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## Empowering Malaysian Consumers through Legislation: Does 'small print' in contract influence consumer behaviour and affect the quality of life?

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### Abstract

Consumers faced with contract do not know what 'small print' contains or understand its effect. Exclusion clauses may deprive a consumer of specific rights in which he deserves protection. The Consumer Protection Act 1999 in Malaysia, allows the consumers to identify between procedural unfairness and substantive unfairness. However, Consumer Protection Act 1999 does not adequately protect consumer. By applying the content analysis research method, this paper reviews the legislative and judicial intervention on unfair terms in consumer contracts. This paper advocates that Malaysia should establish a specific framework on consumer law protection against unfair terms in consumer contracts.

**Keywords:** Exclusion clauses; unfair terms; consumer contracts; judicial-legislative intervention

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### 1.0 Introduction

The approach of paternalistic seems to be essential in protecting consumers, especially with the vast awareness of consumerism at the global scale in this new millennium, along with interventions of legislative and judicial aspects. This revolution in consumerism seems to dismiss the concept of laissez-faire that highlights freedom of contract in the era when consumer rights had been absent. The very notion of consumerism is born mainly because of increasing conceptions that were against the idea of laissez-faire. Freedom of contract is applied by those unethical to manipulate consumers by embedding an exclusion clause. The disparity in knowledge between consumers and traders has left consumers with insufficient information to ensure a fair and balanced contract. Thus, the government devises consumer protection laws in order to ascertain laws linked to consumer protection blanket both public and private laws. (Naemah, 2012)

In reality, most exclusion clauses have been embedded by traders in consumer contracts for exemption of liability at contract breaches. Hence, the paper aims to elaborate on the real implications of the consumers within the modern economy are faced with unequal bargaining power, thus demanding protection for those vulnerable and weak groups (Sinnadurai, 1978). Thus, this effort is deemed essential in safeguarding a fair dealing between consumers and traders, especially in addressing exemption clauses that put consumers on the losing end. This is an essential feature of legislation of consumer protection is an essential equality in bargaining power between consumers and traders by (i) correcting the imbalance in economic power between individual buyer and traders for

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services and goods; (ii) reducing incidences of losses and deficits related to purchase by protecting consumers from unfair trade practices. (Rachagan, 2007).

## 2.0 Literature Review

One of the most popular unfair terms in Malaysia has taken the form of an exclusion clause. Exclusion or exemption clause is a term of the contract which excludes or restricts one party's liability which may arise should that party be in breach of the contract. In the 19th century, the doctrine of freedom of contract, the use of such clauses was seen as a legitimate exercise of bargaining power. This situation escalated as traders begun to deploy standard form contracts with ample exclusion clauses (Sakina, 2011). Beatson (2002) opined that standard form contract upon which the exclusion clauses usually are inserted has few advantages and disadvantages, outlined as follows:

- i. It can be used many times;
- ii. A large number of persons can use it;
- iii. It is time-saving and therefore a quick method of making contracts; and
- iv. It may establish procedures for the making of claims.

Whereas the disadvantages in using a standard form of exclusion clauses are:

- i. consumer has no alternative to choose his contractual terms;
- ii. Instead of becoming a negotiated contract, the contract becomes a contract of adhesion;
- iii. Moreover, consumers have neither the time nor the energy nor the knowledge to scrutinize the standard form of the exclusion clause.

Karl Llewellyn (1939) noted the importance of protecting the weaker party's reasonable expectations when interpreting standard form contracts: "Free contract presupposes free to bargain, and free bargain presupposes free bargaining. Where bargaining is absent, the conditions and clauses to be read into bargain are not those who happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper." Treitel (1984) however acknowledges that the advantage of the exclusion clause is to enable the parties to identify in general, what sort of risks they will probably have to bear; and enable them to take up insurance coverage. However, the downside is that it is opened to abuse when it involves vulnerable consumers who are too weak in bargaining power, knowledge or resources.

Generally, these exclusion clauses can be categorized into three types:

- i) Most common: These exclusion clauses are embedded in contracts to state exclusion from liability. For instance, liability exclusion from losses that are substantial, in which the clause may limit the payable liability to only a certain amount, such as the payable sum stipulated in a contract.
- ii) Other common forms: Clauses that place a limit to an available remedy by implying a short duration for breached claims or impossible conditions to obtain a remedy, for example, transportation costs for faulty products.
- iii) More difficult to control: This kind of clause alters the obligation towards performance, instead of liability exemption, in order to ensure nil breach.

Yates (1986) had defined 'exemption or exclusion clause' as "any clause in a contract or term in a notice that purports to restrict, exclude or modify a liability, duty or remedy that would otherwise arise from a legally recognized relationship between the parties." Syed Ahmad Alsagoff (2007) pointed out that, "these (exemption) clauses may appear in printed tickets, notices or receipts which are brought to the customers' attention at the time of the agreement which, in most cases, the consumers do not have time or energy to read the printed words.

