

Malayan Law Journal Articles/2013/Volume 1/Protecting Consumers against Unfair Contract Terms in Malaysia: The Consumer Protection (Amendment) Act 2010

[2013] 1 MLJ lxxxix

Malayan Law Journal Articles

2013

PROTECTING CONSUMERS AGAINST UNFAIR CONTRACT TERMS IN MALAYSIA: THE CONSUMER PROTECTION (AMENDMENT) ACT 2010¹

Naemah Amin, PhD

Associate Professor

Department of Civil Law, Ahmad Ibrahim Kulliyah of Laws

International Islamic University Malaysia (IIUM)

E-mail: naemah@iiu.edu.my

Consumers enter into various types of contracts for the supply of goods or services in their everyday lives. In most cases these contracts contain terms which are more favourable to traders but are unfair to the consumers. A standard form contract designed by the traders is the common contract where unfair terms can be expected to be found. Unfair terms particularly in the form of exemption clauses can also be found or printed in the receipts, invoices and other sale documents. These terms may operate extremely harshly against consumers because their rights may be limited or restricted or denied all together. Malaysian consumers have been haunted with this issue for a long time even after the introduction of the Consumer Protection Act ('CPA') in 1999 since the issue has not been properly tackled by the Act. Nonetheless this major loophole in the Malaysian consumer protection law has recently been rectified by the CPA (Amendment) Act 2010. It is interesting to note that the Amendment has adopted the Indian Law Commission Report on Unfair (Procedural & Substantive) Terms in Contract (2006), which divides unfairness into 'procedural' and 'substantive' unfairness. Such a division has not been done in any country so far. This article evaluates the extent to which provisions on procedural unfairness and substantive unfairness under a new Part IIIA of the CPA provide better protection to consumers in terms of getting a fair bargain.

Keywords: *consumer protection; unfair contract terms; procedural; substantive unfairness*

1 MLJ lxxxix at xc

INTRODUCTION

The need to have a law dealing specifically with the use of unfair terms particularly in consumer contracts has been in the consumer law reform agenda in Malaysia for a few years. The National Advisory Council for Consumer Protection in its report in 1993 suggested that legislation along the lines of the United Kingdom ('UK') **Unfair Contract Terms** Act 1977 should be introduced in Malaysia.² The proposal is basically founded on the argument that the contract law is inadequate to protect consumers who lack bargaining power against the use of unfair terms by traders. Thus there was a wide-spread expectation that provisions on unfair terms would be included in the Consumer Protection Act ('the CPA') when it came into effect on 15 November 1999. Unfortunately, it turned out to be a great disappointment for consumers when the issue on unfair terms was not properly tackled by the CPA.³ As a result, consumers in Malaysia continue to be haunted with the problem of unfair terms, particularly in the form of exemption clauses that are found in a standard form contract or printed in the receipts, invoices and other sale documents even after the introduction of the CPA. In most cases, the terms and conditions are offered to consumers on a 'take it or leave it' basis. These

terms may operate extremely harshly against the consumers because their rights may be limited or restricted or denied all together.

Although there are provisions in other consumer protection statutes which prohibit contracting out the protection afforded to consumers and disallow certain types of unfair terms, their application are very limited to specific transactions.⁴ There have also been attempts by the courts to come to the rescue of the weaker party via the application of the doctrine of inequality of bargaining power or unconscionable contract⁵ but at the same time, there are

1 MLJ lxxxix at xci

cases that are not in favour of such judicial intervention.⁶ Thus no definite judicial trend can be discerned from those cases. Eventually, it becomes clear that the task of controlling unfair terms is beyond the power of the courts which appear to have been struggling to balance the two interests; to preserve the sanctity of contract on the one hand, and to control unreasonable clauses on the other hand. It appears that the development of Malaysian law in this regard was far behind compared to the legal development of other Commonwealth jurisdictions and even some neighbouring ASEAN countries⁷ until the recent amendment made to the CPA.

THE CPA (AMENDMENT) ACT 2010

There have been several amendments to the CPA over the past ten years and the most significant is the recent amendment, which aims to rectify the major loophole in the Malaysian consumer protection law.⁸ A new Part IIIA has been inserted into the CPA to specifically deal with **unfair contract terms**. 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.⁹ 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.¹⁰ This Part is particularly aimed to protect consumers against unfair terms in a standard form contract,

1 MLJ lxxxix at xcii

commonly used by traders and forms the basis of most contracts in consumer transactions. This is in line with the current trends and development in other jurisdictions, which focuses the control of unfair terms on a standard form contract. Despite the advantages of providing efficiency, certainty and cost reduction, a standard form contract has been known for its one-sidedness in favour of its drafter (the trader). In most cases, consumers have no option but to sign on the dotted lines and thus their actual consent to the agreement is questionable.

