Journal of Scientific Research and Development 2 (14): 68-73, 2015
Available online at www.jsrad.org
ISSN 1115-7569

Consent, standard form contracts and empowerment for consumers

Mohd. Faiz Abdullah [1], Rozanah Ab. Rahman[2,*]

[1]*Faiz & Co., Advocates & Solicitors, 17th Floor, Plaza Permata, No. 6 Jalan Kampar, 50400 Kuala Lumpur*
[2]*Faculty of Economics and Management, University Putra Malaysia, 43400 UPM, Serdang, Selangor Darul Ehsan*

Abstract: In contract law, consent is generally regarded as pivotal for contractual validity. Yet, the scope of its application according to the Contracts Act remains unclear. While there is no fundamental dispute that coercion, undue influence, fraud, misrepresentation, and mistake, will vitiate consent, it remains a matter of contention whether factors such as unconscionability and economic duress may be treated by the courts as nullifying it. This issue is particularly pertinent in light of the provisions of the Consumers Protection Act in respect of standard form contracts (SFC). This article explores the fundamental question from the consumers' view point whether real consent has been given in SFCs. Are such contracts enforceable as a rule without exception? Or are there situations where they are voidable at the option of the consumer?

Key words: Consent; Unconscionability and standard form contracts

1. Introduction

In contract law, consent is generally regarded as pivotal for contractual validity. Yet, the scope of its application according to the Contracts Act remains unclear. While there is no fundamental dispute that coercion, undue influence, fraud, misrepresentation, and mistake, will vitiate consent, it remains a matter of contention whether factors such as unconscionability and economic duress may be treated by the courts as nullifying it. This issue is particularly pertinent in light of the provisions of the Consumers Protection Act in respect of standard form contracts (SFCs). This article explores the fundamental question from the consumers' view point whether real consent has been given in SFCs. Are such contracts enforceable as a rule without exception? Or should there be situations where they are voidable at the option of the consumer?

The existing scholarship appears divided on the extent to which consent may affect factors other than those considered conventional under common law. Some scholars maintain that by virtue of the freedom of contract, consent is the very substratum on which the other vitiating factors depend when considering contractual validity or grounds for avoiding liability. The view is that since parties are free to contract, SFCs should therefore be enforceable as a rule. Other commentators argue that the paradigm for ascertaining contractual validity has been significantly altered with the ascent of the school of contractual justice. Modern realities concerning market disequilibrium and inequality of bargaining power should serve as key factors that impinge on consent and should allow consumers to escape liability for onerous and unfair terms in SFCs.

The Malaysian Contracts Act provides that all agreements are contracts if they are *made by the free consent of parties* competent to contract. Consent is deemed "free" when it is not caused by coercion, undue influence, fraud, misrepresentation, and mistake. Neither "unconscionability" nor "economic duress" is included in the list. There is the question whether the latter could fall under the rubric of "coercion" but this can be summarily dealt with by reference to its statutory definition is so restrictive that it would warrant a great leap of imagination to link it with "economic duress."

This gives rise to the question whether the categories are closed in respect of the situations under which consent may be regarded as free. This paper takes the position that it need not be so and argues that the mere absence of the situations does not render them out of the scope of contract law. It is contended that the doctrines of unconscionability and economic duress should come within the categories of elimination even though they are not specifically mentioned in the statute. The Consumer Protection Act 1999 (CPA), as amended in 2011, appears to have dealt with the problem but it has not done so in a categorical manner. In reality, a big gap exists between the current situation as caused by the phenomenon of the SFCs and the protection that is supposed to be given to consumers.

2. Consent and standard form contracts

An SFC, notwithstanding the use of the word "contract", is effectively an ultimatum rather than a

* Corresponding Author.

mutually negotiated contract. There is a predominant party dictating terms and conditions to cover transactions with a multiplicity of parties who are generally unable to negotiate the terms and conditions: *Siegelman v. Cunard White Star*, Ltd., 221 F.2d 189, 206 (2d Cir. 1955).

