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CONTRACTUAL JUSTICE IN ASEAN: A COMPARATIVE VIEW OF COERCION

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PUTRA MALAYSIA

CONTRACTUAL JUSTICE IN ASEAN: A COMPARATIVE VIEW OF COERCION

ABSTRACT

The European legal system which provided Indonesia, Thailand and partly Philippines with much of their ground rules in contract has witnessed a new and rapidly increasing awareness of the need for justice in contract. Hence, countries sharing the same European legal tradition are well placed to embark on a similar path towards contractual justice. British legal tradition, of which Malaysia is a part, places an undue and unfortunately illusory emphasis on freedom of contract. Free and voluntary consent must be looked at as a mechanism to achieve contractual justice not contractual freedom. An examination of coercion in several ASEAN jurisdictions will reveal the need for this distinction.

INTRODUCTION

The nineteenth century saw the development of English contract law based on the idea of market economy and freedom of contract. Indeed this freedom of contract was so embedded in the minds of English lawyers that the famous words of Sir George Jessel, M.R. in *Printing and Numerical Registering Co. v. Sampson*[1] could reiterate the strong free market sentiment of the law of contract. In that case the learned Master of the Rolls said:

> "If there is one thing more than another which public policy required, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice."

It is quite apparent that the notion of individual liberty emphasized in the above quoted passage reflects the influence of the will theory on the law of contract. The individual's choice is a juristic act which at once attracts rights and obligations, as if the choice is not just an element of the contract, but the contract itself. The influence of free market economy and laissez faire doubtless contributed to the idea that individuals should be left free and unencumbered by governmental intervention to make private arrangements through mutual exchanges for the furtherance of social improvement and happiness. However gradually it began to be realized that the notion of freedom of choice rested on many uncertain and fragile assumptions. The first assumption is that every individual is capable of making the best choice from among the range of choices available to him. This assumption of common capacity has indeed been falsified by the rapid progress of mankind, by the rise of big commercial corporations who now take the place of private individuals in making numerous consumer contracts with private individuals. With the resources at their command, the big corporations are able to invest in acquisition of information and the development of negotiation techniques that place them vis-à-vis the private individual in a far better negotiation position. When faced with this situation in the market, it would be folly for the law to keep assuming that capacity to make the best choice is common and equal among all individuals.

Another assumption of the freedom of contract notion which is, if not the result, at least the counterpart of, the will theory is the principle that there is no compulsion to contract. Again, this assumption is no longer being held as enthusiastically as it used to be since more and more legislation are beginning to impose on individuals the duty of contract, even against their will?[2]

The central theme of the freedom of contract doctrine is the individual and the choice that he has freely made. This theme has failed to view the individual's choice in the social

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[1] L.R. 19 Eq. 462

[2] For instance the duty to insure motor vehicles or for employees to insure against industrial accidents is now a common feature in many jurisdictions.

setting in which the choice is made.[3] The social environment surrounding and influencing the choice can be so great that it may be purely illusory to claim that the individual has freely made his choice. The free market economy has witnessed a 'general decline in the belief that individuals know their own interests best and ..... an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choices may be made or consent given without adequate reflection or appreciation of the consequences: or in pursuit of merely transitory desires: or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion or under pressure by others of a kind too subtle to be susceptible of proof in a law court ....'[4]

Indeed, the increased awareness of the absurdities that could result from extending the doctrine of freedom of contract to its logical limits was sounded by Lord Denning when he said:

> "There is the vigilance of the common law which, while allowing freedom of contract, watches to see that is not abused."[5]

It is in this context of increased awareness and vigilance that the law, both common law and civil law, have evolved means of ensuring contractual justice. The doctrine of freedom of contract is now being overtaken by the more realistic concern for contractual justice.

It will be the aim of this talk to examine the techniques evolved by both the courts and the legislature in the continuing development of basic ground rules of contractual justice or perhaps even the eventual evolution of the doctrine of contractual fairness.[6]

The justice or fairness of autonomous transactions between individuals can be examined from two perspectives, namely procedural and substantive.

