

THE ISSUE OF QUALITY OF GOODS: E-CONSUMER PROTECTION IN MALAYSIA

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ABSTRACT

E-consumers nowadays are increasingly being involved in online transactions of sale of goods where the purchaser and the vendor are located in different jurisdictions or countries. The communication through web page may or may not carry information as well as details about the supplier and his place of business. The reality is, once the e-consumer has chosen the items of interest, he will proceed to the 'cash register' where he will usually be asked to fill in a form and to make payment by credit card or electronic cash. By this, a transaction is concluded and the buyer has performed his duty but the seller's duty is yet to be performed. As a consumer, one would expect the goods bought to be in good condition and acceptable performance in the manner as advertised or the goods supplied to them have measured up to certain standard of quality. In fact, the rights of consumers with regard to quality of goods or products may be regarded as the very heart of consumer protection law. Thus the problem will arise when the goods sold over the Internet were not fit for the purpose for which they were sold or the quality of goods is not to the expectation of the buyer. Basically, a contract is breached when there is a term in the contract which has not been complied with by either party. The question if the said problems arise are, is there any remedy for the buyer, is it possible to bring an action against the seller and what the e-consumers can do to claim their rights against the supplier or trader. Therefore, this paper will discuss on the availability of remedies to e-consumer and the challenges to e-consumers in enforcing their rights in cases of breach of contract by e-traders. This paper will evaluate several Malaysian related e-commerce legislations focusing on the protection for e-consumers in this issue namely the Consumer Protection Act 1999, the Sale of Goods Act 1957 and the Contracts Act 1950. This paper is a doctrinal study which uses content analysis method and major reference is on relevant Acts which provides protection on e-consumers in Malaysia relating to the issue of quality of goods.

Key words: e-consumer, e-consumer protection, quality of goods, Malaysia.

Introduction

The scope of e-consumer protection law in the sphere of e-commerce activities covers a wide spectrum. Several issues concern by e-consumers for instance, in matters of security of payment, data privacy, dispute resolution, unfair terms and conditions, validity and enforceability of e-contract, content regulation, conflict of jurisdiction, misleading information and false advertisement, late delivery, extra charges, and etc; all of them haunted the e-consumers. Therefore these concerns and problems need to be eliminated or minimized to build trust and confidence in e-consumer. However, the scope of discussion of this paper is focuses mainly on e-consumer protection relating to the issue of quality of goods receiving by the e-consumers.

In fact, the rights of consumers with regard to quality of goods or products may be regarded as the very heart of consumer protection law. As a consumer, one would expect the goods bought to be in good condition without zero defects or perform in the manner as advertised or the goods supplied to them have measured up to certain standard of quality. In case of e-consumers, they cannot touch, even see or feel the goods before buying them. Therefore, the quality of the goods can only be examined once they receive it. Thus the problem will arise when the goods sold over the Internet were not fit for the purpose for which they were sold or the quality of goods is not to the expectation of the buyer. In certain instances, some unfortunate online shoppers found that, they receive low quality of goods or defective products from the seller. Basically, a contract is breached when there is a term in the contract which has not been complied with by either party. Thus, there is a need for e-consumers to be protected against the unscrupulous trader who delivered goods which is low in quality, defective and not fit for the purpose.

Consumer and E-Consumer Protection

The term "consumer" has different shades of meaning. According to Sothi, a complex item in any consumer protection is how to define consumer. However, a 'consumer' may be defined as a customer including a licensee, subscriber or buyer of any goods or

services acting primarily in a personal family or household capacity, other than for purpose of resale. In addition, according to Letric Law Library's Lexicon on Consumer, a consumer is defined as individual purchases, uses, maintains and disposes of product and services. Malaysian Consumer Protection Act 1999 (CPA), section 3 defines consumer by reference primarily to a purchasing transaction and then making a distinction between private and commercial use. For the purpose of this paper, a consumer will be defined as a person who acquires goods for private purposes. Therefore, it excludes a person who acquires goods in the course of business for resale or manufacture.

