# The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract

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**Abstract**

The Malaysian Contracts Act 1950, modelled on the Indian Contract Act 1872, has encapsulated contract law tenets of English nineteenth-century laissez faire market capitalism, freedom of contract and classical contract law. Through time, however, new forces have challenged the traditional views of contract law, supported by legislative reforms and judicial developments. The shift from classical to modern contract law has been taken cognisance of and is generally accepted in the common law world. This essay, however, aims to show this movement in Malaysian contract law as provided in the Contracts Act 1950 and as interpreted by the Malaysian courts. It evaluates whether and to what extent values of modern contract law, such as fairness and justice, have influenced the law, and analyses the main theme of vitiation of free consent in the Contracts Act 1950 through the doctrines of unconscionability, undue influence and coercion. Reference will also be made to the law in the United Kingdom and other Commonwealth countries. The essay concludes by exploring the roles of legislative reform and judicial interpretation in developing Malaysian contract law, as embodied within classical law concepts in the Contracts Act 1950, towards a modern law of contract.

## I. Introduction

The Malaysian Contracts Act 1950 (Revised 1974) (the Contracts Act) is the principal legislation governing contracts in Malaysia[1] and is modelled after the Indian Contract Act 1872 (the Indian Contract Act) which, in turn, is largely a codification of the then existing English common law and rules of equity.[2] Late eighteenth- and nineteenth-century English

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1 Other relevant legislations include the Government Contracts Act 1949 (Revised 1973), the Specific Relief Act 1950 (Revised 1974) and the Civil Law Act 1956 (Revised 1972). For legislation governing specific contracts, see eg the Sale of Goods Act 1957 (Revised 1989) and the Hire-Purchase Act 1967 (Revised 1978).

2 See RK Abichandani (ed), *Pollock & Mulla Indian Contract and Specific Relief Acts*, Vol I, 11th ed, NM Tripathi Private Ltd, Bombay, 1994, p v. See also RN Gooderson, 'English Contract Problems in Indian Code and Case Law' [1958] *Cambridge LJ* 67;, Atul Chandra Patra, 'Historical Background of the Indian Contract Act, 1872' [1962] 4 *JILI* 373; Jain [1972] *JILI* (special issue) 178; Minnatur [1972] *JILI* (special issue) 107.

3 Dr Cheong.indd 53 03/10/2014 9:55:56

contract law was essentially known as classical contract law set against the background of the Industrial Revolution, the rise of the free market and the pre-eminence of the philosophy of laissez faire. The prevailing belief was that people should be permitted to conduct their own affairs, commercial or otherwise, as they thought fit, with minimal intervention from the government. The principles of freedom of contract and sanctity of contract thus became the cornerstones of classical contract law. Due to their legislative histories, both the Indian and Malaysian contract legislation have encapsulated classical contract law.

Law evolves with changing economic conditions, political and societal values; many streams of law have developed distinctly and contract law is no different. While the context of the application of contract principles and rules is still the free market, some related phenomena have eroded classical contract law. The emergence of mass-market economic activity followed by the widespread use of standard-form contracts and the recognition of consumer transactions have raised scepticism about the reality of free choice. The perceived threats to contractual freedom, such as inequality of bargaining power and economic pressures on vulnerable groups, are among the factors that have influenced the development of contract law in the twentieth century.[3] Much legislation came to be enacted to protect the consumer, for example, the Unfair Contract Terms Act 1977 (UK) (the UCTA).[4] Similarly, while the courts were hesitant to interfere with the enshrined principle of freedom of contract, they were often influenced by the same considerations that inspired the enactment of consumer protection laws, that is, sympathy for the small consumer or the weak contracting party. Although the courts rarely claimed the power to override the express terms agreed by the parties, they developed new doctrines, used existing doctrines in new situations or used covert means by implying suitable terms or construing the contract in a benevolent manner. These developments have been variously described by authors as 'the shift'[5] or 'the transformation'[6] from classical to modern contract law. It is opined that modern contract law provides the remedial response to the shortcomings of the values underlying classical contract law. Freedom of contract is in reality only a formal equality giving rise to unjustifiable domination or unequal exchange. On the other hand, modern contract law reflects a continuum of values for fairness and justice.

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3 Beatson notes that while the concepts of freedom and sanctity of contract were at their strongest during the nineteenth century, in the twentieth century there has been a reshaping of contract law. In this respect, there has been a dilution of formal requirements while increased regard has been given to considerations of substantive fairness. This can be seen in the erosion of the doctrine of consideration and its replacement by rules of equitable estoppel, and the approach taken in cases of discharge of contract such as breach or frustration, which gives greater emphasis to the consequences of an event rather than the (often fictional) intentions of the parties. See J Beatson, *Anson's Law of Contract*, 28th ed, Oxford University Press, Oxford, 2002, p 4.

4 In this respect, the UCTA has been considered the most significant of these legislative initiatives. See Roger Brownsword, Ch 1 'General Considerations' in the *Butterworths Common Law Series: The Law of Contract*, 2nd ed, LexisNexis UK, 2003, p 35.

5 PS Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, Clarendon Press, Oxford, 1978, p 5.

6 Hugh Collins, *The Law of Contract*, 4th ed, LexisNexis, London, 2003, Ch 2.

The shift from classical to modern contract law has been taken cognisance of and is generally accepted in the common law world. This essay, however, aims to show this movement in Malaysian contract law as provided in the Contracts Act and as interpreted by the Malaysian courts. This will be conducted in three stages. First, it will be shown that the Contracts Act embodies classical law. The second part which forms the major portion of this essay will evaluate whether and to what extent values of modern contract law such as fairness and justice have influenced Malaysian contract law. This evaluation is sought through two perspectives: by tracing the forces that have challenged the views of traditional contract law, followed by an analysis of the main theme of vitiation of free consent through the doctrines of unconscionability, undue influence and coercion. This will be made by reference to the law in the United Kingdom, as well as other Commonwealth countries and relevant international instruments. Finally, the response of the Malaysian legislature, courts and practitioners towards the changing landscape of Malaysian contract law will be considered. In this respect, the roles of legislative reform as well as judicial interpretation are equally vital in developing Malaysian contract law as embodied within classical law concepts in the Contracts Act towards a modern law of contract.

## II. Classical Contract Law

A central principle in classical contract law is the bargain principle. Classical economists such as Adam Smith advocated the theory that individuals have the self-interest to maximise their wealth and, given the freedom, would negotiate to the best of their abilities for the best bargains.[7] The bargain principle is complemented by the will and promise theories which reached their height in the late eighteenth and nineteenth centuries in the manifestation of freedom of contract. The natural lawyers during this period believed that an individual could bind himself or herself by a mere act of the will and the promise was the expression of such an act of the will. Thus promises are sacred and, once made, the common intentions of the parties must be enforced. These early developments are well documented by Atiyah in his famous historical study, *The Rise and Fall of Freedom of Contract* where the period 1770–1870 was considered as the age of freedom of contract.[8]

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7 Melvin Aron Eisenberg, 'The Bargain Principle and its Limits' (1982) 95 *Harv L Rev* 741; Brian Coote, 'The Essence of Contract, Part I' (1988) 1 JCL 91.

8 See PS Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979, in particular Part II for a detailed analysis of the background and factors leading to the rise of classical contract law and ideas of freedom of contract in the nineteenth century in England. At p 681, Atiyah stated: 'In 1870 . . . classical law had arrived at its mature form. A model of contractual theory had been largely worked out by the Courts which had been superimposed on the specific relationships and rules applicable to particular transactions. A general law of contract had come into existence with two principal characteristics. The first was that the model of contract was based on the economic model of the free market transaction; and the second was that contract was seen primarily as an instrument of market planning, that is to say, the model was that of the wholly executory contract . . . Above all, of course, the model was suffused with the notion that the consequences of the contract depended entirely on the intention of the parties, and were not imposed by the Courts. The Courts did not make contracts for the parties, nor did they adjust or alter the terms agreed by the parties. The fairness and justice of the exchange was irrelevant'.

Freedom of contract gives an individual the liberty to choose whether or not to enter into a contract, the party to contract with, and the terms of the contract. Following from this free choice, the principle of sanctity of contract requires that parties be held to the contracts which they have entered into freely and voluntarily. The philosophy underlying freedom and sanctity of contract is made clear in the following dictum of Sir George Jessel MR in *Printing & Numerical Registering Co v Sampson*:[9]

> [I]f there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of Justice.[10]

Contractual liability is thus premised in terms of respect for voluntarily assumed obligations and the corresponding voluntarily assumed rights.[11] As long as there is free consent, that is, the contract is not entered into through any element of coercion, undue influence, fraud or misrepresentation, the contract and its terms are enforceable. Since this construct asserts that contractual obligations are self-imposed, any factor showing lack of consent on the part of any one party is sufficient to vitiate the contract.[12]

Viewed from the perspective of contractual fairness, classical law protects against procedural unfairness[13] as it directs its attention to the bargaining process in entering into a contract. The principle of sanctity of contract demands that courts do not interfere with the terms of contracts freely entered. It is irrelevant if there is non-equivalence of exchange or that the terms of the contract are harsh since classical law assumes that individuals have free choice and will negotiate for the best. Thus, substantive unfairness[14] is seemingly incompatible with classical law theories.[15] However, having drawn the

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9 (1875) LR 19 Eq 462.

10 (1875) LR 19 Eq 462 at 465.

11 Mindy Chen-Wishart, *Contract Law*, 2nd ed, Oxford University Press, Oxford, 2008, p 21; see also Stephen A Smith, *Contract Theory*, Oxford University Press, Oxford, 2004, p 56.

12 Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 15th ed, Oxford University Press, Oxford, 2007, p 16.

13 Procedural unfairness relates to the unfair manner in which a contract is brought into existence including the language of the contract and the availability of independent legal advice.

14 Substantive unfairness arises by reason of the fact that the terms of the contract are more favourable to one party than to the other.