An SFC is also called a "contract of adhesion" on account of its "take-it-or-leave-it" proposition being foisted on to the other party who has no real bargaining power. The former dictates the terms while the latter has no more power in changing them than he has about the performance of the share market. It is also clear from the fact of the terms being "dictated' that there is a lack of negotiation, and this raises the question of whether there has been "free consent" in such a contract (Cohen, 1933, pp 575-78).

Apart from absence of negotiation, there is also the question of ignorance of terms and this has also been a major bone of contention. While the trend in the law in most common law jurisdictions appears to be inclining towards it being fundamental in vitiating consent, Malaysian courts, however, are still hide-bound by their literalist reading of the Contracts Act. In the United States, United Kingdom and Australia for example, on account of the possibility of unequal bargaining power and unconscionability, courts may void certain provisions or the entire contract itself taking into account, inter alia, the nature of the consent.

This answers in the negative the first question whether real consent has been given in SFCs. By definition, a contract entered into where one party with no real bargaining power is confronted with a "take-it-or-leave-it" situation cannot by any stretch of the imagination be said to be arrived at by free consent; a fortiori, when the terms and conditions are dictated.

The U.S. courts, additionally, have also adopted the "expectation" principle in dealing with SFCs. The impugned terms will be scrutinised and the test is whether they fall within the reasonable expectations of the party who had no hand in drafting the contract. Where on a finding of fact, the court deems that they were outside the said party's expectations, prima facie grounds are said to be established for contractual avoidance. The objective test is used to ascertain whether or not a term is reasonable taking into account the purpose of the term, its importance and the entire circumstances leading to the contract being executed.

This expectation principle governing contracts of adhesion is well expounded in American jurisprudence as follows: Where the other party has reason to believe that the party manifesting such assent would not have done so if he knew that the writing contained a particular term, the term would cease to be part of the agreement, and might thus be excised therefrom. This is the purport of Section 211 of the American Law Institute's Restatement (Second) of Contracts. It is to be noted that this stipulation renders the assessment to be ascertained via a subjective test, shifting the focus from the buyer to the seller.

However, this was not necessarily so in the 1980's as the general judicial attitude then, even in the United States, appeared to be averse to permitting contractual avoidance except for clear-cut situations falling within the conventional factors of consent vitiation. The court's approach then was to put the onus on the party seeking avoidance. The overriding question was: Why should the defendant be allowed to avoid the impugned contractual term? The reverse onus would have been: Why should the term be regarded as binding? The law then was described as "a softened or decayed form of the traditional solution" (Rakoff, 1983).

Even lately, the trend is to push for an objective test of consent in such contracts. For example, free market proponents or more correctly, advocates of the economic theory of law contend that courts should allow parties to enter into transactions unhindered by subjective interference. Whether or not the terms are favourable or lop-sided is not a matter that should come within the purview of the courts. Unless one is dealing with a communist system or any kind of totalitarian form of government practicing an absolute command economy, free market forces will ensure that such contracts contain terms that are beneficial to non-drafting parties as a class. Courts should therefore enforce all form terms or, at a minimum, all form terms that non-drafting parties read and understand and there should be greater use of mandatory contract terms (Korobkin, 2003).

The current trend, however, favours the enforceability of SFCs to be challenged from the consent matrix: was there "informed" consent, in the sense of consent arrived at after full or at least adequate knowledge of the nature of the contract and its terms and conditions? Where there is an absence of informed consent, there are strong views against their enforcement. Informed consent presupposes complete or at least substantive information about the contract's terms. Without it, a party cannot be said to have been sufficiently apprised of such information and it becomes doubtful whether consent is possible under the circumstances.

The decided cases in Malaysia indicate generally that the courts are reluctant to intervene to strike down a term which one party alleges to be invalid, or to allow one party to avoid a contract or declare an entire contract void (Nazura, 2008). Arguments resting on the absence of "free" consent arising from insufficient knowledge generally are rejected. For example, in cases where undue influence is pleaded, the court requires proof of "manifest disadvantage" to the party pleading it before it is satisfied that there is indeed a relational situation giving rise to undue influence. Failure to establish that, regardless of the consent being not "informed" would lead to the conclusion that the parties had voluntarily entered into the contract and the court should not

intervene: *Polygram Records Sdn Bhd v. Search & Anor* (1994) 3 MLJ 127.

