LEGISLATIVE CONTROL OF EXCLUSION CLAUSES IN SELECTED COMMON LAW COUNTRIES*

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Abstract

In an economy that is fast becoming global, the liberalisation of trade presents challenges to the consumer protection regime of every jurisdiction. Marketplace has thus ceased to be the guarantor of the best interest of consumers. Thus the survival of any nation consumer protection law depends on how it caters for ways and means to correct the inequalities in the global market. One of the major concerns in remedying market failures is the lack of legal protection given to consumers by way of legislations in the area of unfair terms in particular exclusion clauses in consumer contracts. With the advancement of technology, the adequacy of the existing law of contract has been questioned. The absence of appropriate legal mechanism to curb the use of unfair terms in consumer contracts has lead to oppression of consumers and the spread of unethical conduct of traders. The introduction of the Consumer Protection Act 1999 in Malaysia has to a certain extent enhanced consumer rights in contracts. With the new amendment in 2010 of the 1999 Act, a new legislative regime of controlling unfair terms in consumer contracts has been introduced in Malaysia. Adopting the content analysis methodology, this article explores the extent of the legal protection in the area of exclusion clauses in consumer contracts given by the consumer protection legislations of selected common law countries, namely, Malaysia, United Kingdom and Singapore.

Introduction

The great challenge to the laissez-faire system came at the beginning of the 20th century when attacks on the legitimacy of the prevailing system begun, demanding the shift in commercial transactions affecting consumers. George Watson described the idea of laissez-faire as the greatest misunderstanding of intellectual history (Atiyah 1979). In Europe, the second half of the 20th century had seen the growth of body of laws protecting consumers in trade. The European Community had through the Maastricht Treaty, undertook between them to uphold the new market ideology, the consumer welfarism ideology. Consumerism loaded with paternalistic ideals of protecting customers is by all means a paradigm shift from the so-called freedom of contract ideology. The aim of consumerism is to regulate and intervene in the market in their noble cause of upholding and empowering consumers in trade. Consumerism with its interventionist approach is indeed a great consumer synergy, a far cry from its predecessor laissez-faire which was infamous for discriminating weak consumers.

In recent years, the subject of ‘Unfair Terms in Contract’ has attained grave importance in many of the common law jurisdictions, not only in relation to consumer contracts but also in regard to other contracts. The subject has assumed great importance currently in the context of tremendous expansion in trade and business and consumer rights. In the last two decades, several countries have gone in for new laws or amendment of the existing laws on the subject in order to protect consumers and even smaller businessmen from bigger commercial entities. To understand the development which has taken place in this area, we must be mindful of the policies in play. On one hand, the traditional concern for freedom of contract, the cardinal rule of contract law, and on the other hand, the concern to curb unfairness resulting from significant inequality of bargaining power, and in this context, known as the principles of consumer protection.

The 19th century has seen the system of laissez-faire and the principle of covert emporium, the birthmark of capitalism, reign supreme in Europe. Market ideology during the 19th century was indeed ignorant of consumer welfare. The idea of equal bargaining power was created then by marketers to justify the existence of freedom of contract, the cardinal rule of contract law. Sellers or suppliers had created an absolutely free market for the smooth flow of their products and at the same time ways and means to discharge their liabilities and increase their rights at their own whim, often at the disadvantage of the ‘equally powerful’ consumers. Their most potent tool to discharge their liability is thus through the utilisation of manipulative method of drafting contract in what is now known as the ‘exclusion clause’. Exclusion clause which is part of the laissez-faire legacy has further eroded the protection of consumers in many commercial transactions and thus calls for the paternalistic role of the government. Adopting the content analysis approach, this paper thus looks at the paternalistic role of the government through the legislative treatment of unfair terms in particular exclusion clauses in three selected common law countries, namely, Malaysia, United Kingdom and Singapore.