15 In *Manchester, Sheffield and Lincolnshire Ry v Brown* [1883] AC 703, the court presumed a contract to be just and reasonable by the fact that the parties had entered into the contract. At 717–18, Lord Bramwell stated: '[U]nless some evidence is given to show that a contract voluntarily entered into by two parties is unjust and unreasonable it ought to be taken that that contract is a just and a reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable . . . *[I]ts justice and reasonableness are prima facie proved against him by his being a party to it* and if he means to say that what he agreed to is unjust and unreasonable, he must show that it is so . . . And when it is said "why, what an unreasonable thing it is that you should exempt yourselves . . . from all responsibility even for the wilful default or wilful act of your own servants," I deny that there is anything necessarily unreasonable in it' (emphasis added).

distinction between procedural and substantive unfairness,[16] it must be pointed out that the line between them is not always clear. Procedural and substantive unfairness are intricately linked and feed upon each other.[17] Procedure affects results and an unfair result is often presumed to arise from improper procedures. Thus, a grossly inadequate consideration may be evidence of an unfair advantage taken of the weaker party through some procedural improprieties. However, procedural unfairness was better recognised in nineteenth-century contract law.[18]

Following classical law, the primary function of contract law came to be seen as the enforcement of agreements which private individuals had entered into while the fairness and justice of these agreements were not considerations with which the law was concerned with. The aim of such a legal framework is to obtain certainty in the law and the purpose of contract law is to facilitate marketplace exchanges. This was the background and context of eighteenth and nineteenth-century English contract law that became the backbone of the Indian Contract Act 1872 which was followed in then Malaya's Contract Enactment 1899,[19] the predecessor to the Contracts (Malay States) Ordinance 1950[20] and now the Contracts Act.[21] The Contracts Act is not an exhaustive code and does not deal with every aspect of contract law.[22] However, where there are specific provisions, the court's primary task is restricted to one of interpretation of statutory provisions applicable to the particular legal principle or doctrine. It is only when the Act is silent that the judges would first apply English common law and rules of equity under ss 3 and 5 of the Civil Law Act 1956 (Revised 1972) and then the law in other common law countries.[23] The next part will show that the Contracts Act embodies classical contract law as shown in its historical origins, the overall framework of the Act and judicial precedents.

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[16] The distinction between procedural and substantive unfairness was first made by Leff who distinguishes the former as problems in the 'process of contracting' and the latter as problems in the 'resulting contract'. See Arthur Allen Leff, 'Unconscionability and the Code — The Emperor's New Clause' (1967) 115 *U of Pa L Rev* 485. This distinction was considered by the Privy Council in *Hart v O'Connor* [1985] 1 AC 1000.

[17] See PS Atiyah, Essays on Contract, Clarendon Press, Oxford, 1986, p 334.

[18] It has been suggested that substantive unfairness found little prominence then because standard-form contracts, which represent one-sided orderings rather than a consensual approach to agreements, were far less usual in the nineteenth century. See A Von Mehren, 'Contractual Justice' in 'A General View of Contract', *International Encyclopedia of Comparative Law*, Mohr/Nijhoff, Tubingen/The Hague, Vol ii, Ch 1, pp 64–7.

[19] In the Federated Malay States (Perak, Selangor, Negeri Sembilan and Pahang) and later extended to the Unfederated Malay States (Johor, Kedah, Trengganu, Kelantan and Perlis).

[20] After the Federation of Malaya was formed in 1948 and applied to the Federated and Unfederated Malay States except for Penang and Malacca which continued to apply English law.

[21] The Act was revised in 1974 and extended to Penang, Malacca, Sabah and Sarawak.

[22] See the Privy Council decision of *Ooi Boon Leong v Citibank NA* [1984] 1 MLJ 222 at 224: 'The Contracts Act 1950 is described in the long title simply as "An Act relating to contracts". It is not expressed to be a consolidating or amending statute. It is, however, clearly intended to codify the law of contract as regards those aspects of contract law which are grouped under the Act's nine definitive headings. It is modelled on the Indian Contracts Act 1872, many of the sections being in identical language'. For the position that the Indian Contract Act is not exhaustive, see the Privy Council decisions of *Irrawaddy Flotilla Co Ltd v Bugwandass* (1891) 18 1A 121 and *Jwaladutt Pillani v Bansilal Motilal* (1929) 115 1C 707.

[23] See *Royal Insurance Group v David* [1976] 1 MLJ 128. See also *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356 and *Lori (M) Sdn Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81.

## III. The Contracts Act 1950

As the Contracts Act is modelled after the Indian Contract Act, the background to the latter Act is important. Sir Frederick Pollock, in his commentary on the Indian Contract Act, wrote in 1905 that the Act 'is in effect . . . a code of English law'.[24] The drafting of the Act went through three distinct stages. First, it was prepared in England by the Indian Law Commission, and according to Sir Frederick, was 'uniform in style and possessing great merit as an elementary statement of the combined effect of common law and equity doctrine as understood about forty years ago'. The Act went through another stage of revision and elaboration by the Legislative Department in India, and finally Sir James Stephen supervised the final revision, and added the introductory definitions in s 2 of the Act. However, although this section purports to be an interpretation of terms, it 'is really substantive enactment'.[25]

Interestingly, s 2 of the Contracts Act, (*in pari materia* with s 2 of the Indian Contract Act) which defines the key concepts of an agreement, is set in the language of a promise. Section 2(b) states that a proposal when accepted becomes a promise; s 2(c), the person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee', and s 2(e), every promise and every set of promises, forming the consideration for each other, is an agreement and similarly, the definition of reciprocal promises in s 2(f). Section 2(h) affirms the binding nature of promises and states that 'an agreement enforceable by law is a contract'.

The essential requirement of free consent is set out in s 10(1) which provides that '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'. The principle of consensus ad idem is reflected in s 13 that 'two persons are said to consent when they agree upon the same thing in the same sense'. Free consent is further defined in s 14 as consent which is not caused by coercion, undue influence, fraud, misrepresentation or mistake. Following the common law, if consent has not been freely obtained and a party was induced to enter into a contract due to any of the above vitiating factors, he is entitled to avoid the contract as provided in ss 19(1)[26] and 20.[27] Section 2(i) defines a voidable contract as 'an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others'. Through these provisions, the Contracts Act provides the framework for the bargaining process to ensure that contracts are entered into freely.

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[24] See 'Preface to the First Edition' reproduced in *Pollock & Mulla Indian Contract and Specific Relief Acts*, Vol I, *supra*, n 2.

[25] See *Pollock & Mulla Indian Contract and Specific Relief Acts*, Vol I, *supra*, n 2, p 32.

[26] Section 19(1): 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.

[27] Section 20: 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 thereunder, upon such terms and conditions as the court may deem just.

As long as the procedural process is satisfied and there is no indication of any vitiating factors, once entered, parties are bound by the terms of the contract. The law is not concerned with the exchange value and this is best seen in the concept of consideration. All agreements to be enforceable as contracts must have consideration. Section 26 provides that an agreement made without consideration is void unless it comes within the three exceptions provided. However, as long as there is consideration, the law does not question the adequacy of the consideration: 'consideration must be sufficient but need not be adequate'. This principle is provided in Explanation 2 of s 26.[28] Inadequacy of consideration does not affect the validity of the contract but only raises the issue whether consent was freely given. Gross inadequacy of consideration however will deny a party a remedy for specific performance.[29]

The Malaysian courts have adhered to the principles governing consideration. In *Phang Swee Kim v Beh I Hock*,[30] the court referred to Explanation 2 and Illustration (f) of s 26, and held that the inadequacy of consideration was not an issue in this case as there was no evidence of duress or fraud.[31] In *Vyramuttu v State of Pahang*,[32] the court held that a purchase for gross-under value at an auction sale per se, without evidence of fraud, was no ground for setting aside the sale. In *TAC Construction & Trading v Bennes Engineering Bhd*,[33] Abdul Malik Ishak J stated:[34]

> The law does not require the court to be concerned whether adequate value has been given . . . and the law too is not concerned whether the agreement is harsh or one-sided . . . That would be the general rule and in the absence of some other factors, the courts would enforce a promise so long as some value for it has been given . . .

The proposition that the Contracts Act reflects the classical model of contract law due to its historical origins and as shown by the overall framework of the Act is also supported by judicial views. The courts have upheld freedom of contract and the need for

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28 Explanation 2 of s 26: An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given. See Illustration (f): A agrees to sell a horse worth $1000 for $10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration. See also Illustration (g): A agrees to sell a horse worth $1000 for $10. A denies that consent to the agreement was freely given. The inadequacy of the consideration is a fact which the court should take into account in considering whether or not A's consent was freely given.

29 Section 27(a) of the Specific Relief Act 1950: Specific performance of a contract cannot be enforced against a party thereto in any of the following cases: (a) if the consideration received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff.

30 [1964] MLJ 383.

31 See also *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535 where the Court of Appeal in reversing the trial judge's decision held that the actual sale price of the property (about one-half of the assessed value) is irrelevant in the absence of fraud and misrepresentation.

32 (1923) 4 FMSLR 277.

33 [1999] 2 CLJ 117.

34 [1999] 2 CLJ 117 at 143.

a consensus ad idem. In *Anuiti Enterprise (M) Sdn Bhd v Cubic Electronics Sdn Bhd*,[35] Low Hop Bing J stated:[36]

> The agreement is a product of the doctrine of freedom of contract in which the parties enjoy the freedom to enter into an agreement voluntarily and freely and the terms thereof were the crystallisation of their consensus ad idem accompanied by the necessary intention to create legal relations and lawful considerations, legally binding the parties thereto . . .

The ideas leading to freedom of contract were considered in *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd*[37] as follows:[38]

> It is here relevant to look at the jurisprudence relevant to contracts which is summarised succinctly in *Halsbury* Vol 9 paras 201 to 203. The primary justifications for the enforcement of a contractual promise against a promisor are economic (the economic necessity of compelling the observance of bargains) and moral (the moral justification that the promise was freely given). In the 19th century these two ideas led the common law to the extreme view that there should be almost complete freedom and sanctity of contract. However, this extreme view was not adopted by equity. Inroads were made into the extreme view not only by equity but by the common law itself and by statutory provisions.