In addition, Part 111A arguably applies to other unfair terms particularly in the form of exemption clauses that can be found or printed in the receipts, notices, invoices and other sale documents based on the broad meaning of 'a contract' and 'a term of a contract.' Section 24A provides that 'contract' has the same meaning as assigned to it in s 2 of the Contract Act 1950.¹¹ Furthermore one of factors to be considered in deciding procedural unfairness is 'whether or not, prior to, or at the time of entering into the contract, the terms of the contract were subject to negotiation or were part of a standard form contract'.¹² It can be deduced from this provision that a contract or a term of a contract that may be scrutinised under the CPA is not necessarily contained in a standard form.¹³ It may also apply to negotiated contract terms and this should be the case since negotiation does not necessarily mean that the contract is truly a reflection of the wishes of both parties. It has been argued that 'negotiation may simply provide the supplier with greater opportunity to exploit his or her superior economic strength'.¹⁴

Consequently the new law appears to open up the whole range of contractual provisions in consumer contracts for scrutiny, and for assessment against a standard of fairness. 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'. This general test of unfairness inevitably raises difficult issues of interpretation. Obviously it does not mean that there should be a perfect symmetry between the parties' rights and

1 MLJ lxxxix at xciii

obligations under the contract. The law is only concerned with a term that causes 'significant imbalance to the detriment of the consumer.' In other words, the contract should not appear to be too unbalanced after taking into consideration what the parties have promised to perform for each other. The balancing process

necessarily requires the court not only to look at the term in question but also at the contract as a whole. However the issue that may arise is whether the alleged unfair term needs to be counterbalanced by other terms that may be favourable to the consumer in various different ways'.¹⁵ A more correct approach is perhaps by looking at burdens imposed on the consumers that are not balanced by the rights or benefits granted to the trader. As Lord Bingham in the House of Lords case of *First National Bank v Director General of Fair Trading*¹⁶ observed that:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.

In assessing the unfairness of a contract or a term of a contract, the CPA has adopted a new approach of dividing unfairness into 'procedural' and 'substantive' unfairness. In this regard, the legislator has departed from its usual practice of adopting the legal regime in the UK, Australia or New Zealand.¹⁷ Instead, the 2010 amendment has implemented the proposal by the Indian Law Commission (the Commission) in its Report on Unfair (Procedural & Substantive) Terms in Contract.¹⁸ The Commission has conducted a detailed study on the law of **unfair contract terms** of various countries including the United States of America ('USA'), the UK, Australia, Canada and South Africa and came to the conclusion that 'if any legislation is to be more effective and realistic, it is necessary to make separate provisions dealing with 'procedural' and 'substantive' unfairness.' The Commission claims that such a division has not been done in any country so far and because of that, the laws in several countries have created a lot of confusion due to a 'mish-mash' of procedural and

¹ MLJ lxxxix at xciv

substantive unfairness. It should however be noted that the proposal of dividing unfairness into procedural and substantive division can also be found in the Federation of Malaysian Consumer Association (FOMCA)'s report on the Review of the Consumer Protection Act.¹⁹ The FOMCA suggested that procedural unfairness and substantive unfairness must be distinguished to provide better protection to consumers and for clarity.

THE CONCEPT OF PROCEDURAL AND SUBSTANTIVE UNFAIRNESS

The concept of procedural and substantive unfairness is not a new legal concept. The distinction between procedural and substantive unfairness has been recognised by the court²⁰ and can be found in several literatures.²¹ The Commission defines procedural unfairness as 'unfairness in the manner in which the terms of the contract are arrived at or are actually entered into by the parties' and substantive unfairness as 'a term by itself may be one-sided, harsh or oppressive or unconscionable and therefore unfair'. According to Willet, procedural fairness refers to fairness in the process leading up to the agreement whereas substantive fairness concerns with fairness in the distribution of substantive rights and obligations under the contracts.²² In discussing various approaches to unfair terms, Wilhelmsson has identified several debatable issues, and one of them is:

What kinds of arguments should primarily be used in assessing the unfairness of a contract? Should one mainly look at the possible one-sidedness of the procedure when the contract was made (procedural unfairness), or should one

¹ MLJ lxxxix at xciv

instead consider the outcome of the procedure -- that is, the content of the contract (substantive unfairness) -- or, rather, what interrelationship should the procedural and substantive arguments have in the assessment of fairness?²³

