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Legal Approaches to Unfair Consumer Terms in Malaysia, Indonesia and Thailand

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ABSTRACT

In a global economy, the advancement in new technologies and the liberalisation of trade present challenges to the consumer protection regime of every jurisdiction. The survival of any regime of consumer protection law now depends on how it caters for ways and means to correct the inequalities in the global market. Achieving a fair balance between the needs of market providers and the consumers is indeed a major challenge to law makers. In the course of remedying market failure, one of the most important developments in the area of consumer protection is the evolution of exclusion clauses. The increasing use of standard form contracts and the use of such clauses have now become a predominant feature of many consumer contracts. The growth of welfarism within the law of contract and consumer law has encouraged the courts and legislature to intervene to limit the autonomy of contracting parties, where significant inequalities of bargaining power are reflected in contractual terms. By applying the content analysis research method, this article aims at exploring the judicial and legislative intervention on unfair terms in Malaysia and comparing the legislative provisions on unfair terms in the Malaysian Consumer Protection Act 1999 with the Indonesian and the Thai legal frameworks.

Keywords: Unfair terms, judicial-legislative intervention, Malaysia, Indonesia, Thailand

INTRODUCTION

The 19th century witnessed the system of *laissez-faire*, the non-interference policy of the government, and the principle of *caveat emptor*, let the buyer beware, which were the birthmarks of capitalism that reigned proudly in Europe. The common law being the handmaiden of "laissez-faire constitutionalism" has become indistinguishable from the extreme free-market ideologies. Noga Morag-Levine (2007) opines that its putative opposite was nothing more than the sensible governmental involvement in society and the economy in pursuit of remedies to the inefficiencies and inequities of the market place. In contrast with the civil law, it gave judges and juries the final say on the necessity of regulatory interventions to protect public health and safety, empowering them to oversee actions by both administrators and legislators.

Market ideology during the 19th century was indeed ignorant of consumer welfare. The idea of equal bargaining power was created then by marketers to justify the existence of freedom of contract, the cardinal rule of contract law (Azimon & Sakina, 2009). It cannot be denied that the current modernisation trend in human thinking has produced diversity in creativity and creation of latest technologies in the market that meet and satisfy consumer

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demands. Modern technologies are increasing in consumer trading environment and have sparked a new phenomenon in the future of any consumer protection regime when traders are taking this opportunity to create standard form contracts which can be found in every corner of consumer transaction. Online sales transactions of goods have proven that technological sophistication has been absorbed into consumer daily environment which directly adopts such contracts as the practice of traders in these virtual transactions. Nowadays, sellers or suppliers have created an absolute free market for the smooth flow of their products, and at the same time, ways and means to discharge their liabilities and increase their rights at their own whim, often at the disadvantage of the consumers. Their most potent tool to discharge their liability is thus through the utilisation of manipulative method of drafting contract in what is now known as the 'unfair terms'. These unfair terms, which are part of the *laissez-faire* legacy, have further eroded the protection of consumers in many commercial transactions and thus call for the paternalistic role of the government.

The subject of 'Unfair Terms in Contract' has attained grave importance in recent times, not only in relation to consumer contracts but also in regard to other contracts. The subject has assumed great importance currently in the context of tremendous expansion in trade and business, as well as consumer rights. In the last two decades, several countries had gone in for new laws on the subject in order to protect consumers and even smaller businessmen from bigger commercial entities. Furthermore, several law commissions across the world have taken up the subject for study and recommended new legislation. The British and Scottish Law Commission has prepared its latest report in 2004 on 'Unfair Terms in Contracts' (Law Com No. 292, Scot Law Com No. 199) with a new draft bill annexed to the report after reviewing its earlier laws. In addition, the South African Law Commission, in its report in 1998 on 'Unreasonable Stipulations in Contracts and the Rectification of Contracts' has reviewed the comparative law in several countries and has come forward with a draft bill. The Discussion Paper of 2004 from Victoria (Australia) proposed by the Standing Committee of Officials of Consumer Affairs, the Interim Report of 2005 from Canada (British Columbia) prepared by the British Columbia Law Institute and the Reports of the New Zealand Law Commission and Ontario Law Commission have added new dimensions to the subject (Law Commission of India, 199th Report, 2006). In the south-eastern Asian region, the development in this area of law in certain jurisdictions is also commendable. The enactment of laws in Malaysia, Indonesia and Thailand to curb the harshness of unfair terms evinces the commitment of the respective governments in ensuring ethical and healthy market environment and competition.