“Exclusion Clause”: Introduced

The courts and legislatures in some countries have become increasingly sensitive to the imposition on individuals namely the consumers by business entities, which, by abusing their superior bargaining power, exact unfair contracts from these individuals. The process of mass production and distribution has introduced the use of standard form contracts as a useful tool in expediting market exchanges and as Furnston (1991) put it, “In the complex structure of modern society, the device of the standard form
contract has become prevalent and pervasive." Nevertheless the introduction of such mode of contracting has however been tainted by the incorporation of exclusion clauses as part of the terms of the contract between traders and consumers. Several cases have demonstrated the court’s increasing concern, in particular, on the use of standard form exclusion clauses in consumer contracts. The essence of this concern was captured in Lord Reid’s judgment in *Suisse Atlantique Societe d’Armament Maritime SA v NV Rotterdamse Kolen Centrale* [1967] 1 AC 361.

Exclusion clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he reads them he would probably not understand them. And if he did understand or object to any of them, he would generally be told he could take it or leave it. And if he went to another supplier the result would be the same.

By definition, ‘exclusion clause’ refers to “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 recognised relationship between the parties.” (Yates & Hawkins 1986) Atiyah (2005) observed that “An exemption clause may take many forms, but all such clauses have one thing in common in that they exempt a party from liability which he would have borne had it not been for the clause.” G.H.L. Fridman (1994) notes that such a clause excludes or modifies contractual obligations. It affects the nature and scope of a party’s performance. According to Brian Coote (1964) exclusion clauses may be classified into two types, of which he labeled them as Type A and Type B:

Type A: exception clauses whose effect, if any, is upon the accrual of particular primary rights. Thus where words relating to quality have been employed by a vendor of goods, an exclusion of conditions, warranties or undertakings as to quality, helps determine the extent to which those stipulations by the vendor that he should not be required to make compensation for poor quality.

Type B: exception clauses which qualify primary or secondary rights without preventing the accrual of any particular primary right. Examples would be limitations on the time within which claims might be made, and limitations as to amount which might be recovered on a claim.

The function of exclusion clause as pointed out by Yates & Hawkins (1986), is to delimit the extent of the obligations undertaken by the proferer in the contract. The House of Lords, however, in two leading cases, *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Anor* [1983] 1 All ER 10 and *George Mitchell (Chesterhall Ltd v Finney Lock Seeds Ltd* [1983] 1 AC 803, had expressed the need to distinguish an exclusion clause from a mere limitation of liability clause. Lord Fraser in *Aleisa Craig* opined that:

There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity: see particularly the Privy Council case of Canada Steamship Lines Ltd v R [1952] 1 All ER 305 at 310, [1952] AC 192 at 208, where Lord Morton, delivering the advice of the Board, summarized the principles in terms which have recently been applied by this House in *Smith v UMB Chrysler (Scotland) Ltd 1978 SC (HL) 1*. In my opinion these principles are not applicable in their full rigour when considering the effect of conditions merely limiting liability. Such conditions will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clause.

The party seeking to rely on an exemption clause must show that the loss or damage to the other party is within the scope of the clause. But the other party must first plead and prove that the loss or damage which has been sustained was caused by some breach of contract or duty on the part of the defendant (Beaton 2002). A party seeking to rely on an exclusion clause may insert such a clause in almost any document given to the other party from a contract to a receipt. The party relying on the clause usually alleges that the other party had notice of the clause as it was in the documented handed to the other party. The problem with this argument is that very often than not, the other party who receives the document that contains the exclusion clause does not read or understand the clause. This party usually only realises the effect of the clause once loss has occurred and liability is disputed. Syed Ahmad Alsagoff (2006) points out that, “These (exclusion) 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 consumer has no time or energy to read the printed words. Even if he reads them, he would probably not understand them. It is only when a dispute arises that the consumer realises how much of his rights have been excluded by these clauses.” According to Andrew Phang Boon Leong (1998), “The common law has long been familiar with the attempt of one party to a contract to insert terms excluding or limited liabilities which would otherwise be his. The situation frequently arises where a document purporting to express the terms of the contract is delivered to one of the parties and is not read by him.”

