

## Regulating Standard Form of Consumer Contracts: The Legal Treatment of Selected Asian Jurisdictions

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### ABSTRACT

The use of standard form contract is extensively widespread in the era of globalisation. It has now become a predominant feature of many consumer contracts. Although initially it was formed as an agent to facilitate market transactions, it is now seen as hindering the business process and increasing the cost of goods. Its practice in the daily consumer transaction has drawn attention due to its nature and characteristics. Forms contract are not a result of a negotiation process; they are offered on a take it or leave it' basis, they do not require meeting of mind and they are usually not read by consumers. Its contents often consist of unfair terms and exclusion clauses which often give benefits and advantage to the one who prepares the contract. In this new era, the practice of standard form contract reflects a new dimension of oppression of the consumers. It has further eroded the protection of consumers in many commercial transactions. Hence this paper aims at exploring comparatively the legal treatment on standard form contract in the context of consumer trade in selected Asian jurisdictions, namely Malaysia, Israel, Thailand and Peoples Republic of China.

**Keywords:** standard form contract, unfair terms, consumers, Asian countries

### INTRODUCTION

It is undeniable that the corpus of consumerism has now move towards a new dimension particularly in the aspect of consumer protection. In this global era,

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consumer protection enters the new millennium with a more vigorous role in ensuring a fair marketplace and a just and equitable society which resulted in the increased demand for protection. Achieving a fair balance between the needs of market providers and the consumers is indeed a major challenge to law makers. Most of the market transactions failed to distinguish between different categories of market players. In the course of remedying market failure, thus ensuring fair trading environment, one of the most important development in the area of consumer protection in trade is the increasing use of standard form contracts. Its increasing use have now become a predominant feature of many consumer contracts. Indeed, market requires a vehicle through which exchanges can be effectively made. The process of mass production and distribution has introduced the use of standard form contracts as a useful tool in expediting market exchanges and as Furmston<sup>1</sup> put it, “In the complex structure of modern society, the device of the standard form contract has become prevalent and pervasive.”

Standard form of contract stands as the kind of contract with its special features. Although not in themselves novelties, standard form contracts as pointed out by Lord Diplock in *Shroeder Music Publishing Co Ltd v. Macaulay*<sup>2</sup> are of two kinds, namely, those which set out the terms on which mercantile transactions of common occurrence are to be carried out, such as, bills of lading and policies of insurance. “The standard clause in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade.” On the other hand, as a result of the concentration of particular kinds of business in relatively few hands, another kind of standard form contract has emerged; “The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organization representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say; ‘If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.’ Thus in the context of consumer dealings by way of standard form contracts, Tillotson<sup>3</sup> proposed that, “The consumer, who through economic necessity must frequently take rather than leave standard conditions for the supply of essential goods and services, requires that his interest in goods and services of reasonable quality obtainable at reasonable prices and on fair terms be protected.”

<sup>1</sup> M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, Butterworths, 1991, p. 21.

<sup>2</sup> [1974] 1 WLR 308.

<sup>3</sup> J. Tillotson, *Contract law in perspective*, London: Butterworths, 1981, p. 80.

The courts and legislatures in some countries have become increasingly sensitive to the imposition on individuals namely the consumers by business entities, who, by abusing their superior bargaining power, exact unfair contracts from these individuals. Several cases have demonstrated the court's increasing concern, in particular, on the use of standard form exemption clauses in consumer contracts. The essence of this concern was captured in Lord Reid's judgment in *Suisse Atlantique Societe d' Armament Maritime SA v. NV Rotterdamsche Kolen Centrale*;

*Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he read them he would probably not understand them. And if did understand or object to any of them, he would generally be told he could take it or leave it. And if he went to another supplier the result would be the same.*

The same concern was also demonstrated by Donaldson J. in *Kenyon, Son and Craven Ltd v. Baxter Hoare and Co*;<sup>4</sup> "If [the exemption clause] occurred in a printed form of contract between parties of unequal bargaining power, it would be socially most undesirable..."

