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# Product Liability

is the body of law that provides for compensation for physical injuries and property damage

## INTRODUCTION

Most people would have heard of the well-known case of Singapore MediaCorp artiste, Andrea De Cruz's suit against the manufacturer, importer, distributor and retailer of slimming pills called "Slim 10" after she suffered liver failure from its consumption. One may wonder which area of law does this case fall under. It is none other than the law on "Product' Liability". This article seeks to discuss the civil liability of each party from the manufacturer to the retailer of products with particular reference to the recent Singapore case of De Cruz Andrea Heidi v Guangzhou Yuzhitang Health Products Co. Ltd[1] and others as many lessons can be drawn from it. Reference will also be made to product liability law in Malaysia as far as possible.

## PRODUCT LIABILITY – an overview

Product liability is the body of law that provides for compensation for physical injuries and property damage resulting from defective and unreasonably dangerous products and from the failure of a manufacturer or seller to warn the consumer of product dangers. Broadly, the defects, upon which liability can arise fall into three categories:-

a) design defects which are inherent and exist before the product is manufactured. While the item may serve its purpose well, it can be unreasonably dangerous due to design flaw;
b) manufacturing defects which occur during construction or production of the item such as the composition of its raw materials. Only a few out of many products of the same type may be flawed in this case; and
c) defects in marketing which deal with improper instructions and failure to warn consumers of latent dangers in the product.

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Products mean any goods and includes a product which is comprised in another product, whether by virtue of being a component part, raw material or otherwise.[2] Products which are the subject of product liability suits may range from tangible products such as vehicles, buildings, appliances, machineries, writings (navigational charts), cosmetic products, food items, medicine, healthcare products and others to intangibles such as gas, electricity and even naturals such as pets.

A product liability claim can only be asserted against any or all parties along the chain of manufacture to the supply of any product for damage or harm caused by that product. The parties who could be made liable include the manufacturer of component parts (at the top of chain), an assembling manufacturer, the importer, the wholesaler and retail store owner (bottom of the chain).

In Malaysia, the law on product liability can be found in Part X (sections 66 to 72) of the Consumer Protection Act, 1999 (Act 599).[3]

## BASIS OF LIABILITY

At the time of the De Cruz's case, there has not been any consumer protection legislation in Singapore until their Consumer Protection (Fair Trading) Act 2003.[4] Therefore, the Court had to decide the product liability issues on the basis of common law contractual and tortious principles. Nevertheless, the tortious principles expounded in this case could still be persuasive authority in the event of a similar case here since under section 70 of our Consumer Protection Act, 1999 (Act 599), it is provided that liability for damage under Part X shall be treated as liability in tort.

In the case of De Cruz Andrea Heidi v Guangzhou Yuzhitang Health Products Co. Ltd and others (hereinafter referred to as "De Cruz's case), the Plaintiff sued five Defendants:-

a) the manufacturer of the slimming pills - Guangzhou Yuzhitang Health Products;
b) the importer of the slimming pills – HealthBiz Pte Ltd;
c) the major shareholder and director of HealthBiz Pte Ltd, Mr. Semon Liu;
d) the sole distributor of the slimming pills – TV Media Pte Ltd; and
e) the supplier of the slimming pills to her – her colleague, Mr. Rayson Tan.

1. [2003] 4 SLR [HC] and [2004] 3 SLR543 [CA]
2. definition under Section 66(1) Consumer Protection Act 1999 (Act 599)
3. came into force on 15 November 1999
4. came into effect on 1 March 2004

### (a) Case against the manufacturer

Plaintiff's suit against the manufacturer of the slimming pills in China did not proceed because the said manufacturer could not be located for the purpose of the service of the writ of summons. However, we can safely conclude that had the trial proceeded against the said manufacturer, there would be no doubt that the said company will be held liable in negligence for having manufactured the adulterated and highly toxic slimming pill for sale.

