

COMPARATIVE STUDY ON LAW OF UNFAIR TERMS OF CONTRACT IN MALAYSIA

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Abstract

Unfair contract terms can easily be discovered in invoices, receipts, as well as other consumer contracts and sale documents. These terms, also known as “weapons of consumer oppression”, are often applied oppressively against consumers by limiting, denying and restricting their rights as a consumer all together. In the case of a contract between a seller and a buyer, the buyer pays for certain goods or services, and accordingly, the seller should ensure that it is up to par with the money given for it. Unfortunately, businesses have sought to discard this burden by inserting exclusion clauses in consumer contracts with the intention of forcefully obtaining consent from consumers in order to disclaim them. The objective of this article is to give awareness to consumers that they have no choice but to be left without a remedy as the exclusion of liability are adopted by almost all businesses. The current contract law is insufficient to protect consumers whose rights are infringed by the use of unfair contract terms by sellers, thus the National Advisory Council for Consumer Protection has suggested that the introduction of the UK’s Unfair Contract Terms Act 1977 should be carried out in Malaysia in 1993. Hence when the Consumer Protection Act came into effect in Malaysia on 15 November 1999, it was commonly expected that there would be wide-spread provisions regarding unfair contract terms. However, the act has not successfully tackled the issue of unfair contract terms in consumer contracts, as there are no provisions in the 1999 Act which mentions unfair contract terms. It is generally remarked that although the terms against unfair contract terms contains certain defects, it is better than the Consumer Protection Act 1999 which says nothing about this. However, there is still room for improvement regarding the provisions of unfair contract terms in contracts. In this article, we will look to the consumer protection law in other countries such as the United Kingdom, Singapore and Australia, take the essence and discard the dregs in order to come out with better ideas to protect Malaysia consumers. At the end of this research, it is expected that we can find that there is still plenty of room of improvement for it. It might be better if our country could enact a specific legislation to govern the case of unfair contract terms. Not only that, the deficiencies stated above should be complemented as soon as possible. It is also suggested that we shall take those countries as a reference for us in improving our law regarding unfair contract terms to prevent the consumers being exploited by these unfair contract terms. As referring to the law in different countries, we are of the opinion that United Kingdom should be our role model in improving our law regarding unfair contract term. This is because it has a specific legislation to govern this matter and even Singapore also adopts the English law in this matter. At the same time, Malaysian court shall also learn to interpret the law broadly so it could fully come into play.

Keywords: Comparative Study; Contract Law; Law ; Unfair Term

1. INTRODUCTION

Contractual terms are commonly laid out as “a provision which makes up the part of a contract” and give rise to contractual obligations which may lead to void of the contract or damages being awarded when breached.¹ Usually, it undertakes the duties and rights of the parties who signed the contract, hence agreeing to be bound by them. In the daily lives of all, consumer contracts are frequently entered into for the purchase of goods and services. However, these contracts may contain certain terms which possess a significant advantage to sellers and suppliers, and unfair to consumers at the same time.² These terms, normally laid out by sellers in advance without individually negotiated with consumers, are known as unfair contract terms.

Unfair contract terms can easily be discovered in invoices, receipts, as well as other consumer contracts and sale documents. Terms like “We will accept no liability...” or “The company would not be liable for any damages...”³ are more commonly known in usual phrasing as disclaimers, but are recognised in law as exclusion clauses. These terms, also known as “weapons of consumer oppression”, are often applied oppressively against consumers by limiting, denying and restricting their rights as a consumer all together.⁴ In the case of a contract between a seller and a buyer, the buyer pays for certain goods or services, and accordingly, the seller should ensure that it is up to par with the money given for it. Unfortunately, businesses have sought to discard this burden by inserting exclusion clauses in consumer contracts with the intention of forcefully obtaining consent from consumers in order to disclaim them. Unfair as it is to consumers, they have no choice but to be left without a remedy as the exclusion of liability are adopted by almost all businesses.⁵

Upon realising that the current contract law is insufficient to protect consumers whose rights are infringed by the use of unfair contract terms by sellers, the National Advisory Council for Consumer Protection has suggested that the introduction of the UK’s Unfair Contract Terms Act 1977 should be carried out in Malaysia in 1993. Hence when the Consumer Protection Act came into effect in Malaysia on 15 November 1999, it was commonly expected that there would be wide-spread provisions regarding unfair contract terms.⁶ However, the act has not successfully tackled the issue of unfair contract terms in consumer contracts, as there are no provisions in the 1999 Act which mentions unfair contract terms. By following this act, the parties are not on an equal footing; consumers are not in a position to agree, bargain or refuse on exclusion clauses when signing a contract. This issue is well illustrated in the case of *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan*.⁷ In this case, the insurance company has inserted a clause at the end of the contract, which would render a contract void ab initio when there is any non-disclosure or misrepresentation of facts, regardless of whether the fact is immaterial or not. In other words, it negates the requirement of materiality of facts to avoid a contract. The High Court on appeal has held that the respondent has breached the contract as according to the inserted clause, hence the insurance company was not liable to pay. This case has clearly shown how Malaysian consumers were continuously haunted with the issue of unfair contract terms for a long time.

Therefore, the need to create a law which deals specifically with the usage of unfair contract terms in consumer contracts arises. In 2010, the Malaysian Parliament finally wades in to protect the rights of consumers by implementing the Consumer Protection (Amendment) Bill 2010 to rectify the significant loophole in the consumer protection law of Malaysia. An amendments is made to an existing statute and the said bill becomes the Consumer Protection (Amendment) Act 2010, which inserts a new part into the old

¹ Alan Chapman. (n.d.). Business Contracts Legal Terms and Definitions Glossary. Retrieved from <http://www.businessballs.com/businesscontractstermsdefinitions glossary.htm>

² Unfair contract terms. (2006, November 24). Retrieved from http://ec.europa.eu/consumers/consumer_ rights/rights-contracts/unfair-contract/index_en.htm

³ The Open University. (2016, March 8). Exclusion clauses. Retrieved from <http://www.open.edu/ openlearn/people-politics-law/the-law/exclusion-clauses/content-section-1>

⁴ Unfair contract term. (n.d.). Retrieved from <http://www.businessdictionary.com/definition/unfair-contract-term.html>

⁵ Apdusa Views. (1985, October). A critical analysis of the criticism of Consumer boycotts. African people’s democratic union of southern Africa, 5. Retrieved from http://www.sahistory.org.za/sites/ default/files/av_no9.pdf.

