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THE REGULATION OF UNFAIR CONTRACTS

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UNFAIR TERMS IN MALAYSIAN CONSUMER CONTRACTS - The Need For Increased Judicial Creativity

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Introduction

In dealing with unfair terms in Malaysian consumer contracts, the temptation to take the well–trodden path of regretting the absence of a comprehensive consumer protection legislation and of justifying the perceived lack of consumer–friendly provisions in the Contracts Act 1950, by tracing its genesis to the hey day of theories of Natural Law and Laissez Faire, is almost irresistible.

We can neither deny nor change the facts of history. It is a historical fact that the Contracts Act 1950 (which was based on the Indian Contract Act 1872) is a product of 19th century social, economic, political and philosophical influences on the English judicial thinking of that time.[1]

Given the above truism, and granted that generally, the existing legislative infrastructure in Malaysia may not be the most ideal for consumer protection, it is the premise of this paper that more can in fact be done within the existing legal framework, to check the use of unfair terms in consumer contracts, by way of increased judicial creativity. Provided we are willing to see the provisions of the Contracts Act for what they are, uninfluenced by the social, economic and political climate at the time of its conception, it will be realised that inspite of its origins, the Act has unexplored and unexploited potential in checking unfair terms in consumer contracts. Creative use of the provisions in the Act coupled with other inherently available judicial armoury, is in my view, as important and as necessary as is the introduction of new consumer protection legislation.

Judicial Treatment of Unfair Terms in Consumer Contracts - Some Illustrations

The Contracts Act 1950 attempts to codify only the basic principles of contract law. As such it does not have specific provisions dealing with the contents or the terms of a contract. Hence no mention is made in the Act of clauses which limit or even exclude one party's liability, clauses which incorporate terms in other documents into

the contract, clauses whereby the parties contract out of certain specific statutory provisions, compulsory arbitration clauses, the notorious 'basis of contract' clauses in insurance contracts and the like. It is perhaps for this reason that the Malaysian Judiciary has, hitherto, upheld the validity of clauses that seem to be unfair to consumers. The absence of specific and stifling provisions in the Contracts Act 1950 seemed to be regarded, in the majority of cases, as a carte–blanche to uphold unfair terms in consumer contracts. Granted that cases involving unfair terms in consumer contracts have been fairly limited in number, the decisions in these cases have not been extremely satisfactory. This can be seen in some of the cases considered below.

1. Exemption Clauses in Standard Form Contracts

Clauses in standard form contracts which exemptr limit a contracting party's liability for certain breaches of the expressed or implied terms of the contract or for the commission of a tort, operate extremely harshly against and to the detriment of consumers. Such clauses are found at the back of tickets of public transport, on receipts and other types of standard form consumer contracts. The use or rather abuse of such clauses in standard form consumer contracts have generally been viewed as objectionable by the common law judges, who have as a result introduced or applied a medley of principles to check, control or event sometimes circumvent such clauses. These include the requirement that the clause must be an integral part of the contractual document,[2] and that reasonable steps have been taken to bring the existence of the clause to the notice of the contracting parties before the contract is effected. Furthermore, various rules of construction are also readily available as a means of controlling such exemption clauses such as the contra *proferentum rule*[3] or the requirement that very clear words must be used if one is to be excused from the results of one's own negligence.[4]

Apart from the fairly traditional tools mentioned above, newer ones like economic duress[5] and inequality of bargaining power[6] have also been creatively used in other jurisdictions.

Thus it is clear that even with the demise of the concept of fundamental breach in relation to exemption clauses[7] there remains a wide range of judicial tools which can be used to control the abuse of exemption clauses in standard form consumer contracts.

Regretfully however, none of these judicial tools were used by the Malaysian Supreme in the only reported Malaysian case which involved an exemption clause in a standard form consumer contract. In *Malaysian Airlines System Bhd v Malini Nathan & Anor*,[8] the Malaysian Airlines was sued for breach of contract for failing to fly the 1st respondent, a fourteen year old pupil in England at that time, back to Malaysia on a particular flight although she had a confirmed ticket on the said flight. Malaysia Airlines in denying liability relied on Condition 9 under the Conditions of Contract which was printed on page 2 of the ticket. Condition 9 stipulated as follows:

> "Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the

> ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections."

