AVOIDING AN 'OLD FRIEND' – CAN PARTIES TO AN AGREEMENT *CONTRACT OUT* OF THE POSTAL RULE (S 4(2) OF THE CONTRACTS ACT 1950) IN MALAYSIA?

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Introduction

Consider this situation: Mr X sent Mr Y a letter (post) that included the following: 'I am willing to sell my car to you for RM50,000. If this is acceptable to you, please provide notification to me in writing by 30 June 2023'. The letter was received by Mr Y on 25 June 2023. On the same day (25 June), Mr Y posted a letter stating his unqualified acceptance of Mr X's offer. For the sake of argument, imagine that the letter would typically take three (3) days to arrive at Mr X's address, but due to a minor mix up at the post office, it arrived on 1 July 2023. If one were to ask whether there is a binding agreement, a line of argument would support an affirmative answer using what is popularly known as 'the postal rule'. Simply put, this rule states that acceptance in the situation had occurred when the letter was posted,[1] ie on 25 June, well before the deadline. However, it could also be argued that Mr X had waived the application of the postal rule through his instruction that *notice of the acceptance* must be given to him by the deadline, and since the letter had only been received by him on 1 July 2023, notice of the acceptance had come too late.[2] A question at the heart of the issue between X and Y is whether the postal rule can be waived under Malaysian contract law, bearing in mind that the law of contract comprises both caselaw and statute.

Today, the law of contract in Malaysia can be found in the ***Contracts Act 1950***[3] (hereinafter 'CA1950'), caselaw and other statutes where relevant (e.g., the ***Specific Relief Act 1950***[4] and the ***Civil Law Act 1956***[5]. A 'contract' can be defined as a legally binding agreement. In fact, s 2(h) of the CA1950 states that a contract is an agreement enforceable by law. It is axiomatic that for a contract to be established/formed, certain elements must be present[6] and amongst these are the requirements of a 'proposal' (also known popularly as an 'offer'[7]) and 'acceptance'. The definition of a 'proposal' can be found in s 2(a) of the CA1950, and for an 'acceptance', s 2(b); and when there is a proposal and its corresponding acceptance, a 'promise' is formed.[8] As a general principle, proposals and acceptances can take a variety of forms (see s 3 of the CA1950) and both proposals and acceptances need to be communicated. Section 4(1) of the CA1950 provides for when the communication of a proposal is complete, ie when the proposal comes to the knowledge of the person to whom

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[1] *Adams v Lindsell* (1818) 1 B & Ald 681; 106 ER 250; Contracts Act 1950, s 4(2).
[2] *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161; [1974] 1 WLR 155.
[3] Act 136
[4] Act 137.
[5] Act 67.
[6] *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1, [57].
[7] Dr Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (4th edn, LexisNexis 2015) 37.
[8] Contracts Act 1950, s 2(c).

the proposal is made. After the person to whom a proposal has been made ('the promisee') has had the proposal communicated to him or her, the promisee must then communicate their acceptance (if he or she chooses to accept) to the proposer/promisor.[9] For acceptances by letter/post, s 4(2) of the CA1950 is relevant and states:

> (2) The communication of an acceptance is complete —
>
> (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and
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> (b) as against the acceptor, when it comes to the knowledge of the proposer.

A cursory reading of s 4(2)(a) tells us that a postal acceptance is complete as against the proposer/offeror when the promisee/offeree/person to whom the proposal was made, posts the letter of acceptance, and the acceptance is complete against the promisee when the postal acceptance comes to the knowledge of the proposer.[10] Thus far, the principle seems clear, and if we return to the opening situation, it will seem that Mr Y would be justified in arguing that there is indeed a binding agreement (a contract) between the parties. However, a question that arises then is can the parties choose to side-step s 4(2)(a) of the CA1950 (which is what Mr X has attempted to do in his letter)? To answer this, allow a digression to a brief retelling of the background of the CA1950 and the relevant law in England.

The Contracts Act 1950 - a *very* brief background; and the English position on postal acceptances/the postal rule.