Justice VC George referred to *Halsbury's Laws of England*, that despite inroads into freedom of contract, the law of contract taken as a whole does not lay down rights and duties but rather allows parties to create by contract such rights and duties as they wish, subject to some restrictions. In this case, it was held that the parties had exercised their freedom to contract and the court was obliged to recognise the sanctity of the exercise of the right, there not being any valid reason for the court to intervene. The courts' reluctance to interfere with contracts validly entered is also seen in *Yap Yew Cheong v Dirga Niaga (Selangor) Sdn Bhd*.[39] Abdul Malik Ishak J stated:[40]

> That the parties are entitled to freely enter into an agreement or bargain as equals cannot be doubted. It is not the duty of the court to dictate the terms of the contract to the parties. It is the parties themselves that should decide what are the terms that they should be bound to. This approach is consistent with the idea that contracts should be made by the parties themselves. It is an approach that is known as the freedom of choice. It is certainly consonant with the concepts of a free market economy and the spirit of competition. A contract is a legally enforceable agreement

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[35] [2006] 6 MLJ 565.
[36] [2006] 6 MLJ 565 at 571.
[37] [1992] 3 CLJ (Rep) 611.
[38] [1992] 3 CLJ (Rep) 611 at 617, per VC George J.
[39] [2005] 7 MLJ 660.
[40] [2005] 7 MLJ 660 at 680–1.

> giving rise to obligations for the parties . . . once there is a concluded contract . . . the parties are legally bound to honour it and the courts are duty bound to enforce it.

While classical law is useful to provide the framework for market exchanges, it is not free from flaws. Classical contract law rests on the assumption that all contracting parties are able to negotiate on an equal footing. Thus, even if they enter into a contract containing harsh and improvident terms, they are deemed to have done so of their own free will, and the court will not intervene to save them from the results of their own imprudence. The flaw in this assumption is obvious, it disregards the actual bargaining power of the contracting parties and fails to take into account any inequalities in the distribution of wealth, power and knowledge between them which may place one party in a more vulnerable position *vis-a`-vis* the other party.[41] It is not surprising, therefore, that the model of classical contract law could not be sustained.

As the nineteenth century gave way to the twentieth, it became more and more apparent that the assumptions and ideals underlying classical contract law no longer accorded with the circumstances of the modern world. The recognition of factors such as inequality of bargaining power, the proliferation of monopolies and restrictive trade practices and the increasing use of standard-form contracts led to the need for greater protection of vulnerable contracting parties and consumers. This is the background against which modern contract law has developed. The next part will identify the forces that have challenged the traditional views of contract law and trace the rise of modern contract law. It will be followed by an evaluation as to whether, and to what extent, values of modern contract law such as fairness and justice have influenced Malaysian contract law.

## IV. The Rise of Modern Contract Law

Unlike classical law which adopts a formalistic view of contract and enforces the common intentions of the parties on the basis that the contract is freely entered into whatever the terms agreed, modern contract law is characterised by the development of doctrines which promote contractual fairness and provide protection to the weaker party in a given contractual transaction.[42] Three major factors have been identified for the movement from the paradigm of classical to modern contract law.

First is the transformation of thought on the role of contract law, where two similar movements have been discerned. Atiyah has observed a shift in judicial role from 'principles to pragmatism';[43] the former aims to encourage positive behaviour, while the latter's pragmatic approach aims to achieve justice in the particular circumstances of the case. The shift has been attributed to changing societal response towards the concept of a principle. The early assumptions of natural lawyers and utilitarians of the eighteenth- and nineteenth-century of the need for principles to produce long-term effects have been challenged by advances of social science, the greater diversity of moral beliefs and more

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41 Chen-Wishart, *supra*, n 11, p 15.
42 Chen-Wishart, *supra*, n 11, p 13.
43 Atiyah, *From Principles to Pragmatism*, *supra*, n 5, p 5.

liberal, democratic and egalitarian ideals. With the decline of principles, the binding force of the principle of freedom and sanctity of contract lost its appeal. At the same time, the trend towards pragmatism resulted in an increased assertion of discretionary powers of the judiciary by adopting flexible techniques such as standards of reasonableness and deciding through a process of construction. Treitel described a similar movement from 'doctrine to discretion' wherein precise rules have been replaced by more open-textured rules or conferring discretion to the courts. Thus, the old rule of duress applicable only to unlawful violence to the person has been reformulated to include all conduct or threats giving rise to coercion of will which vitiates consent.[44] The process towards more discretionary powers is also evident in legislation.[45]

The second factor is the recognition of the limitations of freedom of contract. The belief of classical economists of the eighteenth- and nineteenth-century in the free choice of individuals to make legally binding promises was based on two assumptions, that is, individuals possess perfect information and that markets are perfect.[46] Both assumptions have been challenged. The first, that individuals possess perfect information to make informed choices is unrealistic, as information is not always provided by sellers or is insufficient and consumers do not have the ability to process the information. The second assumption of a perfect market is challenged in today's modern big businesses with varying degrees of concentration of economic power, restrictive trade practices and the use of standard-form contracts which perpetuate the inequalities of bargaining power. This has led to acknowledgements of the limitations of freedom of contract and that intervention with the market can be justified when freedom of contract sanctions all exercises of contractual power including exploitative exercises.[47]

The third factor is the rise of consumerism, the international recognition of consumer rights and of the distinctiveness of consumer *vis-a`-vis* commercial contracts. Increased consumer awareness and understanding of the collective interests and market power of consumers have led to the international recognition of consumer rights. These have been recognised and accorded through the Charter of Consumer Rights of the International Organisation of Consumers Union, founded in 1960 and now known as Consumers International,[48] the European Community Commission[49] and the United Nations. Two instruments of the United Nations are pertinent: the Declaration on Social Progress and Development on 'the protection of the consumer'[50] and the 1985 Guidelines for

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44 GH Treitel, *Doctrine and Discretion in the Law of Contract*, Clarendon Press, Oxford, 1981, p 5.

45 See Law of Property Act 1925 (UK), s 49(2); Law Reform (Frustrated Contracts) Act 1943 (UK), ss 1(2) and (3); Sale of Goods Act 1979 (UK), s 17(1).

46 The former was promoted by the Chicago School of Economics while the latter is traceable to Adam Smith's publication *The Wealth of Nations* in 1776: Books I-III with an introduction by Andrew Skinner, Penguin, Harmondsworth, 1970.

47 Barry J Reiter, 'The Control of Contract Power' (1981) 1 *Oxford J Legal Stud* 347 at 351; Spencer Nathan Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 *Oxford J Legal Stud* 17 at 22.

48 S Sothi Rachagan, *Developing Consumer Law in Asia*, Faculty of Law, University of Malaya & International Organisation of Consumers Union (IOCU) Regional Office for Asia and the Pacific, Kuala Lumpur, 1994, p 6.

49 See the *Second Consumer Protection Programme* 1981, OJ 1981, C133/1.

50 Proclaimed by General Assembly Resolution 2542 (XXIV) of 11 December 1969.

Consumer Protection, which provides for protection 'from such contractual abuses as one-sided standard contracts, exclusion of essential rights in contracts, and unconscionable conditions of credit by sellers'.[51] The European Community Commission has issued the Directive on Unfair Terms in Consumer Contracts 1993 which applies a test of unfairness. In the United Kingdom, this has produced the Unfair Terms in Consumer Contract Regulations 1999.

In Malaysia, the enactment of the Consumer Protection Act 1999 (the Consumer Protection Act) and the Direct Sales Act 1993 (the Direct Sales Act) are examples of some legislative influences towards a modern contract law. The discussion and drafting of the Consumer Protection Act took more than ten years and, after much lobbying from consumer bodies,[52] it was finally passed in 1999. Although it is unfortunate that some important proposals in the initial draft were not included,[53] the Act has provided a fairer regime for consumer transactions. The Act provides for statutory implied guarantees in respect of supply of goods and services, and rights against suppliers and manufacturers in respect of these guarantees. These are important rights not accorded in the Contracts Act nor the Sale of Goods Act 1957 (Revised 1989) (the Sale of Goods Act) which is based on the now repealed English Sale of Goods Act 1893.

The Direct Sales Act is another significant statute, particularly its provision for a cooling-off period wherein no goods shall be delivered or services performed until the cooling-off period has elapsed.[54] The purchaser has the right to rescind the contract before the period expires. The buyer's right to terminate the contract during the cooling-off period provides a mode of avoidance from the strict contract rule that parties are bound once the agreement is signed.[55]

It is important that both the Consumer Protection Act and the Direct Sales Act expressly provide that rights accorded statutorily cannot be contracted out nor modified and make it an offence to do so.[56] This is vital as the Sale of Goods Act allows contracting out.[57] The express statutory provisions prohibiting contracting out are also in accord with judicial decisions. The courts have held that while parties are free to contract out

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[51] United Nations, *General Assembly — Consumer Protection*, Resolution No 39/248 (1985). See the following articles by David Harland, 'Implementing the Principles of the United Nations Guidelines for Consumer Protection' (1991) 33 *JILI* 189; 'The United Nations Guidelines for Consumer Protection' (1987) 10 *JCP* 245–66; 'The United Nations Guidelines for Consumer Protection — Reply to Comment by Weidenbaum' (1988) 11 *JCP* 111. See also Patrizio Merciai, 'Consumer Protection and The United Nations' (1986) 20 *Journal of World Trade Law* 206 for the text of the Guidelines at 225–31.

[52] See S Sothi Rachagan, *Consumer Law Reform — A Report*, Selangor and Federal Territory Consumers' Association, Kuala Lumpur, 1993, for the lack of consumer protection in various areas.

[53] Particularly the proposals for the control of exclusion clauses which were similar to the provisions in the Trade Practices Act 1974 (Cth) and for negotiated standard-form contracts wherein parties can agree to the terms of the contract or as prescribed by the Ministry of Domestic Trade and Consumer Affairs. (Interview with Dato Dr S Sothi Rachagan, who together with Dato P Balan were appointed by the Ministry to draft the Act.)

[54] This Act applies to direct selling defined as door-to-door sales and mail order sales to overcome difficulties of purchasers being harassed into obtaining goods or services that they do not need.

