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Navigating Unfair Contract Terms: Drawing Insights From Australia In Addressing The Legal Conundrum In Malaysia

Ibtisam@Ilyana Ilias
Universiti Teknologi MARA, Malaysia, ilyanailias@uitm.edu.my

Norazlina Abdul Aziz
Universiti Teknologi MARA, Malaysia, noraz397@uitm.edu.my

Hariz Sufi Zahari
Universiti Teknologi MARA, Malaysia, harizsufi@uitm.edu.my

Helza Nova Lita
Universitas Padjajaran, Indonesia, helza.nova@unpad.ac.id

NAVIGATING UNFAIR CONTRACT TERMS: DRAWING INSIGHTS FROM AUSTRALIA IN ADDRESSING THE LEGAL CONUNDRUM IN MALAYSIA

—Ibtisam @ Ilyana Ilias, Norazlina Abdul Aziz**, Hariz Sufi Zahari† & Helza Nova Lita††*

Abstract *In Malaysia, the regulation of unfair contract terms within business-to-consumer contracts falls under the jurisdiction of Part IIIA of the Consumer Protection Act 1999. This regulatory framework is overseen by the Ministry of Domestic Trade and Living Cost. However, the effectiveness of Part IIIA is hindered by certain gaps, resulting in its infrequent utilization for determining unfair terms in consumer contracts. One of the primary challenges lies in interpreting key terms such as "harsh," "oppressive," "unconscionable," and "adequate justification." These ambiguities often remain unresolved until legal proceedings take place. Complicating matters, doubts persist regarding the applicability of the Consumer Protection Act, 1999 to financial contracts, which predominantly consist of standard-form contracts. This ambiguity can partly be attributed to the divergence in the definitions of "consumer" as outlined in the Consumer Protection Act, 1999 and the Financial Services Act 2013, as well as the Islamic Financial Services Act 2013 and the Development Financial Institutions Act 2002 which includes small businesses as well. While these laws empower the Central Bank of Malaysia to establish standards related to consumer protection, including unfair contract terms, such regulatory guidelines have yet to be introduced. Thus, inconsistency prevails, leading to divergent judicial interpretations and verdicts concerning cases involving unfair contract terms. Employing doctrinal and comparative legal research methodology,*

* Ibtisam @ Ilyana Ilias, Faculty of Law, Universiti Teknologi MARA, Malaysia.
** Norazlina Abdul Aziz, Faculty of Law, Universiti Teknologi MARA, Malaysia.
† Hariz Sufi Zahari, Faculty of Law, Universiti Teknologi MARA, Malaysia.
†† Helza Nova Lita, Faculty of Law, Universitas Padjajaran, Bandung Indonesia.

this study examines the position of unfair term laws in Malaysia and Australia for benchmarking purposes. Based on the comparative analysis, some recommendations are proposed to enhance Malaysia's current legal position governing unfair terms in consumer contracts. The significance of this study lies in its aim to improve the legal regime concerning unfair terms, thereby fostering greater predictability. The suggested reform is poised to bolster safeguards for consumers who find themselves at a disadvantage in contractual negotiations with corporate entities.

Keywords: Unfair terms, consumer contract, consumer protection, financial consumer, freedom of contract.

I. INTRODUCTION

In Malaysia, unfair contract terms in business-to-consumer contracts are governed by Part IIIA of the Consumer Protection Act 1999 (CPA), which is under the purview of the Ministry of Domestic Trade and Living Cost (MDTLC). Nevertheless, the *lacunae* of the said Part IIIA inhibit its application and is rarely relied on to determine unfair terms involving consumer contracts. Among others, uncertainties arise as to the meaning of harsh, oppressive, unconscionable, and adequate justification, which can be resolved

only after litigations.[1] Furthermore, the applicability of the CPA in respect of financial contracts, which are dominated mainly by standard-form contracts, is also questionable.[2] One of the possible reasons is that the definition of consumer under the CPA[3] and the Financial Services Act 2013 (FSA), the Islamic Financial Services Act 2013 (IFSA) and the Development Financial Institutions Act 2002 (DFIA) are different.[4] The scope of financial consumers under these laws is wider to include small businesses. Although these three pieces of legislation grant the Central Bank of Malaysia (BNM) power to issue standards relevant to consumer protection, including unfair terms, such regulatory instrument has not been introduced yet. Consequently, a lack of uniformity and diverse judicial approaches in pronouncing judgments related to unfair terms transpire.

Against this backdrop, this study comparatively examines the legal framework of unfair contract terms regarding business-to-consumer in Malaysia and Australia. The discussion begins with a review of the relevant literature on unfair terms in Malaysia, followed by a brief description of the methodology employed in this study. Appraisal on the classical contract law and fairness of terms are made subsequently. An extensive examination of the Malaysian position is made by scrutinising the Contracts Act 1950, the CPA and decided cases. Next, it analyses Australia's approach, particularly under the Australian Consumer Laws (ACL) and the Australian Securities and Investment Commission Act 2001 (ASIC Act), in regulating unfair terms vis-à-vis consumer contracts. Based on the comparative analysis, some recommendations are proposed to enhance Malaysia's current legal position governing unfair terms in consumer contracts.

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1 Naemah Amin, 'Protecting Consumers Against Unfair Contract Terms in Malaysia: The Consumer Protection (Amendment) Act 2010' (2013) 1 Malayan Law Journal 6,1.

2 Nor Mahinar Abu Bakar, et al, 'Extending Unfair Contract Terms Protection to Banking Consumers in Malaysia: The Case of Islamic Banks' (2018) 3(8) International Journal of Accounting, Finance and Business 22, 26.

3 S 3 of the CPA defines 'consumer' as: "consumer" means 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.

4 The FSA uses the term financial consumers defines financial consumers in s 121 which substantially refers to consumers of the financial product and services offered by financial service providers. A similar definition is used in the IFSA and DFIA. The context of financial consumer is different from the meaning of consumer under CPA.

II. LITERATURE REVIEW

Numerous studies examine the legal position of unfair terms in Malaysia. In understanding the fundamental law of contract, which forms the basis of the Contracts Act 1950, Cheong compares the traditional approach and modern trends in interpreting the contractual terms and eventually considering the validity or otherwise of terms of contract which are perceived to be unfair.[5] The former refers to a strict application of classical contract law, namely *lais-sez-faire* market capitalism and freedom of contract. On the other hand, the latter appreciates the values of modern contract law, including the fairness principle and the doctrine of unconscionability or unequal bargaining power as vitiating factors that nullify the contract.

Most literature scrutinises the legal issues by referring to the provisions in the CPA, the Contracts Act 1950, and the doctrine of unconscionability and unequal bargaining power for both business-to-businesses contracts and business-to-consumer.[6] There is also literature that provides a detailed analysis of decided cases on unfair terms demonstrating the court approaches covering local and foreign cases.[7] While discussion on unfair contract terms regarding business to consumer contracts in Malaysia is available, the scope is only confined to the exclusion clause. Several studies appraise the position of the exclusion clause under Malaysian law, including the case of *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor*[8], and conclude that the decision has given a different perspective in deciding unfair terms in Malaysia.[9]

Past literature has made a comparative analysis with three jurisdictions: the United Kingdom (UK), Australia, and Singapore.[10] Nevertheless, regarding position in the UK, the legislation referred to is the Unfair Contract Terms Act 1977, which has been repealed by the Consumer Rights Act 2015. Likewise, a discussion on the relevant provisions under the Australian Consumer Law

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5 Cheong May Fong, 'The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract' (2014) 36 Journal of Malaysian and Comparative Law, 53–80.

6 Farihana Abdul Razak, & Zuhairah Ariff Abd Ghadas, 'Legal Issue Due to Unfair Contract Term: The Malaysia Perspective' (2020)1(19) Journal of Critical Review 7457–7463.

7 Anwar Abdul Rahman, 'Unfair Contract Terms: Cases Review' (2017) *Seminar on Law & Society II*.

8 *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1.

9 Azwina Wati Abdull Manaf and Norazuan Amiruddin, 'Comparative Study on Law of Unfair Terms of Contract in Malaysia' (2018) 4th International Conference on Advances in Education and Social Sciences 751-62; Farhah Abdullah and Sakinah Shaik Ahmad Yusoff, 'Consumer Protection on Unfair Contract Terms: Legal Analysis of Exemption Clauses in B2C Transactions in Malaysia' (2018) 8(12) International Journal of Asian Social Science 1097-1106; Tan Pei Meng 'The Legal Saga of Exclusion Clauses in Malaysia' (2019) 1 Review of Politics and Public Policy in Emerging Economies 43-52.

