CONTRACT LAW OF MALAYSIA AND INDONESIA: SOME BASIC COMPARISONS

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Malaysia dan Indonesia memiliki persamaan dan perbedaan dalam sistem hukum. Kedua negara mengenal Hukum Islam dan Hukum Adat. Namun berkenaan dengan hukum Barat maka Malaysia menganut "Common Law System", sedangkan Indonesia negeri yang dimasukan dalam "Civil Law System". Karangan berikut ini mencoba memperbandingkan sahnya suatu perjanjian menurut hukum "Common Law" Malaysia dan "Civil Law" Indonesia. Terlihat adanya perbedaan dalam unsur-unsur yang harus dipenuhi untuk sahnya suatu perjanjian dikedua negara tersebut.

Historical Introduction

Malaysia and Indonesia were once subject to long periods of colonial rule and occupation. It was during these periodes that English laws and Dutch laws gradully introduced into the two respective countries with were varried consequences. In the case of Malaysia, the introduction of English law and Jurisprudence was both directly and indirectly executed was applicable directly to the former straits settlements of Penang and Melaka and the crown colonies of Sarawak[1] an Sabah.[2] In the former Federated Malay States, English law was introduced through the adoption of Indian legislation

[1]Laws of Sarawak Ordinance 1928.

[2]Civil :aw Ordinance of Sabah 1938. Sabah and Sarawak were up to 1946, British protectorates. They became colonies after 1946.

which was enacted into local versions.[3] The Unfederated Malay States whose administration was subject to less British interference were ultimately persuaded to emulate the steps taken their federated counterparts. Soon they too begun to adopt in a re-enacted form, pieces of Indian legislation that had found their way into the Federated Malay states.

English contract law found its way into the Malaysian legal system following the above pattern of gradual reception. Prior to 1948, when the first federation was formed, Malaysia they consisted of three separate political regions administered either directly by the British or indirectly through advisers. These were the straits settlements of Penang and Melaka, the Federated Malay States of Perak, Selangor, Pahang and Negeri Sembilan and the Unfederated Malay States of Johore, Kelantan, Kedah, Terengganu and Perlis. The law of contract at that time was English law for the straits settlements of Penang and Melaka, the Indian Contracts Act, re-enacted into the F.M.S, Contracts Enactment of 1899 for the federated states and the F.M.S. Contracts Enacment re-enacted as Contract Enacment of the individual unfederated states. The Malayan Federation of 1948 brought into its fold these three political entities under the unity of federal rule, but contract law still revealed a diversity founded on separate though simmilar political experience. in 1950, the F.M.S., enacment of 1899 was enacted into the Contracts (Malay States) Ordinance 1950 to apply troughtout the Malay States within this new federation. Penang and Melaka remained subject to English law in matters of contract. This created a dualism that was to last for another twenty four years. Meanwhile, across the South China Sea, Sabah and Sarawak remained crown colonies of the British Empire. English Law of contract was applicable to these two coloniees.

In 1963, Malaysia,, a bigger federation was formed incorporating within it the former Malayan federation and the former crown colonies of Sabah and Sarawak, and Singapore.[4] The law of contract appliable throughout this new federation at the time reflected the dualims in its extended form. English law contract was still applicablle to Penang, Melaka, Sabah and Sarawak. The Malay states within this federation remained subject to the Contracts (Malay States) Ordinance of 1950. It was only in 1974, through the revision of laws under the Revision of Laws Act 1968 the 1950 Ordinance was made

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[3].The Indian Contract Act 1872, the Indian Specific Relief Act 1877 and the Indian Code of Civil Procedure were among the best known legislation introduced into F.M.S.

[4]Singapore left the federation in 1965.

the Contract Act 1950 (Revised 1974) and applicable throughout Malaysia. That ended the dualism in the law of contract in Malaysia.

The Continued Reception of English Law - The Continuing Debate

With the introduction of the Contracts Act 1950 (Revised 1974), it was thought the problem of dualism had been settled but the continued reception of English law of contract into Malaysia was brought to the forefront by the very presence oh this Act. The independent Malaya of 1957 (later enlarged into Malaysia) was anxious that the newly independent legislature might not have the time to enact laws to cater sufficiently for the varied aspects of life within the Federation. Lacunae in the laws were anticipated and to overcome these, the Civil Law Act 1956, was enacted to continue the practice[5] of aplying English common law, and in some instances, rules of equity, to fill in the lacunae.

The Civil Law Act 1956, in sections 3 and 5 provides that where "no other provision has been or may hereafter be made by any written law in force in Malaysia then English common law is to be applicabl": The act is of general application and applies to the sphere of contract as to other branches of law. However, in relation to contract law, does the existence of the Contract Act 1950 (Revised 1974) exclude the reception of English common law? Judicial and some academic opinions seem to favour the continued reception of English common law by contending that since the Contracts Act is not on exhaustive code, there still exist lacunae in the law that must be filled with english principles. These opinions rest heavily on two arguments:

(1) that the act is not a codifying law but merely a consolidating legislation.[6]
(2) that it is incomplete and the defects need to be remedied by importing into English law.