The aim of this paper is thus to look into the above highlighted issues i.e. the characteristics of standard form contracts and the abuses brought about by its use in consumer dealings. Special regard is given to matters which trigger the mushrooming of standard form contracts in consumer trade. An exposé of the Malaysian position with regard to the legal control of the standard form contracts shall be made with reference to the relevant statutes. Upon ascertaining the Malaysian scenario, a comparative study with selected Asian countries shall be made with a hope of proposing a constructive legal control on standard form contracts in consumer transactions in Malaysia. For this purpose, three jurisdictions has been selected, namely Israel, Thailand and People's Republic of China. Israel has been identified as the only Asian country which has enacted a specific Act of standard form contract, whereas Thailand and People's Republic of China have shown their legal treatment into this issue by having legal provisions of standard form contract either in their Consumer Protection Act or Contracts Act.

## MAIN FEATURES OF STANDARD FORM CONTRACTS

For many decades, the vast majority of market transactions which involve traders and consumers had been executed via standard form contracts. It is well-known that the formation of standard form contract depart from the classical

<sup>4</sup> [1971] 2 All ER 708.

paradigm of contract law in various conspicuous ways which pose serious problems to traditional analysis of contract law.

*The freedom was all on the side of the big concern ... The big concern said, 'Take it or leave it.' The little man had no option but to take it.*

Lord Denning MR

George Mitchell v. Finney Lock Seeds Ltd [1983] 1 AER 109 at 113

The development of standard form contract in this modern society emphasises on the fact that the making of a contract is no longer a purely private act. It may be controlled or even dictated by legislative or economic pressure and it may involve the courts in feats of construction akin to or borrowed from the technique of statutory interpretation.<sup>5</sup> The use of standard form contracts undeniably has several advantages to traders engaging in numerous transactions. Standard form contracts, as Macleod<sup>6</sup> explains, "First...saves the cost of individual drafting and hence time and money. ... Second, the standard form contract has been used to exploit economic advantage." The widespread of standard form contract shows that although the use of standard form contract has the advantages of saving time, trouble and expense in any bargaining over terms, its practice in market transaction has now become a major problem due to its characteristics. Macleod<sup>7</sup> pointed out that the use of a standard form contract to disadvantage the weaker party is particularly the case in respect of those enterprises doing business with the consumer: the terms and price are rigidly laid down, and the only choice available to the individual consumer is whether or not to contract at all.

By looking at the nature of the formation of this type of contract, the obvious disadvantage to consumers can be seen from the drafting aspect where the terms of the contract has been drafted by one party without any negotiation with consumers. Futhermore, apart from its formality in using small print which gives difficulties for consumers to read, it is also stood up on a 'take it or leave it' basis. In this regards, consumers have no say where this scenario clearly resulted into a new form of oppression to consumers.

### **Inequality of Bargaining Power**

With regards to the use of standard form contract, there has long been something of a war of attrition between traders or sellers of goods and their customers. Standard form contract has been seen as evidence of unequal economic power.

<sup>5</sup> Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract*, Butterworth Asia, 1994, p. 71.

<sup>6</sup> J.K. Macleod, *Consumer Sales Law*, Routledge-Cavendish Taylor & Francis Group, 2007, p. 427.

<sup>7</sup> J.K. Macleod, *Consumer Sales Law*, p. 428.

The formation of this type of contract is clearly shown as not been created based on equal bargaining power of each party. The practice of standard form contract nowadays does not suit the idea of an ideal competitive marketplace due to the footing of inequality of bargaining power of both parties. In the ideal competitive marketplace, buyers and sellers have equal bargaining power, so that their decisions to buy and sell are made freely, without coercion or undue advantage. However, the perfectly competitive market of economic theory has yet to exist. According to Mariner:<sup>8</sup>

*There are multiple imbalances between buyers and sellers, in both information and ability to make choices and purchases. Buyers may be disadvantaged in two ways, that is, unable to make a voluntary choice or unable to make a desired purchase.*

In most instances, standard form contract reflects sellers informational advantage on consumers. Consumers who are not aware of all the information and product's characteristics might enter into poor deals. Thus, where the use of this type of contract is accompanied by inequality of bargaining power, there is a greater likelihood of them being used as an instrument of economic pressure because their terms can be weighted in favour of the interest of the stronger parties who prepared them. In this sense, the doctrine of freedom of contract is based on the premise that both parties to a contract are bargaining from position of equal strength where each of them are free to accept or reject any term which is imposed on them in the contract. In reality, it fails to take into account the fact that true equality of bargaining power rarely exist in consumer standard form contracts.