The foundation of consumer protection law is the basic rules of contract and tort. These rules were formulated in England several centuries ago in a society vastly different from contemporary society. In fact, the earliest forms of consumer protection were designed to discourage fraudulent trading practices and to protect the consumers from danger (Keenan & Riches, 1998). Consumer protection can be defined as actions taken to protect consumer from defective goods and services. Moreover, based on UK law, consumer protection as highlighted by the United Kingdom Office of Fair Trade for offline commercial activities includes basic legal rights that a consumer will have when he buys or hires goods or services. Accordingly, several basic legal rights were accorded to consumers whereby the goods and services must be in satisfactory quality, fit for their purposes and must be as described (Chissick & Kelman, 2000).

Unfortunately the CPA does not offer any specific definition on 'consumer protection'. However, the Act provides for protection against unscrupulous traders of traditional market place. CPA is the first legislation that provides specifically for consumer protection in relation to supply of goods and services. This is expressly stated in the preamble of the purpose of the Act "to provide for the protection of consumers, the establishment of the National Consumer Advisory Council and the Tribunal for Consumer Claims, and for matters connected therewith". Section 2(2)(g) of the CPA before amendment expressly provided that the Act does not apply "to any trade transactions affected by electronic means unless otherwise prescribed by the Minister". Fortunately, the exclusion has been changed through the amendment of CPA in year 2007 to include "any trade transactions conducted through electronic means" in order to protect e-consumers rights. Therefore, it is understood that CPA is the law governing the supply of goods and services either offline or online. Thus, it means that e-commerce transactions obtain similar treatment as face-to-face transactions (Amin & Mohd Nor, 2013).

Meanwhile, the development of consumer protection law in Malaysia can be traced back as early as 1957 when the Sale of Goods Act (SOGA) was enacted. The Act applied to all commercial transactions entered into by consumers and non-consumers involving the sale of goods. However, it provided only minimal protection to consumers in commercial trade. Thus, the same minimal protection also applies in the context of e-consumer in sale of goods since there are no express or implied prohibitions for the sale of goods over the Net, nor are there any prerequisites to be fulfilled before an offer for sale of goods can be made.

The maxim of "caveat emptor", meaning "let the buyer beware", was much the norm until the passage of the Consumer Protection Act 1999 (Wu Min Aun, 1999). This Act is significant for manufacturers, importers and retailers who face increased liability exposure. With respect to either consumers or e-consumers, it provides new safeguards and rights against suppliers. Until its enactment, there was no particular statute applying to consumers in respect of the supply of goods and services. Therefore, with the passage of this Act its directly given light to the development of consumer protection in Malaysia. Even the CPA is seen not a comprehensive act to be referred to especially in term of e-consumer protection but it is certainly heading towards protection on consumer at large.

Law on Quality of Goods

In Malaysia, there are different legislations which directly or indirectly regulate or have an impact on the conduct of e-commerce. Experience has shown that 'the market' cannot provide a reasonable level of consumer protection. It is crucial to build trust and confidence in the information highways by safeguarding the interest of society in general and consumers in particular. Thus, a regulatory framework for e-commerce to ensure consumer protection is essential and necessary. However, it is not completely true to simply said that the legal protection in Malaysia pertaining to e-commerce is of non-existence. There are various legislations in existence, which can govern all sorts of transactions, conventional or otherwise. After all electronic transactions are just different in terms of its manner and concept; the practice of selling and buying goods is still the same. Hence, the legal implications of such practice must also be the same. The myriad of traditional laws in existence is also applicable to e-commerce. Therefore, explanations on practice of e-commerce vis-à-vis the law of e-consumer protection in Malaysia has to be based on a number of statutes. To do so we have to canvass various statutes; those related to consumer protection generally as well as those related to business transactions such as sales of goods. From there we can determine whether the traditional laws are applicable to e-commerce (Mohd Nor & Amin, 2014). Therefore, this section intends to examine the existing legislation in Malaysian e-commerce pertaining to provision related to protection on consumer in terms of quality of goods.