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[5]The practice was well establihsed and in 1937, the Civil Law Enactment (the predecessor to the present Civil Law Act) was passed to legitimise the practice. Ahmad Ibrahim adn Ahilemah Joned, "The Malaysian Legal System", Kuala Lumpur, DBP, 1987, p. 29. This article will make occasional reference to english Indonesia have obtained substantial intellectual inputs from the laws of both these countries.

[6]Seee Visu Sinnadurai in "*The Law of Contract in Malaysia and Singapore - Cases and Commentary*", OUP, K.L., 1979, pp. 16-17

Both arguments are really not mutally exclusive, the common denominator being the Act's purported "incompleteness'. Suffian J., (as he then was) in **Wotherspoon Co. Ltd. v. Henry Agency House**[7] argued that:

> '.... as the contracts Act 1950 in silent on this subject (of del credere agent) by virtue of section 5 (1) of the civil Law Ordinance, the law applicable in englans is applicable in the Federation...."[8]

A similar view was taken by the federal Court in **Royal insurance Group v. David.**[9]

The common strand in these two cases appears to be the imposition by the courts of the requirement of completeness in any written law before it suffices to be 'other provision' within the meaning of Civil Law Act. The incompleteness of the written law seems fatal to its recognition as 'other provision' and hence the courts found, reception of English law to be mandatory. The courts appeared to proceed by way of determining whether the written law which purports to be the other provision is complete or otherwise. Upon deciding that it is incompplete, the state of incompletenes, becomes the prime reason making it mandatory and compelling to resort to English law.

It is submitted that the words in section 3 and 5 do not require nor do they imply, such condition of completeness. The crucial words in both sections are 'other provision' without imputing that the 'other provision' must completely and exhaustively provide a complete corpus of rules on a mater. Would it not be equally correct to argue that both section envisage the existence of 'other provision' without regard to its completeness or otherwise. The 'other provision' if construed broadl to mean 'other regime of law' another 'corpus of rules ' then its very existence excludes the reception of English common law, irrespective of its alleged incompleteness.[10] By so construing, English law is immediately excluded and the

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[7] [1962] M.L.J. 86.

[8] *Ibid.*

[9] [1976] 1 M.L.J. 128.

[10] Note the Judment of Suffian C.J. (Malaya) (as he then was) in **Tan Mooi Liang v. Lim Soon Seng & Ors.** [1974] 2 M.L.J. 60 seems to approximate this construction. In this case the incompletensess of the Contracts (Malay states) Ordinance regarding partnership law was not fatal. The learned Chief Justice argued that 'the many provision relating to partnership' was

material defects in that 'corpus of rules' can be filled by resort to other means (including by not necessarily reference solely to English principles).

The Indonesian experiennce with Dutch law is similarly gradual but less damaging to indigenous laws. Though in both countries, the ultimate post independent legal systems reveal strong colonial flavour, Indonesia was able to sustain the impact of its adat law on the local indigenous populace. This is significantly so in commercial and civil matters. Here dualism exist and persists to this day.[11] Unlike Malaysia where this dualism operates in respect of differentt regions, in Indonesia, dualism exist in respect of groups of people. The entire body of private civil law is contained in the Kitab Undang-Undang Hukum Perdata (KUHPER) which is based on the Dutch Civil Code, Burgelijk Wetboek which was in turn much influenced by the French 'Code Civil De Francais' which was later revised by Napoleon who then named it Code Napoleon. Code Napoleon replected strong Roman Law influence and this influence persisted in the Dutch version of the code, the Burgelijk Wetboek.[12] The principles of the law relating to agreements and contracts are contained in Book III of the Burgellijk Wetboek.[13] B.W. applies only to non indigenous Indonesias while Hukum Perdata Adat (Adat Civil Law) applies to indigenous Indonesian while Hukum Perdata Adat (Ada Civil Law) applies to indigenous Indonesians. Much of the B.W. has been removed and reenacted with modifications and amendments to satisfy local relevance. The parts that were taken out and reenacted are the declared to be of general application. By so doing, the dualism in relation to the two different groups of citizen is gradually being abolished. For the moment,

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good enough reason to exclude English law relating to the same. The Federal Court did not in any way express or impute the becessity of completeness. It was sufficient if there are 'many provisions'. Note also in the recent case of **Ooi Boon Leong & Ors. v. Citibank N.A.**,the Privy Coouncil has held that the amending statute. The decision lends further weight to the argument that the Act is not a code. With due respect, 'the other provisions' which brings us back to the issue whether such completeness is ever required.

[11]Wirjono Prodjodikoro, *Azas-Azas Hukum Perjanjian*, P.T. Bale, Bandung, 1989. See also E. Utrecht/Mohd. Saleh Djindang, "Pengantar Dalam Hukum Indonesia", 11th. ed, Jakarta, 1983.

[12]E. Utrecht/Mohd. Sallch Djindang, ibid.

[13]See also Z. Ansori Ahmad, *Sejarah dan kedudukan BW di Indonesia*, C.V. Rajawai, Jakarta, 1986. The KUHPer is more often cited in its Dutch version and abbrevitaion of B.W. See Subekti, *Pokok Pokok Hukum Perdata*, 21st. ed., P.T. Intermasa, Jakarta, 1987. Hereinafter B.W. will be used to refer to it.