Procedural justice implies that the transaction "should be done by parties who act with a degree of awareness, (independence) and responsibility. When these qualities are not present in requisite measure, the requirements of procedural justice immanent in the concept of contract are not met."[7]

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[3] Arthur Von Mehren, 'Contractual Justice,' Chapter 1, The International Encyclopedia of Comparative Law.

[4] Hart, 'Law, Liberty and Morality,' London, 1963, pp. 32-33.

[5] In *John Lee and Son (Grantham) Ltd. V. Railway Executive* [1949] 2 ALL ER 581 at 584.

[6] The main obstacle to achieving this appears to be the belief that 'justice' is opposed to 'certainty' which is the central notion of the doctrine of freedom of contract. Many writers have argued that the two notions are not contradictory: "Far from being opposed, justice and certainty are close approximations or harmonious objectives," David Tiplady, "The Judicial Control of Contractual Unfairness," 46 MLR 601. See also Waddams S.M., 'Unsconscionability in Contracts.' 39 MLR 369.

Mensch in his review of Atiyah's 'The Rise and Fall of Freedom of Contract' in 33 Stanford L. Rev. 753 has argued that the assumption that the state was not implicated in the outcomes of free market bargaining was never true, a quite different thing from saying, as Atiyah does, that it is no longer true.

[7] Arthur Von Mehren, 'A General View of Contract,' Chapter 1, International Encyclopedia of Comparative Law, 1-72, p. 64.

The concern for procedural justice initially covers the traditional scrutiny for voluntariness of consent but recent developments have extended this scrutiny to the sphere of pre-contractual negotiations through the more creative employment of existing principles.[8]

Substantive justice concerns itself both with the contents of the agreement, once concluded and the performance of that agreement. Procedural and substantive justice do not overlap; indeed the will theory maintains that once the will has been exercised in a way that satisfies procedural justice, substantive justice is presumed to have been attained. The contention of the will theory rests upon the argument that a contract is just like an exchange where each party receives at least the equivalent of what he gives up. This is called the 'equivalence principle.' The equivalence can be determined in two ways: one by the parties' own standards and another by generally held standards. Hence, if parties are proven to have freely consented to the exchange, if the bargain is the result of the exercise of a free and enlightened will, there are strong practical and theoretical grounds not to interfere with the contents of their agreement which represent the parties' own free assessment of the equivalence in the exchange. This perhaps explained the lack of concern shown by the common law for substantive justice during the nineteenth century. Developments in commercial and mercantile practices of the present century reveal that the contracting parties' own assessment of the equivalence in exchange is no longer a reliable indication of fairness in bargains due to the emergence of many commercial practices, such as standard form contracts, which substantially reduce an individual's capacity to make an enlightened exercise of the will. Hence the law no longer pretends that procedural justice at once and instantly warrants non-interference in or non-scrutiny of the terms of the transactions.

MALAYSIA

Malaysia has no general theory of unconscionability to govern pre-contractual unfairness.[9] The approach of the issue of the pre-contractual justice hinges largely on the requirement of free consent.[10] Section 10 of the Contracts Act defines a contract as 'all agreements made with the free consent of parties competent to contract.'
Hence factors which fetter or vitiate such consent will produce a consent that is not free and render the resulting agreement voidable. Section 14 of the Act enumerates factors which can vitiate consent. These are:

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[8] The emergence of doctrine of estoppel, the doctrine of economic duress and the good faith requirements of the civil law jurisdictions with its 'culpa in contrahendo' principle all point to the concern for the protection of

[9] Except for the 'as yet' insignificant presumption of unconsionability in sub-section 3(a) of section 16. The cases so far reveal no real attempt or conscious effort to utilize this potentially versatile technique as a basis of a general theory of unfair pre-contractual practices.

[10] See the Privy Council decision in *Kanhaya Lal v. National Bank of India, Lted.* I.L.R. [1913] 40 Cal. 598 regarding section 15 of the Indian Contracts Act, which is in pari materia with section 15 of the Malaysian Contracts Act. Here it was said that coercion was concerned solely with the determination of whether the consent was free.

> Coercion, undue influence, fraud, misrepresentation and certain categories of mistake.

So far none of the decided cases concerning these vitiating factors has ever made any mention or reference to a general notion of contractual fairness. The law in Malaysia is still, it appears, preoccupied with the outmoded notion of freedom of contract though the march towards the notion of contractual justice is gaining increasing momentum in other countries.

