

Scrutinising the Borrowers' Protection Under the Moneylenders Act 1951

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ABSTRACT

One of the significant contributors to credit access in Malaysia is the moneylenders, currently known as community credit companies. The governing law, the Moneylenders Act 1951 (MLA), has undergone a series of amendments with the objective of improving the regulation of the moneylending business as well as enhancing borrowers' protection. However, rigorous analysis needs to be carried out to evaluate the extent of borrowers' protection under this law after these amendments. Thus, this research aims to explore and discuss the protection afforded to borrowers under the current Moneylenders Act 1951 (MLA) based on the international framework of financial consumer protection. This research adopted the doctrinal research approach as a systematic means of legal reasoning, analysing the legal propositions and instrumentalizations from both primary and secondary sources. The research employed content analysis approach whereby the relevant laws and regulations were rigorously scrutinised. The results of the study revealed that the legislation has provided various protections to borrowers, which have been classified into three primary categories: licensing regime, fair treatment, and transparency and disclosure. Findings from this study will assist in identifying the loopholes and weaknesses in providing comprehensive legal protection to the borrowers in Malaysia.

Contribution/Originality: This study is one of the very few studies which have investigated the protection of borrowers under the Moneylenders Act 1951, that has undergone several amendments since its enactment. A careful analysis has been made by referring to the international framework of financial consumer protection. The finding revealed three main categories of protection under the MLA namely licensing to ensure fit and proper industry player, fair business conduct and transparency and disclosure requirement.

1. Introduction

Credit is one of the essential features of modern capitalism, for it enables businesses to sell goods and services to consumers that their current income or wealth would not otherwise allow them to buy (Scott & Black, 2000, p. 229). The process of persuading people to incur debt and the arrangements for them to do so are as much a part of modern production as the making of the goods and the nurturing of wants (Galbraith, 1998). One of the significant contributors to credit access in Malaysia is the moneylenders, currently known as community credit companies. Moneylending is a straightforward loan transaction, either with or without security. The loan amount will be repaid with interest within the agreed timeframe. Moneylending remains informal financing to facilitate the needs of specific groups of communities who fall outside the eligible borrower requirements of the formal financing system.

The MLA regulates the business of moneylending which is normally carried out by credit companies licensed under the Moneylenders Act 1951 (MLA) (or being granted exemption) (Lim, 2003). MLA does not provide a definition for moneylending business. Rather, it defines moneylending agreement as an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender (Section 2 of the MLA). Presently, the Ministry of Housing and Local Government (MHLG) is in charge of regulating the business of moneylending in Malaysia.

About 3,900 community credit companies are providing loans to consumers in 2019 (Ramli, 2021). Meanwhile, the number of authorised moneylenders expanded to 4,425 companies engaging in lending activities in the year 2020 (Li & Paul Raj, 2020). Moreover, there were 1,981,913 consumers who borrowed from community credit companies from the year 2015 to 2019 as depicted in Table 1.

Table 1: The total number of borrowers of community credit companies from 2015-2019.

Year	Total Number of Borrowers						Total
	≤RM500	RM501- RM1,000	RM1,001- RM5,000	RM5,001- RM10,000	≥RM10,001	Not Stated	
2015	20,110	64,379	236,479	12,169	3,703	23,088	359,928
2016	20,660	62,541	273,489	13,184	3,276	10,140	383,290
2017	22,987	55,540	309,509	15,106	3,154	16,375	422,671
2018	22,693	48,001	300,992	14,279	2,766	11,880	400,611
2019	29,622	43,730	320,013	17,334	3,546	1,168	415,413
Total	116,072	274,191	1,440,482	72,072	16,445	62,651	1,981,913

Sources: Kementerian Perumahan dan Kerajaan Tempatan (2020)

Recently, the Ministry announced that the moneylending transaction would be conducted by an online platform where eight online licensed moneylenders had been issued (Li & Paul Raj, 2020). Among them are GHL Payments Sdn Bhd, BigPay Later Sdn Bhd, Axiata Digital Capital Sdn Bhd, Grabfin Operations (Malaysia) Sdn Bhd, Presto Finance Sdn Bhd, JCL Credit Leasing Sdn Bhd, Fortune Tree Capital Sdn Bhd, and Hoop Fintech Sdn Bhd.

