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THE LEGAL APPROACHES ON REGULATING UNFAIR CONTRACT TERMS IN MALAYSIA AND AUSTRALIA

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ABSTRACT

In this global economy, the improvement in the daily technologies and the liberalization of trade has now given impact to nowadays contract which will affect the consumer protection system of every jurisdiction. To keep the consumer protection remain alive, they have to manage a certain law to keep the consumer against the unfair term in a certain contract in order to help the consumer from being biased in a contract. The unfair term significantly gave certain advantages against the consumer. In order to prevent this kind of thing happening, the consumer contract law has been enacted to give the right to the consumer and balance their inequalities in bargaining power. This article intends to explore more about the judicial and legislative interference on the unfair terms in consumer contracts in Malaysia and Australia. This article also aiming on comparing the Malaysian Consumer Protection Act 1999 with the Australian legal framework. The analysis shows that unfair terms have been treated as a polemic that requires the paternalistic intervention of government through specific legislation. This research therefore suggests the specific legislation in Malaysia as a measure to minimise the oppression and injustice in consumer contracts. By adopting the content analysis method, this paper aims at exploring the legal control of unfair terms and exclusion of liability in 'business to consumer' (B2C) contracts in Malaysia and Australia.

Keywords: *Unfair term, consumer contracts, legislation, Malaysia, Australia*

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Introduction

Malaysia and Australia have their own consumer contract law as approaches to the unfairness in nowadays contract for the consumer. But before this country use this law, this market ideology was indeed ignorant of consumer welfare. The idea of the being equal in bargaining was created by the marketers to prove the freedom of contracts. However, as time passes, the modernization of technologies has changed the consumer trading environment. As an example, the online sales transactions have proven that modern technologies have been implied in consumer daily environment which they adopt such contracts as a practice of trades in the virtual transaction. Unfortunately, majority of the sellers or suppliers discharges their liability to increase their right in their own desire which unlikely often give disadvantages to the consumers. Their most common ways or tactics to discharges their liability is by manipulating on drafting contract. This is what is called the "unfair term". The subject unfair term in consumer contract has sparked the importance of it not only in the consumer contract but also in another contract. Over the last two decades, several countries have enacted new law regarding the protection of consumer and even a small businessman from this unfair term.

In this content of the journal, the focus is about these two countries which are Malaysia and Australia. As for Malaysia, there is no specific legislation to deal with the unfair terms hold up by the theory of freedom of contract and unable to prohibit these terms but using the theory, they developed strict rule relating to the incorporation of such clause. But after 1999, Malaysia has come with the Consumer Protection Act 1999 which came into force in 15 November 1999. As for Australia, the Australian Consumer Law (ACL) has been the approaches for the regulating of the Unfair Contract Term Law (UCTL). This piece highlights the important aspects of UCTL which are how to determine whether the term use is unfair, examples related to that certain term and the matters that the court must estimate before determining that certain term is an unfair term.

With this introduction, this article intended to give the important information regarding the unfair term in consumer contract of the three countries and their law enacted to prevent the unfairness in contract. This paper also gave examples of cases relating to the unfair term and others. The statutory control of unfair terms in the Malaysia and Australia such as provisions in other specific legislations such as the Malaysian Consumer Protection Act 1999 (CPA 1999) and the Australia Competition and Consumer Act 2010 (CCA 2010). The differences between these two countries also being study in this article to see how different country handle with the problem regarding the unfair term in contract law.

Definition of Unfair Term

In Malaysia law which is Consumer Protection Act might have same definition in what is an unfair term but maybe not detailed as how Australia provide the definition. Section 24A(c) defines unfair term as 'a term in a consumer contract which, with regard to 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'.



Consumer contracts

Under the ACL, a 'consumer contract' is a contract for:

- the supply of goods or services or
- the sale or grant of an interest in land: to an individual who acquires it wholly or predominantly for personal, domestic or household use or consumption.

Consumer contract is if there is an unfair term apply to this contract, the contract was said to be void. However, consumer contract can eventually fix this problem where they can still continue to operate with parties involving with their contract by removing the unfair term in the contract. An individual can apply to the court that he or she might face an unfair term in a contract, therefore was said the contract will be void. Law does not impose contract by having void because of unfair term, but eventually the consumer and the ACL legislators can seek a legal compensation because of loss they are having as the contract declared to be void.