⁶ Dr. Mohamad Fazli Sabri. (2014, June). The Development of Consumer Protection Policies in Malaysia. *International Journal of Business and Social Research (IJBSR)*, 4(6), 98-107. Retrieved from thejournalofbusiness.org/index.php/site/article/download/519/423

⁷ [2001] 1 MLJ 227; [2001] 1 CLJ 476.

Consumer Protection Act 1999, namely Part IIIA which is titled Unfair Contract Terms⁸ to provide more adequate protection to consumers in terms of entering into a fair contract with traders. Now, the Part IIIA of the CPA contains new sections 24A to 24J, all carrying the intention of addressing the issue of businesses seeking to impose terms which are generally considered unfair to exclude or limit their arising liabilities via consumer contracts. Section 1(3) of the CPA has provided that the newly amended part can be applied to all contracts entered into after the coming into force of the Amendment Act.

The main interpretation of this amendment is stated in Section 24A of the act. It retains the definition of a contract from Section 2 of the Contracts Act 1950, which defines a standard form contract as a consumer contract which is drawn up for general use in a particular industry, with no regards to whether the contract differs from the contracts normally used in that industry or not. An “unfair term” is defined as a provision contained in a consumer contract which would lay a significant imbalance in the obligations and rights of the parties, causing a detriment to consumers. Section 24E of the Act states that the burden of proof is on the supplier to prove that the term which is alleged unfair consists adequate justification. On the other hand, Section 24F and 24G of the bill has allowed the interference of courts or Tribunals established by the 1999 Act with the issue of unfair contract terms. It is also interesting to note that the Consumer Protection Amendment Bill 2010 has adopted the concept of distinguishing unfairness into two categories, namely procedural and substantive, from the Indian Law Commission Report in 2006⁹. These two categories are specifically described in Section 24C and 24D of the 2010 bill respectively. The differentiation of such categories is to provide more adequate protection to consumers in order to receive a fair bargain.

There are also a few provisions in this Act which can be considered as novel ideas, for instance, section 24J gives Ministers the power to regulate the Part while section 24H provides more sense of certainty regarding the position of the parties in the midst of a contract which is still in effect. Despite its advantages, it was also commonly commented that the proposed new amendment contains certain weaknesses, including Section 24I which states the contravention by “any person” of the Part an offence. The mentioned section is, however, silent on how exactly is the Part breached. First and foremost, the words “any person” is clouded with uncertainty as it does not clarify certain things, like would it be possible for consumers to commit an offence under it, or is it definitely be clearly spelt out. There also exists numerous matters which may arise by making unfair contract terms an offence; for example, it could inhibit the freedom of contract.¹⁰ The high penalties, including RM 250,000 for a 1st offence and RM 500,000 for any subsequent offence, is potentially crippling especially for small businesses. The merits of making the inclusion of unfair contract terms an offence is debatable, hence it is recommended this issue should be studied comprehensively.

Hence, reference from contract law in other countries is desperately needed to remedy the defects in our current law regarding unfair contract terms. For example, in the United Kingdom, there is the existence of the Unfair Contract Terms Act 1977. Although a number of the provisions in the 2010 Bill in Malaysia are drawn from UK, Malaysia is still far behind UK in terms of consumer protection. Further elaboration will be stated in the following subtopic. Australian Law also recognises the many situations in which customers may be induced into entering contracts which contain unfair terms. They have developed certain doctrines like ‘the doctrine of unconscionability’ which would to prevent the enforcement of a contract which would cause detriment to a weaker party by a more powerful party.¹¹ On the other hand, Singapore also has its own Unfair Contract Terms Act, which is largely influenced by the contract law in UK, and seeks consumer protection by either invalidates an unfair term or limits its efficacy by imposing a requirement of reasonableness.

In a nutshell, it is generally remarked that although the terms against unfair contract terms contains certain defects, it is better than the Consumer Protection Act 1999 which says nothing about this. However, there is still room for improvement regarding the provisions of unfair contract terms in contracts. To improvise this, we should look to the consumer protection law in other countries such as the United Kingdom, Singapore and Australia, take the essence and discard the dregs in order to come out with better ideas to protect Malaysia consumers.

⁸ Timeshare Consumer Association. (2015, June 19). Malaysian Consumer Protection (Amendment) Act 2010 deals with unfair contract terms. Retrieved from <http://www.timeshareconsumerassociation.org.uk/2015/06/19/malaysian-consumer-protection-amendment-act-2010-deals-with-unfair-contract-terms/>

⁹ Justice M. Jagannadha Rao. (2006, August 31). Unfair (Procedural & Substantive) Terms in Contract. Law Commission of India, 199th Report. Retrieved from <http://lawcommissionofindia.nic.in/reports/rep199.pdf>

¹⁰ Alistaire. (2009, May 19). Exclusion clauses and unfair contract terms. Retrieved from <https://readinglaw.wordpress.com/2009/05/19/exclusion-clauses-and-unfair-contract-terms-part-2/>

¹¹ Mitra Manisha Rajadurai. (2014). Unfair Contract Terms In Malaysia: The Gap in the Consumer Protection (Amendment) Act 2010. Retrieved from https://www.academia.edu/10189155/Consumer_Protection

2. COMPARISON OF THE LEGISLATION GOVERNING UNFAIR CONTRACT TERM BETWEEN MALAYSIA AND OTHER THREE COUNTRIES

2.1 Malaysia and United Kingdom

As we mentioned above, the unfair contract terms in Malaysia are regulated by Part IIIA titled Unfair Contract Terms in Consumer Protection Act 1999¹² (hereinafter known as CPA 1999) which contains Sections 24A to 24J to address the issue whereby seek by businesses via standard form contracts, limiting their liability when they arise or to impose on consumers terms excluding and other terms which generally considered unfair.

