal system has its own characteristics, that the applicable law is only the written law and is established by the competent authority, additionally in this system it also places the constitution as the highest law, likewise with Indonesia placing the 1945 Constitution as its highest law.[43]

[42] *Pemberitahu Undangan*/Legal notification.

[43] Satjipto Rahardjo, 2000, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, Hlm-48

This legal system gains binding power as it is manifested in regulations in the form of legislation and is systematically arranged in its codification. This basic characteristic is closely obeyed considering the main value which is the manifestation of the objectives of the law. Legal certainty can only be realized when legal actions in social life are regulated by written legal regulations.

Another character of this legal system is the separation between legislators and judicial powers. Apart from that, in this legal system, judges have a big role in directing and deciding cases, judges are active in finding facts and careful in evaluating evidence. Thus, judges in this system are forced to find a clear picture of an event that is being tried, this legal system relies on the judge's ability, professionalism, and honesty.

2. The source of law in the Indonesian legal system

In its essence, the source of law is divided into two, namely the source of material law and the source of formal law. The source of material law comes from unwritten laws that live and develop in society, grow and develop woven into the values and norms of society. Meanwhile, formal legal sources are divided into five types, namely: (a) Legislative Regulations (b) Customs (c) Jurisprudence (d) Treaties (e) Doctrines. In this legal system, statutory regulations are the main source of law used by state administrators, judges, and other law enforcers in carrying out their duties and functions.

The hierarchy of statutory regulations as the main reference for state administration based on the provisions of article 7 of Law Number 12 of 2011 concerning the Formation of Laws and Regulations which explains the hierarchy of law in such order:

a. The 1945 Constitution of the Republic of Indonesia
b. Provisions from the Consultative Assembly (TAP MPR)
c. Law (UU)
d. Government Regulations
e. Presidential Regulation
f. Provincial Regulations
g. Regency/City Regulations

Doctrines for Separation of Powers in Indonesia

The concept of separation of powers in Indonesia, which was born through Montesquie's thinking/doctrines, clearly separates the duties and functions of state institutions, this separation is a step so as not to create an authoritarian government that rests on one power alone. The separation of powers in Indonesia is the same as the separation of powers in general by separating the executive branch as an institution that enforces laws, the legislative body as the legislature, and the judiciary that performs a judicial function.

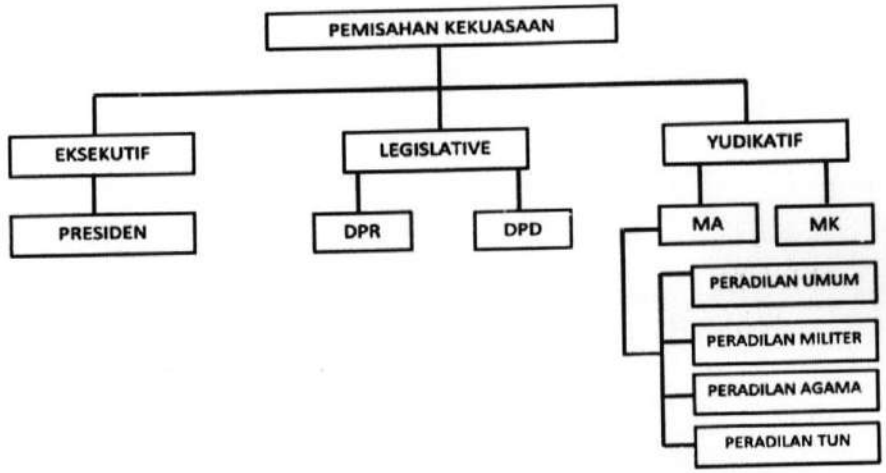


Figure 1.7 Flow chart of Separation of Power in Indonesia

This distribution/separation of power is applied to create checks and balance system in an Indonesian constitutional system. As a system that controls the nets of a governmental system, this doctrine is reflected in the 1945 Constitution which separates the duties and authorities of several state institutions based on their base branches of power.[44]

[44] Nikmatul Huda, 2014, *Hukum Tatat Negara Indonesia*, Rajawali Press, Jakarta, Hlm-259

1. Executive power

Executive power in Indonesia as a manifestation of the presidential system of government requires that the head of state has a dual function, namely as head of state and as head of government at the same time. In the provisions of Article 4 paragraph (1) of the 1945 Constitution, it is emphasized that:

> *"The President of the Republic of Indonesia holds governmental power according to the Constitution".*[45]

Meanwhile, the position of the President as head of state is reflected when the President regulates national security and defense and conducts diplomacy in international relations, including declaring war or in a state of danger. This is as stated in the provisions of article 10 of the 1945 Constitution:

> *"The president holds the highest power over the army, navy and air force".*[46]

Meanwhile, the provisions of Article 11 paragraph (1) of the 1945 Constitution regulate the President's authority to declare war:

> *"The President with the approval of the House of Representatives (is allowed to) declares war, makes peace and agreements with other countries".* [47]

In carrying out his/her duties and powers the President is assisted by the Vice President and Cabinet Ministers who are directly elected by the President. The President's authority to elect ministers is a privilege or prerogative of the President, this right cannot be interfered with by any power, any influence from outside. This authority is stated in the provisions of article 17 of the 1945 Constitution that the President has the authority to appoint and dismiss state ministers, as well as to make changes and to dissolve state ministries.

[45] Article 4 of The 1945 Constitution

[46] Article 10 of The 1945 Constitution

[47] Article 11 Paragraph (1) of The 1945 Constitution

The separation of powers in Indonesia was not carried out explicitly or carried out as a pure separation of powers, hence the President based on the provisions of article 5 paragraph (1) of the 1945 Constitution where it is stated that:

> *"the President has the right to submit a draft/bill of law to the House of Representatives".*[48]

Not only that, the President can further discuss the draft from the beginning of its formation to the ratification of the draft until became a solid law.

2. Legislative power

The branch of legislative power in Indonesia is run by two state institutions, namely the People's Representative Council (DPR) and the Regional Representative Council (DPD). The legislative power by these two institutions is known as the bicameral system (two chamber system). This system divides the legislative powers into two different institutions such as the DPR and DPD. As the legislature in which that holds full power over the formation of laws is carried out by the DPR, as stipulated in Article 20 paragraph (1):

> *"The House of Representatives holds the power to form the laws".*[49]

Each bill is discussed with the President in order to obtain mutual consent.

Meanwhile, the Regional Representatives Council has limited authority in the process of forming laws, as stipulated in Article 22 D paragraph (1).[50]

> *"The Regional Representative Council may submit to the House of Representatives in regards to a bill relating to their regional autonomy, central*

[48] Article 5 Paragraph (1) of The 1945 Constitution

[49] Article 20 paragraph (1) of The 1945 Constitution

[50] Article 22 D paragraph (1) of The 1945 Constitution

and regional relations, formation and expansion and merger of regions, management of natural resources and other economic resources, as well as the balance of central and regional finance"

Not only that, in the process of forming the law, the regional rep council can also discuss the draft/bill from the initial stage to stage one of the discussion stages with the DPR and the President.

3. Judicial power

Judicial power in the Indonesian constitution is brought by two state institutions, namely by the Supreme Court (MA) and the Constitutional Court (MK). The MA / Supreme court as the pinnacle of justice in general and the Constitutional Court as the constitutional court. The Supreme Court as stated in the provisions of Article 24 paragraph 2:

"judicial power is exercised by a Supreme Court and judicial bodies under it in the general court, religious courts, military courts and state administrative courts, and by a Constitutional Court".[51]

Within the Supreme Court, the judiciary is applied within levels, starting from the first level to the cassation level conducted by the Supreme Court. The Supreme Court also examines statutory norms as stated in the provisions of Article 24A paragraph (1):

"The Supreme Court has the authority to judge at the cassation level, examine statutory regulations under the law against the laws, and have other powers/ authority granted by law". [52]

Meanwhile, the Constitutional Court, in practicing its powers of judicial function, has the authority as stipulated in the provisions of Article 24 C paragraph (1):

[51] Article 24 paragraph (1) of The 1945 Constitution

[52] Article 24 A paragraph (1) of The 1945 Constitution

"The Constitutional Court has the authority to judge at the first and last levels whose decisions are final to examine laws against the Constitution, decide disputes over the authority of state institutions. whose powers are granted by the Constitution, decide the dissolution of political parties, and decide on disputes over the results of general elections ".

Not only that, the Constitutional Court is also obliged to provide a decision on the opinion of the DPR regarding the impeachment of the President.

Procedure for Formation of Law

As stated in the doctrine of separation of powers, the legislators are under the legislative branch of power, the power to form laws rests with the DPR. The formation of laws in Indonesia is discussed jointly by the DPR and the President, and a certain bill can be discussed together with the DPD, these specific draft laws/bills are discussed by three state institutions, namely the DPR, President, and DPD. The process of forming laws in Indonesia is divided into four stages, namely the planning stage, the submission stage, the discussion stage, and the legalization stage.

The planning stage is a stage that will discuss the planning for the formation of laws in a certain period of time, usually carried out through the national legislation program (prolegnas), in this stage, it usually discusses the bill that will be formed in the medium term (five years) and an annual term which becomes the priority the in the national legislation program. In this stage, the formation of laws is based on (1) the 1945 Constitution; (2) the Provisions from the Consultative Assembly (TAP MPR); (3) other statutory orders; (4) the national development planning system; (5) the national long-term development plan; (6) the medium-term development plan; (7) government work plan and DPR strategic plan; (8) aspirations and legal needs of the people.

In the stage of submitting/proposing, a draft bill may come from the President, DPR or the DPD. Every bill whether from the President, DPR or

DPD must have an academic text except for ones relating to the state revenue and expenditure budget (APBN), enacting a PERPU (Government Regulation in lieu of Law) into actual law, repeal of a law or revoking a PERPU.

Stage of discussion, in this stage the discussion of the bill of law is carried out by the DPR, President, and DPD (for certain bills). This discussion process was carried out with two discussions, namely the first level discussion and the second level discussion, in the case of the discussion of the bill proposed by the DPD, the DPD's participation in the discussion process was only carried out at the first level. If during this discussion, a draft/bill is not approved or does not get approval from the President and DPR, then the draft cannot be submitted again at that time. If agreed, it will proceed to the ratification process.

The ratification stage, after the deliberation process of the bill then ratified by the President. If the President refuses to ratify a draft that has been discussed previously, then within 30 days, the draft is considered valid. And it is obligatory to carry out the enactment by being given a statute number and entering it in the state sheet.

Indonesian Judicial System

The Indonesian judicial system , from some expert's view, is called the continental justice system, which is marked by the existence of a cassation institution by the highest judicial body conducted by the Supreme Court. Cassation in the Supreme Court is solely carried out to oversee the aspect of legal application of each judicial body at a lower level. The Supreme Court, which is the highest judicial institution, has four (4) judicial environments under it, namely: general courts, religious courts, state administrative courts, and military courts.

The judicial system is divided into several levels, namely the first level court, the appellate court, and the cassation trial conducted by the Supreme Court. At the first level court is a court that conducts examination and assessment of the facts of an incident which adjudicates and decides on these facts, or what is known as the *judex facti*, while at the appellate court and cassation level, it does not assess legal facts but rather assesses suitability and

decision of the judge in applying the law or what is known as the *judex jurist*. As for the types of judicial environments under the Supreme Court, namely the following.

1. General Court

The absolute competence of a general court is to conduct judicial proceedings against civil and criminal cases at the first level, as well as at the appellate level, the high court appeals to civil cases and criminal cases that have been decided by the first-level court. Cassation efforts can be submitted to the Supreme Court, as it is the highest court. The position of the general court is in every district/city. Meanwhile, the high court is located in every province.

2. Religious court (Court of Religious Affairs)

The religious court or the court of religious affairs is a special court for Muslims, this court only conducts special trials for cases within the scope of Islamic law. In this judicial environment, judges are appointed from Indonesian citizens who are Muslim, as well as the high religious courts, the appointment of judges is only made for Muslims. This court has absolute competence which is divided into two types, namely: petition cases that have no opponents and the product is a judge's decision, while contingency is a lawsuit case where there is a dispute and the legal product is a verdict.

Types of voluntary cases, namely: (a) determination of dispensation of marriage for underage children; (b) determination of legal guardian; (c) marriage certificate for unregistered marriages; (d) determination of heirs; (e) determination of child biological origin; (f) determination of adoption.

While the concessional cases are: (a) divorce suit; (b) inheritance lawsuit; (c) waqf; (d) zakat; (e) infaq; (f) grant; (g) will; (h) charity; (i) sharia economic lawsuit.

3. State administrative Court

State administrative court (PTUN) is an administrative court, which controls administrative actions or decisions made by state administrative

bodies or officials. The absolute competence of the PTUN is to carry out judiciary against administrative decisions and actions carried out by a state administrative body or official, which are carried out arbitrarily and outside of their authority. This court has the power to determine a fictitious positive decision on a permit application that is not followed up by the government within a period in accordance with statutory regulations. In the PTUN environment, there are three levels of justice/court, namely the first level court, the appellate court, and the cassation court. However, the cassation court is given restrictions to be able to file an appeal against a lawsuit with the object of a decision or action at the regional level.

4. Military Court

The military court is the executor of judicial power within the Armed Forces to uphold law and justice by taking into account the interests of implementing state defense and security. In the military justice system, prosecution and investigation are carried out by a government power training body known as an oditurate. The judicial system consists of military courts, military high courts, main military courts, and battle military courts. In this trial, judges and court officials are appointed from members of the military itself. The absolute competence of military justice is divided into two, namely adjudicating criminal acts committed by soldiers and cases of administrative disputes by the armed forces.

There are different powers over Military Courts and High Military Courts. Military courts have the authority to adjudicate crimes committed by soldiers with the position of captain and ranks below it, while the High Military Courts have the authority to administer trials at the first level and at the appellate level. At the first level, the High Military Court hears crimes committed by soldiers with a major or higher position. Meanwhile, there is an appeal level, the High Military Court hears criminal cases that have been decided by the Military Court in their jurisdiction where an appeal is requested. On the other hand, the authority of the Main Military Court to conduct judiciary at the first and last level of cases (a) between Military Courts located in different jurisdictions of the High Military Courts; (b) Between High Military Courts; (c) Between High Military Courts and Military Courts. The authority of the Battle Military Court is to adjudicate, examine, and decide at the first and last level on criminal cases committed by soldiers on the battlefield.

CHAPTER 2

LAW OF CONTRACT

Introduction

The word 'contract' may be defined as 'an agreement enforceable by law' and legally binding between the parties in a contract. Elements of a valid contract are:

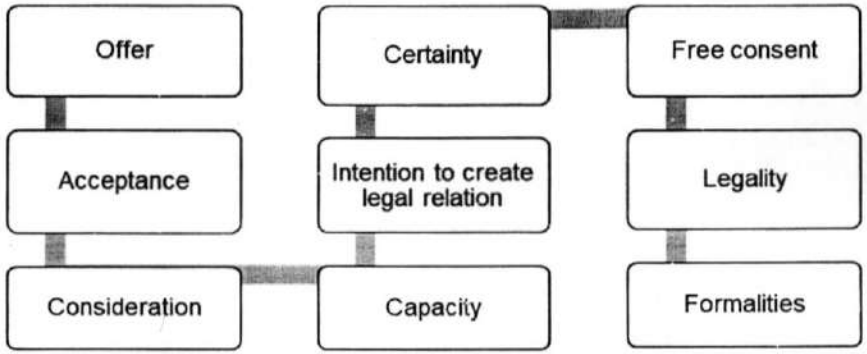


Figure 2.1 Elements of a valid contract

Elements of a Valid Contracts

Offer

An offer and proposal are necessary for the formation of an agreement. Section 2(a) of the Contracts Act 1950 provides:

> *"When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal."*

A proposal must be a definite promise to be bound provided certain specified terms are accepted. The promisor ('offeror') must have stated his willingness to perform an obligation on terms agreed, giving the 'offeree', the person to whom the offer is made, the options of accepting or rejecting the offer.

The individual who makes the proposal is known as the 'promisor' or 'proposer'. An 'offeror' is the person who makes an offer.

The Conditions of offer are:

1. can be made to anyone and everyone.
2. the proposal can be made orally, in writing, or through a combination of these methods.
3. contractual obligation implies that both parties are being required to uphold contract law principles include being fair and transparent with one another.
4. the proposal must be able to be accepted legally.
5. the proposal had to be clear and certain

In the case of *Affin Credit (Malaysia) Sdn Bhd v. Yap Yuen Fui*[53], the court decided that the purported hire purchase agreement was void ab initio, or void from the beginning, as there was a lack of offer and acceptance. A proposal can be offered to an individual, a group of people, a firm, a company, or the public at large.

Communication of offer

An offer is only considered valid if it has been communicated to the offeree. In contract law, an offer is only complete when it is communicated to the other party and accepted by them.

Section 3 of the Contracts Act 1950 states:

"The communication of an offer or a proposal is deemed to have been made by any act or omission of the party proposing by which he intends to communicate the proposal, or which has the effect of such communication."

[53] [1984] 1 MLJ 169.

Section 4(1) of the Contracts Act 1950 provides:

"The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made."

Section 9 of the Contracts Act 1950 states

"a proposal made in words (oral or written) is said to be expressed. If a proposal is made other than in words (e.g. by conduct), it is said to be implied."

In the case of *Taylor v. Laird*[54], the court held that the claimant was not entitled to wages for the return journey on the basis that he had not entered into any contractual agreement with the defendant for the performance of his work as an ordinary crew member. The defendant had not received any communication or offer of work in this capacity from the claimant, and there was therefore no basis for a contract.

In the case of *R v. Clarke*[55], the fact of the case was WA Government (Crown) offered a monetary reward for information leading to the arrest and conviction of people responsible for the murder of two police officers. Clarke was arrested in connection with the murders and made a statement to police about the murders which led to the conviction of other men. Clarke was released and subsequently claimed the reward. Clarke gave information to secure his own release and not in response to the offer for reward to be effective as an acceptance the information needed to be 'given in exchange for the offer'. In the course of his judgement Isaacs ACJ stated:

'An offer of £100 to any person who should swim a hundred yards in the harbour on the first day of the year, would be met by voluntarily performing the feat with reference to the offer, but would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard on that date and swam the distance simply to save his life, without any thought of the

[54] (1856) 25 LJ Ex 329.

[55] [1927] 40 CLR 227.

offer. The offeror might or might not feel morally impelled to give the sum in such a case but would be under no contractual obligation to do so.[56]

Therefore, Clarke has failed in his application for the reward in this case.

It is clear in the circumstances that a party intends their words or conduct to constitute an offer, then the courts will be prepared to construe it as such.

For example, in the case of Carlill v. Carbolic Smoke Ball Co Ltd, the defendant produced and sold the Carbolic Smoke Ball. The manufacturer advertised in several publications that anyone who used the smoke ball three times a day as suggested and obtained influenza, colds, or any other sickness would receive £100 compensation. £1000 was deposited with the Alliance Bank, Regent Street as their sincerity in the matter. Carlill (plaintiff) purchased a ball after seeing the advertisement and used it as suggested. Carlill duly used it but contracted influenza. Carlill then filed lawsuits for the compensation. Carbolic Smoke Ball, on the other hand, refused to pay, and Carlill sued for breach of contract. The court held that an advertisement is an offer when it specifies the quantity of persons who are eligible to accept its terms. The plaintiff was entitled to the £100 as she had accepted the offer made to the world at large.

Invitation to treat

An offer must be distinguished form an invitation to treat. An invitation to treat is not an offer, but rather is an offer to consider offers. Statements that are not proposals are commonly called as invitation to treat. An advertisement, on the other hand, is an attempt to induce an offer. Whether an advertisement is an offer or an invitation to treat depends on the intention of the parties in each case.

[56] Obiter dictum.

In *Majumder v. Attorney-General of Sarawak*[57], the term 'interested' implies that someone is inviting the other person who is interested to make an offer.

In the case of *Pharmaceutical Society of Great Britain v. Boots Cash Chemist Ltd*[58], the defendants, who ran a self-service chemist shop, were charged under the Pharmacy and Poisons Act 1933 which made it unlawful to sell certain poisons unless such sale was supervised by a registered pharmacist. The case depended on whether there was a sale when a customer selected items he wished to buy and placed them in his basket. Payment was to be made at the exit where a cashier as stationed and, in every case involving drugs, a pharmacist supervised the transaction and was authorized to prevent a sale. Court held that the display, even with prices marked, was only an invitation to treat. A proposal to buy was made when the customer put the articles in the basket. Hence the contract would only be made at the cashier's desk. As such, the chemists in this case had not made an unlawful sale.

In English case of *Partridge v. Crittenden*[59], in a bird magazine, Partridge advertised live wild birds for sale as 'Quality British ABCR, Bramblefinch cocks, Bramblefinch hens, £5/-each'. The ad was published in the magazine's classified ads section. The charge against Partridge was that he was selling live wild birds. The question arose as to whether the ad constituted an invitation to treat or an offer. Court held that the advertisement was only an invitation to treat because nowhere was there any indication of an expression of intention to be bound.

The distinction between a proposal properly so called and a mere request to the other party to negotiate or to make a proposal has been expressed in judicial language by the contrast of an offer with an invitation to treat. Thus, an invitation to treat is an offer to negotiate, an offer to receive offers or an offer to chaffer. Instances which are generally regarded as invitations to treat include followings.

[57] [1967] 1 MLJ 101.

[58] [1953] 1 QB 401.

[59] [1968] 2 All ER 421.

1. Auctions

An auction's advertisement seems more like an invitation to treat than an offer to hold it.

In the case of *Harrison v. Nickerson*[60], the defendant advertised that an auction of certain goods would take place at a stated time and place. The plaintiff travelled to the auction only to find that items that he was interested in had been withdrawn. He claimed compensation for breach of contract, arguing that the advertisement constituted an offer, and his travelling to the auction, an acceptance by conduct. Court held that the advertisement was not an offer, merely a declaration of intention.

In the case of *Payne v. Cave*[61], if the defendant placed the highest bid and then withdrew it before the hammer fell, the court held that the bid itself constituted the proposal or offer and that the auctioneer was allowed to accept or reject it by the fall of the hammer. There was no contract between the parties since the defendant withdrew his bid before the hammer fell. In *EON Bank Bhd v. BH Steel Sdn Bhd & Anor*[62], it was held that in a public auction, the proclamation of sale serves as an advertisement and a notification to the public at large of the place, date and time of the auction. It is in effect an invitation to treat, as opposed to an offer to the public.

2. Advertisement of tenders

Tenders are offers and therefore an advertisement for tenders is an invitation to treat.

3. Catalogues

Advertisements for the sale of goods are often seen as an invitation to treat unless if the manufacturers advertise, it is an offer.

[60] [1873] LR8 QB 286.

[61] [1789].

[62] [2005] 2 MLJ 753.

4. Price lists

A list of prices of the goods or services is offered by a company.

5. Good displayed in shop windows and shelves[63]

In the case of *Fisher v. Bell*[64], the authorities charged the defendant with offering for sale a flick-knife in his shop-window that was against the law. The English Court of Appeal treated the point as beyond dispute:

"it is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is no sense an offer for sale, the acceptance of which constitutes a contract."

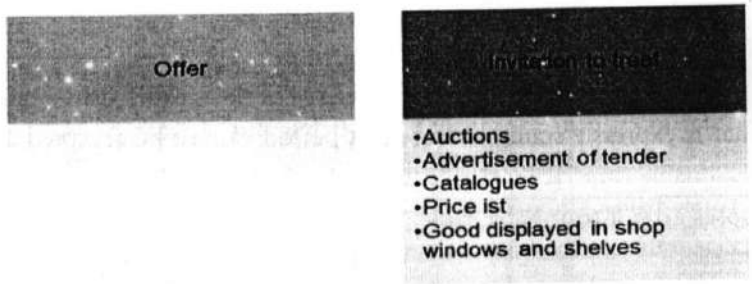


Figure 2.2 Offer and Invitation to treat

Termination of offer

There are numerous ways that a proposal might be terminated followings.

1. Rejection

A proposal is terminated once it has rejected. A rejection of a proposal followed by a counter-proposal (counter-offer) occurs when an

[63] Refer to case Pharmaceutical Society of Great Britain v Boots Cash Chemist Ltd.

[64] [1961] 1 QB 394.

attempt to accept a proposal on additional terms that aren't included in the proposal.

In the case of *Malayan Flour Mills Bhd v. Saw Eng Chee*[65], the court held that a counter-proposal involved the introduction by the promisee of material variation on the terms of a proposal on the same subject matter. In this case, by proposing to purchase all four lots, the plaintiff had not only varied the terms but also the subject matter of the original proposal and by doing so, it had in fact made a counter-proposal. This had diverted the mind of the first defendant away from his original telex proposal, such that it could be legitimately assumed that he was no longer minded keeping the telex proposal open, the effect of which was the same as if he had withdrawn that proposal. The court dismissed the plaintiff's claim.

2. Lapse of time

A proposal may lapse by the passage of time. Obviously, a proposal that is expressly stated to last for a period cannot be accepted after a reasonable time. If no time is stated in the proposal, then the proposal lapses after a reasonable time. Section 6(b) of the Contracts Act 1950 states:

> *"A proposal is revoked by the lapse of time prescribed in the proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance."*

In the case of *Macon Works and Trading Sdn Bhd v. Phang Hon Chin*[66], the defendants gave an option to A or her nominees to purchase a piece of land. The option was exercisable only after one LK showed no more interest in the land. The plaintiff, A's nominee, exercised the option and claimed specific performance. The defendants resisted, contending

[65] [1997] 1 MLJ 763.

[66] [1976] 2 MLJ 177.

that the offer had already lapsed. The court held that where no time is fixed, an offer would lapse after the expiration of a reasonable time.

3. Death of a Party

Section 6(d) of the Contracts Act 1950 provides

> *"A proposal is revoked by the death or mental disorder of a proposer, if the fact of his death or mental disorder comes to the knowledge of the acceptor before acceptance."*

4. Merger

A merger occurs in contract law, when a contract's debtor and creditor becomes the same person. As a result, the contractual obligations are terminated. For example, Amira rents a house from Mahmud. If Amira then buy the house from Mahmud, Amira will become both the landlord (after buying a house) and the tenant in the lease agreement. In this situation, the lease agreement will then terminate.

A proposal is merged by an acceptance into a contract, but a standing offer is an apparent exception to this. A standing offer is an offer to supply such good and/or services upon certain terms as the promisee may require. Such an offer is capable of repeated acceptance over a specified period.

In the case of *Great Northern Railway & Co v. Witham*[67], the plaintiff company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the plaintiff accepted his tender. The plaintiff made several orders which were executed by the defendant. However, the defendant refused to deliver a certain order of goods made by the plaintiff. The court held that once the plaintiff company placed an order, there was a complete contract that the defendant was bound to supply.

[67] (1873) LR 9 CP 16.

5. Revocation

Before acceptance, the proposer may terminate or withdraw the proposal by providing notice of revocation to the other party. The proposal will come to an end once it has been effectively revoked. Section 5(1) of the Contracts Act 1950 states:

> *"A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards."*

The illustration to Section 5 of the Contracts Act 1950 provides as follows:

a. A proposes, by a letter sent by post, to sell his house to B;
b. B accepts the proposal by a letter sent by post; and
c. A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

If the communication of acceptance is not yet complete as against the proposer and he intends to revoke his proposal, the proposer must communicate his revocation of the proposal of the promisee. The revocation or modification of a proposal is not effective unless brought to the mind of the promisee.

In the case of *Goldsborough Mort & Co Ltd v. Quinn*[68], the issue of mistake and irrevocable offers regarding the sale of land and whether a man could revoke an offer where that offer had been given for consideration. The issue arose whether Quinn could withdraw his option before the promised time has elapsed when the option was supported by consideration. Isaacs J held that the option is irrevocable, and that any attempt to cancel it would be ignored. During the option period, an injunction could be issued to prevent the sale to a third party. An acceptance turns the optionee's position into a vendee's. As a result, the specific performance of the original agreement is not only inappropriate but also unnecessary and impossible in this case. Thus, the defendant had to honour the option.

[68] [1910] 10 CLR 674.

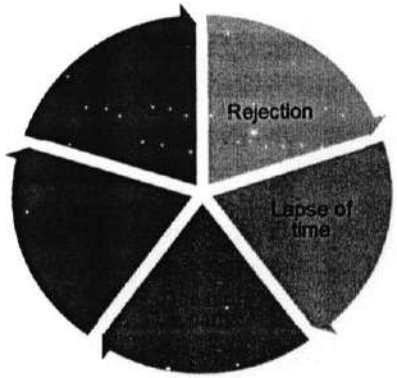


Figure 2.3 Termination of an offer

Acceptance

An acceptance is the final expression of assent to the terms of a proposal. Section 2(b) of the Contracts Act 1950 provides that:

> *"When the person to whom the proposal is made signifies his assent thereto, the proposal has been accepted. A proposal, when accepted, becomes a promise."*

Section 2(c) of the Contracts Act 1950 calls the person accepting the proposal as the 'promisee'.

In the case of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprise Sdn Bhd*[69], the Supreme Court held that the existence of an agreement depends upon the intention of the parties and there must be a consensus between them.

Conditions of acceptance

Conditions of acceptance refer to a situation in which specific conditions must be satisfied before the acceptance can be officially accepted. There are

[69] [1994] 2 MLJ 754.

four conditions of acceptance (i) acceptance must exactly fit the proposal, (ii) acceptance must be made within a reasonable time, (iii) acceptance with 'subject to contract'.

1. Acceptance must exactly fit the proposal.

   Section 7(a) of the Contracts Act 1950 provides:

   "To convert a proposal into a promise, the acceptance must be absolute and unqualified."

To achieve complete consensus, acceptance must be absolute and unqualified. An agreement has not been formed if the parties are still negotiating.

In the case of *Masters v. Cameron*[70], the parties signed a memorandum prepared by the vendor's agent, which stated that "this agreement is made subject to the formation of a formal contract of sale acceptable to my solicitors on the aforesaid terms and conditions...". The buyers (Masters) intended to withdraw the contract. The issue arose of who would be entitled to the deposit? If the contract was enforceable, Cameron would get it, and if it wasn't, Masters would have had it. The agreement was not in its final form, according to the court, just because it was acceptable to Cameron's lawyers. If they had wanted, they could have changed the contract. Whether they did or not, was immaterial. As a result, the contract could not be enforced.

2. Acceptance must be made within a reasonable time.

It is essential that acceptance must be made within a reasonable time. According to section 7(b) of the Contracts Act 1950, it states:

"In order to convert a proposal into a promise the acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in that manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance."

In the case of *Ramsgate Victoria Hotel Co Ltd v. Montefiore*[71], Montefiore applied for shares on June 8, but he wasn't told until 23 November that his offer had been accepted. The shares had been allocated to him, and the amount owed on the shares was due. Montefiore refused to pay, and the company threatened to sue, alleging breach of contract. The issue brought before the court was whether the offer lapsed through passage of time. Court held that the offer to purchase shares had not been accepted within a reasonable time and the offer had therefore lapsed. There was no contract created.

3. Acceptance with 'subject to contract'

Where the promisee (acceptor) in a contract for the sale of land states that his acceptance is 'subject to contract' or 'subject to a formal contract being drawn up by solicitors', then the court would be inclined, in the absence of strong and exceptional circumstances, to hold that there is no contract. It is a mere conditional contract.

This situation does not create a contract because it negatives the intention to create legal relations and an acceptance that does not correspond with the terms of the proposal because it introduces a new and further condition.

In the case of *Low Kar Yit & Ors v. Mohamed Isa & Anor*[72], the defendants provided the plaintiffs the option to buy a piece of land, subject to the parties drafting and agreeing on a formal contract, and the sale and contract being approved by the High Court in Kuala Lumpur. The option was duly exercised by the plaintiffs' representative, but the defendants refused to sign the agreement of sale. As a result, the

[70] [1954] 91 CLR 353.

[71] [1866] LR 1 EXCH 109.

[72] [1963] MLJ 165.

plaintiffs sought specific performance or damages for breach of contract. According to the court, an agreement to enter into an agreement is not a contract.

Communication of acceptance

The promisee has perhaps decided in his mind that he accepts the proposal, but that decision does not constitute acceptance under the law. There must be an external manifestation of assent, some words spoken, or act done by the promisee or by his authorised agent, which the law can regard as the communication of acceptance to the proposal. Section 3 of the Contracts Act 1950 provides:

> *"The communication of the acceptance of proposals is deemed to be made by any act or omission of the party accepting by which he intends to communicate the acceptance, and which has the effect of communicating it."*

The proposer cannot, without the promisee's consent, put a condition in his proposal that the promisee's silence shall amount to acceptance. Section 7(b) of the Contracts Act 1950 provides that *'acceptance must be expressed in some usual and reasonable manner, unless the proposer prescribes the manner in which it is to be accepted.'*

In the case of *Felthouse v. Bindley*[73], Felthouse wrote to his nephew offering to buy his horse, adding *'if I hear no more about him I shall consider the horse mine at £30 15s'*. His nephew intended to sell the horse to his uncle but did not reply to the letter. He told Bindley, who was auctioning his farm, not to include the horse in the auction as it was already sold. Bindley sold the horse by mistake and Felthouse tried to sue Bindley for conversion of his property. The issue arose whether the offer could have been accepted by the offeror claiming the offeree's silence amounted to consent. Court held that the nephew's acceptance had not been communicated to the uncle. As such, the horse did not belong to him.

[73] (1862) 142 ER 1037.

The general rule is that an acceptance has no effect unless it is communicated to the proposer. An acceptance is 'communicated' when it is brought to the notice of the proposer. In the case of *Fraser v. Everett*[74], a case decided in the former Straits Settlements, Wood A.C.J. held that there was no rule of law saying that 'silence gives consent' applicable to mercantile contracts. The defendant, for instance, had contracted for the purchase of 'transfer and scrip' shares but was tendered bearer warrant shares. His Lordship held that the defendant could not be compelled to accept bearer-warrants and his failure to reply to the plaintiff's letter informing him that the certificates had been exchanged for bearer-warrants could not be treated as a waiver of objection. His silence did not constitute consent. In this case, it also laid down the rule that an acceptance of a proposal must be made within a reasonable time. Furthermore, in deciding that 'silence is not acceptance', the Supreme Court of the Straits Settlements also ruled that the acceptance of the plaintiff was not made within a reasonable time. The document of title to shares should have been delivered much earlier, taking into consideration that 'the shares in question were mining shares of a very fluctuating character.'

Course of transmission or the postal rule

Acceptance is not effective until it is communicated, whether by words or conduct, and the major reason for this rule is to protect the offeror. The acceptance, which is sent by post, is an exception to this general rule.

Section 4(2)(a) of the Contracts Act 1950 provides:

> *"The communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him so as to be out of the power of the acceptor."*

With respect to the acceptor, however subsection 4(2) of the Act provides that the communication of an acceptance is complete as against the acceptor when it comes to the knowledge of the proposer.

[74] (1889) 4 Ky. 512.

In general, when receiving through the post, acceptance is complete at the time of posting. The rule that acceptance is complete upon posting, on the other hand, could be expressly excluded by the terms of the offer. This rule is called the postal rule and is an exception to the general rule that acceptance is only complete when it is communicated to the proposer.

The court had three choices of determining when acceptance was complete:

1. When the letter was posted;
2. When the letter was delivered to the proposer's address; and
3. When the proposer reads the letter (The General Rule).

In the case of *Adams v. Lindsell*[75], the defendant wrote to the plaintiff proposing to sell wool on certain terms. The defendant misdirected the letter and it reached the plaintiff later than usual. Not receiving a reply, the defendant sold the wool to a third party. The plaintiff, upon receiving the proposal letter, immediately posted acceptance. The court ruled that the acceptance was complete at the time of posting and that the parties had a valid contract.

Where a party uses the post as his means of communicating acceptance, it must be reasonable in all the circumstances.

In the case of *Ignatius v. Bell*[76], the plaintiff sued for specific performance of an option agreement which purported to give him the option of purchasing the defendant's rights over a piece of land. This option was to be exercised on or before the 20th day of August 1912. The parties had contemplated the use of the post as a means of communication. The plaintiff sent a notice of acceptance by registered post in Klang on August 16th, 1912 but it was not delivered till the evening of August 25th because the plaintiff was away. The letter had reminded in the post office at Kuala Selangor until picked up by the defendant. The Court, applying section 4, held that the option was duly exercised by the plaintiff when the letter was posted on August 16th.

[75] (1818) 1B.

[76] (1913).

Instantaneous means of communication

Instantaneous circumstances, such as telephone, telex, and telefax, as well as email, are another exception to the aforementioned rule concerning acceptance through the post.

1. Telephone

If someone (offeror) make an offer to a man by telephone and in the middle of his reply, the line disconnects so that the offeror does not hear the words of acceptance, thus there is no contract at that moment.

If the offeror wishes to make a contract, he must therefore get through again to make sure that he heard the acceptance from an offeree. The contract is only complete when offeree has answer and accepting the offer.

In the case of *Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas*[77], the court decided that the contract legislation does not specifically address the place of a contract's formation. The telephone conversation is similar to the communication between the parties when they are in an identical place when the negotiations are concluded by immediate speech. Hence, a contract was created when the offeree's acceptance was properly notified to the offeror through telephone.

2. Telex

If someone from a legal firm in Kedah's office taps out an offer to the teleprinter, which is immediately recorded on a teleprinter in Pahang's office, and the clerk at the end taps out the acceptance, suddenly the teleprinter motor stops and the line is dead in the middle of the acceptance sentence, thus no contract occurs.

In the case of *Entores Ltd v. Miles Far East Corporation*[78], the complainants, Entores, were a company that was based in London.

[77] (1966) AIR 543.

[78] [1955] 2 QB 237.

They had sent an offer to purchase 100 tons of copper cathodes to the defendants, Miles Far East Corp. Their company was based in Amsterdam and this offer was communicated by Telex, a form of instantaneous communication. The Dutch company sent an acceptance of this offer by Telex to the complainants. When the contract was not fulfilled, the complainants tried to sue the defendants for damages. The court ruled that the communication of acceptance was completed in London when the proposer received it. Lord Denning stated, *"when a contract is made by post it is clear law throughout the common law countries that acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made."* (p.332)

Revocation of acceptance

A proposal may be withdrawn in any of the following ways.

1. Communication of the notice of revocation by the proposer to the party to whom the proposal was made.
2. The time prescribed in the proposal for its acceptance elapses, or if no time is prescribed for acceptance, by the lapse of a reasonable time.
3. The failure of the acceptor to fulfil a condition precedent required for an acceptance.
4. The death or mental disorder of the proposer if the fact of the proposer's death or mental disorder comes to the knowledge of the acceptor before acceptance.

There are no legal rights until a proposal is accepted, and a proposer can withdraw or terminate his proposal by sending the other party notice of revocation. Section 5(1) of the Contracts Act 1950 states:

"A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards."

If the communication of acceptance is not yet complete as against the acceptor and he intends to revoke his acceptance, the acceptor must communicate his revocation of the acceptance to the proposer. Section 4(2) (b) of the Contracts Act 1950 states:

"The communication of acceptance is complete as against the acceptor, when it comes to the knowledge of the proposer."

Section 3 of the Contacts Act 1950 states:

"The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate the proposal, acceptance, or revocation, or which has the effect of communicating it."

Section 6(a) of the Contracts Act 1950 states that a revocation of an offer must be communicated to be effective. It provides:

"A proposal is revoked by the communication of notice of revocation by the proposer to the other party."

In the case of *Bryne v. Van Tienhoven*[79], the defendant posted his notice of revocation of proposal on 8/10 and it reached the plaintiff on 20/10. On 11/10, the plaintiff posted the letter of acceptance. The court held that the contract was concluded on 11/10. Revocation of proposal was not effective because it was only communicated (20/10) after the letter of acceptance was posted.

In the case of *Dickinson v. Dodd*[80], the defendant offered to sell his premises to the plaintiff on 10 June, stating that this offer would remain open until 9 a.m. on June 12. On the 11 June, however, the defendant sold the property to a third party without notice to the plaintiff. As a matter of fact, the plaintiff was informed of the sale, though not by anyone acting under the authority of the defendant. Nevertheless, he proceeded to give notice before 9

[79] (1880) 5 CPD 344.

[80] (1876) 2 Ch.D.468.

a.m. on 12 June that he accepted the offer to sell. He then brought an action for specific performance of the contract. The court of Appeal held that there was no contract. James L.J. stated that a promise to keep the offer open could not be binding and as such it can be revoked at any time before a complete acceptance of the offer is made.

Consideration

The word 'consideration' is defined in section 2(d) Contracts Act 1950 which states:

> *"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or obtains from doing, or promise to do or to abstain from doing, something, such act or abstinence or promise is called consideration for the promise."*

The promisee must give something in return for the promise made by the promisor.

In the case of *University of Malaya v. Lee Ming Chong*[81], the University of Malaya appointed the defendant to a scholarship offered by the Canadian government under the Colombo Plan, to pursue a course of study in Canada for the degree of Master of Business Administration and Accounting. The parties entered into a scholarship agreement that provided for the defendant to serve the University for a period of not less than five years and a breach of this term will render him liable to pay the University on demand a sum of RM 5000. The defendant breached the term and contended that the scholarship agreement was void as it was made without consideration. Wan Hamzah SCJ held that it was clear that there was consideration on the part of University. The scholarship agreement stated the University agreed to appoint the defendant to the scholarship. The University's consideration for Lee's promise to serve the university for 5 years after finishing the course, however,

[81] [1986] 2 MLJ 148.

which he would not be able to complete the study, was his promise to serve for 5 years to the university after completing the course.

In the case of *Macon Works & Trading Sdn Bhd v. Phang Hon Chin*[82], the defendants gave an open dated option to purchase their land and the plaintiffs exercised the option and claimed specific performance. The defendants claimed that the option was not valid due to lack of consideration. The Learned Judge stated that an option is a right conferred by agreement to buy or not at will any property within a certain time. The court held that an agreement without consideration is void unless it comes under one of the exceptions in section 26 of the Contracts Act 1950. Since none of the exceptions applied in this case, the option was void for lack of consideration.

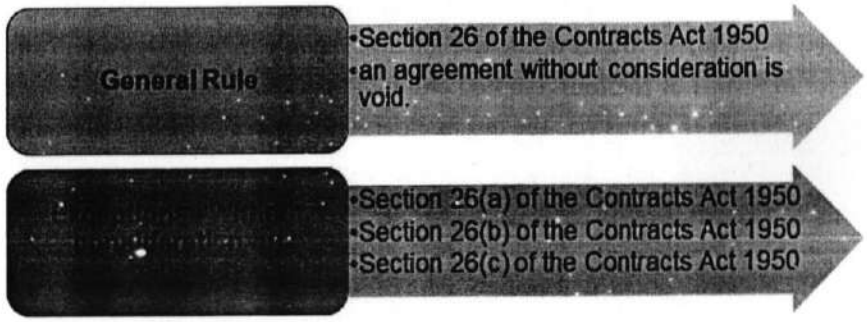


Figure 2.4 General rule and exceptions of the consideration

As a general rule, section 26 of the Contracts Act 1950 provides that, an agreement without consideration is void unless it comes under one of its exceptions. Nevertheless, in any of these situations (sections 26(a)(b) and (c) of the Contracts Act 1950), such an agreement shall be considered as a contract even without consideration to the agreement.

Section 26(a) of the Contracts Act 1950 states:

> *"It is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents and is made on account*

[82] [1976] 2 MLJ 177.

of natural love and affection between parties standing in a near relation to each other."

Illustration (b) to Section 26 of the Contracts Act 1950 provides an example: *'A, for natural love and affection, promises to give his son, B, RM 1000. A puts his promise to B into writing and registers it under a law for the time being in force for the registration of such documents. This is a contract.'*

In the case of *Re Tan Soh Sim*[83], the deceased, Tan Soh Sim, had three sisters. Their mother was firstly married to one Khoo Kim Huat and had seven children. When Khoo died, she married Tan Soh Sim's father and had four daughters. Tan Soh Sim married, but having no issue, adopted four children. Her husband also married a second wife, Tan Boey Kee. When Tan Soh Sim was on her deathbed, too ill to make a will, all the Khoo and Tan children signed a document drawn up by the solicitor renouncing all claims to Tan's estate in favour of the four adopted children and Tan Boey Kee. Tan Boey Kee told them that this was the testamentary intention of Tan Soh Sim. Tan Soh Sim died without having recovered consciousness. The issue arose in the distribution of Tan's estate, whether the instrument signed was valid as a contract under Section 26(a) of the Contracts (Malay States) Ordinance 1950. The court stated that in phrase 'natural love and affection', full effect must be given to the word 'natural', and that it means not only 'reasonably to be expected', but 'reasonably to be expected, having regard to the normal emotional feelings of human beings.' The court found that both these factors, feelings (natural love and affection) and nearness were lacking and held that the document was not a contact.

In the case of *Queck Poh Guan v. Quick Awang*[84], Idris J stated there is no doubt a strong assumption that love and affection exist between parent and child, and any proof of them will satisfy. The court found that the transfer of the 1/3 portion in the land was a gift from the mother to the defendant, her son, because of natural love and affection.