In simple terms, procedural unfairness looks at the process of making a contract, whereas substantive unfairness concerns the outcome of the process, ie the content or substance of the contract. The fact that a consumer was not aware of a particular term due to its typography at the time of signing a contract is an example of procedural unfairness; whereas a clause in a contract that excludes one party from any liability for negligence is a good example of substantive unfairness. The concept has been recognised under the common law and can be found in the statute on contract law. The doctrine of duress, undue influence, fraud and misrepresentation are examples of procedural unfairness whereas prohibition of certain contract terms such as restraint of trade is actually concerned with the substantive aspect of contractual fairness. Nonetheless, the common law court is generally not concerned with a matter of substantive fairness but focuses

more on the procedural aspect of contractual fairness.²⁴ Undoubtedly, it is much easier to invalidate a contract or a term in a contract for lack of consent (procedural matter) compared to interfering with the terms and conditions that the parties have agreed upon in validly formed contracts. However, there appears to be a real need to protect consumers against the use of unfair terms beyond the measures focused on procedural unfairness. This is based on the recognition that a proper procedure does not necessarily guarantee a fair result since consumers' ability to make rational decisions when entering into contracts may be limited by various factors.²⁵

Therefore, by adopting the approach of dividing unfairness into procedural and substantive measures, the law to some extent, is now clear that a contract

1 MLJ lxxxix at xcvi

or term in a contract can be declared to be unfair by itself despite its compliance with requirements of transparency and clarity. In this regard, the Law Commission notes:

We are aware that in certain quarters it has been considered that it is difficult to put these concepts in separate compartments in a statute but we do not agree. We have not found any difficulty. In fact, as pointed by several authors, the focus should not be confined only to 'procedural unfairness' and we must move forward to deal with 'substantive unfairness' also rather than merely state that where parties have signed contracts with the eyes open, if such contracts contained a term which was unfair in itself, the party had himself or itself to blame. This was the method of interpretation of contracts at a time when principles of substantive unfairness were not effectively developed. Today, we find in practice that there are a large number of substantively unfair terms in different types of contracts ie contracts or terms which are by themselves unfair. Therefore, the law must be reformed to be able to stretch its hands to rectify such substantive unfairness.²⁶

Under the separate regime of procedural and substantive unfairness, there would seem to be two stages where a contract or any term in a contract can be scrutinised for its unfairness. In most cases, a contract or a term of a contract that has been found to be procedurally unfair would naturally be regarded as substantively unfair. On the other hand, since transparent procedures in contracting can still lead to unfair results, the issue of substantive unfairness comes into play at a second stage in ensuring both parties have had a fair dealing by looking at terms and conditions of a contract. From a practical point of view, it may be thought that procedural unfairness is more difficult to prove²⁷ compared to substantive unfairness since in the latter case the only relevant evidence is a copy of the unfair contract itself. However, given the fact that the court is more familiar in deciding the issue of contractual fairness on the ground of procedural unfairness, most cases would probably be decided on the procedural ground. Furthermore, a contract may be seriously imbalanced or a term may be extremely unfair so as to raise a presumption of procedural unfairness. However, it should be noted that certain type of contract by its nature only imposes burden and obligation without offering any benefit, for example a contract of guarantee or indemnity. In such a case, the fairness of terms in the contract can only be challenged on the ground of procedural irregularities since there is no issue of contractual imbalance. Nonetheless, the two concepts may overlap and in practice, it is not always easy to distinguish

1 MLJ lxxxix at xcvi

procedural unfairness from substantive unfairness.²⁸ Thus a court or the Tribunal for Consumer Claims ('the Tribunal') may declare a contract or a term of a contract to be either procedurally or substantively unfair, or both.²⁹

PROCEDURAL UNFAIRNESS

Section 24C(1) of the CPA states that '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 supplier'. Section 24C(2) then provides a long list of factors that may be taken into consideration by a court or the Tribunal in determining procedural unfairness.³⁰ Procedural fairness is basically concerned with matters that may prevent the consumer from protecting his interests in the process leading to the agreement. The fundamental requirement of procedural fairness is transparency.³¹ Transparency requires contractual terms to be expressed in reasonably plain language, legible and readily available and accessible to any consumer likely to be affected by the terms. There are two factors listed in s 24C(2) that directly deal with procedural transparency, namely

'whether expressions contained in the contract are in fine print or are difficult to read or understand' and 'the extent, if any, to which the provisions of the contract or a term of the contract or its legal or practical effect was accurately explained by any person to the consumer who entered into the contract'.³² Obviously, the consumers should be provided with adequate information to enable them to make an informed decision. However, it may be argued that for the law to be more effective, transparency should be made an independent and mandatory requirement rather than among the factors that the court may take into consideration in deciding procedural fairness.³³ On the other hand, a

1 MLJ lxxxix at xcvi

transparent procedure and information disclosure does not guarantee that consumers would make rational decisions for the protection of their interest.