What is the cause of action which a buyer of goods has against a manufacturer? Under common law, it has been said that if a buyer wishes to sue the manufacturers he cannot prima facie invoke the strict liability involved in a breach of warranty, but must still base his case on negligence as, for instance, in the famous case of Donoghue v Stevenson.[5] However, there are a number of qualifications to be made to this prima facie situation. Firstly, strict liability can often be effectively imposed on the manufacturer through third and (if necessary) fourth-party proceedings. If the buyer sues the seller for breach of warranty, the seller may claim an indemnity from his own supplier, and that supplier (if not himself the manufacturer) may in turn claim an indemnity from the manufacturer. As between each pair of parties, the relationship will be contractual and liability for breach of warranty can be established. A second possible exception whereby a buyer may be able to hold a manufacturer strictly liable (without having to prove negligence) despite apparent absence of privity is the collateral contract. This is in the case where the specific and personal assurance of quality or fitness of purpose is not given by the seller but by the manufacturer to the buyer. A manufacturer markets his products through retailers; he advertises directly to the public, inviting them to buy his products. It does not seem unreasonable to hold that he is impliedly offering a warranty of reasonable fitness for ordinary use to a member of the public who buys the product.[6]

In Malaysia, a person who manufactured the defective product would, without a doubt be liable under section 68 of the Consumer Protection Act, 1999 (Act 599). That liability would also extend to a person who, by putting his name on the product or using a trademark or other distinguishing mark in relation to the product.

In Malaysia, a person who manufactured the defective product would, without a doubt be liable under section 68 of the Consumer Protection Act, 1999 (Act 599).

### (b) Case against the importer and its director

In the De Cruz's case, the importer (HealthBiz) was a company founded and owned by its director, Semon Liu. On one of his trips to China, he was introduced to the slimming pills which he personally consumed and found to be effective without suffering any side effects. elsewhere although he was new to this business of importing slimming products for sale. The said slimming pills (named Slim 10) were sent for microbiological test and toxic heavy metal chemical analysis test. He was told by the laboratory which did the testing that nothing harmful was detected. The importer received the import and wholesale dealer's licence for Slim 10 from Singapore Health Sciences Authority ("HSA") on 27th June 2001. On 1st November 2001, the importer, at the request of HSA provided an undertaking to comply with HSA's requirements to submit test results for toxic heavy metal and microbial contamination within two months of import of the consignment of Slim 10. HSA then approved the product listing for Slim 10 and the importer commenced importing the products from the manufacturer. Up until 1st February 2002, the importer had still not tested any samples from the imported consignments. On 30th April 2002, HSA issued a press release stating that fenfluramine, a controlled substance under the Poisons Act, had been detected in Slim 10. In June 2002, HealthBiz and Semon Liu were charged for offences relating to Slim 10. In the criminal proceedings, they admitted that the product had arrived by air parcel, unlabelled and in aluminium foil or in plastic bags, unaccompanied by any documentation as to their identity or source. The contents were not declared to the customs authorities in Singapore and there were no records of the imports and therefore no details were available on the various consignments.

Against the backdrop of the above facts, the High Court found that there can be no doubt that HealthBiz as importers owed a duty of care to consumers, like the Plaintiff, of its product. However, the Court disagreed with the Plaintiff's argument that the importer's duty of care extended to conducting a "due diligence" check on the manufacturer. It was sufficient that the importer knew who the manufacturer was, where it was situated and whether it was properly licensed to produce the

5. [1932] AC 562
6. For a more detailed discussion on product liability, please refer to Sale of Goods by PS Atiyah.

goods. What the Court found wanting was the importer's failure to keep proper records of the consignments of pills imported and to do proper batch tests. It was not sufficient for the importer to merely commission tests and then leave it to the authority to inform the company if poisons and synthetic substances were shown. It was required to submit a declaration of the absence of poisons and synthetic substances in the product but it did not do so. Due to the very exceptional circumstances of the case, the Court lifted the corporate veil and found Semon Liu personally liable in negligence too because his involvement in the negligence was not merely very great, it was total. The Court of Appeal upheld the decision of the High Court on the issue of liability against the importer and its director.

A person, who has, in the course of his business, imported the product into Malaysia in order to supply it to another person shall be liable for damage caused wholly or partly by a defect in the product.

### (c) Case against the sole distributor

The sole distributor, a well-known company had advertised Slim 10 extensively in the media, using another TV artiste (Rayson Tan's wife) as their spokeswoman in their commercials to sell the product. The High Court Judge found that the Plaintiff had bought Slim 10 after being convinced by TV media's advertisements that Slim 10 was effective and safe. He held that it was TV media's corporate backing of the pills which assured the Plaintiff of their safety, as she would not have relied on the names of Health Biz, the Chinese manufacturer, or any assurances given by her colleague, Rayson to purchase herbal medicines which had no established reputation in Singapore. Even though, the Plaintiff did not purchase the pills directly through the authorized retail channels of TV media but from her colleague in unmarked containers without written precautions or dosage instructions, the Court held that since TV Media knew that Health Biz was promoting the product to artistes through Rayson by supplying him the products for distribution, TV Media cannot claim that Rayson was an illegitimate source of the product. Moreover, the product whether from the official or unofficial sources all came from the same batches from the China manufacturer, none of which was approved by HSA.