The unfair contract terms in United Kingdom are mainly regulated by Unfair Contract Terms Act 1977 (hereinafter known as UCTA 1977). The UCTA 1977 is enacted by the British Parliament, following the Law Commission recommendations in 1977. It came into force on the 1st February 1978. It marked the efforts of the British Parliament to fight the trend of businesses to exclude liabilities in their contracts with consumers.¹³ It extends to nearly all forms of contract and it's most crucial function is to restrict the applicability of disclaimers of liability. It also regulates contracts by limiting the legality and operation of some contract terms.¹⁴ Section 1(3) of UCTA states that Sections 2 to 7 (except section 6(4)) apply only to business liability which is liability for breach of duties or obligations which arise from the things done or things to be done by a person in the course of a business or from the occupation of buildings used for business purposes of the occupier.¹⁵

Also, unfair contract terms in United Kingdoms are regulated by Unfair Terms in Consumer Rights Act 2015 (hereinafter known as CRA 2015). Consumer Rights Act 2015 applies for contracts entered after October 2015 and it replaces the Unfair Terms in Unfair Contract Terms Act 1977 in terms of the consumer contracts and notices and Consumer Contracts Regulations 1999. The provisions relating to unfair terms are contained in Part 2 of the Act. By virtue of Section 61 in Part 2 of Consumer Rights Act 2015, it is stated that the act applies to Consumer contracts between a trader and consumer and consumer notices between a trader and consumer.¹⁶

As mentioned before, unfair contract terms in United Kingdoms are governed by UCTA 1977 and CRA 2015 whereas unfair contract terms in Malaysia are governed by Part IIIA titled Unfair Contract Terms in CPA 1999. Since the unfair contract terms in United Kingdoms and Malaysia are regulated by different statutes, there must some differences among them. In this part of our assignment, we will be discussing the differences of UCTA 1977 and Part IIIA titled Unfair Contract Terms in CPA 1999.

The first difference is the concept of dividing unfairness into two categories, namely, procedural unfairness and substantive unfairness which was adopted from the Indian Law Commission Report in 2006¹⁷. In Malaysia, in a report of the Federation of Malaysian Consumer Association (FOMCA) on the Review of the Consumer Protection Act, we can find the proposal of dividing unfairness into procedural and substantive. It was suggested by the FOMCA that procedural unfairness and substantive unfairness should be divided in order to provide a better protection to consumers.¹⁸

Procedural unfairness can be defined as the unfairness that happens during the negotiation stage of a contract, which means before a contract is concluded.¹⁹ In addition, procedural unfairness is defined by the Indian Law Commission as unfairness in which the contract entered by the parties or the terms of the

¹² Act 599

¹³ Exclusion Clauses and Unfair Contract Terms (Part 2). (2009, May 19). Retrieved from <https://readinglaw.wordpress.com/2009/05/19/exclusion-clauses-and-unfair-contract-terms-part-2/>

¹⁴ Law Dictionary. (n.d). Retrieved from http://law.academic.ru/6849/Unfair_Contract_Terms_Act_1977

¹⁵ Unfair Contract Terms Act 1977. (1977). Retrieved from <http://www.legislation.gov.uk/ukpga/1977/50/contents>

¹⁶ Unfair terms- regulation by statute- Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999. (n.d.). Retrieved from <http://e-lawresources.co.uk/Unfair-Terms---Regulation-by-statute.php>

¹⁷ Naemah Amin. (2013). Protecting consumers against unfair contract terms in Malaysia: the consumer protection (amendment) act 20101. Retrieved from http://irep.iium.edu.my/30573/1/Unfair_contract_terms.pdf

¹⁸ Unfair Contract Terms. (n.d). Retrieved from <https://www.scribd.com/document/289672998/Unfair-Contract-Terms>

¹⁹ Adnan Trakic. (2015). Statutory protection of Malaysian consumers against unfair contract terms: Has enough been done?. Retrieved from

https://www.researchgate.net/publication/282896437_Statutory_protection_of_Malaysian_consumers_against_unfair_contract_terms_Has_enough_been_done

contract are arrived at.²⁰ All the vitiating factors which are recognized by the Contract Act 1950, for example coercion in Section 15, undue influence in Section 16, fraud in Section 17 and misrepresentation in Section 18 will render a contract voidable due to procedural unfairness.²¹ According to Section 24C(1) of CPA 1999, it clearly states that if a contract or a term of a contract has caused in an unfair disadvantage to the consumer and unfair benefit to the supplier due to the manner or circumstances that the contract or the conduct of the supplier, it is procedurally unfair. In simple terms, procedural unfairness concerns at the process of making a contract.

Substantive unfairness is also known as contractual imbalance, it has been referred to by Lord Brightman in the case of *Hart v O'Connor*²². It refers to unfair contractual terms which have been included in a contract.²³ According to Section 24D (1), it states that a contract term is substantially unfair when it is harsh, oppressive or unconscionable or in the situation where a contract term excludes or restricts the liability for negligence or breach of express or implied terms of a contract “without adequate justification”, it is substantially unfair. The definition of substantially unfair in Malaysia is same as that of Indian Law Commission. In simple terms, substantive unfairness looks at the outcome of the process which is the content or substance of the contract. If a consumer contract or its term is unfair, it can be declared as unfair by the tribunal or court based on its substance.²⁴

As stated above, Malaysia has made a distinction between procedural or substantive unfairness but neither UCTA 1977 nor CRA 2015 which regulate unfair contract terms in United Kingdom made such distinction.²⁵

Next, CRA 2015 has clearly listed out the consumer contract terms which may be regarded as unfair²⁶. Twenty consumer contract terms which may be regarded as unfair are listed in Part 1 under Schedule 2 of CRA 2015. The examples of consumer contract terms which may be regarded as unfair are a term which has the effect or object of inappropriately limiting or excluding the trader's liability in the event of the personal injury or death of to the consumer caused by an act or omission of the trader, a term which has the effect or object of improperly limiting or excluding the legal rights of the consumer to another party in the case of inadequate performance or total or partial non-performance by the trader of any of the contractual obligations, a term which has the effect or object of allowing the trader to hold the amount of money paid by the consumer if the consumer chooses not to perform or conclude the contract, without giving the consumer a term to receive compensation of an corresponding amount from the trader if the party cancelling the contract is the trader and so on.²⁷ However, the consumer contract terms which may be regarded as unfair are not listed out in CPA 1999. Therefore, it caused ambiguity as it is for the judge interprets to what extend it is called unfair term by his own discretion.²⁸

