

## CONSUMERS' AWARENESS AND PRACTICES TOWARDS 'EXCLUSION CLAUSE' AND ITS POSITION UNDER MALAYSIAN LAW

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### Abstract

The aim of this paper is to explore the adequacy of contract law, common law and the Consumer Protection Act 1999 (CPA) as the tools of consumer protection in dealing with exclusion clauses. The underlying philosophy is that consumers are free to enter into contracts and therefore must take care of their own interests. This principle, which is based on the assumption of equal bargaining power between parties, though, is not appropriate when consumers are involved. This is because in most consumer transactions, the natural tendency is that the consumers have no option except to abide by the contractual terms determined by the suppliers. The content analysis is carried out in order to analyse Malaysian law which include the analysis on the Contract Act 1950, the common law as well as the Consumer Protection Act 1999. A survey using questionnaires was carried out among 400 consumers in Klang Valley to explore their awareness and practices towards exclusion clauses. The analysis of the laws demonstrates that the law of contract, common law and the CPA are inadequate in giving comprehensive protection to consumers on the issue of exclusion clauses. In addition, the results of the survey show that only 41.8% of the respondents aware of the existence of such clauses in their dealing with the suppliers and 50.8 % of the respondents responded that they did not understand the implication of such clause. In total, 54.3% of them stated that they would still sign the document even though they were already aware of the exclusion clauses or any other unfair contractual terms. Thus, it is submitted that there are two solutions to this problem. The first one is to educate the consumers so that they are more aware about exclusion clauses and the second one is for the Parliament to take steps to legislate specific legislation dealing with exclusion clauses especially in consumer transactions.

*Keywords:* Exclusion clauses, standard form contract, consumer protection, legal protection.

### INTRODUCTION

Standard form contract is usually understood to refer to a document prepared by a trader of goods and services, and routinely used by the trader in all transactions (Paterson, 2012). The consumers have no option but to accept whatever conditions that have been imposed on "take it or leave it basis". Standard form contracts give advantages to both suppliers and consumers provided that both of them have equal bargaining power (Edwin, 2005). However, in many circumstances, they have become the focus for allegations of unfairness to consumers (Azimon, Sakina & Shamsuddin, 2012; Beale, 2004). They are usually drafted by professionals for the benefits of suppliers. The main danger is that the suppliers would draft the standard terms in ways highly favourable to them so as to

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exclude or limit their liability for failure to perform or for defective performance (Willet, 1994). Consumers usually have no time or opportunity to read or get professional advice before signing the contract. Even if they read the contract, it is doubtful whether they understand its terms (Nik Ramlah, 1993). This is true because they do not usually 'shop around' for the best contract terms. Even if they did go elsewhere, the same problem will arise since the terms may be standard across the industry (Azimon & Sakina, 2005).

Exclusion clauses are the terms which are inserted in a contract with the purpose of excluding or limiting liability which would arise. They have been widely used in standard form contracts and among the problems that are commonly raised by the literature (Nik Ramlah, 1993; Paterson, 2012; Beale, 2004) are the following;

- a) exclusion clauses appear in receipts which are only available to consumers when they make payment after the service has been carried out.
- b) suppliers exclude liability in the case of negligence such as the clause 'all loss are borne by the owners'.
- c) suppliers exclude liability for defective performance.
- d) suppliers limit liability for loss or damage to a certain amount.
- e) suppliers make limitations such as 'all claims to be made within seven days'.
- f) suppliers limit the amount of claim.
- g) suppliers exclude liability for delay.

The courts also raised the concern on exclusion clauses as in *McLead v Ens* (1982) 15 Sask R 75, *Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd* [1959] MLJ 31 and *Sanggaralingam Arumugam v Wong Kook Wah & Anor* [1987] 2 CLJ 255, in which the courts decided that the exclusion clauses were void. Nevertheless, in *Malaysia Airlines System Bhd v Malini Nathan & Anor* [1995] 2 MLJ 100, the court decided that the supplier did not breach his duty based on the exclusion clause printed on the ticket. Thus, these different judgments create question whether the exclusion clauses as being stated in the standard contract is binding on both parties. Thus, the objectives of this paper are to analyse the position of exclusion clauses under Malaysian law which include the law of contract, the law of tort and the Consumer Protection Act 1999. A survey is also carried out to determine consumers' awareness and practices towards 'exclusion clause' and standard form contract.

