



## CONSUMER PROTECTION ON UNFAIR CONTRACT TERMS: LEGAL ANALYSIS OF EXEMPTION CLAUSES IN B2C TRANSACTIONS IN MALAYSIA



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### ABSTRACT

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Globally as part of the economy, the widespread current practice of recent massive standardized large-scale contracts has expanded the oppression of consumers. Consumer interests and rights have become abused due to exemption clauses in these contracts that include terms that are unfair. These additions reveal an increase in consumer rights and interests having been abused. Corporate accountability and integrity in the field of consumer protection should be reviewed. This study illustrates that the development of exemption clauses has assisted in market failure and consumer rights have become abnegated. The research has been carried out through the application of content analysis methodology mainly centered around the review of the literature. It also examines consumer contract exemption clauses from their legal position in selected countries including Malaysia. A valuable tool to ensure corporate accountability and integrity is the application of legal methods. Using these should assist in rectifying market imperfection. This paper aims to show an approach to exemption clauses through the Malaysian judiciary. A solution is also proposed using legislation that echoes similar developments in other countries such as in United Kingdom, which should assist to address this area of the law by balancing the rights of consumers and corporate bodies in Malaysia. These suggestions will go hand in hand with the increase in paternalism, and the objectives of achieving sustainable development through corporate accountability and integrity.

**Contribution/ Originality:** This study contributes to the existing literature on unfair contract terms. It adds to the debate on regulating exemption clauses in B2C transactions in Malaysia in terms of the legal analysis of legislations and case-laws.

## 1. INTRODUCTION

A different dimension in the body of consumer protection law has been introduced through the idea of corporate accountability and integrity. This concept accords with one of the primary worldwide aims of legislation to protect consumers; using social justice and equity. Corporate responsibility (CR) redirects the main corporate objectives away from simply 'profit' to a concept of 'people, planet and profits'. CSR is not philanthropy, contributing gifts from profits, but involves the exercise of social responsibility in how profit are made (Doreen, 2007).

Rachagan (1992) notes that the aim of consumer protection legislation is to achieve the equality of bargaining between trader and consumer in the following ways; (i) correcting the economic power imbalance between individual buyers and producers, plus sellers of goods/services and their collective interests, (ii) ensuring the protection of buyers from trade practices that are unfair and products that are unsafe by reducing the incidence of losses or injuries related to purchases, (iii) appropriate product liability laws to ensure the equitable distribution through the community of continuing injuries and losses. The idea of CR raises corporate awareness, indicating that corporate success very much depends on the satisfaction in their goods or services by consumers, which is seen a consumer welfare enhancing tool.

Globally during the 21<sup>st</sup> century consumerism has risen and is viewed as a market protection instrument. Consumerism has increased as an idea, responding as an opposing one to the concept of freedom of contract. Freedom of contract is also a widespread cardinal belief. Buyer beware or freedom of contract, that left consumers to take care of themselves, was no longer relevant to consumer contracts during this era. Unscrupulous traders abused this cardinal concept and they utilized it as a way of discharging their liability. Their means of abuse involved the manipulative method of contract drafting. Buckley (2005) says that when the terms or price of a contract are excessively one-sided then it can be termed substantively unfair. Judicial creativity was gradually introduced within the court system as a method of protecting the bargaining power of the weaker party in standard form contracts. A new attitude to promote consumer welfare has been adopted by the judiciary. As a result, there has been a call upon the courts to become more paternal in helping to protect the weaker party in business to consumer contracts (B2C).