[83] [1951] MLJ 21.

[84] [1998] 3 MLJ 388.

In the case of *Chua Eng Wei & Anor v. Liow Eng Keong & Anor*[85], Per Vernon Ong Lam Kiat JCA delivering the judgment of the court held that section 26 of the Contracts Act 1950 renders an agreement made without consideration to be valid if it is made on account of natural love and affection between parties standing in a near relation to each other. The words 'near relatives' refer to those who are closely related such as one's parents, brothers or sisters. On the facts, the plaintiffs and defendants did not stand in a near relation to each other.

Section 26(b) of the Contracts Act 1950 provides:

"It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do".

Illustration (c) to Section 26 of the Contracts Act 1950 provides an example: *'A finds B's purse and gives to him. B promises to give A RM 50. This is a contract.'*

In the case of *Leong Huat Sawmill PTE. LTD. v. Lee Man See*[86], the respondent entered into an agreement with the appellants to extract timber in seven blocks of forest land. The respondent sued the appellants for breach of contract by failing to pay in full for the services rendered and claimed for (i) a refund of the deposit paid (ii) workers' wages from March to May 1979 and (iii) additional wages pursuant to an oral agreement. The appellants counterclaimed for expenses incurred as a result of the respondents' breach of the agreement by abandoning work on two of the seven forest compartments. The trial Judge held that the appellants breached the agreement by sending a letter to the Forest Department requesting for "Closure Report" thus preventing the respondent from completing his part of the bargain and ordered that the deposit be refunded to the respondent and awarded the respondent the wages of the workers from March to May 1979 but dismissed

[85] [2015] 4 CLJ 1027.

[86] [1984] 1 CLJ Rep 202; [1984] 2 CLJ 157.

the claim for additional wages. The appellants appealed against the decision of the trial Judge. The respondent cross-appealed against the dismissal of the claim for additional damages on the basis that it is covered by section 26(b) of the Contracts Act 1950 and also on the doctrine of equitable estoppel. Court held that neither the doctrine of equitable estoppel nor section 26(b) of the Contracts Act has any application in this case because of the additional wages that were promised to the respondent are subjected to two conditions and both of them have not been proved to have been properly discharged by the respondent.

In the case of *JM Wotherspoon Co Ltd v. Henry Agency House*[87], both the plaintiff and the defendant acted as agents for a variety of goods. Plaintiff, an England firm, sued Defendant, a Malaysian business, for loss due to non-receipt of payment from Malaysian purchasers. The High Court ruled that Defendant made a promise to Plaintiff to compensate for the damages, but it was not supported by consideration, which is required for a valid contract under the law. The question, in this case, was whether the plaintiff performed the preliminary act of supplying goods voluntarily. The court held that under Section 26(b), *an agreement made without consideration becomes a binding contract if it is a promise to compensate, wholly or in part, a person who has voluntarily done something for the promisor.* It is not voluntary to perform an act at the request of another person. The plaintiff's action, in this case, was not voluntary since the plaintiff acted on the defendant's advice.

Section 26(c) of the Contracts Act 1950 provides:

"It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

Illustration (e) to section 26 of the Contracts Act 1950 provides an example: A owes B RM 1000, but the debt is barred by limitation. A sign is a written promise to pay B RM 500 on account of the debt. Therefore, this is a contract.

In the case of *Unitel Technology (India) Pvt. Ltd. v. SMP International*[88], the High Court held that a debtor can enter into an agreement in writing to pay the whole or part of a debt, which the creditor might have enforced but for the law of limitation. Such a promise constitutes novation and can form a basis of a suit independently of the original debt. A promise to pay the time barred debt is a valid contract.

In *Webb v. Mcgowin*[89], Court held that McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited meanwhile appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay[90].

Types of consideration

There are three types of consideration (i) executory consideration, (ii) executed consideration and (iii) past consideration.

1. Executory Consideration

   Executory consideration consists of a promise to do or to abstain from doing something.

[87] [1962] MLJ 86.

[88] CS (OS) 1532/2011 & Crl. M.A. No. 16770/2012; Decided On: 12.12.2014

[89] 168 So. 196, 27 Ala. App. 82, 1935 Ala. App. LEXIS 14

[90] The rule highlight in this case is for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor, having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and, in consideration of this obligation, promises to pay.

For example, there is a legal contractual agreement if a bookshop promises to supply books to A on credit in the future in return for A's promise to pay. They had done nothing to fulfil the mutual promises on which they struck their agreement when they made their promises. The entire transaction has been in the future, i.e. a promise in return for a promise in the future.

In the case of *K Murugesu v. Nadarajah*[91], the respondent was the appellant's renter. He asked the appellant to sell him the house. Finally, the appellant put on a piece of paper an agreement to sell the aforementioned house to the respondent for $26,000 within three months from the date of the agreement. The respondent filed for specific performance when the appellant refused to sell. The appellant claimed that there was no consideration for the offer to sell, and hence the agreement was null and void. According to the former Federal court, the agreement constituted a case of executory consideration. The court ruled that when there was a promise against a promise, one promise was constituted consideration for the other since each may sue the other for non-performance. It is currently accepted practise that consideration might come in the form of mutual promises.

2. Executed Consideration

Executed consideration consists of doing an act. This type of consideration can be found in unilateral contracts where one party makes a promise in exchange for an act or actions to be performed by another party. The consideration is considered executed when this performance occurs. The simple situation is that of an offer of a reward for an act.

For example: Ali has offered a reward of RM 5000.00 to anyone who can return his lost cat. The required consideration is Brian's return of the lost cat, which he did in compliance with the offer. As a result, Brian has executed the consideration. Ali must, however, complete his part of the consideration by paying Brian the RM 5000.00.

3. Past Consideration

Past consideration consists of something wholly performed before the making of the promise. The past act was done or omitted not in response to the promise. The promise happens after the act or omission and independent of it.

Generally, past consideration is not good consideration. However, if the act or omission done was at the desire of the promisor, then it is good consideration. Section 26(b) of the Contracts Act 1950 provides that past consideration is good consideration if the act was voluntarily done. The provision provides:

> ***"It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do."***

In the case of *Kepong Prospecting Ltd & Ors v. Schmidt*[92], the Privy Council in an appeal from Selangor, held that past consideration is good consideration. In 1953, Tan applied for a prospecting permit for iron ore and Schmidt, a consulting engineer, assisted in the negotiations. Upon the grant of the permit, Tan wrote to Schmidt promising to pay him 1% of the selling price of all ore that might be sold in payment for the work Schmidt had done and might do in starting mining operations. Subsequently, Schmidt and Tan set up a company called Kepong Prospecting Ltd. In 1954, the company and Tan made an agreement whereby the company took over Tan's obligation to pay Schmidt 1% of all ore that might be produced and sold. In September 1955, the company and Schmidt made an agreement wherein the company agreed to pay Schmidt 1% of all ore that might be won from any land comprised

[91] [1980] 2 MLJ 82.

[92] [1968] 1 MLJ 170.

in the 1954 agreement in 'consideration of the services by the consulting engineer for or on behalf of the company (1) prior to its formation, (2) after incorporation and (3) for future services.' A dispute arose leading to Schmidt's dismissal as managing director of the company and he subsequently ceased to be a director. He commenced the present proceedings claiming an account of all moneys payable to him under 1954 and 1955 agreements. Court held that services rendered after incorporation, July 1954 onwards but before September 1955, the date of the agreement, validly amounted to consideration for an agreement to pay under section 2(d) of the Contracts (Malay States) Ordinance 1950.

Rules of consideration

There are five consideration rules, which are discussed below (1) consideration must be sufficient but need not be adequate, (2) past consideration is good consideration, (3) natural love and affection are valid consideration, (4) part payment made by third party, and (5) consideration need not move from the promisee.

1. Consideration must be sufficient but need not be adequate

   Explanation 2 to Section 26 of the Contracts Act 1950 states:

   "an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy may be taken into account by the court in determining the question whether the consent of the promisor was freely given."

   If the promisor asks for in return for his promise, he has received sufficient consideration and the promise becomes bound. It is immaterial that his promise is far more valuable than the price he asked for. In the case of *Phang Swee Kim v. Beh I Hock*[93], the respondent agreed to transfer to the appellant a parcel of land on payment of $500 when the land was subdivided although the land was worth much more. The respondent later refused to honour the promise, contending that the promise was unenforceable. The trial judge held that the agreement was void due to inadequacy of consideration. The Federal court reversed the decision and applied Explanation 2 and Illustration (f) of Section 26.

   Illustration (f) of the Section 26 of the Contracts Act 1950 provides:

   "A agrees to sell a horse worth RM1,000 for RM10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration."

   The courts are generally concerned only with the question whether the promisor has made a bargain, not with whether he has made a good bargain.

2. Past consideration is a good consideration

   Past considerations are not recognised in English law. In the case of *Re McArdle*[94], a wife and her three grown-up children lived together in a house. The wife of one of the children did some decorating and later the children promised to pay her £488 and they signed a document to this effect. It was held that the promise was unenforceable as all the work had been done before the promise was made and was therefore past consideration. However, one of the exceptions to this rule is laid down in English case of *Lampleigh v. Brathwait*[95] where it was held that an act originally done at the request of the promisor, a promise made after the doing of the act, was deemed binding since the act constituted consideration.

[93] [1964] MLJ 383.

[94] (1951).

[95] [1615].

3. Natural love and affection are valid consideration[96]

Under common law, natural love and affection agreements are not accepted as a valid consideration. In Malaysia, however, the Contracts Act 1950 acknowledges natural love and affection as valid consideration provided specific criteria are fulfilled. Thus, an agreement made because of natural love and affection would be held to be binding in Malaysia if the requirements of section 26(a) of the Contracts Act 1950 are present, viz.:

a. it is expressed in writing;
b. it is registered (if applicable); and
c. The parties stand in a near relation to each other.

4. Part payment made by the third party

An acceptance by a third party of a smaller sum of the payment in full satisfaction will be binding on the creditor on condition that the debtor is discharged from the obligation to pay the full debt. In the case of *Hirachand Punamchand v Temple*[97], a father paid a smaller sum to the creditor on son's debt that he accepted as full settlement, later the creditor sued for remainders. The Court held that the part payment was valid consideration, and the claim would be a fraud to the father.

5. Consideration need not move from the promisee.

In general, if a person provides consideration other than the promisee then the promisee cannot enforce the contract. In the case of *Venkata Chinnaya v. Verikatara Ma'ya*[98], a sister agreed to pay an annuity of Rs653 to her brothers who provided no consideration for the promise. But on the same day their mother had given the sister some land, stipulating that she must pay the annuity to her brothers.

[96] Refer to case Re Tan Soh Sim [1951] MLJ 21

[97] (1911)

[98] [1881] 1 LR 4.

The sister subsequently failed to pay the annuity and was sued by her brothers. Court held that she was liable to pay the annuity. There was good consideration for the promise even though it did not move from her brothers.

Lawful consideration

According to section 24 of the Contracts Act 1950, the consideration or object of an agreement is lawful unless:

1. It is forbidden by a law,
2. It is of such a nature that, if permitted, it would defeat any law,
3. It is fraudulent,
4. It involves or implies injury to the person or property of another, or
5. The court regards it as immoral or opposed to public policy.

Any agreement that object or consideration is illegal is null and void. The courts will not enforce an invalid contract under the Contracts Act 1950. Section 66 of the Contracts Act 1950 states:

> *"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."*

Capacity

Every person who has attained the age of majority, i.e. 18, is competent to make a contract.

Section 10(1) of the Contracts Act 1950 provides:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

Section 10(2) of the Contracts Act 1950 states:

"Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Section 11 of the Contracts Act 1950 provides:

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

In the case of *Leha Bte Jusoh v. Awang Johari Bin Hashim*[99], where it was a minor who paid the money in pursuance of a contract, the court enables the minor to recover the money paid upon returning the property transferred to him. In this case, the respondent had alleged that he had entered into an agreement for the purchase of certain lands belonging to an estate of which the appellant was the administratix. At the time of the alleged agreement the respondent was a minor.

In the case of *Mohori Bibee v. Dharmodas Ghose*[100], the plaintiff, Dharmodas Ghose, while he was a minor, mortgaged his property in favor of the defendant, Brahmo Dutt, who was a moneylender to secure a loan of Rs. 20,000. The actual amount of loan given was less than Rs. 20,000. At the time of the transaction the attorney, who acted on behalf of the moneylender, had the knowledge that the plaintiff is a minor. The plaintiff brought an action against the defendant stating that he was a minor when the mortgage was executed by him and, therefore, the mortgage was void and inoperative and the same should be cancelled. By the time of Appeal to the Privy Council the defendant, Brahmo Dutt died and the Appeal was prosecuted by his executors. The defendant contended that the plaintiff had fraudulently misrepresented his age and therefore no relief should be given to him, and that, if the mortgage is cancelled as requested by the plaintiff, the

[99] [1978] 1 MLJ 202.

[100] [1903] 1 LR 30.

plaintiff should be asked to repay the sum of Rs. 10,500 advanced to him. In addition, the Privy Council prevents an adult who contracts with a minor not only from enforcing it, but if he had transferred any property to the minor, he cannot recover the damages[101].

In the case of *Tan Hee Juan by his next friend Tan See Bok v. Teh Boon Keat and Lai Soon*[102], the minor plaintiff transferred two pieces of land in Mentakab to the two defendants, and the action actually brought by the plaintiff's next friend appointed by an order of Court was indeed to have these two transfers set aside, as well as other relief incidental thereto, on the ground that the plaintiff herein was a minor at the time the transfers were executed. The Court decided that the two transfers were void and that the two defendants' registrations as proprietors on the basis of such documents were also void.

As a general rule, contracts made by minor[103] are void. Thus, minor cannot sue or be sued under such void contact.

However, there are exceptions to the general rule where in this exception, the contract involved by a minor becomes valid hence a minor can sue and be sued under such contracts.

Contracts for necessaries

Section 2 of the English Sale of Goods Act 1893 defined necessary goods as:

"goods suitable to the condition in the life of such an infant and to his actual requirements at the date of the sale and delivery."

Section 69 of the Contracts Act 1950 allows a person who has supplied necessaries to the minor to receive reimbursement from the property of the minor. It states:

[101] In India, an agreement or contract with a minor who is below the age of 18 years is *void ab-inito* (void from beginning).

[102] [1933] 1 LNS 101.

[103] A minor is a person who is below the age of 18 and is incompetent to make a contract.

"If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

Certain services provided to a minor may be required. These services include education, medical care, and legal assistance. Whether a particular article is a necessary to a minor or not, it depends upon two factors the condition in life of the minor; and his actual requirements at the time of the sale and delivery.

In the case of *Nash v. Inman*[104], a tailor from Savile Row sued for the cost of clothing valued £22 19s 6d (including 11 fancy waistcoats, at 2 guineas each) supplied to a minor undergraduate at Cambridge. The court held the action must fail because the tailor had not adduced any evidence that the clothes were suitable to the condition in life of the minor and that the minor was not already adequately supplied with clothes.

In *Scarborough v Sturzaker*[105], Sturzaker, a minor, commuted to work on his bike for about 15 kilometers. He purchased a new bike and paid for it in part by selling in his old one. He then made an attempt to avoid the contract. In this circumstance, the bike belonged to a category of items that considered necessary in this case.

Contracts of scholarship

In the case of *Government of Malaysia v. Gurcharan Singh & Ors*[106], the Malaysian government sued the defendants for breach of contract to serve the government as a teacher for five years after training, claiming that the government spent $11,500 on educating the first defendant as agreed, including interest and fees. The question was whether there was a valid scholarship agreement entered into by a minor with the Government of Malaysia. The

[104] [1908] 2 KB 1.

[105] (1905) 1 TAS LR 117.

[106] [1971] 1 MLJ 211.

court made it clear that a minor's liability to pay for necessaries supplied under section 69 does not arise from contract. A minor is totally incompetent and incapable of entering into a contract and thus there is no contract on which the other party can sue him. In this case, the government's claim for breach of contract against a minor is unsuccessful.

The legislature passed the Contracts (Amendment) Act 1976 providing that notwithstanding anything to the contrary contained in the Contracts Act 1950, a scholarship agreement entered into by a minor is valid.[107]

Contracts of service/apprenticeship

A contract under which is a minor obtains education and training for a trade or profession. The Employment Act 1955 and the Children and Young Persons (Employment) Act 1966, allow a minor to engage in a service or apprenticeship contract.

The Act defines a child as any person below the age of 14 while a young person is one between the ages of 14 and 16.

In the case of *Clements v. London and North Eastern Rly*[108], a minor who was a railway porter agreed to join an insurance scheme, to which his employers contributed, and to give up any claim for personal injury under the Employer's Liability Act 1880. His rights under the scheme were in some ways more, and in other ways, less beneficial that those under the Act; and the court held that the contract was on the whole beneficial and binds the minor. If on the other hand a service contract is on the whole harsh and oppressive, the minor is not bound by it.

In the case of *Doyle White City Stadium Ltd*[109], a professional boxer, below the age for making a contract generally, was held to be bound by the

[107] Section 4(a) of the Contracts (Amendment) Act 1976 provide that 'notwithstanding anything to the contrary contained in the principal Act, no scholarship agreement shall be invalidated on the ground that the scholar entering into such agreement is not of the age of majority.'

[108] [1894] 2 QB 65.

[109] [1935] 1 KB 110.

terms of his licence from the British Boxing Board of Control, which allowed him to earn his living boxing but required him to keep the rules. It was said that *'similarly, it has been held that an agreement between a minor and a publisher for the publication of the minor's biography which was to be written by a 'ghost writer', was binding on the minor.'*

Marriage contracts

In the case of *Rajeswary & Anor v. Balakrishnan & Ors*[110], the parties were Celonese Hindus. The second defendant, the first defendant's father, asked the second plaintiff, the first plaintiff's father, to arrange for his son to marry the second plaintiff's daughter. Subsequently, the first defendant repudiated his promise to marry the first plaintiff. In the present proceedings, the plaintiff claimed, *inter alia*, damages against the first defendant for breach of promise of marriage. The first defendant pleaded, *inter alia* the incapacity of the first plaintiff to enter into the contract to marry her. Court held a marriage contracts entered into minors are different from other classes of contracts and do not come within the principle laid down in Mohori Bibee. The first plaintiff could maintain an action on the agreement entered between her father acting as a guardian and on her behalf and the first defendant whereby the latter promised to marry the first defendant.

Section 4(a) of the Age of Majority Act 1971 provides

"nothing in the Act shall effect the capacity of any person to act in the following matters, namely marriage, divorce, dower and adoption."

As a result, a minor can sue or be sued for breach of a marriage contract.

Intention to Create Legal Relations

Although the Contracts Act 1950 is silent on the intention to create legal relations as one of the requirements of a valid contract, case law clearly dictates the necessity for this requirement.

[110] (1958) 3 MC 178.

Commercial agreements

In commercial agreements, there is a *presumption* that the parties do intend to make a legally binding contract. The rebuttable presumption is that legal relationships are intended. It is not essential for the plaintiff to prove the intention existed in the ordinary course of business. The defendant, on the other hand, may challenge the presumption by referring to the parties' statements and/or the circumstances in which they used them.

In the case of *Carlill v. Carbolic Smoke Ball Co*[111], the defendant had made extravagant claims in an advertisement about the efficacy of their smoke ball in preventing influenza. They supported these claims with a promise to pay £100 to anybody who used it and yet caught influenza within a given period. They stated that in order 'to show their sincerity' they had deposited £1000 with their bankers. The plaintiff bought the preparation, used it and caught influenza. Amongst other defences, the defendant contended that the advertisement was 'a mere puff' and was not intended to create legal relations. The Court of Appeal rejected this. The bank deposit was strong evidence that the defendant had contemplated legal liability when they issued their advertisement.

In the case of *Sia Siew Hong v Lim Sim Chian*[112], Gopal Sri Ram, JCA held that the label of the document chosen by the parties does not bind the court. The court must construe the nature and purport from its language and other admissible evidence to decide the relationship between the parties

Domestic/social contract

In domestic arrangements there is a presumption against the existence of an intention to create legal relations. Generally, the law presumes that agreements made between husband and wife is not intended to create legal relations.

[111] [1893] 1 QB 256.

[112] [1995] 3 MLJ 141.

1. Agreement between husband and wife

In the case of *Merritt v. Merritt*[113], the husband left his wife and moved in with another lady. The wife urged her husband to make arrangements for the future. They met and discussed the situation, and the husband made certain oral promises. The wife requests that the husband write and sign the following promise:

> *"In consideration on the fact that you will pay all charges in connection with the house – until such time as the mortgage repayment has been completed, I will agree to transfer the property to your sole ownership."*

The wife has paid the mortgage, but the husband refused to let her take possession of the property. The wife sued for a declaration and the Court of Appeal made a declaration that the wife was now the sole beneficial owner of the matrimonial home.

In the case of *Balfour v. Balfour*[114], husband (defendant) resided in Ceylon (Sri Lanka) promised to pay his wife £30 per month whilst she remained in England due to illness. The defendant thereafter requested to stay separated, and Mrs. Balfour sought for restitution of her conjugal rights as well as alimony equivalent to the sum agreed upon by her husband. Mrs. Balfour received a decree nisi and was granted an alimony order five months later. The lower court ruled in favour of the plaintiff, holding that Mrs. Balfour's consent was adequate consideration to make the contract binding, and the defendant appealed to the Court of Appeal. The Court of Appeal held that the agreement was unenforceable since the parties had no intention of establishing legal relations. The plaintiff had failed to prove the intention. There existed a presumption that spouses did not usually intend to create legal relations when they made promises to one another.

[113] [1970] 2 ALL ER 760.

[114] [1919] 2 KB 571.

In *Pettitt v. Pettitt*[115], a woman used her own money to buy a marital house for herself and her husband to reside in and transferred ownership to her name. The husband and wife lived in the house together, during which time the husband made modifications to the house. Following the couple's divorce, the ex-husband argued that he had a beneficial interest in the house since his contributions to it had increased the value of the house. The House of Lords ruled that the husband does not have an equitable interest in the property because of the renovations made to the house. The Court held that voluntarily performed modifications and decorations to a family house fulfilled the aim of *"the home pleasanter for their common use and enjoyment"*.

2. Agreements between parent and child

In the case of *Jones v. Padavatton*[116], Mrs Padavatton was working as a secretary in the USA. Her mother, Mrs. Jones promised to pay her daughter's fees if she returned to England to study for the Bar. Mrs. Padavatton agreed with the offer. Mrs. Jones later offered to provide a house for her daughter in addition to renting out some of the rooms. Mrs. Padavatton later became so uncooperative and two years later, Mrs. Jones claimed possession of the house. Mrs. Padavatton disagreed, claiming that her mother was contractually bound to the agreement. However, Mrs. Jones was granted possession of the house by the court.

In the case of *Ricketts v. Scothorn*[117], a grandfather promised to his granddaughter a sum of money, inducing her to quit her job. The grandfather dies and the executor of the estate refuses to pay her. The granddaughter brought an action against the executor of his estate, claiming that she relied on the grandfather's promise. The court held that

[115] [1970] AC 777.

[116] [1969] 1 WLR 328.

[117] 77 N.W. 365 (Neb. 1898).

the daughter could recover money damages because she detrimentally relied on the promise of her grandfather.

3. Social arrangements

In the case of *Choo Tiong Hin v. Choo Hock Swee*[118], in 1916, the plaintiff (respondent) and his first wife went to live in a farm in Singapore. They were poor. During time, they had two daughters and adopted five sons living together on the premises. Those old enough worked in the farm and in various other business enterprises and the family prospered. In 1953 the wife died, and the respondent remarried in 1955. There were family quarrels and the plaintiff (respondent) left the family home and later claimed possession of the farm and other property. The defendants (appellants) claimed that there was a contract between the plaintiff and the defendants in which the defendants agreed to be adopted and work on the farm and, having contributed to the plaintiff's wealth, entitled to possession of the farm and other property equally with the plaintiff. The Court of Appeal held that the question in such cases is whether the law will imply, from the circumstances of the case, a common intention that the agreement is to be attended with legal consequences. The agreement alleged by the appellants, even if proved, was not intended to create legal relations and was therefore not binding in law as a contract.

[118] [1959] MLJ 67.

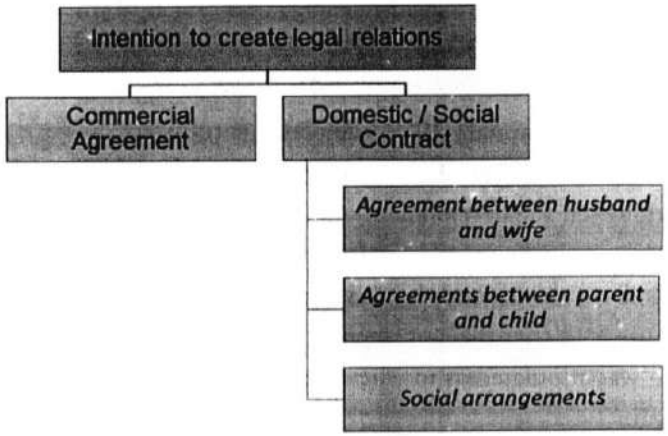


Figure 2.5 Intention to create legal relations

Certainty

The terms of an agreement cannot be vague but must be certain. Section 30 of the Contracts Act 1950 provides:

> *"Agreements, the meaning of which is not certain, or capable of being made certain, are void."*

Illustration (f) Section 30 of the Contracts Act 1950 provides:

> *"A agrees to sell to B "my white horse for five hundred ringgit or one thousand ringgit". There is nothing to show which of the two prices was to be given. The agreement is void."*

In the case of *Karuppan Chetty v. Suah Thian*[119], the requirement of certainty was not met when the parties agreed upon the granting of a lease 'at RM 35.00 per month for as long as he likes.' In *Phiong Khon v. Chonch Chai Fah*[120], the court found that the document's terms were so ambiguous

[119] [1916] FMSLR 300.

[120] (1970) 2 MLJ 114.

and uncertain that there was a considerable question as to whether they were intended to form a legal relationship.

In the case of *Idris Meon v. Sri Rambai Sdn Bhd*[121], pursuant to an agreement dated 1 January 1989, the plaintiff transferred two lots of land to the defendant. The transfer was duly registered at the Registry of Land, Kluang. However, the development of the said land was not completed. The plaintiff then applied to the court for a declaration that the agreement was null and void on the ground that it was wrong in law due to uncertainty of terms. Court held that the agreement contained an element of uncertainty as nothing was stipulated as to when the building plans must be submitted for approval.

Free Consent

The law requires free consent from all parties involved in contracts. Free consent is the basis of a contractual relationship. There must be a meeting of the minds as to the nature and scope of the contract, a *consensus ad idem*[122].

If the party's consent was gained by improper influence, the court may rescind the contract.

Section 10(1) of the Contracts Act 1950 provides:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."*

Section 14 of the Contracts Act 1950 states that consent is said to be free when it is not caused by one or more of the coercion, undue Influence, fraud, misrepresentation or mistake. It provides:

> *"Consent is said to be free when it is not caused by— (a) coercion, as defined in section 15; (b) undue influence, as defined in section 16; (c) fraud, as defined in section 17; (d) misrepresentation, as defined in section 18; or (e) mistake, subject to sections 21, 22 and 23."*

[121] [1999] 8 CLJ 243.

[122] When two parties to an agreement have the same understanding of the terms of the agreement.

Coercion[123]

Section 15 of the Contracts Act 1950 states:

> *"Coercion is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."*

The definition of 'coercion' was recently raised as an issue in the High Court case of *Allied Granite Marble Industries Sdn Bhd v. Chin Foong Holdings Sdn Bhd & Ors*, where one of the defences raised by certain guarantors appeared to be the defence of duress. The court decided that on the facts of the case there was no duress at all. Section 19(1) of the Contracts Act 1950 provides:

> *"When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused."*

In the case of *Kesarmal s/o Letchman Das v. Valiappa Chettiar*, it was held that during the Japanese Occupation of Malaya, a transfer carried out on the Sultan's instructions and in the ominous presence of two Japanese officers was declared invalid. The court decided that consent was not freely provided and that the agreement was voidable at the will or option of the party whose consent has been obtained.

The innocent party may ask the court to rescind or set aside the contract. Once rescinded, both parties do not have to perform their obligations under the contract. Section 76 of the Contracts Act 1950 provides:

[123] The English Law refers to coercion as duress.

"A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract."

In the case of *Pao On v. Lau Yiu Long*[124], there must be present some factor which the law could regard as a coercion of the victim's will so as to vitiate consent. It must be shown that the payment made, or the contract entered into was not a voluntary act. These factors include:

i. whether the victim did or did not protest;
ii. whether he did or did not have an alternative course open to him, such as an adequate legal remedy;
iii. whether he was independently advised; and
iv. whether after entering the contract he took steps to avoid it.

Undue influence

The law provides relief on the grounds of undue influence where a transaction (gift or contract) was obtained by specific kinds of improper influence that were believed not to amount to coercion since it did not entail any element of violence to the person or detention of property. Section 16(1) of the Contracts Act 1950 defines undue influence as:

"A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

In the case of *Chait Singh v. Budin Bin Abdullah*[125], a presumption of undue influence on the grounds of unconscionable bargain was also upheld when a moneylender sued a borrower on a loan at 36 per cent interest, an excessive rate, and in the light of the fact that the defendant was an illiterate.

[124] [1980] AC 614.

[125] (1918) 1 FMSLR 348.

In *Rosli Darus v. Mansor Hj Saad & Anor*[126], the plaintiff has pleaded, *inter alia*, that the transfer of his land to the defendants was null and void as the defendants had exercised undue influence over the plaintiff. Here the defendants were the plaintiff's uncles and one of them had by conduct put himself in *loco parentis* whilst the plaintiff was young and orphaned being the adopted son of the defendants' late sister. When declaring the memorandum of transfer of the land was null and void, the High Court reiterated that the equitable doctrine of undue influence meant that when there subsisted a relationship of trust and confidence between the parties and by virtue thereof one of them was in a position to exert undue influence or dominion over the other and derive some benefit from him, the onus was upon the dominant party to prove good faith of the impugned transaction.

Section 16(2)(a) & (b) of the Contracts Act 1950 provides for particular circumstances whereby the court will deem that a person is in a position to dominate the will of another:

i. where he stands in a fiduciary relation to the other; or
ii. where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

In the case of *Inche Noriah v. Shaik Allie Bin Omar*[127], an old and illiterate Malay woman executed a deed of gift of a landed property in Singapore in favour of her nephew who had been managing her affairs. Before executing the deed, the donor had independent advice from a lawyer who acted in good faith. However, he was unaware that the gift constituted practically the wholly of her property and did not impress upon her that she could prudently, and equally effectively, have benefited the done by bestowing the property upon him by a will. Court held that the gift should be set aside as the presumption of undue influence, which is raised by the relationship proved to have been in existence between the parties, was not rebutted.

[126] [2001] 4 CLJ 226.

[127] [1929] AC 127; 1 MC 79.

In *Malaysian French Bank Bhd v. Abdullah Bin Mohd Yusof & Ors*[128], it was held that to establish undue influence, the defendants had to prove that the plaintiff was able to dominate their will and thus obtained an unfair advantage by using that position. A plea of undue influence can only be raised by a party to the contract and not by a third party.

The effect of undue influence is that the agreement is a contract *voidable at the option of the weaker party or innocent party.* Hence, the innocent party can recover his loss under section 66 of the Contracts Act of 1950, which allows a person who has obtained any advantage under the contract to restore or compensate the party who received it before it becomes void.

To succeed in a claim for undue influence under section 16, the plaintiff must show that:

i. at the time of the contract, there was already a close relationship between him and the defendant and that in that relationship, the defendant was in a dominant position;
ii. the defendant made use of his dominant position to obtain the gift or the contract from the plaintiff; and;
iii. the making of the gift to the defendant or the contract entered with him was unfair to the plaintiff.

Section 20 of the Contracts Act 1950 provides "when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit there, under, upon such terms and conditions as to the court may seem just."

Fraud

Section 17 of the Contracts Act of 1950 defines fraud as certain acts committed with the intention to deceive or convince another person to enter into a contract. Fraud may be classified as one of five different fraudulent acts as follows.

1. The suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
2. The active concealment of a fact by one having knowledge of belief of the fact;
3. A promise made without any intention of performing it;
4. Any other act fitted to deceived; and
5. Any such act or omission as the law specially declares to be fraudulent.[129]

The general rule is that silence does not constitute fraud. A party's passive concealment or non-disclosure of a material fact does not constitute fraud. However, there may be certain circumstances under which silence or non-disclosure may constitute fraud.

The explanation under Illustration (b) to Section 17 provides that the circumstances may be such that 'it is the duty of the person keeping silence to speak'. Illustration (c) of Section 17 - 'Silence may be equivalent to speech'.

In the case of *Kheng Chwee Lian v. Wong Tak Thong*[130], the respondent bought a half share in a piece of land from the appellant. With the appellant's knowledge and consent, the respondent built a biscuit factory on a piece of land. The appellant then convinced the respondent to sign a new agreement that granted the respondent a smaller piece of the land, even smaller than the area now occupied by the respondent's factory. Court held that the respondent had been induced into signing the second agreement by the appellant's misrepresentation, which was fraudulent within the meaning of Section 17 (a) and (d) of the Act.

[128] [1991] 2 MLJ 475.

[129] Section 17 of the Contracts Act 1950.

[130] [1983] 2 MLJ 320.

Section 19(1) of the Contracts Act 1950 provides:

"When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused."

Misrepresentation

A misrepresentation is a false statement of existing or past fact made by one party, before or at the time of making the contract, addressed to the other party to the contract, and the maker of the statement believes that what he said is true.

Section 18 of the Contracts Act 1950 defines misrepresentation to include:

"(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

The plaintiff must prove the following factors:

1. a false representation;
2. the representation must be one of fact;
3. the maker addressed the statement to the party mislead; and
4. the maker believes in the truth of the statement[131].

To constitute misrepresentation, there must be some positive statement or some conduct from which a statement can be implied. The main distinction between misrepresentation and fraud is that in fraud, the person making the representation does not believe in its truth, but in misrepresentation, the person making the representation still believes it is true.

In the case of *Lau Hee Teah v. Hargill Engineering Sdn Bhd*[132], the appellant took a loader on hire purchase from the respondents. The appellant purported to rescind the contract alleging that the respondents represented to him that the loader was a 1968 model' whereas it was manufactured in 1964. Further, he alleged that they also represented to him that it was 'new' when in fact it was second-hand. Court held that the first respondent did not make a false representation when he said that the machine was new.

The effect of a misrepresentation or fraud is that the agreement is a contract *voidable* at the option of the mislead party.

Mistake

Section 21 of the Contracts Act 1950 provides:

"Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

A mistake of fact made by both parties to the agreement may occur in the following circumstances:

1. mistake as to the existence of the subject matter of the agreement;
2. mistake as to the identity of the subject matter;
3. mistake as to the quality of the subject matter; and
4. mistake as to the possibility of performing the agreement.

In the case of *Cundy v. Lindsay*[133], a dishonest individual named Blenkarn, who provided his address as 37, Wood Street, placed an order for handkerchiefs with the plaintiff. Blenkarn signed his name as Blenkiron & Co, a respected firm with a good reputation among the plaintiffs and a location at 123 Wood Street. The plaintiffs delivered the items to Blenkiron & Co, 37 Wood Street, where they were received by Blenkarn. He failed to

[131] Section 18(a) of the Act 1950.

[132] [1980] 1 MLJ 145.

[133] (1878) 3 App Cas 459.

pay for the products and eventually sold them to the defendants. The plaintiff demanded that the defendants return the goods. The court held that there was no contract between the plaintiffs and Blenkarn, as the plaintiffs did not intend to deal with him but with someone else. Thus, no title to the handkerchief passed to Blenkarn, so that he could pass none to the defendants. The defendants were accordingly liable for conversion, although they were *bona fide* purchasers of the handkerchief and had no notice of what transpired between the plaintiffs and Blenkarn.

Although under Section 21 of the Act the effect of an operative mistake is that the agreement is void and unenforceable, Section 66 of the Act provides the remedy of restitution to parties of a void contract.

Legality

When parties engage in an agreement in which the consideration or object of the agreement is unlawful, the agreement is null and void, and the court will not enforce it. Section 2(g) of the Contracts Act 1950 provide a void contract is an agreement that is not enforceable by law.

Section 24 of the Contracts Act 1950 provides the situations wherein the consideration or object of an agreement is unlawful. The consideration or object of an agreement is unlawful if:

1. it is forbidden by law;
2. it is of such a nature that, if permitted, it would defeat any law;
3. it is fraudulent;
4. it involves or implies injury to the person or property of another; or
5. the court regards it as immoral or opposed to public policy.

In *Manang Lim Native Sdn Bhd v. Manang Selaman*[134], the Supreme Court held that an agreement made in contravention of a statute (Sarawak Land Code) was entered into for an illegal consideration and was therefore a void agreement within the meaning of Section 2(g) of the Contracts Act 1950. In the case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*[135], by virtue of section 24 of the Contracts Act 1950, the Supreme Court concluded that an agreement that is a contract prohibited by law or a contract formed into to defeat the purposes of the law is void.

Under the Contracts Act 1950 and English Law, the courts will not lend its assistance to enforce an illegal contract. No person can claim any right or remedy whatsoever under an illegal transaction in which he has participated—no action will arise from a wrong done.

Section 25 of the Contracts Act 1950 stated that agreements are void if any part of their considerations and objects are unlawful. The provision provides:

> *"If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."*

Formalities

Formalities are identified as ensuring compliance to formal documents or complying with the specified format or procedure. Section 9 of the Contracts Act 1950 allows for a contract to be formed orally or in writing. It states:

> *"So far as the proposal or acceptance of any promise is made in words, the promise is said to be express. So far as the proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

Some of the commercial or legal documents requiring certain formalities are Powers of Attorney, trust deeds, wills and negotiable instruments. In the case of *Fauzi Elias v. George Sahely & Co (Barbados) Ltd*[136], Privy Council held that the receipt and letter could be read together; provided they were read together they satisfied the formality requirements in the Statute of Frauds.

[134] [1986] 1 MLJ 379.

[135] [1990] 1 MLJ 356.

[136] [1983] 1 AC 646.

Restraint of Trade

The theory of restraints of trade refers to the enforceability of contractual limitations on the freedom to do trade. Section 28 of the Contracts Act 1950 provides:

> *"Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void."*

In the case of *Wrigglesworth v. Wilson Anthony*[137], the defendant, an advocate and solicitor, entered into an agreement of service with the plaintiff's legal firm. Clause 8 of the said agreement stipulated that the defendant would not for a period of two years after the termination of his engagement by the plaintiff practise as or carry on the business or profession of an advocate and solicitor within a radius of five miles from Kota Bharu without first obtaining the written consent of the plaintiff. Such written consent was not given by the plaintiff. On 7 December 1963, the plaintiff agreed to discharge the defendant from the terms and obligations of the said agreement with effect from 31 December 1963. The plaintiff claimed an injunction to restrain the defendant from practising or carrying on the business or profession of an advocate and solicitor within a radius of 5 miles from Kota Bharu, Kelantan until 31 December 1965. Court held that by Section 28 of the Contracts (Malay States) Ordinance 1950, 'every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.' Accordingly, an agreement whereby an advocate and solicitor are restrained from practising his profession within five miles from Kota Bharu town for a period of two years after the termination of his service agreement with his employer is void. The distance and place in respect of the restraint are irrelevant.

There are three exceptions to the general rule as stated above Section 28 which are:

[137] [1964] 30 MLJ 269.

1. Restrictions of the sale of the goodwill of a business;
2. Agreements between partners made upon or in anticipation of a dissolution, and
3. Agreements between partners not to carry on business during the continuance of the partnership.

In the case of *Schmidt Scientific Sdn Bhd v. Ong Han Suan*[138], where the restraint does not involve restraint from entering the same trade but merely a restraint from using, disclosing and/or divulging confidential information and/or trade secrets, then there is no restraint of trade. Section 29 of the Contracts Act 1950 provides that every agreement by which any party to an agreement is restricted absolutely from enforcing his rights under the contract, or any agreement which limits the time to enforce a party's right, is void.

The Contracts Act 1950 provides 3 exceptions to this general rule:

1. Contracts to refer disputes which may arise to arbitration;
2. contracts to refer any question which may have already arisen to arbitration; and
3. Contracts in respect of an award of a Government scholarship wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be question by any court.

The effects of contracts in restraint of trade or legal proceedings are not entirely void. Such contracts are void to the extent of the restraint only.

Discharge

Discharge of a contract means termination of a contract. It is the act of making a contract or agreement null. A discharged contract refers to contract that is fully performed.

[138] [1997] 5 MLJ 632.

Discharge by Agreement

A contract that is created by consent can be extinguished by consent, expressed or implied. The consent of all parties to the contract is necessary. Consent granted once the contract has been signed may have been in the form of a waiver, release, novation, remission, or rescission. Section 63 and 64 of the Contracts Act 1950 provide for the discharge of contracts by consent. The provision states:

> *"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."*

In the case of *Kerpa Singh v. Bariam Singh*[139], in a unanimous decision, the Federal Court applied this rule to a situation in which a third party, the appellant debtor's son, made an offer of $4,000 to the creditor's solicitor in the discharge of $8,650 on the condition that the creditor either return the cheque to the offeror or retain it and discharge the debtor's debt. Their Lordships held that the creditor's actions in paying the cheque and keeping the money constituted an agreement to discharge the debtor from further liability.

The dispensation or remission of performance as enacted in Section 64 of the Contracts Act 1950 may be applied in the following fact situation:

1. Payment of a lesser sum in satisfaction of a larger sum is binding on the promise if he accepts it.
2. Payment of a lesser sum by a third party to satisfy a larger debt and accepted by the promisee is a good discharge of the original debt.
3. If the promisee accepts payment in satisfaction of an unascertained sum, the payment is a discharge of the amount.
4. An arrangement for the settlement of debts between a debtor and his creditors is also binding despite the absence of consideration.

Discharge by Performance

Generally, the performance of a contract must be exact and precise and should be in accordance with what the parties had promised.

[139] [1966] 1 MLJ 38.

In the case of *Re Moore & Co v. Landauer & Co*[140], the defendants agreed to buy from the plaintiffs, 3,000 tins of canned fruit to be packed in cases containing 30 tins. The plaintiffs delivered a substantial part of the consignment packed in cases containing 24 tins. The court held that the plaintiffs' breach entitled the defendants to reject the whole consignment.

Section 38(1) of the Contracts Act 1950 provides that *"parties to a contract must either perform or offer to perform their respective promises, unless such performance has been dispensed with by any law."*

Performance may come from a third party instead of the promisor. Section 42 of the Contracts Act 1950 provides that *'when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.'*

In the case of *Re Krishnan Rengasamy, ex.p. Arab Malaysian Credit Bhd.*[141], it was held that for Section 42 of the said Act to apply, an agreement must have been achieved between the promisee and the promisor, and there must have been complete performance by the third party.

The condition time is of the essence in a contract is governed by section 56 of the Contracts Act 1950. Section 56(1) of the Said Act states:

> *"When a party to a contract promise to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thin at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."*

Section 51 of the Contracts Act 1950 provides:

> *"the performance of any promise may be made in any manner, or at any time, which the promisee prescribes or sanctions."*

[140] [1921] 2 KB.

[141] [2001] 4 CLJ 797.

Therefore, the effect of both sections 51 and 56 is that a promise must be performed at the time agreed by the parties.

Discharge by Frustration

A contract is frustrated when, after its formation, a change of circumstances renders the contract legally or physically impossible of performance. Section 57(2) of the Contracts Act 1950 provides for the doctrine of frustration:

> *"A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

The doctrine of frustration applies where the following situations occur:

1. physical impossibility because of destruction of subject matter,
2. physical impossibility under contract of personal service,
3. change in the law rendering performance impossible,
4. impossibility due to non-occurrence of event basic to contract, and
5. where the particular state of affairs ceases to exist.

Frustration can only arise where:

1. an unforeseen event outside the control of the contracting parties (a supervening event) has significantly or radically changed the obligations of the parties from their original intentions;
2. neither party caused the supervening event;
3. neither contemplated the supervening event, so there was no provision in the contract for it, and
4. the new circumstances would make it unjust to hold the parties to their original contract.

A contract may be discharged by supervening impossibility or illegality when destruction of the subject matter of the contract.

In the case of *Taylor v. Caldwell*[142], where a music hall hired by the defendant to the plaintiff for a series of concerts was accidentally burnt down before the date of the concert. In the case of *Berney v. Tronoh Mines Ltd*[143], a contract of employment was discharged by frustration on the outbreak of war when Japan invaded Malaysia.

In the case of *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors*[144], the appellant was the sub-lessee of certain lands in Terengganu. The State Government acquired some 3132 acres of the appellant's land. The appellant objected to the acquisition and after negotiations, a consent order was entered into. Later, however, the State Executive Council of the State Government (respondent) rejected the appellant's application for the alienation of the land referred to in the consent order. The trial judge declared that the State Government was not bound by the consent order and the appellant appealed. One of the issues raised was whether the consent order had become frustrated. Court held that the refusal of the State Executive Council to alienate the lands in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. Therefore, it is not open to the respondents to rely on the doctrine of frustration.

