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Contractual Issues of Transformation Technology in SME Industry in Malaysia

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Abstract: SMEs play a major role in the economies of Malaysia and many emerging countries by generating employment and contributing to their gross domestic product. To continue to develop, SMEs have to invest in technology creation processes though internal innovations and technology transfers. The sale and purchase of exclusive rights to patented technology or of consent to use a given technology is affected through a legal relationship between the owner or supplier of the rights and the person or entity acquiring those rights. This study, examines the issue of how the technology is transferred, the main types of legal contracts involved and their implications for SMEs.

Key words: Transformation of technology, legal issues, contract, SME industry, Malaysia

INTRODUCTION

The roles and growth of Small and Medium-sized Enterprises (SMEs) have received significant consideration from scholars and policymakers around the globe in the last 2 decades due mainly to their increasingly important contributions as engines of economic growth by virtue of their numbersand participation in key areas of the economy. SMEs represent over 90% of enterprises in most countries and are the driving force behind many innovations and contribute significantly to the growth of national economies through employment generation, investments and exports. Despite their importance and the potential for enhancing SME competitiveness, the IP system is often underutilized (WIPO, 2004). SMEs play a significant role in Malaysia's economy through their numbers, employment creation and economic output. The 2005 census on establishment and enterprises noted 581,996 SMEs, representing 99.2% of total business establishments in Malaysia (Lin, 2008). The level of innovation created by small firms is generally considered to extend industry restrictions and unfold first-hand business endeavours (Partanen *et al*., 2008).

The fact that SMEs experience resource constraints although playing a key role in the development of technology and science-driven industries is somewhat of a paradox and resource scarcity is an issue that needs to be addressed. Evidence from SME and entrepreneurship lessons recommends critical factor for innovation and growth for small enterprises is the capability to network for mobilization or resources. Investing in technology creation is often costly and risky due to the many uncertainties involved and companies can benefit from developing technological dependence networks with other companies that allows them to strengthen their indigenous capability and to innovate based on their specific needs. This creates a need to rely on both in-house innovations and acquired technology from firms having the resources for making technological enhancements to the corporation's merchandises, processes and services. Such purchases are effected, through agreements enabling the transfer of technology between the 2 entities.

Efficient technology transfer offers commercialization for new product, services and improves the existing product or process. Whether it is simple and straight forward the process depends on the type of technology and the capacity of the recipient and it is often replicable, cooperative and fairly complicated. It may possibly involve the acquisition of first-hand knowledge and skills, as well as new ways of doing things. At times, the technology being acquired or transferred may need to be adapted to enhance application and optimize performance of new situations. Technology transfer can be across national boundaries and industries, as well as be moved from the lab to an existing or new business. It involves related supports that can be provided by governments and banks at local, national, regional or institutional levels, as well as managing the various issues involved in the negotiations (WIPO, overview of contractual agreements for the transfer of technology).

DEFINITION OF SME IN MALAYSIA

SMEs in Malaysia come under the ambit of the small and medium enterprises corporation Malaysia Act 1995. They were previously governed by the Small and Medium

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Industries Development Corporation (SMIDEC) an agency that had oversight in the formulation of overall policies and strategies for SMEs and the coordination of related programmes across ministries and agencies.

Prior to formulation of the act, there was no standard definition of SMEs and agencies and financial institutions referred to them based on their requirements and operational needs (although, there was much overlap in criteria used (Bank Negara Malaysia, 2005). They attempt to overcome such ambiguity in order to have more effective formulation for SME policies, implements development program and provide technical and financial assistance, the National SME Development Council of Malaysia (NSDC) proposed a jointexplanationfor SMEs in 2005 (Wong, 2009). The NSDC which provide policy for SMEs across all sectors in Malaysia is the highest policy making organization that facilitates the development of SMEs (Rachagan and Atkunasingam, 2009). The council used 2 main criteria in SME definition, i.e., annual sales turnover and number of employees, although some banks include size of shareholder funding as a criterion. These criteria were to be adopted by all governments and financial agencies and affecton the SMEs categories of agriculture, manufacturing and services (Bank Negara Malaysia, 2005). These businesses are considered micro, small or medium depending on employee strength and annual sales turnover. Generally, SMEs are those companies employing <50 employees or with an annual income of RM 25 million. The services sector forms the bulk of SMEs in Malaysia followed by the manufacturing and agricultural sectors (Bank Negara Malaysia, 2006). Although, SMEs represent 99.2% of all business establishments in Malaysia, their contribution in terms of value added and output is only 47.3 and 43.5%, respectively compared to an average of over 50% in other Asian countries (Ndubisi, 2008).

