SCHOLARSHIP AGREEMENTS IN MALAYSIA: A NEW DEAL

1. INTRODUCTION

Born out of the wedlock between the 19th century doctrinaire approach and the colonial thinking of those days, the Indian Contract Act, 1872,[1] the precursor of the (Malaysian) Contracts Act, 1950 (revised 1974),[2] failed to take in its strides, the 20th century problems of a free and industrialised society. Of the many problems, which beset the fast developing countries of Asia today, one is brain drain and the allurement and rush for better-paid jobs. This doubtless results in a set back to national economy, national reconstruction and national progress.

Numerous persons, including infants, become beneficiaries of scholarship schemes and attain necessary qualifications and training at the expense of the authorities to help them in their task of achieving goals of national planning. Subsequently some of them are tempted to violate their

[1] The Law Commission of India in their thirteenth report on the Indian Contract Act, 1872, have suggested various recommendations in some fields of contract law, but none in the law of damages or scholarship agreements.

[2] The provisions contained in the Indian Contract Act, made their debut in the federated Malay States of Perak, Selangor, Negri Sembilan, Pahang under "Contract Enactment of 1899". Like the Indian enactment, the Contract Enactment of 1899, contains no provisions on scholarship agreement. The Malaysian Contracts Act, 1950 (revised 1974), on the other hand, has some specific provision in exception 3 and its explanation to section 29, which reads:

> Nor shall this section render illegal any contract in writing between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be questioned by any court.
>
> In this exception, the expression "scholarship" includes any bursary to be awarded or tuition or examination fees to be defrayed by the Government and the expression "Government" includes the Government of a state".

As to India, it appears that the Central Government has some administrative schemes to absorb technical and scientific persons working abroad. In addition, there is the Foreign Contribution (Regulation) Act, 1976 whereunder:

> Every citizen of India receiving any scholarship, stipend or any payment of a like nature from any source shall give, within such time and in such manner as may be prescribed, an intimation to the Central Government as to the amount of the scholarship, stipend or other payment received by him and the foreign source from which and the purpose for which such scholarship, stipened or other payment has been, or is being, received by him. *Id.* Section 7(1).

agreements and either fail to enter upon or complete their contract of service. Legal alibis of infancy, lack of consideration, penal nature of the compensatory clauses are offered as defences for breaches of scholarship agreements.

The Contracts (Amendment) Act, 1976 of Malaysia (hereinafter referred to as the Amendment Act) seeks to grapple with this problem in its own way.[3] Professor Ahmad Ibrahim has opined that:

> the Act although purporting to be an amendment Act is not in form an amendment Act. It makes specific provisions with respect to scholarship agreements . . .[4]

It is, therefore, true that the Amendment Act added something, but repealed nothing and substituted nothing. The purpose of this article is to ascertain the legal rights and liabilities of the contracting parties – the appropriate authority and the scholar – under the Amendment Act.[5]

The vital provisions in the Amendment Act are:

(i) *Scholarship agreement* (section 2)

"existing scholarship agreement" means a scholarship agreement entered into before the commencement of this Act and which had expired prior to the commencement of this Act;

(ii) *Validity of scholarship agreement* (section 4)

Nothwithstanding anything to the contrary contained in the principal Act, no scholarship agreement shall be invalidated on the ground that–

(a) the scholar entering into such agreement is not of the age of majority;

(b) such agreement is contrary to any provisions of any law in force relating to moneylenders; or

(c) such agreement lacks consideration.

(iii) *Remedy in the event of breach* (section 5)

Where a scholarship agreement has been broken by the scholar –

(a) 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

[3] For discussion of the Bill in the House of Representatives (Dewan Rakyat), see Jilid I, Bil 85, Hari Selasa, 16hb. Disember, 1975, Rang Undang-Undang Kontrek (Pindaan) Ruangan PP. 19–43. A substantial portion of the proceedings is in Bahasa Malaysia.

[4] Professor Ahmad Ibrahim, Legislative Digest (Malaysia), (1976) 1 M.L.J. LXXXVI.

[5] This article has been written entirely with an acadamic interest within the range of contract law; constitutional law problems and other factors are outside its consideration.

