

THE REGULATION OF CONSUMER CREDIT TRANSACTIONS

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THE HIRE-PURCHASE ACT 1967: A BRIEF SURVEY

P Balan

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A Brief Survey

The Hire-Purchase Act 1967 came into force on 11th April 1968. Until then Malaysia did not have any legislation on hire-purchase except for a state legislation in Sarawak called the Hire-Purchase Registration Ordinance (Sarawak Cap. 71). The bulk of the Hire-Purchase Act 1967 was based on the New South Wales Hire-Purchase Act 1960-65. The Act was amended four times in the last twenty-seven years mainly to enhance the protection of the hirer.

1. Application of the Act

From the time the Malaysian Act was enacted its application has been restricted to "hire-purchase agreements relating to the goods in the First Schedule" (s. 1(2)). In 1967 only four categories of goods were specified in the First Schedule namely:-

- 1) Motor vehicles;
- 2) Radio, television and gramophone sets, tape-recorders and combinations thereof;
- 3) Refrigerators and deep-freeze food preservers and combinations thereof; and
- 4) Sewing machines.

The list was amended in 1980 and 1983 to increase the categories of goods. Recently the Hire-Purchase Amendment Act 1992 substituted a new First Schedule the contents of which are as follows:

- 1) All consumer goods;
- 2) Motor vehicles, namely -
 - (a) Invalid carriages;
 - (b) Motor Cycles;
 - (c) Motor Cars including taxi cabs and hire cars;
 - (d) Goods Vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms);
 - (e) Buses, including stage buses.

The term "consumer goods" is defined in s. 2(1) as "goods purchased for personal, family or household purposes". Thus the hire-purchase of all categories of goods obtained by a person for his personal, family or domestic purpose will be regulated by the Act. Goods, other than the motor vehicles listed in the Schedule, obtained by hire-purchase by an individual for a business purpose will not be covered by the Act. Thus a sole proprietor of a small business who obtains a refrigerator or a photo-copier or a sewing machine on hire-purchase to expand his business will no longer enjoy the protection of the Act.

Before the 1992 Amendment Act the legal status of the hirer (whether he was an individual, a corporation, a firm or a society) was irrelevant. The principal Act applied as long as the goods let were specified in the Schedule. After the above amendment the legal status of the hirer will continue to be irrelevant in the case of the motor vehicles listed in the Schedule. However in the case of other goods the hirer must be a natural person who obtains the goods for a non-business purpose. Non-consumers will continue to be protected by the Act in the case of a hire-purchase of the motor vehicles listed in the Schedule.

2. The Law Applicable to Hire-Purchase of Goods Outside the Schedule

What law applies to the hire-purchase of goods outside the Schedule? In respect of West Malaysia (except Malacca and Penang) section 5(1) of the Civil Law Act 1956 provides that in commercial matters the law to be applied shall be same as in England on 7.4.1956 unless other provision is made by a Malaysian statute. The English statute that was in force on 7.4.1956 was the Hire-Purchase Act 1938. This Act restricted its application to hire-purchase agreements under which the hire-purchase price did not exceed £ 300. In two reported cases Innaya v. Lombard Acceptance (Malaya) Ltd [1963] M.L.J. 30 and Thambipillai v. Borneo Motors (M) Ltd [1970] 1 M.L.J. 70 attempts to import the aforesaid statute failed. In Innaya the court rejected the attempt on the ground that it was not specially pleaded in the pleading. In Thambipillai the attempt failed on the ground that the hire-purchase in that case was well in excess of the £ 300 mentioned in the English statute. Both decisions are inconclusive on the reception of the English statute. However, even if a Malaysian court decides to import the statute in the future, its application will be limited because of the aforesaid monetary limit of £ 300 (about RM1200).

Section 5(2) of the Civil Law Act 1956 deals with the application of English Law in commercial matters in Penang, Malacca, Sabah and Sarawak. It provides that the law applicable is "the law to be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law." There appears to be an implied requirement both under s. 5(1) (mentioned above) and s. 5(2) that the statute or law to be imported must be suitable for local circumstances. The main statute which regulates hire-purchase in England today is the Consumer Credit Act 1974. The Consumer Credit Act

creates a new system of licensing and enforcement by the Director-General of Fair Trading. Its very domestic nature makes it unsuitable for our local circumstances and it is almost certain that a Malaysian court will not support its importation under s. 5(2).