## RESEARCH METHODOLOGY

The study is a combination of qualitative and quantitative research. For the qualitative research, the content analysis is carried out in order to analyse the Malaysian law which include the analysis on the Contract Act 1950, the common law as well as the Consumer Protection Act 1999. The interpretation of these laws has been done by looking at the decided cases in Malaysia and United Kingdom. The main objective of the analysis is to highlight the provisions under Malaysian law on the issue of exclusion clause.

For the quantitative research, the researcher carried out a survey using questionnaires to consumers in order to get the consumers' viewpoint. The objective of the survey is to identify their awareness and practices towards exclusion clause. Klang Valley is an urban area which located in Selangor and Federal Territory is the commercial hub of the country. Thus, Klang Valley is considered to be the best research location selection to represent Malaysian consumers especially from the urban area. Five cities and ten residential areas were selected through simple random sampling according to the list from Department of Statistics and Municipal Council respectively. A total of 400 respondents have participated in this study. Since this is an exploratory study, a self-administered questionnaire was developed for data collection. Five questions have been asked to determine the consumers' awareness and practices towards exclusion clause. The data has been analysed descriptively with the objective to get general viewpoints of the consumers.

## **FINDINGS**

### **1. Malaysian Law**

#### **The Contract Act 1950**

In Malaysia, there is no statutory provision that deals specifically with exemption clauses. Section 10 of the Contract Act 1950 (CA) only provides that all agreements are contracts if they are made by the free consent of parties. Once the contract is formed, the role of the court is to enforce that promise. It is not the function of the court to improve the contract which the parties have agreed to, however desirable the improvement might be. There can be no objection to this principle in arms-length dealings between businesses of equal bargaining power. For example, in the case of *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770, the court enforced the contract even though it was a bad bargain since both parties were businesses who made a contract in business capacity. The problem is the agreement between consumers and suppliers where the equality of bargaining power is rare. In many circumstances, standard form contract and exclusion clauses become the focus of unfairness to consumers (Azimon et al., 2012; Beale, 2004). They are usually drafted by professionals for the benefits of suppliers. Consumers usually have no time or opportunity to read or get professional advice before signing the contract. Even if they read the contract, it is doubtful whether they understand its terms. If they do understand the terms, the suppliers may not be prepared to change the clauses at their request. The 'take it or leave it' approach places the consumers in a difficult situation and consequently leaves no option to them but to agree to the stipulated terms. This is true because they do not usually 'shop around' for the best contract terms. Lack of true consent can only be attacked by proving coercion, undue influence, fraud, misrepresentation and mistake. The CA, unfortunately, does not provide 'unconscionability' as another ground to determine pre-contractual unfairness (Nurretina Ahmad Shariff, 2003).

The doctrines of inequality of bargaining power and unconscionability have been increasingly used to overcome contractual unfairness in Australia, Canada, United Kingdom and United States but the courts in Malaysia are reluctant to adopt these doctrines (Cheong May Foong, 2010). For example, unconscionability, as provided in section 16(3) of the CA, is just for the court to presume undue influence and if the presumption is not rebutted, the agreement can be rescinded, not for reason of unconscionability but on the ground of undue influence. For example, in *American International Assurance Company Ltd v Koh Yen Bee* [2002] 4 CLJ 49, the Court rejected the application of the doctrine of inequality of bargaining power on the ground of uncertainty since section 14 of the CA only recognizes coercion, undue influence, fraud, misrepresentation and mistake as the factors that can affect free consent. The judge further contended that the courts should rarely interfere with the freedom of parties to contract unless the bargain is contrary to clear provisions of the law. This decision shows that the court is not willing to expand the laws. In the United Kingdom, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 have invalidated many exclusion clauses by using the "reasonableness tests" provided under the Act or Regulation. Attempts to import the principles of the UK Unfair Contract Terms Act 1977 locally have been made in *Standard Chartered Bank v Boomland Development Sdn Bhd & 3 Others* [1997] 4 AMR 3442 and in *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162. However, the Courts in both cases held that it was not appropriate to import the provisions into local law without express local legislation allowing it. In addition, they believed that the CA and the Specific Relief Act 1950 were sufficient to provide the remedies.