## 3.0 Methodology

Improvement of the consumers' quality of life is emphasized in entering a fair market environment. This paper focuses on the effect of legislative and judicial approaches towards identifying the behavior of consumers in consumer market towards understanding the hidden contractual terms and how could improvements be made. Despite this legislative and judicial approaches, the average consumer faced with a wide variety of standard contracts is more often than not disadvantaged by exclusion clauses hidden in fine print. The area is selected due to its lack of research in previous conferences on consumer behavior about reading hidden terms in consumer contracts. Hence, discussions are highlighted in the form of critical analysis from Malaysian legislative and case-laws perspectives.

Like most legal research, this research is of library type. For study and comparison, this research shall adopt the qualitative research method whereby the research materials both primary and secondary sources shall be gathered through a library and electronic resources. The primary sources of information will be case laws and legislation. Information is derived from primary data articles such as the Consumer Protection Act 1999 (CPA 1999) and case-laws. Secondary data will be gathered from published and unpublished materials including research and seminar papers, books, articles in journals and the internet. Nevertheless, it is realized that the present paper lacks primary data which calls for future research to validate the proven arguments through empirical research.

## 4.0 Findings

Regulations related to unfair terms in contracts can affect many business sectors, mainly trades that deal with consumer contracts that are of standard form type. These regulations ascertain a just trading environment and the protection of consumers. Part IIIA of Consumer Protection Act 1999 (CPA 1999) lists the factors, where a tribunal or a court would consider analyzing either procedural or substantive unfairness that is illustrative in nature, in which most items do not require much judicial consideration as to their meaning, such as 'without adequate justification'; 'oppressive'; 'unconscionable'; 'reasonable standards of fair dealing'; which require more explanation (Sinnadurai, 2011). The terms are ambiguous, vague, and open to interpretation (Farhah, 2017).

### 4.1 Legislative Analysis

The legislative development on unfair consumer terms in Malaysia has not been a grand champion of consumer rights (Sakina, 2011). In Malaysia, CPA 1999 appears to be the primary statute that upholds consumer protection. It is under the jurisdiction of the Ministry of Domestic Trade, Co-operatives, and Consumerism; who is responsible for the protection of consumers. The CPA has been influenced one way or other by proper progressions in Australia, New Zealand, Canada, and the United Kingdom (Naemah, 2012). The introduction of CPA 1999 possesses some extent to enhance consumer rights stipulated in contracts. However, the CPA 1999 Act is very limited in its application. Section 2(4) states "this Act is supplemental in nature and without prejudice to any other law regulating contractual relations." The term 'without prejudice' reflects placing CPA in an 'inferior' status, as compared to other legislation. Next, the term 'supplementary' literally means additional and complementary (Naemah, 2011). In this sense, CPA 1999 does not replace the existing law; it only supplements it by providing the consumer with additional protection above the existing legislation. Upon conflict with other legislation, other laws that regulate contractual relations shall prevail.

The new law refers to an essential legislation piece initiated by the Parliament in Malaysia in the light of consumer protection and contract law. This major flaw detected in the Malaysian consumer protection law has been rectified with the initiation of Part IIIA of the Consumer Protection (Amendment) Act 2010. Part IIIA is embedded into the CPA 1999 to deal with unfair terms in consumer contracts. According to Pretam Singh and Rahazlan Affandi (2011), instead of enacting a wholly new statute, the Parliament has amended the existing CPA 1999 after embedding a new section into the existing Act 599, namely Part IIIA entitled 'Unfair Contract Terms.' In dealing with terms that are unjust, the CPA 1999 has integrated a new principle to divide the aspect of unjustness into 'substantive' and 'procedural.' Section 24A(b) of CPA 1999 defines 'standard form contract' as "a consumer contract that is for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry." This approach incorporates contracts that are of standard form employed by many industries, such as insurance, banking, credit, and other supply of goods and services.