SMEs are covered by different criteria and regulations in different countries and their impact and importance varies greatly across them. The European Commission defines SMEs as enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million. The definition is contained in a commission recommendation of 2003 which is applicable to all SME policies in the community. Based on this definition, there are about 23 million SMEs constituting 99% of all enterprises in the EU. Accordingly, most of the contracts in Europe involve SMEs either through Business-to-Consumer (B2C) or Business-to-Business (B2B) relationships. This is the reason why the European commission regards SMEs as the engineof the European economy. SMEs in the EU include businesses ranging from micro, small and medium-sized. They include from self-employed persons, family businesses, companies financedby venture capital in various expertise ranging from social economy enterprises to high-tech companies (Hesselink, 2007).

Compared to large companies and their relatively easy access to factors of production, SMEs face many challenges and limitations and have to contend with constrained financial resources. This contributes towards their difficulty in keeping abreast of technological trends and the skill sets and knowledge pools in SMEs are restricted due to their relative inability to attract and retain the best personnel (Wong, 2009). SMEs have unique position because of their size, structure, challenges, management and strategies. The strategic management of such companies make them distinctive require various theories to explain their behavior, strategy and performance and what may be applicable to large companies in terms of outsourcing decisions and practices may not be valid to SMEs. Thus, a different set of criteria and theories are needed to explain such decisions and practices in SMEs (Wong, 2009). The importance of the SME sector prompted the Malaysian government to create avenues for ICT growth and knowledge-based development for such companies under the Ninth Malaysia Plan (2006-2010) aimed at encouraging the further growth and establishment of SMEs (Rachagan and Atkunasingam, 2009).

AGREEMENTS

Written and signed contracts are important in any trading or commercial transaction and should cover all aspects of the arrangement so as to preclude any areas that may be subject to dispute by the relevant parties and require resolution in the courts.

Until just a few decades ago, SMEs despite their importance limited their operations and business within national borders. However, even before the advent of globalization, this has changed and such companies now trade with the rest of the world sourcing their supplies and supplying goods and services internationally. A difficulty that many such firms face is that they do not have easy access to legal advice for contracts in their commercial transactions and even less so in the current economic climate when the pressure to keep costs low is tremendous. They often encounter difficulties in drafting their contracts particularly those involving international transactions. One of the main issues facing SMEs in Malaysia is the continuous advancement of

technology and the need to have water-tight agreements covering arrangements for transferringthe technology.

Technology transfer agreements: In general, technology transfer involves the transfer of knowledge through the purchase of technology for gainful applications (Sushil, 2009). Through this process a technology, expertise, knowhow or facilities establishedby an individual, enterprise or organization. The processes involving such transfers are different and governed by the type of technology involved and the capacity of the recipient. The document underlying the transfer will determine the degree of the rights to the technology or knowledge involved in the process and the extent to which those rights can be exploited in the general market.

Examples of technology transfer agreement include those covering patent licensing, know-how licensing, software copyright licensing or a combination of the three including any such agreement containing provisions relating to the sale and purchase of products or to the licensing of other intellectual property rights or their assignment, provided that they do not constitute the primary object of the agreement and are directly related to the production of the copyright products; assignments of patents, know-how, software copyright or a combination where part of the risks associated with the exploitation of the technology remains with the assignor are also deemed to be technology transfer agreements.

Creating or incorporating new technology is essential for companies seeking to maintain or improve their competitiveness in the market place. Where competition is solely depends on price, such as the extraction or commercialization of raw materials, new technologies are vital for them to improve their efficiency through advanced productive processes or via the acquisition of new machinery and equipment. The commercialization of products is enhanced by new technology and management structure.