Another effective approach is to strike down exclusion clauses on grounds of public policy. Section 24(e) of the CA states that a consideration or object of an agreement is lawful, unless the court regards it as immoral or opposed to public policy. Therefore, when one excludes liability to the detriment of the other contracting parties, it is something against the public good. In the United States, the American Courts have struck down exemption clauses as against public policy. For example, in *Henningsen v Bloomfield Motors* 75 A.L.R. 2d 1, the Court held that the exemption clause to disclaim the implied warranty of merchantability was void as it was against public policy. Unfortunately in Malaysia, the courts have not ventured to open 'the gates' of public policy. This can be seen in *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162 in which the Court held that section 24(e) of the CA only applies to the consideration or object of an agreement which is unlawful and thus against public policy. The Court held that it was outside the domain of the court to decide on the issue of public policy. Therefore, it seems that the Malaysian courts are reluctant to decide on the issue of public policy and so have left the matter to the legislature (Sinnadurai, 1978). By this approach, the Malaysian courts hesitate to utilize the benefits of section 24(e) as a weapon to strike down exclusion clauses and unfair contract terms. It is hoped that the courts play a more effective role in striking down exclusion clauses, especially by the fact that Malaysia does not have

specific legislation to deal with this matter.

### **Common law**

Since the CA contains no provision specifically dealing with exemption clauses, the Malaysian courts have followed English common law. The English courts over the years, have devised certain rules namely:

1. is the clause duly incorporated into the contract (Rule of incorporation) and
2. does it, on its true construction, cover the event which has occurred (Rule of construction)?

Under the common law, the courts have to decide whether the clause is duly incorporated into the contract. The incorporation of such clause will depend on whether the consumers are aware of the existence of exclusion clause as in the case of *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394. One problem for consumers is that the exclusion clauses appear in the receipts that are only available to them when they pay after the service has been provided. In most cases, they do not take initiative to read the printed words. It is only when a dispute arises that they realize their rights have been excluded by these clauses. The worst situation is when the supplier asks the consumer to sign an invoice before giving it to the consumer as a receipt.

The rule of incorporation is that a person who signs a contractual document is bound by its terms even though he has not read them, unless the signature is shown to be obtained by fraud or misrepresentation (Peden and Carter, 2005; Sinnadurai, 2011). This can be seen in both *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425 and *Lee Teck Seng v Lasman Das Sundra Shah* [2000] 8 CLJ 317, in which the Court of Appeal held that the plaintiffs were bound by what they signed whether they had read it or not, unless it had been misrepresented, since their signatures were irrefutable evidences of their assent to the whole contract. The burden is on the party disowning his signature, i.e. the consumer, to prove that had he known the contents of the document in question, he would not have signed it. This burden of proof is clearly hard to discharge for the consumers.

In a situation where the consumer does not sign any document, his position is much better because the incorporation rules provide that for an exclusion clause to be effective it must be brought to the notice of the contracting party, or reasonable notice of its existence must be given to that party (Peel, 2007). Therefore, in a situation where the exclusion clauses are contained in the receipt, it can have contractual effects if the person to whom it was handed knew that it was intended to be a contractual document or if it was handed to him in such circumstances as to give him reasonable notice that it contains contractual terms. These are cases where the document is of a kind that usually contains contractual terms and any reasonable man is presumed to know of this commercial practice. Therefore, the objective test is applicable by looking at the knowledge of a reasonable man rather than whether that particular consumer had read the clause (*Malaysian Airline*