Based on those facts, the Court held that TV Media as a distributor or wholesaler of the product was in a proximate enough relationship to the Plaintiff so as to owe her a duty of care to check the safety of what it distributes. TV Media was held to be in breach of its duty of care to the Plaintiff because it had placed blind faith in everything an importer who had no experience with the product said without verifying the safety of the product independently. The Court also rejected a defence by TV Media that by placing a written advice on the Slim 10 packaging warning its consumers to

seek medical advice if problems were encountered or to call a hotline number to make enquiries, it had discharged its duty of care. The Court of Appeal also upheld the High Court's decision on liability against TV Media.

Interestingly, in Malaysia section 68 of the Consumers Protection Act, 1999 did not classify a distributor as falling within the class of persons liable for the damage unless the distributor is also the importer of the product. However, since a distributor or retailer falls within the definition of "supplier"[7] under section 3 of the Consumers Protection Act 1999, it can be argued that if the supplier fails to comply with a request to identify the producer or importer of the product or any of them, then the supplier shall be held liable for the loss or damage.

### (d) Case against the supplier

The Plaintiff sued Rayson for breach of contract in supplying to her the defective slimming pills. However, the High Court found Rayson to be not liable, as there was no intention to create legal relations with the Plaintiff and Rayson when he supplied her with the pills.

## CONCLUSION

Presently, case laws on product liability are indeed very few in Malaysia and Singapore but with the growing awareness of consumer rights and their protection, it is foreseeable that such cases will increase in future.

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7. Supplier means a person who trades or supplies goods to a consumer by transferring the ownership or the possession of the goods under a contract of sale, exchange, lease, hire or hire-purchase to which that person is a party.

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# Trade Marks and issues in dealing with products made under licence

Trade marks are personal property and, like the owner of a physical property, the trade mark owner can exploit it in whichever manner it deems fit. Registration of a trade mark is direct and prima facie evidence of exclusive ownership.

There are generally three common ways where the owner of a registered trade mark can benefit from its registered trade mark:-

**i) the trade mark owner may use the mark himself on the goods for which it is registered, to the exclusion of others.**
**ii) the trade mark owner may license the use of his mark, under agreed conditions, to a third party.**
**iii) the trade mark owner may choose to assign his interest in the mark to a third party**

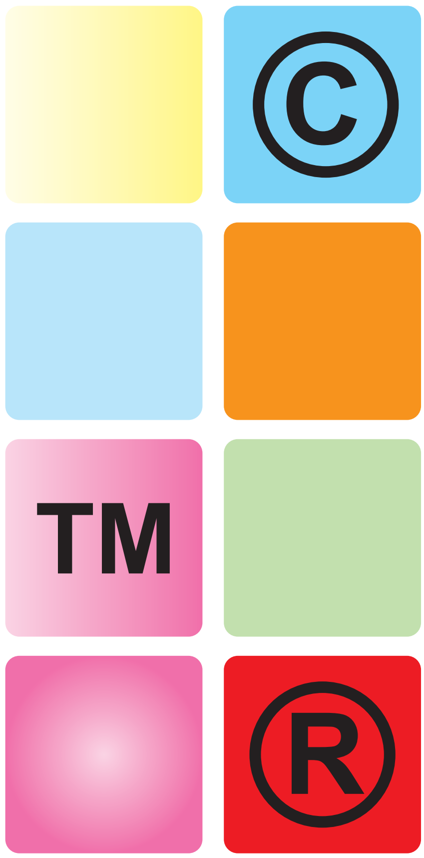
Assignment of a trade mark involves an outright sale and transfer whilst a licence merely authorizes the licensee to use or exploit the licensed mark in consideration of a fee or a royalty, under the control of the licensor.

Licensing is the most commonly deployed tools to commercialize one's intellectual property rights. In the context of trade marks, a trade mark licence agreement may assume various forms such as a franchise. License agreements in Malaysia are primarily governed by the Contracts Act 1950, the Trade Marks Act 1976 and where applicable, the Franchise Act 1998 and/or common law principles.

