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## Extending The Interpretation of “Unfair Terms” in Consumer Protection Act 1999

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### Abstract

The contracting parties are bound by the terms of a contract and must have an understanding of the contract they have entered into. The terms of the contract become unfair when they cause a significant imbalance in the rights and obligations of the parties involved in the contract and are only advantageous to one party. In Malaysia, the Consumer Protection Act 1999 (“CPA 1999”) was amended in 2010 to include Part IIIA, a provision for unfair contract terms. In the context of written contracts, all terms must be written in plain and understandable language. The unfair terms are normally found in a standard form contract prepared by one person called the dominant party without allowing any negotiation to the other party. In this situation, the weaker party agrees to the unfair terms because they have no choice. However, if a term is discovered to be unfair in the agreement, the remaining part of the agreement may still be legally binding on the parties in a contract. The objective of this study is to discuss and explore the interpretation of ‘unfair terms’ as provide in the Malaysian Consumer Protection Act 1999 and to suggest for the possible extension to the interpretation of ‘unfair terms’ in Malaysia. This study employed doctrinal legal research by analysing the primary and secondary legal sources. It is hoped to expend on the suggestion for Malaysian law where there are shortcomings and opportunities for improvement.

**Keywords:** Unfair Terms, Interpretation, Detriment of the Consumer, Significant Imbalance, Transparency

### Introduction

Whether people are aware of it or not, as a consumer, they tend to enter into numerous contracts almost every day (Abdul Razak et al., 2021a). A contract is an enforceable promise which legally binds the parties involved. It is an agreement between two parties to establish mutual legal obligations and mutually agree on terms based on the maxim of *consensus ad idem* (Abdul Razak et al., 2021b). It involves at least two parties; a promisor and a promisee

(Beatson et al., 2016). When parties agree to enter into a contract, they are deciding to have a contractual relationship (Loos & Luzak, 2016). In Malaysia, the Contracts Act 1950 ("CA 1950") is applied to matters pertaining to contract law.

According to Yusoff and Abdul Aziz (2015), the purpose of the contract law is to preserve the legality of the contract and to facilitate economic activities. Contracts can be either oral or written and the terms of the contract may be expressed or implied. If the terms are expressed, it indicates that the parties have provided clear and certain terms; however, implied terms will be interpreted by the court based on the essence of the contract and the parties' genuine intentions, or on the law governing specific types of contracts.

Referring to Loos & Luzak (2016), "contractual terms" describe and confer the right and obligations of the parties in a contract. The contract's terms are important to the parties in a contract since they establish the rights and obligations (McKendrick, 2016). According to Zulhafiz & Rahman (2020), the terms of a contract may usually be clear or uncertain but often consists of unfair contract terms. It is discovered that unfair terms are regularly used in a contract that is drafted by the dominant party who has the ability to draw up the agreement and it is often found in standard form contracts.

As highlighted by Amin (2013), the standard form contract is drawn up by the seller based on the "take-it or leave-it" concept; wherein this concept, consumers only have an option to accept or not to accept the contractual terms because there is no room for negotiation (Abdul Razak et al., 2021a). The terms are drafted by sellers and often include one-sided terms that are unfavourable to the buyer (Mason, 2015). Generally, terms and conditions that exclude or limit the liabilities, rights and obligations of one party are also deemed to be unfair contract terms and always found in the way of using exclusion clauses in the receipts, invoices, and other sales documents (Amin, 2013).

Unfair terms usually happen in a situation when the terms of the contract allow only one party to terminate it; only one party can avoid or limit their contract obligations; provide only one party liable if the contract is breached or terminated; or only one party is allowed to change, revised, add, or delete any of the terms of the contract. Ben-Shahar (2011) contended that contracts are deemed unfair when the terms give more advantage to one party while giving inadequate or negative benefit to another one.

To provide an understanding of unfair contract terms, Malaysian law has included a provision on "Unfair Contract Terms" in Part III of the Consumer Protection Act 1999, Amendment 2010. It is essential since Malaysia does not have sufficient protection in unfair terms and unfair contracts. The approach taken by the government to amend the CPA 1999 opens to the benefit of the weaker party in a contract when they have to agree with unfair terms provided in a contract prepared by the dominant party.