Book III of the BW. remains unremoved and the dualism persists.[14]

The Basis of Agreement - Consensus

Both jurisdictions clearly recoqnise that a contract is borne out of a consensus of minds of the parties. The English law of contract and the Dutch law relating to agreements, the sources of Malaysian and Indonesian laws of contract respectively, reflect strong importation of French ideas, notably that of Savigny and Potheir. In 1806, Potheir's "Treatise on the Law of Obligations" was translated into English and had strong intellectual impact on the works of Blackburn.[15] Similarly, Savigny influenced the thoughts of Lindley and Pollock to some extent. By then the legal perception of contract in England began to recognise contract as a combination of the two ideas of agreement and obligation resulting in the acceptance of the concept of agreement as the necessary outcome of consenting minds.[16]

The Dutch who adopted substansial portion of Code Napoleon[17] and incorporated these into their B.W. also considered the matters of agreement under the broad category of obligations of "verbintenis". Under this broad category of obligations are rules relating to categories of transactions giving rise to obligation, including agreement. Implicit in this notion of agreement is consensus of minds and the voluntary acceptance of obligations. Obligations arise out of a validly created agreement. This undoubtedly is the bases of both English (Malaysian) and Dutch (Indonesian) contract law.

Freedom and Openness

As English law contract advanced beyond the limited framework of assumpsit, ideas from the continent and foreign jurisprudence became tempting references. The economic idea of individualism and free enterprise, or 'laissez faire' began to exert its influence on the development of the

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[14]See Subekti, *ibid.*

[15]Cheshire, Fifoot and Furmstons, *Law of Contract*, 11th ed., ELBS?Butterworths, 1986, pp. 17-18.

[16]By 1887, Kekewich J. admitted that the definitions of contract in textbooks were all founded on Potheir,. See Foster v. Wheeler, (1887) 36 Ch.D., p. 698.

[17]Code Napoleon was Compiled by Several Eminent French Jurist, prominently Potheir.

English Law of contract so much so that by the later quarter of the nineteenth century, sir George Jessel said, "if there is one thing which more than another public policy rrequires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.[18] We know now for sure that the modern law of contracts in many countries, including Malaysia does no longer subscribe to this view in the strictest sense. Many inroads have been made into this freedom Legislation have been enacted to prescribe the form of certain contrtacts, the terms that are to be implied or not to be excluded even by agreement of parties. However, such major inroads into this freedom do "sometimes obscure the fact that across a broad spectrum of contract it remains a prime values"[19] and persist as a strong foundation of the validity of agreements.[20]

The influance of individualim and laissez faire appears to be more strongly adhered to under Dutch and Indonesian contract jurisdictions. The Indonesian Kitab Perdata recognises this explicitly in Article 1338 Clause (1):

> **"All agreement made validly by the parties operate as a law between them."**[21]

The freedom of contract in Indonesia appears to be much wider than under the Malaysian law. The only restriction to this freedom being that it should not be against public policy and morality. The rules contained in Book III of B.W. are merely suppplementary and parties are free to exclude them from their contracts.[22]

It is now clear that both jurisdictions recognise the two important bases of agreement thought the extent of recognition of each varies substantially.

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[18]**Printing and Numerical Registering Co. v. Sampson**, (1875) L.R. 19 Ag. 462 at p. 465. See also Pollock who explained the effect of individualismm and laissez faire when he said that "when, voluntarily and with a clear eye to their own interests, they entered into a contract, they made a piece of private law, binding on each other...". 39 L.Q.R. 163-165.

[19]Cheshire, Fifoot and Furmstons, *Law of Contract*, p. 20

[20]Emphasis added.

[21]See Pollock's statement. *Ibid.*

[22]Subekti, Hukum Perjanjian, 11th. ed., Intermasa Press, 1987, p. 13.

While both agree that the basis of obligation is a valid agreement, they differ substantilaly on the essential of a valid agreement.

Essentials of A Valid Agreement

The Malaysian Contracts Act in section 2(h) defines a contract as a legally enforceable agreement. In section 10 of the sama Act, the constituents a valid agreement are spelt out. The section stipulates that a contract is an agreement made by the free consent of two competent parties for a lawful consideration and with a lawful object. The essentials of a valid agreement stipulated in this section are however not exhaustive; the essentials of certainty and intention to be legally bound[23] are additional constituents of a valid contract. The combined statutory and common law stipulations as to essentials of a valid contract are

(a) An agreement;
(b) Consideration;
(c) Intention to create legal relation;
(d) Capacity;
(e) Certainty;
(f) Lawful objects.

The essentials of a valid contract under Indonesian Law are stippulated in article 1320 Kitab Perdata as follows:

(a) An agreement between the parties;
(b) Capacity;
(c) Certainty;
(d) Lawful objects or purposes.

A cursory comparison will suffice to reveal the fundamental similarities and differences in theese two categorisations of the essentials of a valid contract. The ensuing discussions of the aw of both countries will center chiefly on the three fundamental elemental similarities: *consensus, capacity and lawful cause and consideration.*

The various aspects of performance are discussed to highlight a few

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[23]The Contracts Act 1950 is silent on this reguirement, however, see for example **Phiong Chon v. Chong Chai Fah** (1970) 2 M.L.J. 114.

distinctive features.