It would appear therefore the hire-purchase of goods outside the schedule would be regulated by the common law of hire-purchase. It is trite knowledge that the common law has proved itself as inadequate to protect the hirer.

3. Formation of the Contract

The Hire-Purchase Act 1967 contains elaborate provisions dealing with the formation of the hire-purchase contract. There must be pre-contractual information to the hirer in that a notice in the form of the Second Schedule containing, inter alia, details of the hire-purchase price must be served on the hirer before the agreement is entered into (s. 4(1)). The obvious purpose of the Second Schedule notice is to provide the intending hirer with an opportunity to reflect upon his potential financial commitments and if necessary to change his mind. However, the Act imposes no minimum period which must lapse between the serving of the document and the signing of the agreement.

The Act provides that the agreement must be in clear legible writing or in printed form of print not less than ten point Times (ss. 4A(1) and 45(1)(b)). The agreement must be "duly completed" before it is signed (s. 4B(2)). Thus an agreement with blank spaces will contravene the Act. Section 4C(1) provides further protection to the hirer. It sets out the statutory requirements regarding the contents of every hire-purchase agreement. Among the

requirements are details of how the hire-purchase price is computed and the annual percentage rate (s. 4C(1)(c) and the Seventh Schedule).

A breach of the above provisions renders the agreement void. In addition the owner commits a criminal offence. One may question the need to make the contract void instead of merely making it unenforceable by the owner.

4. The Hire-Purchase Price

The Act requires the owner to obtain a minimum deposit of not less than one-tenth of the cash price from the hirer (s. 31(1)). A breach of the above provision is a criminal offence but no civil consequence is stated by the Act. Charges imposed by the owner other than freight, vehicle registration fee and insurance premiums are termed as "terms charges". Terms charges must be computed according to the formula $R = \frac{100 C}{PT}$ set out in the Sixth Schedule (s. 30(1)). R represents the terms charges calculated as a rate per centum per annum. C represents the amount of terms charges. T represents the period in years during which the hire-payments will be made. P represents the difference between the cash price and the deposit but added together with freight, vehicle registration fee, if any, and insurance premium. The percentage rate for the computation of terms charges (R) must not exceed a rate per annum as may be prescribed by regulations made under the Act. In 1968 the Hire-Purchase (Terms Charges) Regulations fixed the maximum rate as 10%. Where the maximum permitted rate is exceeded by the owner the hirer has an option either to treat the agreement as void or to have his liability reduced by the amount included in the agreement as terms charges (s. 30(2)).

Before 1992 one of the defects in the Act was the absence of a clear provision prohibiting the collection of payments other than those permitted by the Act, namely freight, vehicle registration fees, insurance premiums and terms charges. The absence of a clear provision in the Act encouraged some owners, to demand additional payments from hirers, under various names such as "football money", "agreement fee", "service fee" and "legal fee". These extra payments were usually demanded in addition to the full terms charges at the maximum rate as permitted by the Act and the aforesaid Regulations. The Hire-Purchase Amendment Act 1992 created a new section 36A as an attempt to curb this menace.

The section reads:

Any owner, dealer, agent or person acting on behalf of the owner who collects any payment in respect of a hire-purchase agreement other than a payment listed in the Second Schedule or a payment permitted under this Act shall be guilty of an offence under this Act.

The payments listed in the Second Schedule are:

- (a) the deposit;
- (b) freight charges, if any;
- (c) vehicle registration fee, if any;
- (d) insurance payments; and
- (e) terms charges

5. Service of Copies of Documents

The hirer and his guarantors are entitled to receive copies of the agreement within 14 days (s. 5(1)). A breach of this provision makes the agreement "unenforceable by the owner". No criminal penalty is provided for. Is this an oversight by the draftsman?

Section 5(3) imposes a duty on the owner to serve any relevant insurance policy on the hirer within seven days of its receipt by the owner. The "insurance payment receipt" however must be served "forthwith". Unfortunately section 5(3) is backed by neither a civil nor a criminal penalty.

Before the Hire-Purchase (Amendment) Act 1992, the owner was under a duty to serve on the hirer a notice in the form of the Third Schedule within 14 days after the making of the agreement. The notice served an useful purpose in that it informed the hirer as to some of his statutory rights under the Act e.g. a right to obtain a copy of the agreement and a right to early completion. The 1992 Amendment repealed the provisions relating to the Third Schedule.