While the Sessions Court found in favour of the respondents, the High Court allowed the appeal by the Airlines. This was then affirmed by the Supreme Court. Delivering the judgment of the Supreme Court, Wan Hamzah SCJ observed:[9]

> In my judgment the defendant's decision not to carry the first plaintiff on flight No. MH893 on March 26, was fully covered by Condition No. 9. What the defendant did or omitted to do was in accordance with Condition No. 9, and therefore there was no breach of contract on the part of the defendant. The plaintiffs ought to have known Condition 9 and they were presumed to have known it as it was printed on the ticket. Even if it was true that the defendant had confirmed or represented to the plaintiffs that the first plaintiff had a definite and certain booking of a seat on that flight, it must be understood that such confirmation or representation was made subject to Condition No. 9. Because it was made subject to Condition No. 9 it cannot be said that such confirmation or representation was made falsely or recklessly.

Considering the extent to which exemption clauses in consumer contracts have been placed under judicial scrutiny in England and elsewhere at the time this case was decided, the simplistic approach taken by the highest court of the land in the only reported case on exemption clauses in a consumer contract, is most discouraging.

2. *Contracting-Out Clauses*

Another common feature of consumer contracts in Malaysia is the use of 'contracting–out' clauses i.e. clauses in a contract whereby the parties free themselves from certain statutory obligations.

Judicial treatment of contracting–out clauses in Malaysia seem to be more favourable to consumers compared to the judicial treatment of exemption clauses.

While the Privy Council in *Ooi Boon Leong & Ors v Citibank NA*[10] has cateforically recognised the right of parties to contract out of the Contracts Act, thereby affirming the notion of freedom of contract as the structural foundation of the Act, the courts seem to be consistent in their view that parties cannot contract–out of specific statutes which have been introduced to cater to the needs of specific groups of people and to deal with specific situations.

The latter is clearly illustrated by the decision of the then Federal Court in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo*.[11] The issue in that case was whether the parties to a contract could contract out of the Housing Developers (Control and Licensing) Rules 1970. In holding that the developer could not rely on such contracting– out clause to get around the Rules, Suffian LP delivering the judgement of the Federal Court observed:[12]

> [I]t is clear that only terms and conditions designed to

> comply with the requirements of the rules that may be inserted in a contract of sale of land that is governed by the [Housing Developer (Control and Licensing)] Act [1966]] and the rules, and that on the contrary terms, and condition which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

The Federal Court in fact adopted the principle enunciated by the House of Lords in *Johnson v Moreton*[13] that where the weaker contracting party is the subject of protection by a statute it is no longer possible to state axiomatically that the courts will permit contracting–out of provisions in the absence of explicit language to the contrary.

A similar stand was taken by the same court in *Lee Kim Seng v Acme Canning Sdn Bhd*[14] which involved an attempt to contract out of certain provisions of the Employment Ordinance 1955.

Ooi Boon Leong, *albeit* a more recent decision and a decision of the Privy Council must not be regarded as having negated the effects of the earlier decisions of the Federal Court. The decision of the Privy Council pertaining to contracting out must be confined to attempts to contract out of the Contracts Act only. Attempts to contract out of specific statutes must still be viewed in accordance with the two earlier decisions of the Federal Court.

The distinction between the Privy Council decision in *Ooi Boon Leong* and the two Federal Court cases must not be blurred in dealing with contracting–out clauses in consumer contracts. This is particularly important because of late, there are various piecemeal provisions introduced in existing statutes to protect the interests of weaker parties such as the hirer in a hire–purchase contract, the insured in a contract of insurance or the employee in a contract of employment. Often these provisions do not have express clauses prohibiting contracting–out.[15]

3. Incorporation Clauses

The widespread use of incorporation clauses in consumer contracts is another area of immediate concern. These are basically clauses in consumer contracts which provide that terms and conditions found in other documents which may not be available to the consumer at the time the contract is signed, are deemed to be incorporated into the contract.

Such clauses are most common in cover notes issued by insurance companies, as is illustrated by the case of *Chop Eng Thye v Malaysia National Insurance Sdn Bhd.*[16] Pursuant to the plaintiff's application for a fire policy, a cover note was issued. The cover note contained a clause incorporating the terms and conditions found in the insurer's usual policy. A fire occurred during the period of the cover note and the plaintiff made a claim thereunder. The defendant in denying liability, contended, *inter alia*, that the plaintiff had been in breach of a condition in the policy. The said condition was not found in the cover note but it was contended that it was binding by virtue of the incorporation clause. This was accepted by the court. According to Ajaib Singh J:[17]

> [B]y incorporating the clauses and conditions of the defendant's fire insurance policy in the cover note and by the plaintiff's acceptance of the cover note in that form and content, both the

> plaintiffs and defendants rendered themselves bound by those clauses and conditions.