[55] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Subramanian v Retnam* [1966] 1 MLJ 172.

[56] Section 6 of the Consumer Protection Act and s 37 of the Direct Sales Act.

[57] See s 62 of the Sale of Goods Act that the implied terms on merchantable quality and fitness of goods may be negatived or varied by express agreement or by the course of dealing of the parties.

3 Dr Cheong.indd 63 03/10/2014 9:55:57

of provisions in general legislation,[58] contracting out is not allowed where the specific statute is enacted to protect a certain class of persons.[59] The distinction between statutes of general application and specific statutes that protect a class of persons is a compromise between freedom of contract and the need for some restraint on that freedom. These developments exemplify the recognition of the problem of contracting-out clauses and also of exclusion clauses which are found in almost all standard-form contracts. The examples above show that in Malaysia traditional doctrines of contract law have been moderated by legislation that seeks to promote contractual fairness. From this perspective, it is reflective of the general move from classical to modern contract law.

## V. Inequality of Bargaining Power

The preceding part has highlighted the limitations of freedom of contract and the need for recognising consumer interests, particularly in the light of present modern-day large-scale economies and the resulting use of standard-form contracts and exclusion clauses. The underlying concern is the inequality of bargaining power between contracting parties, particularly in consumer contracts and, to some extent, in commercial contracts in relation to small businesses.

Modern contract law's attempt to address this concern is best seen in Lord Denning MR's judgment in the famous case of *Lloyds Bank Ltd v Bundy*.[60] Here an elderly farmer had charged the full value of his only asset, a farmhouse, to the bank as security for an overdraft facility extended to his son's company. The poor financial position of the company was not told to Mr Bundy nor was he advised to seek independent advice. While the Court of Appeal had set aside the guarantee and charge on the basis of undue influence, Lord Denning also considered the broader ground of inequality of bargaining power as follows:[61]

> There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms — when the one is so strong in bargaining power and the other so weak — that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.

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58 See the Privy Council decision of *Ooi Boon Leong v Citibank NA* [1984] 1 MLJ 222 at 226 that a party may contract out of the Contracts Act unless the Act expressly provides that an agreement is void for contravening the provisions of the Act, for to hold otherwise would be '[a] devastating . . . inroad into the common law right of freedom of contract . . . '. See also the Federal Court decision of *Employees Provident Fund Board v Bata Shoe Co (M) Ltd* [1968] 1 MLJ 236 that there is no rule of law which restricted freedom of contract to debar any party from providing terms to evade the provisions of an Act.

59 See the Federal Court decision of *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 131 on the then Housing Developers (Control and Licensing) Rules 1970 (now replaced by the Housing Developers (Control and Licensing) Regulations 1989). Other similar cases include *Sentul Raya Sdn Bhd v Hariram a/l Jayaram* [2008] 4 MLJ 852; *Brisdale Resources Sdn Bhd v Law Kim* [2004] 6 MLJ 76; *Loh Chow Sang v Meru Valley Resort Bhd* [2002] 2 MLJ 666; *PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh* [1999] 3 MLJ 157; *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285.

60 [1975] QB 326.

61 [1975] QB 326 at 336.

Lord Denning's bold approach has been received with contrasting responses: welcomed for its new approach[62] but also criticised for introducing 'unstructured distributive justice' and the ensuing uncertainty in contractual relations.[63] Several attempts to use this concept were unsuccessful and it was finally disapproved by the House of Lords in *National Westminster Bank plc v Morgan*.[64] In Malaysia, Lord Denning's concept of inequality of bargaining power has also not been accepted by the courts on the ground of a lack of any established precedent.[65]

It has been observed that while the modern approach recognises that contractors rarely negotiate from positions of equal bargaining strength, the dilemma is to find a way to correct this imbalance without causing a collapse of the institution of contract itself.[66] Brownsword opines that English law has responded to prevent the collapse by rejecting a general doctrine of unequal bargaining power and has introduced legislative measures to correct the inequality as seen in the UCTA's black and grey listed terms.[67] For cases of pressure to renegotiate contracts, this is addressed through the doctrine of economic duress.

The doctrine of unconscionability has also been used to address issues of unequal bargaining power and contractual unfairness. The doctrine, originally derived from equity against unconscientious bargains, served two areas. First, to relieve heirs not accustomed to dealing with wealth from unconscionable bargains. Second, general relief was available to a plaintiff who could show that he or she was disadvantaged by 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'.[68] The latter, although available since the inception of the doctrine, has been more developed and applied in recent years. This doctrine is better developed in Australia and Canada than in the United Kingdom.

In Australia, *Commercial Bank of Australia v Amadio*[69] restated the principles of the doctrine and heralded a change in the judicial application of the doctrine. The facts in this case are close to *Lloyds Bank Ltd v Bundy*. Here, Mr and Mrs Amadio, aged 76

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[62] Christopher Carr, 'Inequality of Bargaining Power' (1975) 38 *Mod LR* 463 at 466; Philip Slayton, 'The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v Bundy' (1976) 22 *McGill LJ* 94 at 105; P H Clarke, 'Unequal Bargaining Power in the Law of Contract' (1975) 49 *ALJ* 229 at 233. See also A L Terry, 'Freedom from Freedom of Contract' [1975] *NZLJ* 197 at 202.

[63] David Tiplady, 'The Judicial Control of Contractual Unfairness' (1983) 46 MLR 601 at 615.

[64] [1985] AC 686, in particular Lord Scarman's judgment. See also Lord Scarman's disapproval in *Pao On v Lau Yiu Long* [1980] AC 614. See also *Multi Service Bookbinding Ltd v Marden* [1979] 1 Ch 84; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87, [1985] 1 WLR 173 (CA).

[65] See Visu Sinnadurai J in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127 at 160.

[66] Roger Brownsword, Contract Law: Themes for the Twenty-First Century, Butterworths, London, 2000, pp 76–7.

[67] Black-listed terms are terms which a well advised consumer would almost always reject in an equal bargaining position while grey-listed terms are terms which the consumer would normally prefer not to accept.

[68] *Blomley v Ryan* (1956) 99 CLR 362 at 405 per Fullagar J. In the same case, Kitto J included 'ignorance, inexperience . . . and financial need or other circumstances which affect the ability of a party to conserve his own interests' at 415.

[69] (1983) 151 CLR 447; 46 ALR 402.

and 71 years respectively, were migrants with a limited grasp of written English who had signed a guarantee and mortgage over their property in favour of the bank for an overdraft facility extended to their son's company. The company was insolvent and the bank had assisted to maintain the apparent prosperity of the company by selectively dishonouring the company's cheques. The Amadios signed the documents believing the guarantee was limited to $50,000 and to six months as told by their son, when in fact it was unlimited as to amount and time, which bound the Amadios for all sums owed by the company. The High Court set aside the guarantee and the mortgage on the ground of unconscionability.[70] Both elements of the doctrine[71] were satisfied in this case. First, the Amadios stood in a position of special disability vis-a`-vis the bank and, second, the bank as the stronger party took unfair advantage of the weaker party's disability. On the facts, the special disability was proved: the Amadios, by virtue of their age, limited grasp of written English and business matters, totally relied on their son and believed that their son's company was successful. The bank by contrast was a major financial institution well aware of the company's position and the contents of the documents. The second element, that the stronger party had taken advantage of the weaker party's disability, was also satisfied. In this case, the bank manager had approached the Amadios in their home kitchen (when Mr Amadio was reading the newspaper and Mrs Amadio was washing dishes) and presented them with a lengthy complicated document for their immediate signature without independent advice.

After *Amadio*, the doctrine of unconscionability has been applied in many different situations with the acceptance of wider circumstances of special disability arising from standard contracts,[72] as well as emotionally vulnerable relationships.[73] The doctrine is also provided by statute, in ss 51AA, 51AB and 51AC under Pt IVA of the Trade Practices Act 1974 (Cth) (the TPA) to cover unconscionable conduct. Section 51AB was initially enacted in 1986 as s 52A, implementing the recommendations made by the committee which had reviewed the TPA.[74] It was repealed and re-enacted as s 51AB in 1992, when s 51AA was inserted to extend the remedies provided in the TPA to unconscionable conduct under the general law.[75] Section 51AC was later added to extend the protection

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[70] Judgments of Mason and Deane JJ (with whom Wilson J concurred). Dawson J dissented while Gibbs J decided in favour of the Amadios based on the bank's misrepresentation for failing to disclose the unusual features of the overdraft account.

[71] Mason J explained the doctrine of unconscionability as ' . . . an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage *vis-a`-vis* another and unfairness or unconscientious advantage is then taken of the opportunity created . . . '.

[72] *George T Collings (Aust) Pty Ltd v H F Stevenson (Aust) Pty Ltd* (1991) ATPR 41-104 where the form was misleadingly titled and the clause which was in fine print imposed on the vendor a contingent liability to pay the agent commission for an indeterminate period after the expiration of the exclusive agency term.

[73] *Louth v Diprose* (1992) 175 CLR 621; 110 ALR 1 where a gift of a house from a male solicitor was set aside: the special disability arising from 'the man's extraordinary vulnerability in the false atmosphere of a crisis in which he believed that the woman with whom he was completely in love and upon whom he was emotionally dependent, was facing eviction from her house and attempting suicide unless he provided the money for the purchase of the house' (Deane J at 638).

[74] Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affa*irs, 1976, AGPS, Canberra (*Swanson Committee Report*).

[75] Section 51AA came into force on 21 January 1993.

against unconscionable conduct to small businesses.[76] Another important statute is the New South Wales Contracts Review Act 1980 which gives the courts power to set aside contracts which are unjust.[77]

In Canada, the significance of the doctrine of unconscionability is that Lord Denning's concept of inequality of bargaining power is accepted as one of its constituent elements.[78] Canadian unconscionability cases provide a good discussion point to the idea of modern contract law in its use of 'community standards of commercial morality', emanating from Lambert JA's judgment in *Harry v Kreutiziger*:[79]

> In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired . . . are really aspects of one single question. That single question is whether the transaction, seen as a whole, issufficiently divergent from community standards of commercial morality that it should be rescinded.[80]

In contrast to these more robust developments, the English courts have generally been cautious in using the doctrine of unconscionability, preferring to use the more established doctrine of undue influence. In *Credit Lyonnais Bank Nederland NV v Burch*,[81] the court set aside a charge based on undue influence but also referred to the possibility that it could have been grounded on unconscionability.[82] In *Royal Bank of Scotland v Etridge*

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76 Section 51AC came into force on 1 July 1998.