### **Prepared in Advance by One Party on a 'Take-It or Leave-It' Basis**

Realising the current dynamics of global market, parties to any contract cannot afford to waste time, money and effort negotiating details of ordinary transactions. In this context, the speed of transactions is more essential to make the market more efficient. Hence, parties with dominant position in market with profit-aimed target will come forward to draft terms and conditions of each contract to be used in their dealings. This makes the standard form contract well-known as contracts prepared in advance by only one party who is often the organisation or the seller. Oughton and Davis,<sup>9</sup> pointed out the typical

<sup>8</sup> W.K. Mariner, Standards of Care and Standard Form Contracts, (1998) *Journal of Contemporary Health Law and Policy*, 15.

<sup>9</sup> D. Oughton & M. Davis, *Sourcebook on Contract Law*, Cavendish Publishing Ltd, 2000, p. 391.

features of it; a standardized, printed mode, used for all contracts of the same kind, with relatively little variation in a typical case, and with a general requirement to adhere to the terms, however one-sided, laid down by the stronger party.

In consumer transaction, consumer contracts are often prepared by, or on behalf of, suppliers of goods and services on a 'take-it or leave-it' basis.<sup>10</sup> Such contracts are not arrived at through a process of negotiation between both parties but it is based on a 'take-it or leave-it' basis. Negotiating each and every dealing will only defeat the purpose of its nature of saving and reducing costs and time of each parties.

### ***No Consensus Ad Idem***

The classical contract law theory perceps a contract as meeting of minds between two voluntary parties. Principles on the formation of contract law dictates that the parties to a contract must be of the same mind, that there must be *consensus ad idem*. The classical contract theory attributed the creation of a contract and its attendant legal obligations to the will of the parties.<sup>11</sup> What was intended by the parties was said to arise from meeting of the minds. The signs to show the meeting of minds in the formation of contract are the existence of offer and acceptance. These signs are classified as an offer by one party which was then accepted by the other party.

In the context of standard form contract, to establish the meeting of minds, the standard terms used in the offer must be made known to the other party before acceptance takes place. The contract will only be binding if the offeree knows and understands the standard terms used by the offeror. Hence, this give rise to the offeree whether to accept the offer or not. However, the formation of standard form contracts do not require meeting of minds. In most instances, the offer made to consumers consists of terms which are subject to other terms and conditions of a separate contract and this particular contract are not attach to the main contract. This lead to situation where consumers are forced to agree to the terms which are not made known to them which shows an obvious deviation from the basic contract law principles of *consensus ad idem*. Becher<sup>12</sup> viewed that:

<sup>10</sup> P.S. Atiyah, *An Introduction to the Law of Contract*, Clarendon Press Oxford, 1981, p. 14.

<sup>11</sup> P.J Cooke & D.W Oughton, *The Common Law of Obligations*, Butterworths, 1989, p. 26.

<sup>12</sup> S.I. Becher, *Behavioral Economics and Consumer Standard Form Contracts: Imperative Lessons from Behavioral Science*, 2005, Yale Law School Student Scholarship Series, p. 2.

*For many decades, the vast majority of transactions between firms and consumers had been executed via standard form contract. It is well known that standard form contract depart from the classic paradigm of contract law in various conspicuous ways and some of these departures are assumed to pose serious problems to traditional analysis of contract law.*

### **Absence of Freedom of Contract**

In most of the contract law theory, there should be freedom to contract in any form between parties of full capacity. The nature of standard form contract which was prepared by one party indicates that the concept of freedom of contract is no longer in practice. According to Aronstam,<sup>13</sup> the pure doctrine of freedom of contract exists in four distinct senses:

- i. each person should be free to negotiate the terms of their contract without legislative interference;
- ii. where a contract has been entered, the provisions of that contract should not be interfered with and should be given full legal effect;
- iii. a person should be free to select the person with whom he contracts; and
- iv. a person should be free not to contract.