*System Bhd v Malini Nathan & Anor* [1986] 1 MLJ 330). Therefore the test is by looking at the knowledge of any ordinary consumers and not the complainant. It is left to the judge to decide and since the standard is that of that hypothetical reasonable man, the judge has to imagine what the reasonable man would have foreseen in the same circumstances. It also can be assumed that if it becomes a practice of the suppliers to issue a receipt which contains standard clauses and they are identical across the industry, the clauses can be incorporated as terms of the contract and any exclusion clauses are binding on consumers whether they are aware of them or not.

At common law, the courts also evolved certain principles of construction in which if a person wants to exclude his liability, he can only do so by using clear words (Pierce, 1984; Cheong May Fong, 2010) and any doubts or ambiguities arising from their interpretation would be construed against the party relying on the term (*Malaysia national Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29). Therefore, where an exclusion clause seeks to exempt liability for loss caused by suppliers' negligence, clear words must be used to show the intention to exclude negligence. By analyzing the decided cases, it is submitted that the Malaysian courts adopt the view that the contract cannot exclude liability of negligence. For example, in *Chin Hooi Nan v Comprehensive Auto Restoration Service Sdn Bhd & Anor* [1995] 1 BLJ 25, Siti Norma Yaakob J held that the law on exemption clauses did not exonerate the defendants from the burden of proving that the damage caused to the car was not due to their negligence. They must show that they had exercised due diligence and care in the handling of the car. This decision gives protection to consumers, but it is too much of a generalization to use this decision as a basis for stating that exclusion clauses are never effective against a negligence suit in Malaysia (Venugopal, 2002). For examples, cases such as *Premier Hotel Sdn Bhd v Tang Ling Seng* [1995] 4 MLJ 229, *Syarikat Cheap Hin Toy MFE Sdn Bhd v Syarikat Perkapalan Kris Sdn Bhd & Anor* [1995] 4 CLJ 84, *Chong Kok Weng & Anor v Wing Wah Travel Agency Sdn Bhd & Anor* [2003] 5 MLJ 550 did not automatically state that exclusion clauses could not cover negligence. These decisions opened the possibility that if the clauses were sufficiently clear in excluding negligence, the court would uphold them.

From the above discussion, it is submitted that the rules at common law are inadequate in relation to exclusion clauses. In the United Kingdom, the UCTA and the Unfair Terms in Consumer Contracts Regulations 1999 have been legislated to remedy these defects. Unfortunately, Malaysia does not have similar legislation. The attempts to apply these legislations have been made in *Standard Chartered Bank v Boomland Development Sdn Bhd & 3 Others* [1997] 4 AMR 3442 and *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162. However, they have been rejected by the Courts.

### **The Consumer Protection Act 1999**

The Consumer Protection Act 1999 (CPA) that came into force on 15 November 1999 represents a milestone in consumer protection in Malaysia. By the enactment of the CPA, it is hoped that all the shortfalls under the contract laws can

be remedied including on the issues of exclusion clauses. Section 24A(b) of the Consumer Protection Act 1999 has defined 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 the industry.” The unfair term on the other hand is defined 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.”

Section 6 of the CPA provides that the implied guarantees shall have effect notwithstanding anything to the contrary in any agreement; meaning that any attempt to contract out any of the implied guarantees provided by the CPA is void. In addition, it is an offence for a supplier to contract out of any provision in the CPA as clearly stated under section 6(2) and subject to punishment under section 145. This has been affirmed by the Tribunal for Consumer Claims (TCC) in *Chong Yung Seng v De Paris Image SDn. Bhd* (no.TTPM-Q-(P)-18-2010) where the non-recovery clause inserted in the receipt was declared void because it was contrary to section 6 of the CPA.

