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CONTRACTS (AMENDMENT) ACT 1976 [ACT A329]:

SOME LEGAL ISSUES ON SCHOLARSHIP CONTRACTS

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INTRODUCTION

When it comes to scholarship contracts, not many relevant stakeholders know the existence of the Contracts (Amendment) Act 1976 [Act A329] (hereinafter referred to as “the Amending Act”). The Amending Act relates very closely with universities and higher learning institution. It is a specific law governing scholarship contracts albeit it is concise and short in nature. It came into force on 27th February 1976 as an Amending Act to the Contracts Act 1976 [Act 136]. Despite its standing as an amending act, it appears separately as an Appendix to its parent law, without any clear justification.

Since its introduction in 1976, there is not much writing on the Amending Act which could shed light on its workings. Towards enriching the knowledge on this very point, this write-up will render some aid on the workability of the Amending Act.

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APPLICATION OF THE ACT

The Amending Act has been enacted by virtue (or vice?) of the High Court case of *Government of Malaysia v Gurcharan Singh & Ors*², which held that the scholarship contract entered into by the First Defendant was void since the latter was still an infant at the material time.

Due to significant legal setback that could have befallen onto other government scholarship contracts, the Amending Act was introduced to cover the lacunae disclosed by *Gurcharan's* case.

Despite generality of the definition of the term “scholarship agreement”, its usage has been coupled with the word “appropriate authority” in a few sections of the Amending Act. Upon reading the Amending Act as a whole, it can be observed that the Amending Act is intended to govern “scholarship agreements”³ given by the following bodies

² (1971) 1 MLJ 211 (HC) and judgment by Chang Min Tat, J.

³ “Scholarship agreement” has been defined under section 2 of the Amending Act to mean :-

“...any contract or agreement between an appropriate authority and any person ... with respect to, any scholarship, award, bursary, loan, sponsorship or appointment to a course of study, the provision of leave with or without pay, or any other facility,

only⁴, namely:

- (a) Federal Government,
- (b) State Government,
- (c) statutory authority as established by any written law⁵, and
- (d) any institution or body declared as “approved educational institution” by the Minister of Education pursuant to section 3 of the Amending Act⁶.

Hence, it can be said here that the Amending Act does not apply to scholarship agreements given out by the private sector, unless the said body has secured the label of “approved educational institution” as gazetted by the Minister of Education⁷.

There is also the issue whether the Amending Act applies to public universities? If the answer is in the affirmative, then under what category do public universities fall? As far as public universities are concerned, the same may fall under the category of “approved educational institution”. However, as at to date no declaratory gazette has been found to be issued conferring such status on public universities. Despite that, majority of public universities may also be applying this Amending Act pursuant to the category of “statutory authority”, as most of them are indeed established pursuant to written laws⁸.

With the introduction of the Amending Act, the ruling from the case of *Gurcharan*⁹ is no longer applicable to scholarship agreements governed by the Amending Act.

DEVIATING FROM COMMON LEGAL PRINCIPLES

The Amending Act has accorded special privileges to scholarship agreements, in which situation some of the standard principles of law have been done away with.

One of such privileges is that scholarship agreement may stand as valid despite lack or no consideration at all. The general rule is that a contract without

consideration is void¹⁰. This kind of situation normally happens in a scholarship agreement between the student and public university, when in actual fact the financier is a third party who is a non-party to the said agreement.

This instance is visualized in the case of *University of Malaya v. Lee Ming Chong*¹¹, whereby the scholar raised an argument on lack of consideration on the part of University of Malaya since the scholarship provider was the Canadian Government. In dealing with this very issue, Wan Hamzah SCJ asserted at page 152 that:-

“Even if there was no consideration on the part of the University, this cannot be a valid defence in view of section 4 of the Contracts (Amendment) Act 1976, which provides that notwithstanding anything to the contrary contained in the Contracts Act no scholarship agreement shall be invalidated on the ground that it lacks consideration.”

The other privilege accorded to scholarship agreement is that there is no minimum age limit for any party entering into a scholarship agreement¹². This is in contrast with the basic rule under section 11 of the Contracts Act 1950 which prescribes that a party is competent to contract if he attains the age of majority, and section 2 of the Age of Majority Act 1971 stated that age of majority stands at 18 years old.

By virtue of this privilege, a minor can now sign up for any scholarship agreement without any legal hassle. As many of the scholars signing up scholarship agreements even before attaining age of 18, the privilege seems to be very much facilitative not only to the minor scholars but also to any governmental body and public university. Scholarship disbursements may then be done without any worry.

The third privilege provided by the Amending Act is the non-requirement to be bound by the laws on moneylenders¹³. It is understood that moneylending requirements under the Moneylenders Act 1951 is quite strict especially with its licensing regime¹⁴. Doing away with such moneylending requirements would ease the scholarship process and procedure.