A contract may also be frustrated if supervening events defeat the whole purpose or object of the contract as in *Krell v. Henry*[145], where a room was hired for the sole purpose of watching the coronation procession of King Edward VII but owing to the King's illness, the procession was cancelled. It was held that Henry could be excused from paying rent for the room as the contract was frustrated.

Illustration (d) Section 66 of the Contracts Act 1950: A contracts to sing for B at a concert for RM 1, 000, which are paid in advance. A is too ill

[142] (1863) B & S 826.

[143] [1949] MLJ 4.

[144] [2000] 3 CLJ 666.

[145] [1903] 3 KB 740.

to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the RM 1, 000 paid in advance.

The contract is not *void ab initio*, but only void from the time of the frustrating event.

Discharge by Breach

Where a party fails to perform their obligations as agreed, they are in breach of contract. A breach can occur in some ways including:

1. a failure to comply with a term of the contract;
2. by a party announcing to the other party that they are no longer interested in carrying out their obligations prior to the time for performance (anticipatory breach); and
3. a delay in the performance where time is of the essence in the contract.

Where one of the parties indicates to the other either by conduct or in clear terms an intention not to go on with contract, the party is said to have repudiated or renounced the contract. A refusal to perform a contract may occur before the time for performance is due (anticipatory breach), or during the time of performance itself. A refusal to perform a contract when performance is due would amount to a discharge.

If one party fails to perform their obligations under the contract or breaches a condition, the innocent party is entitled to treat the contract as ended from the time of the terminating event and may be able to recover damages. Generally, the party in default cannot terminate the contract which he himself had broken.

In the case of *Tan Hock Chan v. Kho Teck Seng*[146], the respondent was a building contractor employed by the appellant to build certain shop houses, and payment was to be made by way of progress payment. The respondent

[146] [1980] 1 MLJ 308.

could not complete work on a final lot because of a claim by the occupier of the land to tenancy rights. The Federal Court agreed with the decision of the trial judge and affirmed that the failure of the appellant to give effective possession of the land to the respondent constituted a breach which entitled the latter to rescind the contract. Serving a writ and the statement of claim on the appellant amounted to a rescission of the contract.

Remedies

Remedy is the method by which an injured party enforces a right or corrects a loss. The law awards damages to a party as compensation for the damage, loss or injury suffered by him through a breach of contract. It consists of:

1. rescission;
2. damages;
3. specific performance;
4. injunction;
5. restitution;
6. *quantum Meruit.*

Rescission

The court will set aside a contract if one of the parties obtained it through undue influence, fraud, misrepresentation, or any other reason that significantly restricts its nature as a contract.

Rescission is an equitable remedy, which allows an innocent party to cancel the contract by rescinding it. A contract that can be rescinded is voidable, not void. This means the contract remains enforceable subject to the right to rescinded. Section 65 of the Contracts Act 1950 states the effect of rescission of voidable contract. The provision provides:

> *"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any*

benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received."

In the case of *Atureliya Walendagodage Henry Senanayake v Annie Yeo Siew Cheng*[147], the plaintiff sought reimbursement for monies paid for shares of the defendant's holdings in a business which she later dissolved due to a misrepresentation that caused her to buy the shares. The Privy Council granted rescission because the plaintiff "will be entitled to examine and endeavour to know all the facts" about her contract affirmation but had not done so.

Damages

The law awards damages to a party as compensation for the damage, loss or injury suffered by him through a breach of contract. Damages are granted to a party as compensation for the damage, loss or injury he has suffered through a breach of contract. The general principle for the assessment of damages is compensatory. Section 74(1) of the Contracts Act 1950 provides:

"When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

The effect of Section 74 is that the plaintiff is only allowed to recover a reasonable sum for breach of contract.

Section 74(2) of the Contracts Act 1950 states:

"Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

Section 75 of the Contracts Act 1950 provides to the effect that the plaintiff is only allowed to recover a reasonable sum for breach of contract.

[147] (1965) 2 MLJ 24.

The amounts claimed by the plaintiff cannot exceed the amount stipulated in the contract if a sum is mentioned in the contract.

In *Bettini v. Gye*[148], Bettini entered into a contract with Gye to sign for him in the Royal Station Opera in London for three months. Among the terms was the undertaking that he would attend six days of rehearsal before the start of the performance. He arrived only two days before the commencement of his engagement. Gye repudiated the contract. The court held that taking into consideration the length and nature of the performance, the rehearsal clause was not a vital part of the agreement. It was not a condition but merely a warranty. Thus, Gye could not repudiate the contract but could sue for damages only.

Specific Performance

Specific performance is a decree by the court which forces a contracting party to do what he has promised to do. This is an order by the court to the party at fault to carry out the contract. If the party refuses to obey the court's order, then the court can proceed against him for contempt of court.

In *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor*[149], Section 11(2) of the Specific Relief Act 1950 provides that specific performance may be granted in respect of land transaction agreements if there is a presumption that the breach of a contract to transfer immovable property cannot be sufficiently remedied by monetary compensation.

Injunction

An injunction is a court order that prevents the conduct, continuation, or repetition of wrongful behavior. An injunction may be:

1. prohibitory: preventing the breach of contract;
2. mandatory: requiring a person to perform some contractual obligation;

[148] (1876) 1 QBD 183.

[149] [1982] 2 MLJ 92.

3. interlocutory: it freezes the *status quo* between the parties until the dispute can be heard by the court.

In the case of *Standard Chartered Bank v. Kuala Lumpur Landmark Sdn Bhd*[150], Court held that the injunction obtained by Monsia Investments Pte Ltd restraining both the plaintiffs and the defendants from acting on the redemption agreement had rendered it impossible of performance within the terms and conditions of the agreement. The injunction had frustrated the very essence of the agreement. Thus, its performance would be a radical change of its original terms and conditions in that the redemption agreement was intended to suspend the right of the plaintiffs to institute foreclosure proceedings against the charged lands if, and only if, the defendants were able to comply with it within the time stipulated in the agreement.

In the case of *Lumley v. Wagner*[151], Wagner, a famous opera singer, contracted to sing for Lumley at a theatre for three months and promised that she will not sing elsewhere during that time without B's written permission. Wagner later agreed, for a larger sum of money, to sing for Frederick Gye at another venue, and abandoned her agreement with Lumley. Thereupon, Lumley sued for specific performance of the contract. The court held that it will not enforce a positive covenant of personal service and therefore would not order Wagner to sing at Lumley's theatre. However, the court granted an injunction restraining Wagner from singing for Frederick Gye in breach of the contract.

Restitution

When a contract becomes void under section 57(2) of the Contracts Act 1950, section 66 of the Act provides the remedy of restitution for parties of a void contract which it states:

[150] [1991] 2 MLJ 251.

[151] (1852) 1De GM & G604; 42 ER 687.

> *"when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."*

Restitution is a type of remedy that is calculated based on the gains of the defendant, rather than the plaintiff's losses. Restitution in contract law is intended to restore the injured party, or the party that suffered damage, to the position they had before the formation of the contract.

In the case of *Public Finance Bhd v. Ehwan bin Saring*[152], court held that the agreement has become void under section 57(2) of the Contracts Act 1950 as it would now be impossible for the appellants to assign and make over all its right, benefit and interest in the vehicle as they have now a defective title. Thus, in accordance with section 66 of the Act, the appellants must return the RM 57,000 that they received from the respondents.

Quantum Meruit

Quantum meruit is to determine the value of the extended services based on the amount of work and the rate of work that exists around for similar work when there is no agreement between the parties[153].

In the case of *Constain Civil Engineering Ltd v. Zanen Dredging & Contracting Co*[154], the instructions given did not constitute authorized variations of the subcontract works because they required work to be done outside the scope of the subcontract entitling the subcontractor to payment on a *quantum meruit* basis.

Quantum meruit may arise where the contract has been deemed to have been discharged by frustration, or where the employer has asked the contractor for work that is not relevant to any contract, or where the parties have made

[152] [1996] 1 MLJ 331.

[153] The concept of *quantum meruit* usually means "the amount that is worthy" or "what the job is worth".

[154] (1997) 85 BLR 77

mistakes of understanding that there is an enforceable contract, or where the contract has been terminated by the employer and the contractor has preferred to claim the contract.

In the case of *Davis Contractors Ltd v. Fareham UDC*[155], the appellant contended that there was frustration of the contract and claimed *quantum meruit* for the actual cost incurred. The House of Lord held that there was no frustration.

In the case of *Planche v Colburn*[156], Planche (plaintiff) had agreed to write a book on Costume and Ancient Armour for a series published by the Colburn (defendant) called "The Juvenile Library". Planche was to receive £100 on completion of the book, to which end he collected materials and wrote part of the book. Colburn then abandoned the series. Court held that Planche entitled to recover £50 on a *quantum meruit* basis because Colburn had prevented the performance.

Comparison with Indonesia

A contract or agreement is one of the important sources that lead to an engagement. The definition of an agreement as stipulated in the provisions of article 1338 of the Civil Code

> *"agreement or contract is a legal act in which a person or more binds himself to himself or others."*

Or it can also be interpreted as an event where someone promises to another person or where two people promise each other to conduct an act.[157]

The principles that Apply in Contract Law in Indonesia

[155] [1956] AC 696.

[156] [1831] EWHC KB J56

[157] Komariah, 2014, Hukum Perdata, UMM Press, Malang, Hlm-143.

As for the principles that apply in contract law in Indonesia, namely:[158]

1. The principle of consensuality, meaning that with an agreement, the agreement must be binding on both parties and is made by both parties. The principle of consensuality as contained in the provisions of article 1320 of the Civil Code states that one of the conditions for the validity of the agreement is consent.
2. The form of a free agreement, meaning that the agreement is not bound by any particular form, so it may be made in writing, may be made orally, and in other forms. There are exceptions to this form of free agreement, namely formal agreements: for example, company establishment, land sale, and purchase agreements, mortgages, etc.
3. Freedom of contract, the meaning of this principle is (a) everyone is free to enter into various types of agreements known as contractual agreements, such as sale and purchase agreements, leasing, lending and borrowing, and so on. As well as an anonymous agreement or an agreement that is not regulated by law. (b) make or not enter into agreements. (c) enter into an agreement with anyone. (d) determine the contents of the agreement, its implementation, and requirements (e) determine the form of the agreement whether the agreement is made orally or in writing.
4. The principle of equality of rights, this principle places the parties in the agreement to have the same position regardless of differences in nationality, religion, and, ethnicity. Each party must recognize and respect equal rights in an agreement.
5. The principle of trust, where the parties are willing to enter into an agreement because of mutual trust that each will make an obligation and counter-obligation

[158] Agus Yudha Hernoko, 2014, *Hukum Perjanjian asas proporsional dalam kontrak komersial*, Kencana, Jakarta, Hlm- 31.

6. The principle of balance explains that the parties of the agreement each have equal rights and obligations. The obligation must be balanced with the counter obligation.
7. The principle of compliance, this principle is stated in article 1339 of the Civil Code that agreements are not only binding on the matter that is clearly bound in the agreement. But also for all propriety, customs, and laws. According to this principle, the measure of the relationship between the parties is also determined by the sense of justice that exists in society.
8. The principle of legal certainty, Article 1338 of the Civil Code confirms that all agreements made legally are valid as law for the parties. This article states the principle of legal certainty is due to acknowledging the agreement is binding on both parties in the agreement
9. This moral principle shows the existence of morality in implementing the agreement, as in zaakwarneming (representative without power) which is regulated in the provisions of article 1354 of the Civil Code. A person who voluntarily represents other people's affairs without having the right to claim, has a legal obligation to continue and resolve it.

Terms of Validity of the Agreement/Contract

According to the provisions of article 1320 of the Civil Code, for the validity of the agreement, four conditions are required, namely as follows.[159]

1. Consent and agreement by those who bind themselves

By agreeing it means that the parties who enter into the agreement must agree or consent with the agreement and in the main matters of the agreement being made of. Based on the provisions of article 1321 of the Civil Code, an agreement must be based on free will, and a new agreement is a legal agreement if the agreement is based on a perfect agreement. An agreement can be said to be imperfect if it is based on error, coercion and deception.

[159] Ahmad Miru, 2020, *Hukum Perjanjian, Penjelasan pasal-pasal tentang perjanjian Bernama Dalam KUHPerdata*, Sinar Grafika, Jakarta, Hlm-23.

2. The ability to create an agreement or contract

The importance of physical and mental ability in creating an agreement so that these actions can be carried out following predetermined obligations. In the provisions of Article 1330 of the Civil Code, it explains that people who are incapable of making agreements or other legal actions, namely:

a. an underage person;
b. those who are put in interdiction.

3. A certain matter

A certain matter means that the goods or services that are agreed upon must at least be able to determine the type and quantity, as for the conditions for goods that can be used as objects in an agreement, namely as follows.

a. Goods or services traded as stipulated in the provisions of Article 1332 of the Civil Code.
b. Of which the type can be slightly determined (Article 1333 of the Civil Code) does not become an obstacle to the fact that the quantity of goods is uncertain, provided that the amount can later be determined or calculated.
c. Goods or items that will exist in the future (article 1334 paragraph 1 of the Civil Code) except inheritance that has not been open (Article 1334 of the Civil Code).

Thus, if the interpretation is carried out in a contrary manner, then the goods which cannot be the object of the agreement are as following.

a. Goods outside of trade or goods that are prohibited by law from being the object of the agreement, for example, official weapons used by the state to maintain defense and security and narcotics/drugs.

b. Goods that are not specified in type or size.
c. Unopened inheritance, meaning that there is no agreement from the owner to share the inheritance left by the heir.

4. A Lawful Cause

Because a cause that is stated by the law is the contents of the agreement itself. Therefore, a cause does not mean something that causes someone to make the agreement in question. For example, buying and selling of stolen goods are an agreement whose causes are not lawful.

The validity of the agreement is stated as in article 1320 of the Civil Code. The first condition is the existence of an agreement that binds the two parties, the second condition is the ability to make an agreement, the two conditions as mentioned above are categorized as subjective conditions in the agreement. Because these conditions must be fulfilled by the subject in the agreement. While the third condition, namely the conditions of a certain matter, and the fourth condition of a lawful cause are categorized as objective conditions in the agreement, as in conducting the agreement the two conditions must be fulfilled in an object of the agreement itself.

The legal consequences if the agreement does not meet subjective requirements, for example, the agreement has flaws or the parties are not capable of acting their obligations, then the legal consequence is that it can be canceled (verneteighbaar), which means:

a. the agreement is canceled if someone requests a cancellation to the court, meaning if no one requests a cancellation, then the agreement is still valid;
b. cancellation of the agreement after an incracht court ruling;
c. the legal consequences from the existence of the agreement until the agreement is canceled are recognized by law.

Whereas the legal consequences if the agreement does not meet the objective requirements, for example, the object of the agreement is not determined for the type and size, or the object of the agreement is goods that

are prohibited from being traded, then the legal consequence is null and void (nietighbaar).

a. without being requested, the agreement cancellation has been canceled since the time the agreement was made. Thus the law does not recognize an agreement between the parties.
b. The legal consequences that arise from an agreement that is null and void (neiteghbaar) are not recognized by law.

Termination of Agreement

The agreement/contract that has been made and implemented by the parties can be terminated or canceled. If the agreement/contract ends or is terminated, then the engagement (the legal relationship) has ended or is also canceled. The term of the agreement/contract expiration. that is, the parties have firmly determined the term of expiry of the agreement or contract. This is as stipulated in the provisions of article 1646 of the Civil Code which states that:

> *"The partnership ends with the expiration of the time period for which the partnership was held"*

1. The term of the agreement/contract that is, the parties have firmly determined the term of expiry of the agreement or contract. This is as stipulated in the provisions of article 1646 of the Civil Code which states that:

   "the partnership ends with the expiration of the period for which the partnership has been held".

2. The term of the agreement =/contract has been determined by law, this is as stipulated in the provisions of article 1066 of the Civil Code:

   "such agreement ends with the expiration of the period for which the partnership has been established"

3. One of the parties has passed away, this provision is regulated in Article 1646 paragraph (4) of the Civil Code which states that:

   "an alliance ends if one of the allies dies, or is under interdiction, or is declared bankrupt".

   A direct example of the termination of an agreement because one of the parties making the agreement has passed away, namely as stipulated in the provisions of article 1813 of the Civil Code regarding the contract of power of attorney which states that:

   "power of attorney ends with the withdrawal of power of attorney, with notification of termination of power by the client, with the death of the client, and the marriage of the woman who gives or receives power."

   And other provisions in article 1603 letter J of the Civil Code:

   "the work relationship ends with the death of the employee".

4. One or both parties declare terminating the agreement/contract, for example in a work contract or leasing contract. This is as stipulated in the provisions of article 1603 letter n of the Civil Code which states that:

   "each party can terminate its working relationship without notice of waiver - the provisions that apply to termination notices or if the party terminated the employment relationship in this way because of an urgent reason that is immediately given to the other party ".

5. The contract can be terminated if the parties as the subject making the contract have accomplished the purpose and objective of the contract in the form of obligations which are the interests of the parties. The obligation is the object of the engagement. In law, the obligation is a burden that is borne that is contractual. Based on Article 1382 of the Civil Code, it can be explained that the parties (or parties who have the obligation to perform in the contract), in this case, the contract were made voluntarily, means that first, the parties have performed the obligation according to the contract, and second, the contract may be terminated or canceled.
6. The contract expires or is canceled because there is a judge's decision that decides the termination of the contract. Based on the cancellation lawsuit filed by one of the parties, it is caused because the subjective conditions of the validity of a contract are not fulfilled as specified in Article 1320 paragraph (1) and (2) of the Civil Code, due to a defect of will (wilsgebreke) or due to incompetence (onbekwaamheid).) as well as the existence of one of the parties who is placed under interdiction or bankruptcy as stipulated in Article 1646 of the Civil Code regarding various ways to end a civil partnership.

Overmacht

Overmacht is a forcing circumstance. Overmacht is a legal basis that "forgives" a debtor. The overmacht event "prevents" the debtor from bearing the consequences and risks of the agreement. That is why the overmacht is a deviation from the principle of law. According to the general principle of negligence, the party is obliged to compensate and bear all the risks due to negligence. However, if the fulfillment of the agreement which results in losses occurs due to an overmacht, the debtor is free to bear the losses incurred. This means that if the debtor does not carry out the agreement, it will cause losses to the creditor. Losses occur solely by circumstances or events beyond the capacity of the debtor's calculation, then these circumstances or events become the legal basis that releases the debtor from the obligation to compensate for losses (schadevergoeding). In other words, the debtor is free from the obligation to pay compensation, if the debtor is in a state of "overmacht", and the overmacht hinders the debtor from fulfilling the obligation. Overmacht is a legal basis that overrides/removes the principles contained in article 1239. each default that causes loss, requires the debtor to

pay compensation (schadevergoeding). In an overmacht situation, the debtor is exempted from fulfilling obligations (nakoming) and paying compensation (schadevergoeding).[160]

Overmacht in the contract law in Indonesia is divided into two, namely overmacht which is permanent and overmacht which is temporary in nature. Temporary overmacht if the overmacht situation can end , so that the overmacht ends and the debtor is no longer in an overmacht state.

Default in Contract Law in Indonesia

Default is not fulfilling or neglecting to carry out the obligations as specified in the agreement made between the creditor and the debtor. Default or failure to fulfill an obligation can occur either on purpose or accidentally. Default is contained in article 1243 of the Civil Code, which states that:

> *"Reimbursement of expenses, losses, and interest due to non-fulfillment of an agreement will then begin to be required, if the person in debt, after being declared negligent in fulfilling the contract, continues to neglect it, or if something that must be given or made, can only be given or made within the period that has been exceeded ".*

Default is closely related to the agreement between the parties. Both the agreement is based on an agreement in accordance with Article 1338 of the Civil Code to Article 1431 of the Civil Code as well as an agreement that is based on the law as regulated in Article 1352 of the Civil Code to Article 1380 of the Civil Code.Basically, default is divided into four, namely:

1. failed to carry out any of the obligation at all;
2. late to fulfill the obligation;
3. fulfill the obligation but considered as flawed;
4. doing something that is contrary to the obligations or content of the agreement.

[160] Salle, 2019, Hukum Kontrak Teori dan Praktik,Sosial Politik Genius, Makkasar, Hlm -82.

If the debtor is in default, the debtor may be subject to sanctions or penalties such:

1. forced to fulfill the agreement;
2. paying the losses suffered by creditors;
3. cancellation/termination of the agreement;
4. transfer of risk;
5. pay the court fee if it is brought up in court.

CHAPTER 3

CHEQUE

Introduction

Cheques is one of a monetary instrument facilitate trade and commerce. Such instruments are also called negotiable instruments. A negotiable instrument is a formal legal document that has a legal obligation to pay money and has the characteristics of being negotiable. The types of monetary or negotiable instruments used in Malaysia includes bills of exchange, **cheques**, promissory notes, bankers' drafts, bank notes, treasury bills, share warrants, dividend warrants, debentures, travellers' cheques etc.

The cheque is a species of bill of exchange. The Act regulated for cheques is the Bills of Exchange Act 1949 (BOEA 1949). Section 3(1) of the BOEA 1949 states:

> *"A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer."*

Section 3(2) of the BOEA 1949 provides:

> *"An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange."*

Section 73 of the Bills of Exchange Act 1949 defines cheques as:

> *"A cheque is a bill of exchange drawn on a banker payable on demand."*

Types of Cheques

Cheques are an order by the account holder of the bank directing his banker to pay on demand the specified amount, to or to the order of the person named therein or to the bearer. There are four types of cheques (1) undated cheque, (2) overdue or stale cheque, (3) ante-dated cheque and (4) post-dated cheque.

Undated Cheque

Section 3(4)(a) of the BOEA 1949 provides that undated cheque is not invalid merely because the cheque is not dated. Section 20(1) of the BOEA 1949 provides:

> *"Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit."*

A holder can complete the true date within a reasonable time, and the cheques can be honoured. In practice, the drawee banker sometimes refuses to pay a cheque that is not dated and returns it with the answer 'date required'.

Overdue/Stale Cheque

A cheque is normally valid for six months from the date of issue, after which it is classified as a 'stale cheque.' Section 36(2) of the BOEA 1949 provides:

> *"Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."*

Overdue or stale cheques have been in circulation for an excessively long period of time and section 36(3) of the BOEA 1949 states:

> *"A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."*

Ante-dated Cheque

If bears earlier than date of actual issue (back-dated), the cheque is known as ante-dated cheque. Section 13(1) of the BOEA 1949 provides:

> *"Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be."*

Section 13(2) of the BOEA 1949 states:

> *"A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday."*

Section 14(a) of the BOEA 1949 states:

> *"Where a bill is not payable on demand the day on which it falls due is determined as follows: three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that— (i) when the last day of grace falls on a Sunday, public holiday or bank holiday; (ii) when the last day of grace of a bill drawn payable in a foreign currency falls on a Saturday, Sunday, public holiday or bank holiday, the bill shall be due and payable on the next succeeding business day."*

Post-dated Cheque

Post-dated cheque bears date in future, later than the date of issue. Section 13(2) of the BOEA 1949 provides:

"A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday."

In the case of *Lien Chung Credit & Leasing Sdn Bhd v. Chang Chin Choi*[161], High Court held that the post-dated cheque was not payable on demand and hence could not fall within the definition of 'cheque' in section 73(2)[162] of the BOEA 1949. It had no value as it did not represent any property that a creditor could resort to in the event he wanted to realise or recover the debt. Banker do pay post-dated cheques if they are presented on or after the dates so stated on the cheques. If the banker pays the cheques before their respective due dates, he cannot debit the customer's accounts if the customers stop the cheques or if they die before the respective dates of the cheques.

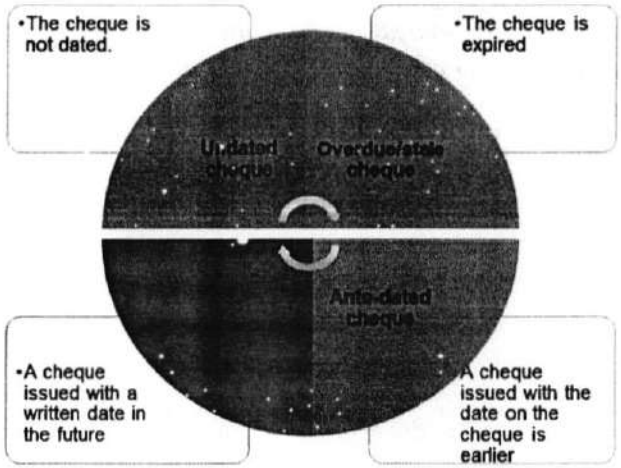


Figure 3.1 Types of cheques

[161] [1994] 3 MLJ 488.

[162] Section 73(2) of the Act states 'except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.'

Characteristics of a Bill of Exchange

The following are the characteristics of a bill of exchange.

An Unconditional Order

Section 3(3) of the BOEA 1949 provides:

"An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional"

The requirement that the order must be unconditional means that if the order contained in a document is conditional, such a document is not a bill of exchange. In the case of *Palmer v. Pratt*[163], the court decided that a payment order issued 30 days after the arrival of the ship "Paragon" in Calcutta was conditional.

In the case of *Cooperative Exportvereniging 'Vecofa' UA v. Maha Syndicate*[164], the defendants, Maha Syndicate, were acceptors of three bills of exchange amounting to RM 69, 750-28. They contended that these documents were not bills of exchange as they included the following words which made the order to pay conditional: *'At 60 days after sight D/A on arrival of steamer, pay this first of exchange ... to the order of Amsterdamsche Bank NV Bijbank, Rotterdam ... for collection.'* The defendants argued that the order to pay was conditional upon the arrival of the steamer. The court held that the operative words were 'D/A' which means 'documents released against acceptance' and payment was not conditional on arrival of the steamer. The documents were bills of exchange.

[163] 2 Bing 185, 130 ER 277.

[164] [1970] 1 MLJ 187.

In writing

'Writing' is define as including printing, lithography, typewriting, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved.[165] A bill may be printed or written or partly printed and partly written. The cheque may be written in pencil as well as ink although it is not advisable to write in pencil as it may facilitate fraudulent alteration. In the case of *Arab Bank Ltd v. Ross*[166], the cheque was held to be a valid bill of exchange even though the cheque is written in Arabic.

Addressed by One Person to Another

In this context, the term "person" refers to a legal person, which includes natural persons as well as businesses and corporations. It must be addressed by one person (the drawer) to another person (the drawee).

Section 5(2) of the BOEA 1949 states:

"Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note."

Signed by the Person Giving It

To make the instrument a bill, the drawer's signature is required. Section 23 of the BOEA 1949 states that no person is liable as drawer, indorser, or acceptor of a bill who has not signed as such. The provision provides:

"No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that— (a) where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name;

[165] Section 3 of the Interpretation Act 1967.

[166] (1952) 2 QB 216.

(b) the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."

Section 30(1) of the BOEA 1949 states:

"Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value."

Requiring the Person to Whom It is Addressed to Pay on Demand or At a Fixed or Determinable Future Time

A bill which is payable on demand means that the holder can demand for payment immediately. Section 10(1) of the BOEA 1949 explains the term 'on demand':

"(a) which is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time for payment is expressed."

Section 11(1) of the BOEA 1949 provides on a bill payable at a future time. The provision reads:

"A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable— (a) at a fixed period after date or sight; (b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain."

A Sum Certain in Money

A bill is an instrument to facilitate the payment of money and is confined to payment in money and such money must be made in legal tender. Section 9(1) of the BOEA 1949 explains what a sum certain is. It reads:

"The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid— (a) with interest; (b) by stated instalments; (c) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; (d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill."

To the Order of a Specified Person or to the Bearer

Section 7(1) of the BOEA 1949 provides:

> *"Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."*

Section 8(2) of the BOEA 1949 states:

"A negotiable bill may be payable either to order or to bearer."

A bill is payable to the order of a specified person when the name of the payee is stated. Section 8(3) of the BOEA 1949 states:

> *"A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank."*

In the case of *Clutton v. Attenborough*[167], a fraudulent clerk induced his employer to sign a cheque drawn in favour of 'George Brett'. Neither of them knew such a person, although the employer assumed that he had a creditor of that name. It was held that George Brett was a non-existent person and the cheque was therefore payable to bearer.

A Bill of Exchange Must Be Supported by Consideration

A bill of exchange must be supported by consideration. Generally, consideration is necessary for the validity and enforceability of all contracts. Section 27(1) of the BOEA 1949 provides:

> *"Valuable consideration for a bill may be constituted by— (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."*

[167] [1897] AC 90, HL.

Capacity to Contract by Bill of Exchange

The parties of negotiable instrument i.e. cheques must have a contractual capacity.

Section 22(1) of the BOEA 1949 states:

> *"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract"*

Section 11 of the Contracts Act 1950 provides:

> *"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."*

A minor and person of unsound mind have no contractual capacity because any agreement made by him does not make him liable or incur any liabilities. Thus, minors and person of unsound mind are not allowed to open current accounts as they are not liable for any bills that they may draw.

Date of Bill

Section 3(4)(a) of the BOEA 1949 provides that a bill is not invalid by reason that it is not dated. Section 13(2) of the BOEA 1949 states that a bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday, bank holiday or public holiday.

Purpose of Crossing on Cheques

The objective of crossing cheques is to indicate that payment may only be made through a bank or in a certain method, such as through an account. Drawers cross their cheques to ensure that even if the cheques fall into wrong hands, it would be difficult for such an unauthorized person to obtain payment on the cheques.

For instance, a crossed cheque must be cleared through an account and this makes it difficult for the wrong party to obtain payment and it also enables the recipient to be traced.

Types of Crossing on Cheques

Cheques can be crossed in four ways: (1) general crossing, (2) special crossing, (3) not negotiable, and (4) account payee.

General Crossing

Section 76(1) of the BOEA 1949 states:

> *"Where a cheque bears across its face an addition of— (a) the words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or (b) two parallel transverse lines simply, either with or without the words "not negotiable", that addition constitutes a crossing, and the cheque is crossed generally."*

According to Section 76(1) of the BOEA 1949, a general crossing may take any one of the following forms:

1. 2 parallel transverse lines only, or
2. 2 parallel transverse lines with the words 'not negotiable', or
3. The words 'and company' between 2 parallel transverse lines, or
4. the word '& Co.,' or
5. the word 'and company' with the words 'not negotiable,' or
6. the words '& Co.' with the words 'not negotiable'.

The effect of a general crossing is that the paying banker can only pay the amount of the cheque to a collecting banker. The banker cannot pay cash across the counter in such a case.

Special Crossing

Section 76(2) of the BOEA 1949 states:

> *"Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition constitutes a crossing, and the cheque is crossed specially and to that banker."*

A special crossing took place when the bank's name is written between the parallel transverse lines or across the front of the cheques without the line. In the case of *Akrokerri (Atlantic) Mines Ltd v. Economic Bank*[168], it was held that the 'a/c payee' crossing directs the banker, with a warning, that the cheque must be collected and credited to the payee's account. If a banker collects an 'a/c payee' cheque for a customer who is not a payee, the banker risks being sued in conversion by the true owner and loses the statutory protection offered to a collecting bank.

The effect of a special crossing is that the paying banker must pay the amount of the cheque only to the collecting banker named in the crossing. Where a cheque is crossed specially, the banker to whom it is crossed may again cross it especially to another banker for collection.

Not Negotiable

Not negotiable crossing arises when a cheque loses its complete negotiability but remains transferable. It means that if the person who holds the cheque is a thief and transfers the cheque to A, who accepts the cheque honestly and for the value, A cannot obtain a better title than the thief, the transferor of the cheque, has.[169] Section 76 of the BOEA 1949 permits a person crossing a cheque to add the words 'Not Negotiable'.

Section 78 of the BOEA 1949 states:

> *"A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing."*

[168] [1904] 2 KB 465.

[169] Section 81 of the BOEA 1949.

Where the crossing also contains the words 'not negotiable', the cheque loses its negotiability, but it remains transferable. This means that the person taking the cheque (the transferee) cannot obtain a better title than the transferors. In the case of *Wilson and Meeson v. Pickering*[170], a clerk took a blank cheque (duly signed and drawer crosses "non-negotiable") from W and fraudulently made it payable to P, for payment of a debt she owed to the latter. Court held that P could not recover from W. Since the clerk had received no title to the cheque, being not negotiable, P could get no better title. If the cheque is stolen, the person who takes it from the thief is unable to hold it against the genuine owner of the cheque since his title to the cheque is depends on the transferor, who in this situation has no title.

Account Payee

Section 81A of the BOEA 1949 provides:

> *"Where a cheque is crossed and bears across its face the words "account payee" or "a/c payee", either with or without the word "only", the cheque shall not be transferable, but shall only be valid as between the parties thereto."*

According to Section 81A of the BOEA 1949, the words, 'account payee' or 'a/c payee' or 'a/c payee only' are frequently used in crossings. This section provides that the addition of the words 'account payee' or 'a/c payee' makes the cheque not transferable but only valid as between the parties to the cheque.

In the case of *the National City Bank of New York v. Ho Hong Bank Ltd*[171], these words operate as notice to the collecting banker that only the account of the payee can be credited. In *Woodland Development Sdn Bhd v. Chartered Bank; Pjtv & Densun (M) Sdn Bhd (Third Party)*[172], Woodland Development Sdn Bhd (Plaintiff) were payees of three cheques for RM10,000 and RM50,000 and RM10,000 respectively. The first cheque was crossed generally, the last two cheques were crossed with the words 'Account Payee'. One Kim Chean Han, director of the plaintiff handed over these cheques to Richard Seow and Yap Yoke Min for opening an account in the name of the plaintiff as well as PJTV & Densun (M) Sdn Bhd (third party). The third party had an account with the Chartered Bank, Petaling Jaya Branch (Defendants). The two directors, to whom the cheques were given instead of opening an account in the name of the plaintiff, persuaded the manager of the defendant bank to collect the amount for the third party. The present action was brought by the plaintiff against the defendant bank and the third party for conversion and alternatively for money had and received for their use. Court held that the defendant bank was negligent in collecting cheques for the third party and was liable for conversion or alternatively for money had and received. The defendant bank was asked to return the said amount of RM70,000 with interest to the plaintiff.

[170] (1946).

[171] [1932] MLJ 64.

[172] [1986] 1 MLJ 84.

Holder of a Cheque

The holder of a cheque is the payee or indorsee who is in possession of it, or the bearer thereof. The bearer is the person in possession of a cheque which is payable to bearer. Section 38 of the BOEA 1949 states that a holder can enforce bill in his own name against anyone who has sign it and the transferor from whom he obtains the bill. The provision provides:

> *"The rights and powers of the holder of a bill are as follows: (a) he may sue on the bill in his own name; (b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves. and may enforce payment against all parties liable on the bill; (c) where his title is defective— (i) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and (ii) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill."*

The other rights and powers of the holder of a cheque as below.

1. The holder of a cheque indorsed in blank may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the cheque to or to the order of himself or some other person[173].
2. Where a cheque is uncrossed, the holder may cross it generally or specially.
3. Section 69(1) of the BOEA 1949 provides that where a cheque has been lost before it is overdue, the person who was the holder of it has the right to apply to the drawer to give him another cheque of the same tenor.
4. As a rule, the holder of a cheque may negotiate it to another person. However, there are exceptions to the general rule which are:
   a. a cheque which contains words prohibiting transfer, or indicating an intention that it should not be transferable, is incapable of negotiation (section 8(1) of the BOEA 1949); and
   b. a cheque may be restrictively indorsed to prohibit its further negotiation (Section 35(1) of the BOEA 1949).
5. If the holder of a cheque does not negotiate it to another person, he may present it for payment to the bank on which it is drawn.
6. If the holder of a cheque presents it for payment and it is not paid, he may give notice of dishonour forthwith to prior parties to retain their liability to him.

Holder in Due Course

Section 29(1) of the BOEA 1949 provides:

> *"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely— (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it."*

[173] Section 34(4) of the BOEA 1949.

According to section 29 of the BOEA 1949, holder in due course is a holder under the following conditions:

1. holder who takes a bill;
2. which is complete and regular on face of it;
3. before it becomes overdue;
4. without notice it has been previously dishonoured;
5. in good faith;
6. has given value for it;
7. without notice of defect in title of the person from whom the bill is taken.

Section 29(2) of the BOEA 1949 provides:

> *"In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."*

Section 29(3) of the BOEA 1949 states:

> *"A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."*

In the case of *Arab Bank Ltd v. Ross*[174], the claimant bank discounted two promissory notes by the defendant, Ross. The notes were made out in the name of a Palestinian firm as payee and indorsed by a partner of the firm

[174] [1952] 2 QB 216.

to the Arab Bank but omitting the word 'company' from the indorsement. It was held that the omission meant that the payee and indorsee may not be the same person. It was therefore an irregular bill, and the Arab Bank could not therefore be a holder in due course.

The rights of holder in due course as below.

1. Section 38(a) of the BOEA 1949: Can sue in his own name.
2. Section 38(b) of the BOEA 1949: Holds bill free from any defects in the title of any prior parties and can enforce the bill against all parties to it.
3. Section 39(3) of the BOEA 1949: anyone who takes bill from holder in due course irrespective of whether he himself has given value will have the same right as holder in due course.
4. Section 30 of the BOEA 1949: every holder is presumed as holder in due course until the contrary is proven.

Protection of Paying Bank

Where a customer draws a cheque on his banker, that banker is known as the paying banker or drawee banker. The paying banker's duty is to pay to the right person according to his customer's (the drawer's) mandate. If the banker makes a mistake and pays the wrong individual, he is responsible for the loss.

In other words, the paying bank is the bank of the person or a company that has written a cheque that has to pay the amount written on it. A bank that is responsible for paying the amount of money on a cheque relating to one of its customer accounts. Section 73A of BOEA 1949 provides:

> *"Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value."*

Section 24 of the BOEA 1949 states:

> *"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."*

Therefore, in making payments, the paying banker must ensure that he would not be liable for non-compliance with the mandate of the customer and for conversion as regards the true owner of the cheque.

In the case of *Syarikat Islamiyah v. Bank Bumiputra Malaysia Bhd*[175], the High Court stated that the object of Section 60 of the Bills of Exchange Act 1949 is to protect the paying banker against forged or unauthorized indorsements. The section does not apply to forged or unauthorized signatures which are governed by section 24 of the Act.

In *Shorubber (M) Sdn Bhd v. CIMB Bank Bhd*[176], court held in allowing claim the disputed signatures on the cheques was forged. Payments released by the defendant on the cheques were in breach of the mandate or authority given by the plaintiff to the defendant in relation to the operations of the plaintiff's current account maintained by the defendant. If a bank pays a cheque bearing a customer's forged signature, the bank had no authority to pay and was not entitled to debit the customer's account unless the customer, like the plaintiff here, was estopped or precluded from placing reliance on the forgery or want of authority by the customer's own representation, as recognised by equity[177].

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[175] [1988] 3 MLJ 218.

[176] [2016] 2 CLJ 158; [2015] 1 LNS 801.

[177] Section 24 of the BOEA 1949 provides that the forged signature renders the cheques in question to be wholly-inoperative as against the bank.

In this case, the defendant was not entitled to debit the plaintiff's account for the cheques. The defendant ought to repay the sum of RM 30,004,775.27 with costs and interest to the plaintiff.

When a paying banker pays to the wrong person, the BOEA 1949 protects it from losing the right to debit his customer's account.

However, before the banker can avail himself of this protection, certain conditions must be fulfilled as follows.

1. A banker is not liable if he pays a cheque in due course under section 59 of the BOEA 1949 - Payment in due course means payment made at or after the maturity of the bill to the holder in good faith and without notice that his title to the cheque is defective.
2. Under section 60 of the BOEA 1949, the banker is not prejudiced by the forgery if he pays a cheque drawn on him in good faith and in the ordinary course of business.
3. Section 80 read together with section 79 of the BOEA 1949 which section 79 sets out the duties of bankers regarding the payment of crossed cheques.
4. If the paying banker pays a crossed cheque in good faith, without negligence and according to the crossing, he is not liable under section 80 of the BOEA 1949 - The banker would lose this protection if he pays the cheque otherwise than in accordance with the customer's mandate or if he has acted negligently.
5. The paying banker is protected if he pays a cheque, which is not indorsed or is irregularly indorsed, in good faith and in the ordinary course of business under section 82 of the BOEA 1949.

In the case of *Slingsby v. District Bank*[178], the executor of an estate signed a cheque for £5,000 in favour of "Pay J P & Co or order", a firm of brokers. There was a large gap between the payee's name and the printed words "or order". The cheque was altered by a third party who wrote in the gap "per C & P", indorsed the cheque with the names C & P and paid it so altered into the W Bank to the credit of a company in which he was interested, and which had an account at that bank. Executors sued the bank for conversion, negligence and breach of duty. In this case, court held that executor did not breach duty of care to bank by leaving a gap after the name of the payee. It was not normal practice for a customer to draw a line through a space after the payee's name.

[178] (1932).

Protection of Collecting Bank

The banker to whom a holder of a cheque presents the cheque for the credit of his account is called the collecting banker. The duty of the collecting banker is to collect the amount stated in the cheque from the drawer's bank (the paying banker). In other words, a collecting bank is one that takes money from the writer of a cheque's account on behalf of the person who has deposited the cheques.

The banker's duties in relation to the collection of cheques concerns:

1. using reasonable care and diligence in presenting and securing payment of such cheques; and
2. giving prompt notice to its customer if cheques paid in by him for the credit of his account or cashed for him by the bank are dishonoured.

A collecting banker may be liable to his customer for breach of contract, for example, when he fails to collect when instructed to do so. He may also be liable to the true owner for wrongful conversion when he collects improperly on behalf of a customer who is not entitled to the money.

When a claim is brought against a bank claiming it has collected the proceeds of a cheque for someone who was not entitled to it, the most common defence pleaded by the bank is the statutory defence under section 85 of the BOEA 1949.

Section 85(1) of the BOEA 1949 provides:

"Where a banker, in good faith and without negligence— (a) receives payment for a customer of an instrument to which this section applies; or (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself, and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof."

Protection is given to the collecting banker in the following situations under Section 85 of the BOEA 1949.

1. When the banker acted for a customer - The protection would be lost if an employee knew that the customer's title to the instruments was defective.
2. When the banker acted in good faith - The requirement of acting in 'good faith' is easily satisfied by the collecting bank if the employees of the bank act honestly regarding the bank collection of the instruments paid in by the customer.
3. When the banker acted without negligence - The onus of proving the absence of negligence rests on the bank since the bank is relying upon this defence.

In the case of decision of *Micro Nutrition Specialties Sdn Bhd v. RHB Bank Berhad*[179] by referring to *Affin Bank Bhd v. Successcom Enterprise Sdn Bhd*[180] where the Court of Appeal states that "section 85 provides a statutory defence to collecting banks in respect of claim made by true owners of cheques, whether brought in conversion or for money had and received. Section 85 of the Act relieves a collecting bank from liability."

[179] [2017] 1 LNS 673.

[180] [2009] 4 CLJ 764; [2008] 1 LNS 473; [2009] 1 MLJ 36.

When Payment Should Be Refused?

Payment should be refused when:

1. cheque is undated;
2. cheque is stale;
3. the instrument is incomplete or not free from doubts;
4. cheque is post-dated and presented before that date;
5. customers account is overdrawn;
6. customer has died or declared insolvent or lunatic;
7. cheque contained material alterations;
8. cheque is mutilated.

Defences to a Claim on a Cheque

The defences to a claim on a cheque can occurs when (1) no notice of dishonour, (2) alterations on a cheque, (3) forged signature, (4) defendant's contractual incapacity, (5) cheque incomplete when signed, (6) fraud, (7) cheque delivered upon a condition, (8) duress or coercion, as well as (9) undue influence.

No Notice of Dishonor

If the holder of a cheque presents it for payment and it is not paid, he should give prompt notice of dishonour to the indorsers to retain their liability. Notice of dishonour may be given as soon as the cheque is dishonoured. The notice must be given within a reasonable time thereafter.

Alterations on a Cheque

If a cheque has been materially altered without the drawer's authority, the drawer will be discharged from liability. This means that if the banks pay on a cheque which has been materially altered, the bank cannot debit the drawer's account for the cheque.

Forged Signature

Forgery is the act of making a false document in order that it may pass or be used as genuine. A document is false if the whole, or a material part of it, purports to be made by, or with the authority of, a person who did not in fact make it or authorise its making.

In the case of *Robinson v. Midland Bank*[181], it was held that an unauthorised signature will amount to a forgery if it is placed on a cheque for a fraudulent purpose.

In the case of *Syarikat Islamiah v. Bank Bumiputra Malaysia Bhd*[182], the sole proprietor of a firm trading as Syarikat Islamiyah (the plaintiff) applied for leave to enter final judgment against BBMB (the defendant) for the recovery of RM 26, 800-00. The plaintiff was a customer of BBMB and maintained a current account. BBMB paid out a sum of RM 26, 800-00 on 6 cheques purporting to have been drawn by the plaintiff payable to bearer. The plaintiff's account was debited for the said total sum from 4 September 1984 till 3 October 1984 on the 6 cheques. Summary judgment was made against the defendant and the defendant bank appealed stating that there were triable issues such as:

1. the plaintiff must prove that the cheques were forged; and
2. the defendant had paid the cheques in good faith and in the ordinary course of business and therefore was protected under section 60 of the BOEA 1949.