To achieve this SMEs have to opt for developing in-house technology or obtaining it from others. It might be too expensive and risky to invest on technology creation which might face in many uncertainties in the process of innovation though, the benefits are enhanced by non-dependence on others and enables the company to strengthen its technological skill, explore opportunities for developing by-products and innovating to meet its own certain requirements. Lots of firms including SMEs (particularly high-tech SMEs) rely on both methods so as to reap benefits from specialization and economies of scale in creating technical developmentsto the company's products, processes and services.

The sale and purchase of the exclusive rights to a patented technology or permission to use a given technology takes place through legal relationships between the owner or supplier of the rights, called the transferor and the person or legal entity which acquires those rights or permission (transferee). The type of technology transfer agreement to be consummated between the 2 parties will be determined by many factors including the relationship between them, the complexity and level of development of the technology, the actual needs of the recipient, technological capacity of the transferee and ability to use and/or adapt the technology being purchased.

The technology transfer agreement will allow an individual to access and obtain rights over the knowledge, works or inventions of others and range from transferring a portion of the rights (use, exploitation) to a complete transfer which gives the purchaser sole ownership rights (Costas *et al*., 2012). In a grant of exploitation rights, the transfer of the research results will require an agreement in which the procedure of awareness established by law should be adhered to.

Preparation and negotiation; a procedure for the award: The first matter to be decided is the procedure to be applied whether on the basis of competitive bidding or private scheme of negotiation. Any procedure will require some analysis of the technology involved and the transferor will need assurance that the information to be disclosed during the negotiation process will only be used for the assessment of the operation. Accordingly, both parties may enter into a non disclosure agreement which may be unilateral (one of the parties will have to adhere to the document proposed by the other) or bilateral (binding on both parties).

The parties may sign a letter of intent (Prior Negotiation Letter of Intent) which will outline the negotiation process, detail any agreements already reached and the rules governing the negotiations. The contents of such a letter may include but be not limited to the following:

- Initial covenants to start the negotiation
- Negotiation schedule (including any extensions) and the governing terms
- Allocation of the expenses arising out of the negotiation process
- Guarantees or protection from non-compliance

Finally, the terms involved for the transfer of the rights to the research results will be decided and

included in the final contract including the provisions protecting their individual interests.

Clauses in a technology transfer agreement: The clauses used in a transfer of technology agreement are very broad and the actual items used depend on the circumstances involved. Generally, they should include the following: Terms and conditions of the transfer of technology; first, the kind of transfer to be effected must be defined (usually a licence although, it may also be achieved by assigning full rights over the technology) and whether it should be exclusive. Also, to be determined are the time frame (lapse of time to use the rights) and the material range (activities for which the company may use the technology) and whether the technology can be assigned or subleased.

Compensation; this can be effected through various mechanisms depending on the following:

- Time of accrual; whether payment should be upfront or deferred
- Basis for calculation; current value, milestone performance, future sales, etc.
- Method of payment; in cash or in kind (e.g., participation in the company). Thus, there can be different, compatible ways of compensation (such as payment upfront or royalties) which may correspond to different factors.

Likewise, the parties may agree to an initial grace period so that compensation can be adapted to the time line when profits are expected to be generated. As long as, the compensation is of a variable character and is subject to certain milestones or indexes, research centres may retain monitoring and control measures of the exploitation (e.g., audit rights).

Rights to developments and technology improvements; the grant of the licence will not necessarily preclude continuation of research on the technology and which may secure new developments and improvements. Such improvements may also be generated by the company using the technology based on its needs. It is important to regulate these developments and whether they apply to the parties. These rights depend on the party that be subject to purchase (for the company) or provision of a licence for research purposes (for the research centre).

Assumptions of liability and indemnity in general, depending on the preferences of the researchers, research centres seldom guarantee the full applicability of the technologies developed to the needs of the company or provide assurance of the existence of similar technologies on the market. As such, the centres limit the liability scenarios against claims on the ownership of the technology, issues arising out of its exploitation or the inability to exploit the technology.