The mischief of exclusion clauses has been expressed by many authors. To Beale (1989), “…most customers faced with contract containing ‘small print’ do not know what it contains or understand the effect of the clauses, and they do not think it worthwhile to spend the time and money necessary to find out or have the small print explained to them. Instead they tend to ignore it and shop in terms of price.” The Law Commission Second Report on Exemption Clauses, Law Com
No 69, Scot. Law Com. No. 39 (1975) describes it in the following passage:

The mischief is that they deprive or may deprive the person against whom they may be invoked either of certain specific rights which social policy requires that he should have (for example the right of a buyer in a consumer sale to be supplied with goods or merchantable quality or the right of a person to whom a service has been supplied to a reasonable standard of care and skill on the part of the supplier) or the rights which the promise reasonably believed the promisor had conferred upon him...

Yates (1982) pointed out that a standard form contract containing an exclusion clause acts as a tool of oppression of the consumers as the terms are not subject to negotiation by both parties to the contract. The above-mentioned arguments fit comfortably within the exploitation theory of exclusion clause in consumer contracts (Kessler 1943). These arguments which are based on the inequality of bargaining power assume a monopolistic situation in which a consumer is confronted with lack of choice or having no choice at all but to accept the offer based on these terms if the consumer wishes to obtain the goods offered (Oughton 1991). Through his empirical study on exclusion clause in marketplace, Yates (1982) discovered that one of the reasons such clause was included in a contract was that “everybody does it”. It is sometimes thought that the sole purpose of an exclusion clause is to set up a shield to a claim for damages or repudiation (Yates & Hawkins 1986). On the other hand, according to Reynolds (1978), the inclusion of these harsh clauses into contracts “may be the result of excessive zeal on the part of the lawyers employed to draw up the standard form contract for the business.” Goldberg pointed out that in certain circumstances, the inclusion of exclusion clauses into contracts will be balanced up by the lower price of goods but questioned whether this is best for the consumers.

If the market is competitive, this gives the business using the standard form an incentive to try to reduce its costs by putting more and more of the risks on to the customer, who of course does not complain because he or she knows nothing about it; and the more competitive the market is in terms of price, the greater the incentive on the supplier to do this, since if its costs are higher than those of the competition it will lose business. Thus harsh terms become widespread across industry, but they are compensated by lower prices. The outcome may be inefficient, since it may well be that the customer, if only he or she had known, would have been prepared to pay more for better terms, more that it would have cost the supplier to provide the better terms...

The reality perhaps, as the Law Commission (1975) puts it, “All too often they are introduced in ways which results in the party affected by them remaining ignorant of their presence or import until it is too late so that the other party even if he knows of the exemption clause will often be unable to appreciate what he may lose by accepting it.” It is because of this ignorance that the consumers do not “bargain for better terms in individual cases or do not place suppliers under sufficient market pressure to compete over these terms. Once these factors are put together a picture begins to emerge of consumers being in a weak bargaining position to even begin to make choices or force changes in terms.” (Willett 1994)

The Malaysian Legislative Approach

In view of increasing unethical conduct by traders, a wide range of contracts in Malaysia where the element of bargaining is absent are entered into without the real sense of freedom of contract. In Malaysia, standard form contracts have also come to dominate more than just routine transactions. In England, the new market ideology, consumer welfareism, had also permeated through its consumer protection laws. The introduction of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 in England evinced the government's commitment in curbing unfairness in contractual dealings. This part of the English law development however has been left untouched in the development of the Malaysian consumer law regime for many years. Prior to 2010, the Malaysian position on unfair terms in consumer contracts was far from satisfactory. Freedom of contract and caveat emptor still remained predominantly the underlying concepts in consumer contracts in Malaysia. In 2010, a great change was introduced in the area of unfair terms in consumer contracts by the introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010. The emergence of consumer welfarism and the rise of paternalism in consumer contracts have now become the underlying concepts of consumer law reform in Malaysia.