A license agreement is essentially a contract and sets out what the licensee is permitted to do and the terms and conditions applicable to such use. A license agreement usually contains standard conditions such as exclusivity, territorial scope, quality control and royalties.

The licensor must ensure that the license agreement is well-structured, properly worded and all potential issues are addressed in writing. In this article, we will discuss briefly the importance of providing for goods made in excess capacity ("production overrun") by the licensee, dealing with goods post-termination of the license agreement and rejected goods.

In the case of remaining stocks of products post expiry or termination of the licence agreement, such goods were produced under licence and as such are original products. If the license agreement expressly provides that the licensee is to deal with these goods in a certain manner, the licensee is obliged to do so. An act of infringement and breach of contract would have been committed if these goods were disposed off in a manner not in accordance with the terms stipulated.




If the agreement is silent on how these products are to be disposed off, the licensor may face a difficult situation if the products end up in the market still bearing the trade mark of the licensor. Third parties and consumers may not have notice that such products were not authorized to be sold. If the licensor commences an action in infringement, the third party recipient (being a distributor or retailer without notice of any restriction in the licence agreement) may put forth a defence of implied consent by the licensor to sell those goods. The plausibility of such a defence will depend on the unique facts of each case and the terms of the licence agreement.

Rejected goods are sub-standard products that have failed to fulfill the quality criteria set out in the license agreement. Rejected goods are original products in that they are manufactured during the course of a valid license agreement. There is no trade mark infringement on the part of the licensee in the disposal of such rejected items in accordance with the provisions of the agreement. The trade mark owner usually stipulates in detail how such goods are to be disposed of (the most common of which is to allow the sale of these goods without the labels bearing the trade mark).

In cases where the agreement is silent on how rejected goods are to be disposed off, can the licensee sell, deal and/or dispose off those rejects as he wishes? The answer is arguably a "no" if the products are still affixed with the trade mark of the licensor or sold with reference to the licensor's trade mark. It may also be implied in a licence contract that rejects are non-saleable and the licensee bears the risk of any loss involved in these items. The licensee should thus obtain prior approval from the licensor before disposing off these rejected items. Failure to do so may risk trade mark infringement and/or breach of contract actions by the licensor.

## What is the position on production overrun?

"Overruns" exists when the licensed manufacturer produces more than the quantity stipulated or desired by the licensor. There is no issue about inferior quality in most of the overruns. It is pertinent to note that section 38 of the Trade Marks Act 1976 provides an infringement of a registered trade mark where there is unauthorized use of a mark which is identical with or nearly resembling the registered mark, as is likely to deceive or cause confusion in the course of trade.

The crux of the matter depends on what has therefore been "authorized" by the trade mark owner or licensor, be it express or implied. When a licensee sells, deals and/or disposes off the overruns in a manner that has not been authorized by the trade mark owner, the licensee would have committed an act of infringement. It is arguable that most overruns are not authorized to be dealt with by the licensee and they should be treated in the same manner as rejected goods. The extent of the acts that a licensee is empowered to undertake should, however, be spelt out clearly or the situation may be complicated once these overruns end up in the hands of resellers who are not privy to the licence agreement. An action in trade mark infringement would still avail the trade mark owner against any unauthorized third party use but such cost of enforcement may be curtailed if proper restrictions and monitoring are put in place to regulate the licensee.

A well drafted intellectual property license agreement should therefore provide for the consequences of termination on the rights and obligations of each of the parties as well as detailed specification on the manner of disposal of products manufactured, whether they are of inferior quality or simply over-production.

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# FRANCHISE:

## A Boon or Bane?

### An Exclusive Interview with Encik Mohamad Amin Ma'amon B. Mohamad Principle Assistant Secretary of the Franchise Division, the Ministry of Entrepreneurial and Cooperative Development

Franchising has become a widely accepted strategy for business growth in Malaysia and it is recognized as one mode of entrepreneurship that can help entrepreneurs achieve higher standards not only in the goods and services offered, but also in upgrading effective management systems and skills.

Previous studies conducted by the government have indicated that the failure rate of business by way of franchise is generally lower than those of conventional startups. The government has come to recognize the role franchises play in the commercial arena and introduced the Franchise Act 1998 which came into force on 8th October 1999 to regulate franchises in Malaysia.