10 Abdull Manaf and Amiruddin above n 9.

is minimal and does not reflect the current legal position. The initial literature review divulges paucity in the existing literature investigating unfair term regimes under the FSA, IFSA and DFIA and the role of BNM regulatory guidelines. There is also an absence of comparative analysis with the latest position in Australia, which has undergone several amendments recently. Hence, this study attempts to close the gap by investigating the latest legal position of unfair terms in business-to-consumer contracts in Malaysia and Australia.

III. METHODOLOGY

The study employs a doctrinal legal research methodology in analysing the relevant statutory provisions governing unfair contract terms in Malaysia, including the CPA, the FSA, the IFSA, the DFIA and the Contracts Act 1950. Additionally, several decided cases were scrutinised to investigate judicial trends in deciding unfair terms in consumer contracts. The comparative legal research methodology was adopted to appraise the approach adopted by Australia to regulate unfair terms in consumer contracts. Fundamental references are the ACL, the ASIC Act and Unfair Contract Terms: A Guide for Businesses and Legal Practitioners. The primary sources of law were meticulously analysed, and secondary sources of law consisting of journal articles and textbooks were thoroughly examined to generate the findings.

IV. CLASSICAL CONTRACT LAW AND FAIRNESS OF TERMS

The idea of freedom of contract dominates classical contract law. Parties should be able to make agreements on their terms as practicable without interference from the courts or Parliament. Courts should respect, uphold, and enforce their agreements.[11] Freedom of contract permits the contracting parties to decide about the contractual terms**.** This classical theory of freedom of contract emerged in the late nineteenth century when there was unequal bargaining power between classes of people in society. The crux to this concept is that both parties are at liberty to decide the appropriate contract terms they would agree to as they are in the position to know better the nature of their contract. Thus, in the event of a future dispute, the court shall decide to the best of its ability to preserve the agreed terms. Lord Bramwell, a well-known defender of contract freedom, expressed his skepticism and detached attitude in a more colourful way in *Manchester, Sheffield and Lincolnshire Railway Co v Brown*:

[11] Stephen A Smith and Patrick Selim Atiyah, *Atiyah's Introduction to the Law of Contract* (OUP Oxford, 6th Edition, 2006) 15-16.

> "For here is a contract made by a fishmonger and a carrier of fish, who know their business and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business."[12]

Freedom of contract indicates that a person can determine whether or not to enter into a contract, with whom to contract, and under what terms. As a result of this freedom of choice, the notion of contract sanctity dictates that parties be bound to the contracts they have freely and voluntarily agreed to. Sir George Jessel MR in *Printing & Numerical Registering Co v Sampson* reflects the concept behind contract freedom and sanctity in the following dictum:

> "If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contracts, when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of Justice"[13]

In its ideal form, contract freedom requires the state to recognise the autonomy of the individual in making decisions that affect that individual, to recognise that a contracting party is a better arbiter of their interests than the legal system and is better qualified to assess the fairness and reasonableness of the methods used to carry out that interest than the legal system. As a result, adhering to the idea necessitates leaving the party alone to decide what type of contract it wants, with whom, and on what terms.[14]

Another concept of classical theories of the contract is the bargain principle. Bargain principle and freedom of contract are the essential features of classical contract law. Classical economists like Adam Smith championed the view that individuals have the incentive to maximise their wealth and, given the opportunity, would engage in aggressive bargaining to get the best deals for themselves.[15] With the advent of freedom of contract theory, the bargaining concept was bolstered by the will and promise theories, which peaked in the late eighteenth and early nineteenth century.

The concept of contract freedom is an excellent example of what is known as the liberal conception of law. Because liberalism emphasises equality of

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[12] *Manchester, Sheffield and Lincolnshire Railway Co v Brown* (1883) 8 AC 713, 716.

[13] See *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 in Zahira Mohd Ishan, 'Doctrine of Unconscionability: Its Development and Possibilities' [2007] 3 Malayan Law Journal xliv, at xlix.

[14] Arthur Chrenkoff, 'Freedom of Contract: A New Look at the History and Future of the Idea' (1996) 21 Australian Journal of Legal Philosophy 37.

[15] Neil MacCormick, 'Adam Smith on Law' 15 Val UL Rev 243 (1981) 243–263 at 251.

opportunity rather than equality of outcome, liberal law tries to provide procedural fairness rather than result fairness.[16] Because liberalism believes that the individual is the best judge of their interests, needs, wants, and preferences, the law will not second-guess the individual and turn itself into a goal-oriented social engineering tool.[17] Because liberalism values individual choice, liberal law will go to great lengths to defend that sphere of autonomy and limit outside intrusion. The idea of contract freedom is unquestionably a perfect expression of this liberal approach to law. Modern libertarianism, such as that advocated by Robert Nozick, views contract freedom as the expression of different persons making independent decisions to pursue their interests under a minimum state.[18] Nozick claimed that respect for individual rights is the most crucial criterion for evaluating government activity. The only legitimate state limits its actions to preserve life, liberty, property, and contract rights.

The theory of freedom of contract is also one of the pillars of the capitalist *laissez-faire* system. The interpretation of *capitalist-laissez-faire* action from Max Weber explains that *laissez-faire* is 'one which rests on the expectation of profit by the utilisation of opportunities for exchange'. The capitalist determination is an attitude or world view that supports self-interest as the foundation of human conduct.[19] Although the popular idea that the capitalist *laissez-faire* proponents forwarded that the government should take its hands off the economy, they did acknowledge the role of government in coordinating the distribution of wealth and sources to all classes of people. It can be illustrated that capitalists acknowledged the principle that allows people to own tangible assets such as land and houses and intangible assets such as stocks and bonds. Still, they require the intervention of the government on land that can be developed for the best interest of many. Along this line, the modern writers termed realists, and the classicists disagreed on matters that should be regulated. Still, they agreed that public policy issues might take precedence over contract freedom and thus should be regulated in some cases.[20] Common carriers and public

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16 Roger Brownsword, 'Liberalism and the Law of Contract' in Richard Belamy (ed) Liberalism and Recent Legal and Social Philosophy (Franz Steiner Verlag Wiesbaden GMBH, Stuttgart, 1989) 86.

17 Arthur (n 14), 38.

18 Eric Mac, 'Robert Nozick's Political Philosophy', Stanford Encyclopaedia of Philosophy (Blog Post, 22 June 2014) <https://plato.stanford.edu/archives/sum2018/entries/nozick-political/>.

19 Richard A Epstein, 'Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire', in FH Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press, United States 1999) 24.

20 Mark L. Movsesian, 'Two Cheers for Freedom of Contract' (2002) Faculty Publication, St. John's University School of Law <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1108&context=faculty_publications>.

utilities, for example, were deemed by *laissez-faire* courts to be unable to enjoy the same contracting flexibility as non-monopolistic providers.[21]

In the late nineteenth century, when there was a clear demarcation between the powerful and the weakest group in society, the theory of freedom of contract jeopardised the contractual rights of the latter. This scenario surfaced when there were oppositions to the theory of freedom of contract who contended that freedom of contact could only exist in an economy founded on trust and goodwill between business partners.[22] When the structure in society becomes complex, some termed freedom of contract as dead on arrival as it does not suit the complexity of the society where people have been segregated into many classes of the group.[23] They are divided considering many factors like wealth, status, position, and power that may interrupt their decision to contract terms. They contended that substantial legal reforms were required to channel the exercise of liberty toward collaboration and decency while keeping the bargain contract as the most efficient means of distributing resources in the economy.[24] Freedom of contract will only be recognised as a viable legal doctrine in a society where a considerable, though not necessarily a sizable, fraction of the people is deemed to have certain rights and freedoms, as history has shown. Thus, in this scenario, the intervention from the government and courts will best secure the rights of the weakest group. The solution adopted then was to allow for freedom of contract between parties who have equal bargaining power but regulate the contract entered by parties who do not share equal bargaining positions.

As a result, the concept of material contractual justice has influenced the traditional liberal approach to contractual freedom. Contractual liberty can be viewed from two different angles. The first is the ability to enter into a contract without restriction. The second is the parties' freedom to freely negotiate the contract's terms. Standard corporate terms, adhesion contracts, and, most crucially, legal limitations limit this independence. Such legal restrictions stem from the fact that contract freedom alone is insufficient to provide fairness, as the parties' bargaining positions are sometimes unequal.

When victims of unfair contracts multiplied, the uniform commercial code was introduced and shielded many victims of unconscionable contracts. The trend to allow the legislator to regulate affairs of a contract and reduce the total acceptance of freedom of contract signifies legislators' intent to make societal norms of honesty and decency and create a market environment that

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21 ibid.
22 Epstein (n 19) 27.
23 ibid.
24 See Arthur (n 14).

discourages irresponsible contract behaviour. Once again, legislators had deviated from the classical vision of the institution of a contract to promote fundamental fairness between parties engaged in Code-governed transactions.