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 of service performed by the scholar on completion of his course of study; or

(b) if no such sum is mentioned in the scholarship agreement, the scholar and the surety shall be jointly and severally liable to pay and the appropriate authority shall be entitled to be paid

(i) the whole amount expended by the appropriate authority under the agreement; and

(ii) the whole of such further amount as it will cost the appropriate authority or another authority designated by it to engage a person with qualifications and experience similar to those which were to be obtained by the scholar to perform the services required of the scholar on the completion of his course of study for the period specified in the scholarship agreement.

Although the Amendment Act seeks to "amend the Contracts Act, 1950 to make provisions with respect to scholarship agreements,"[6] the latter Act already embodies some provisions about them in the law relating to restraint of legal proceedings.[7]

II. EARLIER LAW

Government of Malaysia v. *Gurcharan Singh & Ors*,[8] highlighted the problem at hand. Here

> the Government of Malaysia sued the first defendant as the promisor and the second and third defendants as sureties for breach of an agreement in writing entered into by them with the plaintiff for providing a course of training at a Malayan Teachers' Training Institution between 1960–61,[9]

At the hearing, however, the government made an alternative claim against the minor scholar on the ground of necessaries of life supplied to him in the shape of the government expenditure on his training. The scholarship agreement obligated the minor to serve "as a teacher for five

[6] See preamble

[7] See *supra* note 2.

[8] (1971) 1 M.L.J. 211.

[9] *Id.* at 212.

years after the training".[10] To enable the first defendant to prosecute his studies further, the government suspended the contract. The former, however, served only for three years and ten months and thus the non-performed period was one year and two months.

Two questions arose before the court. First, whether the minor and the two co-sureties with him were liable for breach of contract. In other words, was there a valid contract between the parties to the scholarship agreement? The second, if not, could the minor be liable in quasi – contract for necessaries supplied to him under section 69 of the Contracts Act, (hereinafter called the principal Act) and also the co-sureties with him. Section 11 of the principal Act reads:

> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

This section does not state in explicit terms whether the incompetency of the minor results in his agreement being void or voidable. The only direct conclusion is a negative one – that such an agreement is not valid. In a land mark Privy Council case from India, *Mohori Bibee* v. *Dhurmodas Ghose*,[11] their Lordships of the Judicial Committee held that a minor's agreement is void *ab initio*. The case involved the question whether a minor, under his promise, was bound to return the amount of loan borrowed from the moneylender by mortgaging his property, when the moneylender had known, imputedly through his attorney, that the other contracting party was a minor. The Judicial Committee held that section 65 of the Indian Contract Act, dealing with refund in cases of void agreements, presupposed that the parties were competent to contract.[12] Hence this section was held inapplicable to minors. The discretionary provisions to order refund of money under section 41 of the Specific Relief Act did not help the moneylender either.[13] Thus the moneylender had no remedy

[10] *Ibid.*

[11] (1902–03) L.R. 30 I.A. 114.

[12] Section 66 of the Malaysian Contracts Act, 1950, is in *pari materia* with section 65 of the Indian Contract Act:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[13] This Act has since been repealed and replaced by the Specific Relief Act, 1963. For Malaysia, see section 37 of the Specific Relief Act, 1950 (revised 1974), relating to grant of compensation on the rescission of the contract. The Indian provisions which corresponded with the above provisions were held by their Lordships as inapplicable because firstly the minor was not guilty of fraudulent misrepresentation of his age and secondly, it would be inequitable to compel a minor to refund the money on an agreement which the legislature had declared against him as void.

against the minor. On this reasoning, the *Gurcharan Singh* court disallowed the claim of the Government of Malaysia against the minor for breach of contract. As to co-sureties, their liability was held to be based upon section 81 of the principal act:

> The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.[14]

The court noted some conflicting Indian cases[15] which did not help the problem at hand. In the context of the above provisions, it held that the liability of the principal debtor was a *sine qua non* for the sureties' liability under the contract of guarantee. To quote:

> . . . the terms of section 81 of our Ordinance make it clear: The liability of the sureties is *co-extensive* with that of the principal debtor and it follows, . . . that if the principal debtor is not liable as on a void contract the sureties whose liability is co-extensive are not any more liable.[16]

It is submitted that the word "co-extensive" in the section does not mean "co-existent", so that the liability of a surety is merely co-extensive but not co-existent with that of the principal debtor. This view is fortified by the illustration appended to the section, wherein it is stated that the surety is liable "not only for the amount of the bill, but also for any interest and charges which may have become due on it."[17] Perhaps the honourable court could reach the same result by reference to section 79 of the Principal Act, whereunder the surety is liable only "in case of his (principal debtor's) default."[18] In other words, under section 79, the liability of a surety is contingent upon the default of the principal debtor,

[14] For corresponding Indian provisions, see section 128 of the Indian Contract Act, 1872.