The learned judge referred to the English cases of *Queen Insurance Co v William Parsons*[18] and *General Accident, Fire and Life Assurance Corporation v Shuttleworth & Anor.*[19] In the former, the Privy Council in fact went a step further by saying that where there is an express clause in the cover note which incorporates the terms and conditions of the proposed policy, the insurer is not required to show that they were brought to the insured's notice or even that he had had an opportunity of making himself acquainted with their requirements.[20]

4. Compulsory Arbitration Clauses

Compulsory arbitration clauses are a standard feature in contracts of insurance. Such clauses require a dispute which arises between the insurer and the insured to be referred to arbitration within a specific time before the dispute can be brought to court. These clauses relate to disputes as to liability as well as quantum.

Unlike in England where the British Insurance Association and Lloyd's had declared that their members would not demand that the insured resort to arbitration where the dispute involves the insurer's liability and the insured does not wish to rely on arbitration to resolve the dispute, Malaysian insurers have not given such an undertaking. Hence failure to fulfil such arbitration clauses have frequently been used to deny an insured's claim.[21] The courts have also endorsed such denial of liability by holding the failure to refer a dispute to arbitration fatal to the insured's claim. While an arbitration process may have its advantages over litigation vis–a–vis the consumer,[22] there are concealed disadvantages. The fact that a dispute is considered away from the glare of media publicity may encourage the stronger party to use unfair tactics, raise technical defences and make them less willing to compromise as no adverse publicity will be given to them, unlike in a litigation.

Section 28 of the Arbitration Act 1952[23] gives the High Court the power to extend the time for commencing arbitration proceedings if the court is of the opinion that undue hardship would otherwise be caused. Section 28 was in fact most encouragingly used by the High Court and endorsed by the Federal Court in *Safety Insurance Company v Chow Soon Tat.*[24] The insured who had a fire policy suffered a loss by fire on December 30, 1968. He made a claim on January 5, 1969 but the company remained silent until some 3 1/2 years later when they informed the insured's solicitor that they were repudiating liability under Condition 19 of the policy. This condition provided that the company was in no case to be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration. Condition 18 of the policy required all differences arising between the parties to be referred to arbitration and that such was a condition precedent to any other right of action.

Clearly the insurance company had, in keeping silent, an eye on these provisions in the policy. Mohamed Azmi J however was quick to detect this. According to the learned judge by not disputing the claim, the insurer gave the impression that the insured's claim was being considered thus, giving the insured no opportunity to invoke Condition 18. Further if Condition 19 were to be read independently, it would deprive the insured of his right under the policy after one year as there was no pending action or arbitration. According to the

learned judge such could not be allowed as it would turn Condition 19 into a vehicle of oppression and cause undue hardship to the insured. The learned judge thus granted the application for an extension of time under section 28 of the Arbitration Act. The insurer's subsequent appeal to the Federal Court was dismissed.

5. *'Basis of Contract' Clauses in Insurance Proposal Forms*

As contracts of insurance seem to be the consumer contract that is put under judicial scrutiny more frequently than others, inevitably this last illustration of the judicial treatment of unfair terms also involves contracts of insurance.

Proposal forms submitted by consumers in obtaining insurance cover inevitably contains the notorious 'basis of contract clause.' By the use of this clause the proposer for insurante warrants the truth of all answers and information given therein and that any untruth therein would make the contrct of insurance voidable. The use of this clause thus provides the insurer with the means to avoid a policy which is far more effective than either non–disclosure or misrepresentation.

In England the harshness of the law relating to basis of contract clause are often mitigated by the adoption of strict rules of interpretation by the courts.[25] Furthermore by the relveant Statements of Practice, insurers who are members of the British Insurance Association and Lloyds have agreed the "the declaration at the foot of proposal form should be restricted to completion according to the proposer's knowledge and belief and that neither the proposal form nor the policy shall contain any provision converting the statements as to past or present fact into warranties ..."[26]

In Malaysia, in the absence of similar statements of pracatice and of legislative provisions controlling the use of 'basis of contract' clause the responsibility of mitigating the harshness of such clauses falls squarely upon the judiciary.

Malaysian judges unfortunately, seem to accept the mere existence of such a clause as a conclusive evidence that statements in the proposal form acquire the states of warranties in the context of insurance law, the breach of which allows the incurer to avoid the policy. Such a rigid approach can be seen, for instance, in the case of *Suhaimi bin Ibrahim v United Malaya Insurance Co Ltd*[27] where the learned judge observed that where the statements contained in a proposal formed the basis of a contract of insurance, the truth of the statements in the proposal form was a condition of the liability of the insurer.