(a) Voluntariness of Consent

Both jurisdictions agree on the need for free consent as the underlying basis of consensus. In Malaysia, where the consent of one contracting party is obtained through coercion, duress, frauld or misrepresentation, the consent is said to be vitiated and not free.[24] Similarly in Indonesia, such consent cannot give rise to a binding promise ob the part of the promisor, if his consent to be legally bound is obtained by means of coercion, fraud or mistake. Fraud appears to be defined as deliberate "falsehood and active concealment of truth"[25] there seems to be no place for innocent misrepresentation or simply misrepresentation as understood in Malaysia. Moreover, a mere act and an isolated incidence of fraud will not suffice to vitiate the voluntariness of consent, there must be a series of fraudulent acts so as to constitute fraud within the meaning of Article 1328 B.W.[26] It would appear that article 1328 excludes totally the possibility of an act silence being construed as fraud. By inference, contracts uberrimae fidei do not require special status as exceptions to general requirement. In Malaysia, silence may under exceptional ciscumtances of uberrimae fidei transactions amount to fraud.

Absence of free consent makes the agreement voidable in Malaysia[27] and *vernietigbaar*(voidable) in Indonesia. Perhaps, it is in the areas of contract law relating to mistake and duress that we can observe some very fundamental differences in the perception of the two jurisdictions.[28] Article 1322 B.W. defines mistake in two parts:

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[24]Section 14 of Contract Act 1950.

[25]Subekti, *Ibid.*

[26]Wirjono, *Azas-Azas Hukum Perjanjian*, at page 32. An isolated act of fraud may be pleaded as mistake. It is thus common in cases involving fraud, for the laintiff to seek to avoid the contract on alternative grounds of fraud and mistake.

[27]Section 19 and 20.

[28]See Subekti, *ibid.*, p. 19. Malaysia treats the effects of mistake separately from the other factor vitiating consenst.

(1) Mistake as to a fact essential to an agreement *(zelfstandisheid)*;
(2) Mistake as to identity, if identity is essential to agreement.

Subekti explains that to constitute operative mistake, the mistake must be such that if it is known to the party labouring under it, he wouuld surely refrain from giving his consent. He further explains that one contracting party must know that the other is labouring under mistake.[29]While unilateral mistake in Indonesia occurs only if the mistake of one party is known to the other, no such requirement is imposed by section 23 of the Malaysian Contracts Act Section 23 does not ateempt to define unilateral mistake but merely states its effect on an agreement. It attempts to say no more than that if one party makes a mistake then the agreements is nevertheless valid, irrespective of whether the other party knows that he is labouring under mistake. The common law perceives unilateral mistake as essentially a mistake by one party as to a matter essential to the agreement and known to the other.[30] The effect of unilateral mistake in English Law will depend on wheter the mistake is of such a nature as to negative consensus between the parties. If we take the **Lewis v. Averay**,[31] situation as a case study to compare the likely approaches of Malasysian, Indonesian and English courts respectively we will observe that:

(1) In Malasyia, the situation comes more appropriately under fraud if the identity of the contracting party is crucial and has been fraudulently represented. The result is the agreement is voiidable. If mistake is pleaded, then section 23 will not invalidate the agreement merely on the basis of a mistake by one party.
(2) In Indonesia, the one incident of deceit will not suffice to constitute fraud and therefore mistake within the second ambit of Article 1322 B.W,. will be held to occur, with the result that the agreement is voidable.
(3) In England, if the identity of the contracting party is not proven to be crucial to the formation of agreement, then the contract is valid.[32]

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[29]Section 23 Contracts Act.

[30]Cheshire, Fifoot and Furmstons, ibid., p. 238.

[31] [1972] 1 Q.B. 198.

[32]Cheshire, Fifoot and Furmston, *ibid.*, p. 244

(B) Duress

Section 15 of the Contracts Act defines coercion as:

> *"the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudce of any person, whatever, with the intention of causing any person to enter into an agreement."*

From the definition above what is obvious is the fact that coercion under the Malaysian law under the common law. Unlike common law, duress which is confined to violence or threats of violence to the person and unlawful imprisonment, coercion under section 15 covers any act which is prohibited by Penal Code. Hence duress of goods os covered bu this section.

One importan issue which has not yet found final judicial determination is must ber prohibited act or threats thereof be directed at the plaintiff only? It would appear that the prohibited act or threats thereof need not be directed at the plaintiff personally. This is because the last few word in this section appear to suggest that the act of coercion must have been "with the intention of causing any person to enter into an agreement". However to say that the act of coercion committed on A is meant to induce or compel B, to enter into an agreement with the perpetrator of the act will unneceessarily open a floodgate to action based on alleged coercion. This is particularly so when there is no requirement of any relationship whatever between A and B and even more so when B does not even know or bother to know the identity or existence of A. Though there is not judicial authority yet to finally one case, **Wong Ah Fook v. State of Johore**,[33] the court had given a strong indication of the possible approach to be taken.