6. Implied Terms

The Act provides for the following implied terms:

- (a) warranty of quiet possession (s. 7(1)(a))
- (b) condition that the owner shall have a right to sell the goods at the time the property is to pass (s. 7(1)(b))
- (c) warranty that the goods shall be free of any charge or encumbrance (s. 7(1)(c))
- (d) merchantable quality (s. 7(2))
- (e) fitness (s. 7(3))

These implied terms correspond closely with the terms implied in contracts of sale of goods under ss. 14 and 16 of the Sale of Goods Act 1957 although there are some significant differences in respect of the provisions dealing with fitness. The Hire-Purchase Act does not create any implied terms relating to description and sample similar to those created by ss. 15 and 17 of the Sale of Goods Act 1957.

7. Exclusion Clauses

Where the Hire-Purchase Act applies, the owner's power to exclude implied terms and duties created by the Act is severely curtailed.

The first provision to note is s. 34(g). By virtue of this sub-section any provision in any hire-purchase agreement whereby "except as expressly provided by this Act, the operation of any provision of this Act is excluded, modified or restricted shall be void and of no effect." The effect of this wide provision is that where the Act creates a duty or an implied term it cannot be excluded, modified or restricted unless the Act provides the machinery for doing so. Thus the implied term as to title in s. 7(1)(b) cannot be excluded at all as the Act contains no express provisions on how or when it can be excluded. On the other hand, the implied terms as to merchantable quality in s. 7(2) and fitness in s. 7(3) can be excluded in the case of second-hand chattels. This is because the Act expressly states in ss. 7(2)(b) and 7(3) respectively that these implied terms may be excluded in the case of second-hand goods if certain conditions are fulfilled. The conditions are:

- (a) the goods are second-hand and the agreement contains a statement to that effect;
- (b) there is an express exemption clause negating the relevant implied term;

- (c) the owner proves that the hirer has acknowledged in writing that the clause was brought to his notice.

One may question the aforesaid freedom of the owner to exempt the implied terms of fitness and merchantable quality. The fact that such exemptions must be brought to the notice of the hirer is not adequate protection for the hirer.

8. Triangular Hire-Purchase Transactions Involving a Hirer, Dealer and an Owner

The Act attempts to improve upon the common law rights of a hirer in a situation where a dealer in a triangular transaction has made untrue or false "representations, warranties and statements".

In the aforesaid situation, the Act gives the hirer a right to rescind the hire-purchase agreement (s. 8(1)(a)). For this right of rescission the Act comes to the hirer's assistance and creates a notional agency between the owner and the dealer. The Act in section 8(1)(b) also gives the hirer a statutory right to obtain damages from the "person who made the representation, warranty or statement and any person on whose behalf the person who made the representation, warranty or statement was acting in making it ..." This provision allows the hirer to obtain damages from the dealer without the need to prove a collateral contract, fraud or negligence. However if the hirer intends to claim damages from the owner on account of the dealer's conduct he cannot rely on any presumption or any notional agency. It appears from s. 8(1)(b) above that he has to prove that the dealer was acting on behalf of the owner when he made the untrue representation, warranty or statement. This may cause hardship to the hirer in circumstances where he is unable to exercise the right to rescind (eg.

by reason of his affirmation or delay) and in addition he is unable to exercise his right to damages against the dealer (eg. as a result of the dealer's insolvency).

9. Payments by the Hirer

Section 36C (1) makes it mandatory for an owner, dealer, agent or person acting on behalf of the owner who collects any payment in respect of a hire-purchase agreement to issue a receipt to the hirer in respect of every payment collected. Section 36C(2) provides that any person who contravenes sub-section (1) above shall be guilty of an offence under the Act.

Section 36D applies where it is "within the knowledge of the owner" that any dealer, agent or person, acting on the owner's behalf to collect any hire-purchase payment has ceased to be authorised to act on his behalf. In such a case the owner is required to inform every hirer, from whom the said dealer or agent or person ordinarily collects payment, that the relevant person has ceased to be authorised so to act and that no further payments should be made to him. Surprisingly no civil or criminal penalty is provided for a breach of the owner's duty.

10. Assignment, Early Completion and Early Determination

The Act provides in s. 12(1) that the hirer may assign "his right, title and interest" with the owner's consent. If the owner's consent is "unreasonably withheld" the hirer may apply to court for an order declaring that the owner's consent has been unreasonably withheld. The Act in s. 12(4) allows the owner to stipulate that the hirer and the assignee enter into a tripartite agreement with him," whereby without prejudicing or affecting the

personal liability of the hirer" the assignee undertakes to the owner to discharge the obligations under the agreement. In addition the hirer may be required to pay the stamping and registration fee, if any, of the assignment agreement. These stipulations are deemed reasonable.