In *China Insurance Co v Ngau Ah Kau*[28] the Federal Court held that when the thruth of the answers in the proposal form had been made a condition in the policy, it was not open to the court to consider whether the answers to the question were material.

The Need for a Change in Judicial Attitude

Granted that with the limited number of cases, it may be unfair to expect the judiciary to display a definite and articulated philosophy of consumer protection, most of the decisions considered above are not very encouraging.

The notion of freedom of contract is built on the framework of equality of bargaining power, that parties to a contract can and in fact do negotiate at arms length, that the contracting parties can and do read and understand the terms of the agreement. None of these conditions are applicable vis–a–vis consumer contracts in Malaysia. Even in the best of conditions, the basic pre–

requisite for the strict application of the doctrine of freedom to contract ie equality of bargaining power, is usually not present in a consumer contract. This is more so in Malaysia where the general level of literacy has not reached a stage which we can be proud of and consumer awareness is still even lower. This, coupled with the obvious inertia of the legislators in either rectifying existing provisions or introducing new legislation in the name of consumer protection, not merely demands but in fact mandates that our judiciary display greater interventionism in the enforcement of consumer contracts. Special vigilance is required when consumer contracts are the subject matter of litigation; positivistic or rigid interpretations of existing provisions must make way for creative use of existing law.

Perhaps it may not be long before the Malaysian legislature feel compelled to introduce comprehensive legislation dealing with unfair terms in consumer contracts. However, even in the absence of such legislation there is at present sufficient scope for the exercise of judicial creativity in dealing with such contracts. The existing array of devices include those that are inherently available to the courts and those that are provided for under the Contracts Act. An inventory of such devices is provided below.

Devices Which are Inherently Available

1. The Rules of Construction

Various interpretative devices are frequently used by courts in other jurisdictions as a device to protect the interest of consumers in unfair contracts. These include the strict interpretation of clauses which exempt or limit a party's contractual liability[29] the use of the *contra proferentem* rule when the words used in a contract are vague or ambigous,[30] the doctrine of repugnancy[31] and the other general rules of construction of constractual terms.

The Malaysian Courts of late seem to be fairly reluctant to use any of these devices. In *Kong Ming Bank Bhd v Leong Ho Yuen*[32] a memorandum of charge executed by a customer in favour of a bank in consideration for overdraft facilities had to be construed by the court. What had to be determined was the time from which interest on the overdraft ought to be payable. The trial judge applied the *contra proferentem* rule and construed the clause in favour of the customer. This was however rejected by the Federal Court[33] on the ground that this rule of construction is subject to the overriding principle that an instrument must be construed in accordance with the expressed intention of the parties. The Federal Court further observed that the application of the *contra proferentem* rule may be made only when other rules of construction fail.

The *contra proferentum rule* seem to be more favourably used by judges in dealing with contracts of insurance. In *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud*[34] the Federal Court held[35]:

> [A]s between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has as far as possible, to be read against the insurance company, that is to say that if there is a doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

Apart from the *contra proferentem* rule the Malaysian courts have yet to use any of these devices to deal with unfair terms in contracts.

2. *Device of Collateral Contracts*

A common problem in consumer contracts relate to the status of representations made during the pre–contract stage in relation to contracts which are subsequently wholly reduced to writing. The parole evidence rule will prevent the introduction of those oral statements to contradict, vary, add to or subtract from, the terms of the written argreement. The rigid application of the parole evidence rule causes lot of hardship to consumers who may have entered into a written contract based on certain representations made by or on behalf of the other party prior to the contract.

This is illustrated in the case of *China Insurance Co Ltd v Ngau Ah Kau*.[36] A claim by an insured was rejected by the insurer because of a misstatement in the proposal form. The insured contended that he had given the correct answer to the insurance agent but was told that it was unnecessary to include the said information in the proposal form. The agent also gave evidence to this effect. The trial judge found in favour of the insured on the ground that as the agent was the insurer's agent, knowledge of that information could be imputed to the insurer. This decision was unfortunately reversed by the Federal Court. One of the reasons given by the Federal Court was that the oral evidence given by the agent was inadmissible by virtue of sections 91 and 92 of the Evidence Act relating to parole evidence.

Interestingly however, in some other cases, the courts have creatively used other devices to overcome problems with the parole evidence rule. One such device is collateral contract – whereby the oral representation is treated as an oral contract which is collateral to the main contract which is in writing.