In that case, one of the arguments advanced by the plaintiff was that violence was threatened by the police to his licensees, that non-residents who went to the plaintiff's place to gamble. H.M. Whitney J., commented on this argumnent:

> **"But the plaintiff never suggested that it was to save them from violence that he entered into the agreement and even if it had been so, his interest in**

[33][1937] M.L.J. Rep. 121.

them was too remote to support a plea of duress"

In Indonesia, coercion is not specifically defined by the B.W. but the nature coercion that can ground an action to avoid the agreement is reflected in Article 1324 which provides:

> **"Coercion occurs, when the act is such that it causes apprehension to a rational person and clauses fear in that person that this person or property will suffer loss or damage which is both real and imminent".[34]**

However in deciding whether the alleged act has caused such apprehension, the age, sex and status of the persons concerned should be considered.[35]

Then in Article 1325 it is explicitly provided that the coercion need not be directed solely at the contracting party: any act or threats designed to procure consent of one party to the contract directed at the other partys's spouse, ascendants or descendants will suffice. Thus this article clearly defines the extent of relationship between a contracting party and the person whom the act of coercion is commited. Moreover, mere family or ancestral reverence is not coercion if not accompanied by force.[36]

It is quite clear that coercion under the Indonesian B.W.., being civil law in origin, resembles closely the meaning of that term under the civil law. It relates essentially to coercion of the psychic not the employment of physical force.[37]

(c) Capacity

Capacity is a well-founded essential of a valid agreement in mos legal

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[34]Own translation of the original text in the Indonesian language.

[35]Pemerintah Republik Indonesia v.. P.T. Astra International Inc., Mahkamah Agung, 12 April 1972.

[36]Article 1326, B.W.

[37]Subekti, *Pokok Pokok Hukum Perikatan*, Cet. ke 4, 1987, p. 61. Also Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, Vol: II, Clarendon Press, Oxford, 1987, p.

jurisprudence. The Malaysian law on capacity to contract is contained in section 10 and 11 of the Contracts Act which provides:

> **Section 10:**
> **"all agreements are contracts if they are made by the free consent of parties competent to contract...."**
>
> **and section 11 says,**
> **"Every person is competent to contract who is of the age of majority according to the law to wich he is subject, and who is of sound mind and is not disqualified by any law to which he is subject."**

The Indonesia B.W. Article 1130 provides that the parties to the agreement must be competent (cakap) to contract. Competen is then defines to mean very person who has attained the age of 21 or is married prior to attaining that age.[38]

The categories of person considered lacking in contractial competence in Indonesia used to be:

(a) Those under age of 21 and unmarried;
(b) Person of unsound mind and committed under the charge of a curator;
(c) A married woman.[39] The Malaysian provision categories three groups of persons deemed incompetent to contract. They are:
   (i) Persons who have not attained the age of majority;
   (ii) Person of onsound mind;
   (iii) Person under some legal disqualification.

The Malaysian contracts Act does not define the age of majoriy, that definiton is given instead in the Age of Majority AAct 1971 which provides that a person attains the age of majoritu at the age of 18 for purposes of

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[38]Article 30 of the Indonesian Burgelijk Wetboek.

[39]A married woman could only contract with the consent of her husband. Article 108 B.W. This Rule has been removed by Supreme Court of Indonesia circular date 5th. September 1963. Moreover the Laws of Marriage (UU NO: 1 of 1974) recognises a married woman's right to enter into legal relations, independent of her husband.

being a party contract. thus on paper it would appeat that Malaysian are deemed to mature at an earlier age than their Indonesian counterparts. Ind practice however, the situations are not different, And Indonesia subject to the B.W. is deemed to have attained the age of maturity either ypin attaining the age of 21 or is married prior to attaining that age, which in the case of male is 18 years of age and female 15 years of age. The obvious differense persist in that an unmarried Malaysian who is 18 attains capacity to contract, while his Indonesia counterpart must resort to marriage to give him that capacity and to be emancipated from that incapacity or alternatively wait three years longer. More over, in Malaysia, competence to contract a scholarship agreement with any government body is no longer based on the age of the scholar.[40]

Thought the Malaysia Act does not explicitly spell out the effects of an agreement made by a party not competent to contract, the courts in Malaysia have chosen to follow the Privy Council interpretation of the combined effects of section 10 and 11 the Indian Contract Act (which are in pari materia with the Malaysian sections). In **Mohori Bibee v. Dharmodas Ghose,** [41] the privy Council held that the effect of both sections is to render all agreements made by person not competent to contract, void. This decision has been widely accepted by the Malaysian courts and represents the law on this particular matter.[42] Since a person not competent to contract cannot legally bind himself to all agreement, this rule seems to exclude totally the possibility of such person making contracts that are clearly beneficial to him. To mitigate the harshness of this rule, the Contracts Act incorporates the concepet of necessaries into section 69 which provides that where the alleged contract made by or with the incompetent party is one under which the incompetent party has geen supplied with neceessaries, the despite the agreement's nullity, then party who has provides the necessaries, may claim to be compensated against the property, if any,[43] of that incapable person. "Necessaries" is not defined by the Contract Act, and the

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[40]Contract (Amendment) Acy, 1976

[41][1903] 30 Cal. 539/ 30 I.A. 114.

[42]See Tan Hee Juan v. Teh bon keat; [1934] M.L.J. 96; Government of Malaysia v. Gurcharean Singh & Ors., [1971] 1 M.L.J. 211; Leha binti Jusuh v. Awang Johari, [1978] M.L.J. 202.