### 4.2 Procedural Unfairness

Furthermore, procedural unfairness refers to the very process of contract development. For instance, a purchaser is unaware of a term due to its small print at the time of signing a contract. Meanwhile, substantive unfairness focuses on the process outcome, for instance, the contract content. Exclusion of a party from negligence liability due to a clause refers to substantive unfairness. Furthermore, a term or a contract can be determined for its unfairness, either procedurally or substantively unfair. From the practical aspect, proving procedural unfairness seems to be more challenging, instead of proving substantive unfairness as the only relevant evidence is a copy of a contract that is unjust. However, these two conceptions overlap and differentiating them is not easy. Section 24(C) defines terms that are unfair as, "terms in a consumer contract which, concerning all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer." Part IIIA emphasizes consumer protection and abhors unfair terms found in B2C contracts of standard form, including unfair terms commonly found in invoices, sale documents, and receipts (Norliza Abdul Hamid & Hariati Mansor, 2011). The phrase 'significant imbalance' has yet to be defined by the Act. In general, as far as the common law is concerned, it is up to the court or tribunal to determine if a term causes significant imbalance by referring not only to the term itself but the whole contract as well. In procedural unfairness, phrases such as 'knowledge and understanding', 'fine print', 'bargaining strength', 'linguistic disability', 'independent legal or other expert advice', and other circumstances spelt out in section 24C(2), are technical terms that may overlap with the provision of Contracts Act 1950 linked with mistake, misrepresentation, and undue influence (Sinnadurai, 2011).

### 4.3 Substantive Unfairness

Additionally, section 24D (1) provides that a term or a contract is unfair substantively because "...if the contract or the term of a contract (d) excludes or restricts liability for negligence; or (e) excludes or restricts liability for breach of express or implied terms of the contract with no adequate justification and if it involves harsh, oppressive and unconscionable." Part IIIA, thus, covers liability exclusion for both a contractual obligation and tort of negligence. The CPA 1999, however, does not define the words 'unconscionable', 'difficult', and 'harsh' or the circumstances in which each will arise. For that, courts and tribunals should refer to prior judicial decisions as they are limited by stare decisis in interpreting what amounts to unconscionable, oppressive, and harsh terms. Consequently, it is argued that the bargaining power inequality doctrine refers to land law and should continue to be applied by courts and tribunals. Section 24D (2) reflects the circumstances for terms or contracts to be held void or unenforceable for substantive unfairness.

## 5.0 Discussion

Several cases in Malaysia have observed the increasing concern displayed by the courts regarding the embedded exclusion clauses in standard form type in many consumer contracts, where intervention by courts appears to vary based on different ideologies. The main rules used are those of 'incorporation' and 'construction.' In Malaysia, the principles of common law are employed to rule out liability exclusion based on sections 3 and 5 of the Civil Law Act 1956.

### 5.1 Case-laws Analysis

Malaysian Airlines System Bhd. v. Malini Nathan & Anor is a case illustrating a more lenient approach taken by the courts in deciding the incorporation of exclusion clause within the contract. The Malaysian Airlines (MAS) was sued due to the failure of flying back to Kuala Lumpur the first respondent aged fourteen. Nonetheless, the Supreme Court held that MAS did not breach its contract and was right to rely on the clause found in Condition 9 that was printed on the airplane ticket. This case portrays that the Malaysian courts are stringent in handling cases that involve negligence, particularly those related to exclusion clauses. As for Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn Bhd & Anor, the court took a rigorous interpretation of these types of clauses due to negligence that led to damages. Nevertheless, in Premier Hotel Sdn Bhd v Tang Ling Seng, Elizabeth Chapmen's JC decision in the Kuching High Court did cause several concerns due to the readiness displayed by the court in giving effect to evident and clear exclusion clause despite negligence.

Furthermore, the strict interpretation applied upon the exemption clause for Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn. Bhd., which depicts a case that involved a machine purchased by the plaintiff that became defective after a few months. As the plaintiff invoked the Unfair Contract Terms Act (UCTA) 1977, the defendant relied on an exemption clause to deny liability. As a result, the court ruled out the inadequacy of applying UCTA 1977 within local legislation as the local law expressing permission to do so. The judge was of the view that the Specific Relief Act 1950 and the Contracts Act 1950 were appropriate for the case based on English common law. The judge claimed that local decisions are suitable enough and displayed full agreement with the contract law. It is for the legislature to make a move in promulgating such law if found necessary. The remarks passed by the judge have caused some concern. The unwillingness displayed by the court in acting for the best interest of the consumers is an area that lacks legal control, thus indeed a cause for concern.

Another case worth mentioning here is the case in 2001, whereby Saad Marwi v Chan Hwan Hua & Anor emerged as a landmark case in Malaysia when the Court of Appeal employed inequality of bargaining power based on English doctrine. Malaysia should acknowledge this particular doctrine in the light of Section 3(1)(a) of the Civil Law Act 1956. For instance, Mr. Saad, a farmer who earned a living partially by harvesting coconuts on rented land from the respondent, a businessman. Saad also had a piece of land that was valued at about RM2.4 million (about US\$675,000). The respondent had managed to convince Saad to sell the land to him for just RM42,000 (about US\$11,800). He even got Saad to sign a written agreement in English, in which Saad neither comprehended English nor was represented by a lawyer. Eventually, Saad decided to terminate the agreement. Nonetheless, the judge of the Court of Appeal, Gopal Sri Ram JCA (as he then was) accepted the inequality of bargaining power doctrine in a rather extensive manner in his judgment.