Consumerism has dictated, due to the competitive marketplace, that there should be a new examination in relation to the economic power of sellers with regards to buyers. Any nation that aims for success within the global marketplace that has become increasingly competitive, must not only ensure their economic growth, but also place rights of consumers, in particular, at the center of their economic, political, social, and legal development. Consumers are important contributors to economic growth. In order to attack the nucleus of inequality a reduction in the disproportions between traders and consumers must be made. Responsibility needs to be reviewed in a particular area of concern where traders have attempted to exclude or limit their breach of contract liability by the inclusion of exemption clauses in their consumer contracts. There are two opposing concepts in this contract area which is part of understanding its development; the concern for the traditional tenets of freedom of contract, a contract law cardinal rule, and in contrast, concerns around curbing unfairness that arises out of significant bargaining power inequality, which are also known as consumer protection principles. Consumer protection decrees that consumers should be protected and as a result, the government is required to adopt a paternalistic role.

Syed (2006) indicates, "These (exemption) clauses may appear in printed tickets, notices or receipts which are brought to the customers' attention at the time of the agreement which, in most cases, the customer has no time or energy to read the printed words. Even if he reads them, he would probably not understand them. It is only when a dispute arises that the consumer realizes how much of his rights have been excluded by these clauses." According to Phang (1998) "The common law has long been familiar with the attempt of one party to a contract to insert terms excluding or limited liabilities which would otherwise be his. The situation frequently arises where a document purporting to express the terms of the contract is delivered to one of the parties and is not read by him." The average citizen soon discovers with some certainty almost all of the most important contracts they are called upon to make during their life have terms that are more or less imposed. For example, if a consumer purchases a house, they are obliged agree to the terms that the housing developer has stipulated; if the consumers take goods using hire-purchase they are subject to the finance company terms of the agreement; if they require an essential service, such as water, electricity and telephone they are once more subject to the conditions laid down by the relevant authorities. Should a consumer wish to travel using the train, they will have to abide by the conditions made by the Railway Ordinance or should they want to send a parcel by post they must follow the conditions set by the Post

Office Ordinance. These are some of the more important and commonplace types of contracts entered into by any ordinary citizen. In all these cases the consumer has absolutely no bargaining power as against authorities who could be considered very powerful by comparison. They merely must adhere to the standard form of contract that was drafted by the stronger party. These parties comprise of commercial traders who can be considered to have abused their position and strength in order to do business and make money without any exposure to risk at all (Chris and John, 1999).

## 2. EVOLUTION OF EXCLUSION CLAUSES

By definition, an 'exclusion clause' means "any clause in a contract or term in a notice that purports to restrict, exclude or modify a liability, duty or remedy that would otherwise arise from a legally recognised relationship between the parties" (Yates and Hawkins, 1986). The exclusion clause was commonly used during the 19<sup>th</sup> century, arising from the doctrine of freedom of contract. Exclusion clauses were looked upon as a legitimate bargaining power exercise. Atiyah (1995) observed, "An exemption clause may take many forms, but all such clauses have one thing in common in that they exempt a party from liability which he would have borne had it not been for the clause." Fridman (1999) indicated that this type of clause will exclude or modify contractual obligations. Such clauses affect the nature and the scope of a party's performance. Treitel (2003) acknowledged the advantage of exemption clauses in that they enable the parties to understand the kind of risks they will most likely have to bear in general, and as such allow them to insure against these. The worst-case scenario is one where the contractual process is prone to abuse, particularly where private customers are involved, and who are very weak with regards to their bargaining power, knowledge or resources. Yates and Hawkins (1986) say that the function of the exemption clause is to delimit the range of the contractual obligations undertaken by the proferens. Hugh (1989) expressed the damaging nature of exemption clauses in exemption contracts, "...most customers faced with contract containing, 'small print' do not know what it contains or understand the effect of the clauses, and they do not think it worthwhile to spend the time and money necessary to find out or have the small print explained to them. Instead, they tend to ignore it and shop in terms of price."