Although the above senses constitute the important element of freedom of contract as a basis in any contract formation, in reality, the practice of standard form contract does not adopt freedom of contract as its characteristic. The standardization of contract greatly restricts the freedom of the weaker party.<sup>14</sup> In standard form contract, particularly in consumer contracts, where the use of this type of contract is accompanied by inequality of bargaining power, there is a greater likelihood of their being used as instruments of economic oppression because their terms can be weighted in favour of the interests of the stronger parties who prepares them. Consumers often have no freedom of choice but to accept all the terms prepared for them. In this context, freedom of choice as to the contractual terms has in many situations ceased to exist.

### **The Use of Small Print**

One of the physical features of standard form contract is the use of small print in its formation. Thorpe and Bailey<sup>15</sup> viewed that the derogatory phrase of

<sup>13</sup> P. Aronstam, *Consumer Protection, Freedom of Contract and the Law*, Juta & Co. Ltd, 1979, p. 13.

<sup>14</sup> W. Friedman, *Law in A Changing Society*, Universal Law Publishing Co. Pvt. Ltd., 2003, p. 130.

<sup>15</sup> C.P. Thorpe & J.C.L. Bailey, *Commercial Contracts*, Kogan Page Ltd, 1999, p. 101.

‘small print’ describes the most common and familiar used of standard terms, which is where a business produces its own standard terms and tries to incorporate them into all of its business transactions or in its dealings with consumers. Thorpe and Bailey pointed out that, “a set of standard terms is, like an elephant, very easy to recognize when you see one. They are usually very lengthy, and they often in a very small print.” Mulcahy dan Tillotson<sup>16</sup> agreed to the fact that all too often, standard terms relating to the crucial rights and duties of the contracting parties are contained in the ‘small print’ of standard form documents.

It is undeniable that most standard form of consumer contracts are using small print which, as one of its characteristics, the use of it gives perception that the effect of the small print is to undermine or even to contradict the terms expressly agreed between them. Generally, the party using such standard terms does not want or intend the other to be aware of their contents, so long as they incorporated into the contract.<sup>17</sup>

## LEGAL TREATMENT OF STANDARD FORM CONTRACTS IN SELECTED ASIAN JURISDICTIONS

### Israel

The Israeli legal system belongs neither to the common law, nor to the civil law families of legal system. It is characterized as belonging to the family of mixed jurisdiction. Israel has supremacy of the law where most areas of Israel law are codified. Legislation in Israel does not supplement case law but it is the basis of the system. The use of standard form contracts in Israel has developed widely and according to Jacobson,<sup>18</sup> almost every person becomes a party to a standard form contract. Realising the fact that this type of contract includes terms which are in favour of one party, the supplier, or impose upon the other party, the customer, unfair, harsh and unconscionable terms, the Israeli Minister of Justice has appointed a committee to advise with regard to possible legislation in relation to standard form contract practices. The committee viewed:

*The best means for the protection of the public at large would be the enactment of a law which would empower the courts or an administrative body to approve or to refuse to approve any restrictive terms of a standard contract.*

<sup>16</sup> L. Mulcahy & J. Tillotson, *Contract law in perspective*, Cavendish Publishing Ltd, 2004, p. 167.

<sup>17</sup> C.P. Thorpe & J.C.L. Bailey, *Commercial Contracts*, 1999, p. 101.

<sup>18</sup> D. Jacobson, *The Standard Contracts Law of Israel (1968)* 12 *JBL* 325.



As a result, the Israeli Standard Contracts Law 1964 was enacted by the Israel Knesset (Parliament) on February 12, 1964. It consists of twenty-three sections, enacted with thorough analysis. Section 1 of the law defines standard form contract as:

*... a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by, or on behalf of, the person supplying the commodity or service with the object of constituting conditions of many contracts between him and persons undefined as to their identity.*

Section 2 of the law requires trader who enters, or intends to enter, into agreements with customers by a standard contract to apply to the Board appointed for the purposes of the Restrictive Trade Practices Law for approval of the restrictive terms of the contract. In other words, this law applies specifically to those terms listed as 'restrictive terms' under section 15:

1. excludes or limits any liability of the supplier towards the customer, whether contractual or legal, which would have existed but for such term; or
2. entitles the supplier to cancel the contract, or vary its conditions or suspend its performance, of his own accord, or otherwise provides for the rescission of the contract, or the abrogation or limitation of any of the customers' rights there under, unless such cancellation, variation, suspension, rescission, abrogation or limitation is conditional upon a breach of the contract by the customer or upon other factors not dependent on the supplier; or
3. makes the exercise of any right of the customer under the contract conditional upon the consent of the supplier or of some other person on his behalf; or
4. requires the customer to resort to the supplier or to some other person in any matter not directly connected with the subject of the contract or makes any right of the customer under the contract conditional upon such resort or limits the freedom of the customer to enter into an agreement with a third party in any such matter; or
5. constitutes a waiver by the customer in advance of any of his rights that would have existed under the contract but for such term; or
6. authorizes the supplier or some other person on his behalf to act in the name of the customer or in his stead for the purpose of realizing a right of the supplier against the customer; or
7. makes accounts or other documents prepared by or on behalf of the supplier binding on the customer, or otherwise imposes on the customer a burden of proof which would not have been on him for such term; or
8. makes the right of the customer to any legal remedy dependent on the fulfillment of a condition or the observance of a time-limit, or limits the customer with regard to arguments or to the legal proceedings available to him, unless such term be an arbitration clause; or

9. refers a dispute between the parties to arbitration in such manner as to give the supplier more on influence than the customer on the designation of the arbitrator or arbitrators or the place of the arbitration or entitles the supplier to choose, of his own accord, the court before which the dispute is to be brought.

Besides the Israeli Standard Contracts Law 1964, being a country which uphold consumer protection as their most primary concern, Israel also has enacted the Consumer Protection Law 1981. Although the 1981 Law contains no provision which directly touches on standard form contracts, it however has strict provisions as to the seller's obligations towards consumers. Section 3 of the Act states that:

*A dealer shall do nothing by an act or an omission, in writing or by word of mouth or in any other manner which constitutes taking advantage of a consumer's distress, mental or physical weakness, ignorance, lack of knowledge of a language or inexperience or the exertion of undue influence upon him, all in order to conclude a transaction on abnormal or unreasonable terms or to obtain a consideration exceeding the normal consideration.*

The above-mentioned legal provision directly shows that Israel is very focused in combating the widespread of standard form contracts. The use of a specific legislation by Israel as a resolute step towards achieving their great goal, that is, to achieve a higher standard of justice in their normal business relations should be seen as a welcoming form of regulating the use of standard form contract.

## **Thailand**

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 recognise the common law principles of binding judicial precedent. However, certain persuasive decisions of the Supreme Court are published in the Supreme Court Law Reports.

In relation to standard form contract, Thailand has no specific provisions in any regulations pertaining to its practice. However, analysis of its legislation shows that it give 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 treat standard form contract as a dual issue which falls under consumer law and contract law. As a remedial measure, Thailand 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 has been enacted to uphold legal principles in relation to juristic acts and those contracts which are based on

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. Standard form contract has been defined under section 3 of this Act as:

*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 advantage 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 rate of interest exceeding fifteen percent per year;
- g. Terms in a hire-purchase contract which prescribed excessive hire-purchasing price or which imposes unreasonable burdens on the part of the hire-purchaser;
- h. Terms in a credit card contract which compels 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 cause the consumer to bear excessive burdens.

It is undeniable that all the above terms are common terms which are often been used in 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 consist 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 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 business that brings problem to consumers, thus its practice has been treated as business that requires special attention of the Committee.<sup>19</sup>

Thus, the enactment of the above two Acts 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 (B.E. 2540) 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 (B.E. 2541) creates one governmental organ which is administrative in nature, with its function to detect and identify the existence of the unfair contract terms.

### **The People's Republic of China**

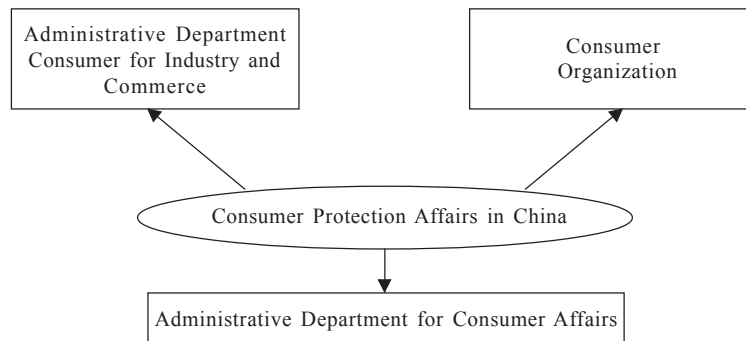
The design of the legal system of the People's Republic of China has its own characteristic. It contains not only the inheritance and development through history of China's legal system, which is the component part of Chinese traditional culture of great significance in the world, it also includes the inheritance and development of the legal system in the revolutionary bases led by the Communist party.<sup>20</sup> In this new decade, the present Chinese Constitution remains the highest law which holds the highest binding power in China.<sup>21</sup>

<sup>19</sup> Thirawat, *International Symposium on Economic Law Reform in the Aftermath of Asian Crisis: Experiences of Japan and Thailand*, 2000.