The Act's chief means of regulation is by imposing the requirement of registration on franchisors and franchisees or foreign franchisors who wish to sell or operate their franchise in Malaysia. To this end, the Franchise Registry was established. For franchises involving foreign franchisors, the Act also imposes a condition on the foreign franchisor to obtain the Registrar's approval prior to selling his franchise to a Malaysian franchisee in Malaysia. Similarly, where a local franchisor is desirous of selling his franchise to a foreign franchisee, prior approval will have to be obtained from the Registrar.

Encik Mohamad Amin from the Franchise Division of the Ministry of Entrepreneurial and Cooperative Development shares his experience and views with us and our readers on some of the issues and problems encountered in the franchise business.

T & P: What challenges and pitfalls await people when they decide to take on a franchise?

En. Amin: There are a few major challenges that await each aspiring franchisee. Apart from the common challenges that most business owners may face in operating a small business such as managing employees, selling products and services that are in demand, I think that the biggest challenge in operating a franchise is the franchisee's ability to keep operating costs low. Many a times, the actual costs of running a franchise is far higher than the estimated cost presented by the franchisor to the franchisee. Thus, if one is interested in purchasing a franchise, he or she should budget their finances slightly higher than the estimated costs presented by the franchisor to avoid the possibility of facing financial difficulties in the future.

Secondly, in a franchise system, franchisees are required to operate the franchise according to the franchisor's standards set in the Agreement or the Operations Manual provided by the franchisor to the franchisee. Franchisees are generally accorded with very little freedom or sometimes no freedom at all in how he or she may want to operate the business. One should refrain from venturing into a franchise business if one is not prepared to work under such constraints.

T & P: The government has been especially active in promoting franchise as a system of business to small business owners. However, not all franchises are successful. What are the common complaints lodged with the Registry by franchisees?

En. Amin: Failure in a franchise business is usually caused by the breakdown in relationship between the franchisor and the franchisee. Generally, I find that most disputes are caused by discontented franchisees. Franchisors are often blamed when the franchise business is not making money. The franchisee usually believes that the franchisor is not fulfilling his part of the obligation under the franchise agreement. For example, it is not uncommon for the franchisee to allege that the franchisor has failed to provide the agreed support to the franchisee or has failed to live up to the terms of the agreement in relation to on-going commitments. We also received complaints that the franchisor is opening additional units too close to the existing franchisee's unit which affects profitability.

From my experience in handling disputes between franchisors and franchisees, I find that franchisees are very quick in finding fault with franchisors and few realize that the failure of a franchise business may also be caused other factors, such as the franchisees' lack of competence in operating the franchise business.

Thus, I think that the key to operating a successful franchise lies not only in the franchisor providing a good operating and business system, it is imperative that the franchisee has the adequate knowledge and skills in operating the franchise.

T & P: What is your advice to prospective franchisees?

En. Amin: Franchising is a wonderful business model that can produce great personal success. However, one should always remember that not everyone is suited to run a franchise business. Interested party may find out about franchises by attending one of the monthly seminars organized by the Malaysian Franchise Association (MFA).

Briefly, one of the many things that one should do before buying a franchise is to ensure that adequate research is conducted on the franchise before an investment is made. One must carefully review all disclosure documents and other materials delivered by the franchisor. One should pay special attention to any disclosed litigation history.

The terms and conditions of a franchise agreement should be reviewed properly before signing. If possible, all clarifications should be made in writing. If verbal promises were made by the franchisor prior to signing of the franchise agreement, such promises should be reduced to writing and incorporated as part of the terms and conditions of the franchise agreement. This is critical to avoid disputes over whether such promises existed or what promises were exactly made.

It is also important to know the law and the rights accorded to a franchisee under the law. Proper legal advice should be sought if one is not clear these issues.

T & P: When faced with franchise disputes, litigation may be an expensive method of conflict resolution especially when the monetary claims are not substantial. What positive steps have the Ministry taken so far in facilitating dispute resolution between franchisors and franchisees?

En. Amin: The Malaysian Franchise Association is hoping to set up a mediation centre in the near future. The centre will function as a forum to collect data and complaints from disgruntled franchisors and franchisees which would then be brought to the Ministry for resolution. The procedure for lodging a complaint at the mediation centre would be simple. The franchisor or franchisee need only lodge his complaint through a prescribed form and the Ministry will look into and investigate the complaint. The Ministry will only act on complaints that are lodged with valid grounds. The plan is still in its infancy and details will be publicized once the proposals are adopted and approved.