This provision gives some protection to consumers especially in respect of negligence because section 53 provides that there shall be an implied guarantee that the services will be carried out with reasonable care and skill. Therefore, any attempt to exclude liability of negligence is subject to section 6 of the CPA. Unfortunately, the CPA does not cover all types of services. There are several types of services which are outside the ambit of the CPA, such as healthcare services and services provided by professionals which are regulated by specific written law. In these situations, the common law rules of incorporation and construction that continue to pose lots of problems are still applicable.

There is also doubt as to whether section 6 is applicable to exclusion clauses that limit liability of negligence rather than those which exclude it altogether. This is because the supplier does not contract out the liability, but only limit the damages to a certain amount. In addition, section 6(3) of the CPA states that nothing in this section prevents a consumer from agreeing to settle or compromise the claim. It can be presumed that it also includes the right to settle the amount in a case if there is a breach. The supplier can use this argument as a defence to show that the consumers have agreed to limit the liability to a certain amount and therefore section 6 is not applicable.

Another point of concern is the exclusion clause of delayed performance. Section 55 provides that the implied guarantee as to the time of completion must be within a reasonable time. However, this implied guarantee is only applicable where the time for the services to be carried out is not determined by the contract or left to be determined in a manner agreed by the contract or by the course of dealing between the parties. This again creates a possibility that an express term to exclude liability for delayed performance can be upheld since it has been clearly decided by the parties in the agreement. Therefore, though the CPA gives protection to consumers by providing certain implied terms that cannot be contracted out, it may not be sufficient to tackle all problems.

Part IIIA of the Consumer Protection (Amendment) Act 2010 has contributed to the development of consumer protection in Malaysia in which this new part in the CPA has tackled the issue of unfair contract terms. The amendment provides that the court or the Tribunal for Consumer Claims can decide that if a contract is procedurally or substantively unfair, they can declare the contract as void and unenforceable. The TCC in *Che Mohd Hashim Abdullah v Air Asia X Sdn. Bhd.* (no:TTPM-WPPJ-(P)-10-2011) stated that a consumer has no bargaining power when purchasing tickets online and Part IIIA can give better protection to consumers in situations where unequal bargaining powers between consumers and suppliers exist.

Section 24C provides 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. There are several considerations in determining procedural unfairness which include the knowledge and understanding of the consumer in relation to the terms of the contract or its effects; the bargaining strength of the contracting parties; reasonable standards of fair dealing; whether the terms are subject to prior negotiation or part of standard form contract; whether the consumer has the competency to protect his or her interests and not suffered serious disadvantages by reason of age, sickness, or physical, mental, educational or linguistic disability, or emotional distress or ignorance of business affairs; whether independent legal or expert advice was obtained by the consumer; whether the provisions of the term were accurately explained to the consumer: the conducts of the contracting parties in their prior dealings; and whether the consumer relied on the skill, care or advice of the supplier. Therefore, if the exclusion clause is incorporated through standard form contracts which are the same across the industry, the exclusion clause is not procedurally unfair.

Section 24D on the other hand provides for the contract which is substantively unfair. This includes the terms of contract which are harsh, oppressive, unconscionable, restricts and excludes liability of negligence or for breach of express or implied terms of the contract without adequate justification. Therefore, there is a conflict between this section and Part VIII of the CPA. The implied guarantees related to the price and time of completion under Part VIII still subject to the terms of the contracts but section 24D considers the terms as substantively unfair. Furthermore, section 24D also does not provide a test for determining adequate justification.

The CPA also does not cover all types of services such as healthcare services and services provided by professionals who are regulated by specific written law even though Part IIIA clearly mentioned that the provisions are applicable to all contracts. In these situations, the common law rules of incorporation and construction that continue to pose lots of problems are still applicable. In addition, Sakina et al. (2011) and Azimon et al. (2012) had scrutinized this new amendment and came to the conclusion that there are many weaknesses and uncertainties of the application of Part IIIA of the CPA and submitted that this statute cannot solve all problems related to exclusion clauses.