In Malaysia, there are several legislations aimed for the protection of e-consumer in commercial trade relates to the issue of quality of goods and defective products which include the Consumer Protection Act 1999, the Sale of Goods Act 1957 and the Contracts Act 1950.

Before the discussion goes further, let's look at the definition of goods under the SOGA and CPA. Section 2 of the SOGA 1957 defines the word 'goods' as every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. By virtue of this definition, therefore land is excluded from the SOGA 1957. In other words, 'goods' are broadly defined and include all chattels personal other than things in action and money. This generally only includes physical

and movable things. Goods that are the subject of contract of sale can be divided into a number of classifications under the sale of goods legislation i.e. existing, future, specific, unascertained or ascertained. Meanwhile, section 3 of the Consumer Protection Act 1999 (CPA 1999) defines the term 'goods' to mean goods which are primarily purchased used or consumed for personal, domestic or household purposes, and includes fixtures, vessels and vehicles but does not include negotiable instruments, shares, debentures and money. Therefore, the definition of goods for both Acts is similar (Lee & Ivan, 2009).

In short, whatever goods advertised and sell by the traders which later on purchase by e-consumer via online transaction, the expectation of e-consumer towards the goods is it is valuable or worth to buy, expect the nature of the goods, the price as what has been agreed by both parties, statement on packaging or label is correct, no misleading representation by the seller, safe to use, no defect and in good quality. In fact, guarantee requiring goods to be of acceptable quality have been clearly mentioned in section 32 of CPA 1999. Section 32(1) provides that 'where goods are supplied to a consumer there shall be implied a guarantee that the goods are of acceptable quality'. Further, section 32(2) states that goods shall be deemed to be of acceptable quality if they fulfill the following requirements:

- (a) they are fit for all purposes, acceptable in appearance and finish, free from minor defects, safe and durable;
- (b) meet the standards that are reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects would regard the good as acceptable having regard to the nature of the goods, the price, any statements on the packaging or label, any representation made about the goods and all other relevant circumstances.

It is reasonably clear that whether the goods are acceptable in quality will be judged based on overall assessment of the goods together with the consumer knowledge and expectation of them (Amin, 1999).

Meanwhile, under SOGA, as a general rule there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. However, there are two exception to this rule as per section 16(1)(a) and (b), where the goods must be reasonably fit for purposes for which the buyer wants them and goods must be of merchantable quality. In other words, if the buyer, expressly or impliedly, makes known to the seller the particular purpose for which the goods are required so as to show that he relies on the seller's skill or judgment, and the goods are of a description which is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose. In the context of e-consumer, definitely the buyer will rely on these implied conditions in order to obtain their rights in requiring goods which are acceptable quality and fit for such purpose they intended to.

Referring to the issue of whether is it possible for e-consumer to bring an action against the seller, trader, supplier and manufacturer when e-consumers receive defective goods which can cause injury to them, is that the answer is yes. This relates to product liability or liability for defective products which is concerned with civil liability of those involved in the production and distribution of defective products. Thus, the obligation to comply with implied guarantee under Part X of CPA is imposed on almost every person in the chain of distribution of goods.

In fact, the law provides a wide range of available grounds for consumers to pursue claims for injury caused by a defect in the products they purchase. In addition, product liability is also intended to provide a victim of a defective product with a wide range of persons who are easily identifiable and accessible to pursue an action. Nevertheless, for practical reason, liability for defective products has been heavily imposed on the supplier and manufacturer. Traditionally, a claim for a defect in a product against a supplier is founded on the grounds of breach of implied conditions of merchantable quality or fitness for purposes. Under the SOGA, a seller is only responsible to immediate buyers due to the privity rule and the liability for breach of implied conditions can be excluded or restricted by express terms as per section 62 of the said Act (Amin, 2012).