Thus the factors listed in s 24C(2) appear to go beyond a procedural transparency and in fact focus more on the relationship between the parties and consumers' bargaining strength. In this respect, among factors to be considered by the court include 'the bargaining strength of the parties to the contract relative to each other', 'reasonable standards of fair dealing' and 'whether or not, prior to or at the time of entering into the contract, the terms of the contract were subject to negotiation or were part of a standard form contract'.³⁴ In addition 'whether or not it was reasonably practicable for the consumer to negotiate for the alteration of the contract or a term of the contract or the reject the contract or a term of the contract' is also a consideration for the court or the Tribunal.³⁵ This factor is not only concerned with the issue on whether the consumer has the strength to negotiate for better terms but also whether he has a choice in relation to the terms or the contract. Thus a lack of choice or no choice at all may be taken as indication that the terms which 'resulted in an unjust disadvantage to the consumer' are procedurally unfair. In addition, the parties' experiences in dealing with each other may also be taken into consideration.³⁶

The disparity of knowledge has been considered to be the main reason why consumers are in a weak bargaining position compared to the more powerful supplier of goods and services. Thus the court or the Tribunal may consider 'the knowledge and understanding of the consumer in relation to the meaning of the terms of the contract or their effect'; 'whether or not independent legal or other expert advice was obtained by the consumer who entered into the contract' and 'whether the consumer relied on the skill, care or advice of the supplier or a person connected with the supplier in entering into the contract'.³⁷ In recognising that consumers' ability to make rational decision when entering into contracts may be limited by various factors, s 24C(2)(g) states that the court or the Tribunal may also consider 'whether or not, even if the consumer had the competency to enter into the contract based on his or her capacity and soundness of mind, the consumer:

(a) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered; or

1 MLJ lxxxix at xcix

(b) suffered serious disadvantages in relation to other parties because the consumer was unable to appreciate adequately the contract or a term of the contract or its implications by reason of age, sickness, or physical, mental, educational or linguistic disability, or emotional distress or ignorance of business affairs.³⁸

It is reasonably clear that a contract or a term in a contract may be declared to be unfair either due to lack of transparency or lack of bargaining power or lack of choice or other disabilities of the consumer. If each factor were to be taken into account in deciding the issue of procedural unfairness, it is hard to think how this 'fair process' would still lead to unfair result. However the law does not clearly state requirements of procedural fairness since 11 factors listed in s 24C(2) are only providing guidelines for the court or the Tribunal in deciding the issue of unfair terms. Traders who need to comply with the law may have serious problems of transforming those factors into a practical reality in the form of standard procedure.³⁹ They may need to have different sets of procedure depending on the nature of transactions and different categories of consumers.

SUBSTANTIVE UNFAIRNESS

Under the separate regime of procedural and substantive unfairness, a procedural fairness is not the determinative consideration because the terms may be subject to review for unfairness without looking at the

procedure of making contracts. Thus it may not possible for a trader to establish that an otherwise unfair term is fair by showing that the term was highly transparent or that other reasonable steps were taken to ensure consumers' full knowledge about the term. There are terms that can be declared to be unfair based on their substantive features alone, irrespective of whether there is procedural fairness. To serve this purpose, the law should define clearly the type of terms under this category. Nonetheless, s 24D states that 'a contract or a term of a contract is substantively unfair 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;
- (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.

1 MLJ lxxxix at c

Obviously, the meaning of substantive unfairness is not straightforward. The terms 'harsh', 'oppressive' and 'unconscionable' are vague terms that need further clarification and ultimately subject to different interpretations. Notably the words 'harsh' and 'oppressive' can be found in a statute on consumer protection in other jurisdictions.⁴⁰ Nonetheless compared to 'harsh' and 'oppressive', the common law legal system is more familiar with the concept of unconscionability, but it is rather a protean concept and has yet to receive full judicial recognition in Malaysia.⁴¹ To compound matters, the concept of unconscionability itself can be divided into procedural and substantive unconscionability.⁴² This further clouds the distinction between procedural unfairness and substantive unfairness. On the other hand, it can be seen as a legislative recognition of the application of the doctrine of unconscionability in Malaysia. While exclusion or restriction on liability for negligence appears to be disallowed rightly out, exemption of liability for breach of express or implied terms is subject to adequate justification.