## 2. Consumers' Awareness and Practices towards 'Exclusion Clause' and 'Unfair Contract Term'

It has been thoroughly discussed that exclusion clauses and unfair contract terms have become the focus for allegations of unfairness to consumers. The Contract Act 1950 provides that all agreements are contracts if they are made by the free consent of parties competent to contract. Under the common law, the courts have to decide whether the clause is duly incorporated into the contract. The incorporation of such clause will depend on whether the consumers are aware of its existence. The CPA on the other hand nullifies the exclusion clauses on the ground of procedural or substantive unfairness. A small survey has been carried out to provide quantitative evidence of the awareness and practices of consumers towards these clauses. The survey is only conducted in Klang Valley and therefore it cannot represent the Malaysian consumers as the whole. Nevertheless, the information from the survey is beneficial to get the general views of consumers especially those in urban areas regarding their perceptions towards exclusion clause.

The results of this study show that only 41.8% of the respondents are aware of the existence of such clauses in their dealing with the suppliers. On being asked whether they understood its legal implication, 50.8% responded that they did not understand. Thus, it is apparent that most consumers do not have much knowledge on the exclusion clauses. In total, 73.5% of the sample claimed that they had read thoroughly any receipt or invoice and 77.5% would read thoroughly any document before tendering their signature. However, in spite of these good practices of consumers, 54.3% of them stated that they would still sign the document even though they were already aware of the exclusion clauses or any other unfair contractual terms.

**TABLE 1: Consumers' Awareness and Practices towards Exclusion Clauses and Unfair Contract Terms**

No.	Items	Yes (%)	No (%)
1.	Aware of their existence in the transaction with the suppliers	41.8	58.3
2.	Understand the legal implication	49.3	50.8
3.	Read thoroughly the receipt/invoice	73.5	26.5
4.	Read thoroughly any document before signing	77.5	22.5
5.	Sign the document even though aware of the existence of unfair clauses.	54.3	45.8

Thus, by looking at the above findings, it is doubtful whether the exclusion terms can be made void on the ground of unfairness as being provided under section

24C and 24D of the CPA. This is because the consumers already read the terms, aware of its existence and signed the documents even though half of them claimed that they did not know its legal implication. Furthermore, most of the exclusion clauses are in the standard form contracts which are similar across the industry and therefore it is not procedurally unfair according to section 24C and 24D.

## CONCLUSION

This paper has shown that the existing law of contract, the common law and the Consumer Protection Act 1999 are inadequate to deal with the issue on exclusion clauses in consumer contracts. Though the CPA gives protection to consumers by providing certain implied terms that cannot be contracted out, it is insufficient to tackle all problems on exclusion clauses. This paper also provides a quantitative data from the perspective of consumers which supports the argument that the present law is not comprehensive in giving protection to consumers. Though the data collection is only limited to Klang Valley, it gives general views of consumers especially those in urban areas regarding their awareness and practices towards exclusion clause.

Thus, it is submitted that there are two solutions to this problem. The first one is to educate the consumers so that they are more aware about exclusion clauses and they will not sign the standard form contract without understanding of such terms. The second one is to amend the laws on exclusion clauses in order to give more protection to consumers. The existing common law rules in operating the exclusion clauses i.e. the rules of incorporation and construction are not on consumers' sides. For example, it provides that if the consumers are already aware of the exclusion clauses or if the course of dealing is established, the clauses would be effective. Based on the survey finding, it shows that most of the respondents have read thoroughly the clauses so that the law will assume that the consumers are already aware of such clauses. The worst part is that the consumers had even admitted that they would still sign the document even though they were already aware of those unfair terms. Furthermore, though Part IIIA of the CPA provides for unfair contract terms, it does not solve all problems since its application have many uncertainties. If prior dealings have been established or its parts of standard form contract, the exclusion terms will be deemed as fair to the consumers. Furthermore, it does not cover all consumers' transactions. Thus, it is hoped that the Parliament takes steps to legislate specific legislation dealing with standard form contract and exclusion clauses. More attention needs to be given to standard form contracts and exclusion clauses since they have become a popular practice in all industries.

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