The local case that blazed the trail for the recognition of collateral contracts is perhaps *Tan Swee Hoe & Co Ltd v Ali Hussain Brothers*.[37] The appellant had agreed to allow the respondent to occupy certain premises for long as they wished on the payment of $14,000 as tea money. Subsequent to this the parties entered into two agreements. Both agreements had provisions for increase in rental. No reference was made in the written agreements to the earlier oral agreement. After a dispute between the parties the respondent was served with a notice to quit the premises.

The trial judge held that the respondents had paid the $14,000 tea money in consideration of which the appellant gave an oral undertaking that the respondents could occupy the premises for as long as they wished provided they paid the rent regularly.

The appellant appealed to the Federal Court, wherein Raja Azlan Shah summarised the issue before the court as follows[38]:

> [W]hether the oral promise can contradict the written agreement ... and be enforced. That question is tied to the salutary provisions of sections 91 and 92 of the Evidence Act, which briefly stated enact that extrinsic evidence is not available to vary or quality the terms of a written contract.

The learned Chief Justice continued[39]:

> [A]n oral promise, given at the time of contracting which

> induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imputed into the main agrement. Instead it constitutes a separate contract which exists side by side with the main agreement.

The device of collateral contract was also used by the Federal Court in dealing with a consumer contract in *Tan Chong & Sons Motor Sdn Bhd v Alan McKnigh.*[40] The respondent wanted to buy a car from the appellant and get the benefit of exemption from duty in Malaysia and Australia. To be able to get such benefit he must buy a car which conformed with the Australian Design Regulations. This fact was made known to the appellant's salesman by the respondent at the pre–contract stage. However the Buyer's Order which was signed by the respondent at the time he committed himself to the purchase of a Datsun 260 from the appellant had *inter alia*, Condition 5 which read:

> No guarantee or warranty of any kind whatsoever is given by the company in respect of the vehicle, the subject of the order, unless such guarantee and/or warranty is separately stipulated in writing hereto, but the Buyer/Hirer shall be entitled to the benefit of the manufacturers warranty.

The car which was supplied to the respondent did not conform with the Australian Design Regulations and the respondent claimed damages for breach of warranty. The High Court[41] found in favour of the respondent by holding that the contract was partly in writing and partly oral. According to Gunn Chit Tuan J[42]:

> In this case the [oral] warranty was really one of the promises that go to make up the main contract, which ... was partly oral, partly written and partly by conduct.

The learned judge refused to call the oral warranty a collateral contract because according to his Lordship such contracts are rare and are difficult to prove.

However, on appeal, the Federal Court favoured the collateral contract approach. According to Salleh Abas FJ[43]:

> In any even whether one regards these oral representations as a separate agreement or as an integral part of it or even as a new term, there is no running away from the fact that the oral representation was contradictory to the printed conditions. This conflict did not in anyway deter the court from doing justice.

By using the collateral contract device, the parole evidence rule is effectively avoided. The Federal Court observed[44]:

> [T]he dominant purpose – of proving the pre–contract statements in the case under the present appeal was not to contradict, vary, add or substract the terms of the [buyer's] order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflcit between the

> warranty and the terms of the contract subsequently entered into.

Salleh Abas FJ displayed extreme judicial sensitivity and concern when his Lordship further observed[45]:

> It is the need to attach responsibility upon the maker of pre–contract statements that such statement have been given an overriding effect despite their defiance of the terms of a written contract.

In *Kandasami v Mustafa*[46] the Privy Council went a step further and agreed with the specific finding of the trial judge that a written agreement entered into between the parties was not binding on the parties as the parties had only intended to be bound by the oral agreement entered into earlier. It was held by the Privy Council on the facts, there was in existence a collateral agreement under which the parties had agreed that the written agreement will have no legal effect. Delivering the judgment of the Board, Lord Brightman observed[47]:

> If parties put their names to a document, and one party represents and the other party agrees that the document shall not, as between themselves, have any legal effect so that it exists only to answer some other purpose, the law will give effect to that collateral agreement and deny the document whatever legal effect it might othwise have had.