However, s 24E states that 'if a contract or a term of a contract excludes or restricts liability, or excludes rights, duties and liabilities, it is for the supplier relying on such exclusion or restriction to prove that it is not without adequate justification.' This section deals with unfair terms in the form of exemption clauses, which may also include exemption of liability for negligence. The issue that may arise is whether exclusion or restriction on liability for negligence is also subject to adequate justification. It is desirable for the interest of consumer protection that no justification should be accepted for excluding or restricting liability for negligence. Furthermore, the term which excludes or restricts liability for negligence may also be regarded as harsh or unconscionable. On the other hand, adequate justification for excluding or restricting liability for breach of express or implied terms should only be confined to justification

1 MLJ lxxxix at ci

provided under the law.⁴³ However, it may be argued that consumers should be given absolute protection in cases concerning substantive interest and thus providing room for the trader to justify the use of exemption clauses is rather misconceived.

In addition to the general definition of substantive unfairness, s 24D(2) provides a list of guidelines to adjudge substantive unfairness. The guidelines are actually illustrations of terms that can be categorised as either harsh or oppressive or unconscionable. Section 24D(2) provides that in deciding substantive unfairness, a court or the Tribunal may take into account '(a) whether or not the contract or a term of the contract imposes conditions:

- (i) which are unreasonably difficult to comply with; or
- (ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract'

and sub-s '(d) whether the contract or a term of the contract is contrary to reasonable standards of fair dealings'. These circumstances are arguably relevant in deciding whether the term is oppressive. Other oppressive terms may include a term of the contract that 'has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties'⁴⁴ and where 'the benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to his or her

circumstances.¹⁴⁵ These kinds of terms are also illustrative of terms which may cause significant imbalance that adversely effects consumers.

It is reasonably clear that substantive unfairness should be focused on the wordings of the contract rather than on the procedure of making contracts. Thus, the relevancy of the circumstances as to 'whether the contract is oral or wholly or partly in writing', 'whether the contract is in standard form' and 'whether the consumer was in a fiduciary relationship with the supplier' in deciding substantive unfairness is highly questionable. However, these factors are presumably listed in s 24D(2) for their connection to the concept of unconscionability which is a mixture of procedural and substantive matters. The question thus arises as to whether there is any significant gap between the concept of unconscionability and the concept of procedural and substantive

1 MLJ lxxxix at cii

unfairness. The appropriateness of the inclusion of unconscionability in the definition of substantive unfairness may be questionable from both theoretical and practical perspectives. On the other hand, the terms that may be categorised as 'harsh' can be found in s 24D(2)(h), which provides that a court or the Tribunal may also take into account 'whether the contract or a term of the contract:

- (i) requires manifestly excessive security for the performance of contractual obligation;
- (ii) imposes penalties which are disproportionate to the consequences of a breach of contract;
- (iii) denies or penalises the early repayment of debts;
- (iv) entitles the supplier to terminate the contract unilaterally without good reason or without paying reasonable compensation; or
- (v) entitles the supplier to modify the terms of the contract unilaterally.

The circumstances listed in sub-s (h) are more specific examples of substantively unfair terms. The list provides clearer guidelines to the court or the Tribunal as well as traders who need to review their standard terms contracts and to avoid terms of such nature. While circumstances (i) - (iv) are straightforward, traders may have valid reason for seeking to retain discretion to vary aspects of the contract especially for a long term contract that is subject to unpredictable market conditions and changing of government regulations. Since the CPA does not invalidate any terms or clauses automatically, a court or the Tribunal may take this point into consideration. As a whole, s 24D does not provide readily ascertainable type of terms that can be categorised as substantively unfair. The list of circumstances is only illustrative and thus if one or more of these circumstances does arise, the term is considered as being unfair in some cases but not necessarily in others. It should be remembered that the ultimate aim of the enquiry is the fairness or unfairness of the term in the sense it causes 'a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer'.