Consumer contracts in Malaysia are governed mainly by the Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999.

i. Contracts Act 1950

The Contracts Act 1950 being the parent law governing contractual relationships is silent on prohibition against notorious, unfair or unreasonable terms. The Contracts Act 1950 contains no provision either on the content of a contract or on standard form and thus reposes to common law on this part of the law of contract is required. Perhaps the reason being, as pointed out by Nik Ramlah Mahmood (1993):

The Contracts Act 1950 attempts to codify only the basic principles of contract law. As such it does not have specific provisions dealing with contents or the terms of a contract. Hence no mention is made of clauses which limit or even exclude one party’s liability, clauses which incorporate terms in other documents into the contract ... It is perhaps for this reason that the Malaysian Judiciary has, hitherto, upheld the validity of clauses that seem to be unfair to consumers.

ii. Sale of Goods Act 1957

One of the legislations in Malaysia affecting unfair terms by way of exclusion
The Consumer Protection Act 1999 (CPA) which comprises of 14 parts and a total of 150 sections, represents the single most important piece of legislation in the history of consumer protection in Malaysia. Speaking at a conference a few months before the passing of the Act, Halimah Ahmad (1999) has this to say:

For the first time in forty-two years, there is a basic law, or an irreducible minimum of consumer protection legislation that will be directly protection for consumers ... instead of 'indirect protection' that is found scattered throughout civil, criminal and commercial legislations covering diverse areas of health, agriculture, and transport where the responsibility for implementation lies with different Ministries. Under the CPA, implementation of consumer protection measures will be directly under the Ministry of Domestic Trade and Consumer Affairs.

The 1999 Act came into force on 15 November 1999. The Act goes some way towards remedying the forces of inequality. As Wu Min Aun (2000) pointed out, it restores some equilibrium between suppliers and consumers. CPA was enacted to provide a comprehensive protection to consumers. It is under the jurisdiction of the Minister who is responsible for domestic trade and consumer affairs. It came into effect on 15th of November 1999. Before the enactment of CPA, there was no single act which gives direct protection to consumers. The enactment of CPA is welcomed by the consumers and consumer movement groups. CPA is divided into fourteen parts in one hundred and fifty sections. As far as the substance is concerned, it covers misleading and deceptive conduct, false representation and unfair practice; safety of goods and services; guarantees in respect of supply of goods and supply of services; rights against suppliers and manufacturers in respect of guarantees in the supply of goods and services; product liability; National Consumer Advisory Council and Tribunal for Consumer Claims.

CPA 1999 goes some way towards remedying the forces of inequality. As Wu Min Aun (2000) pointed out, it restores some equilibrium between suppliers and consumers. CPA was enacted to provide a comprehensive protection to consumers. Section 6 of the Consumer Protection Act 1999 prohibits contracting out of the provisions of the Act. The section further provides that every supplier or manufacturer who purports to contract out of any provision of this Act commits an offence and under section 145 those persons are liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both (Sakina & Rahmah, 2008). The introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010 has to some extent resolved the problems associated with the use of unfair terms in consumer contracts in Malaysia. Under this part, where a court or the Tribunal comes to the conclusion that a contract or term is procedurally or substantively unfair or both, the court or Tribunal may declare the contract or the term as unenforceable or void. Under section 24C, "A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and the supplier." A contract or a term of a contract is substantively unfair, under section 24D, "if the contract or the term of the contract – (a) is in itself harsh; (b) is oppressive; (c) is unconscionable; (d) excludes or restricts liability for negligence; or (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification." Both sections 24C and 24D then list down circumstances to be taken into account for the purposes of deciding whether a term is procedurally or substantively unfair. In addition to the contract or the term being held unenforceable or void, Part IIIA provides for a criminal penalty for contravention of its provisions. Under section 24I, if a body corporate contravenes any of the provisions in Part IIIA, the corporate body shall be liable to a fine not exceeding RM250,000; and if such person is not a body corporate, to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding three years or both.