As opposed to the above mentioned cases, there are also several cases where the courts have strictly applied the parole evidence rule and refused to introduce other terms which are not in the written contract, unless the exceptions tothe parole evidence rule apply. This, for instance, was the stand taken by the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar & Co.*[48]

3. *Device of Implied Terms*

The common law courts have for a long term used the device of implied terms in dealing with certain types of contracts.[49]

While there are no provisions in the Contracts Act which empower a Malaysian Court to imply a term into a contract, it is most heartening to note that the device of implied has, on numerous occasions, been used by the Malaysian courts not only to give effect to the intention of the parties[50] and to adopt customs which are peculiar to a particular transaction[51] but more significantly perhaps, to insist on good faith and fair dealings in contracts between a vendor and purchaser of goods. In *Pasuma Pharmacal Corporation v McAlister & Co Ltd*,[52] one of the defences raised in an action for breach of contract on ground of fraud was that as the relationship between the parties was that of vendor and purchaser of goods, as a matter of law there was no implied term requiring good faith between the parties. This was rejected by the Federal Court. Thompson LP, having considered the facts and circumstances in this case, concluded[53]:

> In the circumstances it is difficult to resist the conclusion that there was an implied condition that in relation to their business as covered by the contract the parties should be reasonably honest and truthful with each other.

Granted that the case of *Pasuma Pharmacal* involved a commercial rather than a consumer contract it is at least a positive indication that the courts can be persuaded to imply good faith even in contracts which do not fall under the category of *uberrimae fides*.

Devices Which are Available Under the Contracts Act 1950

1. Public Policy

Section 24 of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful unless –

> (e) the court regards it[54] as immoral, or opposed to public policy.

Every agreement of which the object or consideration is unlawful is void.

It is submitted that public policy in this context should not and cannot be confined to the common law heads of public policy as determined by the common law judges. There are at least two reasons for this.

The first is the fact that most of the common law heads of public policy are already provided for in specific provisions of the Act.[55] Hence to confine the scope of public policy under section 24(e) to the existing common law heads is to make section 24(e) nugatory. It is a trite rule of statutory interpretation that in such a situation the purposive approach should be adopted. The purposive approach to the interpretation of public policy in section 24(e) demands that the phrase be given an interpretation which does not render the provision nugatory.

The other reason to support the contention that the scope of public policy should not be limited, to or compared with, the common law concept of public policy is the use, in that provision of the phrase "the court regards it as ... opposed to public policy."

This clearly allows the particular court in question to decide on a case by case basis whether it regards the consideration or object of an agreement to be opposed to public policy. It would seem that one court should not even be bound by what another court in another case regards as opposed to public policy – what more to be bound by heads of public policy introduced in another jurisdiction which does not have a provision like section 24(e). Hence it is submitted that section 24(e) of the Contracts does provide a Malaysian Court with the necessary statutory mechanism to deal with unfair terms in a consumer contract.

Unfortunately, the Federal Court in *Theresa Chong v Kin Khoon & Co*[56] seems to think otherwise. It was held in this case that an agreement entered with a person to act as a remisier who was not registered with the Stock Exchange, was not void as contrary to public policy because "the contract did not fit into any of the traditional pigeon holes of contracts contrary to public policy".

It is most unfortunate that the more liberal views of the Indian courts in interpretating an identical provision in the Indian Contract Act had not been given much weight. One would have thought that as the judges in India were interpreting an identical statutory provision, their views ought to be given preference to the views of the English judges.

Reddy J in the Andhra Pradesh High Court, observed in *Ratanchand Hirachand v Askar Nawaz Jung*[57]

> The twin touchstones of public policy are the advancement of public good and the prevention of public

> mischief and these questions have to be decided by judges not as men of legal learning but as experienced and enlightened members of the community representing the highest common factor of public sentiments and intelligence.

The learned judge further observed[58]

> [I]n a modern and progressive society with fast changing social values and concepts it becomes more and more imperative to evolve new heads of public policy wherever necessary to meet the demands of new situation. Law cannot afford to remain static.

Illustrative of the liberal tradition of the Indian judiciary, in *Lily White v Munusami*[59] the High Court of Madras held that an exemption clause in a consumer contract was contrary to public policy and hence unenforceable.

In this case a saree sent by a customer to a firm of dry cleaners was lost due to the negligence of the cleaners. The cleaners when sued, sought to rely on a clause behind a receipt that they had issued to the customer when the clothes were sent. The clause provided that in such an event, the cleaners would only be liable for fifty per cent of the market value of the lost garment. This contention was rejected by the court. According to the learned judge[60]:

> It appears to me to be very clear that a term which is *prime facie* opposed both to public policy and to the fundamental principles of the law of contract, cannot be enforced by a court, merely because it is printed on the reverse of a bill and there is a fact acceptance of the term when the bill was received. Certainly, the conditions printed on the reverse of a bill may well govern or modify any simple contract ...But, if a condition is imposed, which is in flagrant infringement of the law relating to negligence, and a bill containing this printed condition is served on the customer, the court will not enforce such a term which is not in the interest of the public, and which is not in accordance with public policy.