77 See the authoritative text by John R Peden, *The Law of Unjust Contracts*, Butterworths, Sydney, 1982.

78 See *Royal Bank v Hinds* (1978) 88 DLR (3d) 428 (Ont HC) where the doctrine of inequality of bargaining power was applied in a transaction between a bank and its customer who was the widow of a debtor of the bank; *McKenzie v Bank of Montreal* (1975) 55 DLR (3d) 641 (Ont HC) where a party agreed to a transaction while under emotional pressure; *Athabasca Realty Ltd v Lee* (1976) 67 DLR (3d) 272 (Alta TD) where it was said that to invoke the doctrine of unconscionability successfully, there must be proof of unconscionability arising from inequality of bargaining power. See also Steven R Enman, 'Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law' (1987) 16 *Anglo-Am LR* 191 at 217.

79 (1978) 9 BCLR 166 (BCCA).

80 (1978) 9 BCLR 166 at 240. See also *Atlas Supply Co of Canada Ltd v Yarmouth Equipment Ltd* (1991) 103 NSR (2d) 1 (a commercial case involving an exclusion clause); Beverly M McLachlin, 'A New Morality in Business Law' (1990) 16 *Can Bus LJ* 319.

81 [1997] 1 All ER 144. In this case, Ms Burch, a junior employee who had worked for eight years in the company since she was 18 years old, had put up her home as security for the company's increased overdraft facility when requested by her employer, Mr Pelosi. Mr Pelosi had told her that the overdraft was increased by £20,000 but did not tell her that the current overdraft was £250,000 and that the borrowings were already £163,000. Her home was valued at £100,000 but had an existing mortgage of £30,000.

82 An exceptional case that was decided on the ground of unconscionability alone is *Boustany v Pigott* (1993) 69 P & CR 298 (PC). In this case, one Ms Pigott, aged 67, had in 1976 leased premises to Mrs Boustany for five years with an option to renew for another five years. In 1980, Mrs Boustany, who knew that Ms Pigott's affairs were managed by her cousin, invited Ms Pigott to a tea party when the cousin was away and 'lavished attention and flattery' upon Ms Pigott. Mrs Boustany then took Ms Pigott to a solicitor to negotiate conditions for a new lease where the transaction was concluded amidst the solicitor's concern that the new lease was for 10 years with an option for a further 10 years with provision for review at a rent only marginally higher than the present. The court found that there was unconscionable conduct by Mrs Boustany. In this case, the harshness of the transaction was obvious, in addition to the manner in which the new lease had been procured by Mrs Boustany.

*(No 2)*,[83] the House of Lords described undue influence in a manner sufficiently wide to cover cases of unconscionability. Undue influence encompasses three broad categories: overt acts of improper pressure, abuse of relationships of influence and exploitation of vulnerable persons. This approach however raises the question whether its breadth obscures the distinctive roles of each doctrine. This concern is, however, premised on the view that both doctrines are separate and perform distinct functions. There are opposing views that both doctrines share similar characteristics and can be profitably merged into one doctrine. In particular, it has been opined that the broader umbrella doctrine of unconscionability can include undue influence. In this essay, it is argued that both doctrines are, and should be, treated separately under Malaysian contract law, inter alia, to provide more avenues for contractual fairness and justice. This is in accord with the modern law of contract and will be dealt with in the next part.

## VI. Unconscionability, Undue Influence and Coercion Under the Contracts Act 1950

Having surveyed the modern law's response to inequality of bargaining power above, this part considers the position in Malaysia by analysing the main theme of vitiation of free consent through the doctrines of unconscionability, undue influence and coercion.

The doctrine of unconscionability in Malaysia was brought to the forefront in the case of *Saad Marwi v Chan Hwan Hua (Saad Marwi)*[84] when the Court of Appeal, in addressing and recognising inequality of bargaining power, adopted the English doctrine of unconscionability to be applied following the broad and liberal Canadian approach. This case concerned a sale and purchase agreement of a piece of land owned by the appellant, a farmer, and the respondents for RM42,000. The agreement, which was in the English language, stated that a deposit of RM4200 was paid, but did not specify that it was by way of rental payable by the appellant to the respondents (pursuant to a lease whereby the appellant harvested coconuts from the respondents' land). The court, after surveying unconscionability cases from the major Commonwealth jurisdictions,[85] held that the agreement was unconscionable and allowed the appellant's appeal.[86] In this case, the court held that the non-disclosure of the offset of the rental for the deposit gave rise to a fair inference that the respondents were in a position of advantage. Further, there was no

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[83] [2002] 2 AC 773.

[84] [2001] 3 CLJ 98. See May Fong Cheong, 'A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After *Saad Marwi*?' [2005] 4 *MLJ* i, also reproduced in Khee Jin Tan and Azmi Sharom (eds), *Developments in Singapore and Malaysian Law*, Marshall Cavendish, Singapore, 2007, pp 89–105, with an additional part which draws the boundaries of the doctrine of unconscionability by comparing the judicial treatment of *Saad Marwi*'s decision with four later cases, pp 99–102. See also May Fong Cheong, 'The Impact of the English, Canadian and Australian Doctrine of Unconscionability on Malaysia' in Sharifah Suhanah Sy Ahmad (ed), *Developments in Malaysian Law — Selected Essays*, University of Malaya, Kuala Lumpur, 2007, pp 43–65.

[85] The court referred to English, Australian, New Zealand, Canadian and Indian cases.

[86] The High Court rejected the appellant's argument of undue influence and declined to grant specific performance to the respondents but awarded damages of RM1.2 million representing half the current market value of the property.

indication that the agreement, which was in the English language, had been explained to the appellant in his mother tongue, considering that the appellant did not speak English, and the appellant was also not independently advised. The unequal bargaining position of the contracting parties in this case provided the court the opportunity to address this issue where Gopal Sri Ram JCA stated:[87]

> In my judgment, the time has arrived when we should recognise the wider doctrine of inequality of bargaining power. And we have a fairly wide choice on the route that we may take in our attempt to crystallise the law upon the subject . . . What is therefore called for is a fairly flexible approach aimed at doing justice according to the particular facts of a case. Historically, that is what equity is all about. That brings me to the third alternative. This is to adopt the English doctrine [of unconscionability] but apply it in a broad and liberal way as in Canada.

This case is significant as it has addressed the issue of inequality of bargaining power and the doctrine of unconscionability, in particular, the robust Canadian approach described in the preceding part. The court referred to the Canadian cases as providing 'the most just solution' and 'a method by which practical justice may be achieved within a framework of principle'. Although later cases have expressed concern on the introduction of the doctrines of inequality of bargaining power and unconscionability, *Saad Marwi* has been accepted as one yielding to the necessity to provide justice.

In another Court of Appeal decision, *American International Assurance Co Ltd v Koh Yen Bee (f) (AIA)*,[88] Abdul Hamid Mohamad JCA stated:[89]

> Be that as it may, there is a lot to be said for the decision of this court in Saad in view of the facts therein and the justice that the court should do. Saad is a very clear case where a farmer . . . [the facts of the case were summarised].
>
> The facts of that case clearly supports such a decision if justice were to prevail.

While the court in AIA was prepared to accept the decision on grounds of justice in *Saad Marwi*, the concerns raised needs to be addressed. In that case, Abdul Hamid Mohamad JCA stated:[90]

> We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provision of s 14 of the Contracts Act 1950 which

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87 [2001] 3 CLJ 98 at 114–15.
88 [2002] 4 MLJ 301.
89 [2002] 4 MLJ 301 at 319.
90 Another three concerns were the issue of reception of English law, the concern that the court by introducing such principles is in effect 'legislating' on substantive law with retrospective effect and finally, the concern of the uncertainties that the doctrine may cause. The last concern will be dealt with later below.

only recognises coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent.

This concern was also raised by Ian Chin J in the High Court decision of *Yewpam Sdn Bhd v Mohd Salleh bin Sheikh Ahmad (Yewpam)*.[91] Ian Chin J's concerns are summarised as follows:

(1) the Contracts Act already contains s 16 on undue influence and as there is much similarity between undue influence and unconscionability, the latter can be developed within s 16;
(2) if the English doctrine of unconscionability means applying the principles in *Slator v Nolan*[92] and *Fry v Lane*[93] (which were referred to in *Saad Marwi*), this position is already included within ss 16(1) and (2) respectively;
(3) including a test of 'inequality of bargaining power' would effectively be adding a new section to the Contracts Act; and
(4) the statutory form of law in the Contracts Act is different from the common law which is still developing.

*AIA* and *Yewpam* have raised the issue whether there is a need for a separate doctrine of unconscionability in view of s 16 of the Contracts Act which necessitates a discussion on the doctrine of undue influence.

Section 16[94] which is *in pari materia* with the corresponding provision in the Indian Contract Act is based substantially on the rules of English common law.[95] In *Saw Gaik Beow v Cheong Yew Weng*,[96] Edgar Joseph Jr J referred to the Privy Council case of *Poosathurai v Kanappa Chettiar*[97] where Lord Shaw indicated that there is no difference on the subject of undue influence between the Indian Contract Act and English law.

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91 [2001] 1 LNS 43.

92 (1876) 11 IR 367.

93 (1888) LR 40 Ch D 312.

94 Section 16: (1) 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. (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another — (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) 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. (3)(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. (Emphasis added) (b) Nothing in this subsection shall affect section 111 of the Evidence Act, 1950.

95 See two Indian Supreme Court cases, *Ladli Prasad Jaiswal v Karnal Distillery Co Ltd* (1964) 1 SCR 270 at 300; (1963) AIR SC 1279 at 1290 per Shah J and *Subhas Chandra v Ganga Prosad* (1967) 1 SCR 331 at 334; (1967) ASC 878 at 881, which referred to the Privy Council decision of *Raghunath Prasad v Sarju Prasad* (1924) APC 60; 51 IA 101.