The CA1950, introduced in 1899, was based on English common law at that time[11] and models the ***Indian Contract Act 1872***, which is itself a codification of the prevailing English common law.[12] This would bring us to the position concerning postal acceptances in English law at the time, with the case of ***Adams v Lindsell***[13] being an apt starting point. The facts of ***Adams*** are well-known to students of English contract law: the defendant, on 2 September via a letter, sent an offer to sell wool to the plaintiff, and requested a reply 'in course of post'. Unfortunately, due to the defendant misdirecting the letter, it arrived late, i.e. on 5 September. The plaintiff immediately accepted the offer by letter, but by the time it reached the defendant (9 September), the defendant had already sold the wool to a third party (on 8 September). The plaintiff sued the defendant for breach of contract. The court held that the offer had been accepted on 5 September when the plaintiff sent the letter of acceptance, and so the defendant was in breach of contract. The postal rule was applied. According to the court, it would not do to insist that postal acceptance would only take effect upon arrival to the offeror; if this was the rule, the offeree/acceptor could not do anything until *he* had received confirmation from the *offeror*, and both sides would end up waiting for each other's confirmation of receipt. From this, it can be seen that the court's focus was on the 'practicalities of doing

[9] Syed Ahmad Alsagoff (n 7) 111.
[10] Ibid 121 (s 4(2) embodies the postal rule).
[11] Dato' Seri Visu Sinnadurai, *Law of Contract* (4th edn, LexisNexis 2011) 2.
[12] Ibid 12.
[13] (1818) 1 B & Ald 681; 106 ER 250.

business'.[14] It is submitted that the decision is a sensible one that has stood the test of time – it is still applicable in England today, even though the decision itself is over 200 years old (!) and modes of communication have grown in leaps and bounds through the years (instantaneous text messaging and video calls, anyone?). It is, of course, arguable that the decision is one that puts the offeror at a major disadvantage, but there are justifications for its use (as shall be discussed). In fact, the postal rule has even been held to apply where the letter of acceptance has been posted but never reaches the offeror.[15] The postal rule is also applicable to acceptance by telegram (*not* the messaging application, mind).

Are there good reasons for the postal rule's existence/continued existence? One reason would be related to business efficiency, i.e. in ***Adams***, the court was influenced by the practicalities of doing business; the court thought that in such situations, it would be better for business to give certainty to the offeree.[16] In addition, when the rule was established, post was the quickest form of communication for business purposes[17] and from ***Adams*** the justification of the rule stems from the fact of the meeting of the minds (*consensus ad idem*), i.e. the point where there was a meeting of the minds was when the letter of acceptance was sent.[18] Related to this is also the justification based on agency - the post office was treated as the offeror's agent when it received the offeree's acceptance letter,[19] and thus, there is valid acceptance when the letter is posted by the offeree. Yet another explanation for the rule is that 'the proposer who chose to start negotiations by post took the risk of delay and accidents in the post' and he could have avoided the postal rule by stating that he would not be bound until he has actual receipt of the acceptance.[20] It can be argued (especially in today's modern age with its advancements in methods of communication) that the postal rule is anachronistic and has outlived its purpose; after all, who uses the post today? In answer to that, according to figures found on the Pos Malaysia website,[21] over 1,000,000 letters are delivered per day; and in 2021, 364.96 million letters were delivered by Pos Malaysia.[22] With those figures in mind, clearly, there is still room for the postal rule's application for the foreseeable future.

There are certain limitations to the rule[23]: it applies only to acceptances (and not offers, revocations, etc.); it must be reasonable for the acceptance to be sent by post,[24] eg if the offeror lives next door and had given the offer orally it would not be reasonable to accept through a letter; where the parties are communicating over a distance;[25] and the rule can be

[14] Richard Stone and James Devenney, *The Modern Law of Contract* (14th edn, Routledge 2022) 64.
[15] *Household Fire and Carriage Accident Insurance v Grant* (1879) 4 Ex D 216; 41 LT 298.
[16] Stone and Devenney (n 14) 64.
[17] Delphine Defossez, 'Acceptance sent through email; is the postal rule applicable?' (Northumbria Research Link, 18 May 2020) <https://nrl.northumbria.ac.uk/id/eprint/43159/> accessed 10 June 2023.
[18] Ibid.
[19] *Household Fire and Carriage Accident Insurance v Grant* (1879) 4 Ex D 216; 41 LT 298. However, note that in *Henthorn v Fraser* [1892] 2 Ch 27, Kay LJ disagreed (at p 35) with this reason as '[t]he Post Office are only carriers between [the parties]' and are 'agents to convey the information, not to receive it.'
[20] Syed Ahmad Alsagoff (n 7) 123.
[21] 'Our Impact' (*Pos Malaysia*) <https://www.pos.com.my> accessed on 22 June 2023.
[22] 'Number of domestic letters delivered by Pos Malaysia Berhad in Malaysia from 2014 to 2021' (*Statista*, 11 October 2022) <https://www.statista.com/statistics/1052230/malaysia-domestic-letters-delivered-by-the-malaysian-post/#statisticContainer> accessed on 22 June 2023.
[23] Stone and Devenney (n 14) 65.
[24] *Henthorn v Fraser* [1892] 2 Ch 27
[25] Ibid 33.