EFFECT OF UNFAIR TERMS

Section 24G(1) prescribes that a court or the Tribunal may declare an **unfair contract term** under ss 24C and 24D to be unenforceable or void. Alternatively, a court or the Tribunal may consider the unfair term to be severable and give effect to the remaining terms. In a case where the contract is able to stand without the unfair term, a court or the Tribunal has the discretion to determine the extent and the manner to enforce and give effect to the remaining contract

1 MLJ lxxxix at ciii

term.⁴⁶ Pursuant to the judgment, the Tribunal may make an award in accordance with s 112 of the CPA. Section 112 provides a long list of awards that may be granted by the Tribunal including an order that 'the contract to be varied or set aside, wholly or in part'.⁴⁷ Thus the Tribunal may ask the parties to modify or to make necessary amendment to the terms of their contract as a means of saving the contract whilst safeguarding the interest of the consumer. Nevertheless, the issue that may arise is whether the Tribunal can require the inclusion of additional terms to rectify any significant imbalance that adversely effects consumers. In cases where the contract has been wholly or partly executed, a court is empowered to give a judgment, and the Tribunal may make an award and for that purpose it may consider:

- (a) whether and to what extent restitution is possible in the facts and circumstances of the case; and

- (b) where such restitution is not possible, either wholly or partly, whether any compensation is payable.⁴⁸

In addition to civil liability, Part IIIA also imposes criminal liability. Section 24I makes the contravention by any person of any provision of Part IIIA an offence.⁴⁹ In other words, not only can unfair terms be set aside, a criminal action can also be taken against traders who insert such terms. However, the exact nature of this contravention is not clearly spelt out in the Act. Presumably, the inclusion of any **unfair contract term** by a supplier is an offence but it may not be easy to be enforced as fairness is a variable and relative concept and the law on unfair terms under Part IIIA is not entirely clear. Without a black list of terms that are considered as unfair and mandatory procedural compliance, the practicality of criminal sanction is highly doubtful. It is pertinent to note that other jurisdictions have so far not seen the need to make any inclusion of an **unfair contract term** an offence. On the other hand, the provision may have more deterrent effect on traders.

Unlike the law in most Commonwealth jurisdictions, no specific body is given administrative powers under the CPA to monitor and to prevent the use

1 MLJ lxxxix at civ

of unfair terms particularly those drawn up for general use.⁵⁰ Nonetheless, an issue as to whether a contract or its terms are procedurally or substantively unfair can be raised by a court or the Tribunal during the proceeding, even if none of the parties has raised the issue in its pleadings.⁵¹ The immediate question is to query the extent and circumstances in which the court or tribunal would be justified to raise the issue. However, this may be seen as important power especially in relation to cases heard in the Tribunal where consumers who are not legally represented may be ignorant of the protection afforded to them under Part IIIA.⁵² It will be interesting to see how and to what extent this power will be exercised by the court or Tribunal. On the other hand, it still requires a case to be filed in the first place and thus the solution of a court or the Tribunal will help only the consumer who has dared to take the case to the court or Tribunal. It may be argued that an effective control of unfair terms requires a proactive enforcement power which is not provided for under the Amendment. Part IIIA also does not resolve the issue of the burden of proof. While it is for the supplier relying on exemption clauses to prove that it is not without justification,⁵³ there is no provision relating to the burden of proof for other types of unfair terms.

CONCLUSION

An overdue measure to protect consumers from extensive use of unfair terms in Malaysia has finally materialised by the introduction of Part IIIA in the CPA (Amendment) Act 2010. It may be considered as major legislative intervention in contractual settings, which is deemed necessary to curb a widespread use of unfair terms in consumer contracts, especially those found in standard form contracts. However, the adoption of the Indian Law Commission's approach of dividing unfairness into procedural and substantive measures is rather unique as it has never been done before. Since the proposal has not been implemented in India as yet, the effectiveness of this approach cannot be evaluated. Obviously provisions under Part IIIA are not entirely clear and easy to understand. There is also a clear uncertainty about the proper relationship between substantive and procedural measures in deciding the fairness of terms. Despite a long list of guidelines in determining whether a contract or a term of

1 MLJ lxxxix at cv

contract is procedurally or substantively unfair, it does not cover all possible instances whereby the legitimate interest of the consumer may be unfairly prejudiced as a result of unfair terms. Part IIIA also introduces a new set of terms such as harsh, oppressive, unconscionable and adequate justification. Each of these terms however, carries with it uncertainties and ambiguities which are capable of being resolved only after litigations.