2. Literature Review

Consumer protection has been significantly addressed by the Malaysian authorities ([World Bank Group, 2017](#)). Academic literature provides several views on the components of the financial consumer protection framework. [Ardic et al. \(2011\)](#) view that the elements of financial consumer protection framework generally include the introduction of greater transparency and awareness about the goods and services, promotion of competition in the marketplace, prevention of fraud, consumer education and elimination of unfair practices. They further assert that an effective consumer protection framework includes three complementary aspects. First, it includes laws and regulations governing relations between service providers and users and ensuring fairness, transparency and recourse rights. Second, it requires an effective enforcement mechanism including dispute resolution. Third, it includes promoting financial literacy and capability by helping users of financial services acquire the necessary knowledge and skills to manage their finances. According to the [Financial Stability Board \(2011\)](#), the most common elements of consumer finance protection framework include disclosure and transparency, financial education, fair treatment and dispute resolution mechanism. Some jurisdictions also aim to protect consumers from over-indebtedness by placing a floor on minimum household earnings to qualify for an unsecured loan, including credit cards.

Moreover, the [World Bank \(2008\)](#) emphasises that a well-designed consumer protection framework guarantees five principles namely to provide the financial consumers with:

- 1) Transparency through clear, material and comparable information about the prices, terms and conditions, and risks associated with financial products and services;
- 2) Free choice via fair, non-coercive and professional practices in the selling of financial products and services and collection of payments;
- 3) Redress through inexpensive, speedy and effective mechanisms to address complaints and resolve disputes;
- 4) Privacy through control of access to personal information; and
- 5) Access to financial education to enable consumers to empower themselves by improving their financial literacy and capability.

Myriad studies have been conducted on moneylending business in Malaysia. Previous research propounded that there are a few factors that the court will take into consideration in deciding whether a business falls within the purview of a moneylending business under the MLA and not a mere friendly loan, such as the nature of the relationship between the lender and borrower, the history of engagement in similar transactions, as well as the imposition of a rate of interest ([Kee, 2021](#)).

According to the MLA, it is clear that to be deemed a moneylender under the Act, a person must carry on, advertise, announce, or hold himself out as carrying on the business of lending money on an interest-bearing basis ([Kok, 2010](#)). Section 100A was inserted into the MLA in 2011, introducing the presumption of business of moneylending ([Kee, 2021](#)). [Kee \(2021\)](#) explained that section 100A of the MLA encapsulates that in the event that there is an allegation that such a person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved. He further added that following the amendment, judicial decisions seem to support this presumption, as depicted in the recent case where the judge explained that section 100A applies to civil proceedings. The

presumption of money lending business has been adopted and applied by the Court of Appeal in the case of *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1. [Kee \(2021\)](#) has highlighted that providing a single loan with an interest rate can be regarded as money lending activity and the burden of proof to prove the contrary will lie on the lender.

A comparative study between the moneylending law in Malaysia and the UK has been conducted by [Muhammad Arif \(2006\)](#). The said study highlighted, among others, the strengths and weaknesses of the moneylender's law in Malaysia in the light of the Moneylenders (Amendment) Act 2003 (Amendment Act). The same author also extensively examined the licensing regime under the MLA ([Muhammad Arif, 2009](#)). Nevertheless, the examination did not cover other areas of consumer protection such as fair treatment, transparency and disclosure.

[Boo \(2021\)](#) emphasised that the protection provided under the MLA enables the borrower to make an informed decision and to ensure that the borrower understands the terms of the repayment contract before taking the loan. However, the lack of awareness of the right and protection of borrowers is apparent and evident in Malaysia. The literature suggests that there is a lack of knowledge and awareness on the part of the borrower regarding legitimate interest rates, the terms of secured and unsecured loans, the mode of repayment, repayment schedule, repayment duration, and their rights to receive a copy of the attested contract and payment receipts ([Sandhu et al., 2020](#)). Due to borrowers' lack of self-protection and awareness, rogue lenders have been able to use non-transparent transactions to conceal certain conditions that entrap consumers. The similar study also reveals that licensed moneylenders are also unaware of the existence of the MLA ([Sandhu et al., 2021](#)). The lack of knowledge and information on the provisions of the MLA is worrying since it will affect the implementation of business conduct either in the stage of pre-contract, contract transaction, and post-contract transaction ([Sandhu et al., 2021](#)). The lack of understanding of moneylenders' duties and obligations has become the main impediment to authorities and policymakers in directing them to provide for borrowers' protection. Recently, the news highlighted that the authorities would impose a heavier repercussion on moneylenders who fail to conduct their business according to the law including the revocation of the licence ([The Vibes, 2021](#)).