This Malaysian decision stands in stark contrast to the growing body of case law in the United States which had already been developing more than two decades earlier where this traditional duty to read doctrine became increasingly ineffective under the consent theory apart from other vitiating factors, such as contravening public policy and unconscionability (Calamari, 1974).

Thus, where the fall-back on the Contracts Act leaves the defendant defenceless or unable to invoke any ground to enable contractual avoidance in SFCs, further statutory intervention came into force to purportedly fill in the lacuna. As alluded to earlier, this came by way of the Consumer Protection Act (CPA).

3. **Unfairness in SFCs and the consumer protection act 1999**

In the evolution of contract law, equity has played a significant role in "coming to the rescue" where strict law would be powerless to prevent injustice arising from enforcing contracts which are demonstrably unfair. Eventually, the concepts of procedural and substantive unfairness took shape and became part and parcel of the justice doctrine as articulated via the equity courts. With the gradual fusion of the justice role of the equity courts with the common law courts, the latter became increasingly well equipped to dispense justice by taking cognizance of "unfairness" as a relevant concept in contractual dealings.

Over the years, the common law courts have dealt with this concept particularly in respect of consumer litigation and following decisions that have been clearly based not on strict law but on the criterion of fairness, a contract or a term of a contract may be struck down as being either procedurally unfair or substantively unfair. The concept is now crystallised into statutory law via the CPA as amended by the Consumer Protection (Amendment) Act 2010 where an entirely new PART IIIA has been written in pertaining to unfair contract terms.

Though not tested yet, it would appear that for Malaysian courts the contractual validity of SFCs would, henceforth, be subjected to the rigour of the amended CPA. Reference must first be made to the established jurisdictions and their treatment of the subject of unfairness. In England, the matter is taken as resolved as informed by the dicta of Lord Brightman in *Hart v O'Connor* [1985] AC 1000 at p 1017: A contract may be "unfair" in one of two ways, that is, unfair by reason of the unfair manner in which it was brought into existence or unfair by reason of the fact that the terms of the contract are more favourable to one party than to the other. The first is referred to as "procedural unfairness" while the second as "contractual imbalance." It is arguable that the reference to "imbalance" could be regarded as a throw-back to the doctrine of inequality of bargaining power as championed by Lord Denning in the famous case of *Lloyds Bank Ltd v. Bundy* [1975] QB 326, following the principles as enunciated in the leading American case of *Williams v. Walker-Thomas Furniture Co*., 350 F.2d 445 (D.C. Cir. 1965).

That supposition would, however, be purely speculative because as far as the decision in *Hart v. O'Connor* was concerned there were scarcely any dicta in respect of that still formative principle of bargaining power inequality. With respect, it is argued that if Lord Brightman had intended to refer to just the terms or, by extension, the outcome of the transactions, it would have been more appropriate both semantically and logically to call it "substantive unfairness" or "substantive contractual injustice" rather than "contractual imbalance."

While the dictum appears to have gained currency, nevertheless, it would be erroneous to assume the case itself is authority for the proposition that the English courts are ever ready to adjudicate in favour of contractual avoidance on grounds of unfairness. On the contrary, the Privy Council in this case abandoned the tried and tested principle of equity and good conscience in favour of an outmoded doctrine that recognises the validity of a contract made by a party of unsound mind "where the other party has had no knowledge of the unsoundness even if the outcome would prove to be unfair." The unfairness must be such as to "amount to equitable fraud" before the court could intervene.

