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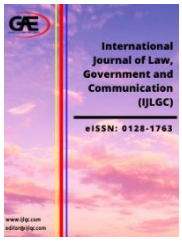

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EXCLUSION CLAUSE UNDER MALAYSIAN SALE OF GOODS ACT 1957: AN OBSTACLE TO BUYER'S PROTECTION IN A CONTRACT OF SALE OF GOODS

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Abstract:

The mass production and distribution of goods across border demanded the producers to produce goods in large quantities without considering the quality of goods. The low quality of goods on the market will affect the buyers. Hence the existing law is important to protect the buyers when dealing with goods on the market. The Sale of Goods Act 1957 is the principal Act that applies to contracts for the supply of goods in Malaysia. In a contract of supply of goods, implied conditions and warranties are essential to cater to issues relating to the seller's civil liability for goods. However, the existence of section 62 in the Sale of Goods Act 1957 weakens the protection of buyers under the contract of sale of goods. Section 62 provides for exclusion clause, which has been used widely by the seller as a tool to exclude liability by manipulating the method of drafting a contract. Adopting a doctrinal approach, this article analyses the provision under section 62 of the Sale of Goods Act 1957. The article aims to assess whether the provision is detrimental to the buyer. It is submitted the present section 62 Sale of Goods Act 1957 is detrimental to the buyer. Thus, the provision needs to be repealed to protect the buyers when dealing with sellers in the market.

Keywords:

Contract Of Sale Of Goods, Exclusion Clause, Section 62, Sale Of Goods Act 1957

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Introduction

Protection for buyers is important in the era of globalization and trade liberalization to create a good economic structure and contribute to a better society (Yusoff, 2007). Trade liberalization also saw market forces fail to protect the buyers. This situation happens due to the unequal bargaining power between buyer and seller. The complexity of goods produced due to the sophistication of technology also results in the buyer being weak because they are unable to assess the quality of products, while sellers are becoming more powerful because they are the parties who have access to information about the products sold.

At present, buyers in Malaysia are divided into two groups. Buyers who are knowledgeable and those who are vulnerably uninformed (Zakuan, 2015). Protecting these vulnerable buyers is vital in today's developing economy since these buyers would be impacted by the mass production of technically produced goods due to technological innovation (Zakuan, 2014). Technically innovated goods make it challenging for buyers to assess the quality of the goods (Noorham, 2020). On the other hand, the seller is in a superior position because they are familiar with the goods. Due to this scenario, the buyer will have unequal bargaining power, ultimately leading to market failure (Ziegel, 1973). Government involvement is required to overcome this market failure, according to Rachagan (1992). He emphasised that government intervention is necessary to provide buyers with the best protection available. Comprehensive legislation is the best protection to safeguard buyers on the market.

The Sale of Goods Act of 1957 is the primary piece of legislation in Malaysia that regulates the supply of goods. The Act, however, only applies to Peninsular Malaysia. Sabah and Sarawak on the other hand, apply different law which is influenced by English law. The protection given to buyers in the Sale of Goods Act of 1957 is often doubtful. This is because most of its provisions were taken from common law rules from the 18th and 19th centuries, a time of laissez-faire and freedom of contract. Thus, its ability to safeguard buyers in the contract of sale of goods is questionable.

Methodology

This paper aims to determine specifically provision under the Sale of Goods Act 1957 relating to exclusion clause and the related issues. This study adopts doctrinal qualitative research. Doctrinal research deals with the law on a particular issue where the legal doctrine is analysed as to its development and applications (Abdullah, 2020). This type of research is selected because the basic aims of this research are to discover, explain, examine, analyse and present in a systematic form, facts, principles, provisions, concepts, theories, or the working of certain laws or legal institutions (Yaqin, 2007). The paper adopts the doctrinal analysis by examining the existing primary and secondary materials, mainly statutory provisions and case law.

Sale of Goods Act 1957

The Malaysian Sale of Goods Act 1957 contains the legal provisions governing contracts for the sale of goods. The act, however, only applies to the states of West Malaysia; Sabah and Sarawak are exempt because they are subject to English law as a result of section 5(2) of the Civil Law Act 1956. The Sale of Goods Act of 1957 regulates the agreement between the seller and the buyer to sell goods, provides for parties' rights and responsibilities, and provides remedies in the event of a breach.

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A contract of sale is one in which the seller transfers or agrees to transfer the property in the goods to the buyer in exchange for payment, according to Section 4(1) of the Sales of Goods Act of 1957. The nature of the contract of sale of goods is that there must involve goods and monetary consideration. There could be a sale agreement between one part owner and another. Section 2 Sale of Goods Act 1957 provides for the definition of goods. Goods include stock and shares, growing crops, grass, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale. Goods exclude money and actionable claims. It refers to any items besides money, real estate, and claims that can be legally pursued. There are a few types of goods. In the sale of goods, it is critical to differentiate the type of goods. This is due to the fact that the passing of property in the goods is based on whether the goods are specific, ascertained, unascertained, or future goods.