Reinhard Zimmermann writes:

> "The courts are merely concerned with the fairness of the bargaining process, that is, ensuring that factors such as duress, fraud, misrepresentation and mistake do not affect the voluntariness of the consent. The courts are also, of course, concerned with the enforcement of contracts; beyond those two areas, however, there is little scope for judicial (or, indeed, legislative) interference"[25]

The freedom of contracts approach is the sum of two components, which together constitute contractual autonomy:

a) the familiar freedom to bargain for terms within a contract; and

b) the long-neglected freedom to choose from among contract types.[26]

Proper analysis of classical law concludes that the contract is valid and enforceable, and the parties are bound by the contractual obligations as long as there is free consent irrespective of whether the terms are fair or not. Free consent denotes that the contract is not entered into pursuant to coercion, undueinfluence, fraud, misrepresentation or mistake. Although classical law is vital in providing a framework for market dealings, it is not free from defects. Classical contract law assumes all parties to a contract to be bargaining from an equal position. Consequently, even if individuals sign an agreement containing harsh or imprudent provisions, the court will not interfere to protect them from their ignorance.[27] However, there is a problem with this assumption: it ignores the actual negotiating power of contracting parties. It fails to account for any disparities between the parties' income, power, and knowledge distributions that can put one party at a disadvantage.[28] In addition to unequal bargaining power, the expansion of monopolies, restrictive business practices, and the rising use of standard-form

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[25] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co, Cape Town, 1990) 577.

[26] Hanoch Dagan and Michael Heller, 'Freedom of Contracts' (2013) Columbia Law & Economics Working Paper No 458 at p 1 <https://scholarship.law.columbia.edu/faculty_scholarship/1825>.

[27] Cheong, above n 5, 61.

[28] Priscilla Shasha Devi, Tie Fatt Hee and Sharifah Suhanah Syed Ahmad, 'Employment Relationship in Malaysia: A Classical Contract or a Contractual Hybrid?' [2019] 3 Industrial Law Journal Article iii at 2.

contracts necessitated additional protection for contracting parties and consumers. Therefore, the sustainability of this model is questionable, and there is an apparent need for departure in favour of a more sensible approach.

V. MALAYSIA POSITION

A. The Malaysian Contract Acts 1950 and Unfair Terms

Historically, the Malaysian Contracts Act 1950 is modelled on the Indian Contract Act 1872, which, in turn, is essentially a codification of the then existing English common law and rules of equity.[29] Thus, it follows that the said legislation integrates laissez-faire market capitalism, freedom to contract, and classical contract law principles popular in England throughout the late 19th and early 20th centuries.

The significance of free consent is accentuated in several provisions of the Contracts Act 1950.Section 10(1) stipulates a critical pre-requisite of free consent. It states, 'All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not at this moment expressly declared to be void'. The principle of consensus ad idem is reflected in s 13 that 'two persons are told to consent when they agree upon the same thing in the same sense. Free consent is further defined in s 14 as consent that is not caused by coercion, undueinfluence, fraud, misrepresentation or mistake. Hence, if consent has not been freely obtained and a party was induced to enter into a contract due to any of the above vitiating factors, he is entitled to avoid the contract as provided in ss 19(1) and 20. Specifically, section 19(1) explains that 'When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. On the other hand, section 20 elaborates that 'When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party entitled to avoid it, has received any benefit thereunder upon such terms and conditions as the court may deem. Section 2(i) defines a voidable contract as 'an agreement which is enforceable by law at the option of one or more of the parties to it, but not at the option of the other or others. Through these provisions, the Contracts Act 1950

[29] Nurretina Ahmad Shariff, 'Contract Law in Malaysia: Reflections on Its Ideologies and Concepts' (2005) 1 Journal of Ethics, Legal and Governance, 32-39 at 33.

provides the framework for the bargaining process to ensure that contracts are entered into freely.

In line with classical law, the fundamental task of contract law is viewed as the execution of private person agreements. Accordingly, the fairness and justice of these agreements are treated as insignificant problems. Legal certainty is the goal of such a framework, and contract law's role is to make marketplace interactions more convenient.

B. Types of Unfair Terms Under Malaysian Law

There are several instances of unfair standard terms in business-to-consumer-. Most of the time, the terms appear in a standard form contract, depriving mutual bargain. Examples of unfair terms ordinarily incorporated are unilateral variation clauses, unilateral rights to vary the services to be supplied under the contract and rights to terminate the contracts given to one party only. The exclusion clause is one of the prevalent terms perceived to be unfair since it excludes exempts, modifies or limits the contractual obligations or liability of one of the contracting parties. The common instances of exclusion clauses include clauses that limit the liability of one party under the contract and clauses that limit a party's right to sue the other party.

Over time, the court has developed specific requirements before the exclusion clause can be enforced. First, such an exclusion clause must be incorporated in the contract before or when it is created. Second, the exclusion clause's scope is broad enough to include any damages or remedies sought by the party who suffers losses. When it came to Malaysian exclusion clause provisions, courts adopted a stringent interpretation or construction of this clause. In *Premier Hotel v Tang Ling Seng* [1995] 4 MLJ 229, the plaintiff was staying at the defendant's hotel. The defendant's employee had negligently given the key to the plaintiff's room to another person. Consequently, the plaintiff's personal belongings were stolen. It was argued that the hotel would not be responsible for items or money left behind in a guest's room because of an exclusion provision in its contract with the plaintiff which states that '. . . the *hotel will not assume responsibility for valuables or money lost from the room*.'[30] Due to poor drafting, the exclusion clause failed to address liability resulting from negligence. As a result, the hotel was held liable.

In *Eontat Sdn Bhd v Budget Kitchen Sdn Bhd (2021),*[31] the defendant had agreed to perform specific construction works regarding two warehouses built for the plaintiff on a piece of land. The agreement contains an exclusion clause

[30] ibid.

[31] *Eontat Sdn Bhd v Budget Kitchen Sdn Bhd* (2021) 3 MLRH 304.

to the defendant's benefit in failure of performance. The defendant would not be liable in any manner to the plaintiff for the works to be performed by the defendant under the contract (Exclusion Clause). The court held that if the defendant had inserted an exclusion clause in the contract, the exclusion clause would have been valid as Malaysia has no legislation like the Unfair Contract Terms Act 1977 in the UK.

It is interesting to also look at the principle stated in the case of *Chiropractic Specialty Centre Sdn Bhd v Ortho Relief & Care Sdn Bhd (2017),*[32] where the court acknowledged the invalidation of the exclusion clause based on the public policy. The instant case is related to the issue that the equipment supplied was not fit for the purpose, and in consequence, the respondent suffered a loss. In addition, both parties had led evidence before the arbitrator regarding the agreement and representation of parties before the Franchise Agreement was executed. Whether misrepresentation will have the protection accorded in an exclusion clause. Lightman J's approach is related to common sense and commercial reality. No person of sound mind will agree to exclude misrepresentation, fraud, deceit, etc. Even if such a clause is included in an agreement, it may lie upon the court not to recognise it on public policy grounds.

Another mechanism that may lead to unfair terms is contracting out clauses. Despite the presence of specific laws which aim to protect both sides of the parties, a party who is usually in more substantial bargaining power will incorporate a provision that will eventually avoid the application of the statutory provision. In the case of *Azhar Ahmat v Rozana Hussin (2019)*,[33] the defendant's position as a moneylender put both parties in unequal bargaining power. The defendant imposed unnecessary oppression on the plaintiff that later led to the accumulation of debt on the plaintiff through oppressive clauses and acts of the defendant. Social legislations such as the CPA[34] and the Hire-Purchase Act 1967[35] prohibit contracting out, and the effect of such a clause is void. Nevertheless, the situation is different for the Sale of Goods Act 1957 and the Contracts Act 1950. Section 62 of the Sale of Goods Act 1967 expressly allows contracting out. Yusoff[36] summarised three situations concerning contracting out under the Contracts Act 1950, namely:

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[32] *Chiropractic Specialty Centre Sdn Bhd v Ortho Relief & Care Sdn Bhd* 2017 SCC OnLine MYCA 315.

[33] *Azhar Bin Ahmat v Rozana Binti Hussain* [2019] AMEJ 0195.

[34] CPA, s 6.

[35] Hire-Purchase Act 1967 (Malaysia) s 34.

[36] Yusfarizal Yusoff, 'Contracting Out of Contracts Act 1950: General Concept of Contracts Act 1950' (2009) 7 Current Law Journal 37, 44.

a) Sections that render the agreement void, such as in sections 25-31. Parties cannot contract out these sections.

b) Sections expressly state the right to contract from sections (section 38(2) and other 16 sections). Parties can contract out these sections.

c) Sections which generally do not expressly provide freedom to contract out; however, by section 1(2) and decision of Privy Council in the case of *Ooi Boon Leong v Citibank NA (1984)*,[37] parties can contract out of these sections.