96 [1989] 3 MLJ 301.

97 (1919) 47 IA 1.

Section 16(1) states the elements of undue influence: first, a relationship between two parties where one is in a position to dominate and, second, the use of that position to obtain an unfair advantage. Section 16(2) provides the situations when a person is deemed to be in a position to dominate the will of another person. Section 16(3)(a) deals with the proof of undue influence when two elements are established; first, the person is in a position to dominate the will of another and, second, the transaction appears to be on the face of it or on the evidence to be unconscionable. When these two elements are established, the burden of proof that the contract was not induced by undue influence shall lie on the person in a position to dominate the will of another.[98]

When it is proved that consent to an agreement is caused by undue influence, s 20 of the Act provides that the agreement is voidable at the option of the party whose consent was so caused. Section 14 provides that consent is free when it is not caused by, inter alia, undue influence.

The issue raised in *AIA* and *Yewpam* is valid and there is a continuing academic debate on the interaction of the doctrines of undue influence and unconscionability. One view is that both doctrines share sufficient similarities, that is, inequality in the bargaining position of the parties, transactional imbalance, and unconscionable conduct by the defendant, as well as objectives and effects that are similar.[99] Thus, both doctrines can be profitably merged into one doctrine and, unconscionability being the broader of the two, it can cover undue influence. A similar view refers to both doctrines' equitable origin which imposes a duty to take reasonable steps to ensure that the weaker party has formed an independent judgment and is aimed at mitigating the risk of exploitation by the stronger party.[100] In Australia, Sir Anthony Mason, the former Chief Justice, has expressed that the concept of unconscionable conduct has relegated the concept of undue influence to a position of relative unimportance, as most situations of undue influence will be covered by unconscionable conduct.[101]

The opposing view is that the two doctrines, though similar, are distinct.[102] This is primarily because undue influence is concerned with the impaired consent of the weaker

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[98] This order of proof of undue influence was explained by the Privy Council in *Ragunath Prasad v Sarju Prasad* (1924) APC 60; 51 1A 101.

[99] See David Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *LQR* 479; Andrew Phang, 'Undue Influence Methodology, Sources and Linkages' [1995] *JBL* 552 which examines the linkages between undue influence, economic duress and unconscionability, and the arguments for and against a possible amalgamation under one broad heading of unconscionable conduct, concluding in favour of a merger.

[100] IJ Hardingham, 'The High Court of Australia and Unconscionable Dealing' (1984) 4 *Oxford J Legal Stud* 275 at 286 and 'Unconscionable Dealing' in P D Finn (ed), *Essays in Equity*, Law Book Co, Sydney, 1985, p 2 that the lines of demarcation between presumed unconscionable conduct and presumed undue influence are less defined than they may have been in the past.

[101] See A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 248–9.

[102] Peter Birks and Nyuk-Yin Chin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, 1995, p 57. See also M Cope, *Duress, Undue Influence and Unconscionable Bargains*, The Law Book Co, Sydney, 1985, pp 132–3; Rick Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?' (1996) 16 *Oxford J Legal Stud* 503; JW Carter, Elisabeth Peden and GJ Tolhurst, *Contract Law in Australia*, 5th ed, LexisNexis Butterworths, Sydney, 2007, para 23-16, pp 513–14.

party, while unconscionability is concerned with the conduct of and exploitation by the stronger party. Thus, relief for unconscionability is fault-based and given on the ground of the unconscientious behaviour of the stronger party. Deane J in *Amadio* adopts this view and states:[103]

> The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party . . . Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.

Further, unlike undue influence, unconscionability is not dependent on proof that a dominant party has actually induced the agreement through influence exerted by the dominant party. There is also no need for any presumption raised by any antecedent relationship of influence between the parties. The interaction of both doctrines has been raised at the English courts. In *Portman Building Society v Dusangh*,[104] the Court of Appeal cited both views but did not express any particular preference.[105] Lord Nicholls's statement at the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*[106] that principles of undue influence apply to three broad categories, that is, overt acts of improper pressure, abuse of relationships of influence and exploitation of vulnerable persons,[107] has reignited the discussion. Chen-Wishart has opined that this doctrine may now be seen as an application of the unconscionable bargain doctrine since it satisfies the four elements of its application.[108] Phang has opined that 'the references by the House to a broader doctrine constitute the boldest attempt yet in heralding a significant change in the law' and raises the distinct development of a broader umbrella doctrine of unconscionability.[109]

Lord Nicholls's statement that unconscionability can be developed within the doctrine of undue influence is attractive for Malaysia in view of s 16 of the Contracts Act on undue influence (as raised in *AIA* and *Yewpam* quoted above) and in particular, s 16(3)

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103 (1983) 151 CLR 447 at 474.

104 [2000] 2 All ER (Comm) 221; [2000] Lloyd's Rep 197.

105 See Lara McMurtry, 'Unconscionability and Undue Influence: An Interaction?' (A commentary on *Portman Building Society v Dusangh*) [2000] 64 *The Conveyancer* 573 at 580 that if the court accepts the distinction between the two doctrines, the court needs to clarify the circumstances in which a defence of unconscionability will succeed where one on undue influence will fail.

106 [2002] 2 AC 773.

107 [2001] 4 All ER 449 at 457–8, paras 8-11.

108 Chen-Wishart, above, n 11, p 374. The four requirements for the application of the doctrine of unconscionability are '1. *bargaining weakness* on the complainant's part (ie special vulnerability to the pressures, lies or influence of the third party); 2. *unconscientious* on the part of the enforcing party (*ie* the lender's constructive notice of the complainant's weakness and the improvidence of the transaction although here the notice is admittedly thin; 3. *the improvidence of the transaction* (*ie* the absence of any direct benefit to the complainant); 4. the enforcing party's *failure to ensure independent advice* or disclosure'.

109 Andrew Phang and Hans Tjio, 'The Uncertain Boundaries of Undue Influence' [2002] *LMCLQ* 231 at 245.

3 Dr Cheong.indd 72 03/10/2014 9:55:57

(a) which makes reference to unconscionability. As to the latter, it has been argued that unconscionability is so closely related to undue influence that it cannot have a separate existence under s 16(3)(a).[110] However, as s 16(3)(a) is on the burden of proof, to place unconscionability within it is for a limited procedural and evidential purpose only. Even if it had a substantive meaning, the resultant significance is blunted by the fact that the provision is evidentiary in nature.[111]

On the primary concern whether there should be a separate doctrine of unconscionabilty in view of undue influence under s 16, it is argued that while their overall aims appear similar, both doctrines are in fact different. The elements and the specific roles of each doctrine are peculiar to the different concern and focus of each doctrine. It is vital to distinguish between the emphasis on the impaired consent of the weaker party in undue influence cases and, on the other hand, the wrongful conduct of the stronger party in unconscionability cases. In the former, the aim is to ensure that the weaker party has given free consent while, in the latter, the aim is to prevent exploitation by the stronger party.[112] Moving back to the theme of this essay on classical law and modern law of contract, the doctrine of undue influence thus reflects a classical law approach that enforces contracts as long as they are freely entered into. As a counterpoint, unconscionability supports a modern contract law approach that provides justice by looking at the wrongful conduct of the stronger party.

Another important distinction is that the doctrine of unconscionability can take into account the interplay of both procedural and substantive unfairness[113] while the doctrine of undue influence is only procedural in nature. The classical law model through the doctrine of undue influence adopts a procedural fairness framework in ensuring that the party's consent is freely obtained in entering into the contract. The modern law provides a substantive fairness regime as seen in the doctrine of unconscionability which allows a consideration of the harshness of the terms of the contract. Allowing both doctrines to develop separately would provide more avenues for fair, just and equitable contracts. Thus, it is submitted that the doctrine of unconscionability should be developed as a separate doctrine and the statutory provision on undue influence under s 16 should not be seen as a hindrance to this development.[114] The development of a separate

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[110] Shaik Mohd Noor Alam SM Hussain, 'Pre-Contractual Fairness: Section 15 and 16 of the Malaysian Contracts Act 1950' [1993] 2 MLJ cxxi at cxxiv. This appears to be also the position adopted by the Indian Law Commission although it is unfortunate that the relationship between undue influence and unconscionability was not fully considered. In a brief report on s 16 of the Indian Contract Act (*in pari materia* with s 16 of the Contracts Act), the Commission commented as follows: 'There are some cases in which on principle of equity, relief has been given against a hard and unconscionable bargain, even though there was no question of undue influence involved (eg *Kirparam v Sami-ud-din* 25 All 284). We favour the view taken in *Kesavulu v Arithulai Ammal* (36 Mad 533) that unless undue influence is proved, no relief can be given on the ground of unconscionableness of a contract. This section needs no change'. See Law Commission of India, Thirteenth Report (Contract Act, 1872), Ministry of Law, Government of India, 1958, para 41.

[111] Boon Leong Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, Second Singapore and Malaysian Edition Butterworths Asia, Singapore, Malaysia, Hong Kong, 1998, p 533.

[112] Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?', *supra*, n 100.

[113] See the explanation on procedural and substantive unfairness, above, nn 13 and 14.

[114] See May Fong Cheong, 'Interaction of the Doctrines of Undue Influence and Unconscionability in Malaysia: A Merger or Separate Development?' [2006] *The Law Review* 220.

doctrine of unconscionability will also aid the better application of statutory provisions on unconscionability provided in the Moneylenders Act 1951 (Revised 1989) (the Moneylenders Act) and the Hire-Purchase Act 1967 (Revised 1978) (the Hire-Purchase Act) which give courts the power to reopen money lending and hire-purchase transactions which are harsh and unconscionable.