Following the demand for credit facilities provided by community credit companies, many authors have pointed out that licensed moneylenders fail to maintain borrowers' trust and confidence and consequently portray a poor image of the moneylending industry. The activity of lending money with interest is frequently confused with loan sharking ([Hamid, 2016](#)). Undeniably, this ambiguity persists throughout society, tarnishing the reputation of the industry and, as such, affecting the effectiveness of the current structure in order to protect the borrower ([Teo, 2013](#)).

Even though the MLA had emphasised the obligation of the moneylenders to conduct their business in an ethical manner ([Sandhu et al., 2021](#)), the recent news depicted a contrary note on this matter. There have been many instances where the licensed moneylenders betrayed the borrowers' trust and reflected poorly on the industry ([Sandhu et al., 2021](#)). Although the discussions on regulated moneylenders' activities have been extensively covered in the area of consumer credit, most of the studies discussed the distinction between a friendly loan and moneylending activities under the MLA, the Amendment Act 2003, the licensing regime and the lack of awareness of the provisions of the MLA either on the part of the borrowers or moneylenders themselves. The discussions on the rights and

protection of borrowers under the MLA were not in-depth and more rigorous research needs to be conducted to cover this area.

3. Methodology

This research adopted the doctrinal research approach as systematic means of legal reasoning, analysing the legal propositions and instrumentalizations from both primary and secondary sources. The primary sources were the MLA, the Amendment Act 2003, the Moneylenders (Amendment) Act 2011 (Amendment Act 2011), the Moneylenders (Control and Licensing) Regulations 2003 (MCLR) and the Moneylenders (Compounding of Offences) Regulations 2003 (MCOR). Furthermore, the secondary sources were also evaluated ranging from journal articles, books and case commentaries. The data were later analysed using doctrinal and content analysis approaches on the relevant laws and regulations.

4. Result & Discussion

This section provides the result of analysis of laws, regulations and applicable secondary sources of law with relevant discussion.

4.1 Overview of the Laws Governing Moneylending in Malaysia

Historically, the business of moneylending can be said to have begun in Malaysia with the arrival of a banking sub-caste of the Chettiar community known as Nattukotai Chettiars in the middle of the nineteenth century set up their business in Penang, Malacca and Singapore (Singh, 2003). The moneylending activities prospered especially when Chinese traders turned to Chettiars for quick credit to help in their business (Singh, 2003). Moneylending became a choice as it involved lesser formalities, quick and hassle-free financing with minimal documentation as opposed to banks (Singh, 2003). If the loan was small, a signature on an "I Owe You" (IOU) document was acceptable while a larger amount required title deeds as collateral (Singh, 2003).

Prior to the introduction of a law to govern moneylending activities, the conduct of moneylenders was unregulated, and parties were free to decide the rate of interest while the repayment terms were biased heavily against the borrowers. However, the need to regulate the oppressive conduct of moneylenders saw the introduction of the Usurious Loans Enactment (Chapter 63 No 12 of 1919), which was then repealed and replaced by the Moneylenders Ordinance 1951 (MLO) (The Moneylenders Ordinance No 42 of 1951); modelled after the UK Moneylenders Acts 1900-1927. MLO was further revised in 1989 by the MLA.

In rectifying the weaknesses of the MLA, especially in respect of the protection of the consumer, the Amendment Act 2003 has been passed. Additionally, there are also two regulations enacted in the same year; the MCLR and the MCOR. However, the MLA only applies to the states in West Malaysia (section 1 (2) of the MLA). In 2011, another amendment was made to the MLA via Amendment Act 2011 whereby the MLA is equally applicable to Sabah, Sarawak and Federal Territory of Labuan. Thus, currently there is uniformity in the application of moneylending laws throughout Malaysia. After the 2003 amendment, the purpose of the MLA includes not only the regulation and control of the business of moneylending but also the protection of borrowers of the monies lent in the course of the money lending business.