According to Section 2

- (1) A term of consumer contract was said to be void when
 - (a) the term is unfair and
 - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term

There are some key points in order to understand Section 2. A consumer contract is a standard-form agreement for the supply of goods or services that is wholly or predominantly for personal, domestic, or household use or consumption. As we can see, consumer have a complex meaning according in TPA, but we can break it into the simple meaning which is personal, domestic, or household use or consumption. This one of the reasons why Australia Consumer Law become most influenced provisions because they clarify simple little things by narrowing down and give a clear answer relating to any scope of question. Under the ASIC Act, a similar definition of a consumer contract applies in relation to financial products and services.

What is a standard form contract?

The unfair contract terms laws do not define 'standard form contract'. However, in broad terms, a standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties—that is, it is offered on a 'take it or leave it' basis. Standard form contracts are typically used for the supply of goods and services to consumers in many industries. Most of the terms can't be negotiated separately. The terms can be on the back of tickets, quotes, terms of trade, invoices and so on. Standard form contracts are common, e.g. rental car agreements, gym memberships, gas and electricity contracts, finance agreements and retirement home contracts.



Meaning of Unfair Term from Australian Consumer Law (ACL)

Section 3 provided there is a specific definition in order to determine the unfairness of a term.

- 1) A term of a consumer contract is unfair if:
 - a) It would cause a significant imbalance in parties rights and obligations arising under contract
 - b) Not reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term
 - c) It would cause detriment (financial or others) if were applied or relied on.
- 2) Court may take into account such matters as it thinks relevant, but must take accounts this following:
 - a) The extent which the term is transparent
 - b) The contract as a whole
- 3) A term is transparent if the term is:
 - a) Expressed in reasonably plain language
 - b) Legible
 - c) Presented clearly
 - d) Readily available to any party affected by them
- 4) For subsection (1) (b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interest of the party who at disadvantages.

It means that the court need to view the contract as a whole. Means that court need to view in a positive point of the contract and negative point of the contract and the court need to weigh up the contract. For example, it might be a term that provide an unfairness but if we looked throughout the contract, there is still a benefit can be get from the contract. Therefore, the term might affect a little part of the contract but not every part of the contract. Next, in order for the court to determine an unfairness of the contract, they need to fulfil the transparency requirement of the contract, clarity and readable.

Table 1: Some of examples of unfair terms

- | |
|---|
| <ul style="list-style-type: none">• <u>Terms that permits or has the effect on permitting, one party to avoid or limit performance of the contract</u>• <u>A term that permits or has the effect of permitting one party to terminate the contract</u>• <u>A term that that permits or has the effect of permitting one party to vary the terms of the contract</u>• <u>A term that that permits or has the effect of permitting one party to renew or not renew the contract.</u> |
|---|



The law sets out examples of terms that may be unfair, including:

- terms that enable one party (but not another) to avoid or limit their obligations under the contract
- terms that enable one party (but not another) to terminate the contract
- terms that penalise one party (but not another) for breaching or terminating the contract
- terms that enable one party (but not another) to vary the terms of the contract.

Ultimately, only a court or tribunal (not the ACCC) can decide that a term is unfair.

Literature Review

Unfair Term: An Overview

The consumers within the modern economy are faced with unequal bargaining power, thus demanding protection for those vulnerable and weak groups. The disparity in knowledge between consumers and traders has left consumers with insufficient information to ensure a fair and balance contract. The existing enactment of the Malaysian Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999 are not adequate to cater the problem of abusive, manipulative, notorious and unfair exclusion clauses in trade (Sakina, 2012). Whereas the Australian Competition and Consumer framework is evolving hand in hand with economy prosperity and maturity (Miller, 2011). Thus, consumer protection laws have been devised in order to ascertain a fair dealing between consumers and traders, especially in addressing exemption clauses that put consumers on the losing end. Laws linked to consumer protection blanket both public and private laws (Naemah, 2012). To Rachagan (2007), legislation of consumer protection ensures equality in bargaining power between consumers and traders by: (i) correcting the imbalance in economic power between individual buyer and traders for services and goods; (ii) reducing incidences of losses and deficits related to purchase by protecting consumers from unfair trade practices and unsafe products; and (iii) ensuring equitable distribution in the society for deficits through apt laws of product liability.