Nevertheless, Part IIIA, in general, certainly enhances the rights of the consumer and if the law is strictly implemented, it can be considered to some extent as putting an end to unfair terms in consumer contracts in Malaysia. Despite theoretical and interpretative uncertainty of the separate regime of procedural and substantive unfairness, the validity of a contract or a term of a contract can now be challenged by consumers on the ground of procedural unfairness or substantives unfairness, or both. Consequently, business organisations particularly those dealing with a standard form contract need to review their procedure before and at the time of signing a contract to ensure transparency and intelligibility. They also need to review all terms in their contracts to avoid contravention with the principles of substantive fairness. Part IIIA should also be seen

as incentive for traders to compete with one another by offering terms that better reflect consumer interest. It remains to be seen how this new law delivers significant practical improvement in protecting the legitimate interests of consumers and provides adequate means for preventing the continued application of unfair terms in consumer contracts.

1 This paper is a revised version of a paper presented at the 9th Asian Law Institute Conference, 31 May -1 June 2012, Singapore.

2 See SS Rachagan (Ed), 1993, *Consumer Law Reform -- A Report*, paras 4.7.1-4.7.8. The report also covers many other aspects of consumer protection such as trade practices, product liability and consumer credit.

3 There are only two sections on the prohibition of contracting out protection under the CPA. Section 6 provides general prohibition and s 71 specifically deals with product liability under Part X. Obviously the provisions are inadequate to protect consumers from other aspects of **unfair contract terms**.

4 For example, s 34 of the Hire-Purchase Act 1967 and ss 17 and 23 of the Moneylenders Act 1951.

5 See *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31; *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522; and *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98. See generally Cheong May Fong, *A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After Saad Marwi?* [2005] 4 MLJ 1.

6 See *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127; *Yewpam Sdn Bhd v Mohd Salleh bin Sheikh Ahmad & Anor Sult* [2001] 1 LNS 43; and *American International Assurance Co Ltd v Koh Yen Bee (f)* [2002] 4 MLJ 301.

7 See the **Unfair Contract Terms** Act (as Cap 396, 1994 Rev Ed) of Singapore and Chapter V of the Indonesian Law No 8 on Consumer Protection 1999. See generally Sakina SAY, 'Exclusion of Liability in B2C Contracts: The Southeast Asian Approach' 7th ASLI Conference, Kuala Lumpur, Malaysia, 25-26 May 2010.

8 [Act A1381] which came into force on 1 February 2011.

9 A 'consumer' is defined in s 3(1) of the CPA as a person who: ' (a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and (b) 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 -- (i) resupplying them in trade; (ii) consuming them in the course of a manufacturing process; or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land.'

10 Section 2(2) states that the CPA shall not apply:

- (a) to securities as defined in the Securities Industry Act 1983;
- (b) to futures contracts as defined in the Futures Industry Act 1993;
- (c) to contracts made before the date on which the Act comes into operation;
- (d) in relation to land or interest in land;
- (e) to services provided by professionals who are regulated by any written law; and
- (f) to healthcare services or healthcare facilities.

11 Section 2(h) of the Contracts Act 1950 defines contract as 'an agreement enforceable by law'. It is not necessarily to be made in writing.

12 See s 24C(2)(d) of the CPA.

13 Section 24A(b) defines 'standard form contract' as 'a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry'. This obviously includes standard form contracts used by various industries such as insurance, banking, credit and any other supply of goods and services.

14 See G Howells and S Weatherill, 2005, *Consumer Protection Law*, Ashgate, p 261.

15 See C Willett, 2007, *Fairness in Consumer Contracts -- The Case of Unfair Terms*, Ashgate, p 5.

16 [2001] 3 WLR 1297, at p 1307.

17 The CPA generally is based on the Consumer Guarantees Act 1993 of New Zealand. The New Zealand Act on the other hand is taken in part from the Australian Trade Practices Act 1976, the United Kingdom's Supply of Goods and Services Act 1982 and the Saskatchewan's Consumer Products Warranties Act 1977.

18 See The Law Commission of India (2006), 199th Report on Unfair (Procedural & Substantive) Terms in Contract.

19 See FOMCA, 2006, *Review of the Consumer Protection Act 1999*, p 141.

20 The Commission has referred to Lord Brightman in the Privy Council case of *Hart v O'Connor* [1985] AC 1000 at p 1017, who noted that: 'if a contract is stigmatized as 'unfair', it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call it 'procedural unfairness'. It may also, in some contents, be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this unfairness from procedural unfairness, it will be convenient to call it 'contractual imbalance. The two concepts may overlap.'

21 The Commission referred to A Leff, 'Unconscionability and the Code -- The Emperor's New Clause' (1967) University of Pennsylvania Law Review 485; Duggan, 'Some Reflections on Consumer Protection and the Law Reform Process' (1991) 17 Mon LR 274.