4.2. Borrowers' Protection Under the Moneylenders Act 1951

This section discusses the protection afforded to the borrowers under the MLA. The protections are divided into three primary categories: licensing regime, fair treatment, as well as transparency and disclosure.

4.2.1. Licensing Regime

The licensing regime ensures that only qualified, ethical and compliant industry players are allowed to be in the market (Borrie, 1982). It helps the regulators in identifying competent market player and simultaneously instil confidence in the consumers while dealing with credit providers (Muhammad Arif, 2009). Furthermore, revocation of the licence serves as an effective mechanism to ensure compliance since being kicked out of the industry is more severe than a rejection of the application at the outset (Goode, 1989).

Registrar of Moneylenders (ROM), Deputy Registrars of Moneylenders and Inspectors of Moneylenders are the key personnel in the current licensing regime. The Amendment Act 2003 has introduced a centralised system that grants the sole right to issue licences to moneylenders in the MHLG, as opposed to the preceding decentralised system. Currently, processing the application for moneylending licences is no longer the responsibility of the local authorities. Apparently, this new system may have addressed the issue of administrative discrepancy under the old moneylender's law. This discrepancy arose because some states had no written rules or guidance on the licence application. In contrast, others like the state of Perak had laid down in detail the application process, which included a written examination and interview, as well as the grant of a licence. Thus, licences were easier to obtain in some states as compared to others (Sulaiman, 1997). The licensing regime fundamentally consists of the issuance of licence, the requirement of fit and proper person, renewal, suspension and revocation of licences and the requirement to display the licence .

4.2.1.1. Issuance of Licence

Section 5 of the MLA prescribes that acquiring a valid licence is compulsory before operating any moneylending business. Nevertheless, one licence only applies to one business premise (Section 6 of the MLA). A separate licence must therefore be obtained for every address at which the moneylender carries on a business (Regulation 3(5) of the MCLR). If a person is convicted of running an unlicensed moneylending business, he is liable to be fined between RM20,000 and RM100,000 or to imprisonment for a term not exceeding five years or both; while a subsequent offence is liable to whipping as well (Section 5(2) of the MLA).

In issuing a licence, ROM may stipulate certain conditions as he thinks fit and, at any time during the duration of the licence, add to, revoke or vary any of the conditions (Section 5D of the MLA). Any person who fails to comply with any of the licence conditions commits an offence and shall, on conviction, be liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding twelve months or to both. If granted, the licence shall be valid for a period not exceeding two years (Section 5C of the MLA) and renewable (Section 5C of the MLA). Detail procedural requirements for licensing are specified in the MCLR.

4.2.1.2. *Fit and Proper Person*

The “fit and proper person” test is undeniably significant in determining whether or not an applicant should be given a moneylending licence. In determining the fitness or otherwise of the moneylender prior to issuing a licence, several provisions have been provided in the MLA and MCLR. The applicant must produce a statutory declaration as specified in Schedule C of the MCLR and a corroboration letter on his suitability, signed by a police officer (Regulation 4 of the MCLR). The statutory declaration certifies, inter alia, that the applicant has attained the age of majority, is not an undischarged bankrupt, and has never been associated with a moneylending business which has been wound up or dissolved by the court.

Apart from the above, ROM is entitled to request, in writing, additional documents or information from the applicant before deciding on the appropriateness of the applicant for the licence (Section 5A(2) of the MLA). If no such prerequisite is supplied, the application is deemed to have been withdrawn (Section 5A(3) of the MLA). In order to ensure that true statements, information or documents are supplied by the applicant, the law has strictly prohibited the following acts:-

1. Knowingly make a false or misleading statement for the purpose of issuance of the licence
2. Knowingly furnish false or misleading particulars or documents for the purpose of issuance of the licence
3. Make a false or misleading entry in a register, record, return, account or any other document required to be kept, maintained or furnished under the MLA
4. Forge, or has in his possession with intent to deceive a document that so closely resembles a licence, record, return, account or other documents required to be kept, maintained or furnished under the MLA
5. Alter any entry made in a register, licence, record, return, account or any other document that is required to be kept, maintained or furnished under the MLA
6. Prepare, maintain or authorize the preparation or maintenance of false records, returns, accounts or any other document that is required to be kept, maintained or furnished under the MLA Falsify or authorize the falsification of records, returns, accounts or any other document that is required to be kept, maintained or furnished under the MLA.