[43]Emphasis added. The incapable person's liability is statutory. thee liability is affixed to his property.

only case decided in Malaysia pertaining to the meaning of this term is **Government of Malaysia v. Gurcharean Singh & Ors.**[44] This dealt with the issue of scholarship agreement entered into by an infant and the Malaysian governnment. The court held that the agreement which enabled the minor to receive training at a Teacher College is a provision for necessaries and therefore comes within the ambit of section 69.[45] It is obvios that a minor is only liable to compensate the other party who has supplied him with necessaries out of his property, if any. What about if the necessaries supplied are of a nature that is capable of being a minor's property? Does a motorcycle supplied to an undergraduate minor to help him commute to and within a large campus constitute necessaries and if so, once suplied to the minor is it capable of being deemed his 'property, such that section 69 becomes immediatelly applicable. To hold that it is property, would be to admit that property can pass under a void contract. To hold otherwise is to allow the minor to roam free with a property not legally owned by him. We have to await for more judicial decisions on the exact operation of his liability under section 69.

The Indonesian approach to the practical need of allowing an incapable person to make a contract that is clearly beneficial to him is straight forward and avoids the nicecities that have plagued the common law. Through the device of agency, of his parents or guardian, a minor can avail himself of the opportunity of entering into an agreement.[46]

As we have seen earlier, agreements made by an incompetent person in Malaysia are void. In Indonesia such agreements are treated as voidable only and the party who is not competent to contract can elect to avoid the consequences of that agreement. If the incompetent person is an infant, that is one who has not attained the age of 21 years or who is not earlier married, he is given up to five years after attaining majority to elect to avoid the contract.[47]

So he can avoid the contract during infancy or within five years after

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[44][1971] 1 M.L.J. 211.

[45]See footnote 43. Visu Sinnadurai points out that with the passing of the Contracts (Amendmeent) Act 1976, the importance of this case of government awarded scholarship, the decision is still relevant to cases of scholarship awarded to minors by the private sectors.

[46]Subekti, *ibid.*, see also Wirjono, *ibid*

[47]Article 1454, B.W.

attaining the age of majority. Superficially this position looks similar to the common law principles regarding voidable contracts made by infants. The common law provides that where an infant makes a contract under which he acquires an interest in a subject matter of a permanent nature or one which gives rise to a continuous and recurring obligations, the contracts are valid until avoided by the infant within a reasonable time upon the attainement of his majority.[48] The position in Indonesia is not very clear on this matter. Are contracts made by infants valid until avoided or the validity is suspended until affirmed by the infant either during infancy or not invalidated by him during the stipulted period? It would appear that the sense 'voidable' used in Indonesia is not dissimilar to that under the common law. Consequently the inference is that both in Indonesia and England, voidable means valid until avoided.

(d) Consideration and Causa

We have seen earlier that the influence of individualism and free enterprise theory on the developtment of the law of contract in nineteenth century, England has led to the recognition of contract as a **bargain**[49] between two competent and consenting parties.

In other words English law recognises consensus as the basic of agreement. This is also, and particularly true of Dutch and Indonesia contract law. With so substantial an interference with this freedom in England, both by the courts and the legislature, freedom to contract has become obscure. This is not the case in Indonesia.

Perhaps the most striking inroad this freedom of contract, or freedom to be legally bound is in the area of consideration. The common law requires consideration to exist in all forms of a simple contracts. The absence of consideration is fatal to an agreement. a promise not supported by consideration is a bare promise and does not bind the maker. Malaysia adopts the common law approach in that an agreement not supported by consederation is unenforceable.[50] The notion of contract in both England and Malaysia is

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[48]Chesire, Fifoot and Furmstons, p. 417.

[49]Agreements are enforceable because they constitute a bargain between the parties. see Hamson, 54 L.Q.R 233 and Shatwell, 1 Sydney L. Rev. 289. Also Chesire, Fiifoot and Furmstons, p. 75.

[50]Section 2(d), 10 and 24, contracts AAct 1950.

rooted in the idea of bargain. Thus not all and every agreement is enforceable at law, only bargains are. A brief history of consideration in English law will help explain the vital importance of consideration to the question of vallidity of agreement. It is a wellknown fact that claims in contracts in England originated in the actions of assumpsit. By the sixteenth century lawyers in England were reluctan to allow a claimant to avail himself of contractual remedy throught the use of the actions of assumpsit unless he can show that the defendant's promise upon which he was suing, was part of a bargain. This underlying idea of bargain persists to this day, though at one stage the existence of consideration as a vital condition of a binding promise was severely attacked by Lord Mansfield, the Chief Justice of the King Bench Division in 1756. He argued that so long as there were other means of proving the defendan's intention to be bound then consideration was not a vital criterion. This contention was rejected.[51] His second argument was based on moral obligations. He argued that consideration may be defined in terms of moral obligations, in that pre-existing moral duty could subsist as consideration for a promises founded on that duty. This was also rejected in **Eastwood v. Kenyon**[52] which laid the modern basis of the notion of consideration.