Furthermore, under UCTA 1977, a test for “reasonableness” is used in the case of liability for negligence that causes other types of damage. The test is stated in Section 11 of the UCTA 1977 and it was specifically required by Section 11(1) regarding whether the term is a reasonable one in light of the circumstances it was negotiated. Also, the availability of other means of claiming remedy, for instance insurance, would influence the courts in their assessment for reasonableness.²⁹

For example, the case of *Smith v Eric S Bush*³⁰ shows the application of guidelines & additional factors that have been considered under reasonableness test.³¹ In this case, the defendant carried out a survey report of the house of the claimant but he failed to advise on some structural damage to the property which resulted in the collapse of the chimney breast. There was no contractual relationship between the claimant and defendant as the survey was arranged by the mortgage company and the payment was paid directly to the mortgage company by the claimant. In the contract between the mortgage company and the claimant, it contained a term which exempting the surveyor from liability. The fact that it was a modest house to be used

²⁰ See Supra Note 17

²¹ See Supra Note 19

²² [1985] AC 1000

²³ See Supra Note 19

²⁴ Ibid

²⁵ See Supra Note 13

²⁶ Ibid

²⁷ Consumer Protection Act 2015. (2015). Retrieved from

http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf

²⁸ See Supra Note 13

²⁹ Ibid

³⁰ [1990] 1 AC 831

³¹ Exemption Clause: Unfair terms. (n.d). Retrieved from

<http://www.bitsoflaw.org/contract/formation/revision-note/degree/exemption-clauses-unfair-terms>

as the family home was taken into account by the court in considering whether such a term was reasonable under the Unfair Contract Terms Act 1977. Therefore, it was held by the court that the term which exempting the surveyor from liability was an unreasonable clause and therefore it is ineffective. It was held by The House of Lords that it might be reasonable for a surveyor to exclude liability if the property was to be used for investment or business purposes or of higher value.³² In this case, Lord Griffiths recommended difficulty of the task, practical impact of the decision of the court and the guidelines stated in Schedule 2 of UCTA 1977 could be taken into account.³³

Section 11(2) of UCTA 1977 states that in determining whether the requirement of reasonableness is satisfied by the term of the contract, the court shall refer to Schedule 2 of UCTA 1977 as an illustrative list of terms that might be considered as unreasonableness is provided under Schedule 2. However, the terms that might be considered as unreasonableness are not listed out in CPA 1999. Schedule 2 of CPA 2015 had clearly stated terms that might be considered as unreasonableness whereas there has no any example or list that makes it clear that to what extend it is unfair term in CPA 1999. Therefore, it caused ambiguity as it is for the judge interprets to what extend it is called reasonableness” in the case of liability for negligence.

In a nutshell, there are many defects in our current laws. As a result, the consumer rights in Malaysia is not properly upheld and well protected by the existing law enforced in Malaysia. There is an specified legislation titled Unfair Contract Terms Act 1977 in United Kingdom which governed the unfair contract term in the country whereas Malaysia has no specific legislation granted the consumers rights. There is still room for improvement regarding the unfair contract terms in contracts. To improve that, we might have to look into make a reference to the Unfair Contract Terms 1977 in United Kingdom in order to give the consumer the rights that they should have.

2.2 Malaysia and Australia

Well, when we talked about the contract terms, it basically means that the rights and the obligation of the parties who entered into the agreement. Then, terms mean that the subject matter which agreed between both of the parties about what they are agreed to be done and how those things are supposed to be done. Of course, with what additional condition that needed to be done all will be stated in the contract.

As we mentioned above, the Consumer Protection Act of Malaysia is enacted with the main purpose to give the consumers rights and also provide them with a great protection.³⁴ One thing should be known is, all the cover areas of the provisions under the Consumer Protection are not covered by other existing laws which in force in Malaysia, included the Contract Act 1950 as well.

Under the Consumer Protection Act, we as a consumer can claim for the compensation and may refer to any dispute if they are being experienced any unfair treatment in any circumstances. This act is very important and vital for every Malaysian as well since this is the basic rights which it granted to us. It does protect us against any unfair treatment and uphold the consumers' rights.

As for the Consumer Protection Act, the rights which it granted to us will not be taken away no matter in what circumstances.³⁵ This is because in the agreement that we have signed, it clearly stipulated that as a consumer, we have our rights uphold. The rights that we have are like repair, replace and refund³⁶ of the products or services once we found any problem with the products or services. However, we as a consumer, our rights are still not being upheld throughout in Malaysia. There are still a lot of loop hole in the legislation to the extent in protecting the consumers rights. In the other words, they are still a lot of consumers rights which are not covered or included or being stated in the Consumer Protection Act and even the Contract Act 1950 of Malaysia.

Except from the above mentioned areas that Contract Act 1950 and the Consumer Protection Act did not cover, one of the areas that the legislation did not cover is the consumer protection for the toll payment. There are no any provisions or any statute in Malaysia granted the restrictions or conditions about the increment of the toll rate. The company named Project Lebuhraya Utara – Selatan (PLUS), or also to be

³² Smith v Eric S Bush [1990] 1 AC 831. (n.d), Retrieved from <http://www.e-lawresources.co.uk/Smith-v-Eric-Bush.php>

³³ See Supra Note 31

³⁴ The Consumer of Protection Act. (n.d). Retrieved from: <http://www.consumer.org.my/index.php/complaints/rights/254-the-consumer-protection-act>

³⁵ Ibid

³⁶ Fara Joifin. (2016). Financial News, Reviews and Advice. Refused A Refund? Know Your Consumer Rights In Malaysia. Retrieved from: <https://www.comparehero.my/blog/consumer-rights-malaysia>

known as concessionaire of the North-South Expressway is the biggest access expressway in Malaysia.³⁷ It is also a main controller of the highway in Malaysia. Our country's work minister, Datuk Samy Vellu had contended that since 1998, our government had to pay almost 80 million of compensation to the concessionaire of the North-South Expressway to compensate them in freezing on the toll rates every year.³⁸ The government is freezing the increment of the toll rates annually once in every three years³⁹. In September of 2004, government had totally paid out RM 1 billion in compensation to the highway concessionaires. This is because they were putting their effort in order to freeze the increment of the toll rates every year.⁴⁰

This shows that our country had no rules or any other laws in stopping and controlling the concessionaire of the North-South Expressway from making the huge profits from the consumers by increasing the toll rate. The government should focus for a full and complete review of this kind of unfair privatization contracts. Since this kind of unfair contract will make the consumers suffering from paying extra and they even do not have any rights to the self-defence since our laws are silence on this part.