With the above introduction, it is the aim of this article to look into the above highlighted issues, namely, the issues of unfair contract terms in consumer contracts. A study on the Malaysian position with regard to unfair terms in particular exclusion clauses shall be made with reference to case laws and statutes alike. Upon ascertaining the Malaysian judicial and legislative intervention, a comparative study with the Indonesian and Thai legislative approach shall then be made.

THE RISE OF PATERNALISM IN CONSUMER CONTRACT

To understand the development which has taken place in the area of unfair terms, we must be mindful of the policies in play; these are, on one hand, the traditional concern for freedom of contract, the cardinal rule of contract law, and on the other hand, the concern to curb unfairness resulting from significant inequality of bargaining power, and in this context, known as the principles of consumer protection. Classical contract legislation, which was fully controlled by the economic theories in the 19th century, has placed contracting parties as an economic unit which should possess equal negotiation strength together with freedom to make any decision. 'Market individualism' was the ideology then. This ideology was partly based on the main

theme dominating contract law throughout this century, namely, the principle of freedom to contract, the cardinal rule of contract law (Atiyah, 1979). To guarantee integrity in free and individual market economies, this principle clearly suggests that the court holds the parties to the terms of the contract independently negotiated. The idea behind the supremacy of this principle is rooted by the economic and market factors. An individual is given full freedom to decide and choose the terms of the contract he/she wishes to enter. This eases the supplier of goods to know thus provide supplies in any form, either products or services, which are required and demanded by the buyer. In a long-term market, this practice gives room to the consumers to obtain goods based on their agreed prices.

In the late 19th century, the doctrine of freedom of contract and the principles of *laissez-faire* had a great influence on judges. This was manifested by the courts' persistent refusal to intervene in contracts on the basis of fairness (Bradgate, 2000). According to Lord Diplock in a landmark case, *Shroeder Music Publishing Co. Ltd. v Macaulay* [1974] 1 WLR 1308, this non-interventionist approach adopted by the courts was justified on the basis that it "facilitates the conduct of trade by promoting certainty." *Laissez-faire* and freedom of contract can truly be said to symbolise the ideology of market individualism. Richard A. Epstein (1996) stated:

> *Laissez-faire capitalism, and its associated doctrine of freedom of contract, had many stalwart defenders during the nineteenth century. But it has received a rocky reception from many legal and philosophical commentators in the twentieth century. Freedom of contract has often been pronounced "dead on arrival" as an organizing principle for complex contemporary societies. That principle has been said to be insensitive to differences in wealth, status, position and power that make the exercise of contractual choice a myth for the weak and dispossessed.*

Beginning mid 19th century, there was a belief that equality was no longer an ideal concept in the trading world. As trading became more and more complex, it transformed the contract environment, thus changed the issue on the reality of an agreement between two parties with unequal bargaining strength (Mulcahy & Tillotson, 2004). With the rise of consumerism, the 20th century had seen paternalistic approach in consumer protection. When the era of consumer welfarism takes place, legal intervention is seen as a requirement in addressing the negative effects of unfair terms in the standard form consumer contracts. Both the judiciary and the legislature have adopted new attitude and measures in promoting consumer welfarism. Consumerism, thus, has an interventionist character, which is a far cry from the doctrine of contract freedom.

Nevertheless, according to Gregory M. Duhl (2009), the malignant spread of unfair terms in consumer contracts is partly due to the attitude of the lawyers in drafting contractual documents. Commenting on the case of United Rentals, Inc. v. RAM Holdings, Inc. 937 A.2d 810, 814-15 (Del. Ch. 2007), he stated:

> *Part of lawyers' professional obligation is to draft clear contractual language for their clients. Furthermore, lawyers have an ethical obligation to reveal known inconsistencies that exist in the agreements that they are drafting, and not to contribute to such inconsistencies. Where the language of the agreement is ambiguous, there is a risk-especially from application of the four-comers rule-of courts not enforcing the obligations to which the parties consented. This risk poses a challenge to consent and other autonomy-based theories of contract.*