The Contracts Act's obsession with free consent is deeply rooted in the assumption of the freedom of contract doctrine that every individual is equally capable of making a rational choice. Once that choice has been made, the law will not go behind it to enquire into the social and environmental setting that influence the choice and render its 'free' characteristic merely illusory.[11]

COERCION

Section 15 of the Act defines coercion as:

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

It will be obvious from the above definition that the notion of duress in Malaysia is broader than duress under the common law. Unlike common law duress which is confined to violence or threats of violence to the person and unlawful imprisonment, coercion under section 15 covers any act which is prohibited by the Penal Code. Hence duress of goods is covered by this section.

Two important queries may be made with respect to this definition:

1. Must the prohibited act or the threats thereof be directed at the plaintiff only? And

2. Must the act be the cause of the plaintiff entering the contract?

The last few words in the section may provide some indications; "with the intention of causing any person to enter into an agreement" can only mean that the physical violence or threats of it may be directed at any person so long as by so doing the intention of the person making the threats or using the violence is to cause the plaintiff to enter into a contract. It is not clear whether there should be any relationship between the person against whom the violence was administered or threats directed and the person who was caused

[11] See Hart, 'Law, Liberty and Morality.'

to enter into an agreement by reason of that violence or threats of violence. A narrow interpretation would suggest that there must be some special kind of relationship between the person violated or threatened and the person induced to enter into an agreement otherwise it will be difficult to prove that the party using the violence or threats would have the necessary intention to cause the plaintiff to enter into an agreement. The whole perspective of the section does not warrant this narrow interpretation. If A enters into a contract because C has committed violence or threatened to use violence against B, with whom A has no relationship whatsoever should not the contract be allowed to be avoided on ground of duress if it can be proved that for reason of pure humanity A wishes to avoid any harm befalling B? In *Wong Ah Fook v. State of Johor*[12] however, one of the arguments advanced by the plaintiff was that violence was threatened by the police to his licensees, that is, the non-residents who went to the plaintiffs place to gamble. M.H. Whitney J. commented on this argument:

> "But plaintiff never suggested that it was to save them (from violence) that he entered into the agreement and even if it had been so, his interest in them was too remote to support a plea of duress."[13]

This seems to suggest that between the person threatened or actually violated and the person induced, there must exist some relationship to give rise to an interest in the person induced to be so induced. This, therefore suggests a narrow interpretation of section 15.

The second contention is that if the coercion is employed with the intention of causing any person to enter into a contract, the agreement is voidable, irrespective of whether the duress is the sole, the main or even only one of the reasons for another to enter into an agreement. What needs to be proved is the presence of an intention on the part of the defendant to make the duress created by him to act as an inducement for the plaintiff to agree to enter into the agreement. Under the common law the element of intention is precluded from the notion of duress. Once violence or threats of physical violence has been used against the person of the plaintiff and such violence or threats of it has caused, though not the sole cause of, the plaintiffs' consent to contract, rescission is available. In Malaysia it appears that the element of intention must be proved and this may prove to be a formidable task in civil cases. However none of the cases on duress in Malaysia appears to have argued or raised this issue.

In an Indian case, *Kanhaya Lal v. National Bank of India, Ltd.*[14] the Privy Council stated that the definition of duress in section 15 of the Indian Contract Act, which is in pari materia with section 15 of the Malaysian Contracts Act, applies "solely to the consideration whether there has been free consent to an agreement so as to render it a contract under section 10 of the Contracts Act."

In *Wong Ah Fook v. The State of Johore,* the plaintiff had used this ground to seek relief.

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[12] [1937] MLJ Rep. 121

[13] Ibid., at pp. 133-134

[14] I.L.R. [1913] 40 Cl. 598.

Though the court did not make a direct attempt to clarify the meaning of coercion in the context of money paid under it, it nevertheless suggested that there could be no duress or coercion where the money was received in good faith. Would this suggest that coercion in section 73 may convey an entirely different notion from coercion as stipulated in section 15?