set aside by the offeror/proposer.[26] In ***Holwell Securities Ltd v Hughes***, by a clause of an agreement, the defendant granted the plaintiff an option to purchase certain property. Another clause provided 'The said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof …'. The plaintiff, through its solicitors, gave notice in writing of the exercise of the option to the defendant but unfortunately the letter was never delivered to the defendant. Subsequently, the plaintiff sued for specific performance of the option agreement and argued that they had validly exercised the option by the posting of their letter. The Court of Appeal, however, held that the option had not been exercised and that the postal rule did not apply in this case because there was a requirement in the agreement that the option was to be exercised 'by notice in writing' ie the defendant had to be notified of the written document. This shows that, under the English position, the postal rule can be avoided by using any phrase to that effect so long as the offeror's intention is clear.[27]

With that cursory overview of the English position concerning the postal rule, the question remains: since the (postal) rule applies in Malaysia,[28] can it also be side-stepped? An alternative way to put it is: *can there be a contracting out of s 4(2) of the CA1950*? This shall now be examined.

Can parties contract out of the postal rule (s 4(2) CA1950)?

Before looking into the issue at hand, it might be helpful to briefly explain the principle of 'freedom of contract' as this essentially forms the basis of parties' efforts or attempts to 'contract out' of statutes.

The principle has as its foundation the free choice of contracting parties as to (i) the party/parties they wish to enter a contract with and (ii) the terms which govern the contract.[29] Under English common law, each contract is a bargain between parties and these parties are free to contract on whatever terms they think suitable; in fact, this approach has generally not been altered by Parliamentary intervention.[30] It is interesting to note that unlike common law, equity took a less relaxed approach to the principle, and made some contracts voidable if vitiating factors such as misrepresentation and undue influence was present.[31] In Malaysia, the learned judge, VC George J in ***Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd***[32] stated at p 617 of the report:

> It is here relevant to look at the jurisprudence relevant to contracts which is summarised succinctly [*sic*] in *Halsbury* Vol. 9 paras. 201 to 203. The primary justifications for the enforcement of a contractual promise against a promisor are economic (the economic necessity of compelling the observance of bargains) and moral (*the moral justification that the promise was freely given*). In the 19th century

[26] *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161; [1974] 1 WLR 155.
[27] Stone and Devenney (n 14) 66.
[28] *Ignatius v Bell* (1913) 2 FMSLR 115; Contracts Act 1950, s 4(2).
[29] Cheong May Fong, *Contract Law in Malaysia* (Sweet & Maxwell Asia, 2010) 211.
[30] Syed Ahmad Alsagoff (n 7) 18.
[31] Ibid
[32] [1992] 3 CLJ (Rep) 611.

these two ideas led the common law to the extreme view that there should be almost complete *freedom and sanctity of contract*. (Emphasis added.)

Unsurprisingly, due to such a principle, parties sometimes attempt to side-step or ignore certain statutory provisions they deem unsuitable or unfavourable to their (contractual) situation, ie to 'contract out' of such. A way to explain 'contracting out' would be where parties 'incorporate terms and conditions in the agreement … to evade application of express provisions of [the ***Contracts Act 1950***].'.[33] It has already been seen that in English contract law, parties are allowed to avoid the postal rule by, for example, making it clear in the agreement (see ***Holwell Securities Ltd v Hughes*** as discussed above). Can the same happen in Malaysia under the CA1950? This then begs the larger question: can parties choose to contract out of the CA1950 (in general)? If the answer is in the affirmative, then there is no reason why the postal rule cannot be avoided in Malaysia. However, an argument against contracting out is that it would render the contract illegal due to being contrary to public policy.

'Illegality' is a vitiating factor. Where a contract is either for an unlawful object or where the consideration is unlawful (or both), the contract will be void. Section 24 of the CA1950 makes this clear. The section states:

> **24. What considerations and objects are lawful, and what not.**
>
> The consideration or object of an agreement is lawful, unless—
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> a. it is forbidden by a law;
> b. it is of such a nature that, if permitted, it would defeat any law;
> c. it is fraudulent;
> d. it involves or implies injury to the person or property of another; or
> e. the court regards it as immoral, or *opposed to public policy*.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> (Emphasis added.)