The Law Commission (1975) describes these contractual issues in the following passage:

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

Yates (1982) discovered one of the reasons for including this type of clause was the perception that "everybody does it". Yates pointed out that this type of standard form contract that contains an exemption clause can become an oppressive tool to consumers because the terms are not subject to negotiation by either of the contractual parties. The arguments above fit very easily within the theory of exploitation by consumer contract exemption clauses (Kessler, 1943). Arguments regarding the inequality of bargaining power make an assumption of a situation that is effectively a monopolistic one where a consumer has a lack of choice or no choice other than to accept the terms of the offer should they wish to buy the offered goods (Oughton, 1991).

Jill (2008) says that there are an enormous different number of types of exemption clause and cataloguing them is hard. The draftsmen of these contracts are extremely creative, which overrides the continuous attempts within in the courts in trying to curb exemption clauses that are unscrupulous. It might be sufficient to generally categorise these clauses into three broad perspectives:

- i) Most common: The clauses that purport to completely exclude liability for at least part of that which would be otherwise included within the contractual undertaking. For example, the

exclusion of liability with regard to consequential losses and clauses that limit the liability to a particular sum; as in, the price that would be payable according to the contract.

- ii) Other common forms: Limiting the available remedy by imposing a short time-limit in which to file a claim for breach or the imposition of conditions that are onerous and rely on obtaining remedies like payment of transport costs for defective goods both from and to the place of business of the supplier.
- iii) More difficult to control: Clauses that instead of exemption of liability for breach, imply modification to the performance obligation, such that a breach cannot occur.

### 3. THE LEGAL POSITION WITH REGARD TO EXEMPTION CLAUSES IN MALAYSIAN AND UNITED KINGDOM CONSUMER CONTRACTS

The development of case law in this contract law area is a cause for grave concern with regard to consumer protection in Malaysia. The current contract law has not championed consumer rights. The Contracts Act 1950 does not contain any provisions on the contents of an agreement and therefore has no governance with respect to exemption clause inclusions. Nik (1993) points out the following:

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

One particular area of Malaysian legislation that affects exemption clauses is the Sale of Goods Act 1957. As defined in section 4, the said Act applies to contracts regarding the sale of goods. The Act incorporates important principles that have been established in case law into a statutory form. The Sale of Goods Act 1957 governs the dealings between business to business (B2B) and also business to consumers (B2C) and gives consumers no protection in the area of exemption clauses. Contrary to regulating the use of exemption clauses in sales, the 1957 Act permits the exemption from the implied terms and conditions by 'express agreement' in section 62. This section reads as follows:

Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negative or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Consumer rights in contract law have been enhanced to some extent by the introduction in Malaysia of the Consumer Protection Act 1999. The 1999 Act has failed to address important areas of protection; the protection of consumers in contracts where the exemption of traders' contractual liabilities is involved. Despite the fact that section 6 of the 1999 Act prohibits contracting out the Act's provisions it has failed to encompass the wide gamut of exemption clauses currently existing in consumer contracts. Several major flaws still exist regardless of the introduction of the 1999 Act. The 1999 Act was long awaited by consumers and their movement groups but unfortunately, the nature of the act has left them disappointed. The application of the 1999 Act is very limited. Section 2(4) states "the application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations."

Consumer contracts in Malaysia are mainly governed by the following acts; the Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999. The Contracts Act 1950 which administers to contractual relationships says nothing regarding unreasonable or unfair terms, the Sale of Goods Act 1957 is not a piece of legislation that protects consumers (Sakina *et al.*, 2009).

The Consumer Protection Act 1999, albeit long-awaited, is nevertheless supplemental and without prejudice to any other law that regulates contractual relations. The 1999 Act has brought about a reduction in the effectiveness of the paternalistic legislation.