The 2010 Amendment approach by dividing unfairness into procedural and substantive unfairness is similar to the approach proposed in the Law Commission of India 199th Report on Unfair (Procedural & Substantive) Terms in Contract. Nevertheless the necessity of dividing the contract or the term into procedural and substantive unfairness is questioned as the civil and criminal
sanctions imposed are the same may it be procedurally unfair or substantively unfair. One of the many weaknesses of the new Part IIIA lies in the uncertainty of its application to unfair notices. Failure of Part IIIA to mention notices and drawing attention to standard form contract as defined in section 24A may lead to interpreting the new amendment as limited in its application and scope. The ambiguity of this Part also lies in section 24B. The phrase ‘all contracts’ opens up to inquiries on the meaning of it; does the new Part applies to ‘all contracts’ literally or only to all contracts’ within the scope of CPA? Does the new Part also apply to contracts where foreign law is the governing law (contract containing an express term on the governing law)? By applying Part IIIA to ‘all contracts’ regardless of the scope of CPA, the new Part would seem to prejudice the provisions, in particular of the Sale of Goods Act 1957 so far as section 62 is concerned. The new amendment provides that the new Part shall apply to all contracts but fails to appreciate the limited application of the Consumer Protection Act 1999. The 1999 Act is very limited in its application. By virtue of section 2(4):

The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

As such the problem posed by section 62 of the Sale of Goods Act 1957 shall continue to exist since the 1999 Act does not have a prevailing effect over the Sale of Goods Act 1957.

Another weakness of Part IIIA lies in its failure to provide a clear definition or a test for certain terms or phrases used. Although section 24D(1)(c) of the new amendment expressly lists down clauses which exclude or restrict liability for breach of express or implied terms of the contract without adequate justification as procedurally unfair, Part IIIA fails to provide a test for determining what amounts to ‘adequate justification’. Unlike United Kingdom and Singapore, the new amendment to the 1999 Act also fails to provide a list of examples of terms which are regarded as unfair taking into account the factors contained in section 24C(2) and section 24D(2).

Despite the introduction of CPA, it nevertheless transpires that the Act is not free from several major flaws. Although the introduction of CPA has been looking forward by the consumers and consumer movement groups hoping that the Act would be able to give a comprehensive protection to consumers, this hope has been set back by the nature of CPA itself. CPA is very limited in its application. Section 2(4) has made the application of CPA subjects to Contracts Act 1950, Sale of Goods Act 1967 and Hire Purchase Act 1967. Many comments have been made to have these provisions deleted. CPA defines ‘consumer’ as a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption and does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of resupplying them in trade, consuming them in the course of a manufacturing process, or in the case of goods, repairing or treating, in trade, other goods or fixtures on land. The crucial words in this definition are regarding the phrase ‘goods or services of a kind ordinarily acquired for personal, domestic or house purpose, use or consumption……. This means that to be a consumer under the Act, a person must be able to satisfy two stages:

i. he must acquire goods or services for personal, domestic or house purpose;
ii. the goods or services that he acquires must be of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption.

If he acquires goods which are not ordinarily acquired for personal, domestic or household purpose, he is not a consumer under CPA even though he acquires the goods for personal, domestic or household purpose. ‘Goods’ is defined as goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes goods attached to, or incorporated in, any real or personal property; animals, including fish; vessels and vehicles; utilities; and trees, plants and crops whether on, under or attached to land or not, but does not include choses in action, including negotiable instruments, shares, debentures and money. The definition only covers goods which are primarily purchased, used or consumed for personal, domestic or household purpose. If the purpose of acquiring of the goods is only ancillary to the personal, domestic or household purpose, the goods are not within the meaning of ‘goods’ under the Act.

Besides failing to understand the limited scope of CPA, Part IIIA also contains many weaknesses in its application and interpretation. All these weaknesses could have been addressed by enacting a single comprehensive piece of legislation on unfair terms for Malaysia by having United Kingdom or/and Singapore as its model.

Legal Treatment of Exclusion

Clauses in United Kingdom

In United Kingdom, the most important limitations on the efficacy of exclusion clauses are now statutory. The Unfair Contract Terms Act 1977 (UCTA) now works together with the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) serving as double barriers to scrutinise the validity of certain contractual terms, in particular the use of exclusion clauses. These two legislations are overlapping in their protection. UCTA and UTCCR differ in their history, conception and structure, but overlap considerably in their coverage.