Under s 24(e) of the CA1950, if the court regards a contract as being opposed to public policy, the consideration or object of the agreement is not lawful, and the contract will be void. Although the phrase 'public policy' is not an easy one to define, some guidance can be obtained from certain sources, for example, Dr Syed Ahmad Alsagoff writes that '[t]he principle of public policy is that no man can lawfully do that which has a tendency to be injurious to the public welfare.'[34] Its scope has also been discussed in ***Brett Andrew Macnamara v Kam Lee Kuan***,[35] a case which concerned a trust of a piece of property (a house). The plaintiff sought, inter alia, an order declaring that the defendant held the house on

[33] Yusfarizal Yussoff, 'Contracting Out Of Contracts Act 1950 General Concept Of Contracts Act 1950 ("CA 1950")' [2009] 7 CLJ xxxvii, xxxix.
[34] Syed Ahmad Alsagoff (n 7) 535.
[35] [2008] 2 MLJ 450.

trust for him in accordance with a trust deed, but the defendant raised several objections, including that the aforesaid trust deed was in contravention of s 24 of the CA1950 as it had the effect of circumventing the government's policy of restricting ownership of property by foreigners. Ultimately, the High Court found for the plaintiff and held that the execution of the trust deed was not illegal. On the s 24 CA1950 issue (public policy), the High Court asked itself what 'public policy' was, and in answer, it stated[36]:

> What is public policy? Pollock and Mulla on *Indian Contract and Specific Relief Act*, 10th Ed, describes 'public policy' in the following terms:
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> > Public Policy — The principle of public policy is this: ex dolo molo non oritur action. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare.

Having stated that, will an attempt to contract out of the provisions of a statute (specifically the CA1950) make a contract void for being illegal due to being contrary to public policy? It is possible to examine this in two ways, i.e. (i) *some* attempts to contract out will render the contract void for illegality due to being contrary to public policy, and (ii) contracting out of a statute, unless expressly prohibited, will not affect the contract's validity.

As an illustration of (i), there are certain sections in the CA1950 (these can be found in Part III, specifically ss 25 to 31) falling under the heading '*Void Agreements*', and it has been submitted that any attempt to contract out of these sections will render a contract void.[37] This is a sensible conclusion because if the effect of those sections is to make an agreement void (which it is), then any attempt to contract out of those same sections will be against public policy and be, likewise, void. There are also sections in the CA1950 that expressly permit contracting out, one such example being s 38(2) (see part in italics, emphasis added) which states:

> **38. Obligation of parties to contracts**
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> (1) The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.
>
> (2) Promises bind the representatives of the promisors in case of the death of the promisors before performance, *unless a contrary intention appears from the contract*.

Another example is s 44(1) CA1950 which has the phrase 'in the absence of express agreement to the contrary …'. Such sections are clear in their allowing for contracting out, but what about sections that are *silent*? This issue was explored in the Privy Council decision

[36] Ibid 463. Reference can also be made to *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253.
[37] Yusfarizal Yussoff (n 33) xliv.

of ***Ooi Boon Leong and Others v Citibank N.A.***.[38] In that case, the appellants argued, inter alia, that since there are sections in the CA1950 that expressly permitted contracting out (e.g. ss 38 and 44(1)), the implication is that where the CA1950 allows contracting out of sections, this will be expressly stated; because of this, it is also an implication that where a section does *not* expressly allow contracting out of that section, any attempt to do so is *unlawful*.[39] The Privy Council disagreed with the argument, stating:[40]

> Random recognition in certain sections of the Act of the fundamental principle that contracting parties are at liberty to express their intentions in their contracts as they please is quite insufficient to support the contrary proposition that the absence of such recognition in another section implies the absence of freedom to contract. If freedom to contract is to be curtailed in relation to a particular subject matter, their Lordships would expect the prohibition to be expressed in the statute, and not left by the legislature to be picked up by the reader as an implication based upon sections dealing with different subject matters. Furthermore, it may be noticed that when the Contracts Act intends to render an agreement void, it says so in express terms; see sections 25 to 31 under the cross-heading "Void Agreements", read with the definitions in section 2 (e) and (g).