Courts in England have shown hostility regarding unfair bargains in cases that involve the inequality of bargaining power created through the use of exemption clauses. This hostility is part of the manifestation of the support of common law for the doctrine of consumer welfarism started in the 20<sup>th</sup> century. As a result, certain rules of construction have been developed by the courts for dealing with exemption clauses. Before the Unfair Contract Terms Act 1977 (UCTA) was enacted, the principles of English contract law existed to mainly reduce some of the imbalances that resulted out of the use of exemption clauses where there was an inequality of bargaining power. In the case of *Levinson v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, Lord Denning relied upon this newly established principle in order to negate an exemption clause in a standard form contract due to unreasonableness. Another case, *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, involved a contractual relationship between a private motorist and a garage regarding their car repairs. An exemption clause in the garage's contract stated that the garage would not be responsible for damage caused by a fire to a customer's car whilst it was on their premises. During the time that it was at the garage, the garage staff's negligence caused a fire and the car was badly damaged. In the resulting case, the defendant, the garage, placed their reliance on the exemption clause to avoid liability. The Court of Appeal's decision stated that it was an ambiguous and unclear clause. As a result of this judgement, the garage was unable to deny liability for damage to the car.

In the case of *Lloyds Bank Ltd v Bundy* [1975] QB 326, Lord Denning attempted to establish a general principle of unconscionability by holding that Lloyds bank was not allowed to enforce their charge on the farm owned by Bundy. A principle of 'inequality of bargaining power' exists. English law affords relief to the party who, without independent advice, enters into a contract with very unfair terms or for a grossly inadequate consideration transfers property; if that party's bargaining power has been impaired grievously due to their own needs or desires, or by their own infirmity or ignorance, and is linked to undue pressures or influences that have been brought to bear on them by or for the benefit of the other.

A case that is quite infamous is that of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; "any need of this kind of distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977 (UCTA)". The Unfair Terms in Consumer Contracts Regulations Act of 1999 (UTCCR) was a result of the national implementation in 1972 of the European Directive of 1993 on Unfair Terms in Consumer Contracts. The 1999 UTCCR Act came into force on 1<sup>st</sup> October 1999. These regulations applied with regard to unfair terms in contracts that have been concluded between a seller or a supplier, and a consumer, have mainly added further protections above those that are conferred by common law/UCTA that relate to non 'individually negotiated' terms. The first case brought up by the regulations was the *Director General of Fair Trading v First National Bank PLC* [2002] 2 All ER 759. The Court of Appeal gave their view on the issue of good faith;

...the good faith element seek to promote fair and open dealing, and to prevent unfair surprise and the absence of real choice. A term to which the consumer's attention is not specifically drawn but which may operate in a way which the consumer might reasonably not expect may offend the requirement of good faith. Terms must be reasonably transparent and should not operate to defeat the reasonable expectations of the consumer. The consumer in choosing to whether enter into a contract should be put in a position where he can make an informed choice.

#### **4. DISCUSSION OF FINDINGS: JUDICIAL APPROACHES TO THE PROBLEM OF EXEMPTION CLAUSES IN MALAYSIA**

Two of the critical elements of economic prosperity are an independent judiciary and contract law (Buckley, 2005). The legal approach in Malaysia to exemption clauses is able to be traced back to the late 1950's and *Sze Hai*

Tong Bank Ltd v Rambler Cycle Co Ltd [1959] AC 576 (Sakina *et al.*, 2009). Many Malaysian cases with regard to exemption clauses have related to the port authority's liability with respect to bailment contracts (Sakina *et al.*, 2009). In cases that involved a consumer, the attitude of Malaysian courts regarding exemption clauses has been difficult to determine due to the different ideologies and perspectives of judges (Sakina *et al.*, 2009). Several Malaysian cases have shown that there is an increase in concern by the courts particularly within consumer contracts that use standard form exemption clauses. Intervention by the courts is variable based on different ideologies when they deal with the exemption of liability clauses. The rules of 'construction' and 'incorporation' are the main rules that are used. Common law principles have applied regarding the exemption of liability in Malaysia due to section 3 and 5 of the Civil Law Act 1956. Courts have been impeded by the theory of contract and were thus not able to prohibit exemption clauses. However, strict rules were developed within the theory of contract that related to the incorporation of these kinds of contractual clauses and also interpreting them as *contra proferentum*; defined as the court interpreting the terms against the party relying on it.