On the other hand, contractual obligations cannot be imposed on manufacturers who are not normally in direct contact with the end-user products. Nevertheless, the common law imposed on manufacturers a duty of care to ensure that their products are safe for consumers' use or consumption. The principle of manufacturer's liability for harm caused by defective product as laid down in *Donoghue v Stevenson [1932] AC 562*, had been the only basis for an action by a third party victim against a manufacturer or other persons in the chain of distribution before the statutory intervention on product liability. However, the main drawback with negligence is the need to prove fault. The plaintiff must establish that his damage has resulted from a defect in the product and has been caused by the manufacturer failing in his duty to take reasonable care. In the e-consumers situation, obtaining evidence of a fault on the part of the manufacturer will be extremely difficult. On the other hand, the loophole in the law of negligence is actually advantage for the manufacturer.

Under the CPA, a victim of defective product is provided with a further possible cause of action over and above the common law. This also means that a supplier and manufacturer have a new set of additional liability for producing or marketing a defective product. Under Part V of the CPA, the liability for breach of implied guarantees is primarily imposed on the supplier. The supplier is not only liable to a consumer who acquires the goods but also to a mere user. The liability for the breach of an implied guarantee has been extended to the manufacturer and in addition, the manufacturer is the primary defendant under the regime of strict product liability which is contained in Part X of the CPA. This is based on the ground that the manufacturers have best control over the quality of their products and they are in the best position to bear the risk and insure against it. Practically, e- consumers would normally pursue a claim against the manufacturer only in cases where the supplier cannot be found or has gone out of business. However, the manufacturer may escape liability in respect of goods which fail to comply with the implied guarantee as to acceptable quality or to comply with description if the failure is due to a fault of other persons such as mishandling, or a cause independent of human control such an act of God. Similarly the manufacturer will not be held responsible for goods which are originally acceptable in quality but turn out to be otherwise due to consumers' misuse of the goods.

On the other hand, a supplier who is sued for breach of implied guarantee as to acceptable quality may escape liability by putting the blame on the manufacturer (Amin, 2007). Section 40 of the CPA provides a defence for the supplier in a situation where the manufacturer makes a representation in respect of the goods other than by a statement on any packaging or label and the goods would have complied with the implied guarantee as to acceptable quality if that representation had not been made. Thus the manufacturer should not make extra claims about the goods such as in the advertisement or other promotional literatures.

The liability of manufacturer for breach of implied guarantee is further limited by remedial scheme under the CPA. These remedies available for consumers against the supplier will depend on whether the failure in the product is remedial or substantial (Amin, 2002). A substantial failure is defined under section 44 of the CPA, where this section lists down the characteristics of goods that can be categorized as having substantial defects:

- (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of failure;
- (b) the goods depart in one or more significant respects from the description or the sample;
- (c) the goods are substantially unfit for the ordinary purpose or special purpose made known to the supplier;
- (d) the goods are not of acceptable quality due to safety reason.

If it is proven the substantial defects exist, two remedies are available for e-consumers, i.e rejects the goods or damages for reduction in value.

However no such distinction is made with regards to the remedies available against the manufacturer. Section 52(1) of the CPA simply provides that a consumer who has a right of redress against the manufacturer for the failure of any goods to comply with a guarantee under Part V may obtain damages from the manufacturer. The damages are in form of reduction in the value of the goods resulting from the manufacturer's failure. It means that, it is the reduction below the price paid or payable by the consumer for the goods or the reduction below the average retail price of the goods at the time of supply, whichever price is lower. In addition, the manufacturer is also liable for consequential loss which is proven to be a result of the failure.

Therefore, it can be understood that several remedies available for e-consumers regarding to the defective goods or goods not as expected, where the choice of remedies is left to the seller to decide. Seller may repair the goods, curing any defect in title, replacing the goods or refunds the money.

A remedy regime needs to balance the interests of the e-consumers' expectations with the sellers' need for finality in the transaction. The primary remedy in the CPA 1999 is based on the concept of seller cure (repair). Litigation is avoided and the consumers' claim is dealt with in the repair shop rather than in the Courts. Where a seller refuses to remedy the problem or does not complete the repair within a reasonable time, the e-consumer is entitled to take the product to a third party for repair and recover reasonable repair costs. Alternatively where the seller refuses to repair, the e-consumer may reject the goods.