[15] See *Sohan Lal* v. *Puran Singh*, A.I.R. 1916 Lah. 376; *Kashiba* v. *Shripat Nashiv*, (1895) I.L.R. 19 Bom. 687; *Chhajju Singh* v. *Emperor*, A.I.R. 1921 Lah. 79. See *Jamna Bai* v. *Vasanta Rao*, (1915–16) L.R. 43 I.A. 99. *Kelappan Nambiar* v. *Moolakai Kunhi Raman*, A.I.R. 1957 Mad. 164. Some English cases were also mentioned. The case of *Kelappan Nambiar, supra*, was followed in *Varadarajulu* v. *Thavasi Nadar*, A.I.R. 1963 Mad. 413, where approving the above case, the court held that where the agreement was illegal and unenforceable, the surety whose liability is only ancillary, is not liable. (Note: The *Varadarajulu* case was overruled by the Supreme Court on some other point in *Viswanatha* v. *Shanmugham*, A.I.R. 1969 S.C. 493, 496.

[16] *Supra* note 8 at 214. Emphasis supplied.

[17] Illustration to section 81 of the Contracts Act, 1950 (revised 1974) runs thus:

> A guarantees to B the payment of a bill of exchange by C, the accepter. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

[18] Parenthesis supplied.

and this pre-supposes the existence of a valid legal obligation on the part of the principal debtor so that he may have a chance of committing default to make the surety liable.

The court next considered the infant's liability for necessaries of life under section 69 of the Principal Act:

> If a person is incapable of entering into a contract or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

The court scanned through numerous decided cases to examine whether educational training imparted to the minor (defendant) constituted necessaries of life. While, on the one hand, it was argued "that apart from the needs of an infant, the needs of the country were also to be considered,"[19] on the other hand it was "suggested that if training for a teaching post was a necessary, the increased expenditure consequent on the selection of an institution in England in preferance to a local institution must in itself remove the matter from the class of necessaries."[20]

The court regarded the question of necessaries of life "as much a question of law as of fact,"[21] and expressed the view that it served the country's needs as well as scholar's "own needs".[22] The government decision to send the first defendant to England instead of a local school did not take the matter out of the class of necessaries of life. The court laid down the following criteria:

> The word 'necessaries' must be construed broadly and in any decision involving whether what are supplied are or are not necessaries, it is incumbent to have regard to the facts of the case, the conditions and circumstances in which the supply was made and the purpose which is served."[23]

Thus the minor's training in England was included in the necessaries of life. Since the minor's liability had to be reasonable under section 69, it could only be proportionate to the period of his default. The liability of the co-sureties was thus fixed by the measure of the minor's liability under this section.

Thus the decision in the *Gurcharan Singh* case showed the nebulous

[19] *Supra* note 8 at 215.

[20] *Ibid.*

[21] *Id.* at 216.

[22] *Ibid.*

[23] *Ibid.*

state of the law on the subject of scholarship agreements.[24] It may also have raised a hope among the scholars that their partial non-performance will make them only partially liable. This, no doubt, led to the passing of the Contracts (Amendment) Act, 1976. The various essential features of this Act are examined below.

III. SALIENT FEATURES OF THE AMENDMENT ACT

A. *Scholarship Agreement*

The use of the word "means", in the definition of scholarship agreement, makes it explanatory and restrictive.[25] In addition to scholarship, the definition includes award, bursary, loan, sponsorship or appointment to a course of study, the provision for leave with or without pay or any other facility, provided it is meant for education or learning of any description. It appears that the views of the appropriate or sponsoring authority[26] and not mere nice considerations of the English language dictionary will weigh in ascertaining the meaning of education and learning.