### **i. Rules of Incorporation**

Two types of incorporation exist; the first is incorporation using signature and the second is incorporation using notice. The incorporation most commonly used in interpreting exemption clauses is that within the controversial document such as a receipt or a ticket. This type of clause affects a document like a ticket or a receipt in which one would not expect to find contractual terms. A document that contains an exemption clause must be one of those that a reasonable man would have an expectation of containing contract terms. However, what about the case where a reasonable man would not be expecting there to be any terms on a document, for example, a funfair ticket? *Chapelton v Barry UDC* [1940] 1 KB 532 resulted in a decision by the court of appeal that a ticket was merely a receipt. The ticket was not a document where the customer would have an expectation of finding contractual terms, therefore the exemption clause printed on it was unincorporated. The court distinguished the ticket in the case from something like a railway ticket that contains the terms of business under which a railway company undertakes to carry passengers. The court decided the category the document should fall into using a test of reasonableness was dependent on the nature, information, and terms that the court views would be the expectations of a reasonable individual. In the case cited above, the chairs were taken and paid for by the hirer and were followed by two tickets. The back of each ticket contained a condition of which the intent was the exclusion of liability by the respondents for any injury sustained by the hirer. The hirer had not read the condition. The chair collapsed, and the appellant was injured because the canvas was defective on one of the chairs. This case showed that the provision of the ticket was too late, because the actual contract was formed at the time the chair was taken by the hirer, and not when the ticket was later provided.

However, a Malaysian court did not follow the ruling in *Chapelton v Barry UDC* [1940] 1 KB 532 when hearing the case of *Borhanuddin Bin Haji Jantara v American International Assurance Co Ltd.* [1986] 1 MLJ 246. Judge George clarified the point that some notices on receipts may be effective since each case depends on particular circumstances. The ticket in the *Chapelton* case [1940] 1 KB 532 (Syed, 2006) was of no effect due to the circumstances surrounding the issuance of the ticket. However, in cases where the conditions were printed on such tickets as railway tickets, cloakroom tickets or documents issued by bailees taking charge of goods, the notices would be effective. In *Ghee Seng Motor v Ling Sie Ting* [1993] MLJU 130, the court put the onus on the party who sought to rely on the clause to prove that adequate steps had been taken to inform the other party of the exemption clause's existence. The requirement that related to giving reasonable notice was highlighted in one of the leading cases on exemption clauses in the 20<sup>th</sup> century, *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 68, where the plaintiff had parked his car in the automatic car park of the defendants. The plaintiff entered the car park via an automatic barrier and took a ticket from the machine at the barrier. It was stated on the ticket, in small print, that the ticket had been issued subject to the conditions that were apparently displayed in the car park premises. In

order to locate the place where the conditions had been displayed, the plaintiff would have been required to drive the car into the garage and then walk around the garage. The conditions were lengthy and included one that exempted the defendant from liability for damage to cars and also liability for any injury sustained by customers. The plaintiff returned to the car park at a later time to collect his car, while he was doing so an accident occurred and he was seriously injured. The Court of Appeal ruled that the exemption clause did not protect the defendants. If they wished to show that the plaintiff was bound by the clauses, it would have been necessary to demonstrate that either he had known of it or that the defendants take reasonable and necessary actions to draw his attention to it. The clause was held to be exceptionally wide and one which was unusual to be found in that class of contract, therefore it was insufficient to claim that the plaintiff had been notified on the ticket that it was issued subject to conditions. It would have to have been shown that adequate steps had been taken to explicitly bring the plaintiff's attention to the particular exempting condition that was being relied on. The defendants had failed to demonstrate that the plaintiff knew of the condition or that they had taken sufficient steps to draw his attention to it. In a case of *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 68, Lord Denning ruled as follows:

The ticket is no more than a voucher or receipt for the money that has been paid, on terms which have been offered and accepted before the ticket is issued. In the present case, the offer was contained in the notice at the entrance giving the charges for garaging and saying 'at owner's risk'... The offer was accepted when the plaintiff drove to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust on him. The contract was then concluded, and it could not be altered by any words printed on the ticket... the customer is bound by the exempting condition if he knows the ticket is issued subject to it or if the company did what was reasonably sufficient to give him notice of it. The wider or more unexpected the exemption clause is, the clearer the notice expected. In *Spurling v Bradshaw*, Lord Denning held that "Some exemption clauses I have been would need to be printed in red ink on the face of the document with red hand pointing to it before the notice could be held to be sufficient".

## ii. Rules of Interpretation

Once it has been established that the exemption clause is incorporated into the contract, the whole contract will be subject to examination to discover if the exemption clause is wide enough and clear enough to cover the breach. The exemption clause will be inoperative unless it is clear and unequivocal. Any ambiguity or uncertainty as to the meaning of the exemption clause implies that the court is liable to construe it *contra proferentum*, and therefore against the party who inserted it in the contract. On appeal to the Federal Court by the plaintiffs, for *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 and *Syarikat Lee Heng Sdn Bhd v Port Swettenham Authority* [1971] 2 MLJ 27, the Federal Court ruled "that the *contra proferentum* rule should apply to the construction of Rule 91(1) just as much as it does to any exemption clause in a contract." In *Malaysian Airlines System Bhd v Malini Nathan & Anor* [1986] 1 MLJ 330, Malaysian Airlines was sued for breach of contract because they failed to fly a fourteen-year-old pupil, the first respondent, back to Kuala Lumpur. MAS denied liability and relied on Condition 9 of the conditions of the contract that were printed on the airline ticket. The Supreme Court ruled that MAS was entitled to rely on the clause and therefore were not in breach of the contract. A strict attitude is normally taken by the Malaysian courts towards exemption clauses where cases involve damage due to negligence on the part of one of the parties to a contract. In *Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn Bhd & Anor* [1995] 2 MLJ 100, the court made a very strict interpretation as regards these types of clauses in a case that involved damage caused by negligence. However, the decision of Elizabeth Chapmen JC in *Premier Hotel Sdn Bhd v Tang Ling Seng* [1995] 4 MLJ 229, in the Kuching High Court caused concern indicating a readiness by a court to allow a clearly worded exemption clause in the event of negligence.

Furthermore, a strict interpretation of the common law with respect to the effectiveness of an exemption clause was displayed in *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162 where the

plaintiff had purchased a machine that became defective after few months. The defendant denied liability and had relied on an exemption clause. The plaintiff invoked the Unfair Contract Terms Act 1977. The court judged, however, that it was not appropriate to rely on the Unfair Contract Terms Act 1977 and import the provisions of this act into local law when there was no express local legislation that would allow this. The judge took a standpoint that the Contracts Act 1950 and the Specific Relief Act 1950 that provided for most remedies were adequately comprehensive and would, therefore, cover the remedies provided for by the English Common Law. The judge refused to move away from existing contract legislation and made the claim that local decisions were more than adequate. The judge also noted that the legislature should move to change and then promulgate such a law were it necessary.

The judge's remarks have caused concern suggesting that the court was unwilling to act in the best interest of consumers. Too much dependence on the existing legislation would not designate the courts as champions of consumers' interests because no specific legislation exists that regulates exemption clauses in Malaysian consumer contracts. Moreover, there is also no equivalent law to the Unfair Contract Terms Act 1977 of the United Kingdom. In Malaysia, adoption of the English system prior to the introduction of the Unfair Contract Terms Act 1977 has been the instrument of legal control of unfair terms through exemption clauses (Sakina *et al.*, 2009). The interpretation in consumer contracts of unfair terms in particular exemption clauses in legal terms rests with the Malaysian courts (Sakina *et al.*, 2009). A poor active role to protect the weaker party simply by seizing upon a strict constructionist approach has produced inconsistencies in the judicial approach to exemption clauses in consumer contracts (Sakina *et al.*, 2009). Therefore, it is timely for the Malaysian government to call for legislative intervention in this matter and thus assume a more paternalistic role as regards to the review and curbing of the use of exemption clauses in consumer contracts. Existing local legislation has not effected adequate justice in this area of the law.