The definitions of procedural and substantive fairness are now considered essentially settled. The first relates to fairness in the process leading up to the agreement. That means that "factors that may prevent the consumer from protecting his interests" in the process of entering into the contract would therefore impinge on this "fairness," (Willett, 2007). Procedural unfairness would thus take into account the process of making the contract. Factors such as duress, undue influence, fraud and misrepresentation that are now written into the Contracts Act as factors that would vitiate "free" consent are classic examples of procedural unfairness. Apart from that, informed consent, as discussed earlier, is also a factor, arising from the realities of commercial transactions. The test is the availability of transparent terms the absence which gives rise to a presumption of unfairness. Whether or not a party has sufficient choice in ascertaining the terms and conditions is also a factor which would give rise to an inference on the bargaining strengths of the parties.

As for substantive fairness, it revolves on factors that have a direct bearing on the party's substantive rights and duties qua the signed agreement regardless of the process by which it came about. Substantive unfairness regards the outcome or substance of the transaction. Thus, while one may pass the test of procedural fairness, there is no automatic pass-through via the substantive gate. For example, even where there appears to have been no impediment to reasonable choice or the party has given duly informed consent, the substantive fairness principle may be operative where the court

concurs that there has been a failure to meet the consumer's reasonable expectations. Similarly, even where the conventional vitiating factors are absent, a contract may yet be invalidated on grounds of substantive unconscionability as a form of substantive unfairness.

It is said that the courts tend to ignore substantive unfairness while giving recognition to procedural unfairness because the latter does not involve subjective adjudication which would give rise to controversial implications, (Nurretina & Ayub, 2003). It may be added that this approach is nothing more than giving a literalist interpretation of the standard provisions on consent vitiation in the Contracts Act.

However, it is argued that such a restrictive approach is outmoded today. When the substantive unfairness doctrine was still in its infancy where the principles forming its substratum had not been crystallised, indeed giving pride of place to procedural unfairness was understandable. The rationale was that the court should not go beyond terms and conditions that had been already "formally" agreed upon. The only avenue open was the question of consent and this could only be arrived at via the "procedural door." With such a constrained judicial position, the upshot was the proliferation of unfair terms. Thus, the state had to step in via legislation particularly on the grounds of consumer protection. Mere consent was not good enough because the question of reasonableness of terms and the making of rational decisions continued to escape the short arm of the procedural restraint principle. In any event, the increasing use of SFCs and the frequent invocation of exemption clauses contributed to the rise of unfair terms and consequently led to retaliation by consumers through their associations. In other words, where the courts had either failed or dealt with the problem unsatisfactorily, societal pressure was brought to bear on the state to intervene (Paterson, 2009).

How is the doctrine of procedural unfairness enshrined in the CPA? By virtue of Section 24C, the elements that render a contract procedurally unfair are "unjust advantage" to the supplier or "unjust disadvantage" to the consumer. The circumstances deemed relevant as provided in the section ranging from (a) to (k) are essentially culled from the principles established by case law.

Opacity in the bargaining process leads to a presumption of procedural unfairness. Hence, the requirement of transparency where terms are to be expressed in reasonably plain language, are legible and readily accessible to the consumer (Willet, 2007). In addition to opacity, illegibility and incomprehensibility therefore raise the presumption of procedural unfairness, over and above the requirement for the legal implications of terms being accurately explained to the consumer: section 24C (2) (f) and (i).

The amendment vide s. 24D provides for what appears to be an attempt at a comprehensive formulation of substantive unfairness. Inter alia, where it is harsh, oppressive and unconscionable, purports to exclude liability for negligence or for breach of express or implied terms, or is in standard form, a presumption of substantive unfairness arises. This clearly answers the second question in this study: Are SFCs enforceable as a rule without exception? By virtue of s. 24D, the inverse is true: the mere fact of a contract being in standard form prima facie gives rise to a presumption of substantive unfairness and renders its validity susceptible to being voided. Indeed, read together with s. 24C, s. 24D offers a degree of protection to the consumer against the pervasiveness of SFCs and their adhesion terms and conditions, and allows the consumer the option of voiding them.