In the continental jurisprudence founded on Code Napoleon, consideration has no relevance to the question of whether a promise is binding. A promisor is bound by his promise solely on the basis that is a promise to be bound made by a competent person acting freely and for a lawful purpose or cause. At one stage in the history of common law, several loose rules on consideration viewed collectively seemed to approximate the continental doctrine of cause.[53] But subsequent developments led to the formulation of the present day common law doctrine of valuable consideration which is substantively different from the continental doctrine of cause.[54]

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[51]See Cheshire, ibid., p. 270.

[52]113 E.R. 482.

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[54]See the classical article by E.G. Lorenzen, Causa and Consideration in the Law of Contract", 28 Yale Law Journal, 621' which discusses the comparison berween causa and consideration. Another scholarly analysis of the apparent similarities and the actual difference between causa and consideratio is by Arthur T. Von Mehren. "Civil Law Analogues To Consideration: An Exercise in Comparative Analysis", 72 Harv. l. Rev., 1009 [1959].

The doctrine of cause found its way into the Indonesian B.W.. Through the Dutch B.W. Cause or Causa (in the Indonesia language) has been defined to mean the "object and contents of the agreement"[55] Where an agreement has no "causa" or contains a false or prohibited causa, the agreement is void at law.[56] Causa is then the objects of the agreement, the very reason for the agreement's existence.

The Malaysian approach is unique as well as reflective of the confusion reigning in the minds of the drafters of the Contracts Act. Section 24 of the Contracts Act provides several categories of unlawful <u>considerations</u> and <u>objects</u> of an agreement; thus giving the impression that consideration and objects are one and the same thing. While the definition of consideration in section 2(d) summarises the common law notion of that doctrine, the unhappy combination of unlawful consideration and unlawful objects within one section tends to obscure their distinction. Moreover, the common law doctrine does not contain any rule requiring consideration to be lawful. Consideration is required only to give formative validity to an agreement and has nothing to do with its performance. English law of contract deals with unlawful objects under the specific heading of void and illegal agreements. That deals with the question of performative validity. As an illustration we take the simple case below.

A promises to pay RM 200 to B if B Promises to hurt C".

There are actually two parts to this agreement.

(a) The formative stage

(b) The performative stage

At the formative stage, B's promise to hurt C is sufficient to constitute consideration for A's Promise so as to give rise to an agreement between them but what really makes the agreement in its totality a nullity is its illegal objects to be achieved through performance or that promise by B. It is not the consideration that is unlawful, it is the performance of that promise that nullifies the agreement. Similarly a promise, when made can be lawfully performed but subsequenly through some intervening event its performance becomes prohibited, then the contract is nullified not because of the consideration but because of the illegality of performance. The confusion in

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[55]Subekti, *Pokok Pokok Hukum Perdata, ibid.*, p. 137. See also Wirjono, *ibid.*, p. 35. This definition is consistent with the generally accepted meaning og causa in civil law jurisdictions. See Konral Zweigert and Hein Kotz, *Introduction to Comparative : Law*, Vol. II, 2nd ed., 1987, p. 79.

[56]Article 1335 B.W. - 'batal demi hukum'

the opening words of this section has also attracted the criticism of Polloc and Mulla.[57]

Essentially the need for consideration in England and Malaysia is to avoid giving to bare promises and moral obligation. In **Eastwood v. Kenyon**,[58] **Lord Denman C.J.**, reminded of the dangers of allowing moral obligation to be the basis of a valid binding agreement. He said, *"suits would therebu be multiplied, to the prejudice of real creditors"*[59]. Despite that warning, in Indonesia where the B.W.. had been operating for the last 35 years, no recorded evidence is available to lend justification to Lord Denmand's worries. In Indonesia, a promise is binding principally because a party of full age and not to subject to any disability must be taken to be competent to understand the nature and consequence of his promise. He has chosen, by that promise, to enact a private law between himself and the promise and that private law will be enforced by the state.

Another facet of confusion in Malaysian contract law pertains to the relationship between the rule that consideration must move from the promisee and the doctrine of privity of contract. Under the common law, it is said that the two are not separate rules but two ways of looking at one rule.[60] The need for consideration to move from the promisee is inherent in the idea of bargain, the very essence that distinguishes a valid agreement from a mere agreement. True to this idea of bargain, this rule remains fundamental in commmon law rule regarding consideration.[61] It has been argued, that both rules are linked to the idea of bargain. If aperson furnishes no consideration he is not a party to the bargain and consequently not a party to te contract. Therefore the doctrine of privity alone will disquality him from suing on the promise. In Malaysia consideration need not come from the promisee; this is clear from the words in section 2(d) which, inter alia, say ***"....at the desire of the promisor, the promisee or any other person***

[57]Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 9th. ed. at p. 195. See section 26 Contract Act containing four exceptions to the general requirement of consideration.

[58]113 E.R. 482

[59]*Ibid.*, 450-451.

[60]Cheshire, Fifoot and Furmston's p. 75. See also Furmston, 23 M.L.R. at 382-384.

[61]Though this view is currently under strong attact by writers: see Smith and Thomas, *Casebook on Contract*, 5th. ed., p. 219, Furmston, 23 M.L.R. 373, pp. 382-382.