Education and learning are flexible terms. And what may not be education or learning at one time may assume these characteristics at a later time. A course on traffic control, anti-smuggling, anti-hijacking and even regular and sustained visits to quick mail service distribution centres to learn the methodology underlying thereat would be within the above description. Obviously, mere tours and short but casual visits would not qualify for it. The course need not lead to conferment of any degree or diploma and training in any art, science, craft or system which the appropriate authority considers suitable would seem to be within the denomination. The quantum of money, the duration of leave and the nature of facility do not determine whether the agreement relates to scholarship. Furthermore, a granting body may be government, central or state, a

[24] In *Government of Malaysia* v. *Thelma Fernandez & Anor*, (1967) 1 M.L.J. 194, the court however held that a provision in the scholarship agreement that the scholar, on breach of contract, will refund all monies incurred on the training of the scholar was not extravagant or unconscionable. The court in the *Gurcharan Singh* case, *supra* note 8, pointed out that the *Thelma Fernandez* case, *supra*, went in appeal to the Federal Court but was compromised there and suggested that "... the Thelma Fernandez case must, I believe, be now seen to be no more good law". *supra* note 8 at 217.

[25] In Craies on Statue Law 213 (7th edn. by Edgar 1971), it is stated that "... where the word defined is declared to '*mean*' so and so, the definition is explanatory and prima facie restrictive".

[26] The term appropriate authority has been defined in section 2 of the Contracts (Amendment) Act, 1976 (A329) thus: "appropriate authority means the Federal Government or a State Government, a statutory authority, or an approved educational institution."

statutory body, an approved educational institution, any person or body or even a foreign government; the purpose of the grant should be education or learning.

(i) Necessary parties

The necessary, though not the only, parties to the contract or agreement are the appropriate authority and the scholar. The agreement would still be a scholarship agreement, under the Amendment Act, if the appropriate authority chooses to dispense with the surety. Thus an officer selected for further training or a course of study may own a house which he may mortgage to the appropriate authority. Again a scholarship agreement may be of a minor nature and perhaps also the scholar may be financially quite sound.

The Amendment Act, however, gives the definition of a surety,[27] suggesting that he may be involved in the scholarship agreement. There is no minimum or maximum number of sureties fixed for a scholarship agreement. Normally, perhaps, one surety would be insisted upon by the appropriate authority.

(ii) Contract or agreement

Scholarship agreement has been defined as any "contract or agreement". Apparently, it is not clear as to why these two different terminologies were used when the term "agreement" alone would have been sufficient to cover both of them. Since section 1 of the Amendment Act requires it to be "construed as one" with the principal Act, it would be useful to advert to the latter Act for definitions of the above terms. Under section 2(e) of this Act, "every promise and every set of promises, forming the consideration for each other, is an agreement," while under clause (g) "an agreement not enforceable by law is said to be void", and lastly, under clause (h) "an agreement enforceable by law is a contract." In other words, every contract is an agreement, but every agreement is not necessarily a contract. It is, therefore, impossible to think that the legislature used "contract or agreement" as connoting the same meaning. However one possible rational explanation seems to be that if the scholarship agreement is made with a minor, it is an agreement and not a contract; where, however, the scholar is major, there may be a (valid) contract. And different provisions of the principal Act may apply in both these cases e.g. see below the discussion on the doctrine of frustration of contracts, exception 3 to section 29 of the principal Act, containing the term "contract in writing".

[27] *Id.*, section 2, in part, reads: "Surety means a person referred to as a surety, or as a guarantor, or by any other corresponding term, in a scholarship agreement."

B. *Validity of scholarship agreement*

The Amendment Act knocks off several grounds of invalidity of agreements, "nothwithstanding any thing to the contrary contained in the principal Act".[28] As pointed out by Professor Ahmad Ibrahim:

> The case of Government of Malaysia v. Gurcharan Singh & Ors/1971/1 M.L.J. 211 can therefore no longer be followed in Malaysia.[29]

In matters, therefore, relating to quantum of damages, determination of surety's liability due to the contractual incapacity of the minor scholar, lack of consideration and age of majority of the scholar, the *Gurcharan Singh* case no longer holds the ground. The Amendment Act leaves all other invalidating grounds intact. These would be apparent consent and not real consent, undue influence,[30] mutual mistake of fact, restraint of marriage if there is any provision restricting it, uncertainty or ambiguity in the terms of the agreement, if any, and considerations of public policy etc. A scholarship agreement requiring the scholar not to have a union with his family (wife and/or children) for an unduly long time during the period of training may raise nice considerations of public policy. Since, however, an appropriate authority, under the Amendment Act, is a highly responsible authority or body, it is hoped that the above problem will always remain confined to the domain of academics only. But the problem of ambiguity of terms may be a crucial one. And since scholarship agreements may be executed by scholars on standard forms supplied to them by appropriate authorities, the ambiguous provisions would be interpreted in their favour.[31] The absence of consideration or its shamness, one-sidedness or illusory nature of the contract cease to be grounds of defence. This is essential because the scholarship may be granted by a person or body which is not an appropriate authority.