<sup>20</sup> Kui Hua Wang, *Chinese Commercial Law*, Oxford University Press, 2000, p. 13.

<sup>21</sup> The present constitution was formulated through nationwide discussion where after two years of discussion and revision, the draft was finally approved and made public by the Fifth National People's Congress at its Fifth Session on December 4, 1982.

In the aspect of consumer protection, the duties to protect the rights and interests of their consumers are laid down in Article 6 of The Law of The People’s Republic of China on the Protection of Consumer Rights and Interests 1994. It remains as a social responsibility in their society which must be upheld by each of their citizens. The consumer protection affairs in China are placed under the administration of three separate bodies, namely the Administrative Departments for Industry and Commerce, the Consumer Organisation and the Administrative Department for Consumer Affairs. The following diagram illustrates the structure of consumer affairs in China:



Besides the above structural body to protect their consumer affairs, there is also a more friendly mechanism used in China where through the Hotline 12315, at any point of time, the consumers can address their complaints to this hotline as to any dissatisfaction over any items or services that they received. By dialing the hotline number, consumer’s complaint will be forwarded to the relevant body who tries to settle them at this stage.

As regards to the unfair contract terms in consumer transactions, the practice of standard form contracts which covers the use of unfair terms in contract has been identified as contracts which have negative impact on their consumers. At present, the law of contract in China is governed by the Contract Law of The People’s Republic of China 1999. As a whole, it does not only focus on the contractual issues but it also has provisions on consumer protection where principles of contract have been used as its foundation. Contract Law of The People’s Republic of China 1999 contains 428 Articles and 23 Chapters which covers the detailed of contract rules as to its formation, implementation, remedies and many others. As regards to standard form contract, there are four articles which directly touch on this matter. Article 39 emphasises on the two important criteria of fairness and notification, which must be fulfilled by those who prepare the standard terms of contract. It states that:

*Where a contract is concluded by way of standard terms, the party supplying the standard terms shall abide by the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other's attention to the provisions whereby such party's liabilities are excluded or limited and shall explain such provisions upon request by the other party.*

Standard terms are defined under this Article as:

*Contract provisions which were prepared in advance by a party repeated use, and which are not negotiated with the other party in the course of concluding the contract.*

Under the heading 'Invalidity of Certain Standard Terms', Article 40 of the Act provides that:

*A standard term is invalid if it falls into any of the circumstances set forth in Article 52 and Article 53 hereof, or if it excludes the liabilities of the party supplying such terms; increases the liabilities of the other party, or deprives the other party of any or its material rights.*

Article 52 further lays down the grounds for the invalidity of the standard terms in contract as shown in the Table 1:

**Table 1** Invalidity of Standard Terms (Article 52)

<b>Elements</b>	<b>Invalidate Circumstances under Article 52</b>
fraud or duress	one party induced conclusion of the contract through fraud or duress thereby harming the interests of the state
bad faith	the parties colluded in bad faith, thereby harming the interest of the State, a collective or any third party
illegal purposes	the parties intended to conceal an illegal purposes under the guise of the legitimate transaction
harms public interest	the contract harms public interests
violates mandatory provision or regulation	the contract violates a mandatory provision or administrative regulations.

The use of exclusion clauses is also treated as invalid terms where Article 53 under the heading of 'Invalidity of Certain Exculpatory Provisions' provides that:

The following exculpatory provisions in a contract are invalid:

- i. excluding one party's liability for personal injury caused to the other party;
- ii. excluding one party's liability for property loss caused to the other intentional party misconduct or gross negligence.