Methodology

This research is purely a legal research. Classified by Anwarul Yaqin (2007), this research is a doctrinal research which the research outlines the important of the issues and the legal issues in it. The methods use in this research are widely use in the legal research even though sometime describe as an old fashioned or legalistic. In this research, the descriptive approach, historical approach, and comparative approach have been applied while analysis the data.

Descriptive approach is used to fully understand what is the problem arises in the standard form of consumer contract and how the unfair contract term law benefits the consumer in protecting their rights. While the comparative approach is used to compare how Malaysia and Australia legislation and to identify the different and common on how each country handle the



unfair contract term problems. Historical approach is used to know the origin of the existing law about unfair terms and how the law come to take their present form.

This doctrinal research uses two sources of law which are primary sources and secondary sources. Primary sources used in this research are the legislation used in each country and case law while secondary sources used include the legal journals, reference books, and any other legal documents involved.

Findings

Standard form contract is defined as one that has been prepared by one party to the contract and is not subject to negotiation between the parties, on the basis of 'take it or leave it'. Malaysia state that there should not be a correspondence between the rights and obligations in the contract itself because of the significant imbalances in the contract means the contract shall not be revealed its unbalancing. However, we need to look at the contract as a whole not only by just looking at the question regarding to unbalancing. How if the consumers do not get the benefits in the contract as how he or she promised within the traders.

Australia Consumer Law define an unfair term in a consumer contract is the term would cause a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term and last is it could case detriment whether financial or otherwise to a party if it were to be applied or relied on. ACL does not specifically define the term standard form contracts and no definition of standard form contracts. To the contrary, it is suggested that under the UCTL consumers become more aware of their consumer rights and may be able to choose various goods and services without worrying about the details because they can 'leave the detail of standard form contracting to be regulated by the law.'

Malaysian law protects consumers against unfair terms in a standard form contract can be found or printed in the receipts, notices, invoices, and other sale documents. Although s 24B states that 'the provisions of this Part shall apply to all contracts', it is obviously confined to consumer contracts (B2C) based on the very purpose of the introduction of the CPA to protect consumers only. However, it is not clear whether Part IIIA applies to all types of consumer contracts or if it is just confined to matters within the ambit of the CPA. There two new methods by dividing the unfairness into procedural and substantive unfairness. The table 2 below is an overview of the legislations on unfair terms used in the two countries.



Table 2: Overview of the Legislations on Unfair Terms used in the Two Countries

	Malaysia	Australia
Specific legislation	Nil	Nil
Specific provisions in other legislations	Consumer Protection Act 1999 (CPA 1999)	Competition and Consumer Act 2010 (CCA 2010)
Unfair terms	24 (C) & 24 (D)	23-28
Elements	Procedural unfairness and Substantive unfairness	Under section 23 of the ACL , unfair terms contained in a standard form consumer contract are void . However, before this provision will apply, three (3) factors must be established. A term can only be voided if: <ul style="list-style-type: none"> the contract is a “standard form contract”(SFC); the SFC is a “consumer contract”; and the term is “unfair”.
Sanctions	Civil & Criminal	Civil & Criminal

Discussion

Malaysia Law on Unfair Term

Back in the early as 1959, the first judicial principle on exclusion clause is in a business to business (B2B) transaction. In Malaysia, there is no specific legislation to regulate unfair contracts. The laws in Malaysia in relation to unfair terms are very much contained in case laws. Judicial development of unfair terms in Malaysia has concentrate on specific term which is exclusion clause.

In some cases that involve a consumer, to determine the attitude of the Malaysian Courts towards unfair terms is difficult due to the limited number of cases (Farhah and Sakina, 2015). Thus, the decisions in these cases does not been a great champion of consumer rights. However, cases that involve damage due to a negligent act of one of the parties to the contract show that Malaysian courts are very strict toward exclusion clauses. For example, like in the case of *Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn. Bhd. & Anor* [1995] 2 MLJ 100, a very strict interpretation of this types of clauses has been took by the court in cases involving damages caused by negligence. However, regarding to the decision of Elizabeth Chapmen JC in *Premier Hotel Sdn. Bhd. v Tang Ling Seng* [1995] 4 MLJ 229, in the Kuching High Court, has caused some concern as it is to point out the readiness of the court to give effect to a clearly worded exclusion



clause in the event of negligence whereby the words used must be very clear enough, usually by referring expressly to negligence or by using such expression will only can protect him from liability for negligence.