Again, the Amendment Act protects the appropriate authority from the minority of the scholar and not of the surety. Where, therefore, a minor becomes surety through fraudulent misrepresentation of his age, his agreement will be void in view of the *Mohori Bibee* case.[32] The Act safeguards

[28] See *supra* note 26, at S.4.

[29] Professor Ahmad Ibrahim, Legislative Digest (Malaysia), (1976) 1 M.L.J. LXXXVI. See *supra* note 4.

[30] See the interesting case of undue influence by a government officer over his subordinate in matter of the latter's service in the department, *U.P. Government* v. *J.R. Bhatta*, A.I.R. 1956 All. 439.

[31] See David E. Allan (General Editor), Mary E. Hiscock & Derek Roebuck (Assistant Editors), Asian Contract Law, A Survey of Current Problems 136–37 relating to India (1st edn. 1969). This writer is one of the several authors of the above book.

[32] *Supra* note 11.

appropriate authority against legislation relating to moneylenders.

The Amendment Act ensures a fair deal to the appropriate authority by providing for it recovery and damages against breaches of scholarship agreement. The scholar is liable if he is guilty of the breaches and not when he is excused from performance under the doctrine of frustration.

(i) Doctrine of frustration

The Amendment Act does not exclude frustration of contracts as an excuse for the non-performance of the scholarship agreement. Take the following illustration:

> A, a scholar, is under an agreement to serve the appropriate authority for a period of five years after completion of his training. After having served the authority for one year, he meets a serious car accident, is afflicted with paralysis, goes mad or dies.

The question arises here whether the scholar or his estate, as the case may be, is liable under the Amendment Act or he is otherwise excused from performance under the principal Act.[33] The former Act requires the two Acts to be read together and, therefore, frustration occurs. Again, if the scholar is too ill to act on certain occasions, then there is frustration on those occasions.[34] Such period will fictitiously be treated or computed as performance. Upon frustration, the Amendment Act will not govern, since this Act does not cover such a case. The rights of the parties then will be governed by section 66 of the principal Act and sections 15 and 16 of the Civil Law Act, 1956 (Revised 1972). Where, however, the parties, being competent to contract, contract out of the doctrine of frustration, the so-called frustrating event may amount to breach of contract and the Amendment Act will apply.

Since the above doctrine pertains to law of contract, it can apply only where a valid contract exists. The scholar may be minor or major. In the latter case, there is no difficulty because the parties can create a contract. In the former case, however, the question largely turns upon the interpretation of the Amendment Act. If the Act is interpreted as creating a contractual capacity in the minor, there would be a contract between the contracting parties and the doctrine of frustration would apply in this case also. If, however, the intention of the Act is merely to remove the disability of the minor to be sued and become liable under this new statute, doctrine of frustration falls through. The latter interpretation seems

[33] See section 57 and the illustrations appended thereto of the Contracts Act, 1950 (revised 1974).

[34] Illustration (c) to section 57, it reads: "A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occassions A is too ill to act. The contract to act on those occasions becomes void." Note the use of the word contract in this illustration.

applicable. For the language in section 4 of the Amendment Act does not affirmatively create a contractual capacity in the minor; it only negatively removes his contractual disability as a defence under the Act. Furthermore, the use of the word agreement, in addition to contract, in the definition of scholarship agreement also takes stock of this situation. Had the legislature intended to confer the capacity to contract upon a minor, it must have said so in plain words.