It is pertinent to note that section 73 is found in Chapter VI of the Contracts Act which is titled 'Of Certain Relations Resembling Those Created by Contract.' Hence the provisions of section 73 is meant to deal not with contracts proper but with relations resembling those created by contracts. As such the definition of coercion in section 15 which contains, inter alia, the expression 'with the intention of causing any person to enter into an agreement' cannot apply to coercion in section 73 which does not deal with contracts. This appears to be the *Kanhaya Lal v. National Bank of India, Ltd.* On the strength of that argument, their Lordship stated that coercion in section 73 is used "in its general and ordinary sense as an English word" and is not governed by the definition in section 15. It is respectfully submitted that if this opinion is correct several difficult implications can arise.

Firstly, in the above case, their Lordship had initially started to dispose of the argument that coercion must be 'with the intention of causing any person to enter into an agreement.' In attempting to show that this was not so, their Lordship referred to the term coercion appearing in section 72 (section 73 of Malaysian Contracts Act) and pointed out that to hold that the requirement of that intention is necessary would be inconsistent not only with the restricted object of section 15 but inconsistent with section 73 where no such intention is ever required. By so doing, their Lordship, by their arguments, implied that the requirement of that intention is precluded so as to make the meaning of coercion consistent in both sections! It is submitted that if coercion in section 73 is indeed different from coercion in section 15, there is really no need to explain section 15 with reference to section 73 or vice versa. It is in fact their very inconsistency that should lend weight to the proposition that in section 15, 'intention of causing any person to enter into agreement' must be a necessary element in the notion of duress as defined there while no such intention needs to be proved in cases of duress under section 73.

Secondly, to assign to a term of such crucial importance to the rights and liabilities of parties in a transaction 'a general and ordinary sense of an English word' is, respectfully not conducive to the full development of the notion. The exact scope and parameters of that term become so fluid as to deny certainty of application. Moreover an English word, as words in any other languages, represents the cultural expression of varied experiences of the English people. An act which an ordinary Englishman may deem duress in its ordinary sense may perfectly be culturally tolerable in India or Malaysia.[15]

However the Privy Council's opinion that section 15 coercion is different from coercion in section 73 may after all be a blessing of sort. By accepting this distinction, Malaysian

[15] However in *Chin Nam Bee Development Sdn. Bhd. V. Tai Kim Chwa & Ors.*, [1988] 2 M.L.J. 117, Eusoff Chin J., prudently avoided reference to 'ordinary English word.' His lordship instead explained that 'coercion' in the context of section 73 should be given 'its ordinary and general meaning.'

judges can proceed to formulate a separate, but complementary notion of coercion so as to embrace within it notions of inequality of bargaining power, economic duress and undue pressure.[16] These varied notions of unfairness in pre-contractual notions would otherwise be incapable of being received in Malaysia had the restrictive[17] meaning of coercion in section 15 been held applicable to coercion in section 73. Indeed, in an early case concerning the application of section 72 of the F.M.S. Contracts Enactment such a possibility had been hinted by the court. In *Naested v. State of Perak,*[18] the court in deciding on the applicability of section 72 of the Federated Malay States Enactment (which is in *pari materia* with section 73 of the Contracts Act) to a claim for the return of money paid to the state of Perak commented:

> "The parties were not on equal terms. On the one side was the plaintiff, a private individual, and his agents, a mercantile firm, on the other the Government of the State, which had the power of saying, 'If you do not pay you shall not have your grant'....."

On the basis of that inequality of bargaining position the court, in the case above, held that the payment by the plaintiff to the State was 'involuntary' and was obtained by coercion within the meaning of section 72.[19]

THAILAND

Thailand's approach to the question of contractual justice, both procedural and substantive is underlined by the general requirement of good faith enshrined in section 5, Title 1, Book I of the Thailand Civil and Commercial Code which reads:

> "Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith."

Though section 5 as worded may appear to exclude the duty to act in good faith in pre-contractual negotiations, where rights and duties have not been created yet, nevertheless section 6 of the TCCC provides that in the performance of any act a person is presumed to be acting in good faith, presumably allowing the presumption to be rebutted on evidence of bad faith by any person.

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[16] Notions of unfairness developed by the common law.