22 See C Willett, 2007, *Fairness in Consumer Contracts -- The Case of Unfair Terms*, Ashgate, p 5. The writer also notes that 'what happens in the course of the process leading to the agreement is, of course, closely linked with substantive agreement itself. However, it remains possible, at least to some extent, to separate out the issues'.

23 See T Wilhelmsson, 2008, 'Various Approaches to Unfair Terms and Their Background Philosophies', *Juridica International*, Nbr XIV pp 51-57.

24 See Nurretina and Z Amin, *Unconscionable Contracts: The Courts' Approach towards Substantive Fairness*, [2003] 4 MLJ clxv.

25 According to G Howells, due to various psychological reasons, consumers may not rely on the available information in a contractual decision-making process. See G Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 *Journal of Law and Society*, p 349; on the other hand, T Wilhelmsson, *ibid* n 22 notes that 'the more trustful consumers are, the less they will feel a need to be on guard against unfair contract practices. A higher level of trust therefore implies a need for or a reliance on more efficient consumer protection.' See also J Paterson, 'The Australian **Unfair Contract Terms** Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts', available at <http://ssrn.com/abstract=1669008>; and T Wilson, N Howell and G Sheehan, 'Protecting the most Vulnerable in Consumer Credit Transactions' (2009) *J Consum Policy*, 32:117-140.

26 See The Law Commission of India, *ibid*, p 136.

27 It may require oral evidence by witnesses and other documentations as the occurrence of the alleged fact needs to be established.

28 For this main reason, the statutes on **unfair contract terms** of various countries do not separate these two concepts.

29 Section 24G of the CPA. In addition s 24F allows a court or the Tribunal to raise an issue as to whether a contract or its terms are unfair, even if none of the parties has raised the issue in its pleadings.

30 This section has adopted almost word for word the recommendation by the Law Commission. See the Report pp 231-233.

31 See C Willett, 2007, *Fairness in Consumer Contracts -- The Case of Unfair Terms*, Ashgate, p 5.

32 See s 24C(2)(f) and (i) of the CPA.

33 In comparison, reg 7(1) of the UK Unfair Terms in Consumer Contracts Regulations 1999 states that terms offered to consumers in writing 'must always be expressed in plain and intelligible language'.

34 See s 24C(2)(b), (c) and (d).

35 See s 24C(2)(e).

36 Section 24(2)(j) states that 'the conduct of the parties who entered into the contract in relation to similar contracts or courses of dealing between them'.

37 See s 24C(2)(a), (h) and (k).

38 See s 24C(2)(g) of the CPA.

39 This may require specific Regulations as indicated in s 24J -- 'The Minister may make such regulations as may be necessary or expedient in respect of this Part'.

40 For example, the Saskatchewan Consumer Protection Act 1998 prohibits unfair practices, inter alia, in the form of 'taking advantage of a consumer by including in a consumer agreement terms or conditions that are harsh, oppressive or excessively one sided.' The Indian Law Commission referred to the Law Commission of New Zealand (1990), which defines 'oppressive' term as a term which '(a) imposes a burdensome obligation or liability which is not reasonably necessary to protect the interests of the other party; and (b) is contrary to commonly accepted standards of fair dealings'.

41 See Zahira Mohd Ishan, *Doctrine of Unconscionability: Its Development and Possibilities* [2007] 3 MLJ xliv.

42 See Nurretina and Z Amin, *Unconscionable Contracts: The Courts' Approach towards Substantive Fairness*, [2003] 4 MLJ clxv.

43 For example, the implied condition of merchantable quality and fitness for purpose can be excluded in cases of second-hand goods under the Hire-Purchase Act 1967. Similarly, certain exemption from liability for breach of implied guarantees can be found in Part V and Part VI of the CPA.

44 See s 24D(2)(e).

45 See s 24D(2)(e).

46 See s 24G(2).

47 See s 112(2)(g).

48 See s 24H.

49 The penalties provided under s 24I(1) are: (i) if such person is a body corporate, shall on conviction be liable to a fine not exceeding RM250,000, and for a second or subsequent offence, to a fine not exceeding RM500,000; (ii) if such person is not a body corporate, shall on conviction be liable to a fine not exceeding RM100,000 and/or to imprisonment for a term not exceeding three years.

50 For example, under the UK Unfair Terms in Consumer Contracts Regulations 1999, the Director General of Fair Trading may apply for an injunction to prevent the use of unfair terms in consumer contracts.

51 See s 24F.

52 See Pretam Singh, *Legislative Intervention in Protecting Consumers from Unfair Contract Term* (2011) MyConsumLJ Vol 1, p 143.

53 See s 24E.