Under s. 14 the hirer may make an early option to purchase and where he does so the Act contains elaborate provisions to ensure that the net amount payable to the owner is calculated in a just and equitable manner.

As a result of the Hire-Purchase (Amendment) Act 1992 the hirer's position has been greatly strengthened in a situation where he makes an early determination of the agreement. The hirer may introduce a cash buyer to the owner to buy the goods at a "price agreeable to the owner" (s. 15(5)(a)). The phrase "price agreeable to the owner" is ambiguous and appears certain to provoke disputes.

Another new provision, namely section 15(5)(b), gives a hirer a right to recover part of his payments in certain circumstances. This significant new provision ensures that the hirer does not suffer a loss when he makes an early determination. The new provision provides that where the "value of the goods" at the time when it is returned is more than the "balance outstanding under the hire-purchase agreement" the hirer is entitled to the difference which is recoverable as a debt due.

Conversely, by virtue of a new section 15(5)(c) where the "value of the goods" at the time when it is returned to the owner is less than the "balance outstanding under the hire-

purchase agreement", the owner is entitled to the difference which is recoverable as a debt due. This provision ensures that while the owner may no longer make a profit from the hirer's early determination he would not in those circumstances be forced to suffer a loss.

It may be noted that the 1992 amendments have made redundant the role of the notorious minimum payment clauses which operate in a voluntary termination by the hirer.

11. Recovery of Possession

Section 16(1) restricts an owner's power in an agreement to repossess the goods let. The power must not be exercised until he has served a written notice in the form set out in the Fourth Schedule. The period fixed by the notice for the hirer to remedy the breach must not be less than 21 days. In addition, the Hire-Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 provides additional rules to be followed whilst the owner and his agents exercise a repossession. The aforesaid statutory protection of the hirer only applies to a repossession "arising out of any breach of the agreement relating to the payment of instalments". Repossessions arising out of other breaches are not protected by s. 16(1) and the aforesaid Regulations.

Under s. 16(3) the owner is required to serve a notice in the form of the Fifth Schedule "within twenty-one days after the owner has taken possession of goods that were comprised in a hire-purchase agreement" (my emphasis). Again under s. 16(4) "where an owner takes possession of goods that were comprised in a hire-purchase agreement" he is to give a receipt as explained in the section. Do s. 16(3) and s. 16(4) apply to all repossessions or is it restricted to repossessions under s. 16(1)?

Section 16(1) also provides that any power of repossession shall not be exercised unless there had been two successive defaults of payment or a default of the last payment.

In 1992 a new provision (s. 16(1A)) was added to provide that where a hirer is deceased there must be four successive defaults of payments. It is not clear whether the defaults may include one or more defaults immediately preceding the hirer's death or whether all four defaults should take place after the hirer's death.

The Act does not provide a criminal sanction for a breach of s. 16. However a breach of any of the rules in the aforesaid Regulations regarding repossession is a criminal offence. The Act also omits to provide any specific civil remedy for the hirer for a breach of s. 16. In Phang Brothers Motor Sdn Bhd v. Lee Aik Seng [1978] 1 M.L.J. 179 damages were awarded to a hirer against an owner for a breach of s. 16(1). However, the reason for the award was not made clear in that decision. Presumably, the damages were awarded for the tort of breach of statutory duty.

12. Hirer's Rights after a Repossession

The Fifth Schedule notice which must be served within 21 days of the repossession informs the hirer of some of his rights under the Act. The hirer's rights, which are subject to various qualifications as set out in the Act, may be summarised as follows:

- i) a right to reinstate the agreement by giving written notice to the owner within 21 days of the service of the Fifth Schedule notice (section 18(1)(a)(i));
- ii) a right to introduce a cash buyer to purchase the goods repossessed from the owner within 21 days of the service of the Fifth Schedule notice (section 18(1)(a)(ii));

- iii) a right to recover part of his payments to the owner where the sum of his total payments and the value of the goods repossessed exceeds the net amount payable (section 18(1)(b));
- iv) where the owner intends to sell the goods repossessed by public auction a right to be served with notice of such public auction (s. 18(4));
- v) where the owner intends to sell the goods repossessed otherwise than by public auction at a price less than that stated in the Fifth Schedule notice, a right to receive an option to purchase the goods at that price (s. 18(4)).