T & P: Is the Registry more stringent in approving franchise applications in light of the rising number of franchise disputes in the country?

En. Amin: Yes, the Registry is strict. This is to ensure better compliance on the franchisor's part. The franchise business must be one of "excellence" with a good and proven business system. With such good and proven business system, new franchisees can be taught exactly what they need to know and do in order to produce successful results. A good franchise system should also have a brand that has value in the eyes of the consumers.

When an application is made, the franchisor will have to show that the business format has strong support for franchisees. This includes not only the initial support and training provided by the franchisor to get the new franchisee's business up and operating, but most importantly, a good ongoing support system to help the franchisee deal with problems that arise in the future.

The Ministry has approved some of the franchise businesses which are not that successful in Malaysia but which are doing very well in overseas. If the franchisor is able to prove that the franchise is very profitable in other countries, there is no reason why the Ministry should reject the registration of such a franchise in Malaysia.

T & P: T&P Thank you for spending time with us and shed some light on issues confronting the franchise system.

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# Moneylending –

## Impact an the Moneylenders (Amendment) Act 2003

The Moneylenders (Amendment) Act 2003 ("the Amending Act") has made substantial changes to the Moneylenders Act 1951 ("the Principal Act"). These changes are effective from 1st November 2003. Some of the changes made to the Principal Act which will be discussed here, are:-

**(a) The definition of "moneylender" in section 2 of the Principal Act.**

**(b) The old section 2A(1)(h) of the Principal Act which excludes any person bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money from the application of the Act, has been deleted by section 5 of the Amending Act.**

As a result of the above stated amendments, the following issues need to be considered:-

**(a) Whether a party can rely on the old section 2A(1)(h) of the Principal Act to argue that the Moneylenders Act is not applicable to him?**

**(b) Whether the amendments made by the Amending Act apply retrospectively?**

**(c) Whether the meaning of "unenforceable" under section 15 of the Principal Act is the same as void? 5 of the Amending Act.**

Previously, the old section 2 provides that "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.

However, the meaning of "moneylender" has now been amended – it now means any person who lends a sum of money to a borrower in consideration of a larger sum being repaid to him. This new definition is wider than the one provided by the old section 2.

"Moneylending agreement" is now defined to mean an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender. Previously, no definition of "moneylending agreement" was provided.

The *old section 2A(1)(h)* has been deleted by the Amending Act. The issue that arises is whether the amendments have retrospective effect? Would a person, say, Mr. X, who lends money to Mr. Y in the course of his business which does not have lending of money as its primary object, before the amendment came into effect, be able to argue that the amendment does not apply retrospectively? Under the new section 2A(1), Mr. X would be a moneylender and thus be liable under the Moneylenders Act. Can Mr. X rely on the *old section 2A(1)(h)* to exclude himself from liability?

The Court of Appeal in *Sim Seoh Beng @ Sim Sai Beng & Anor v Koperasi Tunas Muda Sungai Ara Berhad [1995] 1 CLJ 491* held that the traditional approach to the interpretation of statutes is that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective.

The Court of Appeal went on to say, that the correct test to be applied in determining whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is clear indication in the enactment that it is in any event to have retrospectivity.

The Court of Appeal derived support for their view from the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara [1983] CLJ (Rep) 56, whereby Lord Bingham stated that, "…a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. ... Their Lordships consider that the proper approach to the construction of the Act is… to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations."*

Zakaria Yatim in *Jeou-Shun Industrial Co Ltd v Shuang Hor Enterprise (M) Sdn Bhd [1995] 1 CLJ 359* held that in the absence of any express words in the new provision that is should apply retrospectively, it must be construed to apply prospectively. If the amending statute had the effect of altering a substantive law or removing a substantive right, it should not be construed retrospectively.

Reference should also be made to *section 30(1) of the Interpretation Acts 1948 and 1967 which* is concerned with rights of a substantive kind. This section provides, inter alia, that the repeal of a written law, whether in whole or in part, shall not affect the previous operation of the repealed law nor shall it affect any right, privilege or liability acquired, accrued or incurred under the repealed law.

As such, it is opined that the amendments should not apply retrospectively, as it would affect a party's right to be excluded from liability under the *Moneylenders Act.* Thus Mr. X could, arguably, still rely on the *old section 2A(1)(h)* to absolve himself from liability under the *Moneylenders Act.*

What if Mr. X could not rely on the old section 2A(1)(h) and thus, being an unlicensed moneylender, would he able to enforce the moneylending agreement between him and Mr. Y? Would Mr. Y be able to argue that the moneylending agreement is void and thus, he need not repay Mr. X the money lent to him? Does "unenforceable" have the same meaning as the meaning of "void" under the Contracts Act 1950?