From the above, it is patently clear that where a section is silent as to whether contracting out is permitted, it is allowed (at least as a general rule). Thus, if we were to pause here to consider the central question of this article, i.e. can the parties to an agreement contract out of s 4(2) CA1950 (the postal rule), the answer would be in the affirmative as s 4 (Illustrations included) is silent on the issue of contracting out. Section 4 CA1950 reads:

> **4. Communication, when complete.**
>
> (1) The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> (2) The communication of an acceptance is complete—
>
> (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and
>
> (b) as against the acceptor, when it comes to the knowledge of the proposer.
>
> (3) The communication of a revocation is complete—
>
> (a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and

[38] [1985] LRC (Comm) 336.
[39] Ibid 342.
[40] [1985] LRC (Comm) 336, 343.

(b) as against the person to whom it is made, when it comes to his knowledge.

Having addressed (i), attention will now be given to (ii). It is not always the case that contracting out of a statute or statutory provision will be allowed unless expressly prohibited. This would depend on the purpose of the legislation, whether it is to protect a certain class of persons.[41] An example can be seen in ***S.E.A Housing Corporation Sdn Bhd v Lee Poh Choo***.[42] The parties had an agreement where the respondent/plaintiff agreed to buy property (a shophouse) from the appellants/defendant. The agreement stated that the building on the property was to be completed by the appellants within 18 months from the date of the agreement, and that the appellants would be liable for liquidated damages at a certain rate per annum on the contract price for any delay. Unfortunately, the building was not completed until sometime later, but the appellants claimed the protection of clause 32 of the contract (which exempted them if the non-fulfilment of any terms was caused by circumstances beyond their control). One of the issues for the trial court to decide was whether the appellants could contract out of the ***Housing Developers (Control and Licensing) Act 1966*** (henceforth the '1966 Act') and the ***Housing Developers (Control and Licensing) Rules 1970*** (henceforth the '1970 Rules'). The Judicial Commissioner held, inter alia, that the appellants could not contract out of the statutory provisions of the 1970 Rules, and the appellants appealed. Amongst the issues that the Federal Court had to decide was whether clause 32 was valid, and on that issue held that only terms and conditions that were designed to comply with the requirements of the 1970 Rules may be inserted into agreements that came under the 1966 Act and 1970 Rules. Any terms/conditions which attempted to get round the 1966 Act and 1970 Rules and remove the protection afforded to home buyers could not be inserted. Clause 32 was such a term as it was inconsistent with Rule 12 of the 1970 Rules and thus was void.[43] Suffian LP, who delivered the judgment of the Federal Court, quoted Lord Hailsham in ***Johnson & Anor v Moreton***[44] (at page 34 of the MLJ report):

> With respect, the provisions in question here are similar to those in ***Johnson v Moreton***, a House of Lords decision, where at page 49 Lord Hailsham said:
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> > "The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line *a*).
> >
> > The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest." (line *d* onwards).

[41] Cheong May Fong (n 29) 333.
[42] [1982] 2 MLJ 31.
[43] Ibid 34.
[44] [1978] 3 All ER 37.

> It would appear that only "contracting out" in favour of the weaker party — i.e. the purchaser — might be countenanced by the courts.

Can it be argued that the purpose of s 4(2) of the CA1950 is to protect the offeree? If so, then any attempt to contract out of s 4(2) would be void as per ***S.E.A Housing Corporation Sdn Bhd***. The rationales or justifications for the postal rule (and thus also s 4(2)) have been discussed, and the most relevant one in this context is that of preferring the offeree due to business efficacy (***Adams v Lindsell***). This might be considered as a form of 'protection' afforded to the offeree as the law leans on his side (whether the letter is delivered or not), but to argue that the postal rule's *raison d'être* is to protect the offeree would be a stretch of the imagination - business efficacy and the protection of one party are as alike as chalk and cheese. Therefore, it is submitted that parties, should they choose to do so, can safely contract out of s 4(2) of the CA1950 as the section was not designed for anyone's protection.

Conclusion and possible reform

From the arguments (and conclusions) presented, it is well within Mr X's right to waive the application of s 4(2) of the CA1950. The postal rule, as represented in that section, can be set aside if the parties so intend it. This is something that those who contract at a distance *via post* should take into account as this rule could have unwanted and unfavourable implications to the unwary and/or ignorant. One way to move forward (if the postal rule is to be definitively and expressly preserved) would be an amendment to s 4(2) to *disallow* contracting out. On the other hand, words can also be added to the section to expressly *allow* the parties to set aside the rule, although arguably this effort would be superfluous due to the state of the law as it is. Having said that, an amendment either way would bring clarity to this area.