THE MALAYSIAN SCENARIO

The Judicial Intervention

In Malaysia, the standard form contracts have come to dominate more than just routine

transactions. Unlike Thailand, where there is specific legislation dealing with unfair terms, the laws in Malaysia *vis-à-vis* unfair terms are very much contained in case laws. Malaysia does not regulate unfair contracts by way of specific legislation. In the area of unfair terms by virtue of section 3 and 5 of the Civil Law Act 1956, the common law principles have been applied. The general rule on interpretation is that, the court will construe the words in any written document "in their plain, ordinary, popular meaning, rather than their strictly precise etymological, philosophic, or scientific meanings" (*Malaysian National Insurance Sdn. Bhd. v. Abdul Aziz Bin Mohamed Daud* [1979] 2 MLJ 29, 31). Nevertheless, when interpreting unfair terms, the courts are hampered by the theory of freedom of contract and consequently unable to prohibit these terms, but within this theory, they have developed strict rules relating to the incorporation of such clauses as terms of the contract as well as interpreting them *contra proferentem* (Sakina, Azimon & Suzanna, 2010): the words of written documents are construed more forcibly against the party putting forward the document; in the case of exclusion clauses, this is the party seeking to impose the exclusion. This rule of construction in only applied where there is doubt or ambiguity in the phrases used, and provides that such doubt or ambiguity must be resolved against the party proffering the written document and in favour of the other party (Lee (John) & Son (Grantham) Ltd. v Railway Executive [1949] 2 All E.R. 581). Although the courts have long interpreted ambiguities strictly, in certain jurisdiction, such as the United States, recent cases have shown that the strict interpretation has been rejected. David Horton (2009) claims that the rejection of the strict-against-the-drafter rule stems from the confusion about its normative foundation. Judges and commentators have offered three rationales for the doctrine: it discourages ambiguity, corrects unfairness, and redistributes wealth. These theories share the goal of improving the quality and legibility of standard-form terms.

Judicial development in Malaysia on unfair terms has concentrated very much on a species of unfair terms, that is exclusion clause. The first judicial principle on exclusion clause can be traced back as early as 1959 in a business to business (B2B) transaction. In *Sze Hai Tong Bank Ltd. v Rambler Cycle Co. Ltd.* [1959] MLJ 200, the Privy Council adopted a strict interpretation to narrow down the scope of exclusion clause so as not to allow fundamental breach of contractual obligation. The *contra proferentem* rule was later applied in *Sharikat Lee Heng Sdn. Bhd. v Port Swettenham Authority* [1971] 2 MLJ 27 and later by the Privy Council in *Port Swettenham Authority v T.W. Wu and Company (M) Sdn. Bhd.* [1978] 2 MLJ 137. The Federal Court in *Sharikat Lee Heng Sdn. Bhd.* held "that the *contra proferentum* rule should apply to the construction of Rule 91(1) just as much as it does to any exemption clause in a contract." Ong CJ stated that:

> *In the absence of clear and unequivocal language to the contrary, I am of the opinion that the onus lies on the Authority to show that it has taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack on its part.*

In cases involving a consumer, it is difficult to ascertain the attitude of the Malaysian Courts towards unfair terms due to the scarcity of cases. Nevertheless, granted that cases in this area have been very limited, the decisions in these cases have not been a great champion of consumer rights. In *Malaysian Airlines System Bhd. v Malini Nathan & Anor* [1995] 2 MLJ 100, Malaysian Airlines was sued for breach of contract for failing to fly the first respondent, a fourteen-year-old pupil back to Kuala Lumpur. In denying the liability, MAS relied on Condition 9 under the Conditions of Contract printed on the airline ticket, which reads:

> *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 carrier or aircraft, and may either 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.*

The Supreme Court held that MAS was entitled to rely on the clause, and thus, was not in breach of the contract. However, cases involving damage due to a negligent act of one of the parties to the contract demonstrate a strict attitude of the Malaysian courts towards exclusion clauses. In the case of *Chin Hooi Chan v Comprehensive Auto Restoration Service Sdn. Bhd. & Anor* [1995] 2 MLJ 100, the court took a very strict interpretation of this type of clauses in cases involving damages caused by negligence. In allowing the plaintiff's claim, Siti Norma Yaakob J stated that:

> *It is settled law that an exemption clause however wide and general does not exonerate the respondents from the burden of proving that the damages caused to the car were not due to their negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car.*

However, the decision of Elizabeth Chapmen JC in *Premier Hotel Sdn. Bhd. v Tang Ling Seng* [1995] 4 MLJ 229, in the Kuching High Court, has caused some concern as it indicates the court's readiness to give effect to a clearly worded exclusion clause in the event of negligence:

> *General words of exclusion clauses would not ordinarily protect a contracting party from liability for negligence. To protect him from liability for negligence, the words used must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'howsoever caused'.*

The case law development in this area of the law in Malaysia has shown grave concern for consumer protection. Hence, it is submitted that the uncertainties and inconsistencies by way of judicial intervention could be resolved through legislative measures.

The Legislative Approach

The legislative development in Malaysia prior to 2010 has also shown disregard towards the problems posed by unfair terms. In Malaysia, there is no legislation equivalent to the United Kingdom's Unfair Contract Terms Act 1977. The courts here have also been slow in recognising the doctrine of inequality of bargaining power. Lack of legislation in this area of the law should justify the courts taking a stricter view of the exclusion clause and protect the consumers against onerous terms. The court should recognise that the notion of freedom to contract on one's own terms in consumer transaction is nothing more than a fiction. Since there is no specific legislation regulating unfair terms in consumer contracts in Malaysia, the court should take a more active role in protecting the weaker party and not merely taking a strict constructionist approach. Visu Sinnadurai suggested that the courts should exercise this role by invoking their inherent powers in refusing to sanction certain contracts on the grounds of public policy or under section 24(e) of the Contracts Act 1950 (unlawful objects and consideration). Nevertheless, this proposal has never been taken up in any cases. Lack of consistencies in judicial approach to unfair terms in consumer contracts has indeed called upon legislative intervention in this matter.

The Sale of Goods Act 1957, which governs dealings between business to business (B2B) as well as business to consumers (B2C) simultaneously accords no protection to

consumers as far as unfair terms are concerned. Instead of regulating the use of exclusion clauses in sale, the 1957 Act by virtue of section 62 allows the exclusion of the implied terms and conditions by 'express agreement'. The Consumer Protection Act 1999 (CPA 1999) came into force on 15 November 1999. The Act goes some way towards remedying the forces of inequality. As Wu Min Aun (2000) pointed out, it restores some equilibrium between suppliers and consumers. CPA was enacted to provide a comprehensive protection to consumers. Section 6 of the Consumer Protection Act 1999 prohibits contracting out of the provisions of the Act. The section further provides that every supplier or manufacturer who purports to contract out of any provision of this Act commits an offence, and under section 145, those persons are liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both (Sakina & Rahmah, 2008). The introduction of Part IIIA of the Consumer Protection (Amendment) Act 2010 has to some extent resolved the problems associated with the use of unfair terms in consumer contracts in Malaysia. Under this part, where a court or tribunal comes to the conclusion that a contract or term is procedurally or substantively unfair or both, the court or tribunal may declare the contract or the term as unenforceable or void. Under section 24C, "A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and the supplier." A contract or a term of a contract is substantively unfair, under section 24D, "if the contract or the term of the contract – (a) is in itself harsh; (b) is oppressive; (c) is unconscionable; (d) excludes or restricts liability for negligence; or (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification." In addition to the contract or the term being held unenforceable or void, Part IIIA provides for a criminal penalty for contravention of its provisions. Under section 24I, if a body corporate contravenes any of the provisions in Part IIIA, the corporate body shall be liable to a fine not exceeding RM250,000; and if such person is not a body corporate, to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding three years or both.