As a protection for the buyers, in particular, the Act lists a number of implied conditions and warranties in the contract of sale of goods. The Sale of Goods Act of 1957's implied conditions and warranties are listed in table 1 below:

Table 1: Implied Conditions and Warranties under the Sale of Goods Act 1957

Sale of Goods Act 1957		
No	List of Implied Conditions and Warranties	Section
1	Implied condition as to title	14(a)
2	Implied warranty as to quiet possession	14(b)
3	Implied warranty that the goods shall be free from any charge or encumbrance	14(c)
4	Sale by description	15
5	Implied condition as to fitness for particular purpose	16(a)
6	Implied condition as to merchantable quality	16(b)
7	Sale by sample	17

Exclusion Clause under Sale of Goods Act 1957

In a contract of sale of goods, a specific provision relating to the exclusion clause is provided under Section 62 Sale of Goods 1957. Section 62 reads, "Where any rights, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to a contract." However, the exclusion clauses included in the contract are subject to incorporation and interpretation techniques. Exclusion clauses are usually found in standard form contracts intended to exclude liability to the other party. Usually, the party entering into a standard form contract has no choice. They either agree to all the terms set out in toto or can just forget about the contract (Syed Ahmad Alsagoff, 1996). Examples of standard form contracts include hire-purchase contracts, insurance contracts, and transportation contracts.

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An exclusion clause is defined as "such a clause that excludes or modifies contractual obligation. It affects the nature and scope of a party's performance" (Fridman, 1999). This given definition indicates that the exclusion clause has its own purpose. From one angle, the exclusion clause is seen as a way to explain the rights and obligations of the promisor, while, from another angle, it looks like an excuse on the part of the promisor (Phang, 1998). Whatever the purpose of the application of the exclusion clause, it is certainly not for the benefit of the promisee, who normally, in a contract of sale of goods, consists of a buyer. Syed Ahmad Alsagoff (1996) explained that these exclusion clauses may be included in written tickets, notices, or invoices sent to buyers at the time of the agreement. In most circumstances, the customer does not have the time to study the printed words. He would probably not understand them even if he read them. The buyer is unaware of how many of his rights have been excluded by these clauses until a dispute arises.

The application of an exclusion clause in a standard form contract is seen as an excuse by the promisor (Kessler, 1943). This exclusion clause directly excludes the rights of the buyer in the event of a breach of contract. The application of a standard form contract as a whole by all promises leaves the buyer with no choice. The buyer is forced to enter into a standard form contract containing the exclusion clause and personally bear the risk. Kessler (1943) explained that the authors of standard form contracts normally employ the same clauses. Thus, the buyer is unable to shop around for better terms. The stronger party normally dictates the terms.

Lord Reid in Suisse Atlantique Socirte D' Armement Maritime S.A. v N.V. Rotterdam Kolen Centrale [1967] AC 361 had a similar opinion. The exclusion clause is seen as an attempt to oppress buyers. Since buyers have no choice because almost all promise makers adopt the same exclusion clause, then the exclusion clause has to be accepted by buyers reluctantly. Lord Reid explains that exemption clauses vary substantially in a number of ways. The most unpleasant is more likely to be found in the complex settings that are currently so prevalent. The buyer typically does not have the time to read them, and even if he did, he definitely would not understand them. Freedom of contract must undoubtedly entail some kind of option or room for negotiation. Additionally, he would typically be advised to take it or leave it if he did comprehend them and objected to any of them. Furthermore, the outcome would remain the same if he turned to another supplier.

The application of the exclusion clause is actually opposed by many, namely buyers and legal practitioners (Thomas, 1980). The unfairness of the exclusion clause against the buyer is due to the unequal bargaining power between the seller and the buyer. Buyers also do not have the opportunity to negotiate as they have to accept the exclusion clause as it is or forgets the contract. Since "everyone does it," buyers are plagued with the same problems regardless of the seller they deal with (Yates, 1982).

Application of Exclusion Clauses in Contract of Sale of Goods in England

Courts do their best to protect the weaker party from being exploited by the stronger party. In England, the exclusion clause first came to the court's attention in the 19th and 20th centuries when the court refused to allow the contracting party to waive liability by inserting an exclusion clause into the contract (Yusoff, 2002). Judgment of Lord Diplock in A. Schroeder Music Publishing Co. Ltd. v Macaulay [1974] 3 All ER 616, 623 explained the court's stand in fighting the exclusion clause that oppresses buyers. Lord Diplock argued that the court is enforcing the public policy is not some nineteenth-century economic theory about the benefits of free trade

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to the general populace but rather the defense of those with weak bargaining power against being forced by those with stronger bargaining power to enter into unconscionable bargains.