The concern of uncertainty that may ensue with the doctrine of unconscionability[115] can be allayed by adopting an incremental and systemic approach in drawing the boundaries for its application. The Malaysian courts have already embarked on this process in the cases that reached the courts after *Saad Marwi*. From the courts' decisions in *AIA*, *Yewpam*, *Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd*[116] and *Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn Bhd*,[117] the following factors have been identified for the application of the doctrine: the status of the parties, the nature and duration of the contract, the actual term or transaction alleged as unconscionable, and the manner and circumstances in which the contract was entered into.[118] Of the latter, this includes the language of the contract and the availability of independent legal advice. One observation is clear from the above cases: the courts are reluctant to apply the doctrine of unconscionability to commercial contracts. This cautious approach is fitting in the light of this relatively new doctrine.

The last vitiating factor that will be considered in evaluating the Contracts Act in the context of the classical law and modern law approaches is coercion which is provided in s 15 of the Contracts Act as follows:

> '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 parallel English concept is duress and the contract is voidable as the illegitimate pressure causes the victim to have no practical choice but to submit to a demand. The House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*[119] described duress as follows: 'The classic case of duress is . . . not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him'.[120]

Historically, the only type of pressure which the English courts were prepared to accept as amounting to duress was actual or threatened violence to the person.[121] Threats

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115 See the concerns expressed by Abdul Hamid Mohamad JCA in *AIA*, *supra*, n 90.

116 [2004] 6 CLJ 320.

117 [2004] 4 MLJ 327.

118 Cheong, 'A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After *Saad Marwi*?', *supra*, n 84.

119 [1983] 1 AC 366; [1982] 2 WLR 803.

120 [1983] 1 AC 366; [1982] 2 WLR 803 at 828.

121 *Barton v Armstrong* [1975] 2 WLR 1050 where the appellant alleged that the respondent had coerced him into entering into an agreement with the respondent by threatening to have him murdered and by otherwise exerting unlawful pressure on him.

to property were held to be insufficient to amount to duress.[122] Later, it was held in *Occidental Worldwide Investment Corp v Skibs a/s Avanti (The Siboen and The Sibotre)*[123] that the doctrine of duress extended to threats to property as well as threats to the person. In that case, in response to counsel's submission that a contract could only be set aside for duress to the person but not in any other case of duress, Kerr J stated:[124]

> I do not think that English law is as limited as submitted . . . For instance, if I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed, though without any threat of physical violence to anyone, I do not think that the law would uphold the agreement. I think that a plea of coercion or compulsion would be available in such cases.

The recognition that threats to property could amount to duress led to the development of the doctrine of economic duress. Economic duress, as seen in the cases, generally takes the form of one party threatening to breach an existing contract unless the other party agrees to pay more for the performance of the existing obligation.[125] In *North Ocean Shipping Co Ltd v Hyundai Construction Co*,[126] Mocatta J stated:[127]

> First, I do not take the view that the recovery of money paid under duress other than to the person is necessarily limited to duress to goods . . . the compulsion may take the form of 'economic duress' if the necessary facts are proved. A threat to break a contract may amount to such 'economic duress'.
>
> I think the facts found in this case do establish that the agreement to increase the price by ten per cent reached at the end of June 1973 was caused by what may be called 'economic duress'. The yard [the defendant] were adamant in insisting on the increased price without having any legal justification for so doing and the owners realised that the yard would not accept anything other than an unqualified agreement to the increase. The owners [the plaintiff] might have claimed damages in arbitration against the yard with all the inherent unavoidable uncertainties of litigation, but in view of the position of the owners *vis-a`-vis* their relations with Shell [the third party] it would be unreasonable to hold that this is the course they should have taken . . . They then made their agreement, which can truly I think be said to have been made under compulsion.

In this case, however, the court held that by failing to take any action by way of protest, the plaintiff had affirmed the agreement. The Privy Council in *Pao On v Lau Yiu*

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122 *Skeate v Beale* (1840) 11 Ad & El 983; 113 ER 688.
123 [1976] 1 Lloyd's Rep 293.
124 [1976] 1 Lloyd's Rep 293 at 335.
125 *D & C Builders Ltd v Rees* [1966] 2 QB 625.
126 [1979] QB 705.
127 [1979] QB 705 at 719.

3 Dr Cheong.indd 75 03/10/2014 9:55:57

*Long*[128] referred to both cases above and acknowledged the doctrine as one amounting to 'coercion of will, which vitiates consent'.

While the definition of coercion in s 15 of the Contracts Act by its reference to crimes under the Penal Code and detention of property is wider than the historical common law doctrine of duress, the provision is far from satisfactory as acts which are offences other than under the Penal Code or which are merely civil wrongs are excluded.[129] This has rendered the scope of coercion obsolete.[130] The provision also fails to express the chief objection to the use of illegitimate pressure. The archaic definition of coercion does not allow it to address realistic commercial pressure as recognised through the doctrine of economic duress. Submissions based on economic duress have come before the courts. In *Perlis Plantations Berhad v Mohammad Abdullah Ang*,[131] VC George J appeared to deny the applicability of such a doctrine in the Malaysian context:[132]

> For duress to amount to a defence the defendant should be able to show that his consent to the agreement he had entered into was not free in that such consent was caused by coercion as defined by section 15 of the Act. This the defendant does not even attempt to do. He does not make any accusation of the committing or threatening to commit any act forbidden by the Penal Code or of the detention or threat to detain property. [Counsel for the defence] submitted that the defendant's consent to the contract was not free because it was obtained by what she referred toas 'economic coercion' . . . our Contract Act does not provide for any form of coercion other than as defined by section 15.

In *Yayasan Melaka v Photran Corp Sdn Bhd*,[133] the High Court held that in view of the definition of coercion set out in s 15 of the Contracts Act, the English common law concept of economic duress was not applicable. There are, however, other decisions that have approached the matter more liberally that economic duress can fall within Malaysian contract law as seen in the cases of *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd*,[134] *Mohd Fariq Subramaniam v Naza Motor Trading Sdn Bhd*[135] and *Third World Development Ltd v Atang Latief*.[136] However, in each of these cases, it was held on the facts that the acts complained of did not amount to economic duress. Some degree

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[128] [1980] AC 614.

[129] This matter was addressed by the Indian Law Commission in considering s 15 of the Indian Contract Act (*in pari materia* with s 15 of the Contracts Act). The Commission proposed that the words 'Any act forbidden by the Indian Penal Code' should be deleted and a wider expression be substituted therefor so that penal laws other than the Indian Penal Code may also be included. See Law Commission of India, Thirteenth Report (Contract Act, 1872), Ministry of Law, Government of India, 1958, para 40.

[130] Visu Sinnadurai, *Law of Contract*, 3rd ed, LexisNexis Butterworths, 2003, p 259.

[131] [1988] 1 CLJ 670.

[132] [1988] 1 CLJ 670 at 676.

[133] [2007] 7 CLJ 308.

[134] [1996] 4 MLJ 331.

[135] [1998] 6 MLJ 193.

[136] [1990] 1 MLJ 385.

of acceptance for the doctrine, albeit cautious, can be seen in *OCBC Securities (Melaka) Sdn Bhd v Koh Kee Huat*,[137] where Low Hop Bing J stated:[138]

> 1. Our courts are slow in invoking the concept of duress as defined in s 15 or to import the concept of economic duress unless there is positive evidence to that effect, which must satisfy the guidelines given by the Privy Council in *Pao On*.
>
> The defence of duress or economic duress must be such as to vitiate free consent in order to render a contract voidable.

In view of the limited definition of coercion in s 15, a doctrine of economic duress is needed in Malaysia as modern businesses can expect renegotiations to take place, which the doctrine of consideration cannot adequately address in view of the decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*.[139] In this case, the court decided that practical benefit (although obtained through the performance of a pre-existing contractual duty) is good consideration, contrary to the orthodox rule in *Stilk v Myrick*[140] that performance of a pre-existing contractual duty is no consideration. A modern approach is required to address the current unsatisfactory position in s 15 of the Contracts Act. This will necessitate legislative reform which will be discussed in the next part.

## VII. Conclusion

This essay has painted the landscape of the change from classical to modern contract law and suggested that this has been due to changes in legal thinking and philosophy,

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137 [2004] 2 MLJ 110.

138 [2004] 2 MLJ 110 at 117–118.

139 [1991] 1 QB 1. In this case, the defendants, building contractors, had subcontracted the refurbishment of some flats to the plaintiff. The plaintiff was not able to complete the works in time due to financial problems arising partly from the low pricing and the poor supervision of his workers. Concerned about its own liability to the main employer, the defendants agreed to pay an additional £575 per flat on the timely completion of the flats. When the plaintiff claimed for the additional sum, the defendants argued that there was no consideration since it was performance of work as originally agreed. The court held that the practical benefit the defendants received in the completion of the works amounted to good consideration. The decision in *Williams v Roffey Bros* [1991] 1 QB 1 is controversial and has been the subject of academic review; see Roger Halson, 'Sailors, Sub-contractors and Consideration' (1990) 106 *LQR* 183; Andrew Phang, 'Consideration at the Crossroads' (1991) 107 *LQR* 21; John Adams and Roger Brownsword, 'Contract, Consideration and the Critical Path' (1990) 53 *MLR* 536; Mindy Chen-Wishart, 'The Enforceability of Additional Contractual Promises: A Question of Consideration?' (1991) 14 *NZ Universities LR* 270; Norma J Hird and Ann Blair, 'Minding Your Own Business — *Williams v Roffey* Re-visited: Consideration Re-considered' [1996] *JBL* 254. See also, Raymond S K Lim, 'Sufficiency of Consideration: *Williams v Roffey Bros & Nicholls (Contractors) Ltd*' [1990] 2 MLJ v; Peng Kee Ho, 'A Pragmatic Approach Towards Consideration: *Williams v Roffey Bros & Nicholls (Contractors) Ltd*' [1991] 1 MLJ xcix; Seng Teck Tan, 'Assessing the Extent to Which *Williams v Roffey* Has Altered the Doctrine of Consideration' [2005] *The Law Review* 282.