The 2010 Amendment approach by dividing unfairness into procedural and substantive unfairness is similar to the approach proposed in the Law Commission of India 199th Report on Unfair (Procedural & Substantive) Terms in Contract. Nevertheless, the necessity of dividing the contract or the term into procedural and substantive unfairness is questioned as the civil and criminal sanctions imposed are the same may it be procedurally unfair or substantively unfair. One of the many weaknesses of the new Part IIIA lies in the uncertainty of its application to unfair notices. Failure of Part IIIA to mention notices and draw attention to standard form contract as defined in section 24A may lead to limited application of its scope. The ambiguity of this Part also lies in section 24B. The new amendment provides that the new Part shall apply to all contracts but fails to appreciate the limited application of the Consumer Protection Act 1999. The 1999 Act is very limited in its application. By virtue of section 2(4):

> *The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.*

As such, the problem posed by section 62 of the Sale of Goods Act 1957 shall continue to exist since the 1999 Act does not have a prevailing effect over the Sale of Goods Act 1957. The phrase 'all contracts' also leads to ambiguity as to whether Part IIIA applies to contracts which apply foreign laws. Although the new amendment expressly lists down clauses which exclude or restrict liability for breach of express or implied terms of the contract without adequate justification as procedurally unfair, Part IIIA fails to provide a test for determining what amounts to 'adequate justification'.

Unlike its Indonesian and Thai counterparts, the new amendment to the 1999 Act also fails to provide a list of examples of unfair terms. The 1999 Act also narrowly defines the term 'consumer' as "…a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption." Part IIIA contains many weaknesses which could have been addressed by enacting a single comprehensive piece of legislation on unfair terms for Malaysia.

In short, the legislative development on unfair consumer terms in Malaysia has not been a great champion of consumer rights. As such, enacting specific laws is seen as the best solution to the malignant spread of abuses in the use of unfair terms in consumer contracts.

THE INDONESIAN FRAMEWORK

The Indonesian legal system is complex because it is a confluence of three distinct systems. Prior to the first appearance of Dutch traders and colonists in the late 16th century and early 17th century, indigenous kingdoms prevailed and applied a system of *adat* (customary) law. The Dutch presence and subsequent colonisation during the next 350 years until the end of World War II left a legacy of the Dutch colonial law. A number of such colonial legislations continue to apply today. Subsequently, after Indonesian declared its independence on 17 August 1945, the Indonesian authorities began creating a national legal system based on the Indonesian precepts of law and justice. These three strands of *adat* law, the Dutch colonial law and the national law co-exist in modern Indonesia.

In Indonesia, the interest for the enactment of a comprehensive legislation governing consumer protection has existed since the 1980s (Sakina & Rahmah, 2006). Lack of a comprehensive legislation and awareness on the part of the consumers are the two major contributors to consumer problems in Indonesia. In dealing with these problems, *Undang-Undang No. 8 tentang Perlindungan Konsumen* or Law No. 8 on Consumer Protection 1999 of Indonesia was enacted and came into force on 21 April 1999. Until the enactment of the Law No. 8 on Consumer Protection in 1999, there was no comprehensive legislation providing a framework for consumer protection in Indonesia. Although the enactment of the Law No. 8 on Consumer Protection 1999 was rather recent, prior to 1999 consumer protection in Indonesia nevertheless existed in several piecemeal laws, which protected the interest of consumers in the field of hygiene, electricity, health, food, banking, copyright, patent, trademark and environment. The main ideas behind the enactment of the Law No. 8 on Consumer Protection 1999 are as follows:

(a) The aim of the national development is to realize a just and materially as well as spiritually prosperous society in the era of democratic economy based on the 1945 Constitution and the Pancasila (State Philosophy);

(b) The national economic development in the globalization era must support the growth of businesses enabling the production of various goods and/or services with technology which can promote the welfare of society at large and at the same time ensure that goods and/or services obtained through trade are not harmful to consumers;

(c) With the market which is increasingly opening up as a result of the economic globalization process, the improvement of social welfare and certainty in respect of the quality, volume and security of goods and/or services obtained in the market must be guaranteed;

(d) In order to improve the dignity of consumers, there is a need to improve the consumers' awareness knowledge, attention, capability and independence in order to protect themselves and to develop a responsible business behaviour;

(e) Law provisions protecting consumers' interests in Indonesia have not been adequate yet; and

(f) For all the reasons above, a set of laws and regulations is needed in order to achieve

continuity in the protection of the interests of consumers and business entities for creating a fair economy.

Law No. 8 on Consumer Protection 1999 contains 15 chapters and 65 articles. It provides for the establishment of the National Consumer Protection Board and Consumer Dispute Settlement Boards. The law specifically regulates unfair competitions, standard clauses, warranties and guarantees, advertisements and product liability. Law No. 8 on Consumer Protection 1999 highlights the need to balance between the consumer and the commercial interests. The 1999 Law confers rights and imposes obligations on both the consumers and business entities. The Law also provides for the sharing of responsibility for consumer protection between the government and non-governmental agencies.