Great concern in consumer protection has been showed due to the case law development in the law of Malaysia. Hence, by the way of legislative measures could resolve these uncertainties and inconsistencies of the judicial intervention.

The legislative development in Malaysia before 2010 pay no attention towards the problems regarding unfair terms. In Malaysia, there is no legislation like the United Kingdom's Unfair Contract Terms Act 1977 (UCTA 1977). UCTA 1977 is the UK specific legislation governing exclusion clauses as one species of the unfair terms in consumer contracts in UK. The adoption of the United Kingdom model (Unfair Contract Terms Act 1977) is recommended for Malaysia (Farhah and Sakina, 2018). Atiyah (1981) highly recommended as follows, "UCTA 1977 greatly restricts the use of "exclusion clauses" whereby contracting parties protect themselves from legal liability. The Act extends beyond consumer protection, since it also operates, within limits, where businessmen contract on "standard written terms." The courts also have been slow and not efficient in handling the bargaining power. The courts should be justified due to the lacking in legislation by taking a stricter view of the exclusion clause and protecting the consumers against onerous terms. There is no specific legislation regarding unfair terms in Malaysia.

On 15 November 1999, The Consumer Protection Act 1999 (CPA 1999) was enacted. This is to rectify the forces of inequality. CPA was also enacted to provide consumers a comprehensive protection by upholding the ideology of paternalism for consumer protection, as summarised in Figure 1.

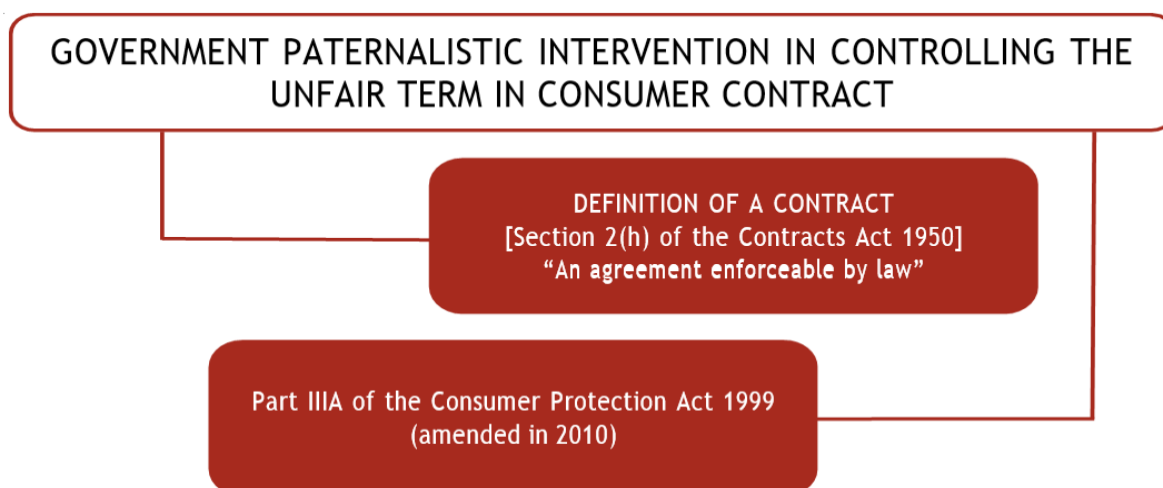


Figure 1: Government intervention in controlling unfair term in consumer contract



Regulations related to unjust terms in contracts can affect many business sectors, particularly trades that deal with consumer contracts that are of standard form type. The introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010 has rectified some problems regarding to the use of unfair term in consumer contract in Malaysia. If the court came out with the conclusion that a contract term is procedurally or substantively unfair or both, they may declare the contract or the term as unenforceable or void.