UCTA is national in origin. It evolves from piecemeal legislative control of exclusion clauses and the Law Commission and Scottish Law Commission, Exemption Clauses: Second Report, Law Commission Series No 69, Scottish Law Commission No 39 (1975). Its name is misleading since it gives the courts no general power to regulate unfair terms, but only the power to control exclusion clauses broadly defined and indemnity clauses in consumer contracts. It renders some exclusion clauses absolutely ineffective and subjects others to a test of
over those conferred by common law and UCTA in respect of terms which have not been ‘individually negotiated’. According to Regulation 5(2), “A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.” The Regulations define a ‘consumer’ to mean ‘any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.” According to Regulation 5(1): 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 the detriment of the consumer.

UCTCR provides that the assessment of whether a term is unfair must take into account “the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.” (Regulation 6(1)) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

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<th>Sources of liability</th>
<th>Definition of liability</th>
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<th>Effect on non-consumer</th>
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<tr>
<td>Negligence leading to death or injury</td>
<td>Void s 2(1) UCTA</td>
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<td>Negligence leading to loss or damage</td>
<td>Acceptable if reasonable s 2(1) UCTA</td>
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<tr>
<td>LIABILITY ARISING IN CONTRACT</td>
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<td>Breach of standard form contract</td>
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<td>Goods do not correspond with their description</td>
<td>S 13 Sale of Goods Act 1979 S 9 Supply of Goods (Implied Terms) Act 1973</td>
<td>Void s 6(2) UCTA</td>
<td>Acceptable if reasonable s 6(3) UCTA</td>
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<tr>
<td>Goods do not reasonably fit for any particular purpose or goods are of unsatisfactory quality</td>
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<td>Void s 6(2)(a) UCTA</td>
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<tr>
<td>MISCELLANEOUS CONTRACTS NOT GOVERNED BY THE LAW OF SALE OF GOODS OR HIRE PURCHASE</td>
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<tr>
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<td>Void s 7(2) UCTA</td>
<td>Acceptable if reasonable s 7(2) UCTA</td>
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As the law currently stands in United Kingdom, there are two relevant enactments, namely UCTA and the UTCCR. Confusions may arise because, as shown above, provisions in these two legislations can overlap. The Law Commission and the Scottish Law Commission (Law Commission & Scottish Law Commission 2002) have been asked to rewrite the law on unfair terms as a single regime, in a clearer and more accessible style. The Unfair Contract Terms Bill 2005 rewrites both laws for the whole of United Kingdom in a way that is much clearer and easier to follow. As far as consumers are concerned, the provisional proposals are as follows:

1. Certain terms that under the Act are of no effect in any circumstances should continue to be so.
2. All other terms that are not specifically exempted should be valid only if they are ‘fair and reasonable’.
3. The requirement that the term be fair and reasonable should apply whether or not the term was individually negotiated. (This is already the case for terms that are within the Act. In addition, the Commissions think that consumers are unlikely to have a sufficiently full understanding of the implications of other terms, except ‘core terms’, to the extent that a term can be said to be ‘fair’ simply because there was a degree of negotiation over it.)
4. The ‘definition of the main subject-matter’ of the contract should be exempted from challenge (as under the Regulations), but it should be made clear that the exemption applies only so far as the subject matter is not substantially different from what the consumer should reasonably expect. The definition must also be in plain language (transparent).
5. Similarly the ‘adequacy of the price’ should be exempted from review, provided that having to make the payment is not substantially different from what the consumer should reasonably expect and is not under a subsidiary term. The price must also be stated in plain language.
6. Terms that merely reproduce what would be the law in the absence of contrary agreement should be exempted, but only if the terms are in plain language.
7. The new legislation should provide detailed guidelines on the application of the ‘fair and reasonable’ test.
8. The list of relevant factors should include not just whether the term is in ‘plain and intelligible language’ (as under the Regulations) but whether the term is ‘transparent’ in the sense that, for example, it is reasonably easy to follow and to read. Transparency, it is felt, should also replace ‘plain language’ as a requirement of the exemptions referred to at (4)-(6) above.
9. The legislation should contain a list of terms that will be unfair unless the business shows otherwise. The list should not follow the list in the Annex to the Directive word for word, but rather should refer to the types of clause found in the UK, and use UK terminology. It should give examples of each type of clause, and it should list common types of unfair term that are not in the Annex to the Directive.
10. A term which is unfair should be of no effect except to the extent that it is beneficial to the consumer (Commission Consult on Unfair Terms Law 2002).