The relevant clause of Law No. 8 on Consumer Protection 1999 on unfair terms can be seen in Chapter V which governs the 'Provisions on the Inclusion of Basic Clause'. Article 1 of Chapter 1 of the Law defines 'basic clause' in clause 10 as "any regulation or provisions and requirements previously and unilaterally drafted and stipulated by a business enactor as drawn up in a document and/or binding agreement and must be fulfilled by consumers." The 1999 Law regulates both the form and content of these unfair terms. Article 18 of Chapter V provides for basic clauses, which are prohibited from being included in any document and/or agreement in the following events:

(a) State the transfer of responsibility of the business enactor concerned;

(b) State that the business enactor concerned is entitled to refuse the resubmit goods purchased by a consumer;

(c) State that the business enactor concerned is entitled to refuse the refunding of money paid for the goods and/or services purchased by a consumer;

(d) State the granting of power of attorney by a consumer to the business enactor concerned, either directly or indirectly, to undertake all actions unilaterally in relation to the goods purchased by a consumer in instalments;

(e) Set forth requirements for providing evidence in respect of the lost benefit of the goods or the services acquired by a consumer;

(f) Authorise the business enactor to reduce the benefit of service or to reduce the consumer's assets being the object of sale and purchase of the service concerned;

(g) State the applicability of regulations in the form of new, supplementary, follow up and/or further amendments stipulated unilaterally by the business enactor to consumers during the time such consumers are using services acquired by them;

(h) State that the consumer authorises the business enactor to secure, pledge or impose other security rights on goods purchased by a consumer on instalments.

Law No. 8 on Consumer Protection 1999 also prohibits traders from including basic clauses the position or form of which cannot be easily seen or cannot be clearly read, or the expression of which is difficult to understand. Any basic clauses included in a document or agreement in contravention with provisions contained in Article 18 shall be declared null and void. The 1999 Law goes even further with its sanctions on traders violating Article 18. Besides civil sanctions (*sanksi perdata*), Article 62 of the 1999 Law provides for criminal sanctions; "Business entities violating the provisions as intended in … Article 18 shall be sentenced with imprisonment for not more than five years or fine for a maximum amount of Rp.2,000,000,000.00 (two billion rupiah)." In addition to the penalty imposed by Article 62, Article 63 provides the following additional punishments:

(a) Confiscation of certain goods;

(b) Announcement of the judge stipulation;

(c) Payment of compensation;

(d) Order for the halt of certain activities causing detriment for consumers;

(e) Obligation to withdraw goods from circulation; or

(f) Revocation of business licence.

THE THAI EXPERIENCE

The growth and sophistication of Thai business communities are relatively recent phenomena. The Thai courts of justice have increasingly had to deal with complex commercial, corporate, intellectual property, maritime, privatisation, banking, financial, securities, environmental, tax, and trade issues. The Constitution of the Kingdom of Thailand in essence protects the right and freedom of the people. It considers the opinion of the people as important, while it protects the right of the people as consumers for the first time in the section on the rights and freedoms of Thai people. It includes promoting formation of independent consumer organizations to give opinions in enacting laws, rules and regulations, and to give opinion on prescribing measures to protect consumers as appearing in section 57 of the Constitution. The Constitution also prescribes the state to promote the free market system based on the marketing mechanism to supervise fair competition, protect the consumers and prevent monopoly, and cut short directly and indirectly (Prapit Yodsuwan, 2005). The Thai legal system is a civil law system. Many of its fundamental legal principles have their origins in the codified systems of continental Europe, particularly France and Germany, as well as common law countries and traditional Thai law. Thailand also does not recognize the common law principles of binding judicial precedent. However, certain persuasive decisions of the Supreme Court are published in the Supreme Court Law Reports.

Consumer protection legislation in Thailand is sparse. The chief modern consumer protection legislation is the Consumer Protection Act of 1979 comprising 64 sections. It is one of the earliest consumer laws to be enacted in the Asia Pacific region. It came into effect on 4 May 1979 and amended in 1998. The Consumer Protection Act of 1979 is the general law that supports the basic rights of consumers in general. In cases where no specific law exists, it shall be applicable. The Consumer Protection Act of 1979 adopts a completely different approach (Sakina & Rahmah, 2006). Section 4 of the 1979 Act prescribes the right of consumers in five aspects:

(a) The right to receive information, including description that is correct and sufficient in relation to goods or services.