Therefore, this study aims:

- to discuss and explore the interpretation of 'unfair terms' as provided in the Malaysian Consumer Protection Act 1999; and
- to suggest for the possible extension to the interpretation of 'unfair terms' in Malaysia.

## Methodology

This study uses a purely qualitative approach where it is based on a library research. This study applies a doctrinal approach as it seeks to discuss and explore the interpretation of 'unfair terms' as provided in the Malaysian Consumer Protection Act 1999. Doctrinal legal research is a study of a doctrine of law and practice and is largely documentary. It is qualitative because it does not engage with statistical data analysis (Abdullah, 2018). According to Ali et al (2017), the most common practice used by those doing legal research is doctrinal or library-based research. In this research, the data were collected from primary and secondary sources.

The primary data collection sources include law cases and statutory provisions. Most importantly, the author uses the Consumer Protection Act 1999 ("CPA 1999"), Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR 1999") and Australian Consumer Laws under Competition and Consumer Act 2010 ("ACL") as the main statutes that become primary sources in this study. Meanwhile, secondary data collection sources include journal articles, textbooks, seminar papers and dictionaries which were also referred to in order to keep up with the relevant information regarding this topic.

According to Alias (2018), the findings of a study similar to this can be supported by secondary data where researchers are focusing on finding information in sentences rather than numbers through qualitative research. It is hoped that this paper would become a contribution to the body of knowledge and able to contribute towards more in-depth research in the area of contract law in the future.

## Discussion

The written terms of consumer contracts are seldom negotiated individually between the business entity and the consumer where the terms are usually set out in standard form on a "take-it or leave-it" basis (Mason, 2015). This study discusses on the interpretation of unfair terms in Consumer Protection Act 1999 as stated in section 24A(c) of the Act and to suggest for the possible extension to the interpretation of 'unfair terms' in Malaysia by referring to Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999) and Australian Consumer Laws under Competition and Consumer Act 2010 (ACL).

### Interpretation of Unfair Terms in Consumer Protection Act 1999

According to Amin and Nor (2013), the addition of Part IIIA of the CPA 1999 is to protect consumer from unfair contract terms in the standard form contract. In standard contract forms, the exclusion clauses are normally used to limit the contractual liability of the dominant party (Abdul Razak et al., 2021a). Hence, it is pertinent for this study to explore the laws in Malaysia that interpret 'unfair terms' and this study hope to expound on the suggestion for Malaysian law where there are shortcomings and opportunities for improvement.

By virtue of section 24A(c) of the Consumer Protection Act 1999,

*"unfair term" means 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.*

Based on the provision, there are two requirements to be met in determining the terms used are unfair i.e., (i) causes a significant imbalance in the rights and obligations of the parties and (ii) detriment of the consumer.

### ***Causes a Significant Imbalance in the Rights and Obligations of the Parties in a Contract***

In the case of *Director of Consumer Affairs Victoria v AAPT Ltd [2006] VCAT 1493*, the decision emphasised the importance of good faith and a significant imbalance in identifying an unfair term. It opens the door to unfair terms and impose harsh terms on customers. This decision shows that the terms provide companies with unilateral powers to be unfair are void. As Morris P observed:

*“The word ‘significant’ simply means ‘important’ or ‘of consequence’. It does not mean ‘substantial’. It is not a word of fixed connotation and besides being elastic is somewhat indefinite. However, in its context, it is designed to identify an imbalance, to the detriment of the consumer, which should be regarded as unfair. In this sense the definition is circular. But it is impossible to avoid the notion of fairness in determining whether a term causes a significant imbalance, even though this exercise is designed to ascertain whether a term is unfair.”*

According to Abdull Manaf & Amiruddin (2018), terms such as “we will not accept liability...” or “the business will not be liable for any damages...” are generally known as disclaimers of the normal words but are basically recognized as exclusion clauses that bring to the significant imbalance in the contract.

### ***Detriment of the Consumer***

If the terms of contract cause detriment without reasonable justification to one party in a contract, the terms are considered unfair. Based on the case of *Director General of Fair Trading v First National Bank plc [2002] 1 AC 481*, the detriment is a minor requirement that does not add anything to the matter of whether a term is unfair. This research argues that if the terms of contract cause detriment without reasonable justification to one party in a contract, the terms are considered unfair. As explained by Diega and Walden (2016), the consumer is the weaker party due to the inability to grasp the contract thoroughly without any reasonable possibility of negotiating the terms and conditions.