Protection of the public interest government research institutions are invested with some powers to ensure their work safeguards public interest and that dissemination of the technology benefits the public. As such, technology transfer contracts by such entities place priority on those objectives. Such contracts include:

- Licence for research; this will enable the public research centres to continue with research in technology which may not be commercially based but aimed more at improving public services and facilities
- Right of reversion; this enables public authorities to ensure adequate dissemination of technology for public purposes. Accordingly, the parties may agree that the contract can be terminated and rights returned where the technology is discarded, the company terminates operations and in cases where the research deviates from the objectives or mission of the research centre

SME contracts: Like any business entity, SMEs can have contracts with and as consumers and with other businesses, depending on the nature of their operations. SMEs generally have 3 forms of contractual relationships which is included with consumers (SME2C), with other SMEs (SME2SME) and with large enterprises (SME2LE). The first one is consumer contract (B2C) and the 2 others are commercial contracts (B2C). In addition, SMEs are sometimes consumers themselves (SMEasC). In suchcases a contract between an SME and another SME or large companyis also defined as, a consumer contract (B2C) (Hesselink, 2007). The national SMEs development council of Malaysia distinguishes 3 types of SMEs:

- Micro Enterprises (MiE)
- Small Enterprises (SE)
- Medium Enterprises (MeE)

Main technology transfer agreement: Under this category, the legal relationship between transferor and transferee is mainly contractual where the previous agrees to transfer and the latter consents to obtainthe rights, the permission or the know-how. Technology can be transferred or acquired through various means and legal arrangements and the parties will need to evaluate the one most suitable for their purposes for negotiation and inclusion in the final contract document. Suitability is

dependent on market factors and may be internal to the recipient or specific to the technology in question. The following outlines the main types of such agreements.

The sale or assignment of IP rights: In this method, the exclusive rights to a patented invention, for example are purchased by another person or legal entity. When this occurs and no restraintin time or other vital condition is included, an assignment of such rights is deemed to have occurred. Parallel principles apply to other forms of assignments such as for industrial property, trademarks, industrial designs and copyrights.

License or license contract: This category provides for the consent by the owner of a patented invention in order to permit another person or legal entity to perform for the certain duration of the patent rights, acts covered by the exclusive rights to the patented invention in a country. Generally, licenses cover anything owned or which one has rights to. Acts include the making or using of a product that includes the invention, the making of products by a process that includes the invention or the use of the process that includes the invention. The license is depending on specific conditions governed by the terms of the contract in return for consideration. It could stipulate that the invention transferred will be used by the licensee only for the manufacture of specific products or use and limit its geographic extent or to specific factories (WIPO, 2004).

Transfer agreements on the licensing of technology are usually aimed at improving economic efficiency and be pro-competitive as they reduce duplication of research and development, strengthen the incentive for the initial research and development, stimulate incremental innovation, facilitate diffusion and generate product market competition. Such, licensing agreements can also be used to avoid competition where business rivals agree to share out markets or where a licence holder excludes competing technologies from the market (Europa Summaries of EU Legislations, 2011). A technology licensing agreement allows the licensee to use the technology under agreed terms and conditions (Technology licensing, WIPO) licensing transactions can broadly be divided into the following:

- Outbound licensing (licensing out or out-licensing)
- Inbound licensing (licensing in or in-licensing)

Outbound licensing or out-licensing, refers to granting a licence to another party to use an IP whereas inbound licensing or in-licensing is obtaining a license from another party to use its IP. Under an outbound transaction, the licensing of an IP to an external party enables it to assume the role of licensor. Conversely in an inbound deal when a party licenses in an IP owned by another party, the role becomes reversed and said party now takes on the role of licensee.

Although, it appears that the license and assignment of IP rights are similar, they have major differences. In IP terms, an assignment is actually a sale involving an outright transfer of ownership of the rights of the owner of an IP (the assignor) to another person or entity (the assignee) for a consideration. The former effectively relinquishes the title to the IP and the assignee acquires the title and is the new owner of the IP. A licence, on the other hand, does not involve any transfer of ownership and the owner retains ownership over the IP. The licensee only authorizes the use of an IP, usually within certain stipulated conditions. The licensee has to ensure that the company licensing out its IP has valid rights to the same that the IP is still enforceable and has not lapsed or abandoned and free from legal encumbrances or disputes (Technology licensing, WIPO).