Besides having the Contract Law of The People's Republic of China 1999 which addresses the existence of provisions of standard terms which are unfair, protection to consumers is also given under the Law of The People's Republic of China on the Protection of Consumer Rights and Interests 1994. Although this particular Act is silent on the use of standard form contract, it nevertheless specifies several rights of consumers which obviously must be present in every consumer's transaction in market. Article 7 of this Act states that:

*Consumers enjoy the rights of personal and property safety from violation when they buy or use commodities or receive services. Consumers are entitled to demand business dealers to supply commodities and services up to the requirements of personal and property safety.*

Rights of free choice which upheld the principle of freedom of contract is also part of the mandatory rights given to consumers. Article 9 of this Act states that:

*Consumers enjoy the rights of free choice of commodities of services. Consumers are entitled to free choice of business dealers for supply of commodities or services, free choice of the kinds of commodities or the ways of services and free decision of buying or not any kind of commodities or accepting or not any item of services. Consumers are entitled to make comparisons, differentiations and selections when they are making free choice of commodities or services.*

Rights to fair deals are also given to consumers under Article 10 where provides that:

*Consumers are entitled to obtain prerequisites for fair deals such as guarantee of quality, reasonable price and correct measures, and to refuse compulsory transactions by business dealers.*

Thus, the practice of unfair terms in standard form contract clearly demonstrates the violation of all the three rights mentioned above. As a conclusion, analysis made on the law and the structure of consumer protection in the People's Republic of China gives us a clear impression that although China is well known as a country with a large population, yet it gives strong emphasis on its consumers' affairs and welfare through its legal mechanism.

### **Malaysia: The Proposed Reform**

As the use of standard form consumer contracts has become widespread, judicial control and legislative intervention are warranted. As pointed by Atiyah,<sup>22</sup> it is

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<sup>22</sup> P.S. Atiyah, *An introduction to the law of contract*, 1971.

important not to underestimate the magnitude of this problem and the extent to which these standard form contracts are undermining the theory and the doctrine upon which contracts are based.

*The average citizen will certainly find that the vast majority of the most important contracts he makes in his life are made on terms more or less imposed on him. For example if he buys a house, he has to agree to the terms stipulated by the housing developer; if he buys goods on hire-purchase he is subject to the terms of the agreement drafted by the finance company; if he wants essential services, like water, electricity and telephone he is again subject to the conditions stipulated by the relevant authorities. If he wishes to travel by train, he is subject to the conditions stipulated by the Railway Ordinance or if he wishes to post a parcel he is again subject to the conditions in the Post office Ordinance. There are but a few of the more important types of contracts which any ordinary citizen enters into. In all such cases he has absolutely no bargaining power as against the powerful authorities. He merely has to adhere to the standard form contract which has been drafted by the stronger party. His choice is merely Hobson's. Where then is the freedom to contract? Perhaps we are not that far from the time alluded to by Sir Hughes Parry,<sup>23</sup> "...when the whole structure of contract law, with its preconceived ideas and nineteenth century doctrines, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures."*

The emergence of the new market ideology and the rise of paternalism in certain matters have been ignored in Malaysia. The current law of contract has not been a great champion of the rights of consumers. The greater bargaining power of most traders or suppliers has enabled them to impose terms in contracts by the use of standard form contracts. In Malaysia however there has never been an attempt to regulate this kind of contract. The current law of contract has not been a great champion of the rights of consumers. The greater bargaining power of most traders or suppliers has enabled them to impose terms in contracts which may negative their liabilities. Consumer contracts in Malaysia are governed mainly by the Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999.

The Contracts Act 1950 contains no single provision on standard form contract, either on content of a contract nor on standard form terms. Perhaps the reason being, as pointed out by Nik Ramlah Mahmood:<sup>24</sup>

<sup>23</sup> Hughes Parry, *The sanctity of contracts in English law*, Hamlyn Lectures, 10<sup>th</sup> Series, 1959, p. 71.

<sup>24</sup> Nik Ramlah Mahmood, Unfair Terms in Malaysian Consumer Contracts – The Need for Increased Judicial Creativity, *Asian Seminar on Consumer Law*, 9-12 August 1993, Kuala Lumpur.