In this case, Court held that the BBMB's appeal was dismissed as there were no triable issue in this case and leave for judgment should be granted for the plaintiff to enter judgment against the defendant.

In the case of *Public Bank Bhd v. Anuar Hong & Ong*[183], the respondent/plaintiff, a legal firm, maintained two current accounts with the appellant/defendant bank; an office account and a client's account. The defendant's account clerk forged the signature of one of the partners on thirty-four cheques totally RM 19,000-00. The accounts clerk was prosecuted and convicted for criminal breach of trust and sentenced to a year's imprisonment. The defendant's bank appealed to the High Court after the magistrate decided in favor of the plaintiff. Court held that the signatures on the cheques were forged. Nevertheless, the respondent/plaintiff's action against the appellant/defendant bank for wrongfully allowing the encashment of the forged cheques must fail because:

1. the cheques were honoured by the defendant bank in the ordinary course of business and in good faith;
2. the plaintiff was negligent in failing to verify its monthly current account statements, monitor its cheque books and keep them in a safe place and supervise its accounts clerk.

Thus, the respondent/plaintiff had breached their contractual duty to prevent fraud. The respondent's own carelessness caused their loss and the appellant was not negligent in honouring the forged cheques.

Defendant's Contractual Incapacity

The general rule laid down in section 22(1) of the BOEA 1949 is that capacity to incur liability as a party to a cheque is co-extensive with capacity to contract. Minor and person of unsound minds are two common categories of contractual incapacity to make a contract. If a person under the age of majority is sued on a cheque, he may always plead his contractual incapacity by way of defence. When a person is sued on a contract and he defends the action on the ground of mental incapacity, he must prove not only his incapacity, but also the other party's knowledge of his incapacity.

Cheque Incomplete When Signed

A person who signs a blank cheque in the space provided for the drawer's signature but does not deliver it (for completion), is not liable on it even to a holder in due course.

[181] [1925] 41 TLR 170.

[182] [1988] 3 MLJ 218.

[183] [2005] 1 CLJ 289.

Fraud

Fraud is defined in section 17 of the Contracts Act 1950. The provision provides:

> *"Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract."*

If the plaintiff himself obtained the cheque by fraud, this would be a defence to any action brought by him. A party whose signature was obtained by fraud can escape all liability by proving that his signature was a nullity.

Cheque Delivered Upon a Condition

If the condition of a cheque is not fulfilled, the drawer is entitled to plead the non-fulfilment of the condition by way of defence.

Duress or Coercion

Coercion is defined in section 15 of the Contracts Act 1950. The provision reads:

> *"Coercion" is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."*

If the plaintiff himself obtained the cheque by duress or coercion, this would be a defence to any action brought by him.

Undue Influence

Undue Influence is defined in section 16 of the Contracts Act 1950. If the plaintiff himself obtained the cheque by undue influence, this would be a defence to any action brought by him. Section 16(1) of the Contracts Act 1950 provides:

> *"A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."*

Comparison with Indonesia

In contrast to Malaysia, Indonesia uses the word "check", and it brings the similar definition.

Definition and Legal Basis for Check in Indonesia

Check is way of payment or transaction instruments issued by banks as a substitute for cash.[184] A check letter is a document that contains unconditional orders to banks that maintain a customer accounts to pay a certain amount of money to a certain person or those appointed by the bearer. Withdrawal using a check means withdrawing funds in cash, therefore checks also function as a means of payment. if the checking account holder wants to withdraw cash, the checking account holder can withdraw the funds by using a check.

The withdrawals of check can be conducted at the bank that issued the check or at another bank if possible. In the event that a check is drawn through the issuing bank the bank must pay as long as the funds are available. Withdrawing checks to a bank that is not an issuing bank, but through another bank, the means of withdrawal will be charged to the issuing bank. The facilities for collecting checks from other banks are carried out through a clearing agency, if the bank that collects the check and the issuing bank are at a different clearing area, the bank tha receives the check can send it to the branch the bank in question to be billed or charged through the clearing agency where the check was issued.[185]

184

185 Ismail, 2011, *Perbangkan Syariah,* Kencana Pres, Jakarta, Hlm-56

In taking or withdrawing a check, if there is a difference in writing between letters and numbers as regulated in the provisions of Article 186 of the Trade Code, the amount that applies is the amount that is written. And if there is a difference both in letters and numbers, then the smallest number or nominal in the check applies.

The legal basis for regulating checks is stipulated in articles 178 to 229 of the Trade Code. In addition, there are additional explanations contained in a Bank Indonesia provision letter. Article 178 of the Trade Code stipulates the requirements for checks as securities, are:

1. there must be a check word in the language used to formulate the content of the check;
2. the check must contain an unconditional order to pay a certain amount of money;
3. the name of the person issuing the check should always be a bank;
4. designation of place of payment;
5. mention the date and place of the check withdrawal;
6. The signature of the person who wrote the check.

Thus, if the conditions above in article 179 paragraph (1) of the Trade Code are said to be an absolute requirement and if one is not conducted or applied, the paper cannot be determined to be a check. However, in articles 179 (2), (3) and (4) of the the Trade Code, checks can have specificities, as follows:

1. the place of payment is not explicitly stated, so the place of payment is considered the place mentioned beside the name of the person who withdraws the check;
2. if the appointment does not exist, the check must be withdraw at the place where the main office (head office) of the person is located;
3. if it is stated the place where the check was written then the place mentioned beside the name of the drawer is deemed to be that place.

Apart from the description above, there are also a number of things that need to be considered in using checks as a payment instrument.

1. The issuing person must provide sufficient funds in their checking account at the time the check is shown to the issuing bank.
2. If the check is drawn during the appointment period and the funds are insufficient, the check is categorized as a blank check.
3. If the check is withdrawn after the expiration date, and the funds are insufficient, the check is then is not categorized as a blank check.
4. Random writing, scratches, or changes must be signed by the issuing person.
5. Checks can only be canceled by the account owner after the deadline for appointment with a cancellation letter that is shown to withdrawing person with a minimum of information regarding the check number, withdrawal date, nominal value and the effective date of the cancellation.

Types of Checks

There are various types of checks that explain in detail below.

1. Bearer Check (*Aan Toonder*), where the bank will pay anyone who comes to use the check.
2. Order Check (Aan Order), where the bank will pay the person whose name is listed on the check.
3. Carrier Check, where the bank will treat this kind of check as a bearer check, but it is different as if the name of the carrier is erased out then the check acts as an order check
4. Postdated check, is a check that is given a date by withdrawal, so that the check concerned can only be cashed on the date stated in the check.
5. Cross check, is a check that is given a cross mark on the surface. The cross indicates to the paying bank that the check can only be

paid to a bank that is mentioned between the two parallel crosses. Thus, cross checks are only to be deposited into the account so that the check can only be cleared at the bank.

Meanwhile, in Article 214 paragraph 2 of the Trade Code, the type of cross check is determined, as follows.

1. General cross check, marked with two parallel lines and between which there is/does not contain any bank instructions/names, the check can only be paid by the payment bank to each bank that delivers it/to the payment bank of the customer who hands over the check;
2. Special cross check, namely a check in which the cross lines that also contain instructions or include the name of a bank. The consequence of a special cross check is that the issuing person can only make payments to the bank whose name is stated on the special cross check. In the event that the bank name included in the special cross check, the special cross check can be paid to the issuing customer.

   So, the purpose of marking a cross on a check is to limit the parties that can withdraw the fund from the crossed check. Thus, the issuer of the cross mark can be made by the issuer or the bearer of the check. In article 214 paragraph (5) of the Trade Code. Checks that have been marked with a cross cannot be canceled. Therefore, any cross/cross marking on the bank's name which is contained in the two parallel lines is considered as unwritten/unmarked.
3. A blank check, a blank check is a check that when submitted to the issuing bank it is to be cashed, when there is not enough funds available in the account of the check issuing customer.

Therefore, if the customer (account holder) draws a blank check three times in a row within a period of 6 months, the account must be closed immediately and the closure must be reported to Bank Indonesia. This means

that the account holder may not be in contact with existing banks either in Indonesia or abroad.

Every holder of the right to a check has the right to regress if they fail to disclose the check shown to the bank because the bank refuses to pay it, thus, by law has been given the right to sue the debtors (issuer) of the check to make payment, provided by the check in question.

Parties that Involved in Check

According to Bambang Sunggono, the parties related to the check are as follows.[186]

1. Issuer (drawer) is a person who issues a check.
2. Payee (drawee), namely bankers who are given unconditional orders to pay a certain amount of money.
3. Holder is a person who is given the right to obtain payment without mentioning their name in a check. The existence of this carrier as a result of the appointed clause (aan tonder) which applies to checks.
4. Bearer which is the person appointed to receive payment without being mentioned on the check. The existence of this carrier as a result of the clause (aan tonder) that applies to checks.
5. Order, namely a person who replaces the position of the check holder by way of endorsement, where in this case, a check is issued with an order clause by including the name of the holder in the check.

The Validity Period of the Check

As for the period of when the check is withdrawn, the drawer is no longer obliged to provide funds for the check. Article 209 of the Trade Code, if no withdrawal occurs then the interested party (bank) may pay it even after that

[186] Hermansyah, 2005, *Hukum Perbangkan Nasional Edisi ke III*, Kencana , Jakarta, Hlm -87

grace period ends. So, the check does not automatically canceled after the 70 day grace period has passed. The drawer must submit a cancellation letter to the interested bank if they does not want the payment anymore. Thus, checks are one of the securities. Therefore, the right to check can be transferred to another person by means of endorsement.[187]

Arrangements for Formal Legitimacy and Material Legitimacy of the Check Holder

Formal legitimacy is that the holder of securities is considered as the person entitled to the bill contained in the securities in format, which shows the physical form of the securities, and it can be easily and simply (visibly) proven that the holder is legitimate. For example, by looking at a series of endorsements (a row of signatures on the back of a securities that shows who is the last holder) which is continuous to the last holder, or if the securities have an order clause, the holder is the person whose name matches the writing in the security.[188]

The law is more concerned with formal legitimacy than material legitimacy. This is due to the fact that so the function of security is not hampered. Because you can imagine how difficult it would be if the transaction using securities had to be seen from its material truth. If the correctness of the material takes precedence, then each holder of securities can only be paid if the issuer is aware of the basic commitments of each recent holder. This of course will create a difficult situation where securities will lose their practical characteristics. So in the case of checking a checks, that the person holding the checkmust be considered as the person entitled to the contents of the matter.

Meanwhile, the material legitimacy is the legitimacy that sees the sholder, that is, the real person or what is contained and written in the securities, based

[187] Ibid, Hlm -88

[188] James Julianto Irawan, 2014, *Surat Berharga Suatu Tinjauan Yuridis dan Praktis,* Kencana Press, Jakarta, Hlm 24

on the basic commitment and how to obtain it. Because formally the holder is the rightful person, but the holder gets it in a way that is not based on good intention Like cheating, blackmailing, and threatening. So it is possible that it formally show that a securities holder is entitled to the invoices contained in it (such as a row of endorsements), but materially, the holder is not entitled to the securities they hold. The holder can be defined as the person with material legitimacy when obtaining these securities in an honest, lawful, good intention and legal manner in a legal event.[189]

As has been written above, the law is more concerned with formal legitimacy when compared to material legitimacy, this is solely for the sake of the payment of these securities. However, this does not mean that material legitimacy is completely ignored. This is as stipulated in the provisions of article 584 of the Civil Code which states that:

> *"Property rights over a material cannot be obtained in any other way. But with ownership. Because of attachment, expiration, and inheritance, both according to law and according to a will and because the appointment or surrender based on a civil incident to transfer property rights, is carried out by someone who has the right to exercise freedom over that existence."*

The article above regulates the method of obtaining ownership rights over an object (including securities) where one of them is through a civil incident, what is meant by the delivery of the goods must be based on legal rights in a basic contract such as sale and purchase, lease, and exchange. On the basis of civil events such as trade, leasing and exchanging, the securities can be hand over to others. Submission on the basis of a legitimate civil incident can be allowed to be a basis for material legitimacy.

This principle as stated in article 198 of the Trade Code stated:

> *"If one somehow loses a check that was under their control. Then the holder to whom the check is hold, is not required to release it, unless the check was obtained in an unlawful manner, or because of a major negligence. "*

[189] Ibid, Hlm-26.

For example, person A's check is stolen by B, and person B exchanges the check for an item with C on the basis of a legitimate exchange event, then according to the article above, C has no obligation to return it to Person A, because Person C obtain it In a way that is not against the law, so it can be said that C is the person who is truly entitled to the check materially. So that on the basis of this material legitimacy, C must be protected.

This will be different if C in obtaining the securities in a dishonest or illegitimate manner, for example, if C obtains the letter by deceiving B, then C has an obligation to return the check to Person A. So that in this case The last check holder must be able to prove that he/she got the check in a lawful way, on the basis of a civil incident and also not because of any mistake or negligence, then the holder will get protection because of material legitimacy.

Legal Protection for Blank check Holders

Legal protection for someone holding a blank check signed by a bank customer, against a check holder who cashes the check with the aim of getting payment for a civil incident committed by the issuer. form of legal protection will applied, namely the regression right. The regression right is the right of the check holder to admonish and ask for compensation and payment by the check holder who is appointed by the debtor who is in default by filing a lawsuit to the district court and an application to confiscate the collateral.[190]

On someone who issues a blank check on the basis of the agreement and makes an obligation statement. So based on the provisions of article 1267 of the Civil Code states that parties who do not fulfill the agreement can force the other party to fulfill the agreement, if this can still be done, or demand cancellation of the agreement, compensation and interest will applies.

[190] Marcella I Dapu, *Perlindungan Hukum bagi Pemegang Cek Kosong yang Dikeluarkan oleh Nasabah Bank*, Lex At Societatis, Vol III, No.4 Mei 2015, Hlm-3

This chapter provides an option for holders who do not receive payment from the issuer of blank checks so that they are not harmed by issuing as follows.

1. Implementation of the agreement.
2. Canceling the agreement accompanied by compensation.
3. Fulfillment of the dissertation agreement with compensation.

CHAPTER 4

ISLAMIC BUSINESS TRANSACTION

Introduction

Islam requires Muslim to comply with Shariah as a basis for all aspects of life. Consequently, Shariah are not only covers aspect of worship, but also the way business transactions should be conducted. Sources of Islamic law consist of:

Al-Quran	• The *Quran* is the primary source of Islamic law, as it contains instruction of Gods.
Sunnah	• The *Sunnah* is the second source of Islamic law which refers to the statements, actions, and agreements of the Prophet Muhammad.
Ijtihad	• *Ijtihad* known as legal reasoning which an untransmitted sources of Islamic law.
Ijma'	• *Ijma'* known as concensus which refers to the agreement of jurists, on a specific legal ruling of a particular act, after being subject to different legal views and opinion.
Qiyas	• *Qiyas* refer to analogy within the realm of legal reasoning.
Istihsan	• *Istihsan* is a legal practice exercised by jurists, which falls within the sphere of legal reasoning and known as preference.
Istislah	• *Istislah* refer to public interest where another legal practice is contained within legal reasoning.

Figure 4.1 Sources of Islamic law

Conditions for a Valid Contact Under Shari'ah

There are several conditions that must be met in order for a shari'ah contract to be valid. The conditions are (1) at-taraadhee, (2) Jawaaz Tasarruf al-aaqidayn, (iii) Milk al-ma'qood' alayhe, (iv) Ibaahah al-intifaa' bil mabee, (v) Maqdoor' alaa Tasleemihi and (vi) Adm al-Jahaalah

At-Taraadhee (Mutual Agreement)

Both the buyer and seller or the parties in the contract must willing agree to all details of the contract. Someone being forced to buy or sell the property invalidates the contract; however, there is an exception to this rule.

ShaykhSaalih al-Fawzaan stated:

"and if someone was justly forced into a sale, then it is legitimate. An example of this is when a judge forces someone to sell his property to pay his debt.[191]*"*

There must be ijab and qabul[192] to make a contract binding. The reason of having an aqad is to clarify and produce willingness between both party who is in contract and knowing its implications.

Jawaaz Tasarruf al-aaqidayn (Both participants are allowing to engage in contract)

Both parties can engage in the contract or business transaction. In addition, they must be free (not slaves), adults (not a child who have not reached puberty), sane and rational in enter into a contract.

Shaykh 'Uthmaan an-Najdee said:

"So the buying and selling of a child or a fool without the permission of his caretaker is invalid. If he gives permission, then it is valid, however it is not permissible to give permission without any benefit. And their transactions involving small things take effect even without permission."

[191] al-Mulakh-khas al-Fiqh-hee (2/9).

[192] Aqad.

Milk al-ma'qood' alayhe (Ownership of property being traded)

Both parties in the contract must own the property that they are trading due to the statement of the Prophet:

"Do not sell what you do not have"

However, a person may sell something on behalf of another with his permission. In this situation, he is in the place of the owner of the property, since he is authorized representative.

Ibaahah al-intifaa' bil mabee (Permissibility of the goods)

The goods in a contract must be *halal* in its origin. If the items in question are haram, therefore the sale of it or its price is also haram. As the Prophet saw stated in another hadith:

"He has prohibited intoxicants and their price, and He has prohibited maytah and its price, and He has prohibited pork and its price.[193]*"*

Maqdoor' alaa Tasleemihi (Dispensibility)

The goods in the contract must be things that can be handed over at the time of the sale. It is not permissible to sell a lost item or something that the seller is not certain if it is still in his possession or not. If the buyer is not totally capable to deliver the goods, then this is kind of *gharar.*

Adm al-Jahaalah (The absence of anonymity)

Both the goods and the price must be something clearly known to both parties in the contract. So, neither the goods nor the price may be *majhool* (unknown) as both parties must clearly know what they are receiving and what they are giving.

[193] (SunanAbee Daawood (2485); it was declared saheehby Al-Albaanee).

For example, it is not permissible to sell a baby animal in the womb of its mother, since it is not known if the baby will be strong and healthy or sickly, nor is its gender known (something that affects the price of animals), nor is it even known if the baby will survive delivery.

Principles of a Valid Contract in Islamic Business Transaction

In Islamic business transactions, the principles of a valid contract consist of the prohibition of gharar, the prohibition of riba, investments should only support practices or products that are not forbidden, the prohibition of maysir, paying and collecting of zakat, as well as the sharing of profit and loss.

Prohibition of Gharar

Gharar is the sale of probable items whose existence or characteristics are not certain, due to the risky nature which makes the trade like gambling. Under this prohibition any transaction entered should be free from uncertainty, risk and speculation.

The Arabic word *Gharar* is a broad concept that literally means deceit, risk, fraud, uncertainty or hazard that might lead to destruction or loss. All such cases involve the sale of an item which may or may not exist. Contracting parties should have comprehensive understanding of the counter values that will be exchanged as a result of their transactions. *Gharar* can be prevented in contracts by clearly identifying the item for sale and the price to avoid any ambiguity. The prohibition is needed in order to protect the weak from exploitation.

Prohibition of *Riba*

Riba is derived from the derivative word *"raba-wa"* which means "to increase; to grow; to grow up, to exceed, be more than." It is known as usury or interest.

Riba or interest in Islam is forbidden. *(Al-Quran, 2:275)* provides:

"Allah has permitted trade and has forbidden Riba".

Hence, all banking activities or business transaction must avoid interest. *Riba* arises with loan such as car loan, home loan, term loan or overdraft, hire purchase loan and personal loan; *Riba* in savings and fixed deposit account; also, *Riba* in credit card. Often *Riba* is intertwined with modern banking and finance.

From Ubaidah Bin al-samit (r.a) that the Prophet saw said:

"gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt – like for like, equal for equal and hand to hand, if the commodities differ, then you may sell as you wish, provided the exchange is hand to hand."

Investments Should Only Support Practices or Products That are Not Forbidden

Certain commodities or activities are prohibited under Shari'ah. Islamic banking regulates the involvement of investment companies in activities that are acceptable and consistent with Shari'ah law, in order to prevent the occurrence of acts prohibited by Islam. Only *halal* activities are allowed. Trade in alcohol, for example would not be financed by an Islamic bank, a real-estate loan could not be made for the construction of a casino, and the bank could not lend money to other banks at interest.

Prohibition of *Maysir*

Most Islamic scholars view *maysir* as gambling or any game of chance (including lotteries, casino-type games and betting on the outcomes of animal races). Islam has outlawed all kinds of gambling. *Maysir* refers to the easy acquisition of wealth by chance, whether or not it deprives the other.

Paying and Collecting of *Zakat*

Wealth, property, and material possessions are regarded as God's blessings in Islam. A paying zakat on one's business wealth is based on the Islamic concept of wealth being bestowed by Allah, the real owner of all wealth, as a trust. In general, the studies on Zakat almost agree on many things, especially on the types of zakat, *Nisāb* (taxable limit) and haul, eligibility (Muslim and full ownership). Business entities such as Islamic bank business is considered as a vehicle to create value added or the wealth of individual, for which zakat levies should be applied provided all requirements be fulfilled.

The Sharing of Profit and Loss

Islam encourages Muslims to invest their money and to become partners to share profits and risks in the business instead of becoming creditors. The concept of Islamic banking is the risks and profits of financing business initiatives should be shared by the depositor, the bank, and the borrower. This is in contrary to the interest-based commercial banking system, in which the borrower bears all of the risk: he must repay his loan with the agreed-upon interest, regardless of whether his business succeeds or fails.

Types of Shari'ah Contracts

According to Islamic law, shari'ah products are based on specific types of contracts. Thus, this part discusses 11 different types of shariah contracts.

Musyarakah (Partnership/Joint venture)

A form of partnership is where two or more person combine each their capital or labour or creditworthiness together to share the profits, enjoying similar rights and liabilities. In the other words, *Musyarakah* refers to a partnership or a joint business venture to make profit. The partners, who manage the partnership, act as an agent for other partners. Profits made are shared as per an agreed ratio whereas the losses are shared in proportion to the capital and fund or investment of each partner. There are two types of *Musyarakah* which are as follows.

1. Shirkah al-Mufawadah
   a. The partners in the partnership must be an adult.
   b. It is a partnership that allows for unlimited investment.
   c. Each partner has full and equal authority to engage with the partnership funds or property.
   d. Each partner acts as the partnership's agent.
   e. The partners can be made jointly and severally responsible for the liabilities of their partnership business.
   f. Partners have the authority to act on behalf of their partners.
2. Shirkah Al-Inan
   a. The partners need not be an adult.
   b. It is a limited investment.
   c. Each partner may only deal with the partnership capital in accordance with the partnership agreement and the amount of shared capital
   d. The partners act as agents for the other partner but not as guarantors.
   e. The liabilities are several, therefore it is not a joint liability.
   f. The partner is not jointly responsible for the management of the firm.

The general condition in *Musyarakah* which are as follows.

1. The capacity of the agency in which the transaction contracted for must be able of accepting the concept of agency.
2. The determination of the profit-sharing ratio must be set in advance because it is part of the contract's subject matter, and ignorance may render the contract void.
3. Profit-sharing must be based on a ratio instead of a fixed amount.

Mudharabah (Profit Sharing)

An arrangement whereby the owner of some property gives a specified amount of capital to another person, who is to act the entrepreneur to trade with the capital, the profit to which will be shared between the two parties according to the terms of the agreement. It is a form of partnership in which one party contributes funds while the other (mudarib) contributes skills and management.

Profits are divided into two parties on a pre-determined basis, while losses are borne by the capital provider. It is forbidden for a mudarib to accept his share of the profit without informing the capital owner. Mudharabah is classified into two categories as follows.

1. Mutlaqah
   Mutlaqah is an unlimited mandate mudharabah in which the employer has given the employee absolute discretion in all business affairs.
2. Muqayyadah
   Muqayyadah is a limited mandate mudharabah in which the owner places restrictions on the workers' activity in relation to the capital provided.

The conditions of *mudharabah* that must be fulfilled are as follows.

1. Ijab and Qabul (*Sighah*).
2. There must be a business.
3. The parties must have the capacity to enter into contract of agency (e.g.: sound mind and attained the age of majority). The difference in religion of the parties does not affect the relationship.
4. The profits not be an ambiguous and must in ratio form.
5. The capital shall be delivered to the worker and must be fixed.

Murabahah (Mark Up)

Murabahah is the practise of selling goods at a price that includes a profit margin that both parties agree on. The seller must disclose the actual price of the goods to the buyer, including the purchase price, selling price, and other costs incurred, as well as the profit margin, at the time of the sale agreement.

The condition of *Murabahah* as below.

1. The financial institution purchases the goods from the seller and sells them to the buyer on a deferred payment basis.
2. Depending on acceptance, the financial institution may either purchase the items before obtaining a promise from the buyer.
3. The goods must exist at the time of the buyer's purchase.
4. The mark-up charged by the financial institution is agreed upon and disclosed to the buyer.
5. The financial institution is normally not allowed to impose any additional fees because of the buyer's payment delays.

Al Wakalah (Agency)

Wakalah is a contract in which a legally competent person authorises another to act on his behalf and perform a lawful activity. A *wakil*[194], is someone who establishes contractual and commercial relations between an *asil or muwakkil*[195] and a third party for which he can receive a commission. *Wakalah* is a non-binding contract.

The main purpose of *wakalah* is to facilitate economic dealings between a principal and third party when the principal is unable to do it personally or he is not willing to perform by himself. Both the principal and the agent may withdraw from the contract of agency at any time. A *wakalah* contract must have all the following elements:

1. The principal and agent;

[194] an agent.

[195] a principal.

2. The *ijab*[196] and *qabul*[197] to enter into *wakalah* contract[198]; and
3. The subject matter of the wakalah contract.

Types of *Al Wakalah* are as follow.

1. Unrestricted Wakalah
   Unrestricted *wakalah* also known as general agency which is a type of contract in which a principal delegates full authority to an agent to perform a series of transactions on his behalf. For example, a principal may delegate an agent to purchase the house, lease it to others and collect the rental on monthly basis.
2. Restricted Wakalah
   Restricted *wakalah* is a type of agency in which a principal authorizes an agent to do a specific task on behalf of him. For example, someone delegates an agent to sell his van at certain price. In this case, the agent's authority is limited to sell that van at given price.
3. Absolute Wakalah
   Absolute *wakalah* includes an unrestricted power given to the agent by the principal. Absolute agency, however, is generally bound by *urf* (usual practices) and the principal's interest.
4. Particular wakalah
   In particular *wakalah*, the principal shall specify a certain condition(s) for the acts of the agent so that, if he fails to comply with the main order, his activities shall not bind the principal. Some scholars believe that if an agent acts against the principal's authority but in good faith, his actions will not be regarded as a breach of the agency's contract.

[196] Offer.

[197] Acceptance.

[198] Offer and acceptance must be expressed orally, in writing or any other method recognized by Syariah.

Bay' Bithaman Ajil (Deferred Payment Sale)- BBA

BBA is a type of contract in which both parties agree to sell products on a delayed payment basis at a price that includes a profit margin. It's a contract in which the purchased item is provided immediately, and the price is paid in instalments. Theoretically, in the contract of BBA, the bank sells the house to the customer at a mark-up price, whose content consists of the cost price plus a profit margin the bank wants to make over a specified financing period, i.e. 30 years.

BBA has been the most prevalent home finance mode in Malaysia since the establishment of Islamic banking in 1983. An Islamic bank can obtain the market rate of interest by applying a discount rate. The following are the requirements that must be met under BBA.

1. Seller
2. Buyer
3. Goods
4. Price.
5. *Ijab* and *Qabul*

It is necessary to include the terms and conditions of *al-bay*, such as the purchase and sale prices, the rights and duties of a seller and buyer, consideration, etc. Any uncertainty and ambiguity about the principles of a sales contract can be rendered the contract as null and void.

Bay Salam (Deferred Delivery Sale)

Salam refers to a transaction in which the payment is paid immediately for goods that will be delivered later but are stated in the contract. The buyer pays the seller in cash and arranges for delivery of the goods at a specific time. This sale applies for goods only hence gold, silver, or currencies are not permitted. *Salam* has six requirements.

1. The transaction is considered *Salam* if the buyer has paid the purchases price to the seller in full at the time of sale.

2. *Salam* can be affected in those commodities only the quality and quantity of which can be specified exactly.
3. *Salam* cannot be impacted by a specific commodity or a product of a certain land or farm.
4. It is also necessary that the quantity of the commodity is agreed upon in unequivocal terms.
5. *Salam* cannot be affected in respect of things which must be delivered at spot.
6. The quality of the commodity is fully specified.

Bay Istisna (Manufacturing Sale)

A Bay Istisna, also known as a contract with a manufacturer, offers both raw materials and labour to produce and deliver a specific product at a predetermined price. For example, contracts to manufacture goods, manufactures or processes them, or construct a house or other building. Bay Istisna can be categorized into two types which are as follow.

1. Classical Istisna

   The classical *istisna* has the following mechanism.

   a. The buyer approaches the seller to construct a specified asset for him. They agree on specifications of the asset, the price and the date of delivery at the time of contract execution.
   b. The customer pays the price to manufacture in cash or instalments according to their agreement.
   c. After the completion of manufacturing process, the manufacturer delivers the completed asset to customer on delivery date.

2. Parallel Istisna

   The parallel *istisna* contract involves three parties and it consists of two separate contracts. The first contract is between the ultimate purchaser and the seller, where the seller is responsible to deliver the asset to customer according to given specifications. The second istisna contract is between the seller (as buyer) and the manufacturer of the asset.

Al Ijarah Thumma al Bay (Hire Purchase)

There are two contracts concerned with this concept and completed one after the other. The first contract is a lease or renting contract, also known as an (ijarah), while the second is a purchase contract (bay). *Ijarah Thumma Bay* is often used to purchase consumer goods, particularly vehicles. The initial contract is entered into by a consumer, who leases the vehicle from the owner (bank) at an agreed-upon rental rate for a specified period. The second contract takes effect when the bank sells the vehicle to the customer at the agreed-upon sale price at the completion of the lease period. In this case, the consumer has the option of purchasing the products directly from the owner (financial institution).

Takaful

Section 2 of the Takaful Act 1984 defines Takaful as

> *"A scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose."*

Takaful is a Shari'ah-compliant type of financial protection and other risk protection under general and life insurance. Members (policyholders or participants) each contribute a specific amount of money to a shared fund in order to collaborate for the greater benefit. The aim of a contributor is to aid members who are in need. The community pooling system, which is founded on the law of big numbers, divides losses and spreads liabilities. *Takaful* is based on the concept of *ta'awun* and *tabarru'*, where risk is shared jointly and freely by a group of participants. The word '*tabarru'* means 'donation' or 'charity'. A given amount of a participant's donation is considered as Tabarru'

in a Takaful contract and deposited into a *tabarru'* fund to pay claims for fellow participants who suffer misfortune.

Qardul Hassan (Benevolent Loan or Interest Free Loan)

A loan is made on the basis of goodwill. Islam forbids lending or borrowing money to gain interest. Under this arrangement, a loan is made on a goodwill basis for a set period of time, and the borrower is only required to repay the amount borrowed. However, the borrower may, at his discretion, pay an additional sum (without promising) as an expression of appreciation to the lender.

Tawarruq (Commodity Murabahah)

Tawarruq is the purchasing of a product on a deferred payment basis through *Bai' Muswamah* or *Murbahah*. It has two stages of transaction. The product is then sold to a party other than the original seller for cash.[199] The requirements of the tawarruq are as follow.

1. A *tawarruq's* selling and purchase contracts must fulfill all of Shariah's requirements for a valid sale and purchase contract.[200]
2. All *tawarruq* sale and purchase contracts must be performed by entering into a separate and independent sale and purchase contract.[201]
3. Each sale and purchase contract in the *tawarruq* must be proved by sufficient documentation or record.[202]
4. The purchaser of each tawarruq selling and purchasing contract shall have the right to take delivery of the commodity.[203]

[199] Bank Islam, 'Application of Shariah Contracts in Bank Islam's Products and Services' <www.bankislam.com.my>.

[200] Bank Negara Malaysia, 'Tawarruq' (2018).

[201] Malaysia (n 201).

[202] Malaysia (n 201).

[203] Malaysia (n 201).

5. The *tawarruq* sale and purchase contract shall not have any terms and conditions that prohibit the purchaser from taking delivery of the commodity or create any obligation on the purchaser to sell the underlying asset.[204]
6. Before entering into the sale and purchase deal, no part of the deferred selling price, including interest, shall be paid to the seller.[205]

Comparison with Indonesia

This part discusses Indonesian Islamic business law, the sources, the legal terms of a business agreement in Islamic law, and the scope of Islamic business law.

Introduction to Islamic business law in Indonesia

Islamic business law is a legal dimension in business activities based on Islamic law. Law is understood as a set of rules that have sanctions and are made by the authorities in order to create peace and harmony in the community. Islamic law as a legal system that comes from Allah Ta'ala has the same function, which is to provide benefit and good to society. Islamic law has a unique characteristic which is not only limited to benefit in the world but also salvation in the afterlife. The application of business law in Indonesia itself is widely used to develop business within the scope of building a sharia economy based on Islamic values sourced from the Al-Quran.

Islamic business law itself also has several characteristics, namely as follow.[206]

[204] Malaysia (n 201).

[205] Malaysia (n 201).

[206] Mardani, 2017, *Hukum Bisnis Syariah*, Pranada Media, jakarta, Hlm. 5.

1. Applicable universally

The characteristics of the validity of Islamic business law apply universally, namely the values and norms that exist in Islamic business law, can be applied anywhere, anytime, and by anyone. It is based on a map of the spread of Muslims in almost every part of the world, therefore the existence of Islamic business law will exist where there are Muslims in it. Islamic Business Law has both halal and haram aspects, so every business activity to be carried out must be based on Islamic sharia, whether it is permissible or otherwise prohibited (*halal/haram).* On this basis, it has two features. First: It is worldly and based on actions that are visible and have nothing to do with what is hidden in the human mind. The second is *Ukhrawi,* meaning there is blessing or pahala for those who carry out the Shari'a and punishment for those who break it.

The basic principles in Islamic Business Law never change such as *an-taradhin* (mutual consent) in various transactions or buying and selling, rejecting haram stuff, avoiding sin, maintaining rights, and also implementing individual responsibility and obligation. Meanwhile, the *fiqh* dimension which is based on *qiy*as or analogy and aims at maintaining benefit and (good) customs can change according to the needs of the times, the benefit of humans and different environments in the context of space and time as long as the law exists in the appropriate area and in accordance the objectives of the Shari'a (*maaqashid asy-syari'ah*) and its correct principles. This is what is meant by the rule: "The law changes according to the changing times" (*taghayyur al-ahkam bi taghayyur al-azman).*

The teaching of Islam is universal, they cover the limitless realm, unlike the teachings of the previous Prophet. Islamic Business Law applies to Arabs and 'ajam (non-Arabs), whites, and other people of color. The universality of Islamic law is under the ownership of the law itself whose power is unlimited, namely *Allah Ta'ala*. Besides, Islamic law has a dynamic character (suitable for every era). Evidence that shows whether Islamic law fulfills these characteristics or not must be returned to the Quran, because the Qur'an is a source of

Islamic teachings that Allah sent down to the people on earth. Al-Qur'an is also God's line of wisdom in regulating the universe including humans.

2. Comprehensive

Islamic Business Law has a comprehensive character, meaning that it regulates all aspects of the business as a whole. Not only in the contract but also in the settlement of disputes that will occur. The comprehensiveness of Islamic Business Law is reflected in the very complete rules regarding the beginning of the contract, the process of implementing the contract until the end of the contract. This comprehensiveness makes this legal dimension perfect for all aspects of life. As a comprehensive business law system, Islamic Business Law will be able to provide solutions to various business problems, whether they are currently happening or not. This is because the equipment of this system is complete. So there will never be a business model that cannot be resolved by Islamic business law.

Sources of Islamic business law

Sources of law that exist in Islam and statutory regulations that have the dimension of Islamic/ sharia law. In general, the source of Islamic Business Law is the entire Islamic/ Shari'a law in the Al-Qur'an and As-Sunnah. In addition, there are legal propositions which are a form of the method of *ijtihad* such *as qiyas, ijma ', mashlahah, istishab, syar'u man qablana, qaul ash-Shahabah and' Urf.* [207]

1. Al-Qur'an

Al-Quran is a gift in the form of book from Allah Ta'ala that was revealed to the *Prophet Muhammad Shalallahu Alaihi Wassalam* in Arabic which aims to benefit life in the world and the afterlife.

[207] Rohidin, Pengantar Hukum Islam dari Semenanjung arabia sampai Indonesia, UII Press, Yogyakarta, Hlm 91.

2. Hadith

Al-Hadith is everything that is relied on by Rasulullah Sallallau Alaihi Wassalam doings, both in the form of words, deeds, characteristics and taqrir. Al-Hadith is a synonym of As-Sunnah which means the legacy and way of life of the Prophet sallallaau Alaihi Wassalam.

3. Ijtihad

Ijtihad is the seriousness of a *mujtahid* (expert in Islamic law) to produce and establish a law in Islam, the procedure used by the mujtahid in stipulating it is called ijtihad, namely the process of producing a legal conclusion in Islam. As a method, ijtihad is the argument in the determination of Islamic law, especially in matters where the law is not stipulated in a *sharih* (clear) manner in the Al-Qur'an and As-Sunnah. Dalil is a guide that will convey to the source of Islamic law (mashadir), namely the Al-Qur'an and As-Sunnah. Ijtihad consists of several types, namely: *ijma, qiyas, istihsan, maslahah mursalah, urf, istishab, syar'u and qablana.*

The Legal Terms of a Business Agreement in Islamic Law

The term Akad or contract comes from Arabic which means a bond or a conclusion, both visible (*hissy*) and invisible (*ma'nawi*) agreement. Meanwhile, a contract and *akad* are an agreement or joint commitment, whether oral, gesture, or written between two or more parties which have binding legal implications The difference in the prevailing legal system makes the terms of the contract differ depending on the validity of the system. If the parties agree to enter into an agreement with the codification of national law, then the provisions of the 1320 Civil Code will apply. If the parties want the agreement to be made based on Islamic law, the provisions of the contract based on Islamic law will apply.

The formulation of the contract above indicates that the agreement must be an agreement between the two parties with the aim of binding themselves with the actions that will be carried out in a manner after the contract is

effectively enforced. As for the legal terms of the agreement, such as the following.

1. The subject of the Engagement (Al'Aqidin).

The objects contained in the agreement according to Islamic law are at least two people who bind themselves to one another. Both parties are required for an agreement to be valid. Eligibility is realized with several conditions, namely as follow.

a. The ability to distinguish between good and bad, that is, when the parties are sensible and considered as baligh and are not in an unfortunate/disabled state, people who are unable because they are considered as mentally incapable or bankrupt are not valid to make an agreement.
b. Free to choose, the contract made by the person under coercion is not valid, if the coercion is proven. For example, people who are in debt and need to transfer their debt, or people who go bankrupt are then forced to sell their goods to cover their debts.
c. The contract is deemed valid if there is no khiyar (right to choose/ decide), such as khiyar syarath (the right to choose sets requirements), khiyar ar-ru'yah (right to decide the point of view) , etc.

2. The existence of the binding object (Mahallul 'Aqd)

The object of the contract is the goods or services agreed upon in the agreement in question. In Islamic law, there are several conditions that an item can become the object of the agreement, namely as follow.

a. These items must be pure or, although unholy/impure (*najis*), can be cleaned. Therefore, this business contract cannot be applied to unholy objects in a *dzati* manner, such as carcasses. Or objects that are unholy but cannot possibly be cleaned, such as vinegar, milk, or similar liquids that are considered in contact with *najis*/unholy items.

b. The item must be able to be used in a prescribed manner. As the legal function of a commodity becomes the basis for the price value of the commodity. All useless commodities such as junk goods that cannot be used or useful things but are forbidden, such as liquor, cannot be bought and sold.

c. The commodity in question must be able to be handed over. It is illegal to sell goods that do not exist, or exist but cannot be handed over, because that is a *gharar,* and it is prohibited.

d. The item being sold must be completely the property of the person who conducts the sale. Items that cannot be owned are cannot be traded.

e. The person who conducts the sale and purchase contract must know the form if the goods are sold directly. The size, type, and criteria must be known if the goods are in complete ownership but not at the transaction location.

3. *Ijab* and *Kabul* (*Sighat al-'Aqd*)

What is meant by the declaration of the *akad* / contract is an act carried out by a person who performs the *akad* to show their desire that the contract must contain handover (*Ijab-Qabul*). *Ijab* (declaration of handover) is expressed first and *qabul* (acceptance) is disclosed later.

The conditions of *ijab and qabul* will have legal consequences such:

a. *Ijab and Qabul* must be declared by a person who has at least reached the age of *Tamyiz* who is aware and knows the contents of what he is saying so that his words truly express his desire. In other words, it is must be done by someone who is capable of taking legal action.

b. *Ijab and qabul* must be fixed on an object which is the object of the agreement.

c. *Ijab and Qabul* must be in direct contact in the audience of an assembly if both parties are present.

Scope of Islamic Business Law

The scope of Islamic business law includes all laws relating to interactions between humans, especially in the field of business. However, more narrowly, several kinds of sharia business scopes apply in Indonesia.[208]

Sharia Banking

The sharia banking system has emerged and developed in Indonesia since 1990, but due to limited legal rules governing the legality of sharia banking institutions in Indonesia, at that time the Indonesian sharia banking institutions did not grow and develop as planned. Then, the new sharia banking system was granted legality in Indonesia through the promulgation of Law Number 10 of 1988 concerning Banking which regulates more comprehensively about aspects of banking including sharia banking.

Sharia banking only got strong legality after the government passed Law Number 21 of 2008 concerning Sharia Banking. Sharia Banking is everything concerning Sharia Banks and Sharia Business Units, including institutions, business activities, methods, and processes in carrying out their business activities. Sharia banking in conducting its business activities is based on Sharia principles, economic democracy, and prudential principles.

Islamic banking based on article 4 of Law Number 21 of 2008 concerning Sharia Banking has the following functions.[209]

1. Sharia banks are required to carry out the function of collecting and financing public funds.
2. Sharia banks are allowed to carry out social functions in the form of a baitul mal institution, namely receiving funds originating from *zakat, infaq, sodaqoh*, grants, or other social funds and distributing them to a *zakat* management organizations.

[208] Andri Soemitra, 2017, *Bank dan Lembaga Keuangan Syariah,* , Kencana Press, Surabaya, Hlm 11

[209] Pasal 4 Undang-Undang Nomor 21 Tahun 2008 Tentang Perbangkan.

3. Sharia banks may collect social funds originating from *waqf* and channel them to the *waqf* manager (*nazhir*) according to the wishes of the waqf giver (*wakif*).
4. Implementation of other social functions

Meanwhile, Islamic banking business activities include as below.

1. collecting funds in the form of Deposits, Savings, or other equivalent forms based on *Akad wadi'ah* or other Akads that do not conflict with Sharia Principles.
2. collect funds in the form of investments from deposits, savings, or other equivalent forms based on the *akad mudharabah* or other contracts that do not conflict with the Sharia Principles.
3. distribute profit-sharing financing based on the *Akad mudharabah, Akad Musyarakah,* or other Akad that is not contradictory to the Sharia Principles.
4. distribute Financing based on *Murabahah Akad, Salam Akad, Istishna 'Akad ,* or other Akads that are not contradictory to Sharia Principles.
5. distribute movable or immovable property leasing to Customers based on an *ijarah Akad* and/or lease-purchase in the form *of ijarah muntahiya bittamlik* or other Akads that are not against the Sharia Principles.
6. Debt takes over based on the hawalah Akad or other Akad that is not against the Sharia Principle.
7. conducting a debit card and/or financing card business based on Sharia Principles.
8. Purchasing, selling or insuring at own risk third party securities issued on the basis of real transactions based on sharia principles, such as *ijarah, musyarakah, mudharabah, murabaha, kafalah or hafalah* akad.
9. purchasing securities based on Sharia Principles issued by the government and/or Bank Indonesia.

10. To receive payment of bills on securities and make calculations with third parties or among third parties based on Sharia Principles.

Non-banking financial industry (NBFI)

In the context of sharia business, the Non-Banking Financial Industry in question is one that has sharia principles. Sharia NBFI is a field of activity related to the insurance industry, pension funds, financing institutions, and other financial service institutions, which in practice do not contrary to sharia principles. In general, their activities do not differ from conventional NBFI. However, there are some special characteristics in which the products and transaction mechanisms are based on sharia principles.

Sharia insurance

Sharia insurance is a collection of agreements, which consists of an agreement between a sharia insurance company and the client and an agreement between them, in the context of managing contributions based on sharia principles to help and protect each other by this following.

1. providing compensation to participants or policyholders of losses, damages, costs incurred, lost profits, or legal liability to third parties that may be suffered by participants or policyholders due to an uncertain event.
2. providing payment based on the death of the participant or payment based on the life of the participant with benefits of a predetermined amount and/or based on the results of fund management.