It is not an infrequent practice for parties to incorporate the provisions of one contract ('original contract') into another contract ('second contract') by generally referring to the provisions of the original contract in the second contract. This is generally known as the incorporation clause. Some of the common phrases utilised are: 'as per original policy' or 'as attached'. The High Court decision of *Pandan Etika Sdn Bhd v Liang Builders Sdn Bhd*[38] reveals the disposition of the Malaysian courts to give effect to an arbitration clause that had been referentially incorporated into an agreement, even though the other parts of the document in which the arbitration clause is contained are devoid of details and may potentially be void for uncertainty.

C. Part IIIA of the Consumer Protection Act 1999

The fundamental law governing consumer protection in Malaysia is the CPA which came into force on 15 November 1999.This act does differentiate between consumer and financial consumers.[39] The term 'consumer' is broadly defined under section 3 of the CPA as 'a person who acquires or use the goods or services of a kind ordinarily acquired for personal, domestic or household purposes, 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 to resupply 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'.

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[37] *Ooi Boon Leong v Citibank NA* (1984) 1 WLR 723: (1984) 1 LNS 26.

[38] *Pandan Etika Sdn Bhd v Liang Builders Sdn Bhd*, (Originating Summons No. WA-24C(ARB)-27-06/2019).

[39] Ibtisam @ Ilyana Ilias and Naemah Amin, 'A Study on the Financial Consumer Protection in Malaysia with Specific Reference to the Financial Services Act 2013' (2016) 19 Malaysian Journal of Consumer and Family Economics 1, 9.

(a) Applicability

An unfair term is defined in section 24A of the CPA as a term in a consumer contract which, about 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. Section 24B states that notwithstanding other acts such as Contracts Act 1950, Specific Relief Act 1950, Sale of Goods Act 1957, and other relevant provisions, Part IIIA shall apply to 'all contracts. Although section 24B states that 'the provisions of this Part shall apply to all contracts, it is confined to consumer contracts based on the very purpose of introducing the CPA to protect consumers only. However, it is not clear whether Part IIIA applies to all types of consumer contracts or is confined to matters within the ambit of the CPA. This is attributed to the fact that there are certain limitations on the applicability of the CPA. Firstly, action can only be made by a consumer within the definition of the CPA. Under the CPA, a consumer must satisfy two criteria: first, they must acquire or use goods or services for personal or domestic use, and second, the products or services bought or used must be of a type generally acquired for personal or domestic use. Acquisition or use of goods for business is expressly excluded from the definition. The restriction on the purpose of acquisition of goods and services in the definition of consumer raises a question as to the right of financial consumers as defined under the FSA, IFSA and DFIA to bring an action based on unfair terms since the definition in these statutes also covers small businesses.[40]

Likewise, the definition of goods relates to items that are principally purchased, used or consumed for personal, domestic or domestic use, including real estate, animals, vessels and vehicles, utilities and plants. However, chose in action, such as a negotiable instrument, shares, debentures, and money, are not included in this definition. This includes anything provided, granted, or conferred due to a contract for services. However, the service definition excludes services by health care practitioners or other professionals regulated by written law, such as lawyers and accountants. Thus, while section 24B asserts that Part IIIA applies to all contracts, the analysis of these definitions creates uncertainties about the scope of the contract covered by the CPA.

As far as the FSA, IFSA and DFIA are concerned, BNM is empowered to issue regulatory instruments in the form of standards on business conduct to ensure that a financial service provider is fair, responsible and professional when dealing with financial consumers. The standard includes the standard on the fairness of terms. Nevertheless, until now, such a standard has not been

[40] FSA s 123; IFSA s 135; DFI s 42A.

established yet. It is viewed that financial consumers dealing with commercial banks, Islamic banks, insurance, takaful operators deserve an increased level of legal protection due to the widespread use of standard form contracts. Thus, there is ambiguity on the applicable test of unfair terms, the legal impact of unfair terms and whether the issue will be dealt with by way of administrative, civil or criminal action. Eventually, the courts will decide the matter, demonstrating unsettled approaches in deciding unfair terms cases.

Interestingly, even if none of the parties has challenged the issue in their pleadings, a court or the Tribunal for Consumer Claims (TCC) might raise the question of whether a contract or its terms are procedurally or substantively unfair (section 24F of the CPA). However, circumstances in which the court or the tribunal would be justified to raise the issue is not clarified.

(b) Unfair Terms Test; Procedural Unfairness

The first category of unfairness is procedural unfairness under section 24C(1) of the CPA. In summary, procedural unfairness determines the fairness or otherwise the contractual terms by looking at the process leading to the contract's conclusion. Guidance on the matters to be taken into account in deciding procedural unfairness is depicted in Table 1.

Table 1: Guidance in Determining Procedural Unfairness under section 24C(2) of the CPA

Guidance in Determining Procedural Unfairness
Whether expressions contained in the contract are in fine print or are difficult to read or understand.
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.
The bargaining strength of the parties to the contract relative to each other.
Parties' experiences in dealing with each other.
Reasonable standards of fair dealing.
Whether or not, before 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.
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.
The knowledge and understanding of the consumer about 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.
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.

Whether or not, even if the consumer had the competency to enter into the contract based on their capacity and soundness of mind, the consumer: (a) was not reasonably able to protect their interests or of those whom they represented at the time the contract was entered; or (b) suffered severe disadvantages about other parties because the consumer was unable to adequately appreciate the contract or a term of the contract or its implications because of age, sickness, physical, mental, educational or linguistic disability, or emotional distress or ignorance business affairs.

(c) Unfair Terms Test: Substantive Unfairness

The second category of unfairness is substantive unfairness. Thus, even though the contract surpasses the procedural unfairness test, such as adequately disclosing terms, it may be declared unfair based on its substantive features alone.[41] Section 24D of the CPA elaborates the circumstances whereby a contract may be regarded as substantively unfair, including when the contract is harsh, oppressive, unconscionable, excludes or restricts liability for negligence or excludes or restricts liability for breach of express or implied terms of the contract without adequate justification. Since the term harsh and oppressive is not defined, it is left to the court to interpret. It is submitted that the inclusion of unconscionable as one of the criteria for substantive unfairness indicates statutory recognition of the common law doctrine of unconscionability. This section also highlights that the exclusion clause is substantively unfair, firstly by excluding the liability for negligence and secondly for breach of express or implied terms. Nevertheless, the second type of exclusion is subject to adequate justification. This means if the supplier can adduce good reasons for such exemptions, the exemption will prevail. In this regard, Amin suggested that it should be confined to the justification provided under the law, such as the implied condition of merchantable quality and fitness for purpose, which can be excluded in cases of second-hand goods under the Hire-Purchase Act 1967.[42] Guidance on the matters to be taken into account in deciding substantive unfairness is shown in Table 2.

Table 2: Guidance in Determining Substantive Unfairness under section 24D (2) of the CPA

Guidance in Determining Substantive Unfairness
Whether or not the contract or a term of the contract imposes conditions: which are unreasonably difficult to comply with; or which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract.

[41] Amin, above n 1, 93.
[42] ibid, 90.

Whether the contract is oral or wholly or partly in writing.
Whether the contract is in standard form.
Whether the contract or a term of the contract is contrary to reasonable standards of fair dealing.
Whether the consumer who entered into the contract was in a fiduciary relationship with the supplier; and
Whether the contract or a term of the contract: requires manifestly excessive security for the performance of a contractual obligation; imposes penalties that are disproportionate to the consequences of a breach of contract; denies or penalises the early repayment of debts; entitles the supplier to terminate the contract unilaterally without good reason or without paying reasonable compensation; or entitles the supplier to modify the terms of the contract unilaterally.
The benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to their circumstances.
Whether the contract or a term of the contract has resulted in a substantially unequal exchange of monetary values or a substantive imbalance between the parties.