Furthermore, the ROM is empowered to reject the application due to several reasons listed in section 9 of the MLA, such as conviction of an offence involving fraud or dishonesty or an offence under Chapter XVI or XVII of the Penal Code, application by undischarged bankrupt, an applicant has been sentenced to a fine exceeding ten thousand ringgit or to imprisonment (other than imprisonment in default of a fine not exceeding ten thousand ringgit) due to a conviction for an offence under the MLA or where the applicant is responsible for the management of any pawn broking business, the licence for that business has been revoked and where satisfactory evidence has been produced that a person is of bad character or is not a fit and proper person to hold a licence. Section 9(2) provides that any person aggrieved by the refusal of the Registrar to issue a licence may appeal to the Minister in the prescribed manner, and the decision of the Minister shall be final. These circumstances extend to an individual applicant, director, president, vice-president, secretary, treasurer, partner or member, or any person responsible for the management of the applicant's business where the applicant is a company, a society or a firm respectively. Another factor is whether the person responsible for the management

of the applicant's business had been a company director, president, vice-president, secretary of a society or a partner of a firm which has been wound up or dissolved by a court. These conditions are substantially incorporated in the statutory declaration required to be submitted during the licence application.

Besides those conditions under section 9 of the MLA, the Ministry provides administrative guidelines that require a reference letter to prove “good character”, a confidential report from the police to establish that the applicant is free from criminal record, and an interview to assess the applicant’s understanding of the moneylender’s law. The guidelines also prescribe that the Registrar shall not grant a licence unless the applicant has an issued and paid-up capital in cash of not less than RM1, 000 000 for a new application and RM500,000 profit for three consecutive years to renew a licence (Bahagian Kawalan Kredit Komuniti, 2019). This requirement mainly aims to ensure that moneylender is financially competent to carry out money lending business. In addition, in case of renewal of licence, it is also an offence to submit any misleading statement, false representation, or description of the particulars or information to ROM) Regulation 5(4) of the MLCR).

4.2.1.3. Revocation or Suspension of Licence

Moreover, ROM is entitled to revoke or suspend the licence if he views that a moneylender has been carrying on his moneylending business in a manner detrimental to the interest of a borrower or to any member of the public (Section 9A of the MLA). Other factors are contravention of any provision of the Act or relevant regulation made thereunder; failure to comply with any of the conditions of the licence or a moneylender has been licensed as a result of a fraud or a mistake or misrepresentation in any material particular.

4.2.1.4. Requirement to Display a Licence

The moneylender is also required to display a licence in a conspicuous part of the premises where the moneylending business is carried out. Failure to comply with the said requirement is an offence and shall be liable to a fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding six months or to both pursuant to Section 5F of the MLA. Furthermore, it is an offence for a moneylender to alter, tamper with, deface or mutilate the licence required to be displayed. Further, exhibiting a forged, imitated, or altered licence, as well as an imitation of the licence, is equally prohibited (Section 29 of MLA).

Additionally, section 6 provides that the licence must be in the moneylender’s “true name” and specify an “authorised address” at which he must conduct his business. A “true name” is the name acquired at birth. For an individual, the name stated in the identification card (or the name registered on incorporation/registration in the case of a company or firm (Singh, 1980). An “authorised address” is the address stated in the licence at which the moneylender is authorised to carry on business. Whether or not a moneylender carries on business under the authorised name also depends on the facts in each case. An immaterial difference or slight discrepancy in the name might not infringe the statutory provision, if it is not such as to mislead. For example, in the leading case of *Menaka v Ng Siew San* ([1977] 1 MLJ 91, PC), the appellant was a registered moneylender carrying on business under the name of AR. PR. M. Firm. Through her attorney, she lent some money to the respondent under her own name on the security of a charge on certain lands

belonging to the respondent. When the respondent failed to pay the principal sum and interest, the appellant filed an order for the sale of land. The respondent objected to the application on the basis that the appellant had been carrying on a money lending business in a name other than her authorised name and had taken security for money other than in the authorised name, which are offences under sections 8(b) and (c) of the MLA. The Privy Council gave judgment in favour of the respondent and held that the contract and the security had contravened section 8 of the MLA and therefore were unenforceable.