Section 2(g) of the Contracts Act 1950 provides that, "... an agreement not enforceable by law is said to be void." This seems to be in favour of Mr. Y. What does the case law say about this?

The Privy Council in Menaka v Lum Kum Chum [1976] 1 LNS 71 deciding on the then section 15 of the Moneylenders Ordinance 1951 were of the opinion that contract which is not enforceable is void under section 2(g) of the Contracts (Malay States) Ordinance 1950. Here, neither party was aware of the illegality at the time of making the loan transaction. The documents were prepared and executed on both sides in complete good faith. The contract was 'discovered' to be void only after the proceedings had been started. Therefore the Privy Council held that section 66 of the Contracts Ordinance would apply and thus, any person who has received any advantage under such an agreement or contract is bound to restore it; or to make compensation for it, to the person from whom he received it.

Section 66 of the Contracts Act 1950 provides that, "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The Federal Court in Wong Yoon Chai v Lee Ah Chin [1980] 1 LNS 132, quoted the case of Menaka v Lum Kum Chum and stated that,

"...even though the moneylending transaction is void and unenforceable by reason of the contravention of certain provisions of the Moneylenders' Ordinance, there remains thereafter an issue for consideration whether a moneylender is entitled to recover the money lent under section 66 of the Contracts Act.

…

# Moneylending

"... it is for the court in each case to determine whether or not the parties to a transaction are aware of the illegality at the time of making the loan transaction. It is also for the court to consider whether in all the circumstances the loan transaction was concluded in good faith. The question that must necessarily be decided is whether in all circumstances of this particular case it is proper to order restitution..."

In Suu Lin Chong v Lee Yaw Seong [1978] 1 LNS 187, Wan Yahya J stated that the term "discover" in section 66 of the Contracts Act indicates something which the parties were not aware of at the time of making the agreement and which they gained sight of or detected only subsequently. Similarly the word "become" refers to something not present when the contract was signed but came into being at a later stage. It is for the party to a contract claiming such restitution to satisfy the Court that he was unaware of the illegality until after execution.


However, as stated by Wan Yahya in of Soh Eng Keng v Lim Chin Wah [1979] 1 LNS 98, section 66 of the Contracts Act has to be applied with care and is not open to indiscriminate use by unlicensed moneylenders whose claims have been defeated by reason of the contravention of the provisions of the Moneylenders Ordinance, 1951. Section 66 of the Contracts Act is not intended to override those provisions of the Moneylenders Act which make contracts in moneylending transactions void but is meant to provide some relief to a party whose right in an agreement has become unenforceable through no fault of his own making.

The changes made by the Moneylenders (Amendment) Act 2003 have yet to be tested in any reported cases. The question as to whether or not the amendments would apply retrospectively has not been fully answered nor is it judicially settled. As such, we would have to wait until there is a judicial pronouncement on this particular issue. In relation to section 15, it would seem that the courts are applying section 66 of the Contracts Act to afford some relief to a party whose right in an agreement has become unenforceable through no fault of his own making. However, moneylenders should be aware that section 15 is not only restrictive but also punitive in nature. It is there to prevent moneylenders from enforcing their illegal interest as well as to deprive them from recovering any sum of money outstanding in the borrower's hands. Therefore, one must not place too much reliance on section 66 of the Contracts Act.

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# NOTICE – NO MORE DISCOUNTS?

## Introduction

The remuneration of a solicitor in Malaysia is governed by the Solicitors' Remuneration Order 1991 (SRO). The Malaysian Bar Council has recently passed a resolution relating to the remuneration of a solicitor in respect of non-contentious business as compared to contentious business. Amongst the non-contentious business includes sales, purchases or other forms of conveyances involving immovable properties, tenancies or leases, charges, debentures or even for businesses where no provisions are provided by any scale fees but instead such sum shall be based on the fairness and reasonableness of the circumstances of the case, as can be found in the sixth schedule of the SRO.


Under the SRO and depending on the type and scope of work required, a solicitor is required to charge the full scale fee based on the value of the property, the rental or the amount that is secured under a debenture. The SRO prohibits all legal fees to be discounted on non-contentious business. The prohibition applies to solicitors accepting less than the scale fees laid down by the SRO.