However, a consumer may lose the right to reject the goods if the right is not exercised within a reasonable time or the goods have been disposed by the consumer or the goods have been lost or destroyed while in the possession of a person other than the supplier.

Section 43(2) of CPA 1999 defines "reasonable time" as a period from the time of the supply of the goods within which it would be reasonable to expect the defect to become apparent having regard to the type of goods, manner of usage, length of usage and the amount of usage. Therefore, what is reasonable time is a question of fact that will be decided based on the fact of each particular case and it is subject to different interpretation of the court.

The effect from the rejection of the defective goods is a consumer can either claim:

- (a) a refund of money paid;
- (b) a replacement of the same type of goods;
- (c) a replacement of similar value goods.

A refund must be in cash of the money paid or the value of any other consideration provided or both. Therefore, the supplier is obliged to comply with a consumer's choice of remedy as per section 46(1).

A number of cases illustrate how the issue of quality of goods has been decided by the court. In the case of *Puncak Niaga (M) Sdn. Bhd. v NZ Wheels Sdn. Bhd. (2012) 1 MLJ 27*, the plaintiff took delivery of a brand new luxury Mercedes motor vehicle in April 2006. The car could not start on seven separate occasions. The plaintiff decided to return the car on May 2007. The court decided that the car was not in fact and in law of an acceptable quality. The defect was substantial which entitled the plaintiff to reject the car. From this case, a company can be consumer and gets protection under the CPA. The "substantial defect" might either exist a latent defect at the time of purchase or it might result because of an accumulation of more minor defects which in themselves could not be described as "substantial". Time to reject would begin to run when the consumer could be said to have lost confidence in the reliability of the vehicle. A repeated effort to have the goods repaired does not affect the consumer's ultimate right to reject. Furthermore, in the case of *Abouzaid v Mothercare (UK) Ltd. [2001] 3 CL 109*, a 'cosytoes' cover fixed by elastic straps injured the plaintiff's eye when one of the straps sprung back while he was helping his mother to fix it to his brother's pushchair. The Court of Appeal held that members of the public were entitled to expect better from the manufacturer and thus the product was found to be defective because there were no warning as to safety tips that the strap could not be secured safely. Similarly in *A and Others v National Blood Authority and other [2002] All ER 289*, the court held that contaminated blood with the Hepatitis C virus was defective because the public at large were entitled to expect that the blood transfused to them would be safe. Burton J. held that the issue of safety should be judged not based on actual expectation of the public but on their entitlement to expectation and this is a matter to be decided by the court.

Conclusion

All in all, repair, replace, refund and compensation for defective and not in good quality of products are now part of Malaysian law. If all the remedies are available for brick and mortar consumer, it is also will be apply to virtual consumer. E-consumers also need to have "return and refund policy" similar treatment as to the face-to-face consumer. The CPA 1999 does provide remedies and solution for e-consumers who are having problem when receive the low quality and defective goods. Thus, the obligation to comply with implied guarantee under the CPA 1999 is imposed on almost every person in the chain of distribution of goods from the seller, supplier, designer and manufacturer. Even though CPA was legislated to protect consumers' interest, it does not guarantee that a consumer's legal action against the chain of distribution will be trouble free. A remedy regime needs to balance the interests of the e-consumers' expectations with the sellers' need for finality in the transaction. In fact, the present guarantees scheme under the CPA is based on the New Zealand CGA 1993 which has been recognized to be more accessible to consumers. Nonetheless the accessibility, understandability, promotion of compliance and enforceability of the CPA is yet to be proven especially when it relates to e-consumers claim in this issue. Obviously enforceability and compliance of the provisions on available remedies are intended in order to strengthen consumer confidence as well as to ensure adequate protection for e-consumers.

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