4. Critique of CPA in respect of unfairness principle

The CPA (Amendment) Act 2010 is said to be a "major legislative intervention in contractual settings," and timely considering the "widespread use of unfair terms in consumer contracts especially those found in standard form contracts," (Amin 2013). It is said further that the new Act "brings in a new vocabulary of phrases that resonate with the doctrine of contractual justice and ushers in a new episode of judicial pronouncements in the future when relevant disputes arise," (Amin 2013). More significantly, it is contended the introduction of terms such as harsh, oppressive, unconscionable and adequate justification throws open the opportunity for the courts to move with the changing times and attempt a fresh articulation of these principles in the name of pursuing contractual justice.

Indeed, the excitement generated by the CPA is understandably well founded considering that it came at least more than three decades late as compared to other jurisdictions. However, it is to be noted that the new law still suffers from the major handicap of not dealing headlong with the fundamental problem of unfair contract terms by failing to have a clear provision to render a contract or term void by reason of being unfair. Its main drawback is the failure of prescription leaving it a question of discretion for a tribunal or a court to consider the various factors that would constitute unfairness.

For example, it prescribes transparency as a factor to be accounted for but leaves open the question whether failing the test of transparency will, without more, render the contract nugatory. This is because, unlike other jurisdictions, transparency is not a mandatory requirement going by the overall tenor of the statute. Contrast this with the Australian Consumer Law (ACL) where unfair contract terms in SFCs are expressly declared void and the court must have regard to the transparency of the term and the contract as a whole in determining whether a term is "unfair". (The ACL is set out as Schedule 2 in the Competition and Consumer Act 2010 of Australia). On the other hand, Section 24A of the CPA provides that "unfair term"

means a term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer. Read with 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 circumstances under which the contract has been arrived at by the consumer and supplier. In determining whether a term of a consumer contract is unfair under subsection (1), resort may be had to the situations stipulated from (a) to (k). Whereas the CPA stipulates that the terms of the contract must be known and understood, Reg. 7(1) of the UK Unfair Terms in Consumer Contracts Regulations 1999 states that terms offered to consumers in writing "must always be expressed in plain and intelligible language."

Lord Brightman's dictum in respect of "contractual imbalance" in *Hart v O'Connor* is also clearly written into the definition of "unfair": a term is "unfair" when, inter alia, it causes a significant imbalance in the parties' rights and obligations arising under the contract. Part 2-3 Unfair Contract Terms, ACL is in point.

Under the amended CPA, relevant factors determining unfairness include "the bargaining strength of the parties to the contract relative to each other," "reasonable standards of fair dealing" and "whether or not, prior to or at the time of entering into the contract, the terms of the contract were subject to negotiation or were part of a standard form contract," (s 24C (2) (b), (c) and (d).)

The CPA also stipulates a lack of choice as indicative of terms which may have resulted in an unjust disadvantage to the consumer. This would be tantamount to procedural unfairness. Furthermore, as advocated by Shaik in the argument against contractual freedom, the CPA in acknowledging "knowledge disparity" as the main cause of a weak bargaining position, outlines various situations as being relevant for the court's consideration in assessing the relative fairness of a term, (s 24C (2) (a), (h) and (k).) Nevertheless, as there is nothing to suggest that the various factors listed in the newly inserted section are mandatory in rendering a term or contract void, it is contended that it may end up being a dead letter unless specific regulations are put into place to enable businesses to fully and correctly comply with the law, (Amin, 2013)

In terms of efficacy in protecting consumers, the Contracts Review Act 1980 of New South Wales is a good contrast, even though the law is now superseded by the even more sweeping ACL. Regarded at the time it was introduced as "revolutionary" and as a "radical disturbance of time honoured concepts governing contractual relations," (Carlin, 2001) this consumer protection statute cloaks the court with wide powers to intervene in the event that a contract or a provision of a contract is found to be unjust. In this regard, the provisions of the CPA pale before the CRA in the protection of consumers.

Section 7 of the CRA grants jurisdiction to refuse to give legal effect to any provision of a contract, declare a contract is void, vary any provision and, order appropriate changes of instruments in in land contracts. Anticipatory relief is also available such as the restraining of a future course of conduct that is expected to lead to the formation of unjust contracts, and persons who are not parties to contracts as yet may also be bound, *pendente lites*, where those contracts are held to be unjust and relief appropriate. "Clearly, the manner in which a court may intervene into contractual affairs is far broader under the Act than under the general law", (Carlin p. 127).