(ii) Quasi-contract

Where a scholarship agreement, for any reason whatsoever, for example, ambiguity of terms, is found to be invalid under the principal Act, excepting the grounds of invalidity stated in the Amendment Act, the appropriate authority, it is submitted, may not be without a remedy. The claim against the minor or major scholar may be proceeded with under *quasi ex contractu*.[35] The minor scholar may become liable under section 69 for necessaries of life and for this purpose the dictum in the *Gurcharan Singh* case survives the onslaughts of the Amendment Act. The major scholar may be liable under section 71[36] for enjoying benefit of non-gratuitous act. The Supreme Court of India has applied section 70 of the Indian Contract Act, 1872, which is in *pari materia* with section 71 above, where the agreement between the government of India and the contractor was void for want of a formal execution of the agreement.[37] The only possible obstacle would, therefore, be the word "lawfully", used in section 71, which may be interpreted widely.

C. *Remedy in the event of breach*

A scholarship agreement, under the Amendment Act, is a bipartite process and is not a unilateral contract (or affair) which has been called as a "legal solecism". However the Amendment Act provides remedy only in favour of the appropriate authority and against the scholar. This may, however, be justified on the ground that in the two earlier reported cases, wherein in each of them, the scholars had committed breach, the Government of Malaysia had adopted lenient and reasonable attitudes – in one case[38] by

[35] See *id* sections 69 to 73.

[36] Section 71 of the Contracts Act, 1950 (revised 1974) reads: Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[37] *State of West Bengal* v. *B.K. Mondal & Sons*, A.I.R. 1962 S.C. 779. The meaning of the term "lawfully" used in section 70 of the Indian Contract Act, 1872, was explained in this case.

[38] *Government of Malaysia* v. *Thelma Fernandez & Anor*, *supra* note 24. For full facts, refer to the report.

compromising the case in the Federal Court when its claim had been sustained in the lower court and in the other case[39] by suspending the agreement to enable the scholar to prosecute his higher studies (whereafter in the latter case, the scholar joined but did not complete the period of service.) Significantly, the Amendment Act is silent in relation to breaches by the appropriate authority. It does not, either expressly or by necessary implication, negative the contractual remedies of the scholar in such a case. In other words, since the Amendment Act must be construed in conjunction with the principal Act, the remedies of the scholars thereunder have been left unimpaired.

Section 5, dealing with the remedy in the event of *breach*,[40] rises this difficult question: whether the Amendment Act creates an absolute liability, irrespective of the validity of the agreement or does it apply only when the scholarship agreement is valid. The latter view is more tenable. Had the intention of the Amendment Act been different, the legislature would have used other suitable language, in lieu of the present one, by enacting like this: "Notwithstanding the invalidity of the agreement, in all cases where the scholar has broken the agreement . . . ." Furthermore the use of the word *breach* in lieu of *non-performance* in the side note and use of words of similar import in the opening sentence of section 5 make the conclusion irresistable that this section applies only in cases of valid agreements. The absence of the word contract and legislative preference for agreement in this section point to no other conclusion. Probably the only relief in such cases, as stated earlier, would lie in quasi-contract.

To ascertain the meaning of breach, reference may be made to section 40 of the principal Act, which reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Thus refusal to perform and disabling himself from performing are breaches of contract. So is wilful absence from duty by the scholar.[41] This will enable the appropriate authority to be "at liberty to put an end to the contract,"[42] and claim statutory scale of damages. Where, however, the

[39] *Government of Malaysia v. Gurcharan Singh & Ors., supra* note 8. For full facts refer to the report at 212.

[40] Emphasis added.

[41] Illustration (a) to section 40 of the Contracts Act, 1950 (revised 1974) reads:

> A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her $100 for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put a end to the contract.

[42] *Ibid.*

authority acquiesces in the breach or waives it off, it cannot put an end to the contract, though it can claim damages for such acquiesed in breach..

Section 5(a) deals with liquidated damages while clause (b) relates to unliquidated damages. The legal effects of clause (a) are that the liability of the scholar arises immediately on breach of contract or agreement, is joint and several with the surety, does not rateably reduce (in proportion to the period of his performance of service), does not depend upon any proof of actual damage or loss incurred by the authority and it is for the "whole of such named sum."

The *quantum* of money, named to be payable in case of breach, is unquestionable in court of law and the scholar must faithfully execute his agreement according to its terms upto its last day. The above provision overrides section 75 of the principal Act, whereunder the court could award any reasonable compensation, not exceeding the amount so named by the parties. The question of the named damages being penal does not arise under the new legislation. The period of service of a scholar would start as per his scholarship agreement.