## 5. CONSUMER PROBLEMS

Identifying consumer problems is vital in determining the level of detriment to the consumer that can arise from such problems as misleading advertising, issues with information, behavioral biases in consumers and failures in the market or regulations. In Australia, information about consumer problems is able to be found in a number of areas; consumer complaints, feedback to businesses, agencies for the consumer, the various ombudsman and other types of dispute resolution services or advice provision services, consumer surveys and focus groups, consumer agency data, industrial reports to consumer agencies, consumer and market issue reports by committees of the Australian, State and Territory Parliaments.

## 6. A LEGISLATIVE SOLUTION CATERING TO THE PROBLEM OF MALAYSIAN EXCLUSION CLAUSES

There can be some positive advantages to the use of exclusion clauses if liability has been equally placed on both parties. This is potentially a myth because, in reality, most exclusion clauses in consumer contracts appear to be one-sided in favor of the businesses that created them. Cases that dealt with exclusion clauses in consumer contracts have indicated that carefully drafted exclusion clauses would be able to relieve traders of their liabilities even though the breach of these clauses goes to the heart of the contract and deprives consumers of their rights. With regard to consumer protection, Visu (1978) states that where an ordinary consumer transaction is involved, the courts should take a stricter view of the exemption clause in such cases and, therefore, protect the consumer from the onerous terms that were imposed by the stronger party. Visu (1978) further notes that the courts should recognise the notion that a consumer is free to contract on their own terms in most consumer transactions as simply a fictional conception. Visu (1978) expresses the opinion "The courts themselves have not been too bashful in expressing their contempt for such clauses." Legislative regulation of exclusion clauses in Malaysian consumer



contracts is a reform that is very much awaited. Legal developments in the realm of exemption clauses in Malaysia leads to a conclusion that the Malaysian courts in have not risen to the challenges with regard to such clauses depriving the rights of a party to the contract. Further concluding that such clauses with careful drafting enable one party to the contract to escape liability while the other, usually weaker, party is left at a disadvantage and without recourse.

Visu (1978) indicates that courts should assume a more active role to protect the weaker party instead of simply taking a strict constructionist approach, and nor should they abdicate their responsibility by asserting that such matters are best left to intervention by the legislature. Judges should not just be perceived as mere interpreters of the law, but also as developers of the law. Sinnaduri has suggested that Malaysian judges could play this role "...by invoking their inherent powers in refusing to sanction certain contracts on the grounds of public policy or under section 24(e) of the Contracts Act". A similar idea was expressed by Nik (1993) who pointed out that public policy under section 24(e) of the Contracts Act 1950 might also be seen as a device where judicial creativity could be exercised when dealing with unfair terms. Proposed legislation should provide a clear rule of interpretation for exemption clauses. It is also recommended in cases involving consumers, that the law should grant the courts judicial discretion to adopt a strict interpretation based on the *contra proferentum* rules.

The adoption of the United Kingdom model (Unfair Contract Terms Act 1977) is recommended for Malaysia. Atiyah (1981) highly recommended as follows, "UCTA 1977 greatly restricts the use of 'exclusion clauses' whereby contracting parties protect themselves from legal liability. The Act extends beyond consumer protection, since it also operates, within limits, where businessmen contract on 'standard written terms.'" Three broad areas of control should be covered by the legislation (Sakina *et al.*, 2009) exemption of liability for negligence, general control of exemption clauses seeking exclude or restrict the liability of one party for breach of contract, control over certain specific contract terms that restrict or exclude liability for breach of certain terms that have been implied by statute in the sale of goods, hire purchase and supply of goods. The proposed legislation shall prevail over cases that conflict with any other legislation. This new proposed legislation, however, should not deter the operation of any other provisions in other legislation that already impose a stricter duty on the seller or supplier than might be done by the proposed legislation.