Lord Denning in Gillespie Bros & Co. Ltd. v Roy Bowles Transport Ltd. [1973] GB 400 also has the same opinion. He stressed that "there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused ..." Lord Denning introduced a principle related to unconscionability, in which he asserted that "it is possible to grant relief based on inequality of bargaining power." This clearly shows that the courts are concerned about protection over buyers who are found to be on the weak side and are constantly oppressed by the seller in applying the exclusion clause in the contracts. To ensure protection for weak buyers in terms of bargaining power, the courts have introduced two techniques to determine a fair and reasonable exclusion clause. Only such exclusion clauses will be recognized by law and will be enforced. These techniques are known as incorporation and interpretation techniques.

The incorporation technique means the exclusion clause must be incorporated into the contract by making it a term of the contract. The court must be convinced that the exclusion clauses indeed form a substantial component of the contract. Lord Singleton in Olley v Marlborough Court Limit [1949] 1KB 532 also had a similar view when he, in his judgment, asserted that if the defendants, who would initially be held responsible for their own negligence, want to be excused by term, they must first demonstrate that the term is a part of the agreement between the parties.

The buyer must also know the terms of the contract. This means that the seller must ensure that the terms containing the exclusion clause come to the buyer's knowledge before or at the time the contract is made. This indicates that if the terms of the contract containing the exclusion clause are not realized by the buyer while entering into the contract may be due to the terms being placed elsewhere, then the buyer is not bound by those terms. The exclusion clause placed in the ticket is also non-binding. In the case of Chapelton v Barry [1949] 1 KB 532, the Court of Appeal ruled that a ticket was only treated as a receipt and not a contract containing an exclusion clause. Furthermore, tickets are obtained after the buyer enters into the contract and not before. The same principle applies if an automatic machine issues the ticket. The exclusion clause stated on a ticket issued by an automated machine will not be binding as the ticket is issued after the contract takes effect.

On the contrary, if it involves a signed contract, the exclusion clause is binding if the document is signed. The party signing the contract cannot set aside the contract on the grounds that he is unaware of the existence of an exclusion clause. A good example can be found in L'Estrange v. F. Graucob Ltd. [1934] 2 KB 394. In this case, the buyer is responsible for the sale and purchase contract he signs. In the contract, there is an exclusion clause written in small print, and the buyer is not aware of the existence of the clause. Nevertheless, the court still ruled that the exclusion clause bound the buyer since the court applies the incorporation technique. Incorporation technique requires an exclusion clause to be included in the contract. The clause must be part of the contract's content, and it is binding if the buyer signs the contract.

The Interpretation technique is the second technique adopted by the court in determining whether the exclusion clause is fair and reasonable and, in turn, will be binding on the buyer. An interpretation technique is a technique used to interpret an exclusion clause included in a

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contract. According to this technique, only a clear and explicit exclusion clause will bind the contracting party. However, if there is any doubt or ambiguity, the clause will be construed *contra proferantum*. *Contra proferentum* is a principle applied in interpreting exclusion clauses under contract law. The application of this principle will result in the exclusion clause being construed against the party inserting the clause into the content of the contract. Usually, in a contract of sale of goods, the clause will be construed against the seller. This is because the seller is the party who has better bargaining power. Judgment of Lord Wilberforce in Ailsa Craig Fishing Co. Ltd. in Malvern Fishing Co. Ltd. [1983] 1 All ER 101 indicates that *the court adopts contra referendum* in interpreting the exclusion clause. Applying the interpretation technique protects the buyer from the tactics of the seller, who is only interested in profit. However, if the existing clause is clear and obvious, then the clause will be binding on the buyer if the buyer is aware of the existence of the clause.

In England, two sources of legislation can be applied in dealing with problems relating to exclusion clauses. The laws involved are the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). UCTA applies to all types of contracts, including commercial contracts and consumer contracts, such as standard form contracts that contain exclusion clauses entered into by the consumer. The provisions under UCTA, section 6 (2), clearly indicate that any exception to any of the implied conditions is prohibited. Section 2 of the UCTA, on the other hand, prohibits the application of an exclusion clause that excludes liability in negligence resulting in death. UTCCR applies to any contract between a supplier and a consumer. Rule 5 (1) prohibits the application of any unfair terms entered into a contract without allowing the consumer to negotiate.