A sharia insurance company must only conduct insurance business in the form of this following.

1. Sharia General Insurance Business, including a health insurance business line based on Sharia Principles and a personal accident insurance business line based on Sharia Principles.
2. Sharia Reinsurance Business for the risks of other Sharia General Insurance Business. A sharia life insurance company can only run

a Sharia Life Insurance Business including an annuity business line based on Sharia Principles, a health insurance business line based on Sharia Principles, and a personal accident insurance business line based on Sharia principles.

Islamic capital market

The Islamic capital market is part of the Indonesian Capital Market Industry. In general, the activities of the Islamic capital market are in line with the capital market in general. However, there are some special characteristics of the Islamic capital market, namely that the products and transaction mechanisms must not conflict with Islamic principles in the capital market. In the Islamic capital market, there are several activities that are prohibited, namely as follow.

1. *Maisir* is any activity that involves gambling where the party who wins the gambling will take the stake.
2. *Gharar* is uncertainty in a contract, both regarding the quality or quantity of the contract object.
3. *Riba* is an additional fee in exchange for ribawi goods and an addition given to the principal of a debt in exchange for absolute deferment of payments.
4. *Bathil* is a sale and purchase that is not in accordance with the law and contractual provisions (origin of the goods and its nature or not justified by Islamic law.
5. *Bai'a al ma'dun* is conducting trade of sharia securities that are not yet owned (short selling).
6. *Ikhtikar* is purchasing an item that is needed by the public when the price is high and hoarding it with the aim of reselling it when the price is higher.
7. *Tagrir* is an attempt to influence other people, either with words or actions that contain lies, to be motivated to make a certain transaction.

Sharia venture capital

Sharia Venture Capital is a financing organization that provides capital participation in a business partner company that wants to expand its business for a certain period of time (temporarily). Companies that are given capital are often referred to as investees, while finance companies that provide funds are called venture capitalists or investors. Venture capital income is the same as income from ordinary shares, namely from dividends and from income from the value of shares held (capital gain). From this understanding, it can be concluded that Sharia Venture Capital, namely investment is carried out by a Sharia financial institution for a certain period of time, after which the financial institution sells its share to the company's shareholders. The purpose of venture capital is to add value so that the venture capitalist may sell its participation with a positive return.

The concept of a sharia venture capital company is as follows.

1. The financing mechanism in venture capital is in the form of equity participation.
2. The method of profit-sharing in venture capital is carried out by sharing the profits obtained from the business activities being financed.
3. Venture capital financing products are issued by non-bank financial institutions, namely, venture capital financing companies.
4. Collateral in venture capital financing is not required, because the nature of the financing is in line with an investme.

CHAPTER 5

HIRE PURCHASE

Introduction

Hire purchase is a type of consumer law that governs the relationship between the owner and the hirer of consumer goods. The Hire Purchase Act of 1967 (herein after referred to as HPA 1967) (Revised 1978) which came into force on 11 April 1968 governs the law of hire purchase.

Section 2(1) of the HPA 1967 provides:

"Consumer goods means goods purchased for personal, family or household purposes."

A hire purchase contract is basically an agreement wherein an owner agrees to hire goods to the hirer with an option for the hirer to purchase the goods. Section 1(2) of the HPA 1967 states:

"This Act shall apply throughout Malaysia and in respect only of hire-purchase agreements relating to the goods specified in the First Schedule."

Section 2(1) of the HPA 1967 define an owner as:

"A person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner's rights or liabilities under the agreement have passed by assignment or by operation of law."

Section 2(1) of the HPA 1967 define hirer as:

"The person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law."

Section 2(1) of the HPA 1967 provides dealer means:

A person, not being the hirer or the owner or a servant of the owner, by whom or on whose behalf negotiations leading to the making of a hire-purchase agreement with the owner were carried out or by whom or on whose behalf the transaction leading to a hire-purchase agreement with the owner was arranged."

In hire purchase, the hirer only obtains possession and use of the goods but not the ownership until the hirer has fully paid off all the instalments for the price agreed upon in the hire purchase agreement.

Section 2(1) of the HPA 1967 define a *'hire purchase agreement':*

"Includes a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments (whether the agreement describes the instalments as rent or hire or otherwise), but does not include any agreement— (a) whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before delivery of the goods; or (b) under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement."

First Schedule of the HPA 1967 provides the list of goods which are:

1. All consumer goods;
2. Motor vehicles, namely:
   a. Invalid carriages;
   b. Motor cycles;
   c. Motor cars including taxi cabs and hire cars;
   d. Good vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms);
   e. Buses, including stage buses.

Requirements of Hire Purchase Agreement

Part II of the HPA 1967 contains essential requirements as to the procedure, formation and content of hire purchase agreements. Failure to comply with

the requirements of the Act would render the agreement void or in some circumstances, the commission of an offence.

The owner or his agent is required to serve the Part I documents to the potential hirer under section 4(1)(a) of the HPA 1967, whereas the dealer is required to do so under section 4(1)(b) of the Act.

The dealer has an additional obligation to serve a written statement signed by him and the potential owner (i.e. a finance company or lender) to the prospective hirer at any time after serving the written statement to the prospective hirer but before the hire purchase agreement is concluded.

In the case of *Ong Siew Hwa v. Umw Toyota Motor Sdn Bhd*[210], the plaintiff was a trader. He wanted to buy a new car (Toyota Camry). He went to the first defendant's branch in Taiping. The plaintiff made an order for the car and paid a deposit of RM 5,000.00. On 19.3.2010, on being informed that the car as ordered had arrived and he paid RM 66,706.45, making a total of RM 71,706.45 paid by him to the First defendant. The purchase price of the car was RM 151,706.45. The first defendant arranged for credit facilities for the plaintiff from the second defendant. Credit facilities for the balance of the purchase price (RM 80,000.00) were provided to the plaintiff by the second defendant. Then, the plaintiff entered into a hire purchase agreement with the second defendant. On the same day, the plaintiff took possession of the car which had been registered with the registration no. of AHC 9928. On that day itself the plaintiff encountered problems with the car. He complained to the first defendant's representative that the car was wobbling, and the steering wheel was pulling to the left side. Thereafter, the plaintiff took the said car for repairs several times. The first defendant's attempts at resolving the mechanical problems of the car were not successful, and the problems persisted. On 8.12.2010, the plaintiff left the motorcar at the first defendant's Ipoh Service Centre. In Federal Court decision, the court found that the contractual relationship between the dealer and the consumer was superseded

[210] [2018] 1 LNS 742.

by the hire purchase agreement as decided in the Federal Court case in *Ahmad Ismail v. Malaya Motor Company [1973] 1 LNS 1; [1973] 2 MLJ 66.* Section 32 of the Consumer Protection Act 1999 and section 16 of the Sale of Goods Act 1957 do not apply to make the dealer liable to the consumer. In the result, the Plaintiff's appeal is dismissed with costs. The decisions of the High Court and the Court of Appeal are affirmed.

In the case of *Credit Corporation (M) Bhd v. The Malaysian Industrial Finance Corp & Anor*[211] the court ruled that unless the hirer exercised his option to purchase by paying the whole price and performing all of his obligations under a hire purchase agreement, only then, the property in the car passed to the hirer.

In the case of *Kesang Leasing Sdn Bhd v. Mohd Yusof B. Ismail & Anor*[212], the goods in issue are computers, and the parties agreed to be governed by the Hire Purchase Act. The court decided that section 2(1) of the Hire Purchase Act did not exclude the applicability of the Hire Purchase Act's provisions to hire purchase agreements involving products that were not covered by the Act, as long as the parties to the agreement agreed to be bound by them.

In the case of *Public Bank Berhad v. Abdul Rashid Abd Majid*[213], the plaintiff bank and the defendant had entered into a hire-purchase agreement ('HP agreement') for the financing of a motor vehicle. The plaintiff sought to recover the sum and interest from the defendant based on the defendant's default under the HP agreement. The defendant had sold the vehicle to a third party. The Court of Appeal in allowing the appeal held that Section 66 of the Contracts Act provides for a discretionary remedy of restitution which the court may grant in line with the ambit of the section and within the principles of the law of contract. With reference to the factual background of this case, section 66 of the Act imposed an obligation on the part of the defendant who had received the pecuniary advantage of the hire-purchase facility either to restore the vehicle or to make compensation for it to the plaintiff. Since the return of the vehicle was now an impossibility because the defendant had sold it to a third party, an order that the defendant make monetary compensation to the plaintiff should have been made.

[211] [1976]1 MLJ 83.

[212] [1990] 1 MLJ 291.

[213] [2013] 2 MLRA 421.

Formation of Hire Purchase Agreement

The following is the process or procedure for forming a hire purchase agreement.

1. The Owner or Dealer must give to the Hirer the Second Schedule Notice

Based on the section 4(1)(a)(b) of the HPA 1967, it provides:

> *"Before any hire-purchase agreement is entered into in respect of any goods (a) in a case where negotiations leading to the making of the hire-purchase agreement is carried out by any person who would be the owner under the hire-purchase agreement to be entered into, or by any person, other than the dealer, acting on his behalf, such person shall serve on the intending hirer a written statement duly completed and signed by him in accordance with the form set out in Part I of the Second Schedule; (b) in a case where negotiations leading to the making of the hire-purchase agreement is carried out by a dealer, such dealer shall— (i) serve on the intending hirer a written statement duly completed and signed by him in accordance with the form set out in Part I of the Second Schedule; and (ii) at any time after the service of the written statement referred to in subparagraph (i) but before the hire-purchase agreement is entered into, serve on the intending hirer a written statement duly completed and signed both by him and the prospective owner in accordance with the form set out in Part II of the Second Schedule."*

According to the provisions, it provides the duty of the owner and/or dealer to give the second schedule notice to the hirer before a hire purchase agreement is signed. The purpose of giving the notice is to inform the potential hirer of the financial imposed under the hire purchase agreement. Section 4(2) of the HPA 1967 states:

"The written statements referred to in subsection (1) shall be served by delivering it in person to the intending hirer or his agent who shall acknowledge receipt of the same by signing under his hand at the appropriate column contained therein."

Section 4(3) of the HPA 1967 provides:

"Any person who has been served with the written statement or statements referred to in subsection (1) shall not be under any obligation to enter into any hire-purchase agreement and no payment mentor or other consideration shall be required from him in respect of the preparation or service of such statement or statements, as the case may be."

The agreement shall be void if the owner fails to serve the second schedule notice to the hirer, as required by section 4(4) of the HPA 1967. The clause reads:

"A hire-purchase agreement entered into in contravention of subsection (1) shall be void."

Section 4(5) of the HPA 1967 states:

"An owner who enters into a hire-purchase agreement and a dealer who carries out negotiations leading to the making of a hire purchase agreement that does not comply with subsection (1), irrespective of whether such hire-purchase agreement is void or otherwise, shall be guilty of an offence under this Act."

According to section 46(1) of the HPA 1967, the penalty for the said offence as below.

1. If such person is a body corporate, it is liable to a fine not exceeding RM 100,000, and a penalty not exceeding of RM 250,000 will be imposed for a second or subsequent offence.
2. If such person is not a body corporate but is an individual, he will be liable to a fine not exceeding RM 25,000 or to imprisonment for a term not exceeding three years or to both, and for a second or subsequent offence, he will be liable to a fine not exceeding RM 50,000 or to imprisonment for a term not exceeding five years or to both.

2. Writing

The hire purchase agreement must be in writing as stated in section 4A of the HPA 1967 which requires a hire purchase agreement to be in writing. The provision states:

"A hire-purchase agreement in respect of any goods specified in the First Schedule shall be in writing."

An agreement is deemed not to be in writing and thus void if a hand writing other than a signature or initials is not clear and legible. If the agreement is printed, the print is of a size smaller than the type known as ten-point Times. Section 45(1) of the HPA 1967 provides:

"Any prescribed document or part thereof— (a) not being the signature or initials of any person, that is in handwriting that is not clear and legible; (b) that is printed in type of a size smaller than the type known as ten-point Times; or (c) that is not printed in black, shall, for the purposes of this Act, be deemed not to be in writing."

As stated in section 45 of the HPA 1967, it provides a hire purchase agreement shall be in writing and printed in black.

Furthermore, section 4A(1A) of the HPA 1967 provides that the agreement must be written in either the national language or English. If a hire purchase agreement is not in writing in the national or English language, it is void, by virtue of section 4A(2) of the HPA 1967.

3. Signed

A hire purchase agreement must be signed by or on behalf of all parties to the arrangement, pursuant to Section 4B(1) of the HPA 1967. The provision read:

"Every hire-purchase agreement shall be signed by or on behalf of all parties to the agreement."

Signing of blank forms by a hirer, a common practice in the past, is now outlawed. Section 4B(2) of the HPA 1967 states that the hire purchase agreement or other forms or documents must be duly completed before the intending hirer or his agent is required to sign thereon. The provision states:

"No owner, dealer, agent or person acting on behalf of the owner shall require or cause any intending hirer or his agent to sign a hire-purchase agreement or any other form or document relating to a hire-purchase agreement unless such hire-purchase agreement, form or document has been duly completed."

Section 4B(2A) of the HPA 1967 provides:

"No owner shall deliver or cause to be delivered to any dealer, agent or person acting on behalf of the owner a hire-purchase agreement or any other form or document relating to a hire-purchase agreement which has not been duly completed."

If the agreement is not signed or is signed without being completed, the agreement shall be void as prescribed by section 4B(3) of the HPA 1967.

Section 4B(4)(a) and (b) of the HPA 1967 provides failure to sign the agreement by the owner, dealer, agent, or anyone acting on behalf of the owner or who requires the hirer to sign or who delivers an incomplete agreement shall be guilty of an offence.

4. Details in the Hire Purchase Agreement

Section 4(C)(1)(a) of the HPA 1967 provides on the contents of hire-purchase agreement. The provision reads:

"Every hire-purchase agreement— (a) shall— (i) specify a date on which the hiring shall be deemed to have commenced; (ii) specify the number of instalments to be paid under the agreement by the hirer; (iii) specify the amounts of each of these instalments and the person to whom and the place at which the payments of these instalments are to be made; (iv) specify the time for the payment of each of those instalments; (v) contain a description of the goods sufficient to identify them; (vi) specify the address where the goods under the hire-purchase agreement are."

Section 4(c)(1)(b) of the HPA 1967 states:

"where any part of the consideration is or is to be provided otherwise than in cash, shall contain a description of that part of the consideration."

Section 4C(1)(c) of the HPA 1967 provides for the hire purchase agreement to provide a table containing the following information.

1. The cash price of the goods;
2. The deposit showing separately the amount paid in cash and the amount provided by consideration other than cash;
3. Delivery or freight charges, if any;
4. Vehicle registration fees, if applicable;
5. Insurance;
6. The total amount referred to above less deposit;
7. Term charges;
8. The annual percentage rate for terms charges which shall be calculated in accordance with the formula set out in the seventh schedule;
9. The total amount in items (vi) and (vii) above which is referred to as the balance originally payable nder the agreement; and
10. The total amount payable.

Section 4C(3) of the HPA 1967 states:

"An owner who enters into a hire-purchase agreement in contravention of subsection (1) shall, notwithstanding that the hire-purchase agreement is void, be guilty of an offence under this Act."

Section 4G(1) of the HPA 1967 provides that where the goods to be included in a hire purchase agreement are second-hand motor vehicles, the person intending to enter into the hire purchase agreement in respect of such second-hand motor vehicle shall declare in writing any defects of the second-

hand motor vehicle in accordance with the inspection report prepared by the relevant authority as determined by the Controller.

5. Every Item of Goods must have a Separate Hire Purchase Agreement

Section 4D(1) of the HPA 1967 requires a separate hire purchase agreement in respect of every item of goods purchased. If a hire purchase agreement are not separate for the item of goods purchased, the agreement shall be void by virtue of section 4D(2) of the HPA 1967.

6. No Alteration or Additions can be made to the Hire Purchase Agreement

After the agreement is signed by the parties, there should not be any alterations, additions or amendments made to the hire purchase agreement. According to section 39 of the HPA 1967, any alteration, additions or amendments will have no effect unless the hirer or his agent has consented by signing or initials the agreement in the margin opposite the change or, in an agreement supplemented to the hire purchase agreement. The provision states:

> *"Any alteration of, or matter added to, a hire-purchase agreement or any written document that contains the terms and conditions of the agreement after the document was signed, if the alteration is an alteration of any of the matters set out in the written statement or statements required to be served on the hirer pursuant to paragraphs 4(1)(a) and (b) before the hire-purchase agreement was entered into, shall have no force or effect unless the hirer or his agent has consented to the alteration or the additional matter by signing or initialing the agreement or the written document in the margin thereof opposite the alteration or additional matter or, the hirer or his agent has consented to the alteration or the additional matter by signing an agreement supplemental to the hire-purchase agreement."*

By virtue of section 4F(1) and (2) of the HPA 1967, if there was any alteration or modification in the construction and structure to a motor vehicle, the agreement is deemed void at the time of signing the hire purchase agreement.

7. Copies of Agreement

Section 5(1) of the HPA 1967 provides that the owner must serve a copy of the hire purchase agreement on the hirer and the guarantors within twenty-one days (21) after the making of the agreement. Section 5(3) of the HPA 1967 provides for a copy of the insurance policy should be served by the owner to the hirer. The provision states:

> *"Where any part of the total amount payable consists of an amount paid or to be paid under a policy of insurance in respect of the goods, the owner shall serve or cause to be served on the hirer forthwith a copy of the insurance payment receipt and, within seven days of receipt of the policy, a copy of the policy or statement in writing setting out the terms, conditions and exclusions of the policy that affect the rights of the hirer."*

If the owner failed to serve the copies of the documents to the hirer, he will be found guilty. Section 5(4) of the HPA 1967 states:

> *"Any person who contravenes this section shall be guilty of an offence under this Act."*

In addition, the hirer has the right to request and keep the vehicle's registration certificate, also known as the JPJ grant or registration card, which the owner or bank must provide to the hirer as stated in the section 4E(1) and (2) of the HPA 1967.

8. Deposit to be Paid by the Hirer

Section 31(1) of the HPA 1967 states:

> *"Where the minimum amount of the deposit in respect of any goods or class of goods is not prescribed, an owner who enters into a hire-purchase agreement without having first obtained from the proposed hirer thereunder a deposit in cash or in goods, or partly in cash and partly in goods, to a value not less*

than one-tenth of the cash price of the goods comprised in the agreement, shall be guilty of an offence under this Act."

There is no prescribed minimum deposit required on a hirer however, an owner must first obtain a deposit to a value of not less than one-tenth (1/10) or 10% cash price of the goods from the hirer. By virtue of section 31(1A) of the HPA 1967, upon signing of the hire-purchase agreement, the deposit is collected by the owner.

9. Booking Fees

The booking fee is provided in section 30A of the HPA 1967. Section 30A(1) of the HPA 1967 states:

"No owner, dealer, agent or person acting on behalf of the owner shall collect or accept a booking fee from an intending hirer before the receipt of the duly completed form set out in Part II of the Second Schedule by the hirer."

According to section 30A(2) of the HPA 1967, the maximum amount of booking fees is 1% of the cash price of the goods stated in a hire purchase agreement. The booking fee also shall form part of the deposit by virtue of section 30A(3) of the HPA 1967. However, if the booking is cancelled or withdrawn, 90% of the booking fee shall be refunded. Section 30A(4) of the HPA 1967 states:

"An owner, dealer, agent or person acting on behalf of the owner shall refund ninety percent of the booking fee to the intending hirer upon the withdrawal of the booking of the goods comprised in a hire-purchase agreement."

By virtue of section 30A(5) of the HPA 1967, any person who breaches this provision would be found guilty of an offence.

Statutory Rights of the Hirer

Part IV of the HPA 1967 provides the statutory rights to a hirer[214]. According to section 47 of the Consumer Protection (Amendment) Act 2010, it provides:

"The damages that a consumer may recover for a failure of goods supplied under a hire-purchase agreement to comply with a guarantee under this Act shall be assessed, in the absence of evidence to the contrary, on the basis that the consumer will complete the purchase of the goods or would have completed the purchase if the goods had complied with the guarantee."

By virtue to HPA 1967, the hirer has the following rights.

No	Provisions	The Hirer's Rights
1.	Section 9	Hirer has the right to have a copy of his financial statement (documents and information). A hirer is entitled to request the owner for a written statement pertaining to the following information: 1. The amount paid to the owner by the hirer or his agent; 2. The amount which has become due under the agreement but remains unpaid; 3. The amount which is to become payable under the agreement; and 4. The amount derived from the interest on overdue instalments. **This right can only be exercised not more than once in three months. If the hirer makes such requests more than once in three months, the owner can refuse to comply.* The owner must give the statement to the hirer within 14 days from the date he received the written request or application by the hirer.

[214] Section 9 to 15 of the HPA 1967.

No	Provisions	The Hirer's Rights
2.	Section 10	Right to require the owner to appropriate of payments made in the hire purchase agreement. The hirer is subject to appropriate payment in accordance with the agreed schedule. If the hirer fails to make such appropriation, the payment shall be appropriated towards the satisfaction of the sums due under the respective agreements in order in which the agreements were entered into.
3.	Section 11	The hirer is under the duty to keep the goods at the address stated in the agreement and not to remove it to other places. However, if the hirer intent to remove the goods from the designated site, he has the right to request a Magistrate's order for the removal of goods to a new location. On the application of the Hirer, Magistrate Court may grant an order allowing the removal of goods to a new location.
4.	Section 12	In a hire purchase, the hirer is not the owner of the goods and he has no right to assign his rights over the goods to another person. In the case of *Muhamad Haqimie Hasim & Anor v. Pacific & Orient Insurance Co Berhad*[215] and *Aqmal Dakhirrudin v. Azhar Ahmad & Anor*[216] The principles extrapolated were that i. there cannot be a transfer of interest as the car was still on hire purchase; and ii. that when the car is on a hire purchase the title cannot be transferred from one individual to another individual without the consent of the financier (owner).
5.	Section 13	This provisions provides on the right by operation of law to have his right, title and interest. This occurs on the death or the bankruptcy or winding up of the hirer. In most cases, the hirer's rights, title, and interest under the hire purchase agreement passed to his personal representative upon his death. If the hirer is a company and upon the bankruptcy or winding up, the liquidator has the same rights as the company under the agreement. This means that the liquidators are succeeded to the hirer's right and liabilities as provides in a hire purchase agreement. If the hirer is an individual and declares bankruptcy, his property, including rights, title, and interest under the hire purchase agreement, is transferred to the trustee in bankruptcy.

[215] [2018] 1 LNS 627.
[216] [2019] 1 LNS 492.

No	Provisions	The Hirer's Rights
6.	Section 14	Right to early completion of agreement complete the purchase of the goods earlier than due date. To exercise this right, the hirer must provide the owner written notice of his intention to do so on or before the date indicated in the notice. The hirer may finalise the purchase by paying or tendering the payment to the owner, i.e. the net remaining sum owing under the agreement.
7.	Section 15	Section 15(1) indicates that the hirer has the right to terminate the agreement by returning the goods to the owner at any time during normal business hours at the owner's ordinary business location or to the location indicated in the agreement for that reason. In the case of *Bridge v. Campbell Discount Co Ltd*[217] at page 398 Lord Denning said: - *"When hire-purchase transactions were first validated by this House in 1895 in Helby v. Matthews, the contract of hire had most of the features of an ordinary hiring. The hirer was at liberty to terminate the hiring at any time without paying any penalty. He could return the goods and not be liable to make any further payments beyond the monthly sum then due. There was no clog on his right to terminate. And this was one of the reasons why the House saw nothing wrong with the transaction."*

[217] [1962] 1 All ER 385.

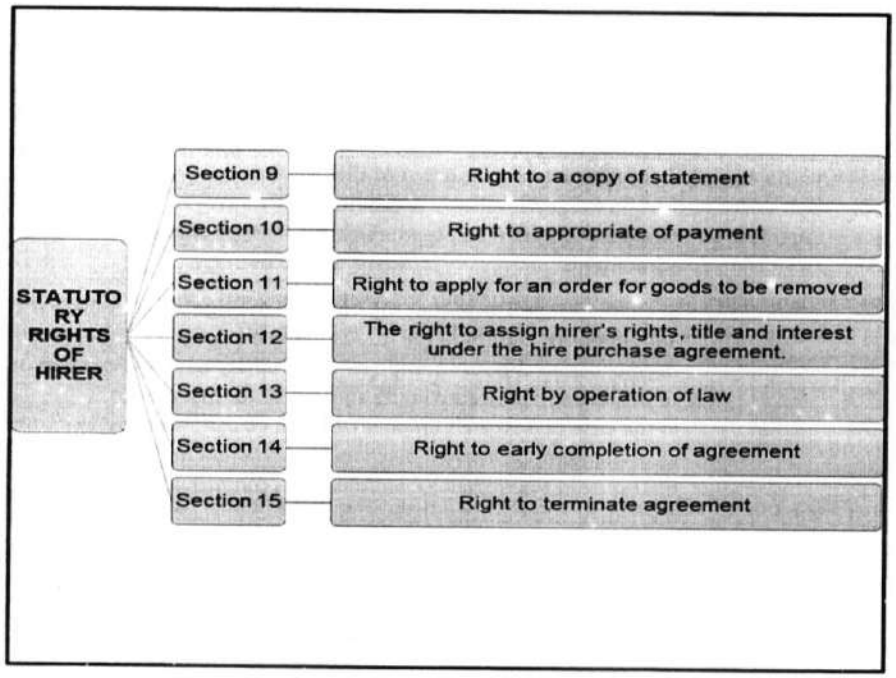

Figure 5.1 Statutory rights of the hirer

Protection for the Hirer and Guarantors

Part III of the HPA 1967 provides certain terms which are implied in a hire purchase agreement which provide protection for the hirer and guarantors.

Provisions	Protection for the hirer and guarantors
Section 7	In every hire-purchase agreement there shall be— (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods; (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass; (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass. These implied conditions and warranties cannot be excluded or modifies. However, there are exception which second hand goods (in respect of merchantable quality and fitness for purpose).
Section 7(1)(a)	The hirer shall have and enjoy quiet possession of the goods without any interference by the owner. In the case of *Jones v. Lavingston*[218], defendant (tenant) sublet the premises to the plaintiff (sub-tenant). By an agreement, not under seal, the defendant agreed to "let" to the plaintiff the premises for the term of three years. The lease between the defendant tenant and the superior landlord was subject to a restrictive covenant as to carrying on any business thereon. The plaintiff wasn't aware of this and carried on a business there until restrained by an injunction obtained by the superior landlord. In an action by plaintiff for breach of contract for quiet enjoyment. Court held that, whether any contract for quiet enjoyment could be implied from the word "let", the use of that word did not create an unrestricted covenant for quiet enjoyment which covers lawful interruption by a person claiming under title paramount. In this case, the plaintiff was not entitled to recover.

[218] 1903 1 KB 253.

Provisions	Protection for the hirer and guarantors
Section 7(1)(b)	Owner shall have a right to sell the goods at the time when the property is to pass (Implied condition as to title). In the case of *Public Finance Bhd v. Ehwan B Saring*[219], the High Court of Malaysia held that the owner should have a good title in the goods when the hire purchase contract was made and not when the final payment was made. In this case the owner of the goods did not have a good title in the goods when the hire purchase contract was made. The respondent (hirer) entered into a hire purchase agreement with the appellant (owner) in respect of the vehicle. The vehicle was subsequently seized by the Customs authorities after the hire purchase agreement was executed and the vehicle was not returned to either party. Therefore, the hirer was entitled to rescind the contract and could recover the amount of the money already paid. In the case of *Karflex Ltd v. Poole*[220], because the option to purchase might be exercised at any time after delivery, the court held that the person hiring out goods on hire purchase, i.e. the owner, should possess title at the time of delivery to the hirer.
Section 7(1)(c)	Implies warranty as to encumbrance which means the goods are free of charge from any parties other than the owner.
Section 7(2)	The goods shall be of merchantable quality. However, no such condition will be implied in the following circumstances: 1. where the hirer has examined the goods, or a sample thereof, as regards defects which the examination ought to have revealed – Section 7(2)(a) 2. if the goods are second hand and the agreement contain a statement to the effect that a. the goods are second hand; and b. all the conditions and warranties as to quality are expressly negative, and the owner proves that the hirer has acknowledged in writing that the statement was brought to his notice – Section 7(2)(b).

[219] 1996 1 MLJ 331.
[220] [1933] 3 KB 253.

Provisions	Protection for the hirer and guarantors
Section 7(3)	The goods shall be reasonably fit for that purpose—the hirer makes known to the owner the purpose for which the goods are required, the goods must be reasonably fit for that purpose, except in the following circumstances: 1. if the goods are used (second-hand); and 2. the agreement contained a clause stating that: a. the goods are second hand; and b. all conditions and warranties of fitness and suitability are expressly negative, and the owner proves that the hirer has acknowledged in writing that the statement was brought to his notice. In the case of *Lau Hee Teah v. Hargill Engineering Sdn Bhd & Anor*[221] the first respondent had breached the implied condition as to fitness for purpose. An agent of the respondent had, in fact, visited the mine and observed the work carried out. The appellant had made known for the purpose which the loader was required. However, the Court decided that "they were no defects sufficiently serious to render the loader useless for any purpose which it would usually be used. And therefore, it cannot be said that the loader was unmerchantable quality or unfit for the plaintiff's purpose."

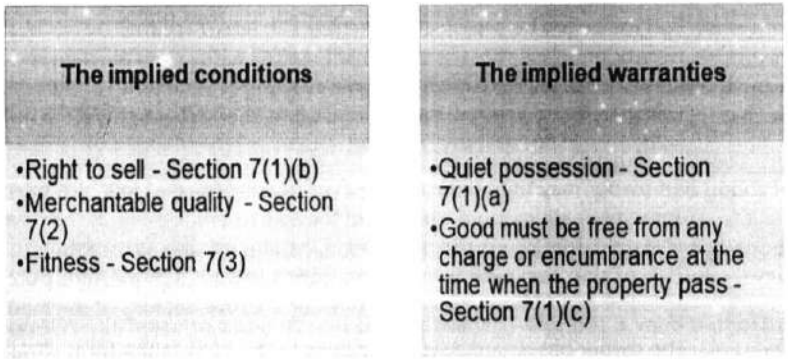

Figure 5.2 The implied conditions and warranties under section 7 of the HPA 1967

[221] (1980) 1 MLJ 145.

Repossession

Repossession is a term used to describe when the actual owner of the item that have been rented, leased or borrowed by the hirer takes the item back, either with or without compensation based on agreement that they made and agreed. Under common law, the owner has the right to recover possession of the goods if the hirer commits a breach of his obligations under the hire purchase agreement. The HPA 1967 lays down various restrictions on the power of the owner as a means of protecting the hirer.

Provisions	Description
Section 16	When goods are repossessed, notices need to be issued to the hirer. The owner has no authority to repossess a car financed through a hire purchase facility if notice under section 16(1) of the Hire Purchase Act is not delivered on the hirer. In the case of *Pang Brothers Motors Sdn Bhd v. Lee Aik Seng*[222], a car was taken by the respondent on hire purchase with the appellant. The respondent failed to pay the instalments due and the appellant issued a notice under section 16(1) of the HPA 1967. The issue arose whether the notice under section 16(1) was in fact served. Court held that section 16 clearly specifies that the period before which the seizure can take place shall be not less than twenty-one days after the service of the notice. However, the date specified in the notice was two days short of the statutory minimum and the notice was therefore bad in law even if served and its effect was therefore null and void. Appeal dismissed. An owner may not take possession of goods included in a hire purchase agreement arising from a breach of the agreement relating to the payment of instalments unless the payment of instalments amounts not more than 75% of the total cash price of the goods included in the hire purchase agreement and there have been two consecutive defaults of payment. The owner has issued a written notice to the hirer in the form stipulated in the Fourth Schedule, and the period specified in the notice has expired, which shall not be less than twenty-one days after the serving of the notice.

[222] [1978] 1 MLJ 179.

Provisions	Description
Section 16A	If the hirer returns the goods within twenty-one days of receiving the notification in the Fourth Schedule, he is not obligated to pay the cost of repossession, the cost of obtaining possession, and the cost of storage. Section 16(1A) of the HPA 1967 states: *"notwithstanding subsection (1), if the payment of instalments made amounts to more than seventy-five percent of the total cash price of the goods comprised in a hire-purchase agreement and there had been two successive defaults of payment by the hirer, an owner shall not exercise any power of taking possession of the goods comprised in the hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless he has obtained an order of the court to that effect."* Section 16(1B) of the HPA 1967 states: *"where an owner has obtained an order of the court under subsection (1A) and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice, the owner may exercise the power of taking possession of goods referred to in subsection (1A)."* Section 16(1C) of the HPA 1967 states: *"where a hirer is deceased, an owner shall not exercise any power of taking possession of goods comprised in a hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless there have been four successive defaults of payments."*
Section 17	The owner is allowed to keep possession of the repossessed goods for 21 days. After repossession the owner must not sell or dispose of the goods for twenty-one days.
Section 17A	Offence to appoint non-permit holder—Without a valid authorization provided by the Controller, no one may repossess goods that were included in the hire purchase arrangement. (Section 17A(1))

Provisions	Description
Section 18	Hirer's rights and immunities when goods repossessed as bellows: 1. Pays or tenders to the owner any sum due by the hirer under the hire purchase agreement for the contract term up to the date of payment or tender; 2. Remedies any breach of an agreement or pays or tenders to the owner the reasonable fees and expenses spent by the owner in performing any act, matter, or thing necessary to remedy the breach; and 3. Pays or tenders to the owner any reasonable costs and expenses incurred by the owner in taking possession of the goods and returning them to the hirer.
Section 19	In some cases, the hirer has the right to regain possession of the goods. The owner has no right to take possession of the goods as a result of the breach unless: 1. By written notice issued to the hirer at the time of the delivery of the goods, he details the breach and requests it to be remedied; and 2. After receiving the notice, the hirer fails to remedy the breach within twenty-one days or the time specified in the notice (whichever is longer).
Section 20	In repossessing items, the court has the authority to amend prior judgments or orders.

Process of Repossession for Motor Vehicle

The procedure of repossession for motor vehicles in Malaysia is illustrated in the Figure 5.3.

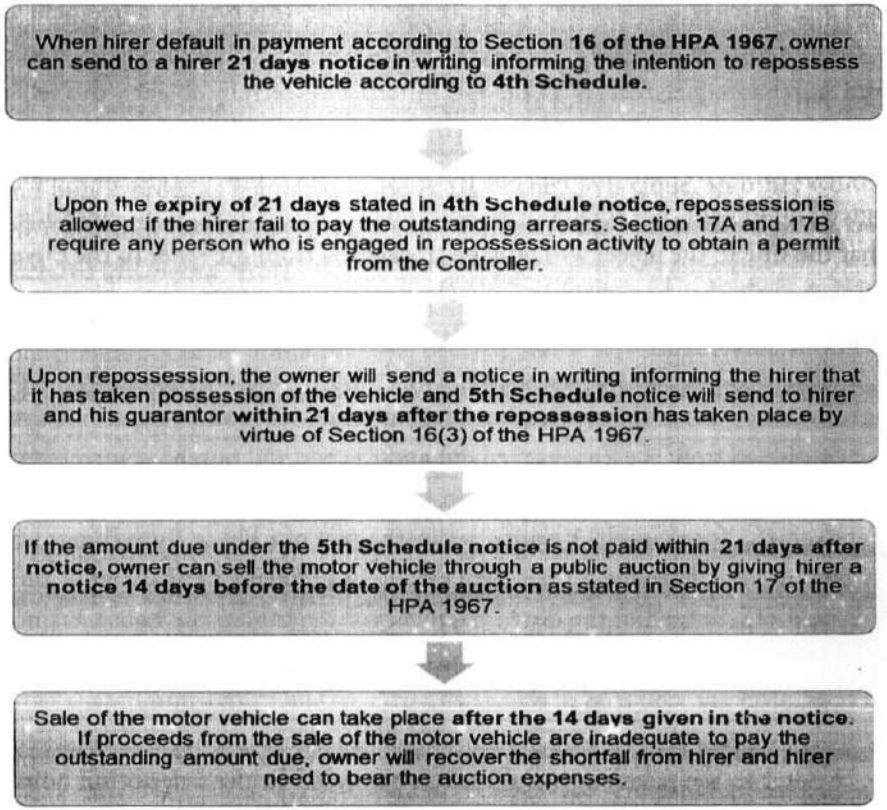

Figure 5.3 The process of reposession

Comparison with Indonesia

In comparison to Malaysia, hire purchase is known as lease purchase in Indonesia.

The Definition of a Lease Purchase Agreement

There is no law that regulates it, but this agreement is still enforced in the community, as long as it still adheres to the principle of freedom of contract without neglecting law, morals and public order. This agreement is not a

sale and purchase agreement or a lease agreement, this type of agreement is a combination of obligations between the lease and sale and purchase. A sale and purchase agreement is a sale and purchase of certain objects, the seller carries out the sale of the object by paying attention to every payment made by the buyer with the settlement of the price of the object that has been mutually agreed upon with the dictates in an agreement. Furthermore, it is determined that the title to the object will only be transferred from the seller to the buyer after the price has been paid in full.[223]

The application of a lease purchase agreement in Indonesia is carried out like any other agreement in general. A lease-purchase agreement is an agreement in which the application combines the rights and obligations that are combined from the lease agreement and the sale and purchase agreement. Usually the implementation of the sale and purchase agreement in Indonesia. For example, for example A wants to buy the rent of a house from B, namely by paying a down payment first, then paying installments / installments until it is paid off. By paying the down payment for the title to the house has not been transferred, but the house is already controlled by A, with an obligation to look after the house as it was at the time of the initial purchase.[224]The property rights will transfer after A has paid off the house he has controlled. So as long as the payment has not been paid in full, the title to the house lies with the seller even though the house has been controlled by the rental buyer.

The Principle of Freedom of Contract as the Basis for the Issuance of the Lease Purchase Agreement

The basis for the entry into force of the rental purchase agreement is Article 1338 paragraph (1) of the Civil Code which stipulates that all agreements made legally are valid as a law for those who make them. This article contains

[223] Eka Astri Marisa, 2013, Making Business Agreement Letters, Visi Media Pustaka, Jakarta, Pg-75.

[224] Ibid, pp- 77.

the principle of freedom of contract. The word "all" implies covering all agreements both known and unknown by the law. Based on the contents of the aforementioned Article, each agreement is binding on both parties and everyone is free to make an agreement as long as it does not violate decency and public order as regulated in Book III of the Civil Code. In other words, the rules in Book III are generally complementary laws (*aanvullend recht*), not coercive (*dwingend recht*).

The understanding of the principle of freedom of contract must be interpreted not in an absolute sense, because in the freedom of contract there are various restrictions, namely Law, public order, and morality. power that is balanced or equivalent

In general, an agreement occurs based on the principle of freedom of contract between two parties who have an equal position, and both parties try to obtain an agreement by going through a negotiation process between the two parties. However, currently the tendency shows that many agreements in business transactions are not through a balanced negotiation process, but that agreement occurs in a way that one party has prepared standard conditions on a printed agreement form, then presented it to the other party for approval and almost does not give either party any freedom to negotiate on the proposed terms. Such agreements are called standard agreements or standard agreements or adhesion agreements.[225]

Basic Legal Relationship of the Parties to the Lease Purchase Agreement

Legal experts have not had an understanding of the lease purchase agreement until now. Subekti said that the lease and purchase agreement was an extension of the sale and purchase agreement, while Wirjono Prodjodikoro argued that the lease and purchase agreement was more inclined to the lease agreement.

When viewed from the principles in the Civil Code, the original lease agreement is the lease agreement and the sale-purchase agreement, the

[225] Ridwan Khairandi, 2003, Good Faith in Freedom of Contract, UI Press, Jakarta, p-45.

arrangements of which have been regulated in the Civil Code. However, the two forms of agreement are not able to meet the needs of society, so that in the end they arise automatically in practice, an agreement that has not been regulated in the Civil Code, namely an agreement.[226]

In practice, there are two forms of agreement that dominate public life, namely the lease and purchase agreement and the sale and purchase agreement in installments. In the lease-purchase agreement (huurkoop), the seller (the owner of the object for lease of purchase) has not submitted the title to the goods he is selling to the buyer, as long as the buyer has not paid the price of the goods within a certain period as agreed.

If as long as the price of the goods has not been paid in full, then the goods remain the property of the seller. This also becomes a guarantee for the seller that the buyer will not transfer the goods to another person, because Article 372 of the Criminal Code provides a limitation that if there is a transfer of goods that do not belong to him, he can be considered to have committed embezzlement. On the other hand, in a sale and purchase agreement with installments, the title to the goods / objects of sale and purchase has been transferred from the seller to the buyer at the same time as the delivery of the goods to the buyer, although the payment can be made in installments within a certain period as agreed and determined. Thus the buyer has absolute rights over the object of sale and purchase and is free to take legal action to transfer the goods to another party. If the buyer does not pay the installments for the goods, the seller can demand payment of the remaining debt which is the remaining price of the goods.[227]

In practice, business actors/sellers generally feel it is safer to enter into a lease and purchase agreement than to enter into a sale and purchase agreement in installments. This is even more so if it is related to the reasons for finding

[226] Sandrina Wijaya, 2009, Business Agreement, Direct Deal. Pustaka Grahatama, Jakarta, p-57.

[227] Mohamed Arkoun, Civil Rental Agreement, Suara Muhammadiyah Journal, Vol 81, Issue 21-24, 1996. Pg-36.

as many buyers as possible by prioritizing security aspects with a guarantee that gives the seller the right to control the object/goods until the buyer is paid for the goods in full. In this case the seller demands the buyer's responsibility to pay off the payment, before the title to the goods passes from the seller to the buyer.

Rights and Obligations of the Parties in the Lease Purchase Agreement

There are some experts who call it a seller and a buyer or a renter. According to Subekti, the buyer becomes the first tenant of the item he wants to buy. The obligations of the parties are as follows.[228]

1. Rights and Obligations of the rental seller
   a. Seller rights in the lease purchase agreement
      1) Ask for and receive payment for the installment of the object being rented.
      2) Demanding compensation and cancel the agreement, if the lessee does not pay installments.
      3) Withdrawing the object from the lessee, if he transfers it to a third party or is in arrears to pay installments
2. The seller's obligations in the sale lease agreement
   a. Submit the object of the agreement to the tenant to buy.
   b. Take care of the goods to be rented and bought as well as possible so that they can be used properly.
   c. Submit full ownership rights to the lessee if the payment of the object being rented is fully paid.
3. Rights and obligations of the lease buyer
   a. Lease Buyer's Rights
      1) Obtaining the leased goods from the buying and selling party even though the property rights of the object have

[228] Ismantoro Dwi Yuwono, 2013, Read This Book Before Signing a Letter of Agreement, Meddpress, Yogyakarta, P-119

not been transferred to the rental buyer until the price of the object is paid in full.

2) Suing the parties who are renting the trade for hidden defects in the leased goods.

3) Obtain full ownership rights to the object for which he is leased if the payment for the object price has been paid off as agreed.

4. Obligations of the Lease Buyer
   a. Pay the down-payment and then pay the installments in full, as determined in the agreement.
   b. Maintain the object he rented and act as a good household father and must not transfer in any form before the installments are paid.

Similarities and Differences between Lease and Purchase Agreements

There are several similarities between a lease and purchase agreement sale and purchase, namely as follow.

1. Lease purchase and sale purchase is an agreement that originates in agreement. For the validity of an agreement, its legal requirements must be met the agreement regulated in Article 1320 of the Civil Code.
2. In the lease purchase and sale agreement, the seller on the lease purchase and sale purchase has the obligation to bear the existence of serene and peaceful enjoyment and any hidden defects.
3. In the lease purchase and sale agreement there is an obligation to deliver certain goods or objects.
4. Leasing and buying and selling aims to acquire and transfer property rights.

As for the differences between the lease and purchase agreement sale and purchase include the following.

1. A sale and purchase agreement is usually an agreement in which the seller binds himself to hand over his property rights over the sale and purchase goods to the buyer who is obliged to pay the purchase price (Article 1457 of the Civil Code), whereas in a lease and purchase agreement, the buyer is allowed to pay in installments or in installments the price of the goods in several installments and the title (even though the goods are in the control of the buyer) remains in the hands of the seller.
2. Although the regulations regarding the lease and purchase have not been regulated in the provisions written law, but it can be said that the leased goods must be able to determine the type and price. This is different from a sale and purchase agreement that specifies that each party is allowed to enter into buying and selling agreements even though the goods are the object of the agreement does not yet exist (Article 1334 Paragraph (1) of the Civil Code).
3. The definition of surrender in a sale-purchase agreement in general is real delivery and juridical delivery, while the meaning of delivery in a lease purchase agreement is a real delivery, and not juridical delivery.

Similarities and Differences between Installment Sale and Purchase with Rent

Between the lease and purchase agreement and the sale and purchase agreement in installments there are several equations as follows.[229]

1. In principle, both the lease and purchase agreement and the sale and purchase agreement in installments are a method of purchasing non-cash goods, both of which grow in daily practice in society and have not been regulated in the Civil Code or in other laws.