While section 24C(2) and section 24D(2) of the CPA list down factors to be considered in determining the unfairness of terms, they are merely illustrative. Eventually, the primary test is to assess the extent to which the problematic term 'causes a significant imbalance in the rights and obligations of the partiesarising under the contract to the consumer's detriment', considering all circumstances of the case. Despite being introduced in 2010, ironically, no court cases discuss the applicability of Part IIIA of the CPA. Hence, the judicial interpretation of the procedural and substantive unfairness remains a question mark. Currently, there is no public access to the decision made by the TCC. However, past literature revealed one case decided by the TCC on unfair terms, namely *Che Mohd Hashim Abdullah v Air Asia X Sdn Bhd* (no: TTPM-WPPJ-(P)-10-2011). This case illustrates the TCC's approach in dealing with unfair terms incorporated in the contract to purchase online flight tickets by AirAsia. The contentious clause reads as follow:

> "At any time after a booking has been made, we may change our schedules and/or cancel, terminate, divert, postpone, reschedule or delay any flight where we reasonably consider this to be justified by circumstances beyond our control or for safety or commercial reasons. In the event of such flight cancellation, we shall either:
>
> i) carry you at the earliest opportunity an another of our scheduled services on which space is available without additional charge and, where necessary, extend the validity of your booking; or

ii) should you choose to travel at another time, retain the value of your fare in a credit account for your future travel provided that you must re-book within three months there from; or

iii) offer a refund if we are unable to carry you to/from your destination within 48 hours from the scheduled time of departure.**"**

The TCC decided that the above clause was unfair. AirAsia was ordered to pay compensation to the claimant for losses suffered due to the cancellation of the flight.

(d) Effect of Unfair Terms

Consequently, if a term or contract is considered unfair, the court or TCC may declare it unenforceable or void (section 24G of the CPA). Alternatively, the court or TCC may consider the unfair term severable and affect the remaining terms. Thus, it is at the discretion of courts or Tribunals to determine the extent and the manner to enforce and affect the remaining contract term. Contravention of Part IIIA of the CPA is considered an offence. While it may deter the business from incorporating unfair terms, the viability of such a provision is doubtful. It may be difficult to be enforced since 'fairness is a variable and relative concept and the unfair terms under Part IIIA are not wholly clear'.[43]

(e) Remedies

Section 24G generally states that the court may grant judgment, and the TCC may make an award as provided under section 112 of the CPA when the term is unfair. As far as the award is concerned, the relevant one is a variation or setting aside the contract either wholly or partly.

(f) Enforcement

Since the CPA is under the purview of MDTLC, this Ministry is responsible for enforcing Part IIIA of the CPA. It is questionable how unfair terms regarding contracts by suppliers or industry players not regulated by MDTLC can be enforced, such as unfair terms in financial contracts.

(g) Burden of Proof

As far as the burden of proof is concerned, section 24E of the CPA only imposes the burden on the supplier who wishes to rely on the exemption clause that it is not without justification. There is no equal provision on the burden of

[43] Amin, above n 41, 96.

proof regarding other types of unfair terms, implying the usual burden of proof in a civil suit, namely on the plaintiff to prove that the term is unfair.

D. Judicial Trends in Deciding Unfair Terms in Malaysia

Freedom of contract demands no interference from the court to interpret other than what transpires within the four walls of the agreement. The Court's attitude in upholding freedom of contract principle is manifested in the case of *Anuiti Enterprise (M) Sdn Bhd v Cubic Electronics SdnBhd* (2006).[44] whereby Low Hop Bing J stated:

> "The agreement is a product of the doctrine of freedom of contract in which the parties enjoy the freedom to agree voluntarily and freely, and the terms thereof were the crystallisation of their consensus ad idem accompanied by the necessary intention to create legal relations and lawful considerations, legally binding the parties thereto."

However, judges were often affected by the same arguments that led to consumer protection laws: empathy for the small consumer or the weak contracting party. Notwithstanding the courts' hesitance to assert their power to override the parties' express agreements, they invented new doctrines, applied existing doctrines to new situations, or employed covert techniques by insinuating suitable provisions or construing the contract generously. This sentiment is best illustrated by the case of *Saad Marwi v Chan Hwan Hua (2001).*[45] ('Saad Marwi'), which recognised the doctrine of inequality of bargaining power. In addressing and recognising inequality of bargaining power, the Court of Appeal adopted the English doctrine of unconscionability and the broad Canadian approach. This case concerned a sale and purchase agreement of a piece of land owned by the appellant, a farmer, and the respondents for RM42, 000. The agreement, which was in the English language, stated that a deposit of RM4, 200 was paid but did not specify that it was by way of rental payable by the appellant to the respondents (under a lease whereby the appellant harvested coconuts from the respondents' land). After surveying unconscionability cases from the significant Commonwealth jurisdictions, the court held that the agreement was unconscionable and allowed the appellant's appeal.

In this case, the court held that the non-disclosure of the offset of the rental for the deposit gave rise to a fair inference that the respondents were in a position of advantage. Further, there was no indication that the agreement, which

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[44] *Anuiti Enterprise (M) Sdn Bhd v Cubic Electronics Sdn Bhd* (2006) 6 MLJ 565 at 565-66.

[45] *Saad Marwi v Chan Hwan Hua* [2001] MLJU 761.

was in the English language, had been explained to the appellant in his mother tongue, considering that the appellant did not speak English. The appellant was also not independently advised. The unequal bargaining position of the contracting parties, in this case, provided the court with the opportunity to address this issue where Gopal Sri Ram JCA stated:

> "In my judgment, the time has arrived when we should recognise the wider doctrine of inequality of bargaining power. And we have a fairly wide choice on the route that we may take in our attempt to crystallise the law upon the subject. Therefore, what is called for is a fairly flexible approach aimed at doing justice according to a case's particular facts. Historically, that is what equity is all about. That brings me to the third alternative. This is to adopt the English doctrine [of unconscionability] but apply it broadly and liberally as in Canada."[46]

In Canada, the significance of the doctrine of unconscionability is that Lord Denning's concept of inequality of bargaining power is accepted as one of its constituent elements.

However, Ian Chin J, in the case of *Yewpam Sdn Bhd v Mohd Salleh Bin Sheikh Ahmad (2001)*,[47] raised his concerns about over-reliance on the doctrine of inequality of bargaining power. Ian Chin J's concerns are summarised as follows:

a) the Contracts Act already contains s 16 on undue influence, and as there is much similarity between undue influence and unconscionability, the latter can be developed within s 16;

b) if the English doctrine of unconscionability means applying the principles in *Slator v Nolan (1876)*[48] and *Fry v Lane (1888)*,[49] this position is already included within ss 16(1) and (2) respectively;

c) including a test of 'inequality of bargaining power' would effectively be adding a new section to the Contracts Act; and(4) the statutory form of law in the Contracts Act is different from the common law, which is still developing as stipulated in the case of *Yewpam Sdn Bhd v Mohd Salleh Bin Sheikh Ahmad (2001)*.[50]

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46 ibid.

47 *Yewpam Sdn Bhd v Mohd Salleh Bin Sheikh Ahmad* 2009 SCC OnLine MYMHC 46: (2001) 1 LNS 43.

48 *Slator v Nolan* (1876) IR 11 Eg 367.

49 *Fry v Lane* [LR] 40 Ch D 312.

50 *Yewpam Sdn Bhd v Mohd Salleh Bin Sheikh Ahmad* 2009 SCC OnLine MYMHC 46: (2001)1 LNS 43.

Likewise, in another Court of Appeal decision, *American International Assurance Co Ltd v Koh Yen Bee (f) (AIA)* [2002] 4 MLJ 301, Abdul Hamid Mohamad JCA cautioned on the use of the inequality of bargaining power when he stated:

> "Be that as it may, there is a lot to be said for the decision of this court in Saad given the facts therein and the justice that the court should do. Saad is an obvious case where a farmer . . . [the facts of the case were summarised]." The facts of that case would support such a decision if justice were to prevail.[51]

Although the court was prepared to accept the decision on justice in Saad Marwi, the concerns raised need to be addressed. In that case, Abdul Hamid Mohamad JCA also stated:

> "We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provision of s 14 of the Contracts Act 1950, which only recognises coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent."[52]

The issue of adopting the principle of unequal bargaining power or unconscionable contract rises once again in *Malayan Banking Bhd v All Green Agritech Sdn Bhd (2021)*.[53] Instead of approving the Malaysian count stand in recognising the applicability of this principle, the court chose to differentiate the parties involved in *Saad Marwi*, who is a farmer, from the one in the case who consist of directors of a big company. The court rejected the claim of an unconscionable contract. It can be summarised that the adaptation of the principle varies from one case to another depending on the facts and parties to the case.

In the case of *CIMB Bank Bhd v Maybank Trustees Berhad (2014)*,[54] the Federal Court has confirmed and reiterated the correct legal approach to determine the enforcement of exclusion clauses, one form of unfair terms. Moreover, the Federal Court unanimously agreed with the Court of Appeal whereby the proper approach to be adopted about the effect and scope of an exclusion clause is by principles of construction of the contract. The Federal

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51 *American International Assurance Co Ltd v Koh Yen Bee (f) (AIA)* [2002] 4 CLJ 49.
52 ibid.
53 *Malayan Banking Bhd v All Green Agritech Sdn Bhd* (2021) 1 LNS 556.
54 *CIMB Bank Bhd v Maybank Trustees Berhad* 2014 SCC OnLine MYFC 30 : (2014) 3 CLJ 1.