Where, however, the scholarship agreement omits to specity the amount of damages, section 5(b) shall apply, irrespective of the length of the default period. The legal effects of this clause are that the scholar and the surety become jointly and severally liable for immediate payment of the *whole* of the amount spent on the scholar under the agreement. Any other amount, not spent as per the agreement, is beyond their liability. Interest and overhead charges of administration can only be charged when they are so specified in the scholarship agreement. Under the above provisions, the scholar and the surety will also be liable for such additional sum of money

> "as it will cost the appropriate authority . . . to engage a person with qualifications and experience similar to those which were to be obtained by the scholar . . . for the period specified in the scholarship agreement."

Where the appropriate authority does not actually appoint or engage a substitute, either because it may be unnecessary to make such an appointment or the one with similar qualifications and experience is not available, it is doubtful, at least in the first case, whether the provision shall apply. In the second case, the estimates of engagement must be notional since no cost could actually be incurred. Furthermore, it is not clear, as to what is the meaning of "cost . . . to engage". Perhaps this will include all such expenses as will be involved in reselection process, advertisement, overhead charges of administration and the costs of travel of the new incumbent to

[43] Literally, the term engage, *inter alia*, means "to hire or employ". New Webster's Dictionary of the English Language 511 (College edition 1975 by Consolidated Book Publisher, Chicago – New York).

join the post including cost of return journey but not the actual difference between the two monthly salaries. This conclusion stems out of the words "cost . . . to engage", which is not the same thing as "cost . . . to maintain" or "cost . . . to engage and maintain". It, therefore, appears that the liability of the scholar is limited to the initial investment by the appropriate authority and not the recurring amount. Appointment of the substitute at a lower salary would mitigate the liability of the scholar.

Again it seems difficult to spell out the exact implications of the phrase "for the period specified in the scholarship agreement". What will be the duration of the new appointment when the scholar had partly performed his agreement? But one thing is obvious: The scholar will be liable for full cost "to engage" as stated in the preceding paragraph, although the new appointment is for a short period, say one month. Thus in respect of unliquidated damages, the new legislation hardly makes any significent departure from section 74 of the principal Act.[44] It, however, precludes all independent evidence as to the reasonableness of the amount spent and other costs actually incurred by the appropriate authority to engage a person of comparative qualifications and experience.

The liability of the erring authority is not touched upon in the Amendment Act. Where, however, such is the case, the appropriate authority will be liable under section 74. The scholar will, no doubt, be under a legal duty to mitigate the damages so as to avoid them being punitive to the defendant.[45] As a general rule, the law will not take into account the scholar's injured feelings, disappointment and questions of his defamation in case of breach of agreement by the appropriate authority.[46] In non-

[44](1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person has contracted to discharge it and had broken his contract.

Explanation – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

See *Hadley* v. *Baxendale*, (1854) 9 Exch. 341.

[45]*M/S Murlidhar* v. *M/S Harish Chandra*, A.I.R. 1962 S.C. 366.

[46]In *Addis* v. *Gramophone Co., Ltd.*, (1909) A.C. 488 at 491 (H.L.), Lord Loreburn L.C. said:

"If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings

service contracts, the English courts have allowed damages for loss of publicity where the plaintiff was an actor[47] and damages for loss of further reputation where the plaintiff was an author.[48] In these cases, it would seem, the damages for loss of publicity or additional reputation were directly or necessarily a part of the contract between the parties. Furthermore, an eminent American jurist, Professor Corbin, goes to this extent that:

> In actions for wrongful discharge of a teacher, a servant or other employee, the fact that the discharge was effected in a humiliating manner probably should not be allowed to increase the damages to be recovered.[49]

The scholar's remedies are, thus, limited within the bounds of monetary relief for actual loss of money, but not of status or reputation (unless there is a contract to the contrary).

It is cardinal to the situation that section 74 of the principal Act applies only when there is a breach of *contract* i.e. existence of a valid enforceable agreement between the parties. Since this writer has submitted earlier that the Amendment Act does not confer a contractual capacity upon the minor, it is obvious that neither the doctrine of frustration nor section 74 will apply to him. In other words, the minor continues to be liable under the Amendment Act, although the event ordinarily is of a frustrating nature. Nor can he hold the erring appropriate authority liable for there is no *contract* with it. Such a dichotomy of results between the liability of the major and minor scholars was perhaps unthought of. This Amendment Act, it is submitted, may be amended by expliciting incorporating a provision that for the purpose of the Act, the minor shall be competent to contract or by some other suitable words. Consequently, the scholarship agreement should be defined as a contract and not as a "contract or agreement". Any how, the problem requires immediate attention.