Valuation of the licensee and licensor: Before linking any contractual agreement due diligence should be conducted on the licensee that would include a background check to ascertain financial standing or commercial viability, technical competency, manufacturing capability and facilities relating to the transaction. An independent investigation should be carry out by the licensee. Valid rights to ownership by the licensor have to be confirmed before any agreements are signed. A licensor should also ensure that a potential licensee has the experience and ability to successfully carry out the intended commercial venture and provide sound financial returns. Also, the IP in question should still be enforceable has not lapsed or abandoned and is not subject to any legal disputes or claims.

The reputation of a potential licensee is also of concern to the licensor because a faulty licensee could impact the former’s reputation and standing in the market place.

The licensor also needs to ascertain whether the licensee deals with other technologies or products which may be in direct competition with that of the licensor. Another, key area of concern is the valuation of the subject IP which should be undertaken at the initial stages to provide the licensor with a realistic value of its worth and also the returns it may expect to gain from the licensing deal. It is also important that the licensor undertake a review of its IP portfolio to establish the validity and enforceability of its IP rights to the licence.

An assessment of the range and strength of its IP rights will ensure that the licensor does not grant more than what it has ownership of. Importance should also be given to the valuation of the subject IP as this will give the licensee an indication of its technical and monetary value. There are no standard licence or licensing agreements or templates that can be followed in all cases due to the uniqueness of such transactions. As such, the terms and conditions of individual transactions have to be tailor-made to fit the particular circumstance.

Know-how contract: Another of the principal legal methods for the transfer and acquisition of technology involves the question of know-how. It is possible to include provisions concerning know-how in a document that is separate from a license contract. It is also possible to include such provisions in a license contract. The know-how may be communicated in a tangible form through documents, photographs, blueprints, computer cards and microfilm and cover plans of factory buildings, diagrams of the layout of the equipment in the factory and drawings or blueprints of machines. The know-how could also be communicated in an intangible form, such as when an engineer or the supplier explains a manufacturing process to an intended recipient or the witnessing of the operations of a production line in the supplier's enterprise. As know-how is sensitive information it should be shielded from third parties to prevent unwarranted disclosure and various safeguards should be instituted to forestall dissemination to unauthorized parties.

Franchise: The commercial transfer of technology can also involve the franchising of goods and services. A franchise or distributorship is a business arrangement whereby the reputation, technical information and expertise of one party are combined with the investment of another party for the purpose of selling goods or rendering services directly to the consumer. The outlet for the marketing of such goods and services is usually based on a trademark or service mark or a trade name and a special decor (the look) or design of the premises. The license of such a mark or name by its owner is normally combined with the supply of know-how through technical information, services, assistance or management services that cover the production, marketing, maintenance and administration of the business.

Acquisition of equipment and their capital goods: A technology transfer process can also involve the sale and purchase of equipment and other capital goods such as equipment, machinery and tools needed for the manufacture of products or the application of a process. Contracts covering the sale and purchase and the import of capital goods are sometimes associated with a license contract and/or a know-how contract and in certain provisions on the transaction involving the import of capital goods can be part of the license or the know-how contract itself.

LEGAL ISSUES IN SME CONTRACT MANAGEMENT

Contracts are an unavoidable and integral part of SME business processes as they can have a major impact on its operations. However, disputes may arise in the contracts and their interpretation. Major reasons for such disputes are:

- Losses from failure to investigate a counter party's qualification and credit status prior to executing a contract
- Ambiguity in or flawed contract terms
- Defects in complying with contract stipulations during performance

Dispute resolution in contractual obligations: A judicial system that provides effective commercial dispute resolution facilitates the operations and development of an economy. It enables disputes to be resolved according to the norms of justice through appropriate rewards and penalties and ensures contractual obligations are fulfilled. While using alternative dispute resolution systems may have their benefits, the existence of standard practices agreed to by all parties ensures that the field is level and there will be no reluctance to revert to the courts for dispute resolution. The dispute involved a breach of sales contract worth twice the income per capita of the economy. The case study, assumes that the court hears arguments on the merits and that an expert provides an opinion on the quality of the goods in dispute. This distinguishes the case from simple debt enforcement. The time, cost and procedures are measured from the perspective of an entrepreneur (the plaintiff) pursuing the standardized case through local courts. Efficiency in this process matters.