At the end, the consumers like us will have to pay a higher and higher toll fees afterwards and the government will have to pay a huge amount of compensation to the concessionaire of the North-South Expressway. The government definitely need to spend up to billions and trillions for stopping them in increasing their toll rates. The consumers like us need to pay up double or even triple toll fees without having any rights of stopping this from happening.

Therefore, the only effective solution is that, our legislation need to legislate another provision either in Contract Act 1950 or the Consumer Protection Act in order to prevent this kind of unfair contracts terms keep continuing to exist. By this way, it will protects the consumers like so that we no need to worry about have to pay a high rate of toll fees every year and the government also need not to pay extra money in solving this kind of problem.

This is because the law will control and govern the concessionaire of the North-South Expressway not simply increasing their toll rates. Thus, there will always have a consistent and fair toll rate for everyone in order to protect the consumers of using the highways. Yet, the consumers also have their rights to file an action against the North-South Expressway if they simply raise the toll fees unreasonably.

There are few countries which have the legislation about the unfair contract terms. One of them is Australia. The provisions of the unfair contract terms which legislated in Australia are being stipulated in two statutes.⁴¹ The first one is the Australian Competition and Consumer Commission (ACCC) and the second one is the Australian Securities and Investments Commission (ASIC).⁴² In Australia, when they are dealing with the unfair contract terms, the legislation will need the whole contract and the transparency of the terms is to be looked and taken into account by the court. In spite of that, the court also need to figure out that whether this particular terms in the contract is expressed in a simple and plain language, readable, presented clearly and is available to the consumer.⁴³

Besides, there are few provisions that stipulated in the Competition and Consumer Act 2010 is quite different with our Consumer Protection Act of Malaysia in which the provisions stated in the Competition and Consumer Act 2010 will be more detail and clear compare to ours.

There are many restriction and limitation are expressly stated in the Competition and Consumer Act 2010

³⁷ Nouth South Express Way . (n.d). Retrieved from :

http://www.plus.com.my/index.php?option=com_content&view=article&id=67&Itemid=182

³⁸ KWSP EPF. UEM-EPF Unveils Balanced Revised Concession Terms. (n.d). Retrieved from :

https://secure.kwsp.gov.my/portal/en/web/kwsp/news-listing-page?p_p_id=newslisting_WAR_newshighlightsportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-3&p_p_col_pos=1&p_p_col_count=3&_newslisting_WAR_newshighlightsportlet_jspPage=%2Fdisplay%2Fnews_content.jsp&_newslisting_WAR_newshighlightsportlet_redirect=%2Fportal%2Fen%2Fweb%2Fkwsp%2Fnews-listing-page%3FnewsId%3D820&_newslisting_WAR_newshighlightsportlet_primaryKey=820

³⁹ Lim Guan Eng. (2004). Only A Complete Review Of The North-South Expressway(NSE) Privatisation Contract Can Reverse The Government's Policy Failure That Has Turned Privatisation Into Piratisation That Benefits The Few At The Expense Of The Poor. Retrieved from: <https://dapmalaysia.org/all-archive/English/2004/dec04/lge/lge048.htm>

⁴⁰ Ibid

⁴¹ Ms. Lin Enlight. (2010). Australian Competition and Consumer Commission. A guide to the Contract Unfair Terms Law. Retrieved from : <https://www.accc.gov.au/media-release/a-guide-to-the-unfair-contract-terms-law>

⁴² Ibid

⁴³ Understanding Australia's Unfair Contract Terms. (n.d). Retrieved from : http://consumerlaw-staging.tspace.gov.au/files/2015/09/window_floor_guide.pdf

which permitted by the Commonwealth for the protection of the consumers' rights.⁴⁴ Some of them are not being covered under our existing laws in protecting the consumer's rights.

According to S.25 of the Competition and Consumer Act 2010⁴⁵ (herein after known as CCA 2010), there are some examples of the unfair terms which are being stated. For example, S.25 (a) – (n) of CCA 2010 stated that once the terms of the contract had permitted by both of the parties to the contract, one of the parties avoid or limit the performance, terminate the contract, breach of the contract, alter or change the terms of the contract, renew of the contract, vary the upfront price payable under the contract without the permits from another parties, one of the parties had unilaterally interpret that the contract has been breached, one party signed the contract without the permits of the other party to the detriment of him and the terms of the contract having a kind which suggested by the regulations, these are all the situation and the circumstances which considered as the contract was unfair to either of the contracted parties.

S.25 of CCA 2010 had clearly stipulated each and every circumstance that may be considered as unfair terms. Unlike the Consumer Protection Act of Malaysia, there have no any words or example that tells us that to what extend it calls "unfair term". The situation is so vague and need to be interpreted by court itself, this considered as a defect of our current existing laws and as for the result, the consumer's right did not upheld properly. Therefore, our current laws should be like S.25 of CCA which is so clear and direct.

Next, according to S.27 of CCA 2010⁴⁶, it tells us that if one of the parties to the contract had contended that the particular contract that they had signed is a standard form of the contract, then it will to be assumed that the contract is a standard form of contract. In the Consumer Protection Act in Malaysia, it is silent on to what extent a contract will be assumed as a standard form of contract.

As we know, the term in a consumer contract is considered unfair if it had caused imbalance in the rights and obligation of either parties. Then, the court of Australia will have taken into account of many issues whether the contract is a standard form of contract or not. In S.27 (b) and (c) of CCA 2010, the court will determine and find out whether the contract was being discussed by both of the parties before it was executed and isn't either of the parties had rejected any terms in the contract. If there is a term that being rejected by either of the parties, it would be considered that the contract is not a standard form of contract.