Legal Control of Exclusion Clauses in Singapore

The statutory law in Singapore relating to exclusion clauses is essentially based on English law. The English Unfair Contract Terms Act 1977, which either invalidates an exclusion clause or limits the efficacy of such terms by imposing a requirement of reasonableness, has been re-enacted in Singapore as the Unfair Contract Terms Act (as Cap 396, 1994 Rev Ed) (SUCTA). It should be noted that SUCTA generally applies only to terms that affect liability for breach of obligations that arise in the course of a business or from the occupation of business premises. It also gives protection to persons who are dealing as consumers. Under SUCTA, exclusion clauses are either rendered wholly ineffective, or are ineffective unless shown to satisfy the requirement of reasonableness. Terms that attempt to exclude or restrict a party’s liability for death or personal injury resulting from that party’s negligence are rendered wholly ineffective by SUCTA, while terms that seek to exclude or restrict liability for negligence resulting in loss or damage other than death or personal injury, and those that attempt to exclude or restrict contractual liability, are subject to the requirement of reasonableness. The reasonableness of the exclusion clause is evaluated as at the time at which the contract was made. The actual consequences of the breach are therefore, in theory at least, immaterial.

Besides SUCTA, with regards to unfair terms in consumer contracts, another relevant Act is the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed) (CPFTA) which was largely drawn from fair trading legislation enacted in Alberta and Saskatchewan Section 2 of the CPFTA defines ‘consumer’ as “an individual who, otherwise than exclusively in the course of business – (a) receives or has the right to receive goods or services from a supplier; or (b) has a legal obligation to pay a supplier for goods or services that have been or are to be supplied to another individual” and a ‘consumer transaction’ is defined as “(a) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement; or (b) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement.” Diagram 1, below shows the unfair practices within the scope of the Act.
Diagram 1: Meaning of ‘Unfair Practice’ in Section 4 CPFTA

The relevant provision on unfair practices is as contained in the 2nd Schedule – Specific Unfair Practices of the Consumer Protection (Fair Trading) Act 2003: Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable. The schedule lists down acts amounting to specific unfair practices as follows:

1. Representing that goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, components, qualities, uses or benefits that they do not have.
2. Representing that goods or services are of a particular standard, quality, grade, style, model, origin or method of manufacture if they are not.
3. Representing that goods are new or unused if they are not or if they have deteriorated or been altered, reconditioned or reclaimed.
4. Representing that goods have been used to an extent different from the fact or that they have a particular history or use if the supplier knows it is not so.
5. Representing that goods or services are available or are available for a particular reason, for a particular price, in particular quantities or at a particular time if the supplier knows or can reasonably be expected to know it is not so, unless the representation clearly states any limitation.
6. Representing that a service, part, repair or replacement is needed or desirable if that is not so, or that a service has been provided, a part has been installed, a repair has been made or a replacement has been provided, if that is not so.
7. Representing that a price benefit or advantage exists respecting goods or services where the price benefit or advantage does not exist.
8. Charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has expressly agreed to the higher price in advance.
9. Representing that a transaction involving goods and services involves or does not involve rights, remedies or obligations where that representation is deceptive or misleading.
10. Representing that a person has or does not have the authority to negotiate the final terms of an agreement involving goods or services if the representation is different from the fact.
11. Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.
12. Taking advantage of a consumer by exerting undue pressure or undue influence on the consumer to enter into a transaction involving goods or services.
13. Representing in relation to a voucher that another supplier will provide goods or services at a discounted or reduced price if the supplier making the representation knows or ought to know that the other supplier will not do so.
14. Making a representation that appears in an objective form such as an editorial, documentary or scientific report when the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or a promotion.
15. Representing that a particular person has offered or agreed to acquire goods and services whether or not at a stated price if he has not.
16. Representing the availability of facilities for repair of goods or of spare parts for goods if that is not the case.
17. Offering gifts, prizes or other free items in connection with the supply of goods or services if the supplier knows or ought to know that the items will not be provided or provided as offered.
18. Representing that goods or services are available at a discounted price for a stated period of time if the supplier knows or ought to know that the goods and services will continue to be so available for a substantially longer period.
19. Representing that goods or services are available at a discounted price for a particular reason that is different from the fact.
20. Using small print to conceal a material fact from the consumer or to mislead a consumer as to a material fact, in connection with the supply of goods or services.