Court stated that "*the upholding or otherwise of the exemption clause agreed to by the parties depended upon the proper construction of that clause*". If the exclusion clause is ambiguous, the principle of *contra proferentem* rule will apply. The court would adopt an interpretation to the slightest advantage of the party who relies on the clause. However, if the clause is clear and unambiguous, the court would have to affect the meaning despite the possible unfair outcome of the particular case. There is no burden imposed on the party relying on the clause to prove that it has exercised due diligence or is not guilty of any misconduct. Nonetheless, in this case, the Federal Court held that an exclusion clause could not be operative to protect a party from its fraud.

In *United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin (2016)*,[55] the Court of Appeal had to deal with an appeal regarding the issue of whether the defendant (bank) was liable for losses suffered by the plaintiff due to the burglary of the safe-deposit boxes under the care of the defendant. The High Court disallowed the defendant from relying on the exclusion and limitation clause as it decided that the exclusion clauses were not incorporated into the contract. If the clause were given effect, this would be 'making illusory the explicit representations of safety and security offered by the banks regarding safe deposit boxes'. The Court of Appeal disagreed with the High Court as it found that the exclusion clause had indeed been incorporated into the contract between the plaintiff and the defendant. The Court of Appeal held that the losses suffered and the cause of the losses were covered in the exclusion clauses, and the defendant was not liable. In addition, the Court of Appeal opined that the hire of safe deposit boxes was an additional service offered by the bank to the convenience of its customers for a very modest amount of money. The bank did not know the contents kept at the safe deposit boxes, so excluding and limiting liability for events beyond its control was reasonable.

In the case of *Clearpath Mktg. Sdn Bhd v Malayan Banking Berhad (2017)*[56] ('*Clearpath*'), the High Court stated that the principle governing exclusion clauses in Malaysia is found in the case of *CIMB Bank Bhd v Maybank Trustees Sdn Bhd (2014)*.[57] In *Clearpath*, the exclusion and limitation clause read as follows:

> "I/We at this moment agree that in no event will the Bank be liable for any lost profits, loss of business, loss of use, loss of goodwill, lost savings or other consequential, special, incidental, indirect,

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[55] *United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin* 2016 SCC OnLine MYCA 32: (2016) 2 AMR 638.

[56] *Clearpath Mktg. Sdn Bhd v Malayan Banking Berhad* 2019 SCC OnLine MYCA 52: 2017 AMEJ 0300.

[57] *CIMB Bank Berhad v Maybank Trustees Berhad*2014 SCC OnLine MYFC 30: (2014) 3 CLJ 1.

> exemplary or punitive damages suffered by me/us because of any delay in performance or non-performance of any obligations of the Bank whether arising from any negligence, breach of these terms or howsoever.
>
> Notwithstanding anything to the contrary in these terms or conditions, the Bank's total liability hereunder however arising shall be limited to actual direct loss suffered by me/us(provided the same is supported by documentary evidence submitted by me/us to the Bank)which shall not exceed RM500.00 for all claims."

Applying *CIMB Bank Bhd v Maybank Trustees Sdn Bhd's* case, the High Court in *Clearpath* held that the above exclusion clause was '*uncompromisingly clear and unambiguously expressed*' and '*ought to be given full effect*' despite the fact the plaintiff's opinion as to how unreasonable the clause was. Nonetheless, the plaintiff had failed to prove that the Bank (defendant) had breached its obligations in this case.

The latest decision regarding unfair terms, specifically on the exclusion clause, may be referred to the Federal Court judgment in the case of *CIMB Bank Berhad v Anthony Lawrence Bourke (2019).*[58] The Federal Court held that clauses that absolved a party from all liabilities to pay compensation or damages for non-performance of contracts were in breach of section 29 Contracts Act 1950. In this case, the plaintiffs were husband and wife, and they were from the United Kingdom. In 2008, they purchased a property in Malaysia and entered into a housing/shop house loan agreement with CIMB Bank Berhad. The property purchased was under construction. The appellant was obligated to release progressive payments on behalf of the respondent to the developer upon issuing the certificate of completion for each stage of the construction. The appellant failed to pay them progressive payments in 2014, and the developer terminated the sale and purchase contract for the property in 2015. The appellant pursued legal action against the defendant to claim damages for losses suffered by the termination of the contract by relying on the ground of breach of contract and negligence. The appellant relied on Clause 12 of the loan agreement with provides that:

> "Notwithstanding anything to the contrary, in no event will the measure of damages payable by the bank to the borrower for any loss or damage incurred by the borrower include, nor will the bank be liable for any amounts for loss of income or profit or savings, or

[58] *CIMB Bank Berhad v Anthony Lawrence Bourke* 2018 SCC OnLine MYFC 24: (2019) 2 MLJ 1.

> any indirect, incidental consequential exemplary punitive or special damages of the borrower, even if the bank had been advised of the possibility of such loss or damages in advance, and All such loss and damages are expressly disclaimed."

The respondent's claim failed at the High Court as it was held that Clause 12 had absolved the defendant from any liability for its breach of contract. The plaintiffs then appealed to the Court of Appeal, which reversed the decision of the High Court. The Court of Appeal decided that Clause 12 was void as it went against section 29 of the Contracts Act 1950 as Clause 12 was treated as an ouster of the court's jurisdiction. Dissatisfied, the appellant appealed to the Federal Court, which concurred with the decision of the Court of Appeal. A panel of five judges at the Federal Court in this case unanimously decided that:

> "The words in Clause 12 are clear, and there is no need to resort to the contra proferentem rule. But since whatever the plaintiffs were claiming was negated, this invoked the application of s29. Thus, Clause 12 was void and unenforceable. This case deserved the application of the principle of public policy as there would be patent injustice to the plaintiffs had Clause 12 been allowed. It was also unconscionable and an abuse of freedom of contract to allow the defendant to use Clause 12 as a shield against any claim."[59]

However, the Federal Court ruled that section 29 could only apply to defeat an exclusion clause if, upon construction, the exclusion clause amounts to an 'absolute restriction' on the right of a plaintiff to claim for his losses.[60] Section 29 of the Contracts Act 1950 provides that:

> "Every agreement, by which any party to it is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time which he may thus enforce his rights, is void to that extent."

The previous appraisal demonstrates a lack of discernible judicial patterns. Hence, even while courts have struggled to balance protecting contracts' sanctity and reining in absurd clauses, it's becoming increasingly evident that doing so is beyond their power.

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[59] *CIMB Bank Berhad v Anthony Lawrence Bourke* 2018 SCC OnLine MYFC 24: (2019) 2 MLJ 1, 14-15.

[60] ibid, 1, 25.

VI. UNFAIR TERMS IN AUSTRALIA

Concerning Australia, the primary law governing consumer protection is the ACL, set out in Schedule 2 of the Competition and Consumer Act 2010. The ACL encompasses a wide range of protection against misleading conduct, unconscionable conduct and unfair terms. This law is regulated by the Australian Competition and Consumer Commission (ACCC), Australian Securities and Investments Commission (ASIC) and each state and territory consumer protection agency. Regarding unfair terms in the financial contract, the ACL terms are reflected under the ASIC Act, which fall under the regulatory purview of the ASIC. If adopted in Malaysia, this approach may help avoid the turf of war between different regulators in regulating unfair contract terms under their existing jurisdictions. Hence, in discussing the unfair terms regimes in Australia, reference will be made to the ACL and ASIC Act.

(a) Recent Amendments

The recent amendment in the ACL extends the protection to small business contracts and individual consumers. Additionally, the unfair contract terms law will apply to an insurance contract if the insurance contract is entered into or renewed on or after 5 April 2021. A term in an existing contract varies on or after 5 April 2021. Therefore, the present unfair contract terms regime under the ACL and ASIC Act applies to a term in a contract if it is a consumer contract or a minor business contract. A contract is a standard form (section 23(1) of the ACL. Section 12BF further adds the applicability of unfair terms under the ASIC Act to confine to financial contract related products or a contract for the supply, or possible supply, of financial services. It is submitted that extending the contract to small businesses is a significant shift to support small businesses. From Malaysia's perspective, small-medium enterprises have played an essential role in promoting Malaysia's economic transition by creating jobs and revenue.[61]

(b) Consumer Contract and Small Business

Under the ACL, the consumer contract is defined as a contract for a supply of goods or services; or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly

[61] See Mitra Madanchian, et al, 'The Role of SMEs in Economic Development; Case Study of Malaysia' (2015) 4(3) International Journal of Academic Research in Management 77-84; Hirnissa Mohd Tahir, Nurshuhaida Abdul Razak and Fadilla Rentah, 'The Contributions of Small and Medium Enterprises (SME's) on Malaysia Economic Growth: A Sectoral Analysis' in Anitawati Mohd Lokman, et al (2018) 739 Proceedings of the 7th International Conference on Kansei Engineering and Emotion Research 2018; Jamari Mohtar, 'SMEs are Time-Bombs in the Nation's Economy', Malaysia Kini (Kuala Lumpur, 1 April 2020).

for personal, domestic or household use or consumption (section 23(3) of the ACL). A minor business contract must meet several requirements: first, the contract is for a supply of goods or services or a sale or grant of an interest in land; second, at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and third either the upfront price payable under the contract does not exceed $300,000, or the contract has a duration of more than 12 months, and the upfront price payable under the contract does not exceed $1,000,000. (Section 23(4) of the ACL). Under the ASIC Act, a similar consumer contract definition applies to financial products and services. Section 12BF (1) of the ASIC Act defines it as "where at least one party is an individual acquiring the financial product or services for predominantly personal, domestic or household use or consumption. Likewise, a small business contract definition is adopted in section 12BF (4) of the ASIC Act. Hence, compared to Part IIIA of the CPA, the term consumer contract is clearly defined. This way, ambiguity on the coverage of contracts that is subject to the unfair term's scrutiny can be avoided. Furthermore, Australian law coverage of unfair terms encompasses individuals and small businesses alike.