Then, S.27 (d) of CCA 2010 also states that a consumer contract is not in a standard form if one of the parties does not have the opportunity to negotiate about the terms of the contract.⁴⁷ Therefore, it shows that the consumer rights are clearly upheld and being protected under this section, this had protected the consumers when they had entered into any contract which might be unfair to them. Unlike Malaysia, it is vague about the job of the court how to determine whether a contract is in a standard form or not. Therefore, when the legislation is silent on this, the courts could not do much since they weren't granted any authority by the legislation in determining the unfair terms. As a result, the rights of the consumer will not be upholding as well.

In short, there are a lot of consumers rights that did not upheld properly in Malaysia since the provisions are silent on the unfair contract terms. When they are no any specific legislation giving the consumers rights, it would contradict with the concept of rules of laws that our country are so determined to upheld. Thus, since the consumers even cannot enjoy the consumers' rights thoroughly, this had breached the fundamental ideas of rules of law.

2.3 Malaysia and Singapore

Just like what have been stated in the introduction, Malaysia did not contain any specific provision on unfair contract terms in consumer contracts, unlike the other neighbouring countries such as Singapore. The National Advisory Council for Consumer Protection had stated in its report in 1993 that the Unfair Contract Terms Act 1977⁴⁸ which was in force in United Kingdom should be introduced in Malaysia to protect consumers from unfair advantages⁴⁹. Although there was Consumer Protection Act 1999⁵⁰ came into force,

⁴⁴ Unfair contract terms. (n.d). Retrieved from : <https://webcache.googleusercontent.com/search?q=cache:My-n31RjrekJ:https://www.consumer.vic.gov.au/library/publications/businesses/fair-trading/guide-to-unfair-contract-terms-law-word.doc+&cd=1&hl=en&ct=clnk>

⁴⁵ Competition and Consumer Act 2010. (n.d). Retrieved from:
file:///C:/Users/SU%20Family/Downloads/C2011C00003VOL03.pdf

⁴⁶ Competition and Consumer Act 2010. (n.d). Retrieved from:
file:///C:/Users/SU%20Family/Downloads/C2011C00003VOL03.pdf

⁴⁷ Ibid

⁴⁸ Chapter 50

⁴⁹ See SS Rachagan (Ed), 1993, Consumer Law Reform.

consumers in Malaysia continue to be haunted with the problem of unfair terms. A most significant amendment is when the Consumer Protection (Amendment) Act 2010 introduced Part IIIA to the Consumer Protection Act 1999 (hereafter referred as CPA) which has addressed this lacuna⁵¹. However, Malaysia did not apply The Unfair Contract Term Act 1977 into legislation.

On the other hand, in Singapore, the contract law is largely based on the common law of contract in England. All contract disputes were settled through British common law on the relevant matters. Singapore didn't have their own independence laws. Hence, Singapore followed The Unfair Contract Terms Act 1977 (hereafter referred as UCTA) which was in force in England. When there is no Singapore authority on certain circumstances, it will usually be assumed that the position will be no different from that in England. Unlike Malaysia, Singapore's Parliament did not codify Singapore's law of contract into statutes. Accordingly, much of the law of contract in Singapore follow the judge-made British rules. Some of the statutes in Singapore has passed to modify judge-made law which are based on the British statutes, such as the Contracts (Rights of Third Parties) Act⁵².

The Unfair Contract Terms Act⁵³ which was revised by Singapore in 1994 has the same objective as the original enactment of Unfair Contract Term Act 1977 in United Kingdom. It is an Act to impose further limits to civil liability for breach of contract, or for negligence or other breach of duty in order to protect consumers from unfair practices. It also prohibits and restricts certain contractual terms which are deemed unreasonable⁵⁴. Any matters that related to the unfair contract terms will be deal with Unfair Contract Terms Act (Chapter 396) based on English model. However, there are also other statute based on non-English models has taken place which is the Consumer Protection (Fair Trading) Act.

The Consumer Protection (Fair Trading) Act⁵⁵ is the lemon law in Singapore. It was largely drawn from fair trading legislation enacted in Alberta and Saskatchewan. The lemon law in Singapore provides that the customers would be able to make a claim for a defective product (also known as lemons) sold to them within 6 months of their purchase. And it is compulsory for a seller of a defective product to replace, repair, refund or reduce the price of the defective product subject to certain conditions⁵⁶. The Act applies to most consumer matters, but it does not apply to sales of land and houses and employment contracts. It was formulated to provide additional rights to consumers to ensure that they are fully protected under the act⁵⁷.

Malaysia and Singapore had adopted different law based on unfair contract terms. Although there are some differences among their law, their objective remain the same that is to protect consumers against any unfair contract matters in consumer contracts. Under The Unfair Contract Term Act in Singapore, they places a reasonable limit on the exception clauses to exclude liability under the contract which is based on a similar statute in England. Under this act, exception clauses are either considered wholly ineffective, or are ineffective unless shown to satisfy the requirement of reasonableness. The court will look at whether the exception clause is reasonable or not⁵⁸. Section 11 provides that whether the exception clause is reasonable is depend on the contemplation of the parties when the contract was made⁵⁹. The court will consider several factors including the bargaining positions of the parties and whether there was an inducement to agree to the clause. Terms that attempt to limit or exclude a party's liability for death or personal injury resulting from that party's negligence or breach of duty are considers wholly ineffective, while terms that seek to limit or exclude liability for loss or damage of person or property, and those that attempt to limit or exclude contractual liability,

⁵⁰ Act 599

⁵¹ Naemah Amin. (2013). Protecting consumers against unfair contract terms in Malaysia: The Consumer Protection (Amendment) Act 2010. Retrieved from http://irep.iium.edu.my/30573/1/Unfair_contract_terms.pdf.