The other offering under the Amending Act is that scholarship authority may not be required to prove damages in order to demand compensation for breach

whether granted directly by the appropriate authority, or by any other person or body, or by any government outside Malaysia, for the purpose of education or learning of any description.”

4 Section 2 of the Amending Act on the definition of “appropriate authority”.

5 Section 2 of the Amending Act on the definition of “statutory authority”.

6 Section 2 of the Amending Act on the definition of “approved educational institution”.

7 Minister of Education must declare in the gazette that such body is an “approved educational institution” pursuant to section 3 of the Amending Act.

8 All public universities in Malaysia are either established under Universities and University Colleges Act 1971 [Act 30], University of Malaya Act 1961 [Act 682] or Universiti Teknologi MARA Act 1976 [Act 173]. Only International Islamic University of Malaysia is established pursuant to the Companies Act 1965. Note also the provisions of the Statutory Bodies (Discipline and Surcharge) Act 2000, definition of “statutory body” in section 4.

9 (1971) 1 MLJ 211 (HC).

10 Section 26 of the Contracts Act 1950.

11 [1986] 2 MLJ 148 (HC).

12 Section 4(a) of the Amending Act.

13 The main law on moneylenders in force at the moment is the Moneylenders Act 1951 [Act 400].

14 Licensing regime under section 9(1) of the Moneylenders Act 1951 requires that top officers of a moneylender to be fit and proper person, not involved in wound-up or dissolved moneylending body, not having bad character and never been convicted with any fraud or dishonesty case.

of contract. The general rule is that a party complaining of breach against the other party is entitled to receive such sum as compensation provided that the actual damages or reasonable compensation is proven. This principle has been established by *Hadley v Baxendale*¹⁵ which is later followed by two Federal Court cases, namely *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy*¹⁶ and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd*¹⁷.

It is without doubt that the above Federal Court cases are decided based on the authority of section 75 of the Contracts Act 1950, which is the general provision on contract law. The Amending Act, being a specific law on scholarship agreements has provided a related provision in its section 5(a)¹⁸. Applying the principle of *generalia specialibus non derogant*, section 5(a) of the Amending Act shall take prevalence over section 75 of the Contracts Act 1950. It was also made clear by the elaborative words of Wan Yahya, FCJ, namely:-

*“Where there are two conflicting provisions of the Legislature and the question arises which of the two should govern the case, it is the Court’s duty to see the terms of which provisions are more appropriate in the circumstance of the case. The principle of linguistic cannons of construction on the use of legal maxim may provide the answer to our case. The relevant maxim in the present appeal is generalia specialibus non derogant - general statements or provisions do not derogate from special statements or provisions, or conversely, specialia derogant generalibus - special provisions derogate from general.”*¹⁹

Under section 5(a) of the Amending Act, it is observed that upon the occurrence of a breach, scholarship authority is entitled to such damages or compensation if and when important elements existed therein, namely:-

- (a) There is a named sum in the agreement (if no named sum, then section 5(b) applies);
- (b) Joint and several liability of scholar and surety;
- (c) Entitlement of the scholarship authority on such named sum;
- (d) Actual damage or loss is immaterial; and

15 (1854) 9 Exch. 341.

16 [1995] 1 MLJ 817.

17 [2009] 4 MLJ 445.

18 Section 5(a) of the Amending Act states that :-

“... if a sum is named in the agreement as the amount to be paid in case of such breach, notwithstanding anything to the contrary contained in the principal Act, the scholar and the surety shall be liable jointly and severally to pay and the appropriate authority shall be entitled to be paid the whole of such named sum whether or not actual damage or loss has been caused by such breach, and no deduction shall be made from the said named sum on account of any partial period or service performed by the scholar on completion of his course of study.”

19 *per* Wan Yahya, FCJ in *Director of Customs Federal Territory v. Ler Cheng Chye* [1995] 3 CLJ 316 (SC).

- (e) Such named sum shall be claimable without deduction²⁰ even after considering period of bond served.

In the event no sum is being named in the agreement, then section 5(b) of the Amending Act shall apply, whereby amount of damages or compensation shall be taken based on the followings:-

- (a) actual amount expended by the scholarship authority under the scholarship agreement; and
- (b) such sum expended for engaging new person in place of the breaching scholar.

COURT JURISDICTION

Another issue that is worthy of discussion is on the court jurisdiction. Section 7 of the Amending Act has undoubtedly outlined that it is the Sessions Court (for Peninsular Malaysia) and Magistrates Court (for Sabah and Sarawak) that have jurisdiction to decide on cases pertaining to scholarship contracts. This means that, no matter how much the value of the subject matter of such scholarship case, the jurisdiction still lies at Sessions Court (for Peninsular Malaysia) and Magistrates Court (for Sabah and Sarawak).