INTRODUCTION TO EXCLUSION CLAUSES

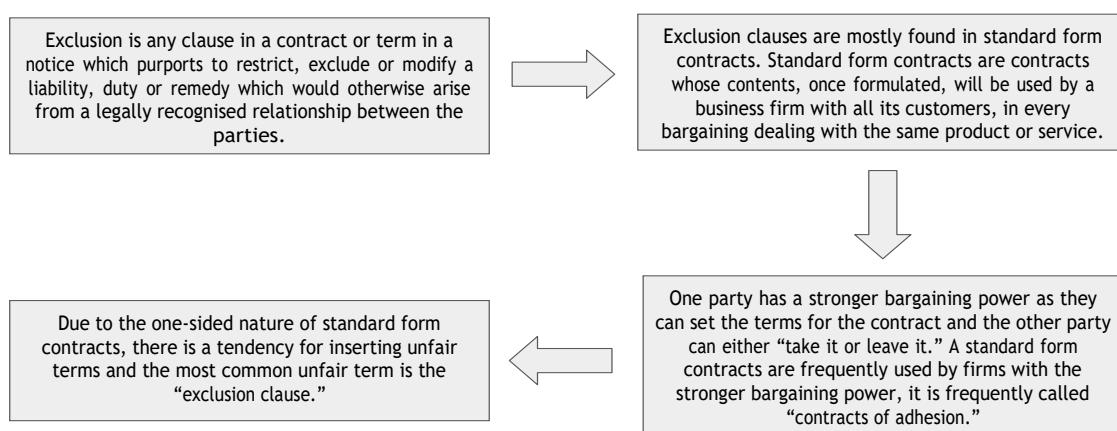


Figure 2: Interpretation of exclusion clauses in Malaysia

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 so as to deal with unjust 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'. 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 is not only beneficial for consumers, but it may also affect the transactions of B2C by businesses and corporations that offer consumer services and goods (Sinnadurai, 2011).

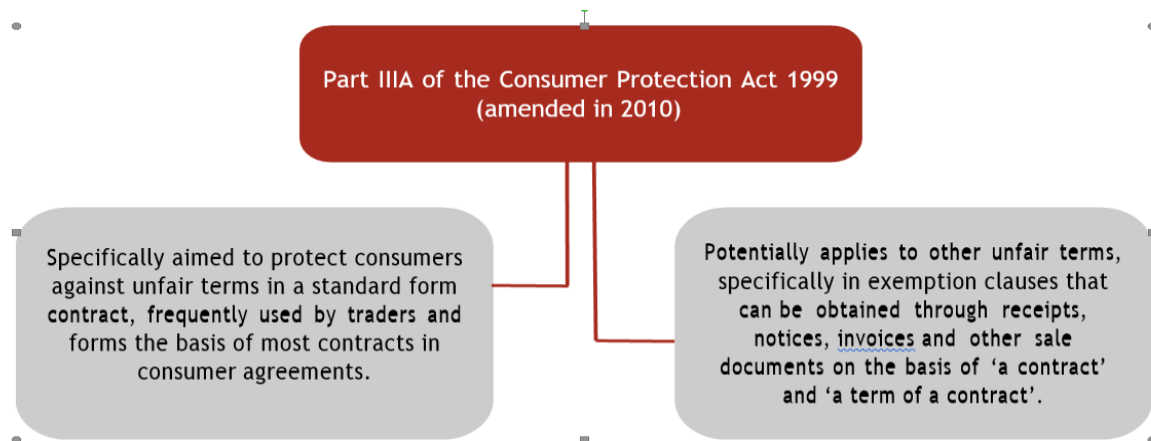


Figure 3: Part IIIA of the Consumer Protection Act 1999

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. In *Anthony Lawrence Bourke and Alison Deborah Essex Bourke v CIMB Bank Berhad*, the appellants purchased a piece of property in Kuala Lumpur from developer, Crest Worldwide Resources Sdn Bhd. However, to finance the purchase, they took a loan from the defendant bank in the same year. In a term loan agreement where the appellants would service the monthly instalments 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 and as a result, the developer revoked the entire sale and purchase agreement with the appellants. The appellants then lost their property due to 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 clearly 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 liability of the bank's primary and 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-man 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 for 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:



“... [55] In the circumstances we are of the considered view that Clause 12 contravenes section 29 of the Contracts Act, because in its true effect, it is a clause that has effectively restrained any form of legal proceedings by the appellants against the bank. It can be clearly demonstrated by the current appeal that despite our findings on the breach by the bank, in this case, if Clause 12 is allowed to stay, it would be an exercise in futility for the appellants to file any suit against the respondent bank... [57]. We find the bank was in breach of the fundamental term of the Loan Agreement in failing to pay the Invoice in accordance to its term, which had directly caused SPA termination; causing the appellants to suffer loss and damage... We further find Clause 12 in effect is a clause that absolutely restrains legal proceedings and [hence] it is void under section 29 of the Contracts Act...”