⁵² Contract Law in Singapore. (n.d.). Retrieved from <http://www.startupdecisions.com.sg/singapore/business-laws/contract-law/>

⁵³ Chapter 396

⁵⁴ Unfair Contract Terms Act – UCTA in Singapore. (2014, July 8). Retrieved from <https://singaporelegaladvice.com/law-articles/unfair-contract-terms-act-ucta-in-singapore/>

⁵⁵ Chapter 52A

⁵⁶ The lemon law in Singapore – Consumer Protection (Fair Trading) Act. (2013, February 12). Retrieved from <https://singaporelegaladvice.com/law-articles/what-is-the-lemon-law/>

⁵⁷ Unfair sale practices, cooling periods, and the right to cancel contracts – Consumer Protection (Fair Trading) Act. (2014, October 15). Retrieved from <https://singaporelegaladvice.com/law-articles/unfair-sale-practices-cooling-periods-right-cancel-contracts-consumer-protection-fair-trading-act/>

⁵⁸ SingaporeLaw.sg. (n.d.). Retrieved from <http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8>

⁵⁹ CONSUMER PROTECTION ACT 1999. (1999). Retrieved from http://mystandard.kpdnkk.gov.my/mystandard_portal2014/document/akta_perlindunganpengguna1999.pdf

are subject to the requirement of reasonableness⁶⁰. For example, a theme park in Singapore would not be allowed to use an exception clause to exclude or restrict its liability for negligence that caused injury or death of a rider in the theme park.

In contrast, the terms that might be considered as unreasonableness are not provided under CPA 1999. There is no any list provided to what extend it is belong to unfair terms under the act. Besides, the act did not really cover the consumer's right particularly in the form of exemption clauses that are found in a standard form of contract or printed in the receipts, invoices and other sale documents. In most cases, the terms and conditions of the exemption clauses are offered to consumers on a 'take it or leave it' basis. These terms may operate harshly against the consumers as their rights may be excluded or restricted⁶¹.

Besides, The Unfair Contract Terms Act in Singapore which adopted the provisions in the UCTA 1977 was enacted as a separate Act and is applicable to all consumer and commercial contracts. It does not limit to specific transaction but cover nearly all circumstances. It is also applicable to the retailers who are protected under the act against any unfair contract terms⁶².

Under the Singapore case of *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and anor*⁶³, the High Court provided the guidance on indemnity clauses for penal sanctions and severability of such provisions to save the indemnity clause. The High Court also held that the Unfair Contract Terms Act would apply to the commercial parties under the commercial contract when one party deals with the other on a standard terms contract⁶⁴.

While for CPA 1999, it is only applicable to consumer contracts for private use but not commercial contracts. For example, the goods or services bought by individual consumer for personal, domestic or household purposes. While under contracts which the consumer acquires the goods or services for trade or manufacturing purpose will not protected under the act. In fact, it is limited to the protection of consumers, and not retailers. CPA 1999 excludes retailers and businesses and they are not given rights under this act. The definition of "consumer" in the act expressly excludes retailers and businesses⁶⁵. It would be reasonable that retailers should not be given the same degree of protection as consumers based on their stronger bargaining power and better access to resources. However, retailers and are not limited to large corporates but include small and medium sized enterprises. Those small and medium size enterprises play an important role in creating employment in rural and urban area and sustaining the economy. Generally, the act is silence on protection of rights regarding the small and medium size enterprises against the unfair contract terms.

Instead of enacting a separate piece of legislation concerning the unfair contract terms, like UK and Singapore, Malaysia inserted a new Part IIIA into the CPA 1999⁶⁶. This new Part IIIA is substantially introduced based on the recommendations of the Law Commission of India's 199th Report on Unfair (Procedural & Substantive) Terms in Contract (2006). Part IIIA would apply to all terms in a contract that are considered as 'unfair'. Section 24A(c) defines an unfair term as terms in a consumer contract cause a 'significant imbalance' to the rights and obligation of the parties. Part IIIA divide unfairness into two types, which is procedural unfairness and substantive unfairness in which significant imbalance may appear. The Indian Law Commission Report 2006 also defines procedural unfairness as the process of making a contract between the suppliers and consumers which has result in unfairness in the manner while substantive fairness. According to Willet, procedural unfairness looks at the process of making a contract while substantive unfairness concerns with fairness regarding the rights and obligation of the parties⁶⁷.

Under 24C (1) of CPA 1999, a contract is said to be procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer due to the conduct of the supplier or the

⁶⁰ SingaporeLaw. (n.d.). Retrieved from https://www.jetro.go.jp/en/reports/survey/other/surveys_b2c/singapore.pdf

⁶¹ Naemah Amin. (2013). Protecting consumers against unfair contract terms in Malaysia: The Consumer Protection (Amendment) Act 2010. Retrieved from http://irep.iium.edu.my/30573/1/Unfair_contract_terms.pdf.

⁶² Christopher Lee & Co. (2012, October 12). Consumer Protection (Amendment) Act 2010. Retrieved from <http://www.christopherleeco.com/wp3/?p=868>

⁶³ [2012] SGHC 186

⁶⁴ Shaun Lee. (2012, September 27). Indemnity for Penal Sanctions, Reasonableness and Severability. Retrieved from <https://singaporeinternationalarbitration.com/2012/09/27/indemnity-for-penal-sanctions-reasonableness-and-severability/>

⁶⁵ S3 OF CONSUMER PROTECTION ACT 1999. (1999). Retrieved from http://mystandard.kpdnkk.gov.my/mystandard_portal2014/document/akta_perlindunganpengguna1999.pdf

⁶⁶ Malaysian Consumer Protection (Amendment) Act 2010 deals with unfair contract terms. (n.d). Retrieved from <http://www.timeshareconsumerassociation.org.uk/2015/06/19/malaysian-consumer-protection-amendment-act-2010-deals-with-unfair-contract-terms/>

⁶⁷ C Willett.(2007). Fairness in Consumer Contracts -- The Case of Unfair Terms. Ashgate. p 5.

circumstances when the contract was entered into. Whereas a contract is said to be substantially unfair if the terms of the contract themselves lead to injustice. Generally, all the vitiating factors which are recognized by the Contracts Act 1950, such as coercion, undue influence, fraud and misrepresentation are the examples of procedural unfairness that will make the contract voidable. Whereas the prohibition of certain contract terms such as restraint of trade is concerned with the substantive unfairness. The facts shown that most cases would probably be decided on the procedural ground by the courts or tribunals. Once they have decided that the term of contract is unfair, either procedurally or substantively, may declare such contract to be void.