(b) The right to have independence to choose goods and services.

(c) The right to safety from using the goods or services.

(d) The right to receive fairness in signing a contract.

(e) The right to be considered and compensated for damage.

In relation to standard form contract (Azimon & Sakina, 2008), Thailand has no specific provisions in any regulations pertaining to its practice. However, the analysis of its legislation shows that it gives emphasis on the issue of unfair contract terms, which is also the main characteristic of the formation of standard form contract. In other words, Thailand has treated the standard form contract as a dual issue which falls under consumer law and contract law. As a remedial measure, Thailand has adopted respectively the laws on the unfair contract terms in Unfair Contract Terms Act 1997, B.E. 2540 and the Consumer Protection Act 1979, B.E. 2541.

The Unfair Contract Terms Act 1997 (TUCTA) has been enacted to uphold legal principles in relation to juristic acts and those contracts which are based on the principle of sacredness of declaration of intention. It consists of 15 sections with its main justification to combat unfairness in their society. Since the law of contract in Thailand is based on the principle of 'autonomy of will' and 'freedom of contract', the objective of this Act is to protect

the contracting parties from any deviation from these two principles. The standard form contract has been defined under section 3 of this Act as:

> *A written contract in which essential terms have been prescribed in advance, regardless whether being executed in any form, and is used by either contracting party in his business operation.*

Section 4 further provides:

> *The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.*

In determining what unfair terms are, section 4 of the Act provides a list of nine unfair terms which cause unreasonable advantages over the other party:

(a) Terms excluding or restriction liability arising from breach of contract;

(b) Terms rendering the other party to be liable or to bear more burden than that prescribed by law;

(c) Terms rendering the contract to be terminated without justifiable ground or granting the right to terminate the contract despite the other party is not in breach of the contract in the essential part;

(d) Terms granting the right not to comply with any clause of the contract or to comply with the contract within a delayed period without reasonable ground;

(e) Terms granting the right to a party to contract to claim or compel the other party to bear more burden than that existed at the time of making the contract;

(f) Terms in a contract of sale with right of redemption whereby the buyer fixes the redeemed price higher than the selling price plus the rate of interest exceeding fifteen percent per year;

(g) Terms in a hire-purchase contract which prescribe excessive hire-purchasing prices or impose unreasonable burdens on the part of the hire-purchaser;

(h) Terms in a credit card contract which compel the consumer to pay interest, penalty, expenses or any other benefits excessively, in the case of default of payment or in the case related thereto; and

(i) Terms prescribing a method of calculation of compound interest that causes the consumer to bear excessive burdens.

It is undeniable that all the above terms are common terms which are often being used in the standard form contracts in consumer transaction. Hence, it clearly strengthens the perception that standard form contract is to be known as the type of contract which consists of unfair terms.

On the other hand, the Consumer Protection Act 1979 was adopted with the view of guaranteeing fairness for the parties in the conclusion of a contract, where it has been provided that specific types of contract shall be examined by a governmental agency called 'The Committee on Contracts' whose members are nominated by the Consumer Protection Board. In determining the types of businesses which are subject to their supervision, the widespread of standard form contract has been identified under section 35 of the Act as a business that brings problems to consumers, thus its practice has been treated as a business that requires special attention of the Committee (Thirawat, 2000). Section 35 Part 2 *bis* provides that, in any business in connection with the sale of any goods or the provision of any services, if such contract

of sale or contract of service is required by law or tradition to be made in writing, the Committee on Contract shall have the power to declare such business a contract-controlled business.

A contract between a businessman and the consumers in the contract-controlled business shall be of the following descriptions:

(a) it shall contain the necessary contract terms without which the consumers would be unreasonably disadvantageous;

(b) it shall not contain the contract terms which are unfair to the consumers.