......"[62] By removing this fundamental rule of common law from its application in Malaysia, the Contracts Act has created a perplexed situation. The doctrine of privity applies in Malaysia, obviously because a party who is not a party to a contract, albeit a bargain, cannot sue on that contract.[63] While allowing the notion of bargain to prevail in the doctrine of privity, the Malaysian law at the same time rejects that notion by excluding the common law rule that a promisee must give consideration.

In Indonesia, there is no real or apparent dichotomy berween these two rules. This is because no consideration is needed to bind a person to his promise. The doctrine of privity does not apply in its strict narrow sense. Article 1315 KUHPer and Article 1317 allow a party, not privy to the agreement. This is consistent with the idea of a promise being undertaking to be legally bound. Privity as is applied in Indonesia is restricted to the idea that if an agreement between A and B does not contain any stipulation of benefits or rights to be conferred on C, a third party, then C cannot claim such rights.[64]

Performance and Good Faith

Generally the rules regarding performance and breach (wanprestasi in Indonesia) are substantially similar in many respects. The one striking difference is the requirement under Indonesian law that performance must be based on "good faith" and in this respect Article 1338 (3) allows the court to reformulate the bargain between the parties if strict performance of the bargain will bring injustice to one party or produce unreasonable result.[65] Obviously a thoroughly inadequate consideration in the absence of factors vitiating free consent may attract judicial intervention in Indonesia but not in Malaysia where such requirement is not explicitly required by the Contracts Act.

Nevertheless, despite the lack of formal requirement of good faith in the

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[62]Guthrie Waugh Bhd.v. Malaippan Muthucumaru, [1972] 1 M.L.J. 35.

[63]See Kepong Prospecting Ltd. v. Schmidt, [1968] 1 M.L.J.

[64]See Subekti, *Hukum Perjanjian*, pp. 129-131.

[65]*Ibid*. See also the case of Ny. Lee Lian Joun v. Arthur Tutuarina, No. 268k/Sip./1971.

performance of contractual obbligations, the Malaysian courts in recent years have shown significant creative courage to impose such a requirement. The two leading cases in this new development are: **Pasuma Pharmacal Corp. v. McAlister & Co.**[66] and **Perbadanan Kemajuan Ekonomi Johor v. Lim Shues Pin & Anor.**[67]

In the former case, a dealership agreemen between the appellant and the respondent resulted in some difficulty due in part ot the allegation by the respondent that essence of chicken produced and supplied by the appellants were defective. Subsequently, both parties agreed to an amortisation agreement by which the appellants undertook to replace defective stocks with new improved products. The respondents agreed to remove the defective producs from the market. This they did not do. Nevertheless, when the appellants repudiated the amortisation agreement on the ground that the deliberate failure of the respondents to with draw the defective products when new improved products were sent and delivered to them as substitutes, amounted to a fraud, the respondents argued that such a fraud could not be used as a reason for repudiation. On this particular point the highest court in Malaysia, the Federal Court then,[68] held that the contract between the parties envisaged a relationship founded on good faith and fair dealings, and such being absent, the contract was rightly repudiated. In the latter cas, the appellant had granted to the respondent a forest area to be logged. the initial area allocated was 2,000 acres. It was subsequently discovered a substantial part of the allocated area had already been logged and hence the workable area was accordingly reduced to 776 acres. With the reduction of the workable area the respondent had expected a reduction, pro rata, of the premium payable. When such a request was made to the appellants, it was turned down. The High Court ruled that equity and good conscience required the reduction of premium pro rata and ordered accordingly.

These two cases represent significant developtment in the Malaysian law of contract simply because, despite statutory silence on the question of good faith, the courts have shown increasing readiness to go beyond the limits of statutory provisions in the interest of a wider need for half of the eighteenth

[66][1965] 1 M.L.J. 221.

[67][1968] 1 M.L.J. 184.

[68]Now the Supreme Court. Note Also Ho Shee Jan v. Stepens Property Sdn. Bhd., [1986] 2 M.L.J. 43.

century, the common law experienced such development but the progress towards a general principle of good faith in common was thwarted by the advent of economic liberalism which, at about the same time began to influence the evolution of the common law of contract.[69]Though relics of this stillborn principle survived to this day, their scope and application had been so much restricted that what was envisaged as a 'principle applicable to all transactions' is now reduce to an exception.[70]

Conclusion

Comparisons of some basic precepts of Malaysian and Indonesian contract law have so far revealed some striking similarities and a few fundamental differences. These differences stem from different colonial experience and the different philosophical bases of contract law both countries. Despite these differences, the fundamental conception of promise as a binding obligation prevails in both systems. The Indonesian perspective of promise being influenced as it is by Poetheir's natural law view makes consideration unnecessary, if not, redundant element of a binding promise. The common law rule regarding consideration declares it as an indispensable element in a promise to be bopund while Malaysian provisions regarding consideration reveal some confusion compounded by the absence of certainty as to its true philosophical basis.

The overall view presented by this basic comparison reveals many areas of possible co-operation in the sphere of commercial law research to enable the two countries to formulate a common legal framework to facilitate commercial transaction between the people of these two countries.

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[69]Atiyah, P.S., *Rise and Fall of Freedom of Contract,* Oxford, Clarendo Press, 1979, p. 168.

[70]per Lord Mansfield in Carher v. Boehm, (1766) 3 Burr. 1905, at 1909-10, 97 E.R. 1162 at 1164.