Australia Unfair Term Legislation

Historical perspective

Australia introduced the unfair contract term protections for consumers as part of the holistic national Australian Consumer Law, which was fully implemented from 1 January 2011, if it is a consumer contract and the contract is a 'standard form contract'. In order to uphold consumer welfare and sovereign, the government aims to empower consumers with statutory protection is highly recommended, as reflected in Figure 4.

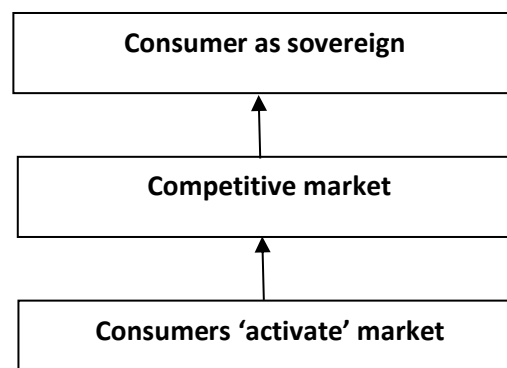


Figure 4: Consumer sovereignty is related to efficient markets and consumer welfare.

According to N Averitt and R Lande (1997):

Consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that causes that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. It is the state of affairs in which the consumers are truly 'sovereign', in the sense of having the power to define their



own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods or services.

Thus, in order to uphold 'consumer sovereignty' is the ultimate ends in order to enhance the welfare of Australians to be more fair, competitive and informed markets to be economic processes. In this modern approach, there is often a very significance in the bargaining power between consumers and the traders. The rise of 'standard form' contracts and a 'take it or leave it' approach to negotiation often leaves consumers with tiny power to negotiate the terms of a contract for their individual needs and interests (Bruce, 2014).

Australian Legal Approach Regulation Exclusion Clauses in Consumer Contracts

The Productivity Commission's (PC) Review of Australia's Consumer Policy Framework in May 2008 which proposed the implementation of a single, unified and national Australian consumer law to replace the consumer protection regimes in both the TPA, including various State and Territory Fair Trading Acts and was tabled in Federal Parliament. In 2010, the Australian Consumer Law ('ACL') include a regime regulating unfair terms in standard form consumer contracts, the unfair contract terms law ('UCTL'). The ACL will be contained in sch. 2 of the *Trade Practices Act 1974* (Cth) ('TPA'), itself to be renamed the *Competition and Consumer Act 2010* (Cth) ('CCA') will be to the ACL as it appears in the CCA (in force 1 January 2011). On 1 January 2011, the consumer protection and product liability law in Australia has undergone huge, reformed legislation towards the creation of a single, nationwide consumer protection and product liability regime known as ACL (Bruce, 2014).

To be 'unfair', a term must:

- cause a significant imbalance in the parties' rights and obligations
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- cause financial or other detriment (such as delay) to a small business if it were relied on.

Ultimately, only a court (not the ACCC) can decide whether a term is unfair. In deciding whether a term is unfair, a court must consider how transparent the term is, as well as the overall rights and obligations of each party under the contract. The court may also consider other relevant matters.

Consumer contracts are characterized by an asymmetry between the two parties, the seller of a good or the provider of a service on the one hand and the consumer on the other. One party is usually sophisticated corporation, the other...an individual prone to the behavioural flaws that make is human. Absent legal intervention, the sophisticated seller will often exploit the consumer's behavioural biases. The contract itself, commonly designed by the seller, will be shaped around the consumer's systematic deviations from perfect rationality (O Barr-Gill, 2004).



The Australian Productivity Commission discovered that consumer protection is being weakened by the exclusion of some small business purchases (Lynden Griggs, Aviva Freilich and Eileen Webb, 2011). According to the Productivity Commission report on Australia's Consumer Policy Framework (2008), there was only a brief discussion on the topic of who is a consumer. Malaysia has restricted definition as a consumer cannot be a trader, at any purchase for business purpose. Thus, small manufacturers industry is not within the definition of consumer. JW Carter (2009) identified three criteria of exclusion clauses:

An exclusion clause the objective of which is to deal with a potential liability in damages, assumes three things:

- (1) a basis for liability, that is, a breach of duty — usually a breach of contract or tort;*
- (2) an act or omission which satisfies the legal requirements of the basis for liability; and*
- (3) that the promisee has sustained loss or damage as a result of the act or omission.*