Nevertheless, parties are not prevented to opt for High Court or Magistrates Court (for Peninsular Malaysia) as both of them still have jurisdiction by virtue of Courts of Judicature Act 1964 [Act 91] and Subordinate Courts Act 1948 [Act 92].

Section 23(1) of the Courts of Judicature Act 1964 provides that the jurisdiction of the High Court covers all civil proceedings. This would mean High Court can hear cases with unlimited value of the subject matter.

On the other hand, section 90 of the Subordinate Courts Act 1964 stipulates that Magistrates Court do have jurisdiction to try cases with value of subject matter up to RM100,000.00.

The question is how to harmonise between the three conflicting provisions of court jurisdiction. Upon reading section 7 of the Amending Act, we can observe that its wording does not really give exclusive jurisdiction to Sessions Court (for Peninsular Malaysia) and Magistrates Court (for Sabah and Sarawak). This is espoused further in the Supreme Court case of *Bank Negara Malaysia v. Gerald Glesphy G.M.Perara & Ors.*²¹, wherein Harun Hashim, SCJ has opined that:-

20 Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston’s Law of Contract*, 2nd Edition, Butterworths Asia, 1998, at page 1043.

21 [1992] 1 CLJ (Rep) 10 (SC).

“But is the jurisdiction exclusive to the Sessions Court? The plain wording of s. 7 does not say so. It merely says “the Sessions Court ... shall have jurisdiction ...” It would be different if the word “only” is added before the words “the Sessions Court” or by some other expressions like “to the exclusion of any other Court.” The words, “Notwithstanding anything contained in any written law to the contrary” in this context, can only refer to s. 65 of the Subordinate Courts Act which limits the civil jurisdiction of the Sessions Court to claims not exceeding RM25,000 before 1976 and RM100,000 thereafter. Section 7 is therefore only permissive and not imperative in enhancing the jurisdiction of the Sessions Court.”

It was held further by Harun Hashim, SCJ in the same case that:-

“Section 23(1) of the Courts of Judicature Act 1964, provides inter alia:

Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings ...

The word “all” means any civil proceeding irrespective of the amount of the claim. To put it in another way, the High Court has unlimited jurisdiction to try all civil claims, including claims that may be made in the Sessions Court and the Magistrate’s Court.”...

It follows that s. 7 of the Act read together with s. 23 of the Courts of Judicature Act does not oust the jurisdiction of the High Court to try scholarship agreement cases.”

Upon analyzing the reasoning given by Harun Hashim, SCJ, the same analogy could then be applicable to the Magistrates Court, whereby the jurisdiction of Magistrates Court under Subordinate Courts Act 1964 is not ousted, and still stands as the provision in section 7 of the Amending Act does not confer exclusivity to Sessions Court (for Peninsular Malaysia) and Magistrates Court (for Sabah and Sarawak). Section 7 of the Amending Act is therefore regarded as mere *“permissive and not imperative”* in giving such jurisdictional power.

LACK OF CONTRACT DOCUMENT

It is undeniable that in some cases scholarship documentations is not well-managed and this results in no contract document being signed or formalized. This situation may stifle scholarship authority if it wishes to pursue legal action in breach of contract

cases. However, in the absence of a contract document, other documentary evidence may be sufficient for court purposes, especially documentation on the scholarship disbursements and correspondences leading to the scholar-scholarship authority relationship.

Hasnah, JC in the case of *International Islamic University Malaysia v. Omar Jamaluddin & Ors*²². has decided that :-

“...despite the Plaintiff not having signed the Agreement there was an offer which was accepted by the 1st Defendant. There was consideration i.e. the financing of the study leave by the Plaintiff. The fact that the Plaintiff has not signed the Agreement does make the Agreement void ab initio.

...

In the instant case there was an offer by the Plaintiff and there was an acceptance by the 1st Defendant and the 2nd Defendant. There was consideration and certainty. It is clear from the facts that the Parties were ad idem. Therefore I find that there was a valid and concluded contract between the Plaintiff and the Defendants.”

In such a situation, absence of a contract document may not be fatal, but it is a challenge to the Plaintiff’s burden of proof. What matters most is establishing that there are offer, acceptance and disbursements made thereto.

CONCLUSION

The Amending Act is not a hot burning topic among legal writers. Perhaps this is due to the fact that it mostly involves public universities, and rarely any major legal issues arise thereon. The Amending Act does indeed provide some relief to the workings of a scholarship process based on several flexibilities as deliberated above by providing some exemptions from standard legal principles.

Notwithstanding the above, the relevant authority should also look into gazetting all government-linked educational institutions as *“approved educational institution”* pursuant to section 3 of the Amending Act, so that those institutions may enjoy the privileges offered by the law and also to avoid non-application of the Amending Act to them. Gazetting under section 3 will ensure protection of government interest in terms of scholarship rights and liabilities.

²² [2010] MLJU 1648 (HC)

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