### ***Suggestion for the Possible Extension to the Interpretation of ‘Unfair Terms’ in Malaysia***

This study suggests for the possible extension to the interpretation of ‘unfair terms’ in Malaysia in order to strengthen and improve the law on unfair terms. As determined by Tang (2016), by having a clear provision concerning unfair contract terms, the weaker party may take legal action in the courts if the contract is deemed to be unfair and the terms used do not protect them. Therefore, this study explores the relevant law dealing with the interpretation of unfair terms for the suggestion.

According to section 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999), it provides:



*“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to detriment of the consumer.”*

By referring to section 24 of the Australian Consumer Laws under Competition and Consumer Act 2010 (“ACL”), it states:

*(1) A terms of a consumer contract or small business contract is unfair if*

*(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract;*

*(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*

*(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

*(2) In determining whether the term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:*

*(a) the extent to 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; and*

*(b) legible; and*

*(c) presented clearly; and*

*(d) readily available to any party affected by the term.*

### ***The Terms is not Reasonable to Protect the Legitimate Interests of the Party who Would Benefit from Using the term***

The contract’s terms are important to the parties in a contract because they establish the right and obligations (McKendrick, 2016). Referring to Alexandra (2013), the evaluation of the requirement is based on the issue of whether the seller has a ‘legitimate interest’ that needs to be protected and whether the term ‘reasonably necessary’ is used to protect the legitimate interests of that seller.

### ***Transparency***

The possible extension to the interpretation of ‘unfair terms’ in Malaysia refers to the transparency of the terms of the contract. Transparency is an aspect that courts must consider when determining whether a term is unfair (Alexandra, 2013). Even if it is not the determining factor in identifying whether a term is unfair, the clear words to make a layman understand the terms of contract becomes a major concern. To meet the transparency principle, Loos (2015) emphasized that the seller must ensure that the other party has an opportunity to become acquainted with the terms before the contract is concluded; and the terms must be ‘understandable’ to the another party if he decides to take that opportunity to become acquainted with these terms.

Some terms may be in small print or written in legal jargon that consumers find difficult to grasp (Mason, 2015). According to Willett (2011), terms are transparent when they are available at the time of contract; clear, free jargon language, using the suitable font size; the sentences, paragraphs, and overall contract are properly structured. It is important the terms of contract are clear and understandable to the buyer. As explained by Alexandra (2013), a term is transparent if it is understandable, clearly presented, and readily accessible to all parties concerned in reasonably straightforward language.

In the case of *Office of Fair Trading v Abbey National plc [2008] EWHC 875*, Smith J stated:

*“Unfair contract term law requires not only that the actual wording of individual clauses or conditions be comprehensible to consumers, but that the typical consumer can understand how the term affects the rights and obligations that he and the seller or supplier have under the contract ... the unfair contract terms law does not exclude an assessment of fairness unless not only can the typical consumer understand the actual wording used in the contractual documentation but also its effect.”*

Willett (2011) contended that transparency is necessary as a basic social right because customers should be able to comprehend what they are consenting to; to improve the market discipline, and to enable consumers in protecting their interests in the event of a dispute. Furthermore Loos (2015) highlighted that the transparency principle is to allow the party who puts standard contract terms into the contract to determine the legal position when they decide to read the contract.

## Conclusion

It is concluded that the contract's terms and conditions must be reasonable and fair. The parties enter into a contract must be in free consent and the terms of the contract achieve the same mind (*consensus id idem*). Based on the exploration and discussion in this study, it is observed that the law of unfair terms is inadequate and needs to be strengthened. As Malaysian CPA 1999 only provide (i) causes a significant imbalance in the rights and obligations of the parties and (ii) detriment of the consumer as the interpretation of the 'unfair terms', it is hoped that Malaysia can consider to include (iii) it is not reasonable to protect the legitimate interests of the party who would benefit from using the term and (iv) transparency as an additional requirement to interpret 'unfair terms'.

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