A study in Eastern Europe noted that in countries with slow court systems firms on average tend to have less bank financing for new investments. The study shows that reforms in other areas, such as creditor's rights, contribute to greater bank lending only if contracts can be enforced before the courts. Another, recent study covering 98 developing economies suggests that foreign direct investment are inversely related to the cost of contract enforcement in debt collection and that property eviction cases is lower. Also, where better systems are in

place, such as having electronic systems in courts the overall business environment improves. Commercial litigants are allowed to file complaints electronically thereby helping to speed up the process. This also facilitates the managing and monitoring of cases, ensuring compliance with judgments and the reduction of backlogs. Electronic systems are an effective tool for reducing procedural delays in courts and monitoring the performance of judges and court officers. Enhancing the specialization of judges, divisions or courts in commercial cases has been a common feature of reforms to increase court in recent years. This enhances, transparency and limit opportunities for corruption in the judiciary. Specialized commercial courts allow for speedier and lower cost enforcement especially where commercial caseloads are heavy. Of countries in Europe, Poland improved the most in the ease of enforcing contracts and is also among the 10 economies that have progressed most in modernizing regulatory practices since 2005. Some countries such as Serbia have made it easier to enforce contracts by introducing a private bailiff system which is a viable alternative for enforcing court decisions.

Freedom of contract: Contract law in Malaysia is governed by the Contract Act 1950 which recognizes the fundamental principle that contracting parties are free to express their intentions in their contracts. This was recognized by the privy council in the case of Ooi Boon Leong and Ors v Ciitibank NA which revolved around the issue of whether the contracting parties can contract out of the provisions of the 1950 Act. Section 1 (2) of the Contract Act allows the parties to do so and this was strongly relied upon by the appellants in the above case. Section 1 (2) has no effect on the freedom of contracting parties to decide upon what terms they desire to contract. It would be indeed surprising if so devastating an inroad into the common law right of freedom of contract were introduced by the legislature in a section which is primarily devoted to expressing the short title to the act and which moreover appears in a part of the act which is merely headed preliminary.

The central theme of the freedom of contract doctrine is based on the individual and the choice that has been freely made. This theme appears to be so embedded in the provisions of the Contracts Act 1950 that section 10 defines contracts as, all agreements made with the free consent if parties competent to contract. As such, the foundation of legal liability is the consent of both parties, freely given to be bound by their agreement. Factors which invalidate such consent, such as undue influence, fraud, misrepresentation and certain categories of mistake are simply illustrations of defective consent or unfree will which render the resulting agreement voidable.

The Contract Act 1950 stressed on the rule of offer and acceptance. Neither party owes any duty to volunteer information to the other and the explanation to Section 17 of the act provides that Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud. This is merely a restatement of common law. It is only when the circumstances of the case are such that it is the duty of the person keeping silent to speak or unless his silence is in itself equivalent to speech that the other party is entitled to rely upon them.

The law of the market is based on contract law and this is reflected in the narrow application of the doctrine of mistake under the Contracts Act 1950. Under Section 23, for instance, parties will not be easily discharged from their contractual undertakings simply because they entered into the contract under some oversight or error. These rules can be rationalized in terms of the underlying doctrine of freedom of contract in the Contracts Act. Where both parties are of full age, fully competent to negotiate deals and to take the necessary and ordinary precautions, the law will not intervene to correct any imbalance in the transaction or bargain which the parties have agreed to. In the interests of certainty and commercial convenience, parties are bound by their apparent agreement. Nevertheless, although the act fostered the ideology of freedom of contract in most of its provisions there are however, some provisions that mitigate the freedom of the parties to contract, for example those dealing with contracts which are illegal, immoral or against public policy or agreements and which contravene statutory law.

Breach of contract: Breach of contract is addressed in contract law especially in areas where parties seek to exclude or limit their liability through exemption or exclusion clauses in consumer contracts. The development in the area of contract law revolves around 2 opposing concepts: The traditional concern for freedom of contract and the cardinal rule of contract law. These concepts attempt to balance the issue of freedom to enter into contract with curbing unfairness arising from inequality of bargaining power, such as in consumer protection. In this context, the importance of consumer protection requires the government to intervene in a paternalistic role. Exclusion clauses have often worked against consumer interests and several cases have demonstrated the concerns of courts over the employment of standard exclusion clauses in consumer contracts. In dealing with the exclusion of liability clauses, the courts have developed and adapted formal rules, mainly in incorporation and construction. However, the lack of legislative control over exclusion clauses in Malaysia has forced the courts to revert to common law principles in handling them.