(c) Standard form Contract

Standard form contract is not defined. Nevertheless, in deciding whether a contract is a standard form consumer contract, a court may consider a range of relevant matters. Still, it must take into account factors stipulated in section 27(2) of the ACL or section 12BK(2) of the ASIC Act:

a) whether one of the parties has all or most of the bargaining power in the transaction

b) whether the contract was prepared by one party before any discussion occurred between the parties about the transaction

c) whether the other party was, in effect, required to either accept or reject the terms of the contract in the form in which it was presented

d) whether the other party was given an adequate opportunity to negotiate the terms of the contract

e) whether the terms of the contract take into account the specific characteristics of the other party or the particular transaction.

However, if a party to a proceeding alleges a contract is a standard form, the presumption will prevail unless another party proves otherwise. Thus, if a consumer contesting the fairness of the terms alleges that the contract is a standard form contract, then the business may present relevant evidence to rebut the said presumption (section 27(1) of the ACL and section 12BK1 of

the ASIC Act). This way will facilitate the consumers to sue the business due to alleged unfair terms without proving that the contract is a standard form contract.

(d) Unfair Terms Test

The ACL and ASIC Act provide a similar unfairness test as laid down in section 24 and section 12BG, respectively. A term of a contract is unfair if the three conditions are met: it would cause a significant imbalance in the party's rights and obligations arising under the contract; it is not reasonably necessary to protect the legitimate interests of the party who the term would advantage, and it would cause financial or other detriments to a party if it were to be applied or relied on. Paterson argues that the focus of the threshold test for an unfair term in a standard form consumer contract under the unfair contract terms law accentuates on the substantive fairness of the term not the process through which the contract has been made.[62]

It is prerequisite for a claimant to prove all three limbs of unfairness test on the balance of probabilities before a court can decide that a term is unfair. In this situation, evaluation of facts and evidences is necessary in determining whether a consumer contract term would cause a significant imbalance in the party's rights and obligations. A court must find that the term is not reasonably necessary to protect the party's legitimate interests that the term would advantage. What constitute legitimate interest is subject to court's interpretation. The presumption that a term is not to be reasonably necessary to protect the party's interests applies unless that party proves otherwise. The party enjoying the benefit of the term needs to prove that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer. Some of the acceptable evidences may comprise relevant material relating to costs and structure of business, mitigate risks requirements, or particular industry practices. Finally, the court would need to find that the term would cause detriment to a party if it were applied or relied on. The court will consider whether the term causes detriment such as financial detriment, delay or distress for the consumer due to the unfair term. A claimant does not need to show proof of having suffered actual detriment but must show more than a hypothetical case in which they would suffer a detriment.[63]

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[62] Jeannie Marie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 (3) Melbourne University Law Review 934, 937.

[63] Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, para 5.31.

(e) Matters Must be Considered in Deciding Unfairness

Another element which must be taken into account in deciding unfairness is the extent to which the term is transparent and the contract as a whole.[64] A lack of transparency in a standard consumer contract may cause a significant imbalance in the party's rights and obligations. Transparency of a term is proven, inter alia, if expressed in reasonably plain language, legible, presented clearly, readily available to any party affected by the term. Again, it is essential to emphasize that the authority to determine whether or not a term is transparent for the unfair contract terms provisions lies is vested in court. This is due to the fact that a term that is not transparent will not necessarily be unfair. Further, transparency alone will not necessarily overcome underlying unfairness in a contract term. Terms hidden in fine print or schedules phrased in legalese, complex or technical language, or ambiguous or contradictory are examples of terms that may not be transparent.

The task of deciding unfairness of term is not straightforward. It should be assessed in light of the whole and not in isolation. Some terms that appear to be unfair in one context may not appear to be so in another. On the contrary, if a court decided a particular term in one case to be fair, this does not mean it will always be fair. An unfair term may be regarded in a better light when seen in the context of other counterbalancing terms. For example, a potentially unfair term may be included in a consumer contract but maybe counterbalanced by additional benefits, such as a lower price. However, even if a contract contains terms that favour the consumer, such favourable terms may not counterbalance an unfair term if the consumer is unaware of them. Examples include implied terms, or terms hidden in fine print, in a schedule or another document, or written in legalese. This may result in an information imbalance in favour of the business as stated in the case of *Director of Consumer Affairs Victoria v AAPT Ltd (2006).*[65]

(f) Examples of Unfair Terms

To assist the court in determining the fairness of terms, the laws list down some examples. These examples provide guidance but do not prohibit using these terms or create a legal presumption that they are unfair. The example of terms and cases decided by the courts regarding the terms are described in Table 3.

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[64] See ACL s 24(3); see ASIC Act s 12BG (2).

[65] *Director of Consumer Affairs Victoria v AAPT Ltd (Civil Claims)* [2006] VCAT 1493.

Table 3: Examples of Unfair Terms and Decided Cases

NO	EXAMPLES OF TERM	DECIDED CASES
1	A term that allows one party (but not another party) to terminate the contract.	A mobile phone contract with an immediate termination clause for any breach potentially had an application so broad that it was considered unfair. Victorian Civil and Administrative Tribunal found: A customer may have breached the agreement in aninconsequential manner yet faces the prospect of having the service terminated. Further, suppose the customer changes their address (which will not necessarily be the address for receipt of billing information). In that case, this will also provide a ground to AAPT to terminate the Agreement. Because these provisions are so broadly drawn and are one-sided in their operation, they are unfair terms within the meaning of the FTA. Case: *Director of Consumer Affairs Victoria v AAPT Limited (2006)*[66]
2	A term that allows one party (but not another party) to vary the terms of the contract.	A clause in a consumer contract allowing a health club operator to unilaterally change the location of the club within a 12-kilometre radius of the club's original location, among other things, was found to be unfair because 'it is a term to which the consumers' attention is not specifically drawn, and which may operate in a way that the consumer may not expect and to his or her disadvantage'. Case: *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (2008)*[67]

[66] *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, 53.

[67] *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims)* [2008] VCAT.

		A review of the terms and conditions of significant stadiums was conducted in Queensland. The terms that were considered unfair included: *Items may be confiscated at the discretion of management as per the 'Confiscated Items Policy'.*
3	A term that penalises one party (but not another party) for a breach or termination of the contract.	Certain items, such as cameras with lenses over 200 millimetres, were prohibited as a condition of entry. The 'confiscated items policy' sought to give management the right to confiscate a person's property without returning it or compensating the consumer for taking it. The trader changed the term to request the consumer to 'check' the item for return upon exit or request the consumer leave for breaching a condition of entry (bringing in the prohibited item).

Source: Unfair Contract Terms: A Guide for Businesses and Legal Practitioners

(g) Terms Exempted from Unfairness Test

Nevertheless, the laws point out specific terms which cannot be contested as unfair, namely terms that define the primary subject matter of a consumer contract, terms that set the upfront price payable under the contract or terms which are required or expressly permitted by a law of the Commonwealth or a state or territory.[68] The primary subject matter refers to the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract. Hence, a consumer cannot allege that a term is unfair on the basis that they have changed their mind about or no longer require the good or service that they have agreed to purchase. The upfront price in a standard form consumer contract is the amount the consumer agrees to pay for the supply, sale or grant under the contract. This includes the cash price of, or a series of payments for, a good or service or sale or grant of an interest in land, or an interest rate for credit.[69]

(h) Contract Exempted from Unfair Terms Provisions

Although the applicability of the unfair terms' regime is comprehensive, there are specific categories of contracts that are not subjected to this rule. The contracts are specific shipping contracts such as a contract of marine salvage,

[68] ACL s 26(2); ASIC Act s 12BI (2).
[69] ibid.

towage or a charter party of a ship; contracts that are constitutions of companies managed investment schemes or other kinds of bodies or a minor business contract to which a prescribed law of the Commonwealth, a State or a Territory applies. In addition to these, ASIC Act further prescribes other inapplicable contracts, namely the medical indemnity insurance contracts, insurance contracts that are not contracted for financial products or services under the ASIC Act, including contracts for private health insurance, compulsory third party insurance, and workers compensation insurance, or insurance contracts entered or renewed before 5 April 2021 (but terms in existing contracts varied on or after 5 April 2021 are covered).