However, The CPA does not define the terms 'unconscionable, oppressive and harsh' under substantive unfairness. The courts and tribunals should refer to the prior judicial decisions which interpret the meaning of the terms. It might be confused that although part IIIA divide unfairness into procedural and substantive, it did not define the meaning of terms under it. The another unsettled issue is in regard to the extent of jurisdiction of the Tribunal for Consumer Claims set up under the CPA⁶⁸. Section 98 provides that the Tribunal can hear only complaints not exceeding RM25,000. It means that the jurisdiction will not extend to the complaints exceeding RM25,000. The court may refuse to allow parties to rely on the provisions of Part IIIA if the complaints exceeds RM25,000. It seems contradict that part IIIA was inserted to provide consumers rights in fact it restrict the consumers claims under RM25,000⁶⁹.

While in Singapore, they didn't insert any new part into their law to divide unfairness into two parts but choose to incorporate their law into the Unfair Contract Term Act 1977. Under UCTA 1977, there is no any division of unfairness based on the unfair contract terms. The courts in Singapore choose to follow UCTA 1977 which was in force in United Kingdom.

It can be seen that there are still many loopholes and inconsistencies under our current law in Malaysia. Consumer protection is not completely provided under the Consumer Protection Act. There might also have some unfair contract terms which does not covered under the act. Although the addition of Part IIIA is a great step providing greater consumer protection in Malaysia, but that the situation is still far from perfect. As such, we have to take into account the provisions under UCTA 1977 as a reference which was enforced in United Kingdom and modelled in other countries including Singapore that provide separate legislation concerning the unfair contract terms. An improvement under our current law will ensure that all consumers are given protection to enforce their rights.

3. CONCLUSION

From the explanation above, we clearly see that, there are still many defects found in our current law governing the unfair contract term. However, there is a special feature stated in CPA 1999 which is not mentioned in the legislation of other three countries. Malaysian law has distinguished procedural and substantive unfairness and wider protection to the consumer is guaranteed. Unfortunately, the distinction of these two types of unfairness is still considered as insufficient. For instance, in the recent case of *Fairview International School v Tribunal Tuntutan Pengguna Malaysia & Anor*⁷⁰, the issue raised is whether the provisions concerned were unfair terms. The first provision concerned was that the enrolment of a student at Fairview would be subject to provisions where a student is required to submit a withdrawal notice one academic term before the student actually withdraws, and the security deposit which was paid previously would be forfeited if the student fails to do so. The second provision was a general term which empowers Fairview with the right to annul, amend or add any terms and conditions whenever it wishes, and such terms and conditions are applicable to all its enrolled students.

It was held that the first provision was not substantively unfair as the operation of private schools in Malaysia is competitive. Such competitive environment renders the first provision reasonable, as it is able to aid Fairview in its intake of student population, as well as instilling commitment and discouraging students from transferring schools from time to time at their whim. At the same time, it was held that the second provision which grants the school the authority to amend its terms universally was neither unreasonable nor objectionable. The judge considered that the change of terms and conditions may be of the purpose "for the improvement of the students' learning system" in reaching at his conclusion. This is not considered unfair, and would not induce an imbalance to the parent or student of the school. Thus, it was agreed that the

⁶⁸ CPA 1999 (Mal.), s. 85

⁶⁹ Adnan Trakic. (2015, September). Statutory protection of Malaysian consumers against unfair contract terms: Has enough been done? Retrieved from https://www.researchgate.net/publication/282896437_Statutory_protection_of_Malaysian_consumers_against_unfair_contract_terms_Has_enough_been_done

⁷⁰ [2015] 1 AMR 370; [2015] 1 CLJ 224, HC

provision was neither procedurally nor substantively unfair. The decision in the stated case shows the approach which may be adopted by the Malaysian courts in cases regarding the construe of unfair terms, and also indicates that the Malaysian courts may not be willing to interpret procedural and substantive unfairness broadly.

Other than that, we can also see some deficiencies of Malaysian law regarding unfair contract term after comparing it with the law of other three countries, namely United Kingdom, Australia and Singapore. The most obvious deficit we notice is that, Consumer Protection Act 1999 is lack of detailed explanation of the unfair contract term. For example, in United Kingdom, Consumer Rights Act 2015 lists out twenty unfair consumer contract term under Part I of Schedule II of the act. At the same time, in Australia, section 25 Competition and Consumer Act 2010 also indicates the example of unfair contract terms and even stipulates the circumstances which unfair contract terms would be constituted. Lastly, as Singapore follows the English law, it is definitely that the Singaporean law also provides clear examples of unfair contract terms as United Kingdom does. The lack of illustration and explanation in Malaysian law might cause ambiguity and the court could not interpret the law based on the vague wording. Thus, the right of consumer may not be protected properly.

Unfair Contract Terms Act 1977 in United Kingdom also set out the reasonableness test for the contract term. If the term is unreasonable then it would be ineffective. However, in Malaysia, such reasonableness test is not being applied. In Australia, section 27 of Competition and Consumer Act 2010 also mentions about the standard form of contract which the contract is not in standard form if one of the party is not able to have a chance to negotiate the contract. It could provide the consumer an opportunity to express their opinion on any contract term that does not satisfy them. Again, our law is also silent on this aspect. Besides, Unfair Contract Term Act in Singapore also imposes reasonable limit on exception clause so the seller will not gain benefit from the innocent consumer as long as they want. It is also the provision which Malaysia lack of. Lastly, in Singapore, the law concerning unfair contract terms is applicable to all commercial contracts. Hence, it could give every consumer the adequate protection under any situation. On the contrary, CPA 1999 only provides protection to consumers instead of retailers. Therefore, in Malaysia, not everyone could enjoy the protection granted by the act.

Based on the comparison above, we can conclude that, even though the Part IIIA is added into CPA 1999, there is still plenty of room of improvement for it. It might be better if our country could enact a specific legislation to govern the case of unfair contract terms. Not only that, the deficiencies stated above should be complemented as soon as possible. It is also suggested that we shall take those countries as a reference for us in improving our law regarding unfair contract terms to prevent the consumers being exploited by these unfair contract terms. As referring to the law in different countries, we are of the opinion that United Kingdom should be our role model in improving our law regarding unfair contract term. This is because it has a specific legislation to govern this matter and even Singapore also adopts the English law in this matter. At the same time, Malaysian court shall also learn to interpret the law broadly so it could fully come into play.