It is difficult to ascertain the attitude of the Malaysian courts towards exclusion clauses due to the scarcity of such cases involving consumers. Nevertheless, decisions made have not been favourable to the promotion of consumer rights. In Malaysian Airlines System Bhd v Malini Nathan and Anor 1 MLJ 330, the airline was sued for breach of contract for failing to fly the first respondent, a 14 years old pupil back to Kuala Lumpur. In denying liability, MAS relied on condition 9 under the conditions of contract printed on the airline ticket. The supreme court held that MAS was entitled to rely on the clause and thus was not in breach of the contract. However, cases involving damage due to negligence reveal a more strict interpretation to exclusion clauses by Malaysian courts. This was demonstrated in the case of Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn. Bhd. And Anor [1995] 2 MLJ 100 where in allowing the plaintiff's claim, Siti Norma Yaakob states that it is settled law that an exemption clause, however wide and general does not exonerate the respondents from the burden of proving that the damages caused to the car were not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car. However, the decision of Elizabeth Chapmen JC in Premier Hotel Sdn. Bhd. v Tang Ling Seng [1995] 4 MLJ 229 in the Kuching high court indicates the court's readiness to give effect to a clearly worded exclusion clause in which general words in exclusion clauses would not ordinarily protect a contracting party from liability for negligence. To effect such protection, the words used must be sufficiently clear, usually by referring expressly to negligence or by using expression as howsoever caused.

There have been cases where carefully drafted exclusion clauses would allow traders to be relieved of their liability even though the breach attacks the very basis of the contract and as such deprive consumers of their rights. It is felt that the courts should take a stricter view of the exclusion clause and protect the weaker party, the consumer, against terms imposed by the stronger party. The courts should be more forthcoming in protecting the weaker party and not merely take a strict constructionist approach nor should they abdicate their responsibility by leaving it to the legislature to intervene. Judges should be seen as not just mere interpreters but also as developers of the law.

The absence of suitable legislation checking the use of exclusion clauses in consumer contracts has led to weaker consumer rights and the perpetuation of unethical conduct among traders in Malaysia. It is often left to the discretion and creativity of the judiciary to handle this issue but as demonstrated above case law development in this area has left consumers open to exploitation. The Contracts Act 1950 contains no provision on the contents of an agreement and as such, does not govern the addition of exclusion clauses. One piece of legislation affecting exclusion clauses in Malaysia is the Sale of Goods Act 1957 specifically as defined in its section. The act incorporates into statutory form important principles established in case law and governs dealings between businesses and business with consumers but affords no protection to consumers as far as exclusion clauses are concerned. Instead of regulating, the use of exclusion clauses in sales, Section 62 of the 1957 Act allows exclusion of the implied terms and conditions by express agreement.

The Consumer Protection Act 1999 in Malaysia has somewhat addressed this shortcoming though it fails in preventing the use of exclusion clauses by traders. Although, section 6 of the 1999 Act prohibits contracting out of the provisions of the act, it does not cover the wide spectrum of exclusion clauses existing in consumer contracts and as such, has limited application. For instance section 2 (4) states that application of this act is supplemental in nature and does not prejudice any other law on contractual relations.

The introduction of Part IIIA of the Consumer Protection (amendment) Act 2010 has to some extent resolved the problems associated with the use of exclusion clauses in consumer contracts in Malaysia. When a court or the Tribunal believes that a contract or term is procedurally or substantively unfair or both it may declare the contract or the term as unenforceable or void. Under section 24D a contract or the term of a contract is substantively unfair if it; is in itself harsh; is oppressive; is unconscionable; excludes or restricts liability for negligence or excludes or restricts liability for breach of express or implied terms of the contract without adequate justification. Part IIIA, also provides for a criminal penalty for contravention of its provisions.