In cases where there has been an unfair practice exercised by a supplier, the court may grant the following reliefs to the consumer, as shown in Table 2.
Table 2: Relief Against Unfair Practice of the Supplier

<table>
<thead>
<tr>
<th>RELIEF</th>
<th>SECTION</th>
<th>ELABORATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restitution</td>
<td>s 7(a)</td>
<td>Order restitution of any money, property or other consideration given or furnished by the consumer</td>
</tr>
<tr>
<td>Damages</td>
<td>s 7(b)</td>
<td>Award the consumer damages in the amount of any loss or damage suffered by the consumer as a result of the unfair practice</td>
</tr>
<tr>
<td>Specific performance</td>
<td>s 7(c)</td>
<td>Make an order of specific performance against the supplier</td>
</tr>
<tr>
<td>Repair / provide spare parts</td>
<td>s 7(d)</td>
<td>Make an order directing the supplier to repair goods or provide parts for goods</td>
</tr>
<tr>
<td>Variation of the contract</td>
<td>s 7(d)</td>
<td>Make an order varying the contract between the supplier and the consumer</td>
</tr>
</tbody>
</table>

**Conclusion**

The rise of standard form contracts and the use of exclusion clauses to deprive consumers from their rights have indeed inspired the law in these countries to react against the increasing decline of individual’s capacity to make free and rational choices (Shaikh Mohd Noor Alam 1994). The legal development in this area illustrates the role of contract law and can thus be best summed up as follows (Zweigert & Kotz 1987): "...the modern task of contract law is to develop criteria and procedures through which contractual fairness can be assured." The response to the challenge of exclusion clause has been the concern of most common law jurisdictions. The control of substantive unfairness through the regime of contract law of these selected common law countries reflect substantially their varied way in which the law reform in each country is taking form. In the common law system, as evinced by the three selected countries, the legislature have evolved various techniques of control to ensure the epidemic brought by the use of exclusion clauses is contained and controlled. The statutory control of exclusion clauses in the selected common law countries above has taken many forms, from specific legislation on unfair terms such as in the English Unfair Contract Terms Act 1977 and the Singaporean Unfair Contract Terms Act 1994, to provisions in other specific legislations such as the Malaysian legislation, the Consumer Protection Act 1999.

With the rise of consumerism in many countries, the 20th century had seen paternalistic approach in consumer protection. The old adage of ‘let the buyer beware’ no longer applies to consumer transactions as courts gradually began to turn to ways and means to protect the weaker party in the bargain. In many countries both the legislature and the judiciary have adopted a new attitude in promoting the consumer welfare.

Nevertheless the same is not true in Malaysia. The case law development and the lack of regulation on unfair terms in consumer contracts in Malaysia have shown grave concern for the consumers. With the coming into force of the Consumer Protection Act 1999, it has given hope to consumers but the nature of the Act being supplemental and without prejudice to any other law regulating contractual relations has indeed reduces the effectiveness of this long awaited legislation. The time for reform on the law on exclusion clauses in consumer contracts in Malaysia in line with the current development in other jurisdictions has thus come. Any delay in this new law is justic delayed to the Malaysian consumers.

**References**