Provided that, it shall be in accordance with the rules, conditions and particulars prescribed by the Committee on Contract, and for the benefit of the consumers as a whole, the Committee on Contract may require a businessman to prepare a contract in accordance with the form prescribed by the Committee on Contract. In addition, section 35 quarter provides that failure to comply with such requirement as provided by the Committee shall have the following effect on the contract:

> *When the Committee on Contract prescribes that any contract of a contract-controlled business shall not contain any contract term under section 35 bis, if such contract contains such contract term, it shall be deemed that such contract term does not exist.*

A businessman who fails to comply with the requirement set by the Committee shall, according to section 57, be liable to the following criminal penalty:

> *Any businessman who fails to deliver the contract containing the contract terms or containing contract terms in the correct form in accordance with section 35 bis ... shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one hundred thousand Baht or to both.*

Thus, the enactment of the above two legislations gives a clear picture that although the objectives of these two Acts are identical, nonetheless, the mechanisms for the protection in these two Acts are different. The Unfair Contract Terms Act 1997 aims at the determination of the characteristics and legal consequences of unfair contract terms, which would be beneficial to the consumer in the case where the conflict is brought before the court of law, whereas the Consumer Protection Act 1979 creates one governmental organ which is administrative in nature, with its function to detect and identify the existence of the unfair contract terms.

CONCLUSION: A COMPARATIVE ANALYSIS

The rise of standard form contracts and the use of unfair terms to deprive consumers from their rights have indeed inspired the law in Malaysia, Indonesia and Thailand to react against the increasing decline of individual's capacity to make free and rational choice (Shaik Mohd Noor Alam, 1994). The legal development in this area illustrates the role of contract law and can thus be best summed up as follows (Zweigert & Kotz, 1987): "…the modern task of contract law is to develop criteria and procedures through which contractual fairness can be assured." The control of substantive unfairness through the regime of contract law and consumer law of these selected south-eastern Asian countries reflect substantially their varied, though not dissimilar colonial experiences and the way in which the law reform in each country is taking form. The response to the challenge of unfair terms is not the concern of the common law alone. Both in the common law and the civil law systems, the legislatures have evolved various techniques of control to ensure the epidemic brought by the use of unfair terms is contained and controlled. The statutory control of unfair terms in the selected southeast Asian countries above has taken many forms, from specific legislation on unfair terms, such as in the Thailand Unfair Contract Terms Act 1997, to provisions in other specific legislations, such

TABLE 1
Overview of the legislations in Malaysia, Indonesia and Thailand on unfair terms: The pattern of control

	Malaysia	Indonesia	Thailand	
Type of legislation: Specific legislation	X	X	✓ Unfair Contract Terms Act 1997	
Type of legislation: Specific provisions in other legislations	✓ Consumer Protection Act 1999	✓ Law No. 8 on Consumer Protection 1999	✓ Consumer Protection Act 1979	
Nature of provision on unfair terms	Provides for procedurally and substantively unfair contract/ a term of a contract to be held unenforceable or void. Lists down 11 circumstances of procedural unfairness and 5 instances which render a term/a contract substantively unfair taking into account 8 circumstances	Provides 8 basic clauses which are prohibited from being included in an agreement	TUCTA Lists down 9 unfair terms which cause unreasonable advantage over the other party	CPA Declares standard form contracts as contract controlled business – subject to the control of the Committee on Contract
Sanctions	Civil & Criminal	Civil & Criminal	TUCTA Civil	CPA Civil & Criminal

as the Malaysian Consumer Protection Act 1999 and the Indonesian legislation, Law No. 8 on Consumer Protection 1999 and the Consumer Protection Act 1979 of Thailand. The table below is an overview of the relevant legislations on unfair terms in the three selected southeast Asian countries.

In recent years, consumers have grown more conscious of their rights and tend to resort more often to legal remedies provided by the consumer protection laws. Consumerism thus has again arisen in view of the new market condition in the world economy that warrants a fresh examination of the economic power of sellers in relation to buyers. In the past, in many Asian nations, consumers' interests were suppressed under the goal of long-term economic development. With the advancement of technology and changes in the trading world, market should not be allowed to neglect consumers' interests. The concern for better consumer protection has been expressed not only in Malaysia but in many other countries, such as Indonesia and Thailand. The legal regimes of Malaysia, Indonesia and Thailand as demonstrated above have come to recognise unfair terms as a threat to consumers and to ethical trading environment, and thus, the necessary protection by way of legislation has been accordingly provided.

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