On the other hand, in the case of *Chai Sau Yin v Kok Seng Fatt* [1966] 2 MLJ 54, where the moneylender's actual name was Kok Seng Fatt and he was one of a number of parties carrying on business under the authorised name of Yoong Shing Finance Company, it was inter alia held by the Federal Court that he complied with the Ordinance when he was described in the Memorandum of Loan and the charge as "Kok Seng Fatt of Yoong Shing Finance Company". A moneylender who applies for a licence in a name other than the true name is liable to criminal sanctions based on Section 8(d) of the MLA.

4.2.2. Fair Treatment Provisions

This section discusses several provisions concerning fair treatment of borrowers or prospective borrowers dealing with moneylenders.

4.2.2.1. Maximum Rate of Interest

One way to prevent interest rate manipulation by the moneylender is via ceiling interest rate whereby the MLA specifies that the rate for a secured loan shall not exceed 12% per annum while for an unsecured loan, it must not be more than 18% per annum. The rate must not exceed the prescribed rate otherwise the agreement will be void and unenforceable (Section 17A(1) of the MLA). It should be noted as well that the amount of interest must not exceed the amount of principal. Non-compliance with these provisions entails criminal sanction whereby the punishments are fine not exceeding RM20000 or imprisonment not exceeding eighteen months or both.

Another important aspect related to interest is the prohibition of compound interest which has the effect of making the agreement illegal if charged (section 17(1) of the MLA). The MLA further stipulates that the interest charged must not be excessive and 'harsh and unconscionable or substantially unfair' (section 21(2) of the MLA). Next is the permissibility to charge default interest calculated at the rate of eight per centum per annum from day to day of default in payment of the sum or instalment until that sum or instalment is paid. Finally, if the moneylender defaults in the supply of a copy of the accounts statement requested by the borrower, the moneylender cannot levy interest during the period of the default (section 19(3) of the MLA).

4.2.2.2. Prohibition of Inducement to Borrow

To protect the prospective borrowers from being unfairly induced to borrow money, section 29 of the MLA prescribes that it is an offence to fraudulently induce or attempts to induce any person to borrow money by using false, misleading or deceptive statement, representation or promise or, by any dishonest concealment of material facts. This provision applies to an individual moneylender or his employee, a moneylending company, including the director, general manager, manager or officer of the company, a moneylending society, including the president, vice-president, secretary, treasurer or

other officer of a society, and a moneylending firm, including the partner or member, or other officer. Additionally, the MLA also prohibits the employment of an agent or canvasser for the purpose of inviting person to borrow money from moneylenders (section 27A(1) of the MLA). Acting as an agent or canvasser inconsideration of commission is also an offence (section 27A(2) of the MLA).

4.2.2.3. Transactions at the Registered Business Premise

It is viewed that if the transaction is conducted at the financial consumer's home, he will face difficulty to get rid from the moneylender and consequently pressurised to accept the offer from the latter. On the other hand, the situation may be different if the transaction is conducted at the moneylender's office since not only the financial consumer is mentally prepared to get the loan but he can freely walk away if he later on changes his mind. Section 5F (1) of the MLA requires the moneylender to conduct his moneylending business on his premises. This is supported by regulation 15 of the MCLR, which states that every moneylending transaction shall be made by a moneylender and a borrower at the registered address of the moneylender.

Although the MLA and the MCLR do not directly state that debt collection must be effected at the moneylenders' premises, it seems that this is the interpretation of the MHLG (Muhammad Arif, 2009). Therefore, it appears that the law not only confines a moneylending transaction, i.e. the making of the agreement and release of the principal loan, to the moneylender's premises but also seems to require repayment of the loan and debt-collection to be effected at his office. Non-compliance will render the offending moneylender liable to criminal prosecution but will not invalidate the moneylending transaction because regulation 15 of the MCLR does not provide such invalidating provisions.