Subsequently, in Anthony Lawrence Bourke and Alison Deborah Essex Bourke v. CIMB Bank Berhad Civil Appeal No W-02-(NCC)(W)-1345-07/2016, the appellants bought a piece of property on Jalan Sultan Ismail in Kuala Lumpur from a developer, Crest Worldwide Resources Sdn Bhd, in 2008. However, to finance the purchase, they took a loan from the defendant bank. It was a term loan agreement where the appellants would service the monthly installments, and the bank would essentially pay to the developer progress payments whenever they were due. However, CIMB failed to make payment on one of the invoices. As a result, the developer terminated the entire sale and purchased agreement with the appellants. The appellants then lost their property due to the failure of CIMB to pay the sum due to the developer. In 2015, the Bourkes sued the bank for negligence and breach of contract. The counsel for appellants claimed that the exemption clause 12 stated in the agreement was breached under section 29 of the Contracts Act 1950 and was against public policy. Hence, it did not refer to an absolute exemption on the bank's liability. The bank counsel, nonetheless, contended that the exemption clause, which is reflected one meaning only, must be enforced however unreasonable the court may think. Clause 12 of the Loan Agreement is exclusion clause that seems to exclude the liability of the bank's primary and general secondary obligations (CIMB Bank Bhd v Maybank Trustees Berhad and other appeals [2014] 3 MLJ 168 and Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556). However, the three-person bench chaired by Rohana Yusuf J with Vernon Ong Lam Kiat J and Hasnah Mohammed Hashim J in a unanimous decision held that the bank was liable for contract breach and tort due to its refusal in making the progress payment of housing loan to the developer. The exclusion clause of liability stated in the agreement was deemed as non-sustainable and cannot protect the bank from its liability. (Kho Feng Ming & Sakina, 2017).

### 5.2 The Way Forward: A High Common Level of Consumer Empowerment

To reiterate, according to the OECD Recommendation on Consumer Policy Decision Making (March 2014) "Consumer detriment" means the harm or loss that consumers experience, for example, ... iii) they suffer from unfair contract terms or iv) the goods and services that they purchase do not conform to their expectations concerning delivery or performance. Consumer detriment can take many forms: it can be structural (i.e., affecting all consumers) or personal; apparent to consumers or hidden; and financial or non-financial which affect their quality of life. Consumer detriment may be apparent to consumers' behavior immediately, may take time to emerge, or remain hidden. It also defined vulnerable consumer who is silent under Malaysian laws. Empowered consumers need real choices, accurate information, market transparency and the confidence that comes from effective legislation. This goal shall ensure that vulnerable consumers have access to information in plain and understandable language. It could also be relevant to establish if

“vulnerable consumer groups” exist in Malaysian Consumer Protection Framework and whether such groups need additional protection.

## 6.0 Conclusion & Recommendation

In the realm of consumer contracts, consumers must not suffer due to the inherent weaknesses of the statutory provisions and uncertainties in judicial decisions. The repercussion would defy the whole nation. Hence, a specific legislative shift in controlling the exclusion clauses embedded in consumer contracts is in dire need of change in Malaysia, not only due to the borderless nature of the blockchain technology, but also consumer contracts in an e-commerce environment and quality of life. The legislative enhancement in controlling terms that are unjustly embedded in consumer contracts in Malaysia displays the paternalistic initiative of the government in ensuring only a commercial environment that adheres to enhancing the quality of life as one of the sustainable development goals (SDG). One important SDG is to reduce inequalities, where vulnerable consumers, are given protection from exploiting and manipulative terms (Sakina, 2011). While the demand for specific legislation must be enacted for consumer contracts to adhere to mass production and availability of vast products choices, it is important to note that Malaysia is receiving relatively consumer complaints as opposed to the contractual fairness. As the role of such legislation should be able to regulate exclusion clauses, future research is recommended to embark on gaining insights on an ad hoc approach on a case-to-case basis is not appropriate for e-commerce contracts too. The present article suggests several solutions to enable consumers to be protected from abusive, manipulative and unfair terms in trade. Consumer knowledge and advocacy are enhanced through the development of an online knowledge center such as publishing a handbook on Consumer Protection, establishing of a webpage and date-base “unfair contract terms” and implementing national and regional awareness campaigns. (ASEAN, 2015) It is perhaps also important to determine whether plain language plays (or should play) any role in consumer contracts. This research may endeavour through qualitative case studies with interviews on service providers and vulnerable consumers in Malaysia towards enhancing adequate consumer protection. The goal of the legislation is to reduce the gap of bargaining power inequality between traders and consumers.

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