In this respect, it may perhaps be worthwhile to note that even in England, not all judges seem to be of the view that the heads of public policy are now closed.

In *Nagle v Fielden*,[61] Denning MR reaffirmed his earlier view[62] on public policy when he observed:[63]

> [T]he law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it.

It is most regrettable that Gill CJ in *Theresa Chong* was of the view that *Nagle v Fielden* and similar cases did not carry the matter of public policy any further.[64]

2. *Undue Influence*

According to section 6 of the Contracts Act, consent to an agreement is said to be free, when *inter alia*, it is not caused by undue

influence. A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.[65] The Contracts Act links the concept of undue influence to the concept of unconscionability in the following terms:[66]

> Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

It is submitted that these provisions provide the court with yet another means to strike off unfair consumer contracts without being stifled by common law precedents and interpretations. As was observed by Lord Show in *Regunath Prasad v Sanju Prasad*[67] when dealing with an identical provision in the Indian Contracts Act:[68]

> It is in own view by that section that the question arising between the parties falls to be considered, and not by reference to the legislation of other countries. The statute to be here construed is the [Indian] Contract Act ... It is accompanied with danger to invoke as authority in an Indian case expression which merely connote the principles which underlie a particular English Statute and form a guide to its interpretation.

A positive development in this area can be seen in a case[69] pertaining to certain guarantees given in favour of a bank. The guarantors sought to set aside a default judgement obtained by the bank in respect of the guarantee by alleging that the guarantee agreements were executed under the exercise of undue influence by the bank. Whilst finding that the parties had failed to adduce evidence to substantiate their claim, the learned judge recognised the possibility that the Bank could have exercised undue influence over the guarantors. The learned judge in fact went further and endorsed the decision of the Privy Council in *Bank of Montreal v Jane Jacque stuart & Anor.*[70] It was held in this case that when a party enters into a contract with another and that party was induced by the undue influence by a person who is not a party to the contract, the contract is not enforceable. According to the learned judge[71]:

> In my view this conclusion is not inconsistent with section 16 of the Contracts act 1950. It is based on the common law and should be considered as a principle of law in addition to what is provided in section 16 especially in cases of bank guarantees.

3. *Fraud and Misrepresentation*

Fraud under section 17 of the Contracts Act includes certain acts which are carried out with intent to induce another party to enter into a contract. In fact the explanation to section 17 seems to provide that silence can amount to fraud when 'it is the duty of the person keeping silence to speak'. Fraudulent misrepresentation is also a variety of fraud under section 17.

However, inspite of the seemingly wide scope of fraud under the Contracts Act, parties seldom succeed in setting aside a contract on this ground as a high standard of proof is required in cases where fraud is alleged.[72]

Misrepresentation under the Act covers only innocent misrepresentation. Although the standard of proof for misrepresentation is not as high as for fraud, misrepresentation it must still be shown that the consent of the party was caused by the misrepresentation because it is only in such a situation that a contract is voidable for misrepresentation.[73]

Conclusion

While increased judicial creativity may not be the cure–all for unfair terms in Malaysian consumer contracts, it is submitted that such creativity can and will in fact go a long way in checking and controlling the use of such unfair terms. And even if, detailed consumer protection legislation were to be introduced, a 'consumer–friendly' judiciary is an absolute imperative so as to ensure that both the letter and more importantly, the spirit of the legislation are observed. Furthermore even the best and most comprehensive of statutes may still contain uncertainties, ambiguities and gaps which may need to be dealt with by the judiciary.

The decision in the case of *Affin Credit v Yap Yuen Fei*[74] is in fact a fine example of how judicial creativity can be used to overcome legislative sloppiness. In this case, a hirer alleged that a finance company had failed to comply with section 4(1) of the Hire Purchase Act 1967. This provision required the company to serve what is known as the Second Schedule Notice to the hirer, before a hire purchase agreement is enfered into. The Act however provided no penalty for non–compliance. The Federal Court however held that such a requirement was a condition precedent to the making of an offer to enter into a hire purchase agreement and that the company's failure to comply with such requirement meant that no valid offer had been made.

It should perhaps be added that the Hire Purchase Act 1967 has since been amended and both civil and criminal penalties have been introduced for a breach of section 4(1). This perhaps is a clear indication that a creative judiciary can in fact result in positive changes in the area of consumer contracts.