[229] Ari Primadyanta, Legal Protection Against Consumers in a Motor Vehicle Rental Agreement in Surakarta, Thesis, Postgraduate, Diponegoro University, 2006, Pg 28

2. Both the lease and purchase agreement and the sale and purchase agreement in installments, both aim to get a larger number of buyers, with the payment of the price of the goods made in installments within a certain agreed period.
3. According to Article 314 juncto 749 KUHD, the sale and purchase of vessels registered in the ship register (20 m^3 or more) is not included in the lease and purchase agreement and the sale and purchase agreement in installments.
4. Both the lease and purchase agreement and the sale and purchase agreement with installments are all special forms that arise from the common sale agreement.

Apart from the above equations, the lease purchase agreement and the sale and purchase agreement in installments has several differences as the following.

1. The delivery of goods in the lease purchase agreement does not result transfer of property rights. New ownership rights are transferred when paid the last installment. Transfer of property rights is done simply show proof of the last payment, because from the beginning it was the buyer has already controlled it. Meanwhile, in the sale and purchase agreement in installments, the delivery of the goods has resulted in the transfer of ownership of the goods to the buyer even though the payment has not been paid off.
2. In a lease and purchase agreement, as long as the payment for the price of the goods has not been paid, the buyer is prohibited from selling or transferring rights over the goods to another person. This is a guarantee that the goods will not be lost or damaged as long as they are in the possession of the buyer. If the buyer is not properly responsible for the goods, then the buyer can be deemed to have committed a criminal act of embezzlement as regulated in Article 372 of the Criminal Code. On the other hand, in an installment sale and purchase agreement, because the ownership rights have been transferred to the buyer since the sale and purchase agreement was made accompanied by delivery of the goods, the buyer is free to take any legal action on the goods. If before the payment is paid off, the goods have changed hands or are destroyed or damaged,
3. The lease and purchase agreement is the result of a combination of sale and purchase with the lease. This can be inferred from the use of the words "lease" and "buy" (there are terms seller-lease and rent-buyer), whereas the installment sale and purchase agreement is a special form of an ordinary sale and purchase agreement.

Similarities and Differences between Sales Lease Agreement and Lease-Lease Agreement

There are several similarities between the rental purchase agreement and the lease, namely the following.[230]

1. The lease purchase and lease agreement is an agreement that originates from the agreement and for the validity of the agreement must fulfill the validity conditions of the agreement specified in Article 1320 of the Civil Code.
2. There is an obligation to deliver goods by the seller on the lease and the party renting out the lease
3. The seller in the lease and the lessee in the lease is obliged to maintain the goods which are already in control.
4. The seller in the lease and the lessee under the lease are obliged to provide serene and peaceful enjoyment and the absence of hidden defects in the goods sold on the lease and the lease on the lease.

Furthermore, the differences between the lease purchase agreements with leases include as follows.

1. The definition of leasing is only to provide enjoyment of the objects or goods that are rented. Therefore, in leasing, not only the owner of

[230] Ibid, p-29.

the property rights can rent it out, but it can also be done by other right holders, for example the right holder to collect the results, whereas in a lease that has the aim of transferring property rights, the seller must be correct. True holders of property rights of the leased goods.

2. The law provides for the possibility of a lease agreement held in writing or orally, while the rental purchase agreement according to custom must be done in writing.
3. The risk in the lease agreement is regulated in Article 1553 of the Civil Code, namely if the leased property is destroyed, due to an event beyond the fault of one of the parties, the lease agreement is null and void, and the risk must be borne by the renting party as the owner goods or houses.

CHAPTER 6

EMPLOYMENT LAW

Introduction

Section 2(1) of the Employment Act 1955 (herein after referred to as EA 1955)[231] define *"employee"* means any persons:

> *"(a) included in any category in the First Schedule to the extent specified therein; or (b) in respect of whom the Minister makes an order under subsection (3) or section 2A."*

An employee is a person who:

1. wages do not exceed RM 2000.00 per month; or
2. any person whose 'wages' exceed RM 2000.00 and if he is engaged in manual labour including such labour as an artisan or apprentice; or
3. any person engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes; or
4. any person supervises or oversees other employees engaged in manual labour, employed by the same employer; or
5. any person engaged as a domestic servant; or
6. any person engaged in any capacity in any vessel registered in Malaysia.

[231] The Employment (Amendment) Act 2012 came into force since 1 April 2012.

Section 2(1) of the EA 1955 states:

"Employer means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word "employ", with its grammatical variations and cognate expressions, shall be construed accordingly."

This means the employer is any person who has entered into a contract of service to employ any other person as an employee and includes any agent, manager or factor of such first mentioned person.

Section 2(1) of the EA 1955 states:

"Contract of service means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract."

Section 1A of the Children and Young Persons (Employment) Act 1966 define *"child"* as a person who is under the age of 14 years old and "young person" refers to a person of 14 and above but below 16years of age.

A foreign employee cannot be employed in any business in Malaysia unless such a person has been issued with a valid employment permit. The permit is valid for a certain period only and on its expiry, it can be renewed through a fresh application.

Section 2 of the Industrial Relations Act 1967 (as amended) defines "workman" as *"any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute".*

Contract of Service and Contract for Service

Contract may specify that the person doing the work is an independent contractor, or that the contract is a contract for services, but this is not conclusive, and it is open to the court to consider, as a matter of fact, the precise nature of the employment.

Contract for service provide services for another and known as independent contractors. Meanwhile, contract of service relationship is constituted of employer and employee.

In Malaysia there are several legislations governing the relationship between an employer and an employee such as Employment Act 1955, Industrial Relations Act 1967 and Occupational Safety and Health Act 1994.

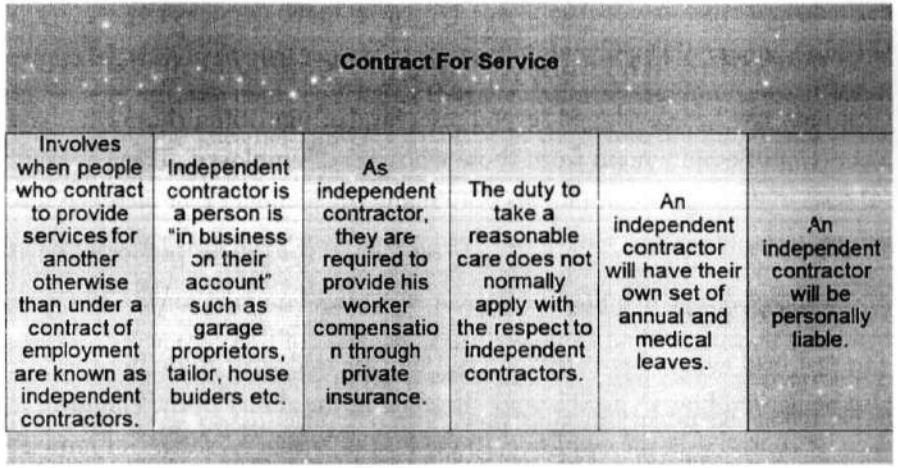

Figure 6.1 Contract for service

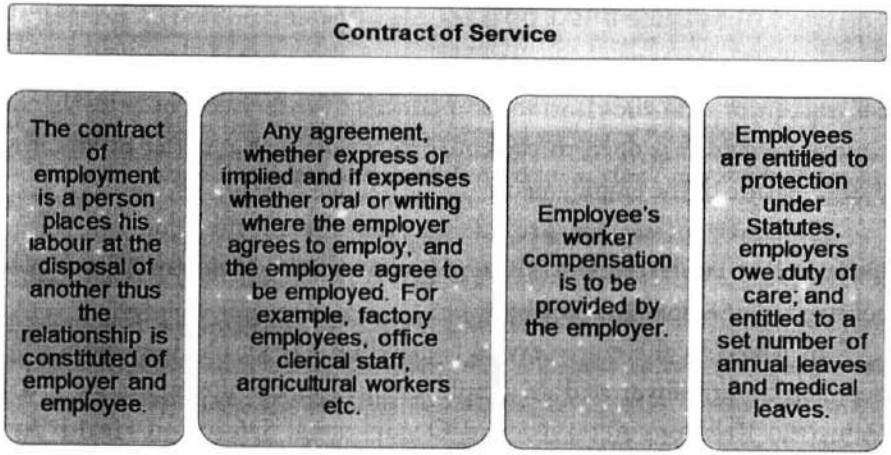

Figure 6.2 Contract of service

Test for Distinguish Employees and Independent Contractors

Common law has developed several tests for distinguishing those who have a contract of employment from those who are self-employed. There are four (4) tests in distinguish employees (COS) and independent contractors (CFS) below.

The Control Tests

The test held that employees could not only be told what to do but they are also being told how to do the work. It relies on the ability of the employer to exercise control over the employee. In the case of *Yewens v. Nokes*[232], Bramwell LJ stated that "a servant is a person subject to the command of his master as to the manner in which he shall do his work."

In the case of contract of service, the master not only directs what work is to be done, but also controls the work to be done. On the other hand, in the contract for service, the employer is entitled to direct what work is to be done but not control the work to be done. Thus, independent contractors could be told what purposes to achieve, but it was up to the contractors to use whatever method they though fit to achieve these purposes.

This test was laid down in the case of *Short v. J & W Henderson Ltd*[233] where Lord Thankerton said that there were four factors to be considered in determining the existence of contract of service. First, the power of selection by the employer; secondly, the power in determining salary or other remuneration; thirdly, the power to or right of the employer to control the method in which the work was done; and fourthly, the power and right of the employer to terminate the employee's services.

However, this test did not work particularly well with some skilled employees and so further tests evolved. In *Bata Shoe Company (Malaya) Ltd. v. Employees Provident Fund Board*[234], the question was whether salesmen employed by shop managers were employees of Bata Shoe Company. Applying the control test, the court concluded that the company did not have sufficient control over the salesmen, and for that reason they were not employees of the company.

The Organization/Integration Test

Employees were part and parcel of the organization whereas independent contractors were not. This test, sometimes called the 'integration test', was designed to get around some of the problems experienced with the control test. The basis of the 'organisational test' is its assumption that under a contract of service a person is employed as an integral part of the business.

In the case of *Stevenson Jordan and Harrison v. Macdonald and Evans*[235] Denning LJ put forward an integration test *"one feature which seems to run through the cases is that, under the contract of service (contract of employment), a man is employed as a part of the business and his work is done as an integral*

[232] (1880) 6 QBD 530.

[233] (1946) 62 TLR 427 at p.429.

[234] [1967] 1 MLJ 120.

[235] [1952]1 TLR 101.

part of the business; whereas under a contract for services (contract made by an independent contractor) his work, although done for the business, is not integrated into but only accessory to it."

For example, the work of surgeons, their employers do not control the way surgeons act when operating upon patients, although they can insist that certain procedures are followed. However, the work of surgeons is done as an integral part of the hospitals in which they work. This test considers the degree of integration into the organization, whether it be a hospital, a factory, a university or a shop.

In the case of *Mat Jusoh bin Daud v. Syarikat Jaya Seberang Takir Sdn Bhd*[236] and *Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy*[237] applying the organisational test laid down by Lord Denning in Stevenson, Jordon and Harrison Ltd v. MacDonald and Evans, Salleh Abas FJ, held that it is clear that what was done by Lim and the workmen procured by him was done as an integral part of the defendant's business and he therefore had no hesitation to hold that the plaintiff was an employee of the defendants.

The Mixed/Multiple Test

Modern employment relationship is undoubtedly complex and cannot be solved by a single test. For that matter, the courts have attempted to introduce a comprehensive test, which may apply to any circumstance. This test is a further recognition that there is no one factor that can establish whether a contract of service exists. In different situations, the various factors can assume greater or lesser importance.

This test concludes that no single test can determine employment status. It accepts that all tests have value and merit and are useful as general guidance. It is based on the principle that in each case it is necessary to weigh all the factors and ask whether it is appropriate to call the worker an employee.

[236] (1982) 2 MLJ 71.

[237] (1982) 2 MLJ 31.

According to McKenna J. in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*[238], the test asks for three questions:

1. Did the servant agree to provide his work in consideration of a wage or other remuneration?
2. Did he agree, either expressly or impliedly, to be subject to the other's control to a sufficient degree to make the other master?
3. Are the other provisions of the contract consistent with it being a contract of service?

McKenna J. also pointed that "a man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence".

In the case of *Ready Mixed Concrete v MPNP*[239], it was held that a worker would be an employee only if three conditions are satisfied which are the following.

1. The worker must agree to provide his own work and skill in return for a wage or other payment.
2. The worker must agree, expressly or impliedly that he will be under the control of the person paying for his work.
3. The rest of the terms of the contract must be consistent with a contract of employment.

Intention of the Parties

The intention of the parties is based on the contract and it should be disregard. Although intention of the parties is an important element in determining a contractual relationship, the Courts will not solely rely on this aspect to decide whether a contract of service existed.

[238] (1968) 2 QB 497.

[239] Ibid.

The whole factual circumstances will have to be considered. In the case of *Massey v. Crown Life Insurance*[240], the Court was of the view that the intention of the parties is important where there is ambiguity as to whether the contract is of service or for services, despite having considered the facts and circumstances of the case. The intention of the parties is considered only as a last resort to determine the status of the workman. It is useful to look at the intention of the parties to decide the true nature of the relationship, but it is submitted that intention may not be consistent with the whole construction of the terms and conditions of the agreement. This may leave the Court with one choice only falling back on the established test and approaches to identify the parties' status.

Formation of a Contract of Service

A contract of service can be either oral or in writing, express or implied. However, there are certain contracts of service that must be in writing. They are as follows.

1. Section 10(1) of the EA 1955 states that any contract of service for a specified period exceeding one month, or for a specified piece of work where the time required for the completion of the work may exceed one month.
2. Section 2(1) of the EA 1955 provide that an apprenticeship contract entered by a person with an employer who undertakes to employ the person and train him for a period which is not less than two years.

Based on section 5(b) and 8 of the Employment Regulations 1957, through a contract of service may be oral or in writing, the following terms must be given to an employee in writing on or before the commencement of his employment, i.e.

1. Name of employee and National Registration Identification Card.
2. Occupation of appointment.
3. Wage rates (excluding other allowance).
4. Other allowances payable and rates.
5. Rates for overtime work.
6. Other benefits (including approved amenities and service).
7. Agreed normal hours of work per day.
8. Agreed period of notice of termination of employment or wages in lieu.
9. Number of days of entitlement to holidays and annual leave with pay.
10. Duration of wage period.

Duties of Employer

An employer has an important role in carrying out his or her duties towards employees.

Duty to Pay Wages

Employer has a duty to pay the employee the agreed amount if the employee arrives for work and is able to work. All employees must be given a statement showing details of wages earned, deduction, etc. made during a wage period.

Section 19 of the EA 1955 provides that all wages must be paid not later than the seven day after the end of a wage period. Section 19(2) of the EA 1955 (Amendment 2012) states that wages for overtime work must be paid not later than the last day of the next wage period.

Sections 25(1), 25A and 25A(1) of the EA 1955 provide that the payment of wages must be made in the following manner.

1. Payment in legal tender; or
2. Payment by cheque made payable to, or to the order of the employee.

[240] [1978] 2 All ER 576.

3. With the employee's written consent, payment to be credited into an account at a bank, or finance company registered under the Banking and Financial Institution Act 1989 in any part of Malaysia, provided that the account is in the name of the employee, or an account in the name of the employee, and is jointly operated with one or more other persons as stipulated by the employee.

Section 61 of the EA 1955 states that the employer must keep a record of all normal hours of work and all overtime work done by an employee as well as all payments for work done for a wage period. The record of wages must be signed and acknowledged by the respective employee and must be kept for a minimum of 6 years, as well as being kept available for inspection by Labour Department officers.

Section 60A(3)(a) of the EA 1955 provide that an employee who works overtime during a normal working day should be paid at a rate of at least 1 ½ times his or her hourly rate of pay.

Duty to Provide Work

Employer has a duty to provide work to the employee according to the contract of employment.

Section 60A(2) of the EA 1955 provide the general rule is that an employer cannot compel his employee to work overtime unless,

1. if there is an accident, actual or threatened, in or with respect to the place of work; or
2. where the work performed by the employee is essential to the life of the community; or
3. where the work performed by the employee is essential to the defence or security of Malaysia; or
4. where there is an urgent work to be done on machinery or plant; or
5. where there is an interruption of work which is impossible to foresee; or
6. where work must be performed in any industrial undertaking essential to the economy of Malaysia; or
7. where work must be performed in any essential service as defined in the Industrial Relations Act 1967.

Observe Health & Safety Regulations

An employer is usually legally obliged to:

1. bear the medical examination fee if his employee has worked for him for one year or more.
2. Provide a workplace free from serious recognized hazards and comply with standards, rules and regulations issued under Occupational Safety and Health Act 1994 (OSHA 1994).
3. Make sure employees have and use safe tools and equipment and properly maintain this equipment.
4. Provide safety training in a language and vocabulary workers can understand.
5. Update operating procedures and communicate them so that employees follow safety and health requirement.

It is the employer's duty to take reasonable care to avoid exposing his employee to unnecessary risk of injury. It is his duty to provide him safe and proper system of work.

In the case of *Manlio Vasta v. Inter Ocean Salvage & Towage Ltd*[241], while performing diving operation for the defendant company, the plaintiff was injured. On the claim for damages by the plaintiff, the Singapore High Court held that the defendant company had failed to provide safe and proper system of work, as they did not provide a second diver at the scene, and also, they were negligent in that through their agent or agents they were responsible for the unreasonable delay in bringing the plaintiff to the decomposition chamber at Loyang after the accident. The company, *inter alia*, was held that

[241] [1954] MLJ 261.

where the employer had not provided a safe and proper system of work for his employee, the employer cannot rely on the doctrine of common employment as a defence.

Give the Correct Information

The employer must provide his or her workers with accurate information about their contractual rights as well as a reasonable opportunity to have their complaints reviewed.

Mutual Trust and Confidence

The employer and employee also owe each other a duty of "*Mutual Trust & Confidence*", basically they must show respect for each other.

Every Employer Must Maintain Such Records

Section 61 and Section 44 of the EA 1955 states that every employer must maintain such records and register which must always be made available for inspection by the officer of the Labour Department. It is an offence for not keeping such records.

Employer Shall Not Reduce the Wages Of Employee

Section 24(1) of the Employment Insurance System Act 2017 provides employer shall not reduce the wages of employee by reason of his liability for any contributions payable under this Act.

Pay the Employee's Contribution

According to Section 7(1) of the Employees' Social Security Act 1969, it states the principal employer shall pay both the employer's contribution and the employee's contribution in respect of every employee.

Duties of Employee

Employees have obligations to their employers that should be delivered in good faith. Employees must perform the following duties.

1. To perform in person the work specified in his contract of employment.
2. To follow instructions given by the employer based on the terms of the contract and work rules.
3. To handle with due care all instruments and tools entrusted to him for work.
4. To report for work always in fit (good) mental and physical conditions.
5. To give all proper aid when an accident occurs, or an imminent danger threatens life or property in his place of work without endangering his safety and health.
6. To inform the employer immediately of any act which endangers himself or his fellow employees or which may prejudice the interests of the undertakings.
7. Section 40(2) of the EA 1955 provide that a female employee who is on maternity leave must inform her employer of the date of the commencement of her maternity leave within a period of 60 days immediately preceding her expected confinement, otherwise the payment may be suspended until such notice is given.

Right of the Employer

If an employee (not monthly-rated employee) takes unpaid leave, he is not entitled to any pay for a gazetted public holiday which falls on any day while he is on unpaid leave.

Right of the Employee

All employees must be given a statement showing details of wages earned and deductions during a wage period. The table below lists the rights of Employees in Malaysia.

Section 4 of the Children and Young Persons (Employment) Act 1955	A child or a young person is permitted in any period of seven consecutive days to work for not more than six days.
Section 5(1) of the Children and Young Persons (Employment) Act 1955	The maximum number of hours permitted for children to work as follows: - A child is not permitted to work between the hours of 8 o'clock in the evening and 7 o'clock in the morning. However, this does not apply to any child engaged in employment in any public entertainment. A maximum of 3 consecutive hours with a rest of 30 minutes. Not more than 6 hours per day, or in the case of a child who is also attending school, the total number of hours will be 7 hours including the hours he spent attending school. To commence work on any day without having had a period of not less than fourteen consecutive hours free from work.
Section 6(1) of the Children and Young Persons (Employment) Act 1955	The maximum number of hours permitted for young persons to work are as follows: A young person is not allowed to work between the hours of 8 o'clock in the evening and 6 o'clock in the morning. However, this does not apply to those engaged in an agricultural undertaking, or any employment in public entertainment, or on any vessel. Not more than 4 consecutive hours with a rest of 30 minutes. Not more than 7 hours in any one day, or 8 hours if he is an apprentice. If he is attending school, the total duration must not exceed 8 hours, inclusive of his time spent in school. To commence work on any day without having had a period of not less than twelve consecutive hours free from work.
Section 59(1) of the EA 1955	Every employee shall be allowed in each week a rest day of one whole day as may be determined from time to time by the employer.
Section 27 of the EA 1955	An employer is not allowed to make any deduction or receive any payment from any employee by way of interest; or any similar charge because of any advance of wages where such advance does not exceed one month's wages.
Section 34(1) of the EA 1955	No female employee can work in any industrial or agricultural venture between the hours of 10 o'clock in the evening and 5 o'clock in the morning. No female employee shall commence work without having had a period of 11 consecutive hours free from work.
Section 60A(1) of the EA 1955 (Amendment 1998)	Maximum number of hours of work permitted per day under the Act is 5 consecutive hours with a period of rest for at least 30 minutes (any break of less than 30 minutes in the five consecutive hours shall not break the continuity of that five consecutive hours). An employee who is engaged in shift work cannot be required to work two shifts in a day.
Section 60C(1) of the EA 1955	An employee who is engaged in shift work can be required under the contract of service to work more than 48 hours in any one week; and more than 8 hours in a day up to a maximum of 12 hours a day, provided that the average number of working hours over any period of exceeding 3 weeks does not exceed 48 hours per week.

Every employee has the right to a minimum number of days' leave under his/her contract of service. The employee is entitled for five reasons (1) rest day, (2) public holidays, (3) sick leave, (4) maternity leave and (5) annual leave.

Rest Day

Rest day is governed by sections 59 and 60 of the EA 1955.

Section 59(1) of the EA 1955	Every employee shall be allowed in each week a rest day of one whole day as may be determined from time to time by the employer.
Section 59(1A) of the EA 1955	Allowed for employees engaged in shift work will only be after a continuous period of 30 hours.

Section 60(1) of the EA 1955	No employee shall be compelled to work on a rest day unless he is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts.

Section 60(3)(a) of the EA 1955 provide that for a daily, hourly or other similarly rated employee, the rate of pay would be as follows.

1. Working for half a day or less = 1 day's wages at ordinary rate of pay.
2. Working for more than half a day but not exceeding 1 day during normal hours of work = 2 days' wages at ordinary rate of pay.

Section 60(3)(b) of the EA 1955 states that for a monthly-rated employee, the rate of pay is as follows.

1. Working for half a day or less = half day's wages, calculated on ordinary rate of pay basis.
2. Working for more than half a day but not more than 1 day during normal hours of work = 1 day's wages, calculated on ordinary rate of pay basis.

Section 60A(2) of the EA 1955 provide that no employee shall be compelled to work on a rest day unless he is engaged in such work which by reason of its nature is required to be carried out continuously or continually by two or more shifts, or an employer may require any employee to work on a rest day under the following circumstances:

1. accident, actual or threatened, in or with respect to his work place; or
2. work essential to the life of the community; or
3. urgent work to be done on the plant and machinery; or
4. work essential to the defence and security of Malaysia; or
5. unforeseen interruption of work; or
6. work in any industrial undertaking essential to the Malaysian economy, or any essential service as defined in the Industrial Relations Act 1967.

Public Holidays

Section 60D of the EA 1955 provide that every employee shall be entitled to be paid holiday at his ordinary rate of pay on the following days in any one calendar year on eleven of the gazetted public holidays.

Section 60D (1)(a) and Section 60D (1)(b)[242] states every employee is entitled to eleven (11) out of any of following gazetted public holidays and any declared as a public holiday by the Federal/State Government under Section 8 of the Holidays Act 1951 in any one calendar year.

Federal Public Holidays	States Public Holidays
Hari Raya Puasa	New Year's Day (except for Kedah, Johor, Kelantan, Perlis & Terengganu)
Chinese New Year	Federal Territory Day (Kuala Lumpur, Putrajaya and Labuan only)
Workers' Day (Labour Day)	Hari Hol Almarhum Sultan Ismail (Johor only)
Wesak Day	Thaipusam (Penang, Perak, Selangor and Negeri Sembilan only)
Birthday of Yang Di-Pertuan Agong	Israk and Mikraj (Kedah and Negeri Sembilan only)
Hari Raya Haji	Awal Ramadhan (Johor only)
Awal Muharram	Good Friday (Sabah and Sarawak only)
Merdeka Day (National Day)	Nuzul Quran (Kelantan, Melaka, Perak, Perlis, Selangor, Terengganu and Pahang only)
Birthday of Prophet Muhammad	Hari Hol Negeri Pahang
Deepavali	Pesta Keamatan (Pesta Menuai) (Sabah and Labuan only)
Christmas Day	Perayaan Hari Dayak (Sarawak only)
Malaysia Day	Hari Raya Haji yang Kedua (Kedah, Kelantan, Perlis and Terengganu only)
	Birthday of State's Sultans/Rulers (for respective states only)

[242] EA 1955 (Amendment 2000 and 2012)

An employer may require an employee to work on any paid gazetted public holiday. If this is the case, he must be paid in the following manner.

1. In the case of an employee who is on a monthly, weekly, daily, hourly or similar rate of pay and is required to work on any paid gazetted public holiday, he shall be paid as follows.
   a. Section 60D(3)(a)(i) of the EA 1955 states two days' wages at his ordinary rate of pay, in addition to his holiday pay he is entitled to for that day.
   b. Section 60D(3)(aa) of the EA 1955 states at least 3 times his hourly rate of pay if he works for more than his normal number of hours of work (i.e. considered as overtime work).
2. An employee who is on a "piece" rate basis and is required to work on a paid gazetted public holiday, shall be paid as follows.
   a. Section 60D(3)(a)(ii) of the EA 1955 provide 2 times his ordinary rate per piece, in addition to the rate of pay he is entitled to for that day.
   b. Section 60D(3)(aaa) of the EA 1955 states 3 times his ordinary rate per piece if he works in excess of his normal working hours.
   c. Section 60D(4) of the EA 1955 states that if any public holiday falls on a half-working day, the ordinary rate of pay will be that of a full-working day.

Sick leave

Section 60F(1), (1A) and (2) of the EA 1955 states that an employee is entitled to paid sick leave only under the following circumstances.

1. he has obtained a certificate from a registered medical practitioner duly appointed by his employer; or
2. he has obtained a certificate from a dental surgeon; or
3. if no such practitioner such appointed, or the services of such a practitioner are not obtained within a reasonable time or distance, then other registered medical practitioners or government medical officers will be accepted; and
4. he has informed or has attempted to inform the employer of his sick leave within 48 hours of the commencement of the sickness.

Section 60F(1)(aa) of the EA 1955 provide that an employee sha!l be entitled to paid sick leave of this following.

1. Fourteen days in each calendar year if the employee has been employed for less than two years.
2. Eighteen days in each calendar year if the employee has been employed for two years or more but less than five years.
3. Twenty-two days in each calendar year if the employee has been employed for five years or more.

Maternity leave

Section 37(1)(a) of the EA 1955 provide that a female employee is entitled to 60 days paid maternity leave for up to five surviving children. It's provides:

> *"every female employee shall be entitled to maternity leave for a period of not less than sixty consecutive days (also referred to in this Part as the eligible period) in respect of each confinement and, subject to this Part, she shall be entitled to receive from her employer a maternity allowance to be calculated or prescribed as provided in subsection (2) in respect of the eligible period."*

Section 42(2) of the EA 1955 (Amendment 2012) states that if the service of a female employee is terminated during the period of her maternity leave, the employer shall be deemed to be committing an offence and shall be liable to a fine.

Annual leave

Section 60E(1) of the EA 1955 states that an employee shall be entitled to paid annual leave of this following.

1. Eight days for every twelve months if he has been employed by the employer for a period of less than two year.
2. Twelve days for every twelve months if he has been employed by the employer for a period of two years or more but less than five years.
3. Sixteen days for every twelve months if he has been employed by the employer for a period of five years or more.

Termination of Employment

In Malaysia, the common practice under numerous court cases is that the employer cannot simply terminate the contract of the employee (i.e. termination simplicitor) without a valid reason or excuse, or without mutual consent of compensation. Person who has been charged must be heard before any decision is taken.[243]

Section 10 of the EA 1955 provide that a contract of service (made for a period of more than one month/for specific work), must be made in writing and shall include a clause which sets out the manner the contract may be terminated by either party.

Section 11 of the EA 1955 states that a contract of service for a specified period (or specified work) terminates at the expiry of that agreed period (or when the specified work is completes). If the contract is not for a specified period, it shall continue in force until terminated in accordance with this Part of the Act.

Section 12(1) of the EA 1955 states that either party to a contract of service may at any time give to the other, notice of his intention to terminate such contract of service. The length of notice of termination of such contract of service shall be the same for both employer and employee. The period of notice required by either party is usually in accordance with the provision in the contract of employment.

[243] Based on maxim *audi alteram partem*.

Section 12(2) of the EA 1955 provide that in the absence of a provision for period of notice made in the contract, the period of notice of termination shall be based on the provisions of the Employment Act as follows.

Length of Employment	Period of Notice required
Less than 2 years	At least 4 weeks
2 years or more but less than 5 years	At least 6 weeks
5 years or more	At least 8 weeks

Section 60E(3A) of the EA 1955 provide that if an employee's contract of service is terminated (not due to misconduct) before he has taken his annual leave, he is entitled to the ordinary rate of pay in lieu of such annual leave not taken.

In the case of *Partheepan Sinniah John v. Bernard Tan Wei Tatt*[244], the plaintiff claimed for breach of contract for the relevant sum together with damages against the defendant. The defendant contended that the termination of the contract was based on two grave misconducts. There was apparently a commotion between the plaintiff and the bar's regular customer, one Edward where the plaintiff had uttered vulgar words and pushed Edward. Because of the incident, Edward stopped patronising the bar and it was put to a loss. The plaintiff had thus intimidated Edward. Further, the plaintiff as a DJ regularly came to work late since the date of commencement of contract. The High Court is allowing the defendant's appeal and held that there were merits in the grounds of appeal submitted by the defendant which warranted this court to interfere with the findings of the SCJ. Thus, the plaintiff had failed to prove his case against the defendant on a balance of probabilities.

An employer may terminate an employee's service in the following common cases.

1. Reaching the retirement age as stipulated in the letter of appointment or contract.

[244] [2014] 3 MLRH 416

2. Wilful breach of contract.
3. Redundancy or retrenchment.
4. Frustration of contact.
5. Criminal offence.
6. On the ground of misconduct after conducting a due inquiry, where the employer (company):
    a. dismisses the employee without notice;
    b. downgrades the employee;
    c. Imposes punishment of suspension without wages or salary but for a period not exceeding two weeks.

Termination without Notice

Termination of a contract of service without giving notice, or without waiting for the required notice period to expire may be done so under the following circumstances.

1. Section 13(1) of the EA 1955 provide that by paying to the other party an indemnity equal to the amount of wages which would have been earned by the employee during the required period of notice.
2. Section 13(2) of the EA 1955 states that in the event of any wilful breach by the other party of a term or condition of the contract of service.
3. Section 14(1) of the EA 1955 provide that an employer may, on the grounds of misconduct, inconsistent with the fulfilment of the expressed or implied conditions of his service, after due inquiry:
    a. dismiss the employee without notice and without having to pay wages in lieu of notice; or
    b. instantly downgrade the employer; or
    c. impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

Section 14(3) of the EA 1955 states that an employee may terminate his contract of service without notice if he or his dependents are immediately threatened by danger of death, violence or diseases by any person or circumstances, even though no such conditions may be stipulated in his contract of service.

Dismissal

Dismissal usually refers to a termination of an employee on grounds of conflict of Interest. In other words, dismissal is an act of an employer to terminate the contract of service unilaterally. By such act, the employee ceases to be in the services of the employer.

The power of dismissal was considered to be prerogative of the employer, as he had the right to 'hire and fire' a workman without assigning any reason. Now the employer can exercise this right only if there is any cause. The law has laid down restriction on this power of an employer.

Section 21(1) of the EA 1955 states that if an employee is dismissed, or if his contract of service is terminated by his employer, the total wages (less any lawful deduction) or indemnity due to him must be paid on his last day of employment.

In the case of *Syarifah Assmah Syed Idrus v. Nusapetro Sdn. Bhd*[245], as the Company had evinced an intention to no longer be bound by the terms of their contracts of employment, in particular with regards to the payment of their salaries, the Claimants tendered their notices of resignation and contend that they had been dismissed without just cause and excuse by the Company as the Company had failed to rectify the said breach despite their repeated verbal complaints to the Human Resources Department and their superiors. The Court finds that there has been a fundamental breach of the employment contract on the part of the Company when the claimants' wages were not paid for the months of January 2018 until May 2018 when it fell due.

[245] [2019] 2 LNS 1474.

The Claimants had succeeded in establishing that they were constructively dismissed by the Company. Thus, court award and directs the company to pay the claimants.

Constructive dismissal refers to a situation where an employee being dissatisfied with the manner in which he is being treated by the employer such as where there is a unilateral change in the terms and conditions of service, the employee tender a letter of resignation and pleads that he has been constructively dismissed.

In the case of *KGN-Hin Bus Company Sdn Bhd v. Ferdaus Md Hassan & Ors*[246], it was held by the Industrial Court:

> *"The claimants contended that it is the company's obligation to pay wages as provided for under section 19 of the Employment Act 1955. Despite the intervention of the labour department the company still failed to make any payment towards the claimants' salaries. The failure of the company to pay wages is a serious breach of the employment contract and it goes to the root of the contract. In the circumstances all the claimants are entitled to treat themselves as being constructively dismissed".*

Part X, Section 59 of the Industrial Act 1967 makes it an offense to dismiss a workman or employee or injure or threaten to injure a workman or employee during employment or alter or threaten to alter the position of the workman or employee to prejudice under certain circumstances. An employer contravening to the above section is liable on conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding RM 2, 000-00 or to both.

Unlawful dismissal occurs when an employee has been dismissed without just cause or excuse by an employer. The employee can file in a written representation within 60 days of the dismissal to the Director General of Industrial Relations Department for reinstatement, if he considers that he has been dismissed from the service without just cause or excuse by his employer

[246] [2001] 1 ILR 41.

pursuant to Section 20(1) of the Industrial Relations Act, 1967. The letter must have the following information.

1. The remedy (reinstatement).
2. The name, identity card number and address and telephone contact if any.
3. The name, address and telephone number of the employee's former company.
4. Occupation.
5. Date of appointment.
6. Date of dismissal.
7. Reasons for dismissal.
8. Whether the employee is a member of a union or otherwise.
9. Attach copies of other supporting documents such as letter of appointment and termination letter.

In the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd*[247], the duty of the Industrial Court was stated by his Lordship Salleh Abbas LP as follows:

> *"When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse."*

In the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors*[248], the respondent was dismissed from their services, as they were alleged to have committed a theft in the factory premises. The prosecution failed to establish the case against them and were acquitted by the trial court. Subsequently, they made a representation under section 20(1) of the Industrial Relations Act 1967. The claim was resisted by the appellant on the ground that

[247] [1988] 1 CLJ (Rep) 298.

[248] [1981] 1 MLJ 238.

the Industrial Court had no jurisdiction as the claim for reinstatement was not made within the prescribed time. The Federal Court, speaking through Raja Azlan Shah CJ, said that a workman must claim reinstatement for wrongful dismissal within the prescribed time, otherwise the Industrial Court has no jurisdiction to consider the claim.

The Director General Industrial Relations will try to resolve the case through conciliation by inviting both the employer and the employee for a meeting.

In the case of *Ireka Construction Berhad v. Chantiravathan Subramaniam James*[249], court held that:

> *"It is the basic principle of industrial jurisprudence that in a dismissal case, the employer must produce convincing evidence that the workman committed that offence of which the workman is alleged to have been dismissed. The burden of proof is on the employer to prove that he has just cause or excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, misconduct, negligence, or poor performance based on the case."*

In the case of *Metroplex Administration Sdn Bhd v. Mohamed Elias*[250] Low Hop Bing, 'J' in considering a certiorari application to quash an Industrial Court's Award held as follows: *where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rules of natural justice were properly applied, the employee being given the opportunity to be heard and to present his case, and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude whether the employee has been dismissed without just cause or excuse.*

In *Suhaimie Safari v. Safeguards G4s Sdn Bhd*[251], it was a case made under section 20(3) of the Industrial Relations Act 1967 arising out of the alleged dismissal of Suhaimie bin Safari ("the Claimant") by Safeguards G4S Sdn Bhd ("the Company") on 12 December 2018. However, in this case, court rules that there was no dismissal and it was the Claimant who had walked out of his employment after he was unhappy with the decision made by the Company. Hence, there is no necessity to delve further to decide if the dismissal was for a just cause or excuse.

Collective Bargain

Collective bargain is an effective means of promoting industrial relations. It is that form of bargaining where the employer, or his representative, and the employees, or their representative, bargain in good faith and arrive at an agreement relating to conditions and terms of employment.

Section 2 of the Industrial Relations Act 1967 states "collective bargaining" means negotiating with a view to the conclusion of a collective agreement. Once an employee union has been recognised by an employer (or employer union), the union may invite the employer to commence collective bargaining. If the bargaining is successful, the parties may conclude a collective agreement.

The objective of collective bargaining is as follows.

1. To create equality of bargaining power.
2. To adjust the terms of employment.
3. To unify labour relations.
4. To produce industrial peace.

[249] [1995] 2 ILR 11.

[250] [1998] 3 MELR 184; [1998] 2 MLRH 858; [1998] 5 CLJ 467.

[251] [2020] 2 LNS 0718; Award No. 718 of 2020 [Case No: 3/4-1007/19]

In the case of *Offshore Logistics Sdn Bhd and H Jaree bin Eli & Ors*[252], the court declared there is a collective agreement between the company and the Sarawak Seamen's Union which has been given cognisance by this Court. Although the union has been deregistered, the IRA vide section 17(1) (b) confers certain rights to a workman, whether he be a union member or not and whether he had joined the company at the time of the signing of the collective agreement. Therefore, the collective agreement aforementioned still has binding force between the company and every workman of the company, unless varied by a subsequent agreement or a decision of the Industrial Court.

Comparison with Indonesia

Employment law in Indonesia is based on civil law. This topic will look into the legal status of employment, the principles and objectives of Indonesian labour law, the work relationship, the employee and employer's rights and obligations, work termination, and industrial relations disputes.

The Legal Status of Employment in Indonesia

Echoing the Dutch system, in that country labor/employment law was previously used as a part of civil law, and traditionally labor/employment law has always been classified under civil law. This idea originated from an era when it was considered that workers/labor and employers were free to do whatever in order to enter into work agreements with each other (Article 1338 of the Civil Code) and the Government was prohibited from interfering in the independence of the parties of the agreement.[253]

However, the technological developments and evolution in the field of production and manufacturing have forced the government to keep interfering in labor issues, and sometimes it is for the public interest and or the benefit of the worker/laborer who is always in a weaker, more disadvantaged position. Thus, in employment /labor law the government intervention is to protect and fulfill the rights and obligations between employers and employees. So that there are three subjects that exist in Indonesian labor law, namely between the government, employers, and employee/labor.

The Principles and Objectives of Indonesian Labor Law

The principles and objectives of employment law are as follows.

1. Labor Law Principles
   The foundation of labor development in Indonesia is based on Pancasila and the 1945 Constitution as stipulated in the provisions of Article 2 of Law Number 13 of 2003 concerning employment. Meanwhile, the principle of labor development in Indonesia is on the basis of integration through cross-sectoral and functional coordination at the central and regional levels (article 3 of the Employment Law). This principle is in line with the objectives of Indonesia's national development, especially the Pancasila democracy and the justice and equality principles. Employment/Labor development has many dimensions and links with various parties, such as between the government, employers, and employees. Therefore employment/labor development is carried out in an integrated manner in the form of mutually supportive cooperation.
2. The objectives of employment law
   The purpose of Employment development as regulated in Article 4 of the Employment Law are as follows.
   a. Empower and utilize labor/employment optimally and humanely.
   b. Realizing equal distribution of work and provision of employment in accordance with the needs of national and regional development.

[252] Award 168 of 1987.

[253] Lalu Husni, 2019, *Pengantar Hukum Ketenagakerjaan Edisi Revisi*, Raja Grafindo, Jakarta, Hlm- 3.

c. Provide protection to workers in creating welfare.
d. Improve the welfare of workers and their families.

Work Relationship

Work relationship as mentioned in the provisions contained in article 1 paragraph 15 of the Employment Law, is a relationship between an entrepreneur and a worker/laborer based on a work agreement, which has elements of work, wages, and obligations of the parties. The employment relationship as further stipulated in the provisions of article 50 of the Employment Law states that a working relationship exists because of an agreement between a worker and an employer, the work agreement can be in the form of a written agreement or an oral agreement. In making a work agreement, there are four legal requirements that must be fulfilled, namely : (1) the agreement between the two parties (2) the ability to consciously take legal actions (3) the existence of the work that was agreed upon (4) the work which was promised does not conflict with public order, morals and the prevailing laws and regulations If these conditions are not fulfilled, then the terms of points (1) and (2) will lead to legal consequences as the agreement can be canceled and the if the provisions (3) and (4) if not fulfilled, will make the agreement null and void by law.[254]

In Indonesian labor law, the types of work relationship agreements are divided into two, namely the following.

1. Unspecified period of time employment agreement
   An unspecified period of time employment agreement or PKWTT is a work agreement between an employer and a worker to enter into a work agreement or work relationship that is permanent in nature. Therefore, this working relationship is not limited by the time and can run continuously.

[254] Article 1 paragraph 15 of Law Number 13 of 2003 concerning Employment

2. A specified period time employment agreement
   A work agreement for a specified period of time or PKWT is a work agreement between an employee and an employer to establish a working relationship within a certain period of time.This work agreement is based on the period or completion of a job. A specified time work agreement is carried out only for certain types of work that can be completed within a certain period, namely the following.
   a. A one-time job or a temporary one.
   b. The work is estimated to be completed not in a long time and three years at most.
   c. A work of a seasonal nature.
   d. Jobs related to new products, new activities, or additional products that are still in trials .

Rights and Obligations of Employee

In Indonesian labor law, several rights and obligations of workers or employees can be found in several articles in the Employment Law, namely: (1) right to salary; (2) right to equal treatment; (3) right to job training; (4) right to job placement; (5) right to have proper working hours; (6)) the right to occupational health and safety; (7) the right to welfare; (8) the right to join a trade union; (9) the right to leave or day off.

As for the obligation of the employee, basically, the employee must do their job per the agreement agreed upon in the work agreement and there are no specific rules regarding the obligations of labor unless it is regulated in the respective company regulations. However, in general, the obligations of the employee are (1) obedience, employees must obey the company and its regulations or other binding agreements as long as they do not interfere with their rights; (2) confidentiality obligations, this obligation is a must to maintain the confidentiality of the company data; (3) loyalty obligations, this obligation forces employees to behave and be loyal to work and their employers.

Rights and Obligations of the Employer

No different from the employee, the employer also has rights and obligations in an employment relationship, namely the following.

1. Employer rights
   The rights of the employer are (a) the company has the right to the work of the employees; (b) the company has the right to regulate and order the workforce to achieve the targeted goals; (c) the company has the right to terminate workers or employees who do not comply with the regulations. or work agreement.
2. Obligations of the employer
   The obligations of companies which are stated in several articles in the Employment Law are as follows: (a) providing social security for the workers; (b) providing time off; (c) paying salaries; (d) providing time for worship or other religious practice.

Wages and Social Security for Workers

There are salary or wages systems and social security for workers.

Salary or wage system

The wage system in employment law in Indonesia is divided into two, namely, time-based wages and on work units based. Wages based on time units are given within the agreed period, such as providing wages or salaries once a week or once a month in accordance with the work agreement that has been made between the worker and the employer. While wages based on the work unit/result unit are given when a job is completed. The wage scale is determined in accordance with the standard of living needs.

The provisions regarding wages in the Employment Law mention several types of wages that a worker/employee may receive, namely as follows.

1. Overtime pay
2. Wages for absence from work due to unexpected absence
3. Wages for not coming to work for doing other activities outside of work
4. Wages for exercising the right to take time off from work
5. Wages for severance pay (for workers who were laid off or quit for other reasons)
6. Employment reward (for workers who have been laid off or quit for other reasons)
7. Rights of compensation money (for workers who have been laid off or quit for other reasons, who still have rights that have not been taken and are still valid)

Social Security For Workers

The several types of worker social security provided by companies to workers and are divided into four, namely as follows.