Standard form of contract: The use of standard forms of contracts is widespread, especially in this era of globalization and they have become a predominant feature of many business contracts. Such, contract have removed them from being purely private acts subject to being controlled or even dictated by legislative or economic pressure. They may involve the courts in feats of construction similar to or borrowed from the technique of statutory interpretation. As standard contract forms provide several advantages such as cost and time savings over individual drafting, they have been used to attain economic advantage. However, they are subject to some drawbacks.

An obvious disadvantage is on the drafting phase where the terms of the contract have been prepared without reference or negotiation with consumers. Standard form contracts are not a result of a negotiation process, they are offered on a take it or leave it basis with little consideration of the need to take into account the views of all parties. Its contents often consist of terms and exclusion clauses which usually are weighted in favour of the contract drafter (Adlerd and Silverstein, 2000).

Standard form contracts have permeated almost every aspect of corporate business activities. Although, the Contracts Act 1950 overrides other legislation in business dealings or contracts, it attempts to codify only the basic principles of contract law and has no specific provisions dealing with the contents or the terms of a contract. Hence, no reference is made to clauses which limit or exclude one party's liability or those that incorporate terms in other documents into the contract. This could account for why the Malaysian judiciary has had no issue with the validity of clauses that seem disadvantageous to consumers. There is greater likelihood for contracts made from an unfair bargaining position to be used to economically pressure weaker parties by including terms weighted in favour of the stronger preparing parties. While the doctrine of freedom of contract is based on the premise that both parties to a contract are bargaining from positions of equal strength in Malaysia most traders use standard form contracts in their transactions to maintain dominance over the marketplace.

CONTRACTUAL RELATIONSHIP BETWEEN PARTIES IN COMMERCIAL AND CONSUMER TRANSACTIONS

Contract duration: Most SME contracts cover a period ranging from a few months to a year in line with their short-term outlooks and planning horizons and to allow them flexibility in their operations. Lambda noted, researchers usually do not plan that far ahead. So, a short-term contract fits us well. Researchers do not want a long-term contract that ties us down. What if researchers have to change the planning unexpectedly? Although, contract duration may be short, renewal of contracts with existing vendors who meet their requirements are common. Compared to large companies, SMEs are not much concerned with the flexibility of a contract and as such customization of contracts is also rare as they usually adopt standard contracts provided by vendors which require less effort to maintain (Schu, 2007).

Pre-contractual trust building between sme and vendor: SMEs place great emphasis on trusting a vendor and such trust is usually a pre-requisite for entering into an out sourcing agreement. Having personal relationships and being comfortable with vendors is helpful as their limited resources preclude much effort to execute and monitor their operations with vendors. Vendors who are trustworthy, dependable and have the ability to deliver have greater chance of sealing a deal with SMEs and such confidence is usually attained via the successful execution of a few pilot projects, termed trial marriage by beta (β). Such trial marriages offer both parties the opportunity to size each other up and by the time an outsourcing agreement is signed, the vendors usually have formed a good relationship with SMEs (Vrontis and Thrassou, 2013).

Trusting relationships in long-term contracts: A trusting relationship enables SMEs to remain loyal to their vendors and they will continue to engage them over longer term periods. Trust is often the bedrock of such relationships. As an SME noted, a contract is just a piece of paper. If a vendor does not abide by it there is really nothing researchers can do. Suing the vendor would not help much. So, I believe more in having a trusting relationship. If I am comfortable with a vendor, I will continue using its services (Wong, 2009).

CONCLUSION

SMEs and large companies differ greatly in their approach towards contractual agreements. Large companies have recourse to legal teams for preparing and enforcing detailed contracts and to service level agreements while SMEs with their limited resources have to depend more on relationships than the terms of a binding contractual agreement. This again may be attributed to their emphasis on a trusting relationship as a greater guarantee of vendor performance than contracts which in any case do prevent vendors from behaving opportunistically. Instead, it is trust that motivates vendors to act in the interest of SMEs. However, despite the importance and trust in good relationships, SMEs should constantly be aware that contractual agreements ultimately overrule other considerations, especially in the event of a dispute.

The contractual relationships which through them the technology may be transferred are various. Thus, businesses and institutions need to constantly evaluate contracts on a case-by-case basisin order to select the most viable and beneficial before negotiating and entering into any binding contractual arrangement. Many factors

both internal and external to the SME and the technology being considered for transfer impact decisions on the formof agreement reached between the 2 parties.

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