Australian courts will generally approach indemnity clauses in exactly the same treatment as they do exclusion clauses (JLR Davis, 2006). Patterson's (2009) review of the current Unfair Contract Terms Law (UCTL) in terms of its term fairness in a standard form contract on the ground of 'a significant imbalance in the parties' rights and obligations arising under the contract as to whether a right is balanced between a trader and consumer in section 25(1) of the Australian Competition and Consumer Act 2010. Having said that, it is an illusion to expect perfect symmetry between both parties' rights and obligations. The issue here is to identify unnecessary burdens placed on the consumer which are not balanced by concessions or justified (Paterson, 2009).

The new Australian Consumer Law named Australian Competition and Consumer Act 2010 (CCA) will replace previous Commonwealth, State and Territory consumer protection in Fair Trading Acts and the Trade Practices Act 1974 (TPA 1974) (Bruce, 2014). The new law incorporates best practice from existing State and Territory legislation. According to ACL 2010, a 'consumer contract' is a contract for the supply of goods or services or the sale or grant of an interest in land to an individual who acquires it wholly or predominantly for personal, domestic, or household use or consumption. On 1st January 2011, Australia has its holistic reform on consumer protection is regulated with a single national consumer law, contains in CCA Sch. 2, as a law of the Commonwealth in Pt XI of the CCA, and as an applied law of the States and Territories in Pt XIAA of CCA (Bruce, 2014). The Productivity Commission's (PC) Review of Australia's Consumer Policy Framework in May 2008 which proposed the implementation of a single, unified and national Australian consumer law to replace the consumer protection regimes in both the TPA, including various State and Territory Fair Trading Acts and was tabled in Federal Parliament.

In addition, in Australia, 'No refund' are unlawful as it indicates that consumer cannot be possible to get a refund under any circumstance, mainly during major problem with the goods or services. The above reasons, the following signs are unlawful such as 'No refund on sale items' and "Exchange or credit note only for return of sale item." Exception on 'No refunds will be given if you have simply changed your mind' are lawfully acceptable.



Table 3: Several options for supplier or consumer

For minor problems, the supplier can choose to:	For major problems, the consumer can choose:
Repair	A refund
Replace or;	A replacement
Refund	Compensation

The unfair contract terms regime is in the ACL Ch 2 Pt 2.3 ('Unfair contract terms') from section 23-28, CCA 2010 which gives protection to consumer contracts that are standard form contract. Section 23(1) provides that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract. Standard form contract is defined as one that has been prepared by one party to the contract and is not subject to negotiation between the parties, on the basis of 'take it or leave it'.

A party to a consumer contract or the Australian Competition and Consumer Commission (ACCC) whereas, section 24(1) provides that a term of a consumer contract is 'unfair' if:

- It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In the leading case of *Darlington Futures Ltd v Delco Australia Pty Ltd* [1986] 161 CLR 500 at 510, the High Court held that the meaning of a limiting term:

...is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and where appropriate, construing the clause contra proferentum in case of ambiguity (emphasis supplied).

The court in this case, further explained that in the absence of ambiguity or special considerations where a weaker party is in need of protection from the clause, an exclusion clause will be interpreted according to its plain, natural and ordinary meaning.

Conclusion

The problems arising in the unfair contract term have made each country to take act in controlling the problem. There is a growing body of literature that recognises the importance of enacting specific legislation to control the unfair contract term problems. There are a few similarities and differences between these two countries. At the end, Part IIIA consists of many weaknesses by



enacting a single comprehensive legislation on unfair terms for Malaysia. The legislative development on unfair consumer terms in Malaysia is not a great champion of consumer rights. Thus, enacting specific law is seen to be the best solution to prevent from abuses in the use of unfair terms in consumer contract. Indeed, consumer law may stand on its own due to its vital role to the economic prosperity. It is no longer become a part to the discipline of the contract law.