1. Work accident insurance, this is given to workers who have an accident at the workplace that can cause physical or mental disability.
2. Death insurance, given to workers who die not because of a work accident. This social security is provided to ease the burden on the family of workers who have died, usually in the form of funeral expenses or a certain amount of compensation from the company.
3. Retirement insurance provided by the company to elderly workers who have devoted themselves to the company. This guarantee is only given to workers who meet the requirements.
4. Health care insurance, given to maintain the productivity of the workforce so that they can carry out their duties properly.

Work Termination

Basically, in Indonesian labor law, the termination of employment is a final way, if there is a problem or conflict, either from a discipline problem or the company's ability to pay and wage the labor itself, however, termination of employment is always attempted to not occur or efforts must be made to

prevent termination of employment, whether it is carried out by trade unions, the employers or the government itself.

Termination of employment in Indonesia must be made through a formal application submitted in writing through the Industrial Relations Dispute Settlement Institution along with the reasons. This is done so that the company does not act arbitrarily in terminating employment.

Employers are prohibited from terminating employment for the following reasons. [255]

1. The employee is unable to do their job due to illness, according to a doctor's statement, in which the period is not more than 12 months.
2. The employee is unable to carry out their work because they fulfill their obligations to the state following the laws and regulations.
3. The employee is currently performing a form of worship that is in accordance with their religion
4. The employee is going to have a wedding.
5. Female workers who become pregnant, giving birth, miscarries, or currently breastfeeding their babies.
6. Because the employee is a member of a trade union and will carry out trade union activities.
7. The employee reports the company to the authorities regarding the company's act of committing a crime.
8. Due to differences in understanding, religion, political ideology, ethnicity, skin color, class, gender, physical condition, or marital status.
9. The employee is permanently disabled, sick due to work accidents, or sick due to work relations which according to a doctor's statement, and the time of their recovery is still uncertain.

[255] Article 153 of Law Number 13 of 2003 concerning Employment

Industrial Relations Disputes

Industrial relations disputes in employment law in Indonesia are regulated in a different law other than Law Number 13 of 2003 concerning Employment. In the provisions of Article 1 paragraph 1 of Law Number 2 of 2004 concerning the Settlement of Industrial Relations, it explains that:[256]

> *"Industrial relations disputes are differences of opinion that result in conflicts between the organization or a between organization and workers or trade/ labor unions in the cause of disputes over rights, interests, termination of employment and disputes between trade unions/labor unions in a company."*

Based on the elements, industrial relations disputes are divided into four types, namely the following.

1. Disputes over rights
   Rights disputes are disputes that exist as certain rights are not fulfilled, due to differences in the implementation or interpretation of statutory provisions, work agreements, company regulations or collective working agreements.
2. Disputes of interest
   Disputes of interest are disputes that exist due to work relations regarding the manufacture and/or changes in the working conditions as stipulated in the work agreement, or company regulations or collective working agreements.
3. Disputes over termination of employment.
   Disputes over termination of employment are disputes regarding the termination of employment relations carried out by one of the parties.

[256] Article 1 paragraph 1 of Law Number 2 of 2004 concerning Settlement of Industrial Relations Disputes

4. Disputes between trade/labor unions

These disputes between trade/labor unions are disputes between trade unions/labor unions and other workers in the same company, these disputes usually occur because of the absence of a concurrent understanding of membership, and the practice rights and obligations of trade unions.

Industrial relations disputes are resolved by a special mechanism, in general, the settlement method is carried out in two ways, namely the bipartite settlement method and the tripartite settlement method. However, referring to the Law on Industrial Relations Settlement, the settlement of industrial relations disputes is carried out by prioritizing the principle of kinship by conducting deliberation and consensus to obtain a win-win solution. As we refer to the following provisions contained in the Industrial Relations Settlement Law.

a. Settlement of Industrial Relations Disputes through Bipartite Negotiations (Article 3 - Article 7 of Law Number 2 of 2004).

   Any industrial relations dispute must first be resolved through bipartite negotiations between the employer and the worker within thirty (30) working days from the date of commencement of the negotiations. Within thirty working days if one of the parties refuses to negotiate or has conducted negotiations, but does not reach an agreement, then the bipartite negotiation is considered a failure so that one party or both parties are obliged to register the dispute with the agency responsible for local Employment affairs with attaching evidence that efforts to resolve through bipartite have been made.

b. Settlement of Industrial Relations Disputes through Conciliation (Article 17- Article 28 of Law Number 2 of 2004)

Settlement of disputes through conciliation is carried out by the conciliator after the parties submit a request in writing to the conciliator appointed and agreed by the parties. At the latest, seven working days after receiving the request for settlement of the dispute in writing, the conciliator must research the state of the case and at the latest on the eighth day hold the first conciliation hearing.

If an agreement is reached through conciliation, then a collective agreement is signed by the parties and witnessed by the conciliator, and registered at the industrial relations court to obtain a proof of registration deed. If no agreement is reached, the conciliator will issue a written recommendation which must have been submitted to the parties no later than 10 (ten) working days from the first conciliation session. The parties are obliged to provide a written answer to the conciliator, which agrees or rejects the written recommendation.

c. Settlement of Industrial Relations Disputes through Arbitration (Article 29 - Article 54 of Law Number 2 of 2004)

   The settlement of industrial relations disputes through arbitration is carried out by the arbitrator based on a written agreement of the disputing parties. The arbitrator is required to complete the arbitration assignment no later than thirty working days after the signing of the agreement letter for the appointment of the arbitrator. The investigation of the dispute shall be carried out no later than three working days after the signing of the agreement letter for the appointment of the arbitrator and upon the agreement of the parties the arbitrator has the authority to extend the period for settling industrial relations disputes by no later than fourteen working days. Examination by the arbiter or arbiter council is conducted behind closed doors unless the disputing parties wish otherwise. In an arbitration hearing, the disputing parties

can be represented by their proxies with a special power of attorney. Settlement of industrial relations disputes by arbitrators begins with efforts to reconcile the two disputing parties. If a settlement is reached, then the arbiter or arbiter council is obliged to produce an Agreement Deed signed by the disputing parties and the arbitrator or arbiter council, then registered the deed at the industrial relations court at the district court within the arbiter's territory.

If the reconciliation fails, the arbitrator or panel of arbitrators continues the arbitration hearing. An arbitration settlement has a legal force that binds the disputing parties and is a final and permanent decision. The arbitration agreement is then registered in the industrial relations court at the district court in the area of the arbitrator.

d. Settlement of Industrial Relations Disputes through Mediation (Article 8 - Article 16 Law Number 2 of 2004).

Settlement of industrial relations disputes through mediation is carried out by the mediator by conducting research on the case and the mediation trial. If an agreement is reached through a mediation session, a collective agreement is made and signed by the parties and witnessed by the mediator and registered at the industrial relations court to obtain a proof of registration deed.

If no agreement is reached through mediation, the mediator will issue a written recommendation. If the parties agree to the written recommendation, the mediator must have finished assisting the parties to make a collective agreement no later than three working days after the written recommendation is approved—which is then registered in the industrial relations court to obtain proof of registration deed. The mediator completes the mediation duties no later than thirty working days after the transfer of the case.

e. Settlement of Industrial Relations Disputes through the Industrial Relations Court (Article 55- article 58 Law Number 2 of 2004)

Settlement of industrial relations disputes through the Industrial Relations Court begins with filing a lawsuit at the industrial relations court at the district court whose jurisdiction covers the place where the worker/employee works. The submission of the lawsuit must be accompanied by a minute of settlement through mediation or conciliation, if there is no such document, the judge is obliged to return the claim to the plaintiff. The examination of a case in an industrial relations court shall be carried out utilizing a regular procedure or a quick procedure.

The decision of the panel of judges must be issued no later than fifty working days from the first trial in a session open to the public. Industrial relations decision is regarding disputes over rights and disputes over termination of employment relations which have legal force when it is still not submitted for cassation to the Supreme Court within fourteen days at the latest. As for settlement of industrial relations disputes at the Supreme Court is no later than thirty working days.

CHAPTER 7

SALE OF GOODS

Introduction

The word 'contract' may be defined as *'an agreement enforceable by law'*. Thus, a contract is an agreement which is legally binding between the parties.[257]

Section 2 of the SOGA 1957 defines the word 'goods' to mean:

> *"Every kind of movable property other than actionable claims and money, and includes stocks 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."*[258]

Section 3 of the SOGA 1957 states that unless they are inconsistent with the specific requirements of the Sale of Goods Act, the provisions of the Contracts Act 1950 will apply to all contracts for the sale of goods. A contract of sale is defined under section 4(1) of the SOGA 1957 as:

> *"a contract wherein the seller transfers or agrees to transfer the property in goods (ownership) to the buyer for a price (money) as consideration.*[259]*"*

Privity of Contract

The general rule is that only the parties to a contract are bound by the term of the contract. Thus, the term implied by a contract of sale is between the

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[257] Except for the states of Sabah and Sarawak, the Sale of Goods Act 1957 (Revised 1989) [SOGA 1957] applies to all states in Malaysia.

[258] Land is excluded from this definition.

[259] The nature of sale of goods are goods, money or price and transfer of property.

contracting parties, i.e. the buyer and the seller. If a third party uses goods purchased by another and is injured because of some defects in the goods, he cannot sue the seller in an action under contract. His remedy would be to sue the manufacturer under tort.

In the case of *Donoughe v. Stevenson*[260], a ginger beer manufacturer supplied ginger beer in an opaque bottle to a merchant. The merchant resold it to A, who gave it to a friend as a gift. The decomposed remains of a snail had found inside the ginger beer bottle. A's friend claimed she fell very ill and sued the manufacturer for negligence. Although there was no contractual obligation on the side of the manufacturer to A's friend, the Court held that the manufacturer owed her a duty to ensure that the bottle did not contain noxious materials, and he would be responsible if that obligation was breached. Therefore, the plaintiff had the right to sue the manufacturer for damages based on negligence.

Terms of the Contract: Conditions and Warranties

Terms of a contract can be divided into three categories namely conditions, warranties and intermediate. Section 12(1) of the SOGA 1957 states:

> *"A stipulation in a contract of sale with reference to goods which are subject thereof may be a condition or a warranty."*

Section 12(2) of the SOGA 1957 provide a condition is define as:

> *"A stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated."*

A breach of condition, in general, allows the innocent party to repudiate the contract. The innocent party i.e. buyer, on the other hand, can only claim damages and is not allowed to terminate the contract under the following conditions.

[260] [1932] AC 562. 580.

1. When the buyer agrees to waive the condition.
2. Where the buyer chooses to regard the breach of condition as a breach of warranty and claims damages.
3. If the contract of sale is not severable and the buyer has accepted the goods or a part of it, any breach of condition must be considered as a breach of warranty, unless otherwise stipulated in the contract.
4. Unless otherwise stipulated in the contract, a breach of any condition shall be considered as a breach of warranty if the contract is for specific goods in which the property has passed to the buyer.

In the case of *Public Bank Bhd v. Ng Kang Siang & Anor*[261] the plaintiff bank (the owner under a hire-purchase contract) requested a declaration for the repudiation of the defendants' (a used-car dealer) sale and purchase of a motor vehicle, as well as a refund of the purchase price, indemnity, interest, and costs. The Court granted the requested declaration as it was discovered that the vehicle sold was a half-cut car. The implied conditions of quality and fitness were breached, and the car was not of merchantable quality and was not reasonably fit for its purpose.

Section 12(3) of the SOGA 1957 defined a warranty as:

> *"A stipulation collateral to the main purpose of the contract, the breach of which give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated."*

The aggrieved party can consider a breach of condition as a breach of warranty under section 13 of SOGA 1957, which implies that the aggrieved party can claim damages but not reject the contract.

In *Associated Metal Smelters Ltd v. Tham Cheow Toh*[262], the Federal Court allowed the respondent or buyer to consider a breach of condition as a breach of warranty, allowing the buyer to claim damages under section 13 of the Sale of Goods Act, 1957.

[261] [2011] MLJU 988.

[262] (1972) 1 MLJ 17.

SOGA 1957 introduces several terms, such as conditions and warranties, into such contracts. The distinction between conditions and warranties under contract law is preserved by the sale of goods laws is explained in the Figure 7.1.

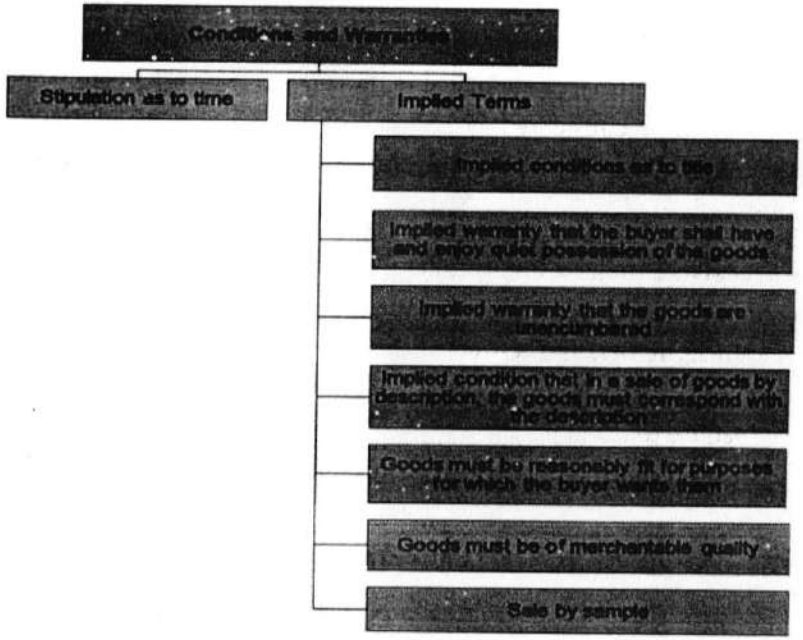

Figure 7.1 Conditions and warranties

Stipulation as To Time

Section 11 of the SOGA 1957 provides:

> *"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be essence with respect to the contract of sale."*

This implies that, if a buyer fails to pay by an agreed-upon date, the seller is not entitled to repudiate the contract unless the contract expressly indicates that the time of payment is the essence of the contract.

In the case of *Bunge Corporation New York v. Tradax Export S.A. Panama*[263], a contract for the sale 5,000 tons of soya beans required the buyers to give the sellers 15 days' notice of readiness of loading. This term was stated as a condition. The buyers gave a shorter notice period and the sellers treated this as terminating the contract and claimed damages. In this case, the court decided that time clauses are essential because the seller's power may be subject to the buyer's punctual performance.

Implied Terms

Buyers have only themselves to blame if they failed to make a careful inspection of the goods before they purchase them[264]. However, *the caveat emptor* rule would be unfair if:

1. the buyer does not have a reasonable opportunity to inspect the goods, and
2. when the buyer is relying on the seller's specific skills or expert judgment.

Sections 14 to 17 of the SOGA 1957 imply a number of conditions in every contract for the sale of goods. These implied terms apply only if the contracting parties have not excluded or amended them.

Implied condition as to title[265]

The seller has the right to sell the goods in the case of a sale or in the case of an agreement to sell, will have the right to sell the goods when the time comes for the buyer to become the owner.

The main purpose of a contract for the sale of goods is to transfer ownership to the buyer. If the seller does not have title or ownership, then

263 [1981] 1 WLR 711.

264 this is based on the maxim *caveat emptor* – let the buyer beware.

265 Section 14(a) of the SOGA 1957.

there has been a total failure of consideration. A breach of this condition entitles the buyer to repudiate the contract.

In the case of *Rowland v. Divall*[266], Rowland bought a car from Divall and used it for four months before discovering that it had been stolen. Rowland then had to hand over the car to the true owner. The issue arose whether Rowland could recover the full amount he had paid from Divall even though he had used the car for four months. Court held that although Rowland had the use of the car for some time, he was entitled to recover the full price he had paid because Divall had no right to sell him the car because it was stolen. Rowland had failed to get the title of the property (Car), so there was a total failure of consideration.

In the case of *Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin*[267], the respondent/defendant sold the appellant/plaintiff a motorcar. The car was then confiscated by the police for being a stolen vehicle. The plaintiff sued for the refund of the purchase price and the defendant resisted the claim on the ground that he was a ***bona fide*** purchaser of the car with no knowledge of any defects relating to ownership. Court held that the transfer of property stated in section 4(1) of the Sale of Goods Act 1957 constitutes the essence of a contract of sale and the seller who does not so transfer the property breaks the basic duty created by the contract and there is a total failure of consideration. Further, there was an implied condition on the part of the defendant under section 14(a) of the Act that he had a right to sell the car. The defendant did not have the right of possession to the car and could not consequently give it to the plaintiff. The plaintiff therefore had a right to sue for the price paid as money had and received on a total failure of consideration.

[266] [1923] 2 kb 500.

[267] [2001] 1 CLJ 768.

Implied warranty that the buyer shall have and enjoy quiet possession of the goods[268]

There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. A third party will not come and claim to be the true owner or that they have a right in the goods after the sale has taken place. This implied stipulation is merely a warranty and not a condition. Therefore, a breach of this stipulation will not entitle the innocent party to repudiate the contract.

In the case of *Heng Long Motor Trading Co v. Osman Bin Abdullah*[269], respondent bought a van from appellant worth RM 13, 500 in 1983. However, the van was seized by the Custom in 13th May 1985 because it was material evidence in an investigation. Court held that the implied warranty of quiet enjoyment is not fulfilled. Therefore, the plaintiff was entitled to damages for breach of implied warranty.

Implied warranty that the goods are unencumbered[270]

There is an implied warranty that the goods are free from any charge in favour of a third party who is unknown to the buyer; for example, storage charges which must be paid before the goods can be collected.

In the case of *Steinke v. Edwards*[271], the plaintiff, who had purchased a car from the defendant, was required to pay the remaining tax owed to the government. The plaintiff requested compensation from the defendant (seller) for the amount he had paid for the tax. The court held that the plaintiff was entitled to compensation because the defendant breached the implied warranty.

[268] Section 14(b) of the SOGA 1957.

[269] [1994] 2 MLJ 456.

[270] Section 14(c) of the SOGA 1957.

[271] [1935] 8 ALJ 368.

Implied condition that in a sale of goods by description, the goods must correspond with the description[272]

The obligation of the seller under this section is absolute and it is no defence that the defect in the goods is latent. All contracts for the sale of unascertained goods are sales by description and in respect of specific goods, it applies particularly where the buyer has not seen the goods such as mail order, telephone and sale from a catalogue.

In the case of *Varley v. Whipp*[273], the buyer purchased a second-hand reaping machine without ever having seen it. The seller had described it as "quite new the previous year and used it to cut only 50 or 60 acres". In fact, the machine was very old. The issue arose whether there was a breach of an implied condition. Court held that this was a sale by description, and since the machine did not correspond to its description, the seller was in breach.

Where goods are sold by reference to a sample as well as description, the goods must correspond with both the sample and the description.

A sale by description usually happens when a consumer buys goods based on the description of the goods or decides to buy goods made to the specifications. The term "sale of goods by description" refers to any case in which the buyer has not seen the goods and is relying solely on the description.

In *Nagurdas Purshotumdas & Co v. Mitsui Bussan Kaisha Ltd*[274], under previous contracts between the parties for the sale of flour, the flour had been sold in bags bearing a well-known trade mark. Further flour was ordered *'the same as our previous contracts.'* Flour identical in quality was delivered but it did not bear the same well-known trade mark. Court held that the goods did not comply with the description. Defendant had breached the condition as to description.

[272] Section 15 of the SOGA 1957.

[273] [1900] 1 QB 513.

[274] [1911] 12 SSLR 67.

Goods must be reasonably fit for purposes for which the buyer wants them[275]

Generally, there is no implied warranty or condition as to quality or fitness for any purpose of goods supplied under a contract of sale. The two exceptions to this rule are:

1. goods must be reasonably fit for purposes for which the buyer wants them; and
2. goods must be of merchantable quality.

In the contract for sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any purpose. The buyer must show that there is at least some reliance upon the judgment and skill of the seller. In the case of *Grant v. Australian Knitting Mills*[276], Grant bought cellophane-packaged, woollen underwear from a shop that specialized 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 arose 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. 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.

If the goods are required for a special purpose, the buyer must expressly notify the seller of that purpose and rely on the seller to provide him with a suitable article. In *Griffiths v. Peter Conway Ltd*[277], a woman with abnormally sensitive skin bought a coat without telling the salesman that she had sensitive skin. She subsequently contracted dermatitis from wearing the coat. Court

[275] Section 16(1)(a) of the SOGA 1957.

[276] [1936] AC 85.

[277] [1939] 1 ALL ER 685.

held that she was unable to recover for breach of fitness for purpose because there was nothing in the cloth that would have affected the skin of a normal person. She had failed to disclose that she suffered from skin problems.

Goods must be of merchantable quality[278]

Where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality provided that if the buyer has examined the goods, there shall be no implied condition about to defects which such examination ought to reveal. Merchantable quality mean that they must be reasonable for the purpose described. The goods sold are fit for the use to which they were sold.

In the case of *Wilson v. Ricket, Cockerall & Co. Ltd*[279], the plaintiff, a housewife, has ordered coal (using the trade name 'Coalite') from the defendant, coal merchants. Plaintiff was injured when the coal was set on fire in an open grate in the plaintiff's residence and resulting in an explosion in the plaintiff's home. The plaintiff wishes to claim damages resulting from a breach of warranty under the Sale of Goods Act of 1893. The court held that the defendant was liable because the explosive item, was not of merchantable quality as required by section 16(1)(b).

As in the case of fitness for purpose, the implied condition that goods must be of merchantable quality only applies where the sale is by description from a dealer in goods of that description.

In *David Jones Ltd v. Willis*[280], Willis went to the shoe department of David Jones and told the saleswoman that she wanted a comfortable pair of walking shoes because she had a bunion on her foot. After trying on a few pairs, she bought a pair which was recommended by the saleswoman. The third time that she wore the shoes the heel broke off one of them, causing her

[278] Section 16(1)(b) of the SOGA 1957.

[279] (1954) 1 All ER 868.

[280] (1934) 52 CLR 110.

to fall and break her leg. The evidence showed that the shoes were not well made and that the heels had not been properly attached to the shoes. Court held that as the shoes had been bought by description, there had been a breach of the implied condition of merchantable quality. This requirement must be satisfied even where the article is sold under its trade or patent name. The following factors determine 'merchantability':

1. price;
2. the description used to describe the goods;
3. whether the seller was aware of the goods' intended use; and
4. any other relevant sales circumstances.

Sale by sample[281]

Section 17 of the SOGA 1957 provide that:

"a contract of sale is a contract for sale by sample where there is a term in the contract express or implied to that effect."

There are three implied conditions in contracts of sale by sample which are:

1. that the bulk shall correspond with the sample in quality;
2. that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
3. that the goods are free from any defect which would not be apparent on reasonable examination of the sample.

Each of the three conditions is related to the others. If one of the three requirements are breached, the buyer is entitled to reject the goods and treat the contract as at an end. In the case of *Godley v. Perry*[282], a boy bought a catapult. While using it, the catapult broke and he lost the sight of an eye. The shopkeeper had bought it from a wholesaler by sample and tested it by

[281] Section 17 of the SOGA 1957.

[282] [1960] 1 WLR 9.

pulling back the elastic. The shopkeeper was sued, and the court held that the catapult was not fit for the purpose for which the buyer wanted it and that it was unmerchantable quality. The shopkeeper then filed an action against the wholesaler. Court held that although the shopkeeper had made reasonable examination, the defect was not one which was apparent on such examination. Thus, he had an action against the wholesaler.

Intermediate or Innominate Terms

Intermediate or innominate terms is a terms which cannot be specified either as a "condition" or a "warranty". The creation of this intermediate term is associated with the analysis of Diplock LJ in the case *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 and is credited with the introduction of innominate terms in Hong Kong Fir. It has been noted that many contractual undertakings are too complicated to be either categorized as "conditions" or "warranties". Some have interpreted this decision as establishing a third type of contract terms: "innominate terms" or "intermediate stipulation". In this case, Shipowners let the vessel, the Hong Kong fir (plaintiff), charter for 24 months to charterers (defendant). Clause 1 of the contract required the owners to provide a "seaworthy" vessel, while Clause 3 required them to maintain the vessel's seaworthiness and excellent condition. The vessel's machinery was reported as being in "reasonably good condition" when it was delivered, but due to its age, it required constant maintenance. The vessel owner's chief engineer was inefficient and incompetent, and the vessel experienced numerous breakdowns and delays. The charterers repudiated the contract, claiming a breach of the contract's obligations to supply and maintain a seaworthy vessel. The questions arose as to whether the seaworthiness obligation was a "condition" of the contract, the breach of which enables the party to repudiate, and whether the breach entitles the charterer to regard the contract as repudiated. Court held that the defendants were liable for wrongful repudiation. Thus, the court in this case had introduced the approach of the innominate term. Rather than seeking

to classify the term itself as a condition or warranty, the court should look into the effect of the breach and ask whether the breach has substantially deprived the innocent party of the entire contract benefit. It is only when this is answered affirmatively that it is a breach of condition. Twenty weeks of a contract period of two years did not significantly deprive the defendants of their full benefit but instead were not entitled to repudiate the contract. Judgment by Diplock LJ went as follows:

> *'The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?' Though a term (in this case a 'seaworthiness' term) was not a 'condition' in the technical sense, it might still be a term breach of which if sufficiently serious could go to the root of the contract'.*

Upjohn LJ therefore concluded:

> *"In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences".*

The judge does not however refer to this type of term as "innominate" or "intermediate" anywhere in the judgment. The word "innominate" was coined in Stephenson LJ in *Schuler AG v. Wickman Machine Tool Sales Ltd* [1973] UKHL 2, the Courts held that contractual interpretation is unrelated to the Parties' subsequent conduct. On the facts, the Court interpreted the clause as unreasonable and vague in many aspects. As a result, it cannot be regarded as a condition within the context of the whole contract, and there was no right to terminate for breach of it.

Accordingly, innominate terms are where the remedy of breach will depend upon the effect of that breach at the time it occurs. If the aggrieved party has a substantial effect, it is likely to be a fundamental term and give

that party the right to terminate the contract and claim damages. If the terms are not fundamental terms, then that party will merely claim damages.

All in all, a difference between the condition and the warranty is that the breach of the condition gives the promisee the right to revoke the whole contract, while the breach of the warranty does not exempt him from the contract but is merely a ground for an action for damages.[283]

Transfer of Title (*Nemo Dat Quod Non Habet Rule*) and its Exceptions

According to Section 27 of the SOGA 1957, if goods are purchased from a person who is not the owner and does not sell them under the permission of the owner, the buyer does not obtain any title. The purpose of this provision is to protect the right to ownership. *Nemo Dat Quod Non Habet* means:

> *'No one can give a better title than he himself possesses.'*

As a general rule, when a person acquires goods, he or she obtains only the same rights to the goods as the person from whom the goods were taken. There are, however, exceptions to the *nemo dat quod non habet* rule, which are as follows.

Estoppel

Estoppel may arise when the owner of the goods is by his conduct *precluded from denying the seller's authority to sell.*[284] The owner of goods by his conduct makes it appear to a buyer that the person who sells the goods has his authority to do so and the buyer acts in reliance on it. The buyer obtains a good title because the owner is precluded by his conduct from denying the seller's authority to sell.

[283] Frank Weldon Russell, 'Conditions and Warranties in Contracts of Sale' (Cornell University 1894) <http://scholarship.law.cornell.edu/historical_theses>.

[284] Section 27 of the SOGA 1957, second limb.

In the case of *Mercantile Bank of India Ltd v. Central Bank of India Ltd*[285], a merchant pledged railway receipts with the Central Bank and obtained an advance from them. The Central Bank, following their usual practice, redelivered the railway receipts to the merchant for clearing the goods and storing them in the Central Bank's go-down without any indication in the receipts to show that the Central Bank had possession of them. The merchant fraudulently pledged the receipts a second time with the Mercantile Bank and obtained an advance from them. The Mercantile Bank obtained the goods and sold them for value to an innocent purchaser. In an action by the Central Bank against Mercantile Bank for conversion. Court held that the Central Bank was not estopped from setting up a prior title as pledgees against the Mercantile Bank by reason of the subsequent pledge by the merchant to the Mercantile Bank. To maintain estoppel, it is essential to show neglect of a duty which a person owes to the public or to an individual. In this case the Central Bank were under no duty to the Mercantile Bank to deal with the railway receipts in any other way than they did.

In *N.Z Secutities & Finance Ltd v. Wrightcars Ltd Warmington (third party)*[286], A agreed to sell a car to B, and B was granted possession of the car in exchange for a cheque. They agreed that the title to the car would not be transferred to B until the payment was paid (i.e. the cheque has been honoured or cashed). The car was later sold by B to C. C had called A's office before the transaction to C was completed. In answer to C's inquiry, A's employee informed C that B had paid for the car. The cheque issued to A by B was later returned unpaid (dishonoured). As a result, A repossessed C's car. In this case, the court found that C was right in claiming towards A's action prohibits or estopped him from denying B's authority to sell. Thus, C has the title (ownership) to the car.

[285] [1938] AC 287.

[286] [1976] 1 NZLR 77.

Sale by Mercantile Agent

A mercantile agent is not someone who sells his own goods. Section 2 of the SOGA 1957 stated that to be a mercantile agent, the person must in the customary course of business as an agent usual authority to sell goods, or consign them for sale, or buy them, or raise money on their security.

Section 27 of the SOGA 1957 provides:

"where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorized by the owner of the goods to make the same."

Requirements for a valid sale by a mercantile agent as follows.

1. The possession must be with the consent of the owner.
2. At the time of sale, the mercantile agent must be in possession of the goods or of a document of title to the goods.
3. The mercantile agent sells the goods in the ordinary course of business.
4. The buyer must have acted in good faith, at the time of the contract of sale, and must not have knowledge that the seller had no authority to sell.

In the case of *Folkes v. King*[287], Folkes entrusted his car to a mercantile agent, asking him not to sell it for less than a certain amount. The agent sold the car to King for less than the minimum price, and King bought it in good faith and for a good price, with no indication of any fraud. The money was subsequently taken by the agent. Folkes filed a lawsuit against King in order to obtain his car. The question of whether King received a good title. The court ruled that the purchaser got good title since the mercantile agent was in possession of the car with the owner's consent for sale and the sale happened in the ordinary course of the agent's business. As a result, Folkes was unable to obtain the car from King.

[287] [1923] 1 KB 282.

Sale by One of Joint Owners

Goods may be owned by more than one person. Section 28 of the SOGA 1957 provides:

"If one of several joint owners of goods has the sole possession of the goods by permission of the co-owners, the property in the goods is transferred to any person who buys them from such joint owner in good faith and has not at the time of the contract of sale notice that the seller had no authority to sell."

Based on Section 28 of the SOGA 1957, there are two conditions must be met, namely as follows.

1. One of the several joint owners has the sole possession of the goods by permission of the co-owners; and
2. The buyer acts in good faith and has not at the time of the contract of sale notice that the seller lacks authority to sell.

Sale under a Voidable Title

Section 29 of the SOGA 1957 provides:

"Where the seller of goods has obtained possession thereof under a contract voidable under Sections 19 or 20 of the Contracts (Malay States) Act 1950 (Revised 1974), but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title."

A contract is voidable under either Section 19 or Section 20 of the Contracts Act 1950 when the consent of the original owner is caused by coercion, fraud, misrepresentation or undue influence.

Sale by a Seller in Possession after Sale

Section 30(1) of the SOGA 1957 provides that

> *"If a seller continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effects as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."*

According to section 30 (1) of the SOGA 1957, if a seller resells to a second buyer a good previously sold to the first buyer, the second buyer will get good title to the goods provided he obtained the goods in good faith and without knowledge of the earlier sale. The first buyer will lose the title, but he can seek compensation from the seller through legal action.

In the case of *Pacific Motor Auctions Pty Ltd v. Motor Credits (Hire Finance) Ltd*[288], a car dealer entered into a display agreement with Motor Credits. Under the agreement, cars bought by the dealer were sold to the finance company for 90 per cent of their purchase price. The car dealer retained possession for display purposes. When the dealer got into financial difficulty, the finance company cancelled its agreement with him. The same day as its authority was withdrawn, the dealer sold all his stock to Pacific Motor Auctions. Pacific Motor Auctions was unaware of the withdrawal of the car dealer's authority and the car dealer signed a declaration stating that all of its stock was unencumbered and was its sole property. The issue arose whether the finance company can successfully sue Pacific Motor Auctions for the return of the cars. Court held that Pacific Motor Auctions had title to the cars as they had bought them in good faith and without notice of the sale from a seller who had continued in possession of the goods after the sale.

[288] [1965] 112 CLR 192.

Sale by a Buyer in Possession

Section 30(2) of the SOGA 1957 provides:

> *"If a buyer, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or the documents of title under any sale, pledge or disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."*

If a buyer, having bought or agreed to buy goods, obtains possession of the goods or the documents of title with the consent of the seller, he can pass a good title to a subsequent buyer acting in good faith, even if under the first transaction, he has not obtained a good title.

In the case of *Newtons of Wembley Ltd v. Williams*[289], the plaintiffs sold a car to A, who paid by cheque. Although he was given possession, it was agreed that the property would not pass until the cheque was honoured. A was given possession of the car but the cheque was returned unpaid (dishonoured). The plaintiff terminated the contract. Subsequently, A resold the car to B, who purchased it unaware of the circumstance. It was then resold to the defendant by B. The Court of Appeal decided that because A, the original buyer, was in possession with the plaintiffs' permission, he may transfer a good title to B, who then transferred it to the defendant.

Performance of Contract

According to Section 31 of the SOGA 1957, it is the seller's duty to deliver the goods, while the buyer's duty is to accept and pay for them in compliance with the contract's terms. The term "delivery" refers to the voluntary transfer of property from one person to another.[290]

[289] [1965] 1 QB 560.

[290] Seller to buyer.

A buyer may sue the seller for damages for non-delivery under section 57 of the SOGA 1957. Acceptance of goods means when a buyer accepts the goods from the seller.

Remedies of the Seller

Chapter V and VI of the SOGA 1957 deals with the rights of the seller in a situation where the buyer breaches the contract of sale of goods. An 'unpaid seller' is a seller to whom the whole of the price has not been paid or tendered; or where a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled due to the instrument being dishonoured or for some other reason. The seller's rights in the event that the buyer breaches the contract of sale of goods are a lien, stopping of the goods in transit, resale, and the right to sue for breach of contract.

Lien

Section 46(1)(a) of the SOGA 1957 grants the seller a lien on the goods for the price while the goods are in his possession. A legal lien is dependent on possession. The unpaid seller of goods who still possesses them is entitled to retain possession of them until payment or tender of the price in any of the following events:

1. the goods have been sold without any stipulation as to credit;
2. the goods have been sold on credit, but the term of credit has expired; or
3. the buyer becomes insolvent.

The seller may exercise his right of lien even if he is in possession of the goods as agent or bailee for the buyer. If the seller has made part delivery of the goods, he may exercise his right of lien on the remainder unless the part delivery has been made under such circumstances which indicate that the seller waived the lien. The unpaid seller however loses his lien if:

1. when he delivers the goods to a carrier or other bailee in order that the goods transmitted to the buyer without reserving the right of disposal of the goods;
2. the buyer or his agent lawfully obtains possession of the goods; or
3. when the seller waives his lien.

Stopping the Goods in Transit

Section 46(1)(b) of the SOGA 1957 provides that in the case of the buyer's insolvency, the seller has the right to stop the goods in transit. When a buyer becomes insolvent and the unpaid seller has parted with the possession of the goods, the seller has the right to stop the goods in transit for as long as the goods are in transit. This means that the seller may resume possession of the goods and retain them until payment or tender of the price.

The goods are still in transit unless the buyer, his agent, or bailee receives delivery of the goods. The unpaid seller imposes a stoppage in transit by:

1. obtaining actual possession of the goods; or
2. notifying the carrier or bailee in whose possession the goods are.

When the seller notifies the carrier or bailee who is in possession of the goods of a stoppage in transit, the carrier or bailee must redeliver the items according to the seller's orders at the seller's cost. In the case of *Booth SS Co. v Cargo Fleet Iron Co*[291], the seller's right of stoppage in transit is depend to the carrier's lien for any unpaid freight, which takes precedence over the seller's right.

Section 54(1) of the SOGA 1957 provide that *"subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by the unpaid seller of his right of lien or stoppage in transit.*

[291] [1916] 2 KB 570.

Resale

Section 46 (1)(c) of the SOGA 1957 – A right of resale (subject to Section 54 of the SOGA 1957). Under Section 54(3) of the SOGA 1957, the unpaid seller who resells can give a good title to a second buyer as against the original buyer. However, while the second buyer may obtain title under resale, the seller may be liable to the original buyer for breach of contract. The power to transfer a good title does not necessarily mean that he has the right to resell. In a resale, the seller has the power to transfer a good title to the second buyer as follows.

1. When property in the goods has not passed to the original buyer.
2. Sale by a seller in possession as set out in Section 30(1) of the SOGA 1957.
3. When the seller resells after he has exercised his right of lien or stoppage in transit.

Section 54(2) and (4) of the SOGA 1957 allow the seller the right to resell where:

1. the goods are of a perishable nature;
2. the seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to resell, and the buyer fails within a reasonable time to pay or tender the price;
3. the seller has in the original contract '*expressly reserved a right of resale in case the buyer should make default*'.

In the case of *Mordaunt Bros v. British Oil and Cake Mills Ltd*[292], Court held that a seller could not be regarded as having 'assented' to a resale simply because the buyer had informed him of the resale after the resale had been affected.

[292] [1910] 2 KB 502.

Right of the Seller to Sue for Breach of Contract

Based on Section 55(2) of the SOGA 1957, the seller can sue for the price of the goods where:

1. the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods; and
2. where it is agreed that the price is to be paid on a specific date regardless of delivery, and the buyer wrongfully neglects or refuses to pay such price despite the fact that property in the goods has not passed and the goods have not been appropriated to the contract.

Breach by the buyer may be considered under the following circumstances.

1. Failure of buyer to take delivery

   Section 31 of the SOGA 1957 states:

   "it is the duty of the seller to deliver the goods whilst the buyer's duty is to accept and pay for them in accordance with the terms of the contract of sale."

   Section 44 of the SOGA 1957 provide:

   "when the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not, within a reasonable time after such request, take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery."

   The buyer is also liable for a reasonable charge for the care and custody of the goods.

2. Failure of buyer to accept goods

   Section 56 of the SOGA 1957 provides:

   "where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance."

   Where the property in goods has passed to the buyer, the seller may sue for the price under Section 55 of the Act.

3. Failure of buyer to pay for goods

Section 37(1) of the SOGA 1957 provide that where the seller delivers to the buyer a quantity of goods less than that which he contracted to sell, the buyer may reject all the goods so delivered. If the buyer accepts the goods so delivered, he is bound to pay for them at the contract rate.

If the seller provides additional goods to the buyer than was agreed for, the buyer has the following options:

a. accept the quantity of the goods as stated in the contract and reject the other;
b. reject all goods; or
c. accept all of the goods.

If the buyer chooses to accept all the goods, he must pay for the goods at the contract rate.

Remedies of the Buyer

The following are the buyer's rights in the event that the seller breaches the contract of sale of goods.

Right of Buyer to Sue for Non-Delivery

Section 57 of the SOGA 1957 provides:

> *"where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery."*

In the case of *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd*[293], the plaintiffs claimed damages against the defendants for non-delivery of goods alleging loss of profits on resale. Court found that the defendants liable.

[293] [1989] 3 MLJ 360.

Right of Buyer to Bring an Action for Specific Performance

According to section 58 of the SOGA 1957, the buyer may file an action for specific performance by the delivery of specific or ascertained goods. However, this remedy is only granted at the discretion of the courts.

Remedies under specific performance are applicable only if the contract is for the delivery of specific or ascertained goods. In the case of *Re Wait*[294], a contract for the sale of 500 tonnes of wheat from a consignment of 1000 tonnes did not entitle the buyer to seek an order of specific performance because the goods were neither specific nor later ascertained, according to the English Court of Appeal.

Remedies Available to Buyer for Breach of Warranty

Section 59 of the SOGA 1957 prescribes the remedies available to a buyer for breach of warranty, that is, contractual term which is not, or cannot be treated by the buyer as a ground for rejecting the goods. Where the seller commits a breach of warranty or where the buyer elects or is compelled to treat a breach of condition by the seller as a breach of warranty, the buyer cannot reject the goods, but he may:

1. set up against the seller the breach of warranty in diminution or extinction of the price; or
2. sue the seller for damages for breach of warranty.

Even if the buyer has set up a breach of warranty to lower the price, he can still sue the seller for damages due to the same breach of warranty. In the case of *Mondel v. Steel*[295], a ship was built for the buyer and it was discovered to be defective. When the seller sued for the price, the buyer set up as a defence the seller's breach of an express warranty as to quality. At this stage, the buyer's damages were calculated as the difference between the actual value of the ship at the date of delivery and its worth if built to the contractual standard.

[294] [1927] CH 606.

[295] (1841) 8 M & W 858.

When he later sued for further damages for the cost of repairs to the ship, the court took the view, in reference to the earlier claim, that the buyer has defended himself and to the extent *that he obtained an abetment of price on account of the breach, 'he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; and no more'.*

Buyer's Action in Tort

If the buyer has obtained property in the goods and is entitled to delivery that is being withheld, he may sue in tort for unlawful interference with the goods. By commencing an action in detinue and conversion, the buyer can sue the seller in tort.[296]

Detinue is the improper detention of the plaintiff's personal property after their return has been ordered, whereas conversion is the use of the goods in a way that contradict the buyer's ownership.

In the case of *Puncak Niaga (M) Sdn Bhd v. NZ Wheels Sdn Bhd*[297], where a new luxury Mercedes Benz motor vehicle kept breaking down, the court held to the effect that the car was not of satisfactory or acceptable quality and was unfit for its purpose and the purchaser was protected by the Consumer Protection Act 1999.

Comparison with Indonesia

In Indonesia, the sale of goods commonly refers to trade agreement.

The legal Basis of Trade in Indonesia

A sale or trade agreement is an agreement that is most commonly held among the public. The form of the agreement is a series of rights and obligations of the two parties, namely the seller and the buyer, the trade agreement is regulated in articles 1457 to article 1540 of the Civil Code. The definition of trade as stipulated in the provisions of the 1547 Civil Code is "an agreement, whereby one party binds themself to deliver an object, and the other party to pay the price of the object."

On the definition of trade according to Article 1457 of the Civil Code above, it can be concluded that trade is a reciprocal agreement, in which the seller promises to give up property rights over an item and the buyer promises to pay an amount of money in return. The right of ownership of an item that is originally owned by the seller will be hand over to the buyer if there is a juridical delivery in accordance with the provisions of Article 1459 of the Civil Code.

The agreement is deemed to have occurred between the two parties, immediately afterward these people reach an agreement on the object and the price, even though the material has not been surrendered, nor has the price been paid (Article 1458 of the Civil Code). These goods and prices are the main elements of the agreement. According to Article 1517 of the Civil Code, if the buyer does not pay the price, then it is a default which gives the seller reasons to demand compensation or cancellation of the agreement according to the provisions of Articles 1266 and 1267 of the Civil Code, the "price" must be in the form of a sum of money. Regarding the provisions of the price as stipulated in Article 1465 of the Civil Code, the price is determined jointly by both parties.

Based on the principle of consensuality in the trade agreement, since an agreement has been reached regarding the trade of goods and prices, even though the goods have not been delivered or made the payment, since then a trade agreement has been established. The principle of consensuality itself according to article 1458 of the Civil Code:

> *"a trade has taken place between the two parties immediately after they have reached an agreement on the object and price, even though the goods have not been delivered and the price has not yet been paid".*

[296] Section 56 of the SOGA 1957.

[297] (2012) 1 MLJ 27.

The word consent comes from the Latin consensus which means agreement. The word agreement implies that the parties concerned have reached an agreement of will. This means that what is desired by the parties has achieved a commonality, which then the mutual agreement is reached. For example, the seller as the first party wants to release ownership of an item after getting a certain amount of money in return. Likewise, the second party, as the buyer, who wants property rights over the goods must be willing to give a certain nominal amount (money) to the seller as the previous owner.

The nature of the obligatory in the trade agreement, according to the Civil Code means that the trade agreement will put reciprocal rights and obligations on the parties, namely when it gives the seller the obligation to surrender property rights over the goods sold, then giving the right to demand payment for the price that has been the deal. While the buyer is obliged to pay the price in exchange for his right to transfer ownership of the purchased goods, in other words, the ownership rights will transfer from the seller to the buyer after delivery.

Obligatory trade in Article 1359 of the Civil Code, that the ownership rights to the goods sold will not be transferred to the buyer as long as the delivery has not been made according to the provisions of Article 612 of the Civil Code which states that the delivery of movable objects is carried out by real delivery, Article 613 stated that account receivable can be created through an authentic deed or letter.