[17] Restrictive because it is confined to the commission or the threat to commit acts prohibited by the Penal Code and the unlawful detention or threats to unlawfully detain goods of another. Acts that are not per se prohibited by the Penal Code may nevertheless have a vitiating influence on the will or consent of another and such acts are not coercion under section 15 but may be construed as such under section 73. The courts in Malaysia therefore have a choice to declare such acts merely as coercion under section 73 or categorise them under the fashionable headings of economic duress and inequality of bargaining power.

[18] [1925] 5 F.M.S.L.R. 185

[19] See also *Yap Chee Meng v. Ajinomoto (M) Bhd.*, [1978] 2 M.L.J. 249.

Section 6, it is submitted is of general application and is not confined to the restrictive duty to act in good faith in section 5. Hence every juristic act is founded on the basis that the act is presumed to have been done in good faith.

Thailand adopts the civil law notion of contractual obligation as an obligation voluntarily assumed by the parties. Hence, the voluntariness of intention to be bound is crucial to the assumption of obligation under a contract. To establish voluntariness of intention, Thailand has taken the approach, quite similar to the approach of most jurisdictions, of identifying factors which can render the declaration of the will or intention defective.

DURESS

A declaration of intention procured by duress is voidable.[20] Duress, to be the basis of avoiding the contract must be such that it induces in the person affected by it a founded fear of injury to his person, his family or his property.[21] The act of duress may be one committed by one contracting party against another or exercised by a third party. In any event, duress vitiates the juristic act.[22] It is not duress, however, to threaten to exercise a right, and simple reverential fear is also not duress.[23] It is not certain however to what extent a person can take advantage of simple reverential fear without bordering on the sphere of duress. Or probably 'fear' is being used in the oriental sense of respect, in which event, by the usual standards of social and moral mores of Thai society, it is perfectly acceptable.[24] The Code provides that where an act is voidable, the party whose declaration of intention has been rendered defective by any act causing the voidability, has the choice of either to rescind the contract[25] or to ratify it.[26] However the option to rescind is confined to a period not later than one year from the time when ratification could have been made.[27]

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[20] Section 121

[21] Section 126

[22] Section 128

[23] Section 127

[24] In determining the effect of duress, mistake and fraud on a juristic act, several factors are bound to be considered namely the age, sex, position, health, temperament of the person aggrieved: section 129.

[25] Section 137. When deciding to rescind, the party must observe the provision of section 386 which requires the rescission to be made by a declaration of intention to the other party, meaning, notice of such intention *must* be given to the other party.

[26] Section 139

[27] Section 143

THE PHILIPPINES

One of the essentials of a valid contract is consent. The Civil Code of the Philippines stipulates that consent must not only be free and voluntary but also conscious and intelligent.[28] To ascertain the voluntariness of consent the Code has identified factors that can vitiate the consent, much in the same manner as other jurisdictions do. Article 1330 provides:

> "A contract where consent is given through mistake, violence, intimidation, undue influence or fraud is voidable."

Hence, Article 1330 enumerates the factors that can render a contract voidable. The presence of any of these factors vitiates consent and its voluntariness becomes suspect.

VIOLENCE AND INTIMIDATION

Coercion of the will, overbearing it by physical force or threats of physical violence has never been censured by most legal system. The free will is fundamental to the exercise of freedom of contract. Duress or coercion faces similar objections under the Code. Article 1335 provides that, **"there is violence when in order to wrest consent, serious or irresistible force is employed"** and there is 'intimidation when one of the contracting parties is compelled by a reasonable and well grounded fear of an imminent and grave evil upon his person or property, or upon the person or property of his spouse, descendants or ascendants, to give his consent.'

It is obvious that violence is defined to refer to actual employment of physical force which is both serious and irresistible.

Violence operates to overbear the will of the party subjected to it. This has been well stated and illustrated in the case of *Vales vs. Villa*[29] where it was said:

> "In this case, A is mere automaton and acts mechanically only. While his hand signs, the will which moves it is another's."

Unlike violence, which is actual and real, intimidation does not render the consent invalid unless it is grave and imminent and produces a reasonable apprehension on the part of the victim that is very likely to be carried out. And unlike violence, intimidation may be directed against not only the person and property of the other party but also extends to threats against the person or property of his spouses, descendants and ascendants. Moreover, the determination of the seriousness of intimidation or whether it can reasonably produce an apprehension of imminent evil in the minds of the other party must take into

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[28] Hector S. De Leon, 'The Law of Obligations and Contracts,' 1989, revised ed.p. 267.