(i) Effect of Unfair Terms

A court can declare a term of a standard form consumer contract or small business to be unfair. In some instances, unfair contract term disputes may be resolved through external dispute resolution schemes.[70] Once a term is declared to be unfair, it will be void.[71] However, the remainder of the contract will continue to apply if it can continue without the void term. Including a term in a standard form contract that is declared unfair does not attract a financial penalty.

(j) Non-Party Consumer Redress

It is interesting to note that the laws also provide non-party consumer redress. Accordingly, ACCC, state and territory regulators and ASIC have power under the ACL and the ASIC Act respectively to apply to the court to seek specific orders for the benefit of persons that are not parties to proceedings where: the respondent is a party to a consumer contract and is advantaged by a term of the contract that the court has declared to be an unfair term; the declared term has caused or is likely to cause a class of people to suffer loss or damage; the class includes people who have not been a party to enforcement action about the declared term.[72]

Section 243 of the ACL and section 12GNC of the ASIC Act list down the orders that the court can make to redress the loss or damage suffered by non–party consumers to include all or any of the following:

1. Declaring all or part of a contract to be void (either before or after the date that the order is made, including from its very beginning).

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[70] ACL s 260; ASIC Act s 12GND.
[71] ACL ss 23(1) and 23(2); ASIC Act ss 12BF (1) and 12BF(2).
[72] ACL s 239; ASIC Act s 12GNB.

2. Varying a contract or arrangement as the court sees fit (either before or after the date that the order is made).
3. Refusing to enforce all or any of the terms of a contract or arrangement.
4. Directing the respondent to refund the money or return the property to a non–party consumer.
5. Directing the respondent, at their expense, to repair or provide parts for a product provided under a contract.
6. Directing the respondent, at their expense, to provide specified services to the non–party consumer.
7. Directing the respondent to terminate or vary an interest in land created or transferred by the contract.

State and territory consumer protection agencies may take similar proceedings under the relevant legislation.

(k) Enforcement

The ACCC, ASIC, and state and territory consumer protection authorities collaborate to enforce the unfair contract terms laws. The agencies cooperate to ensure that compliance and enforcement are addressed consistently. ASIC is in charge of enforcing the ASIC Act's consumer protection provisions, such as the unfair contract terms regulations, that apply to financial products and services. Although regulators will urge businesses to cooperate by removing unfair contract terms, it is not the responsibility of any regulator to approve contract terms or to declare unequivocally that they are unfair. In thi context, only a court can determine whether a standard form consumer contract term is unfair.

VII. COMPARATIVE ANALYSIS

Table 4 demonstrates a comparison between Part IIIA of the CPA and the relevant provisions under the ACL and the ASIC Act.

Table 4: Comparative Analysis between Part IIIA of the CPA, the ACL and the ASIC Act

ITEMS	***UNFAIR TERMS PROVISIONS UNDER THE CPA***	***UNFAIR TERMS PROVISIONS UNDER THE ACL & ASIC ACT***
Applicable contracts	Part IIIA states that it applies to all contracts. However, since Part IIIA is under the CPA, thus it is submitted that Part IIIA only applies to contracts under the purview of the CPA, namely consumer contract for domestic and personal use and, the products or services bought or used must be of a type generally acquired for personal or domestic use. Applicable to negotiated and standard form contract. Excluded contracts not stated in Part IIIA. However, it is viewed that contracts outside the purview of the CPA are automatically excluded.	Consumer contract and minor business contract; encompassing goods and services as well as a financial contract. Applicable to standard form contract only. Excluded contracts expressly stated.
Test of unfairness	The term causes a significant imbalance in the rights and obligations of the parties arising under the contract; to the detriment of the consumer; having regards all circumstances of the case. Divided into procedural and substantive unfairness: Procedural unfairness determines the fairness or otherwise of contractual terms by looking at the process, which leads to the conclusion of the contract. Substantive unfairness is when the contract is harsh, oppressive, unconscionable, excludes or restricts liability for negligence or excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.	it would cause a significant imbalance in the party's rights and obligations arising under the contract; it is not reasonably necessary to protect the legitimate interests of the party who the term would advantage; and it would cause financial or other detriments to a party if it were to be applied or relied on..
Compulsory matters to be considered in deciding unfairness	Not expressly stated.	The extent to which the term is transparent; and the contract as a whole.
Examples of unfair terms	Provided.	Not provided.
Terms exempted from unfair terms regime.	Not provided.	Provided.

Burden of proof	On plaintiff except in case of exemption clause whereby the burden is on the supplier who wishes to rely on exemption clause that it is not without justification.	On plaintiff except in the case of standard form contract whereby business needs to prove otherwise if the other party alleges that the contract is standard form contract.
Enforcement	Ministry of Domestic Trade and Living Cost	Enforcement of the unfair contract terms laws is shared between the ACCC for general goods and services at the commonwealth level, ASIC regarding financial products and services at the commonwealth level and the state and territory consumer protection agencies.
Effect	The court or TCC may declare unfair terms is unenforceable or void. Alternatively, the court or TCC may consider the unfair term severable and affect the remaining terms.	A court can declare a term of a standard form consumer contract or small business to be unfair. However, the remainder of the contract will continue to apply if it can continue without the void term.
Power to determine unfair terms	The court and the TCC	The court or alternative dispute resolution body
Criminal penalty	Contravention of Part IIIA of the CPA is considered an offence.	Including a term in a standard form contract that is declared unfair does not attract a financial penalty.
Non-Party Consumer Redress	Not provided	Provided

VIII. CONCLUSION AND RECOMMENDATIONS

Preceding discussion reveals that a comprehensive regime protecting consumers against unfair contract terms is absent in Malaysia. The procedural and substantive unfairness under the CPA is inadequate, evidenced by a lack of reference in previous civil litigation contesting unfair contract terms. Although cases like *United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin (2016)*[73] and *CIMB Bank Berhad v Anthony Lawrence Bourke (2019)*[74] involved an individual consumer, no reference was made to Part IIIA of the CPA. Moreover, BNM has yet to introduce any standard or guidelines on unfair terms. Due to this gap, courts took divergent approaches, reflected in a succession of unfair terms judgments.

This study proposes some recommendations to resolve the dilemma of unfair terms in consumer to business contracts in Malaysia. Firstly, consumers'

[73] *United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin* 2016 SCC OnLine MYFC 32: (2016) 2 AMR 638.

[74] *CIMB Bank Berhad v Anthony Lawrence Bourke* 2018 SCC OnLine MYFC 24: (2019) 2 MLJ 1.

definition is extended to include small businesses to par with the FSA, IFSA and DFIA. Secondly, the applicable contract under Part IIIA to be expressly stated to cover consumer contract and minor business contract; hence the definition of these two should be made accordingly. Thirdly, different regulators will enforce the unfair contract term provisions under the existing jurisdictional purview, which must be spelt out under the CPA. Thus, the relevant regulators assigned to specific industries must be identified first, such as MDTLC regarding general consumers and BNM for financial consumers. The approach by Australia in providing the unfair terms laws under two different legislations yet incorporating similar provisions is worth considering to ensure a coherent approach yet concurrently maintaining the respective regulators' autonomy. Fourthly, the division of unfair tests into procedural and substantive may be complicated and unclear, hence the test of unfairness adopted by the ACL and ASIC Act may be considered, together with other provisions including factors which must be taken into account to determine unfairness, contract and terms exempted from unfair terms regime. Fifthly, as far as dispute resolution is concerned, it must also be explicitly stipulated that general consumer can submit their claim on the alleged unfair terms to the Tribunal for Consumer Claims. In contrast, financial consumers should submit their cases to the Ombudsman for Financial Services. Sixthly, criminal penalties on traders and businesses may be reconsidered. Finally, another option worth looking at is the availability of non-party consumer redress. It is submitted that incorporating these provisions into Malaysian law will elevate the legal regime on unfair terms and create more certainty, eventually facilitating compliance by industry players. This reform will strengthen protection for consumers who lack bargaining power when it comes to contracts with businesses and corporations.