4.2.2.4. Fairness of Contractual Terms

In ensuring fairness of contractual terms, the MLA requires that moneylending agreement must be in accordance with the prescribed form namely Schedule J for moneylending transaction without security and Schedule K in respect of the moneylending transaction with security (Section 10P (1) of the MLA and Regulation 10 of the MCLR). Non-compliance will render a punishment of a fine between RM10000 to RM50000 or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence additional punishment of whipping will be imposed (Section 10P (2) of the MLA).

It is suggested that the standard form agreement intends to ensure the terms of the agreement is fair to both parties and not one-sided. Therefore, the MLA specifies several circumstances which will it render void and unenforceable: -

1. The agreement is not in accordance with the prescribed forms (Section 10P(3) of the MLA)
2. Modification or change of the terms and conditions without prior written consent of the Registrar (Regulation 10(1) and Regulation 11 of the MCLR)
3. Moneylending agreement by an unlicensed moneylender (Section 15 of the MLA)
4. Failure to deliver a copy of a duly signed and a duly stamped moneylending agreement to the borrower before the money is lent (Section 16(1) of the MLA)
5. The interest charged is more than the rate prescribed for both secured and unsecured (Section 17A of the MLA)

6. Moneylending agreement which is not attested in accordance with section 27 of the MLA.

Some of the pertinent terms of the contract are the charging of only simple interest in the event of default and the right of moneylenders to terminate the agreement in two circumstances namely due borrower's failure to repay any instalment amount and interest in excess of 28 days after its due date and secondly when the individual borrower is declared bankrupt or enters into composition or arrangement with his creditors. Concerning secured loans, another essential provision is related to security whereby the agreement stipulates that the moneylender is required to exercise the same care and diligence over the security in his custody as would a prudent owner exercise over his own property. His responsibility extends to any loss or damage caused by fire, theft, negligence or otherwise that occurs during the tenure of security. In cases where any security is damaged or destroyed by fire, the value of the security shall, for the purpose of compensation to the borrower, be assumed to be one quarter more than the value of the security so lodged. The agreement also places a duty on the part of the moneylender not to encumber the security for whatever purpose.

4.2.2.5. Prohibition on Charging Extra Fees and Expenses

Section 23 of the MLA and Regulation 10(4) of the MCLR provides that the moneylender shall not charge extra expenses on the borrower except as prescribed in the moneylending agreement. According to the stipulated moneylending agreement, the borrower shall bear all stamp duties and attestation fees incurred in connection with the agreement.

4.2.2.6. Right to Request a Statement of Account and Document Related to Loan

Sometimes, the borrower may have lost the original copy of the moneylending agreement and was unaware of the actual standing of his account (section 19(1) of the MLA). The said document and information are crucial, especially when the legal proceeding is initiated against him. In this regard, the borrower is entitled to get updated information on his account status by requesting the same from the moneylenders at any time during the continuance of the agreement.

4.2.2.7. Prohibition on Harassment or Intimidation of Borrower

Section 29B highlights a vital feature of consumer protection in respect of debt collection by prohibiting harassment or intimidation of the borrower, his family or other person related to the borrower. The prohibition is extended to the agent of moneylenders as well at the residence or place of business or employment of the borrower or any place at which the borrower receives his wages or any other sum periodically due to him. The MLA provides a detailed explanation of the meaning of the doing of an act of harassment, including the making of statements, sounds or gestures, or exhibiting of any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such person or intruding upon the privacy of such person. Furthermore, the term harassment has been defined to include aggravation, annoyance, badgering, bedeviling, bother, hassle, irritation, molestation, nuisance, persecution, pestering, torment, trouble or vexation in circumstances in which a reasonable person, having regard to all, or any of the circumstances would be offended, humiliated or intimidated while the term

intimidation has similar meaning with criminal intimidation in section 503 of the Penal Code.