[29] 35 Phil. 769

account the general circumstances and the specific factors of age, sex, and condition of the person.[30] Violence, to be the basis of avoiding the contract must be one directed against the other party only though it need not originate from a party to the contract.[31]

Quite similar to the provision in the Thailand Civil and Commercial Code and Article 1326 of the Indonesian KUHPer., is the provision that a contract procured by the use of mere 'reverential fear' shall not be viodable by that reason alone. However, in the case of *Sabalvaro v. Erlanger and Galinger*[32] the Philippines' court has shown a readiness to qualify and fix the parameters of this concept. In that case it was said that mere reverential fear which induces a contract is no ground for avoiding the contract unless the fear has deprived the party labouring under it of a reasonable freedom of choice such as to justify the inference that undue influence has been exercised. The narrowing down of the limits of 'reverential fear' proportionately widens the applicable limits of the doctrine of undue influence and undoubtedly encourages greater contractual justice in pre-contractual negotiations.

INDONESIA

The consensual nature of agreements under the Burgerlijk Wetboek or the KUHPer requires that consent to contract must be free and voluntary. Where consent has been vitiated by any factor or element, sufficient to deny the consent the characteristic of voluntariness, the ensuing agreement becomes voidable.[33] Factors that may vitiate consent and render it involuntary are: coercion, mistake and fraud.

COERCION

Coercion is not specifically defined in the Indonesian Burgerlijk Wetboek but the nature of coercion that can ground an action to avoid the agreement is reflected in Article 1324 which provides:

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

In deciding whether the act has caused such an apprehension, the age, sex and status of the persons concerned should be considered.[34]

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[30] Article 1335

[31] Article 1336

[32] 64 Phil. 588

[33] Subekti, 'Hukum Perjanjian,' Cetakan XI, 1987, p.23.

[34] Own translation. It will e for the court to decide whether a particular threat or intimidation amounts to coercion in law. See *Pemerintah Republik Indonesia v. P.T. Astra International Inc.*, Supreme Court decision 12th April 1972

Article 1325 then provides that the coercion need not be directed solely at the contracting party, any act or threats designed to procure consent from one party to the contract directed at the other party's spouse, ascendants or descendants will suffice. However, the actual text of Article 1325 when translated appears to give the impression that coercion against a party's spouse, ascendants or descendants makes the contract void not voidable. The words:

> "Paksaan mengakibatkan batalnya suatu persetujuan tidak saja apabila dilakukan ..." when translated read, "Coercion which nullifies an agreement occurs not only ..."

It is submitted that despite the wording of Article 1325 which appears to give the impression that an agreement procured by threats against a party's spouse, ascendants or descendants is void, the general notion of coercion is perceived only as a factor invalidating consent, not denying it absolutely and hence capable of being used as an excuse to avoid the agreement. This is apparent from Article 1323 which provides:

> "Coercion which is done against a party to a contract is a ground to invalidate the agreement ..."[35]

This view appears to be supported by the majority of textbook writers.[36] Article 1326 qualifies the meaning of coercion by providing that mere family or ancestral reverence is not coercion if not accompanied by force.

It would appear that from the four broad provisions in Article 132301326, the notion of coercion under the KUHPer is civil law in origin and resembles closely the meaning of coercion under the Thailand Civil and Commercial Code.[37] From the description of this notion under the KUHPer, coercion under Indonesian law is confined to the use of psychical pressure not physical force. Subekti argues that coercion as described in Articles 1323 to 1346 relates to coercion of the psychic not the employment of physical force.[38] This is consistent with the civil law notion of coercion as a factor vitiating the voluntariness of consent not one that denies consent entirely. Konrad Zweigert has commented that, "In all Continental legal systems the third 'defect of will' ..... is duress. Duress does not include physical compulsion, when, legally speaking, there is no declaration of will at all: duress is concerned only with psychical pressure."[39]

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[35] Owa translation

[36] Wirjono Prodjodikoro, 'Azas Azas Hukum Perjanjian,' 11th ed. P. 31. Subekti, op.cit., p.23

[37] See sections 126 and 127 of the TCCC.