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

In the context of sale and purchase of goods, the Sale of Goods Act 1957 allows the use of exemption clauses in trade, a term most commonly used in standard form contracts. Despite the introduction of the Consumer Protection Act 1999 (CPA) which objective is to give protection to consumers, it nevertheless transpires that the issue of standard contract which is used to contain unfair terms remained unsolved. CPA itself does not regulate standard form contracts as such. Although it was introduced to afford consumer a better protection in trade, the CPA is very limited in its application, by virtue of section 2<sup>25</sup> and as the term 'consumer' is narrowly defined by the Act. Although section 6 of CPA prohibits contracting out of the provisions of the Act, it fails to cover the wide spectrum of exclusion clause which is a common feature of any standard form of consumer contracts.

With the rise of consumerism in many countries, the 20<sup>th</sup> century had seen paternalistic approach in consumer protection. The old adage of 'let the buyer beware' no longer applies to consumer transactions as courts gradually began to turn to ways and means to protect the weaker party in the bargain. In many countries both the legislature and the judiciary have adopted a new attitude in promoting the consumer welfare. Nevertheless the same is not true in Malaysia. Lack of legislation in this area of the law should justify the courts taking a stricter view on unfair terms in standard form contracts 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 standard form 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. The case law development and the lack of regulation on standard form consumer contracts in Malaysia have shown grave concern for the consumers. Hence, the government of Malaysia is called upon to play their paternalistic role in curbing the harshness brought about by the use of standard form consumer contracts. The enactment of the Contracts Act 1950, the Sale of Goods Act 1957 and the Consumer Protection Act 1999 shown that it has not done justice to this area of the law. The absence of specific and stifling provisions

<sup>25</sup> Section 2 of CPA provides that the application of the Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations.

in for example the Contracts Act 1950 seemed to be regarded, in the majority of cases, as a *carte-blanche* to uphold unfair terms in consumer contracts. The legal regime of Israel, Thailand and the People's Republic of China as demonstrated above have come to recognise the use of standard form consumer contracts as a threat to consumers and to ethical trading environment and thus the necessary protection by way of legislation was accordingly provided. It is timely then for Malaysia to follow suit in this area to enable consumers to be protected from abusive, manipulative, notorious and unfair terms in trade. Any delay in this new law is justice delayed to the Malaysian consumers.

Based on the experiences of the selected Asian countries, there are thus several alternatives open to Malaysia in regulating standard form consumer contracts:

- a. Amending the Contracts Act 1950 by adding provision(s) on standard form consumer contracts. The problem with this alternative is the general nature of the 1950 Act. It does not have specific provisions dealing with contents or the terms of a contract.
- b. A specific legislation on standard form consumer contracts with specific provisions on form and content of the said contract. This method of regulating standard form contracts is regarded as the best method for Malaysia, bearing in mind the limitations of other legislations; or
- c. Consumer Protection Act 1999
  - i. Adding a part on unfair terms in the 1999 Act; or
  - ii. Enacting a regulation on unfair terms under section 150 of the 1999 Act.

It is thus recommended that a combination of the salient features of the Israeli model (Standard Contracts Law 1964), Republic of China model (Contract Law of The People's Republic of China 1999) and the Thailand's Unfair Contract Terms Act 1997 be incorporated into the proposed legislation in Malaysia.

## CONCLUSION

Traders have created an absolutely 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 their unequal partner, 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 'standard form contracts'. The problem posed by the use of standard form contract has long been haunting the public at large. In this complex structure of modern society, the device of the standard form contract has become prevalent and pervasive. In consumer transactions however, this type of contract has often been used as a tool of oppression and abuse of

consumer rights. The abuses in the use of this kind of contract in consumer dealings have called for a paternalistic role of the government, thus requiring some form of legal intervention. A central issue in consumer law throughout the world has concerned the regulation of standard form contract and in particular the use of unfair terms in consumer contracts. Legal mechanism has known to be the best treatment to this issue. In Malaysia, the legal development in this area appears to be minimal. Lack of regulation has to some extent contributed to this malignant spread of abuses in the use of standard form contracts. Realising the fact that countries such as Thailand, Israel and Peoples Republic of China have given legal treatment to this issue by enacting provisions pertaining to it, therefore, there is a need to protect the interests of Malaysian consumers against the more glaring abuses of standard form contracts. Indeed, enacting specific laws pertaining to the practice of standard form contract will be the best solution to this problem.

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