If the harassment is conducted by the moneylenders themselves, the punishment is a fine not exceeding RM100000 or to imprisonment for a term not exceeding fifteen months or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment. The punishment for cases involving an agent of moneylenders is a fine not exceeding RM20000 or imprisonment for a term not exceeding twelve months or both. If, in addition to harassment, the moneylender or his agent also causes hurt, he shall be liable to imprisonment for a term not exceeding two years and whipping.

4.2.2.8. Reopening Harsh and Unconscionable Transactions

Where there is evidence that satisfies the Court that the interest charged in respect of the sum lent is excessive and that the transaction is harsh and unconscionable or substantially unfair, the Court shall reopen the transaction (Section 21(2) of the MLA). For this section, the interest charged in respect of money lent by a moneylender is excessive when the interest rate exceeds the maximum interest permitted under the MLA (Section 21(8) of the MLA). Whether the transaction is harsh and unconscionable or substantially unfair are matters for Court to decide.

4.2.3 Transparency and Disclosure

This section elaborates the relevant provisions on transparency and disclosure.

4.2.3.1. Transparency and Disclosure in Moneylending Advertisement

One of the tools adopted to ensure consumers obtain relevant information prior to committing into moneylending transaction is through advertisement permit regime. Section 11 of the MLA and Regulation 6 of the MCLR require the moneylender to apply for a permit for the issuance or publication of an advertisement. Failure to comply with this requirement is an offence and shall be liable to a fine not exceeding RM10000 or imprisonment for a term not exceeding twelve months or both. Permit is required in respect of various modes of advertisement including brochures, newspapers, signboards, radio, television, compact disc-video, cinema and internet. Each advertisement must be submitted to the Registrar to be individually vetted to filter vague or misleading advertisement. Following are the particulars which must be shown in the advertisements:

- (a) the licence number of the moneylender and the validity period;
- (b) the advertisement permit number and the validity period;
- (c) the name, address and telephone number of the licensed moneylender; and
- (d) the interest rate offered.

If the terms stated in the advertisement differ from the actual agreement, the terms shall to the extent of the non-conformity, be rendered void (Regulation 12 of the MCLR). Moneylender must confirm that the information in the advertisement is not misleading or false as this is prohibited under the MCLR. The validity period of an approved advertisement permit shall not exceed the validity period of a licence. Modification to the content of the advertisement can only be made with the approval of the Registrar.

4.2.3.2. Attestation of Moneylending Agreement and Explanation of Terms

In confirming the borrowers understand the terms and conditions of the moneylending agreement, the MLA makes it compulsory for the agreement to be attested by qualified legal professionals such as an Advocate and Solicitor of the High Court, an officer of the Judicial and Legal Service, a Commissioner for Oaths, District Officer, Justice of the Peace or such other person as may be appointed by the Minister generally for such purpose (Section 27(1) of the MLA). It is the responsibility of the attestor to explain the terms of the moneylending agreement to the borrower, and he shall certify on the agreement that the borrower appears to understand the meaning of the terms of the agreement.

5. Conclusion

The conduct of moneylenders in money lending activities is highly regulated under the MLA, and this is significantly correlated with the protection of borrowers. It is submitted that the amendments have significantly improved the level of protection to the borrowers through a comprehensive licensing regime whereby only fit and proper individuals can run the business. Likewise, a number of provisions have been incorporated to ensure fair treatment prior to entering the transaction, the content of the agreement itself and after the transaction has been completed. Requirement of transparency and disclosure help consumers to have a detail understanding on the terms and conditions of the agreement even during the advertisement stage. Arguably, the presence of comprehensive law alone is inadequate. It must be accompanied with stringent enforcement to ensure compliance by the industry players. Also, awareness on the part of the consumers is unquestionably crucial to enable self-protection rather than relying totally on law, regulation and the regulator. Previous discussion also discloses that other elements of consumer protection namely responsible lending to avoid over indebtedness, affordable and flexible redress mechanism and financial education for consumer empowerment are regrettably not available under the MLA. It is suggested that these elements need to be incorporated into the MLA to allow all-embracing protection. This research has shed light on the protection of borrowers dealing with community credit companies or moneylenders. However, more empirical research on the implementation of money lending activities is called for. It is hoped that the outcome of the research offers a significant impact on the development of improved mechanisms in strengthening the protection of borrowers.

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