[38] Subekti, op.cit., p. 23. However, R. Setiawan, in 'Pokok-pokok Hukum Perikatan,' Cet. Ke-4 1987, p. 61 mentions that coercion extends to the use of physical force. Setiawan is probably referring to the application of force in the use of reverential or family influence to make such influence an undue influence under Art. 1326.

[39] Konrad Zweigert and Hein Kotz, 'Introduction to Comparative Law,' Vol. II, Clarendon Press, Oxford, 1987, p.110

That the coercion must be a factor inducing the willingness of the other party to the contract is not explicitly spelt out by the Indonesian Civil Code. However, judicial decisions as well as general jurisprudence require the coercion to have the effect of inducing the other party's consent.[40] It is generally settled that the coercion may be exercised by a third party.[41]

CONCLUSION

The underlying theme of the law of contract in most jurisdictions has traditionally been the freedom of contract. Central to this theme of freedom of contract is the individual and the choice he has freely made. However it is increasingly being realised that the freedom is sometimes both illusory and fictional. The rise of standard form contracts or contracts of adhesion, the need to protect individual consumers from the bargaining strength of big corporations have contributed towards a new realisation that what is desirable is contractual justice, not freedom of contract per se. Contracts of adhesion which epitomise the freedom of contract in its most extreme form continue to pose the most difficult legal challenge to the quest for contractual justice. All the jurisdictions under study have gradually evolved both judicial and legislative techniques and devices to ensure contractual justice.

In all the jurisdictions under study, it is obvious that the requirement of free and voluntary consent has been used by the courts as an instrument to ensure contractual justice, at least at the pre-contractual and negotiating stages. Though they may differ in their perception of duress, the common objective is to determine whether according to accepted notions and value systems, a consent can be said to be free and voluntary. In this respect the notion of duress or coercion presents some significant differences. The civil law countries in ASEAN do not regard parental pressure or influence or even simple reverential influence as amounting to duress. However the courts in the Philippines have held that if the reverential fear was accompanied by actual threat or had substantially deprived a party of the freedom of choice, it could amount to undue influence. In Indonesia, reverential fear, respect and influence may amount to coercion if it is followed by actual threat of force. The Malaysian Contracts Act does not regard such reverential fear or respect as duress because section 15 of the Act requires the act to be penal in character. Nevertheless such reverential respect may be brought under the ambit of undue influence. Another significant difference in the meaning of duress between the two jurisdictions is that duress in Indonesia and Thailand is directed not against the person or goods of one contracting party but is psychical in nature. In Malaysia and the Philippines coercion is physical in nature. While the Civil Codes of Thailand, Indonesia and the Philippines explicitly provide the range of persons who can be subject to coercion, the Malaysian Contracts Act 1950 provides an even wider range of persons capable of being subjected to this coercion.

The explicit mention of the range of persons capable of being subject to coercion under the Civil Codes of Thailand, Indonesia and the Philippines helps avoid the need to determine

[40] See Wirjono, op.cit., p. 31

[41] Subekti p. 23, Wirjono p. 32, Setiawan p. 61.

whether between the person coerced to contract and the person subject to coercion there must exist some kind of relationship, because the range of persons mentioned in their civil codes made this implicit. However in the Philippines where coercion takes the form of actual violence, it is operative as a vitiating factor on consent only if the violence is directed against the person of the contracting party: but where coercion is in the form of intimidation them it extends to the person of the contracting party, to his spouse, ascendents and descendants. The Civil Codes of Thailand, Indonesia and the Philippines consider an act to be coercive only after having regard to the age, sex and condition of the person subjected to it. Such factors are not relevant under the Malaysian Contracts Act 1950 and to that extent and in that respect the Malaysian notion of coercion is rather strict: the mere commission of or the threat to commit any act forbidden by the Penal Code will suffice to make the act coercive irrespective of the age, sex and condition of the other party.

SENARAI SYARAHAN INAUGURAL

1. **Prof. Dr. Sulaiman M. Yassin**
   The Challenge to Communication Research in Extension
   22 Julai 1989

2. **Prof. Ir. Abang Abdullah Abang Ali**
   Indigenous Materials and Technology for Low Cost Housing
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