140 (1809) 2 Camp 317; 6 Esp 129. In this case, a seaman agreed with the master of the ship to work the ship on a voyage from London to the Baltic and back. When two of the seamen deserted and the master was unable to find replacements, the master agreed that the deserters' wages be shared among the remaining seamen including the plaintiff if they would work the ship back to London. When they returned to London, the master refused to pay the additional sum and the court refused the plaintiff's claim on the basis that the plaintiff had already undertaken, under the original agreement, to work the ship back to London, and the master's subsequent promise was void for lack of consideration.

and in community and societal values: more specifically, the transformation of thought on the role of contract law, recognition of the limitations of freedom of contract, and the rise, and international recognition, of the consumer interests. These changes were in response to the changed environment that contracting now takes place in modern economies with mass production, use of standard-form contracts and the accompanying exclusion clauses and the stronger consumer interests. While still operating within the paradigm of freedom and sanctity of contract, modern contract law has shown a greater willingness to address issues arising from the unequal bargaining position of parties. Modern contract law's concern for fairness and justice is reflected both in legislative and judicial developments. Legislation such as the UCTA on exclusion clauses, the TPA on unconscionable conduct and the Contracts Review Act 1980 (NSW) on unjust contracts supports the trend towards law attempting to give substantive justice to the parties by protecting the perceived weaker party. In relation to consumer protection, the European Community Commission's Directive on Unfair Terms in Consumer Contracts and the accompanying Regulations implemented in most of its member states effect a powerful challenge to traditional contract law. Judicial developments, particularly in the doctrines of unconscionability and economic duress, have shown the courts' concern for fairness and justice with differing degrees of intervention with freedom of contract.

In relation to the Malaysian Contracts Act, it has been shown that that by virtue of its English law heritage, the Contracts Act has adopted the classical law framework. This essay has argued that the general movement towards a modern contract law is also evident in Malaysia. While legislation based on early English law including the Contracts Act and the Sale of Goods Act provided the primary source of law, modern statutes such as the Consumer Protection Act and the Direct Sales Act complement the basic laws and provide new rights consistent with the needs of new consumer environments. From the perspective of judicial developments, the decisions on the doctrines of unconscionability (in particular the Court of Appeal's decision in *Saad Marwi*) and on economic duress show that the courts are more willing to develop Malaysian contract law alongside other common law jurisdictions to recognise the unequal bargaining position of parties. At the same time, there is some uncertainty about the importation of these doctrines which is reflective of the continuing development of Malaysian contract law. The pendulum should continue to swing and all organs of the law must continue to respond and initiate reforms to enable contract law to fulfil its role to facilitate marketplace exchanges in a fair and just manner. The legislature can introduce new provisions or review existing archaic legislation to keep up with modern conditions. The courts can contribute by giving a creative interpretation to the provisions of the Contracts Act. Both modes of reform have their own benefits. Well drafted legislation can provide clear standards of regulatory control across the board while the courts can complement legislative reform by allowing an incremental and systemic development of the law. With respect to Malaysian contract law, a combination of both legislative and judicial developments can work towards achieving the aims of justice and fairness while maintaining the certainty and predictability essential to the commercial world.

Towards this, reform of the Contracts Act is long overdue. In relation to the areas evaluated in this essay, the concept of coercion in s 15 of the Act needs to be reviewed

to clearly include the doctrine of economic duress to overcome the current uncertainty whether the doctrine falls within the present definition as provided. On the issue of standard-form contracts and particularly exclusion clauses, there is an urgent need for legislative intervention. So far the control of exclusion clauses has been left to the courts which have applied conventional principles of notice and rules of construction.[141] A new statute similar to the UCTA[142] or the provisions governing exclusion clauses in the TPA (which were proposed but not taken up in the Consumer Protection Act) needs to be enacted. In relation to unconscionable contracts, a separate doctrine of unconscionability needs to be incrementally developed by the courts. Another alternative is to enact legislation governing unconscionable contracts as has been adopted in Hong Kong's Unconscionable Contracts Ordinance 1994, although this is not the immediate recommended course. Besides these, more attention is needed to protect consumer interests. The Consumer Protection Act needs to be complemented with more specific statutes such as a Consumer Credit Act to provide more coherence and uniformity in regulating the various forms of credit. The Moneylenders Act and the Hire-Purchase Act, although containing reopening provisions for unconscionable transactions, are archaic legislation. The regulation of consumer credit needs to adopt a functional approach to provide fair and equitable credit terms across the board.

The courts also play a very crucial role in promoting values of fairness and justice in contractual relations and particularly in moulding suitable remedies. In this respect, the increasing use of equitable concepts in commercial relationships should be noted as 'the traditional boundaries between equity, contract and commerce is becoming a very thin line'.[143] Existing doctrines can be used creatively while new ones can be created. A relevant approach for judges when contract law issues arise for determination is that of commercial realism.[144] It needs to be acknowledged that where there are lacunae in the law, judges have a certain amount of discretion to fill those lacunae, that there is more to law than rules and that legal reasoning is indeterminate.[145] In their decisions, judges will need to strike a fair balance between the interests of certainty and justice, bearing in mind

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[141] May Fong Cheong, 'Exclusion Clauses in Malaysia: The Need for Reform' in MF Cheong, Sridevi Thambapillay and CM Yong (eds), *Selected Issues in the Development of Malaysian Law*, Faculty of Law, University of Malaya, Kuala Lumpur, 2008, pp 55–81.

[142] The UCTA has been adopted in Hong Kong as the Control of Exclusion Clauses Ordinance 1989 and in Singapore under the same name, the Unfair Contract Terms Act (Chapter 396) which came into effect on 12 November 1993.

[143] See May Fong Cheong, *Civil Remedies in Malaysia*, Thomson Sweet & Maxwell, 2007, Ch 8 Equitable Remedies, p 351 citing Garry Muir, 'Contract and Equity: Striking a Balance' (1985) 10 *Adelaide LR* 153–183; G A Kennedy, 'Equity in a Commercial Context' in P D Finn (ed), *Equity and Commercial Relationships*, The Law Book Company Ltd, Sydney, 1987, ch 1, pp 1–18; Malik Imtiaz Sarwar, 'Equity and Commerce: An Alternative Perspective' [1997] 3 MLJ cxlix–clxxviii. Some Malaysian cases for this proposition include *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd and other appeals* [1996] 2 MLJ 265, applying the fiduciary principle to a contract entered into by members of a club with the promoters of a club. This case is also significant for the court's reference to community standards of commercial morality.

[144] Adapting it from the legal realism theory.

[145] Simon Lee and Marie Fox, *Learning Legal Skills*, 2nd ed, Blackstone Press Limited, London, 1994, p 185.

3 Dr Cheong.indd 79 03/10/2014 9:55:57

the realities of the commercial world and in so doing apply 'the standard of commercial morality'[146] having regard to the needs and circumstances of Malaysian society.

Practitioners also play an important part in making contracts fair and just through their roles in advising and drafting agreements. A timely illustration is the House of Lords decision in *Royal Bank of Scotland v Etridge (No 2)*[147] where the court had set out in detail the steps to be followed by a lending bank (and their solicitors) in cases where a wife guarantees her husband's debts, in order to ensure that her agreement was not procured by undue influence. The vital issue is whether the bank has taken reasonable steps to satisfy itself that the wife has been informed in a meaningful way of the practical implications of the proposed transaction. The decision has been viewed as tilting the balance to ensure commercial certainty in favour of banks, by laying down 'clear, simple and practically operable' minimum requirements which, if followed in the ordinary case without abnormal features, would ensure the enforceability of the guarantee.[148] The effect of the House of Lords decision, however, need not be so clearly demarcated. From the competing view of justice (as a counterpoint to certainty), this decision is important as solicitors have an obligation to ascertain that the minimum guidelines laid down in this case are complied with. This provides protection to ensure that parties enter into guarantees after having their attention drawn to the relevant clauses and being aware of the implications of the document signed.

From the reforms proposed above, there is a need for all involved in the workings of the law: the legislature, the courts, the practitioners, the academia and the students of the law, to respond to the changes in the legal landscape of contract law. The legislative and judicial developments supporting the shift from classical law towards a modern contract law are to be welcomed and are great challenges to Malaysian contract law. The infusion of values of fairness and justice (with a balance to be struck for the needs of certainty) into a contractual framework of free choice will enhance contract law. This will also contribute to paving the way for future developments that can be embraced in the reform of Malaysian contract law.

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146 he Court of Appeal in *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd and other appeals* [1996] 2 MLJ 265 at 295.

147 [2002] 2 AC 773.

148 Chen-Wishart, *supra*, n 11 at 363.

# Removal of Company Directors in Malaysia: Section 128 of the Companies Act 1965 and Associated Case Law Revisited[1]

S.T.Lingam[2] and Sri Rama[3]

## I. Introduction

One of the potent powers of the members of a public[4] company in Malaysia is their ability to remove the directors of their company by an ordinary resolution. The potency of the power may be demonstrated by the fact that the power extends to removing a director appointed to represent the interests of a particular class of shareholders or debenture holders (although such a removal shall not take effect until the successor of the removed director has been appointed).[5] The functional utility of the power is not restricted to removing dishonest and incompetent directors. Indeed there is no requirement in the Companies Act 1965 or in case law for those seeking to remove a director of a public company by a resolution at a general meeting to give reasons for their proposed resolution; neither can a director demand the reasons for his removal.[6] The power of removal is important as it is a weapon of members against recalcitrant directors who act in disregard of members' aspirations as to how the company should be managed. In this context, it is usual for modern companies to have a regulation in their articles of association designed to make management the sole domain of the board, and consequently, to make it difficult for members to challenge board decisions.[7]

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[4] The expression is defined in section 4, the definition section of the Companies Act 1965 of Malaysia.

[5] Section 128(1) Companies Act 1965.

[6] Although he is given an opportunity to mount a defence against his removal before, and at the time of, the meeting called to remove him (s 128(3) of the Act). On the issue whether the director must be informed of the grounds of the intended resolution and whether a failure to do so will conflict with the rules of natural justice, see part 7(d) and the case of *Indian Corridor Sdn Bhd* v *Golden Plus Holdings Bhd* [2008] 3 MLJ 653.

[7] Most companies in the common law jurisdictions adopt a regulation similar to regulation 73 of Table A (the model set of articles of association in the Fourth Schedule of the Companies Act 1965) in their respective articles of association The article reads as follows: ' The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made'**.**