Unfair terms are terms entered into a contract that results in the existence of an imbalance of power between the supplier and the consumer. UTCCR is enforced by the Office of Fair Trading (OFT) and other bodies authorized under UTCCR. In terms of enforcement, OFT plays a role in preventing the continued use of unfair terms by scrutinizing consumer complaints. When a complaint is received, OFT will review the contract provided by the seller. If it is found that the terms lead to injustice, OFT will inform the seller not to continue using the terms. OFT will also obtain a letter of guarantee from the seller to discontinue the use of the terms.

OFT has the power to review the seller's contract and advise the seller if the terms contained in the contract, in OFT's view, are unfair terms. However, OFT does not have the power to recommend, review or approve the terms for the seller. OFT has prepared draft terms that comply with the requirements under the UTCCR. The seller will then need to seek legal advice to amend and re-draft the terms. OFT also has the power to obtain injunctions to prevent the seller from continuing to apply such unfair terms. Director-General of Fair-Trading v First National Bank plc. [2002] 1 AC 481 is the first case handled by OFT in obtaining an injunction to prevent a seller from adopting unfair terms in a consumer contract.

The presence of UCTA and UTCCR means a lot to consumers in England. At the very least, there is a ban on the application of exclusion clauses in consumer contracts in England. Nevertheless, the existence of both legislations does not provide easy access to justice. They are also overlapping, complex and inconsistent (Nebbia, 2007). As such, steps have been taken by the Law Commission and the Scottish Law Commission to combine the two. Finally, this merger resulted in the Unfair Contract Terms Bill 2005 (Law Commission, 2005).

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The scope of application of this bill is not limited to consumer contracts only. It also applies to trade contracts.

Application of Exclusion Clause in Malaysia

In Malaysia, the primary law governing contractual relationships is the Contracts Act 1950. This Act, however, does not contain provisions on exclusion clause. Syed Ahmad Alsagoff (1996) explained that the Contracts Act 1950 contains no provision dealing with exclusion clauses. Thus, the Malaysian courts have followed English common law when considering these aspects of the law. The exclusion clause in Malaysia is governed by English law based on section 3 and section 5 of the Civil Law Act 1956, which allows for the application of English law in Malaysia for commercial matters. Hence, the UK Unfair Contract Terms Act 1977 applies to matters involving exclusion clause in Malaysia. According to Visu Sinnadurai (1987), there are a few examples of exclusion clauses in buyer transactions in Malaysia and Singapore. When analysing this area of law, Malaysian and Singaporean courts are likely to follow English common law.

Since law relating to exclusion clauses does not exist under Malaysian law, the courts must refer to common law in such disputes. The court's role in this matter is clarified through the judgment of the case. The application of an exclusion clause is found in the case of Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd. (1959) MLJ 200. An exclusion clause in the delivery contract excludes liability for goods when the goods have been unloaded out of the ship. The Privy Council adopts the interpretation technique in making the decision. The principle of *contra proferentum* is used to protect buyers from persecution by sellers. The case of Sanggaralingam Arumugam v Wong Kook Wah & Anor [1987] 2 CLJ 255 shows that the exclusion clause, which the buyer is unaware of, is non-binding. The application of the exclusion clause can also be seen in the case of Associated Products (M) Sdn. Bhd. v Tackoh Sdn. Bhd. [1992] 2 CLJ (Rep) 133. Yang Arif Siti Norma Yaakob argued that the exclusion clause held by the plaintiff was not binding on the defendant as the defendant was unaware of the existence of the clause. However, there are also cases where the judgment favors the seller and not the buyer. In Malaysia Airlines System Bhd v Malini Nathan & Anor. [1995] 2 MLJ 100, the appellant was sued for failing to fly the respondent to Kuala Lumpur. The Appellant acted according to the conditions printed on the flight ticket. The court ruled that appellant did not breach the contract.

From the above cases, it is clear that the courts tried their best to prevent the potential misuse of exclusion clauses. There are situations whereby the weaker party is being distorted due to the usage of exclusion clauses. In order to best stop any potential misuse, specific law on the exclusion clause must be introduced.

Conclusion

Sale of Goods Act 1957 provides for an exclusion clause under section 62. The existence of section 62 makes the Sale of Goods Act 1957 unfriendly to buyers as it is seen to pressure buyers. Section 62 allows the seller to exclude all implied terms in Section 14 to Section 17 of the Act. Thus, it is considered an anti-buyer provision because it oppresses local buyers. Owing to this, it is proposed that section 62 be repealed. The weakness in the Act craved for the movement towards enacting a specific buyer protection-oriented law to continue.

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Authors' Contribution
ZZMZ is the main and corresponding author responsible to interpret the law and conclude the study. SAH is responsible to prepare the manuscript. AM and HNMH are responsible for reviewing the literature.

Conflict Of Interest
None declared

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