of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

In *Herbert Clayton and Jack Waller, Ld.* v. *Oliver*, (1930) A.C. 209 (H.L.) damages for lack of publicity and advertisement were also allowed because the injured plaintiff was an actor. Lord Buckmaster refused to treat damages under the head of loss of publicity by the jury as equivalent to "a loss of reputation." *id* at 220. Viscount Dunedin in his separate concurring judgment emphasised that each contract must be confined to its own circumstances "to see what are the prestations which each party is bound to perform" *id* at 221. So considered, he held, that the word salary included for the actor "the opportunity of appearing before the public". *id* at 221.

[47] *Id.* (Oliver case).

[48] *Joseph* v. *National Magazine Co. Ltd.*, (1958) 3 All E.R. 52. For application of English law in Malaysia, see section 5(1) and (2) of the Civil Law Act, 1956 (Revised 1972).

[49] 5 Corbin, Contracts s. 1077 at 445 (1964).

An appropriate authority may so carefully draft the standard scholarship agreement that its liability thereunder may seldom arise. Thus the agreement may recite that the scholar shall be bound to serve if the appropriate authority calls upon him to take up the service within (say) a period of six months on completion of the course of study or training. Alternatively or additionally, it may envisage that the period of service of the scholar may be curtailed to whatever extent at the sole satisfaction of the concerned authority.

The Amendment Act is retrospective. Whether the breach of the existing agreement occurs before or after the coming into force of this Act, is immaterial. The only requirement is that the life of the agreement should not have ended when the Amendment Act came into force.

IV. CONCLUSION

The scholar, therefore, is now enjoined to reckon his stakes under the Amendment Act (in advance) before he marches on for a breach of the scholarship agreement. He must scrupulously perform the agreement or else invite the strict provisions of the law. It may be hoped that the Amendment Act will achieve the twin purposes of national reconstruction and employment needs of the scholar.

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THE BARE TRUST SYNDROME IN THE PENINSULAR MALAYSIAN TORRENS SYSTEM – A HARBINGER OF TOTAL COMMITMENT TO EQUITY? OR THE MEANS OF A RETURN TO TORRENS CONCEPTS?

A owns Torrens land and contracts to sell it to B. B pays the purchase price in full and receives a transfer in registrable form, the issue document of title and possession of the land. Prior to registration, what interest does B have?

THE TORRENS VIEW

Under Torrens concepts B is said to have a registrable interest with an immediate right to register sufficient to support the entry of a caveat against A's title.[1] Lodgement of the transfer for registration is within the capacity of B and registration should follow automatically.[2] Most Torrens jurisdications would say, in general law terms, B has an equitable interest in land[3] or, in Torrens terms, a registrable interest for which "he has taken all the steps specified by the Statute to confer on him the ability to register."[4]

Under this executed contract A has no further relationship with B[5] and whilst "it is the official act of registration and not the execution and delivery of the dealing or instrument, which creates or assigns the estate",[6] A may have no *effective* power to deal with the land. If the basic Torrens concept of a conclusive Register and the role of the caveat (here in giving notice of claims against the registered title) in support of that conclusiveness is maintained, then until B caveats A can deal with the land and perhaps can pass title.[7] If, however, general law priority rules are applied

[1] As to who may caveat in Peninsular Malaysia see decisions such as *Ong Chat Pang & Anor* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224; *Macon Engineers Sdn. Bhd.* v. *Goh Hooi Yin* [1976] 2 M.L.J. 53.

[2] Providing no questions of priority, form or substance occur.

[3] See e.g. *Barry* v. *Heider* (1914) 19 C.L.R. 197.

[4] D. Jackson: *"Registration of Land Interests – The English Version"* (1972) 88 L.Q.R. 93 at p. 101.

[5] Save perhaps to answer any requisition from the Registrar of Titles – this duty would stem from the contractual relationship.

[6] *Jasbir Kaur* v. *Tharumber Singh* [1974] 1 M.L.J. 224 per Azmi L.P. at p. 228.

[7] See e.g. *Abigail* v. *Lapin* [1934] A.C. 491; *Osmanoski* v. *Rose* [1974] V.R. 523.