## 7. CONCLUSION

Law is not something that acts in isolation. Corporate accountability and integrity must be seen to work hand in hand with legal developments in order to rectify any imbalance in bargaining power. Exemption clauses are part of a *laissez-faire* legacy upholding the idea of freedom of contract and belong to the unfair trade regime that has eroded the rights of the consumer in many commercial transactions. Malaysian case law development coupled with the lack of specific regulation with regard to exemption clauses in Malaysian consumer contracts is of grave concern to consumers. Now is the time to reform the law regarding exclusion clauses in consumer contracts in Malaysia. Because the purchasing power of the consumer has a significant effect on the profits gained by businessmen and in the commercial sectors, articulation of the concept of corporate integrity and accountability is crucial in the field of consumer contracts. It would be a noble effort by traders to exercise corporate integrity and accountability in this area of the law as part of their corporate responsibility, striking a balance between the needs of market providers and the consumers in the course of remedying market failure. In the long term that would thus ensure a fair-trading environment and that consumers are protected.

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## REFERENCES

- Atiyah, P.S., 1981. An introduction to the law of contract. Oxford: Clarendon Press.
- Atiyah, P.S., 1995. An introduction to the law of contract. Oxford: Clarendon Press.
- Buckley, F.H., 2005. Just exchange: A theory of contracts. London: Routledge.
- Chris, T. and B. John, 1999. Commercial contracts: A practical guide to deals, contracts, agreements & promises. London: Kogan Page.
- Doreen, M., 2007. Corporate social responsibility beyond law, through law, for law: The new corporate accountability, in mcbarnet, voiculescu & campbell, the new corporate accountability corporate social responsibility and the law. London: Cambridge University Press.
- Fridman, G.H.L., 1999. The law of contract in canada. 3rd Edn., Canada: Carswell Thomson Professional Publishing.
- Hugh, B., 1989. Unfair Contracts in Britain & Europe, 42(1): 201-209,212.
- Jill, P., 2008. Textbook on contract law. Oxford: Oxford University Press.
- Kessler, F., 1943. Contracts of adhesion—some thoughts about freedom of contract. Columbia Law Review, 43(5): 629-642. Available at: <https://doi.org/10.2307/1117230>.
- Nik, R.M., 1993. Unfair terms in Malaysian consumer contracts-The need for increased judicial creativity. Asian Seminar on Consumer Law.9-12 August 1993. Kuala Lumpur.
- Oughton, D.W., 1991. Consumer law text, cases and materials. London: Blackstone Press Ltd.
- Phang, A.B.L., 1998. Chesire, firfoot and furmston's law of contract. Singapura: Butterworths.
- Rachagan, S.S., 1992. Consumer law reform- a report. Kuala Lumpur: University Malaya Press.
- Sakina, S., Y. Ahmad and A.A. Azimon, 2009. Recognize Malaysian contract law. Kuala Lumpur: International Law Book Servicesr.
- Syed, A.A., 2006. Principles of the law of contract in Malaysia. Malaysia: Malayan Law Journal Sdn. Bhd.
- Treitel, G.H., 2003. The law of contract. London: Thomson Sweet & Maxwell.
- Visu, S., 1978. Exemption clauses v. Public policy and inequality of bargaining power. 2 MLJ cxxx.
- Yates, D., 1982. Exclusion clauses in contract. London: Sweet & Maxwell.
- Yates, D. and A.J. Hawkins, 1986. Standard business contracts: Exclusions and related devices. London: Sweet & Maxwell.

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