1. The same is in fact true of another important piece of legislation vis-a-vis consumer contracts - the Sale of Goods Act 1957 which was based on the Sale of Goods Act 1893 of UK

2. *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 and *Olley v Malborough Court Ltd* [1949] 1 KB 532

3. *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71

4. *White v John Warrick & Co Ltd* [1953] 2 All ER 1021

5. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1978] 3 All ER 1170 and *Universe Tankships of Monrovia v International Transport Workers Federation* [1983] 1 AC 360

6. Although it is said that the English Courts have approached the doctrine of inequality of bargaining power with, considerable caution - Cheshire, Fifoot and Furmstons **Law of Contract**, 12th Ed (1991) p 314-315

7. *Photo Productions Ltd v Securicor Transport Co Ltd* [1980] AC 827

8. [1986] 1 MLJ 330

9. *Ibid.*, at pp 332-333

10. [1984] 1 MLJ 222

11. [1982] 2 MLJ 31

12. *Ibid* at p 34

13. [1978] 3 All ER 37

14. [1977] 2 MLJ 141

15. One example is section 44A(1) of the Insurance Act which attempts to negate the effect of the decision in *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 by providing thus:

> A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract ofinsurance in such capacity shallin every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer

16. [1977] 1 MLJ 161.

17. *Ibid.*, at p 165

18. (1882) 7 App Cas 96

19. (1938) 60 L1 LR 301

20. For a critique of the decision in *Chop Eng Thye*, see P Balan "Cover without Cover" [1978] JMCL 161

21. See eg *Suhaimi bin Ibrahim v United Malaya Insurance Co* [1966] 1 MLJ 141 and *Wong Lang Hung v National Employee's Mutual General Insurance Association Ltd* [1972] 2 MLJ 191

22. The frequently cited ones being that an arbitration is cheaper, quicker and afford the parties the privacy which litigation does not provide

23. This provision is in *pari materia* with section 7, Arbitration Act 1950 (UK)

24. [1975] 1 MLJ 93

25. See eg *Provincial Insurance Co v Morgan* [1933] AC 240 and *Fair v Motor Traders Mutual Insurance Society* [1920] 3 KB 669

26. Statement of General Insurance Practice, paragraph 1(a) and(b)

27. [1966] 1 MLJ 140 at p 142

28. [1972] 1 MLJ 52

29. [1983] 1 MLJ 226

30. See eg *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71

31. *J Evans & Sons v Andrew Merzario* [1976] 1 WLR 1078

32. [1982] 2 MLJ 11

33. *Ibid* at p 112

34. [1979] 2 MLJ 29

35. *Ibid* at p 32

36. [1977] 1 MLJ 52

37. [1980] 2 MLJ 16

38. *Ibid* at p 18

39. *Ibid* at p 19

40. [1983] 1 MLJ 226

41. [1983] 1 MLJ 220

42. *Ibid.*, at p 225

43. *Ibid.*, at p 229

44. *Ibid.*

45. *Ibid.*, at p 230

46. [1983] 2 MLJ 85

47. *Ibid* at p 88

48. [1979] 2 MLJ 229

49. See eg *The Moorcocke* (1889) 14 PD 64 and *Liverpool City Council v Irwin* [1977] AC 239

50. *Yong Ung Kai v Enting* [1965] 2 MLJ 98

51. *Cheng Keng Hong v Government of Federation of Malaya* [1966] 2 MLJ 33

52. [963] MLJ 221

53. *Ibid.*, at p 226

54. Emphasis added

55. Eg S 27 - Agreements in restraint of marriage are void
S 28 - Agreements in restrain of trade are void
S 29 - Agreement in restraint of legal proceeding are void

Additionally, the other limbs in section 24 deal with object or consideration which are forbidden by law or would defeat any law, those which are fraudulent, those which involve or imply injury to the person or property of another and those which are immoral

56. [1976] 2 MLJ 253

57. AIR 196 AP 112

58. *Ibid.*, at p 117

59. AIR 1977 Mad 13

60. *Ibid.*, at pp 13-14

61. [1966] 2QB 633

62. *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 382

63. [1966] 2 QB 633 at p 650

64. [1976] 2 MLJ 253 at p 255

65. Contracts Act 1950, S 16(1)

66. Contracts Act 1950, S 16(3)(a)

67. AIR 1924 PC 60, Appeal to Privy Council from India

68. *Ibid.*, at p 63

69. *Malaysian Franch v Abdullah bin Mohd Yusof & Ors* [1991] 2 MLJ 475

70. [1911] AC 120

71. [1991] 2 MLJ 475 at p 478

72. *Datuk Jaginder Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105

73. Contracts Act 1950, s 19

74. [1984] 1 MLJ 169