References

- Atiyah, P.S., (1981). *An introduction to the law of contract*. Oxford: Clarendon Press.
- Australian Competition and Consumer Act 2010
- Averitt, N., & Lande, R. (1997). Consumer sovereignty: a unified theory of antitrust and consumer protection law. *Antitrust Law Journal*, 65 (3), 713-714.
- Anthony Lawrence Bourke and Alison Deborah Essex Bourke v CIMB Bank Berhad Civil Appeal No. W-02-(NCC) (W)-1345-07/2016
- Bruce, A. (2014). *Consumer protection law in Australia*. Chatswood, Nsw: LexisNexis Butterworths.
- Carter, JW. (2009). Exclusion of liability for consequential loss. *Journal of Contract Law*, 25, 118–134
- Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn. Bhd. & Anor [1995] 2 MLJ 100
- CIMB Bank Bhd v Maybank Trustees Berhad and other appeals [2014] 3 MLJ 168
- Commonwealth of Australia. (2010). A guide to the unfair contract terms law: 2010. Retrieved from <https://www.accc.gov.au/publications/a-guide-to-the-unfair-contract-terms-law>
- Consumer Protection Act 1999
- Darlington Futures Ltd v Delco Australia Pty Ltd [1986] 161 CLR 500
- Farhah Abdullah & Sakina Shaik Ahmad Yusoff. (2018). Consumer protection on unfair contract terms: Legal analysis of exemption clauses in B2C transactions in Malaysia, *International Journal of Asian Social Science*, (pp.1097-1106).
- Farhah Abdullah & Sakina Shaik Ahmad Yusoff. 20-23 November 2017. Intervensi perundangan dalam pengecualian liabiliti bagi kontrak pengguna di Malaysia. 2017 *Tuanku Jaafar International Conference*. Universiti Kebangsaan Malaysia, Fakulti Undang-undang. 21-32.
- Farhah Abdullah & Sakina Shaik Ahmad Yusoff. (2015). Legal treatment of exclusion clauses in consumer contracts in Malaysia. *Proceedings of the International Academic Conference 2015* (pp. 1 - 15). Primula Beach Hotel, Kuala Terengganu.
- Gray, Anthony. 2009. "unfair contracts and the consumer law bill." 9 (2): 155-175.
- Holly, Loren. 2010. "An overview and analysis of the National Unfair Contract Terms Provisions." *Commerce law quarterly* 24 (3): 3-14.
- Freilich, A. and Griggs, L., & Webb, E. (2011). Challenging the notion of a consumer: time for change. *Competition and Consumer Law Journal*, 19 (1), 54 & 77.
- Naemah Amin. (2013) Protecting consumers against unfair contract terms in Malaysia: The Consumer Protection (Amendment) Act 2010. *Malayan Law Journal*, 1.1-11. ISSN 0025-1283. doi: <http://irep.iium.edu.my/30573/>



- Naemah Amin. (2011). The Nature of the Law on Consumer Protection, Law & Commerce: The Malaysian Perspective, in Mohammad Naqib, Kuala Lumpur: IIUM Press.
- Paterson, Jeannie. 2009. "The Australian Unfair Contract Terms Law: The rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts." *Melbourne University Law Review* 33 (3): 934-956.
- Productivity Commission. (2008). Review of Australia's Consumer Policy Framework. Final Report Commissioned by the Australian Government. Canberra, Australia: Commonwealth of Australia. Retrieved from <https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>
- Pretam Singh a/l Darshan Singh & Rahazlan Affandi Abdul Rahim. (2011). Legislative intervention in protecting consumers from unfair contract term. Vol 1 my. consum. LJ , 143-158.
- Sakina Shaik Ahmad Yusoff, Azimon Abdul Aziz, Suzanna Mohamed Isa. 2012. "Kesatuan ekonomi asean: model undang-undang terma tidak adil dalam kontrak pengguna ASEAN." *Current Research in Malaysia* 1 (1): 189-230.
- Sakina Shaik Ahmad Yusoff, Suzanna Mohamed Isa, and Azimon Abdul Aziz. 2012. "legal approaches to unfair consumer terms in malaysia, indonesia and thailand." *pertanika J. Soc. Sci. & Hum* 20: 43-55.
- Sims, Alexandra. n.d. "Unfair Contract Terms: A New Dawn in Australia and New Zealand." *Monash University Law Review* 39 (3): 739-775.
- Yaqin, Anwarul. 2007. *Legal Research and Writing*. LexisNexis.
- Visu Sinnadurai. (2011). *Law of Contract (Volume One)*. Fourth Edition. Malaysia: Lexis Nexis.
- Yaqin, A. (2007). *Legal Research and Writing*. Malaysia: LexisNexis.

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