Subjects and Objects of Trade

The trade agreement is a legal act, where the trade agreement occurs because of an agreement between two or more people. Each of these people has a role, one person is the seller and the other person is the buyer, the seller and the buyer are the subjects of the trade agreement. Any person or legal entity can become a subject of a trade agreement.

Objects that can be the object of trade are all movable and immovable, both according to the size and weight, while those that are not permitted for sale are:

1. other people's belongings
2. items that are not permitted by law such as illegal drugs;
3. contrary to order, and
4. good morality.

To determine what can be the object of trade, Article 1457 of The Civil Code uses the term zaak. According to Article 499 of the Civil Code, zaak is an item or right that is owned, this means that what can be bought and sold is only objects that are the property of the seller.

Rights and Obligations of the Parties in the Trade

Each trade agreement creates rights and obligations for both parties entering into the agreement. Obligations from an engagement, whether an engagement that originates from an agreement or an engagement that originates from the law are also known as legal obligations that must be fulfilled. In general, in the buying and selling process, there are rights and obligations of the following parties. Buyer and seller rights are:

1. the seller's right is to receive the price of the goods sold from the buyer in accordance with the price agreed between the two parties.
2. the right of the buyer is to receive the goods they have bought from the seller by agreement between the two parties.

As for the obligations of the buyer and seller namely the following.

1. Giving up property rights over the goods being traded. 'The delivery of goods in the trade is an act of transferring the goods sold into the power of the new owner.
2. In delivering the goods must be delivered at the place and time that has been agreed.
3. The seller is obliged to deliver the goods completely.
4. If the buyer makes a withdrawal or cancellation of the purchase of the promised goods, the seller is obliged to return the money

that has been paid including the money spent by the buyer for the delivery of the goods.

5. Even though it has been agreed that the seller will not bear anything, they still responsible for any consequences caused by it.
6. If a seller in ill intention has made a sale of other people's goods, the seller is obliged to return the money that has been spent to buy the item, either the price or the money used for the delivery process.
7. The seller is obliged to bear defects that are known or unknown by the seller which can make the price of the item if the buyer knows it is less or the use function of the buyer is less due to the defect So, the seller is obliged to return the buyer's money, either the price of the goods or the money incurred for delivery. If the buyer knows and continues to make a purchase, the seller does not bear the defect.

As parties who are directly bound in an agreement, there will also be obligations from the buyer in a trade relationship. Juridically, the buyer's obligations as stipulated in the provisions of 1513-1518 of the Civil Code, namely the following.

1. The main obligation of the buyer is to pay the purchase price, at the time and place determined by the agreement. If at the time of the agreement there is no stipulation, the buyer must pay at the place and at the time of the delivery.
2. The buyer is obliged to bear the cost of taking the promised goods.
3. The buyer is obliged to pay interest from the purchase price if the goods sold or delivered provide results or other income
4. If the buyer gets interrupted by a lawsuit based on mortgages or asks for the return of the goods, or if the buyer has reason to fear that he will be under the seller's control, the buyer may postpone payment of the purchase price until the seller stops the interruption. Unless the seller chooses to provide a guarantee.

Cancellation of the Trade Agreement

In the trade agreement, the trade agreement may be automatically canceled because the object contained in the trade agreement is not a perfect object or an object that is prohibited from being traded. Meanwhile, cancellation in the legal context of trade is based on negligence or service imperfections and other reasons, which may allow the buyer to cancel the trade agreement as agreed.

The trade agreement is considered canceled if match the following.

1. The trade agreement is automatically canceled if the seller makes a trade of goods belonging to someone else. The provisions concerning the cancellation of the trade of an item belonging to another person are regulated in the provisions of article 1471 of the Civil Code that

   "a trade of other people's goods is prohibited, and can provide a basis for reimbursement of costs, losses, and interest if the buyer does not already know that the goods belong to someone else ".

2. The trade is considered canceled if the seller makes a sale of goods that do not exist or defective. This is as stipulated in the provisions of article 1472 of the Civil Code

   "if at the time of sale, the goods sold have been completely defective, then the purchase is canceled. If only part of it is broken, the buyer is free to cancel the purchase or demand the remaining part, and order to set the price according to a balanced assessment."

There are several reasons for the cancellation of the trade agreement, namely the following.

1. Negligence in the process of delivering the goods, such as goods that were promised in the buying and selling process would be there within a few days after the agreement was made but the buyer was not notified when the delivery is going to happen or there was damage to the goods and unknown to the buyer. The buyer may

cancel the goods that have been promised. This is based on the provisions of article 1480 of the Civil Code:

"if the delivery due to negligence cannot be carried out, then the buyer can demand cancellation of the purchase according to the provisions of articles 1266 and 1267."

The seller may cancel the agreement if the buyer does not make payment for the goods that have been agreed upon within a predetermined time. This is as stipulated in the provisions of article 1518 of the Civil Code:

"If the buyer does not pay the purchase price, the seller can demand the cancellation of the sale according to the provisions of Articles 1266 and 1267."

2. The seller can cancel the trade that has been agreed upon when the object is household furniture, if the buyer does not take the purchased item within the specified period, it will be nuli and void or automatically canceled. This is as stipulated in the provisions of the 1518 Civil Code:

"However, in the case of the sale of merchandise and home furnishings, the cancellation of purchases for the benefit of the seller occurs by law and without warning, after the specified time has passed to retrieve the goods sold."

3. For trade whose object is a land, which is subject to a certain dedication, the trade agreement may be canceled. As stipulated in the provisions of article 1502 of the Civil Code:

"If it turns out that the goods being sold are burdened with land usage but this is not notified to the buyer, while the land use is so important that it can be presumed that the buyer will not purchase if this is the case. Knowing that, then the buyer can demand cancellation of the purchase unless he chooses to receive compensation."

In addition to only regulating the possibility for a buyer or seller to cancel an item that is traded, the Civil Code also regulates articles that do not allow cancellation of the buying and selling process, this is if it is carried out based on giving an advance payment, then the process cannot be canceled and will continue as promised.

This is as stipulated in the provisions of article 1464 of the Civil Code that:

"if a purchase is made by submitting a down-payment, neither party can cancel the purchase by ordering to have or return the down payment".

Guarantee in Trade in Indonesia

The legal basis for providing guarantees in trade in Indonesia was born through the ratification of Law Number 8 of 1999 concerning Consumer Protection (Consumer Protection Law). The guarantee itself is a guarantee given by the company for a product that is produced of good quality, free from errors, or without defects during production.

In the provisions of article 7 letter (e) that one of the obligations of a business actor is:

"to provide opportunities for consumers to test, and/or try certain goods and/or services and to provide guarantees and/or guarantees for goods made and/or traded."

Furthermore, this law protects consumers who use the goods for more than one year, so businessmen are required to provide spare parts or after-sales facilities. This is as stipulated in the provisions of Article 25 (1):

"Producer or seller who produces goods that the usage period is within a time limit of at least 1 (one) year are obliged to provide spare parts and/or after-sales facilities and must fulfill the guarantee as agreed."

For the seller who does not provide such guarantees, they can be sued for neglecting to provide spare parts or repair facilities and failing to fulfill the guarantees referred to in the provisions.

CHAPTER 8

LAW OF AGENCY

Introduction

Agency is a three-way arrangement that allows or creates a legal relationship between a person (the Principal) and a third party through the presence of the agent i.e a person who represents the principal. Agency arises apart from partnership law, however there can be no partnership without agency.

The law of agency is governed by Part X of the Contracts Act 1950 [CA 1950].[298] According to section 135 of the CA 1950:

> *"An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'."*

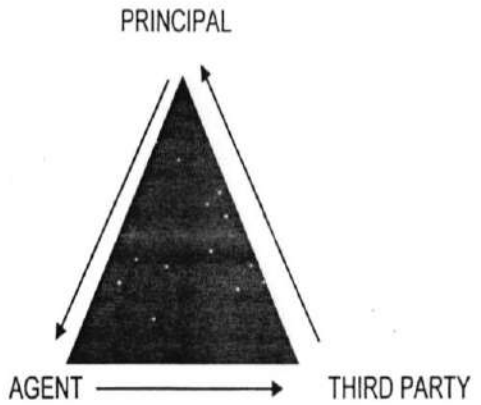

Figure 8.1 The relation between principal, agent and third party

[298] Sections 135 to 191.

In the law of agency, there are two contracts in effect, namely

1. contract between the principal and the agent from which the agent derives his authority to act for and on behalf of the principal; and
2. contract between the principal and the third party through the work of the agent.

Formation of an Agency

An agency can be created in several ways. A contract of an agency can be expressed or implied from the circumstances and the conduct of the parties. Section 136 of the CA 1950 provides:

> *"Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent."*

Section 137 of the CA 1950 states:

> *"As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained."*

In order to form a contract, an agent must be of the age of majority and of sound mind. However, he is not liable to his principal for acts performed as an agent if he is a minor or a person of unsound mind.

Section 138 of the CA 1950 provides that there is no consideration to create an agency. The provision states:

> *"No consideration is necessary to create an agency."*

Generally, an agency may arise in five circumstances namely express appointment by the principal, implied appointment by the principal, ratification by the principal, by necessity and by the doctrine of estoppel or holding out.

Express Appointment by the Principal

The agency is formed by express appointment when the agent is appointed by the principal through express consent with the agent. Express appointment may be formed in a written or oral. It involves the actual consent of the principal and the agent. Section 140 of the CA 1950 states:

> *"An authority is said to be express when it is given by words spoken or written."*

Implied Appointment by the Principal

In certain cases, the principal may not directly grant the authority to the agent, however, the principal's authority may be inferred by his actions. Section 140 of the CA 1950 provides:

> *"An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case."*

The circumstances of agency by implied appointment are as follows.

1. By words or conduct (actions)

The law may infer the formation of an agency by implication when a person by his words or conduct (actions) holds another person as having authority to act for him under section 140 of the CA 1950. The principal may impliedly appoint the agent (actual implied authority).

In the case of *Chan Yin Tee v. William Jacks & Co (Malaya) Ltd*[299], the appellant and Yong, a minor, were registered as partners. At a meeting with a representative of the respondent company, the appellant claimed to be Yong's partner. Yong was given goods, but they were not paid for. The respondent company was successful in its lawsuit against the appellant and Yong. The appellant appealed his case to the Federal Court, which found that

[299] [1964] MLJ 290.

the appellant was responsible for Yong's actions since he had appointed Yong as his agent with authorization to act on his behalf.

2. By the relationship between husband and wife

It's possible that the husband and wife have a principal-agent relationship. A rebuttable presumption in law that a wife who lives with her husband and children has the right to pledge credit to her husband for necessities that are reasonable for their lifestyle.

For example, a husband who routinely undertakes obligation for his wife's past dealings and purchases from the seller would remain responsible and obligated for all such contracts unless and until he notifies the seller that the wife is adequately provided.

In the case of *Miss Gray Ltd v. Cathcart*[300], a wife was supplied with clothes to the value of £215 on her husband's credit. The husband refused to pay for the price. When sued by the seller, the husband proved that he had paid his wife £860 a year as an allowance. The court held that the husband was not liable.

There are several instances in which the husband may challenge the implied authority which:

a. he had expressly forbidden his wife from pledging his credit; or
b. he has expressly warned the seller not to supply his wife with goods on credit; or
c. his wife was given a sufficient allowance for the purpose of buying goods without having to pledge her husband's credit; or
d. his wife was sufficiently provided for with the goods of the kind in question; or
e. the contract though for necessaries, it was unreasonable by considering her husband's financial position at the time.

[300] (1922) 38 T.L.R. 562.

3. By the Partnership Act 1961

According to section 7 of the Partnership Act 1961, when contracting in the partnership business, it requires partners to act as agents for one another. The provision reads:

> *"Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner."*

Any act performed by a partner in the ordinary course of business binds the firm and his fellow partners, even if the partner acting has no authority to act for the firm in the matter, unless the person with whom he is dealing is aware of his lack of authority or does not know or believe he is a partner.

In the case of *Rosembaun v. Belson*[301], it was held that instruction from an owner of a house to an agent to sell his property was an authority to the agent to make a binding contract which included an implied authority to sign an agreement of sale.

In the case of *Beckham v. Drake*[302], the Court of Justice was held that a partner may also employ the necessary staff in order to run the firm's business. That means employing a necessary staff was also considered the ordinary course or usual way of business. Therefore, the other partners were also liable under the contract.

Ratification by the Principal

The term 'ratification' refers to the principal's authorization or recognition of an act performed by his agent without permission or in excess of the

[301] [1900] 2 CH 267.
[302] (1841) 9 M & 79.

authority granted. Agency by ratification may arise in any one of the following situations:

1. an agent who was duly appointed has exceeded his authority; or
2. a person who has no authority to act for the principal has acted as if he has the authority.

When any one of the above-mentioned situations arise, the principal can either reject the contract or accept the contract according to section 149 of the CA 1950. The provision provides:

> *"Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts. If he ratifies them, the same effects will follow as if they had been performed by his authority."*

When the principal accepts and confirms such a contract, the acceptance is called ratification. Ratification may be expressed or implied under section 150 of the CA 1950 which provides:

> *"Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done."*

The circumstances listed below allow a contract to be ratified.

1. The agent's conduct was unauthorised, i.e. done without authority or in exceeding of that authority.
2. The unauthorised conduct performed by the agent must be legitimate and not illegal.
3. The agent must expressly act as the principal's agent at the time of the contract.[303] He must not enter into a contract in his own name and must not induce a third party to assume he is the principal.
4. The agent must have a principal, who is in actual existence or capable of being ascertained, when the contract is made. No one can ratify a contract if he is not a party competent to contract at the date of the contract.
5. The principal must have contractual capacity either when the contract is made or when it is ratified.
6. At the time of ratification, the principal must have full knowledge of all important facts, unless it can be proved that he intends to ratify the contract regardless of the facts and take responsibility for them.[304]
7. The principal must ratify the entire act or contract. Hence, he is not allowed to accept only a part of the contract.[305]
8. Ratification must be made within a reasonable time.
9. The ratification shall not cause harm to a third party, i.e. it must not bring the third party to damages or terminate his right or interest, as stated in section 153 of the CA 1950:

> *"An act done by one person on behalf of another, without that other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have that effect."*

In the case of *Keighley Maxsted & Co v. Durant*[306], the appellants allowed an agent, Roberts, to purchase wheat at a specific price. The agent exceeded his powers by purchasing at the higher price in his own name but intended it for Keighley. Keighley agreed to buy the wheat at that price but did not accept delivery. The court found that Keighley was not liable to Durant since Roberts did not profess to act as an agent at the time of the contract.

In the case of *Brook v. Hook*[307], it was stated that a principal could not ratify a forged signature on a cheque, as this was unlawful. In *Metropolitan*

[303] Section 149 of the CA 1950.

[304] Section 151 of the CA 1950.

[305] Section 152 of the CA 1950.

[306] [1901] AC 240.

[307] (1871).

Asylum Board v. Kingham & Son[308], the principal's purported to ratify the contract one week after the agent's bought eggs without authority was held the ratification was too late.

In the case of *Kelner v. Baxter*[309], a contract to build a hotel made by an agent on behalf of a company, which was about to be formed, could not be ratified by the company, since it did not exist at that time. It had no contractual capacity to make the contract. The agent was held liable for the contract unless the third party agreed to release him.

Ratification has the effect of making the contract as binding on the principal as if the agent had been duly allowed beforehand.

By Necessity, i.e. by operation of law in certain circumstances

In an emergency, an agent has authority to do all such acts to protect his principal from loss as a person of ordinary prudence would do in his own scenario under similar circumstances, according to section 142 of the Contracts Act 1950. An agency of necessity may be created if the following conditions are met.

1. It is impossible for the agent to get the principal's instructions.[310]
2. There must be real and actual emergency with relevant case.
3. The agent was entrusted with the principal's property in a relevant situation.
4. The agent's action is necessary, in the circumstances, to prevent loss to the principal with respect to the interest committed to his charge, e.g. when an agent sells perishable goods belonging to his principal to prevent them from rotting.
5. The agent of necessity must have acted in a good faith. In an emergency, an agent has the authority to do all such acts for protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.[311]

The elements of agency of necessity are:

1. there must be a situation of necessity;
2. the agent cannot obtain instructions from the principal;
3. the agent must act in good faith and in the interests of the principal; and
4. the agent's acts must be reasonable and prudent.

In the case of *Springer v. Great Western Railway Co*[312], the defendant, the Great Western Railway Company, promised to deliver the plaintiff's tomatoes from the Channel Islands to London by ship to Weymouth and train to London. Due to bad weather, the ship was stopped at Channels Island for three days. When the ship finally arrived in Weymouth, the defendant's workers were on strike, so tomatoes were unloaded by casual labourers, although the process was delayed for two days. Some of the tomatoes were discovered to be rotten at the time. As a result, the defendant decided to sell the tomatoes because they believed the tomatoes would not arrive in good and sellable condition at Covent Garden market. Plaintiff decides to sue the defendant for damages after knowing about this. Plaintiff was entitled to damages, and according to the court, the defendant should have communicated with the plaintiff when the ship docked in Weymouth to get instructions. There was no agency of necessity because the defendant failed to contact with plaintiff when they had the opportunity.

In the case of *Great Northern Railway v. Swaffield*[313], the railway company carried the defendant's horse to its contracted destination. On arrival there was no one to meet it. The station master did not know the defendant or his agent's address and directed that the horse be put in a stable. The railway

[308] (1890) 6 T.L.R. 217.

[309] (1866) LR 2 CP 174.

[310] Section 142 of the CA 1950.

[311] Ibid.

[312] [1921] 1 KB 257

[313] (1874) LR 9 Ex 132

company later claimed for the charges for the stable. The defendant refused to pay. The court held that the plaintiff acted as an agent of necessity in this matter.

In the case of *Jebarra v. Ottoman Bank*[314], the courts held that a person is entrusted with another's goods when he is given instructions to deliver the goods to a specific location and an emergency occurs while the goods are in the agent's hands.

By the Doctrine of Estoppel or 'holding out'

Estoppel is a legal principle that forbids or prevents a party from denying or claiming a certain fact owing to that party's previous conduct, allegation, or denial. An agency can come into existence by means of the doctrine of estoppel. Section 190 of the CA 1950 states:

> *"When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that those acts and obligations were within the scope of the agent's authority."*

The formation of an agency by estoppel is created constructively, that is, by imposition of law. A person cannot be bound by a contract made on his behalf without his authority. However, if he by his words and conduct allows a third party to believe that person is his agent even when he is not, and the third party relies on it to the detriment of the third party, he will be estopped or precluded from denying the existence of that person's authority to act on his behalf.

The elements to constitute estoppel are:

1. a representation made by or on behalf of the principal to the third party concerning the authority of the agent;
2. reliance by the third party on the representation made by the principal to the third party and
3. the third party must rely on the principal's representation and alter his or her legal position on the strength of the representation.

In the case of *Freeman and Lockyer v Buckhurst Park Properties)*[315], Lord Diplock states:

> *"Actual authority and apparent authority are quite independent of one another. Generally, they coexist and coincide but either may exist without the other and their respective scope may be different."*

Duties and Rights of an Agent Toward His Principal

The agent has responsibilities to his principal and, according to agency law, he also has rights as an agent.

An Agent Cannot Delegate his Authority to another Person

The general rule is the maxim *delegates non potest delegare* means:

> *'an agent cannot, without the authority from the principal, devolve upon another person obligations owed to the principal which the agent has personally undertaken to fulfil.'*

The maxim applies to the relationship between principal and agent as theirs is a personal one.[316] However, there are exceptions to this general rule which are the following:

1. where the principal approves or consents to the delegation of the authority;
2. where it is presumed from the conduct of the parties that the agent shall have power to delegate his authority;

[314] [1927] 2 KB 254.

[315] [1964] 2 QB 480.

[316] An agent cannot employ another person to do his duty.

3. where the custom, usage or practice of the trade or business permits delegation;
4. where the nature of the agency is such that delegation of the authority to another person is necessary to complete the business;
5. in case of necessity of an unforeseen emergency;
6. where the act to be done is purely ministerial, clerical, or administrative and does not involve the exercise of any special discretion or skill.

In the case of *Wong Mun Wai v. Wong Tham Fatt and Anor*[317], the first defendant breached his duties as the plaintiff's agent on two occasions: first, he sold the plaintiff's half share of land substantially below market value, and second, he failed to inform the plaintiff that he had sold it to the second defendant, who was his wife. The court held that the first defendant had a duty to act in good faith in protecting the plaintiff's interests and could not benefit at the plaintiff's expense by using his position as an agent.

In the case of *De Bussche v. Alt*[318], the court held that the agent was not in breach of his duty in appointing the sub-agent because there was express approval from the principal to the delegation.

An Agent must obey the Instructions of the Principal

An agent has a duty to obey the instructions of his principal. According to section 164 of the CA 1950, it states:

> *"An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts the business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it."*

317 [1987] 2 MLJ 249.

318 (1978) 8Vh.D. 286.

In the case of *Turpin v. Bilton*[319], the agent has been instructed by the principal to insure his vessel. However, the agent failed to do so. The vessel was lost and the principal sustained losses. The court held that the agent is liable for breach of duty, due to his failure to obey the principal's instructions. The agent is liable to pay compensation for the loss.

A principal's instructions must be followed, according to section 164 of the CA 1950, and if the agent fails to do so, there would be a breach of the agency contract, and he would be responsible for the principal's loss.

The Agent must Exercise his Duties with Skill and Reasonable Diligence

An agent is required to carry out his duties with skill and reasonable diligence. Section 165 of the CA 1950 provides:

> *"An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct."*

Render Proper Accounts

An agent is under the duty to render proper accounts when required. Section 166 of the CA 1950 states:

> *"An agent is bound to render proper accounts to his principal on demand."*

319 (1843) 5 Man & G 455.

In the case of *Lyell v. Kennedy*[320], the court held that an agent who is entrusted with the principal's money or property is required to keep the money or property separate from his own.

The Duty to Communicate with the Principal

The agent is under the duty to communicate with his principal. By virtue of section 167 of the CA 1950, it states:

> *"It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions."*

In the event of an emergency or difficulty, the agent must communicate with his principal with all reasonable diligence. The aim of communicating with the principal is to get instructions for the circumstances that occur.

Agent's Right of Retainer out of Sums Received on Principal's Account

Section 170 of the CA 1950 states:

> *"An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent."*

The agent however, is entitles to deduct any sum from the principal's money for the payment of the following.

1. Any sums owed to the agent in respect of advances made or expenses incurred by the agent in conducting the business.
2. Any commission or remuneration payable to the agent.

[320] (884) 27 ChD 1.

To Pay his Principal

The agent is obligated to reimburse all payments received on his behalf of his principal. Section 171 of the CA 1950 states:

> *"Subject to the deductions specified in section 170, the agent is bound to pay to his principal all sums received on his account."*

Any amount received by the agent on behalf of the principal must be paid to the principal.

When Agent's Remuneration becomes due

An agent is only entitled to remuneration for his duties as an agent under common law if the terms of the agency agreement provide for it. Section 172 of the CA 1950 provides:

> *"In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of the act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete."*

Agent Not Entitled to Remuneration for Business Misconducted

Section 173 of the CA 1950 states:

> *"An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted."*

In the case of *Andrews v. Ramsay and Co*[321], where the principal succeeded in recovering both the commission paid to the agent plus the secret commission received by him from a third party. In this case, the plaintiff instructed the defendant to sell property and agreed to pay him 50 pounds as

[321] [1903] 2 KB 635.

commission. The defendant received 100 pounds from a purchaser as deposit for the property. The defendant paid 50 pounds to the plaintiff and kept the other 50 pounds in payment of his commission with the plaintiff's consent. The plaintiff later learnt that the defendant had also received 20 pounds as commission from the purchaser. He sued to recover these 20 pounds and the 50 pounds he had paid the defendant. It was held that he could recover both sums.

Agent's Lien on Principal's Property

The agent has the obligation to keep the goods, documents, and other property of the principal that he receives, whether movable or immovable. Section 174 of the CA 1950 provides:

> *"In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him."*

In certain cases, a lien is limited to a right of ownership of the goods. It gives the agent no authority to sell, charge, or otherwise dispose of the property.

Duties and Rights of Principal to His Agent

The principal has to perform duty towards his agent, and he also has a right as a principal.

Right of Principal When Agent Deals, on His Own Account, in Business of Agency without Principal's Consent

If an agent deals on his own account in the agency's business without first obtaining the consent of his principal, the principal may repudiate the contract if the situation reveals that the agent has hidden some material fact from him dishonestly. Section 168 of the CA 1950 provides:

> *"If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."*

Principal's Right to Benefit Gained by Agent Dealing on His Own Account in Business of Agency

Section 169 of the CA 1950 provides:

> *"If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction."*

If the agent receives a profit or a secret profit and the principal does not consent to it, the principal entitled to the following remedies.

1. Repudiate or rescind the contract which made on his behalf by the agent with a third party.
2. Recover the secret profit amount.
3. Withhold the commission or other payments to the agent.
4. Terminate or dismiss the agent's authority due to a breach of duty.
5. The principal may claim damages from the agent and the third party who gave the secret profit or bribe for any losses he may have suffered as a result of entering into the contract.

In the case of *Mahesan v. Malaysian Government Officers' Co-Operative Housing Society*[322], Mahesan was a director of the society. The object of the society was to provide housing for government workers. In the process of purchasing a piece of land for the society, Mahesan received a bribe from

[322] [1978] 1 MLJ 149.

a person named Manickam. Manickam had purchased the land earlier for $456, 000. Then he sold it to the Society through Mahesan for $944, 000. Out of the profit, $122, 000 was paid by Manickam to Mahesan as a bribe. Privy Council held that Mahesan had breached his duty to the society. The society could have acquired the land for $456, 000; instead they had paid $944, 000. Accordingly, the society was entitled to recover the amount of the bribe or alternatively damages for the loss incurred

Agent to be Indemnified against Consequences of Lawful Acts

The principal is obligated to indemnify an agent for the implications of all lawful actions performed by the agent in the exercise of the authority delegated to him. Section 175 of the CA 1950 states:

> *"The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him."*

In the case of *Davison v. Fernandes*[323], the defendant asked the plaintiff, a stockbroker, the price of some stock ex dividend but the plaintiff quoted the price cum dividend and negligently failed to inform the defendant accordingly. Acting in the belief that the price quoted was ex dividend, the defendant authorised the plaintiff to sell. The plaintiff sold and in due course, under the rules of the London Stock Exchange, had to pay the dividend to the purchaser. The court held that the plaintiff was not entitled to be indemnified by the defendant

Agent to be Indemnified against Consequences of Acts Done in Good Faith

Section 176 of the CA 1950 states:

> *"Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons."*

The right to be indemnified entitles the agent to recover not only his commission or remuneration, but also money which he paid on the principal's behalf and all losses suffered by him in carrying out the directions of his principal.

Non-Liability of Employer of Agent to Do a Criminal Act

Section 177 of the CA 1950 provides:

> *"Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act."*

Illustration of this provision read:

> *"A employs B to beat C and agrees to indemnify him against all consequences of the act. B thereupon beats C and has to pay damages to C for so doing. A is not liable to indemnify B for those damages."*

Compensation to Agent for Injury Caused by Principal's Neglect

Section 178 of the CA 1950 provides:

> *"The principal must make compensation to his agent in respect of injury caused to the agent by the principal's neglect or want of skill."*

According to the illustration in section 178 of the Contracts Act of 1950:

> *"A employs B as a bricklayer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B."*

[323] (1889) 6 TLR 73.

Effect of Contracts Made by Agents

The contract that the agent enters into on behalf of his principal will binds the principal to the contract with the third party. Section 179 of the CA 1950 states:

> *"Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person."*

Section 183 of the CA 1950 provides:

> *"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases: (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; (b) where the agent does not disclose the name of his principal; and (c) where the principal, though disclosed, cannot be sued."*

The agent can be made personally liable for the contract that he entered into on behalf of his principal when:

1. the agent agrees to accept and make himself personally liable,
2. the agent exceeds his authority and the principal is not ratified. Section 181 of the CA 1950 provides:

   > *"Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction."*

3. the agent signed a negotiable instrument in his own name without making it clear that he is signing it only as an agent.
4. the agent, who has no Power of Attorney, executes a deed or agreement under his own name.

Section 186 of the CA 1950 provides for the right of person dealing with agent. The provision states:

> *"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable."*

Termination of an Agency

Section 154 of the CA 1950 provides:

> *"An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated or declared a bankrupt or an insolvent."*

In the case of *Merbok Hilir Berhad v. Sheikh Khaled Jassem Mohammad and Other Appeals*[324], the respondent was appointed in 1994 as the sole and exclusive agent for the appellant to market the appellant's goods in the Middle East. The appointment and terms of the agency were not reduced into writing. The agreement was a purely verbal arrangement between the parties and entered into between Robert Kokshoorn for the appellant and John Frederick Keen ('JFK') for the respondent. Subsequently, the relationship of principal and agent was terminated with effect from 1 January 2003, when the appellant sent a letter of termination addressed to "Petroserv-JFK Division" to the respondent in Dubai. The main issue in the appeal was whether the notice of termination given constituted enough or reasonable notice and whether the appellant was liable to pay damages for such termination. The Court of Appeal in dismissing the appeals and the cross-appeal with costs held that

[324] [2014] 1 MLRA 62.

where an agency is contractually for a fixed term, and quite often parties agree on a clear notice period, they should be bound by it.[325]

Termination by the Act of the Parties

The principal and the agent may terminate their agency relationship in three ways.

1. By Mutual Consent

The authority of an agent may be terminated by the act of the parties, by agreement or mutual consent or revocation by the principal or renunciation by an agent. When both parties agree, the agency is terminated.

2. Revocation by Principal

According to section 154 of the CA 1950, an agency is terminated when the principal revokes his authority.

Section 156 of the CA 1950 states:

"The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal."

However, section 157 of the CA 1950 states:

"The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency."

In the case of *Syarikat Jaya v. Star Publication (M) Bhd*[326], it was held that 6 months' notice was reasonable in terminating a sole agency agreement.

[325] In any event, the period of notice must be reasonable, and furthermore, a fixed term agency cannot be terminated without sufficient cause, consistent with sections 157 and 158 of the Contracts Act 1950. Where parties have not expressly agreed upfront on a period of notice and the contract is not for a fixed term, although in most cases of commercial agency it will be of a continuing nature, termination should also be preceded by a reasonable period of notice.

[326] [1990] 1 MLJ 31.

In Read v. Anderson[327], it was held that the defendant (Principal) could not revoke the plaintiff's authority after losing the bet. He would have to indemnify the plaintiff for the amount which the latter had paid to the person with whom he made the bet.

In order to revoke the agent's authority, the principal must give a reasonable notice to the agent.

Section 159 of the CA 1950 states:

"Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other."

3. Renunciation by Agent

The agency may also be terminated by renunciation of the agency by the agent. When both parties desire and agree that the agency shall be terminated, the agency becomes end.

Section 159 of the CA 1950 clearly mentions that where the agency is for an indefinite duration, the agent can terminate the agency by giving reasonable notice of termination to the principal.

If reasonable notice is given, the agent will no longer be liable to the principal and he can claim reimbursement for all his service and expenses up to the date of termination of his agency.

Where the agency is for a definite or fixed period, the agent cannot terminate the agency before the expiry of that period without just cause. Otherwise, according to section 158 of the CA 1950, he will be liable to the principal for damages for any loss caused by the premature termination of the agency.

Section 158 of the CA 1950 provides:

"Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to

[327] [1884] 13 QBD 779

the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause."

Revocation or renunciation of the agency may be expressed or implied by the conduct of the principal or agent as stated in section 160 of the CA 1950.

Termination by Performance

Based on section 154 of the CA 1950, it is clearly stated that the contract of agency is ended when the agent has performed the contract, and this can arise when an agency is created for a single specific transaction is completed. If an agency is created for affixed period, the agency is terminated at the expiry of that period whether the business or transaction has been completed or not.

Termination by Operation of Law

An agency may be revoked by operation of law in any of the following circumstances.

1. Upon the death of the principal or the agent

Generally, agency comes to an end when the principal or the agent dies.

The exception to this general rule is when the agent has an interest in the property that is the subject of the agency. Section 155 of the CA 1950 states:

"Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

Section 161 of the CA 1950 provides:

"The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them."

An agency which is terminated by the death of the principal is effective only when the agent has notice of the principal's death.

"A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor."[328]

In such a case, when the principal dies, the agent may continue to exercise authority; and if the agent dies, the authority passes to the agent's personal representatives.

Section 162 of the CA 1950 goes on to provide that when the principal dies, the agent must take all reasonable steps to protect and preserve the interests entrusted to him. The provision states:

"When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him."

2. When the principal or agent becomes insane

Since an insane person is not capable to enter into a valid contract to appoint an agent or act as one, agency is terminated by such insanity. When the principal becomes insane, the agent is bound to take all reasonable steps to protect and preserve his principal's interest as stated in section 162 of the CA 1950.

3. When the principal or agent becomes insolvent or is made a bankrupt

Upon insolvency, a person's rights and liabilities are vested in the Official Assignee and, therefore, the agency relationship ceases.

[328] Illustration C, Section 161 of the CA 1950.

Termination by Frustration

Upon the happening of an event which renders the agency unlawful, the agency may be terminated. An agency contract, like any other contract, may be discharged by frustration. In the case of *Stevenson v. Aktiengesellschaf Fur Cartonnagen Industrie*[329], where an outbreak of war made the principal an enemy alien, it was held that the agency was terminated.

Comparison with Indonesia

This section discusses the definition and legal basis of agency, as well as the parties to an agency agreement and the legal relationship between the parties to the agency agreement.

Definition and Legal Basis of Agency

The definition of Agent according to Article 1 number 1 of Regulation of the Minister of Trade Number 11 / M-DAG / PER / 3/2006 concerning Provisions and Procedures for the Issuance of Registration Certificate for Agent or Distributor of Goods and/or Services defines what is meant by agent is a national trading company that acts as an intermediary for and on behalf of the principal based on an agreement to carry out marketing without transferring rights over the physical goods and/or services controlled by the principal who appointed them. From this definition, the agent has the following characteristics.

1. Agent is a national trading company.
2. The agent acts as an intermediary
3. The agent acts for and on behalf of its principal
4. The legal relationship between the principal and the agent is stated in the form of an agency agreement
5. The purpose of appointing an agent is for the marketing of goods or services
6. The agent does not need to transfer the rights to goods or services authorized by the principal

Agent is someone who is given the authority by the principal to represent them in carrying out a legal act or a legal relationship with a third party. Meanwhile, in his book Purwosutjipto what is meant by agent is a person who serves several entrepreneurs as intermediaries with third parties.

Article 1 points 14-19 of the Decree of the Minister of Trade and Industry Number 23 of 1998, defines the agents as follows.

1. Trademark holder and sole agent (ATPM) including licensee agent is an individual or business entity appointed for and on behalf of a factory that owns a certain brand of goods to make sales in bulk of goods from that party.
2. Agent is an individual or business entity that acts as an intermediary for and on behalf of the party who appoints them to make purchases, sales/marketing without physically moving the goods.
3. Factory agent (manufactures agent) is an agent who carries out sales activities on behalf of and for the benefit of the factory that appointed it without physically moving the goods.
4. Sales agent is an agent who makes sales on behalf of and for the benefit of other parties who appoint them without physically moving the goods.
5. A purchasing agent is an agent who makes purchases on behalf of and for the benefit of other parties who appoint them without physically moving the goods.
6. Brand holder sales agent (APPM) is an agent who makes sales on behalf of and for the benefit of the brand holder sole agent (ATPM) who appointed them.

In the Regulation of the Minister of Trade Number 11/M-DAG/PER /3/2006, there are several terms that refer to trade practices, especially in relation to agents. Some of these terms are as follows.

[329] [1918] A.C. 239.

1. Agent is a national trading company acting as an intermediary for and on behalf of the principal based on an agreement to carry out marketing without transferring rights over the physical goods and/or services controlled by the principal who appointed it.
2. Sole agent is a national trading company that obtains exclusive rights from the principal based on an agreement as the only agent in Indonesia or certain marketing areas.
3. Sub agent is a national trading company acting as an intermediary for and on behalf of the principal based on the appointment or agreement of the sole agent or agent to carry out marketing.

In certain activities, what is meant by an agent is a person or entity whose business is to act as an intermediary authorized to carry out certain legal actions, for example making transactions or making agreements between a person with whom he has a permanent relationship (principal) with a third party, by obtaining recompense. An agent is not an agreement with a third party, and in essence, the agent is the principal's proxy.

An agency agreement is one form of anonymous agreement or in other words an agreement that does not get a special arrangement in the Civil Code. Even though it contains a representative aspect, the agency agreement is not entirely the same as the lastgeving agreement. In the book a set of agency and distributor regulations published by the Ministry of Trade of the Republic of Indonesia published in 2006, defining what is meant by an agency agreement is an agreement between the principal and the agent in which the principal gives the mandate to the agent for and on behalf of the principal to sell goods and or services owned or controlled by the principal.

The agency agreement may also end, as for several reasons that can lead to the termination of the agency agreement before its validity period ends, namely:

1. the company is dissolved;
2. the company ceased business;
3. transferred agency rights;
4. bankruptcy.

The Parties of an Agency Agreement

The parties to an agency agreement in Indonesia is similar to Malaysia because it involves a principal, an agent, and a third party.

Principal

The principal as one of the parties in the agency agreement, namely an individual as one of the parties in the agency agreement, is an individual or company that gives orders/powers, appoints certain parties to carry out a legal action.

The principal is the party that gives the power to do something or action of law to other party for their benefit. A principal has the authority that is given to an agent. Authority can be given verbally, in writing, or secrecy. Agency form what commonly happens is where the principal appoints explicitly an agent to represent the principal.

Agents are specifically appointed by principal to perform several actions in general. The appointment of the agent will include the formation of a contractual relationship between the principal and the agent. This explicit appointment can be made orally or written.

Principals are obliged to provide commissions or other rewards to their intermediary according to what has been promised. If that intermediation done without commission or other compensation, it must be stated strictly. Commission or other compensation if not agreed will be given after the engagement or the terms specified in the agreement is fulfilled.

In his book Arthur Lewis states that a principal is obliged to pay a commission that has been agreed upon to the agency and reimburse all expenses incurred by them. So, it can be concluded that the principal is the party who gives permission or authority on their behalf to a party that provides a legal act on the behalf of the principal.

Agent

An agent or intermediary is a party who brings the principal into a contractual relationship with a third party. That is, it is them who makes a contract with another person, but this contract is not binding on the intermediary itself, but rather binds the people they represent. In a typical agency relationship, the intermediary opens a contract to perform legal acts on behalf of the principal.

These agents by the principal are given training for self-development for the sake of their business. This training and self-development is given to agents, sole agents, sole distributors or sub distributors entitled to educate and trains as well as to improve skills and after-sales services from the principal, also they must regularly get information about product developments.

The agency has the obligation to keep information which according to the principal or according to the suit must be kept confidential from third parties. The Agency is not permitted to take secret profits or accept commission, bribes originating from an engagement they have made for the benefit of the intermediary, even if this does not harm the principal's interests.

Without a principal's license, an agency is prohibited from engaging in actions that create conflict between their own ownership and obligations as an intermediary. This provision is intended to ensure that the interests of the principal are not accompanied by the interests of the agency. Without principal permission, agency is not allowed to further delegate their duties to other parties. The other party does not have a direct relationship with the principal, unless the principal expressly gives permission to the intermediary to further delegate the performance of their duties.

As part of executing the duties of the company as an intermediary, the agent has intermediary rights and authorities, namely the following.

1. The agency is obliged to comply with the instructions given by the principal, the agency is obliged to obey the instructions given by the principal, even if they believe that the instructions are wrong. Of course, sometimes the principal expects advice from the intermediary, maybe even the principal reason for hiring an intermediary is to take advantage of their expertise and accuracy. Intermediaries may not delegate their duties to other people, unless the delegation has been approved by the principal, is customary in business, or the delegation only involves administrative matters.
2. Agency must not allow their personal interests to conflict with those of the principal.
3. Agency may not take secret advantage or accept bribes from a third party.
4. If they do receive a secret commission or bribe, the consequences that follow is that they then be sued for.
5. Agency may not disclose confidential information that is known during their duties as intermediaries. Everything related to it must be notified to the principal, as well as everything related to the intermediary that he knows.

The rights of an agent or intermediary are as follows.

1. Right to re-imbursement
   The principal must reimburse all reasonable costs incurred by the intermediary in completing their tasks. Although the amount reimbursed is not determined, this obligation can be carried out on the basis of the amount due.

2. Set-off (the ease of choosing an alternative, which the plaintiff gives to the defendant)
   If the principal files a lawsuit against the intermediary for breach of duty, the intermediary can practice the set-off right for any amount due to the commission.

3. The right to hold goods
   If the principal does not pay the agreed commission or indemnity to the intermediary and the intermediary holds the principal's goods under their control, then, depending on the conditions, the

intermediary is allowed to the right to hold the rest of the goods until the principal performs their obligations.

4. To File a legal process to get a commission or fee that has been agreed upon.
   The intermediary is entitled to a commission after the intermediary duties have been completed.

Third party

The third party in the agency or intermediary agreement is the party the agent is contacting with whom the transaction is carried out. The agent makes an agreement with the party regarding the transaction carried. The agent enters into an agreement with the third party regarding the transaction authorized by them. From a practical point of view, the problem can be considered from a practical point of view of a third party regarding the transaction authorized by it. That it is impossible for an agency to go around all the time in a way that says "intermediary". The third party knows this fact only if the intermediary gives the person who does not transact with the third party an intermediary. In normal intermediary situations, the intermediary informs the third party that the agency acts on the behalf for a particular principal. In this case, the third party knows the position of the intermediary and the contract that will exist between the principal and the third party.

This third party will carry out the transaction with the agent appointed by the principal. An agent acting on behalf of the principal will engage a third party in carrying out a legal action, one of which consists of making a contract or agreement. This third party will carry out the transaction with the agent appointed by the principal. An agent acting on behalf of the principal will engage a third party in carrying out a legal act, one of which consists of making a contract or agreement. The legal action is carried out on the basis of the authority granted by the principal to the agent in conducting a legal relationship with a third party. So, the third party will automatically trust an agent who has official approval in the principle. If there is a loss happened by a

third party due to the fault of an agent, the third party will hold the principal accountable as long as the agent's act is the authority that is explicitly stated in the agency agreement between the agent and the principal.

Legal Relationship Between the Parties in the Agency Agreement

The principal-agent relationship is governed by law and comprises a fiduciary relationship.

The relationship between principal and agent

Given that the agent generally acts as an intermediary, after the principal and the third party enter into a contractual relationship, the agent will be contractually expelled. The agent will leave this relationship except in matters relating to the right to compensation that they have against the principal, and more specifically to third parties. Thus, without the consent of the principal given after receiving the information, the agent is prohibited from placing themselves in a position where the obligations of the principal may conflict with their interests.

In relation to agents in their activities acting on behalf of their principals based on power, the relationship between agents and principals is in nature, unlike the relationship between employers and workers. In the employer and worker agreement the most important thing is the provision work and wages, besides that there is a lower position on the side of the labor than the employer, where this is not found in the relationship between the agent and the principal.

The relationship between the principal and the agent is often said to be an agency relationship because the principal uses the term agent as an intermediary in carrying out legal actions with third parties.

According to Budi Santoso, the relationship between the principal and the agent is a fiduciary relationship, where the principal allows the agent to act on behalf of the principal and the agent is under the principal's supervision. Agency is a relationship between two parties in which one party is often referred to as an agent, namely a party who is given the authority to

perform actions for and on behalf of and under the supervision of another party, namely the principal. The principal is the party that authorizes the agent to take certain actions and supervises the agent's actions. Meanwhile, the party conducting transactions with agents is called a third party. The relationship between the two parties is stated in an agreement known as an agency agreement, based on the agreement, the agent is given the authority to conduct transactions, contract negotiations with third parties that will bind the principal party to the contract.

However, agency in general can occur either by creating a written or unwritten agreement. Although a written agreement guarantees the safety of the parties, in some countries, written agreements are required for agency to last more than one year

The relationship between intermediaries/agency and third parties

The intermediary or agents acts on behalf of its principal, so that the intermediary in the engagement is not a party to the agreement, the principal has the right to sue the third party the right to claim its principal interests to fulfill the intermediary engagement acting in the interests of its principal or where the scope of the performance of their duties are or after the principal ratifies the engagement. The third party and its principles whose whereabouts and names are known to the third party are obliged to fulfill the agreement made by the intermediary based on the authority granted by the principal. An agreement made by an intermediary for the principal whose whereabouts and name is not known is not binding on the principal, unless the principal voluntarily fulfills the engagement or if the principal then discloses their identity to a third party and the third party states its option to request that principal as the party that must fulfill the engagement. The option put forward by the third party entitles the principal to claim compliance with the third party.

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(Footnotes)

1 [2018] 1 LNS 627.
2 [2019] 1 LNS 492.
3 [1962] 1 All ER 385.
4 1903 1 KB 253.
5 1996 1 MLJ 331.
6 [1933] 3 KB 253.
7 (1980) 1 MLJ 145.
8 [1978] 1 MLJ 179.