## No More Discounts?

It is no secret that such discounts are openly and rampantly offered by legal firms in Malaysia. Since the legal fees are fixed, the firms giving or allowing discounts would thus have an unfair advantage over firms that abide by the rules. Clients would be more attracted to firms that gives them attractive discounts and would then "fish" for firms willing to give them the highest discounts. This would create an unhealthy competition amongst the legal firms. The notion that a client chooses or wants to be represented by a solicitor based on the solicitor's competence and expertise has now been disregarded.

Due to the reasons above, come 1 November 2004, the Solicitors' Remuneration Enforcement Rules (SRER) will be implemented to allow the Malaysian Bar Council (Bar Council) the powers to order these firms to hand over their documents for investigation or inspection purposes.

## Steps Taken

After coming into force of the SRER, legal firms would now have to make some minor adjustments to their offices. Legal firms are now required to put up a "No Discount" signage to be displayed inside the premises in which the practice is carried out. The signage has to be an A-4 size signboard prohibiting solicitors from giving discounts for non-contentious business.

Not only would legal firms be required to put up a signage, they would now have to submit their returns and produce documents in order for the Bar Council to obtain full information to ascertain whether a solicitor has complied with the SRO or any other rulings relating to the SRO. This request can be done by the Bar Council acting on its own motion or upon receipt of information or complaint by a third party that a solicitor has accepted less than the scale fees laid down by the SRO.

Upon finding that such solicitor has indeed accepted less than the scale fees laid down by the SRO, the report may be used as a basis for a complaint to the Disciplinary Board against the solicitor concerned.

## Is It Foolproof?

It is a known fact that the Bar Council is headed by people who are themselves practicing solicitors. To submit the returns and documents in order for the Bar Council to obtain full information would go against the very essence of confidentiality. Can we be assured that access to such documents, accounts and bills will not be misused?

It says that the Bar Council can on its own motion or upon receipt of information or complaint by a third party request the solicitor concerned to produce the returns relating to the transactions for the period specified or to produce their documents. If it is on its own motion, how will the Bar Council decide on which firm to ask the documents from? How and what will it be based on? Would mere suspicion suffice? Or do they need actual proof? How valid is a complaint? These issues would indeed be of concern to the solicitor as the standards to be applied appear vague.

***How effective will this be? It remains to be seen ……..***

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# T&P News

**NEOH LAY CHOO & CHANG HONG YUN**
our partners attended the International Bar Association's conference in Auckland which took place from the 24th to 29th of October. Hong Yun was one of the speakers in the Asia Pacific Forum. He spoke on issues regarding the sale and purchase of complex production equipment relating to brewery plants.

**LINDA WANG & SU SIEW LING**
our partners in the Intellectual Property practice group, attended the Asian Patent Attorneys Association meeting at Fukuoka, Japan which was held between 24th and 27th October. Siew Ling also attended the Marques Conference in Rome held from 14th to 28th of September and the 69th Conference of the Pharmaceutical Trade Mark Group in Madrid from the 6th to 9th of October.

**LEONARD YEOH**
our partner in the Litigation and Dispute Resolution practice group presented a paper at the 11th Annual Company Secretary's Conference held in Kuala Lumpur on the topic "Staying Abreast with the Latest Legal & Regulatory Updates to Effectively meet the Advisory Duties of the Company Secretary" on the 24th and 25th November.

**CHANG HONG YUN & LEONARD YEOH**
contributed to the "Doing Business in 2005: Removing Obstacles to Growth", an international publication recently co-published by the World Bank, the International Finance Corporation and Oxford University Press.

**SHARMILA SEKARAN**
our senior legal associate in the Intellectual Property practice group spoke on the topic, "Brand Protection under Registered Trade Mark Law" in a 2-day national conference which was held on the 15th and 16th of September on "Intellectual Property and the Innovators" organised jointly by INTAN (Institut Tadbiran Awam Negara) and Universiti Teknologi Mara and supported by both the Intellectual Property Corporation of Malaysia and Ministry of Domestic Trade and Consumer Affairs.

**ASMET NASRUDDIN**
our partner in the Litigation and Dispute Resolution practice group attended the Global Water Partnership Conference in Hanoi on 4th November.

We would like take this opportunity to wish all of our readers

**"Merry Christmas and a Happy New Year!"**