By virtue of these wide ranging powers of intervention, it is not surprising that it has been opined that the Act "signals the end of much classical contract theory", per Kirby P in *West v AGC (Advances) Ltd & Ors* (1986) 5 NSWLR 610 at 612.

"Unjust" includes unconscionable, harsh or oppressive, and "injustice" shall be construed in a corresponding manner: Section 4(1). Unlike the CRA, the CPA, however, leaves open terms such as "harsh" and "oppressive" being instead left to the court to employ an objective evaluation. It has been suggested that reference to the 1990 Law Commission of New Zealand definition may be useful: an "oppressive" term is one that imposes a burdensome obligation not reasonably necessary to protect the interests of the other party and contrary to commonly accepted standards of fair dealings, (Amin 2013). However, it is indeed puzzling why such a crucial term in a law that purports to protect consumers be left open to speculative interpretation. Furthermore, what was there to prevent the adoption of the Australian position on unconscionable conduct that would indeed settle the issue of what constitutes "harsh" and "oppressive?"

5. Conclusion

A contract entered into where one party, with little bargaining strength, is presented with an ultimatum cannot by definition be said to be arrived at by free consent. By virtue of s 24D of the CPA, a SFC prima facie gives rise to a presumption of substantive unfairness and renders it susceptible to being voided. Nevertheless, while the CPA, particularly after the 2010 amendments, appears to be an earnest attempt at rectifying its initial weaknesses, its effectiveness in providing consumer protection is, however constrained by its failure to go the extra mile in dealing with the problem of SFCs and their inherent unjust features. Recourse to the Contracts Act to resolve the question of unconscionability would appear to be futile under the present judicial attitude towards contractual liability avoidance. In this regard, a two-tiered resolution may be necessary: First, by way of amendments to the Contracts Act in respect of writing into law the doctrine of unconscionability

and secondly, by fine-tuning the CPA to render as *void ab initio* standard form agreements which purport to confer exemption of liability or are manifestly unjust either procedurally or substantively.

References

Barnett, Randy E. "A Consent Theory of Contract." *Columbia Law Review* 86, no. 2 (1986): 269-321.

Calamari, John D. "Duty to Read – A Changing Concept." *Fordham Law Review* 43, no. 3 (1974): 341-362.

Carlin, Tyrone M. "The Contracts Review Act 1980 (NSW) - 20 Years On." *Sydney Law Review* 23 (2001): 125-144.

Cohen, Morris, R. "The Basis of Contract." *Harvard Law Review* 46 (1933): 553-592.

Korobkin, Russell. "Bounded Rationality, Standard Form Contracts, and Unconscionability." *The University of Chicago Law Review* 70, no. 4 (2003): 1203-1295.

Nazura, A. M. "Enforceability of Database Licensing Agreement: A Comparatives (sic) Study Between Malaysia and the United States of America." *Journal of Politics and Law* 1, no. 3 (2008): 102-117.

Nurretina Ahmad Shariff and Ayub, Z. A. "Unconscionable Contracts: The Courts' Approach towards Substantive Fairness." *Malayan Law Journal* 4 (2003): clxv.

Pascoe, Janine. "Statutory Unconscionability and Guarantees." *Bond Law Review* 18, no. 2 (2006): 104-142. Accessed May 19, 2013. http://epublications.bond.edu.au/blr/vol18/iss2/4.

Rakoff, Todd D. "Contracts of Adhesion: An Essay in Reconstruction." *Harvard Law Review* 96, no. 6 (1983): 1173-1284.

Willett, Chris. *Fairness in Consumer Contracts – The Case of Unfair Terms*. Ashgate Publishing Ltd, 2007.

Zahira M. Ishan. and Shaik Noor Alam. "Unconscionability – Statutory Prevention of Unethical Business Practices." *International Journal of Economics and Management* 3, no. 1 (2009): 151-169.