In addition, the hirer has a right of early completion as stated in s. 14(3). It may be noted that the Fifth Schedule notice does not mention rights (iv) and (v) above.

The time-limit of 21 days referred to in (i) and (ii) above may be extended by application to a Magistrate's Court under a general provision (s. 41) which gives the said Court a power to extend the time-limits stated in the Act. It must be noted that rights (i)-(iii) is restricted to repossessions "under section 16" whilst rights (iv)-(v) are applicable "where an owner takes possession of any goods comprised in a hire-purchase agreement". The meaning of the words "under section 16" (added by the 1992 amendments) is unclear. It appears to limit the said rights to cases of repossession under s. 16(1) namely for non-payment of instalments. On the other hand, rights (iv)-(v) appear to apply to all repossessions.

Again the Act does not provide a criminal penalty or a civil remedy if the owner contravenes the aforesaid rights. Presumably the hirer may bring an action in tort for damages for breach of statutory duty.

13. Owner's Money Claim

The Act in s. 18(2) imposes a ceiling on the money claim that may be brought by the owner against the hirer. The ceiling may be conveniently stated in the form of a formula,

A - (M+V) where A is the net amount payable or the hire-purchase price less the statutory rebates, M is total payments of the hirer and V is the value of the goods. The aforesaid ceiling only applies "where the owner takes possession" of the goods let. There is no statutory ceiling for money claims in non-repossession cases.

Section 18(3) deals with the computation of the value of the goods. The value to be taken is the best price that could be reasonably obtained by the owner. There have been occasions when owners have given low values to the goods repossessed. Needless to say a low value will increase an owner's money claim. A low value should encourage a hirer to introduce a cash buyer under s. 18(1)(a). In most cases hirers are ignorant of this right and the opportunity is hardly used.

Section 18(3) allows the owner to take into account:

- i) "the reasonable costs incurred by the owner of and incidental to his taking possession of the goods;"
- ii) "any amount properly expended by the owner on the storage, repair, or maintenance of the goods;" and
- iii) "(whether or not the goods have subsequently been sold or disposed of by the owner) the reasonable expenses of selling or otherwise disposing of the goods."

The owner is only allowed "reasonable costs" of repossession or storage, repair costs "properly expended" and "reasonable expenses" of resale. In the past there have been many complaints of owners claiming exorbitant sums for the above items.

14. Insurance

As a result of changes brought about by the Hire-Purchase (Amendment) Act 1992, insurance is mandatory for the goods comprised in a hire-purchase agreement (see s. 26(1)).

Section 26(3) provides that an owner shall not require a hirer to insure any risks with any particular insurer. Surprisingly this provision is not backed by a civil or criminal sanction.

Section 26(8) deals with any commission or rebate (including a no-claim rebate) given by an insurer to an owner who is a bona fide agent of the insurer and who arranges the insurance on behalf of the hirer. In such a case the hirer is entitled to the commission and rebate. Any person who knowingly pays or allows any such commission or rebate to an owner and any owner who receives the said payments commits an offence under the Act. An important point to note is that the provision does not apply to a "legitimate agency commission" paid to an owner.

15. Absence of a General Penal Provision and Specific Civil Remedies

A significant feature of the Malaysian Hire-Purchase Act 1967 is its failure to provide a general penal provision for non-compliance by owners of their obligations under the Act. Although the principal Act was based on the Hire-Purchase Acts 1960-65 of New South Wales, the Malaysian legislation did not adopt the general penal provision in section 50(1) of the Australian legislation. Another shortcoming of the Malaysian Act is its failure to state the civil remedy available to a hirer for a breach of some of the owner's obligations under the Act. The Hire-Purchase Amendment Act 1992 attempted to overcome some of these

defects by creating criminal and civil sanctions for many of the sections dealing with the owner's obligations. However there still remains a number of provisions dealing with the owner's obligations which are not backed by a civil or criminal sanction.

16. Enforcement

The office of Controller of Hire-Purchase was first created in 1976. Section 3 of the Act provides for the appointment of the Controller, Deputy Controllers and Assistant Controllers. The powers of enforcement of these officers is dealt with in Part VIII of the Act. Section 55 empowers "any officer" appointed under the Act to prosecute any offence created by the Act or any regulations made thereunder. The Controller and a Deputy Controller may compound any offence which is prescribed to be a compoundable offence (s. 56).