

Reforming Unfair Terms in Consumer Contracts: A New Challenge.

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We confirm that the work herein submitted is our own and that appropriate credit has been given where reference has been made to the work of others.

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In the name of Allah the Lord Most High and Most Merciful,

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CHAPTER 1 – RESEARCH PROPOSAL

1.1 Introduction

1.1.1 Background

An apt introduction to a legal research proposal, we think, ought to commence with the areas of law intended to be examined in the proposal. These areas are, *inter alia*, consumer protection law and contract law, with exclusion clauses specifically getting the highlight in the latter.

The inspiration for this topic traces its origins back to research done by one of us involved in the law faculty's first ever moot competition back in 2006. At the time one of the issues the moot problem was concerned with was the applicability of exclusion clauses in limiting and mitigating liability of a party privy to a contract for any breach suffered. Upon investigation, it was found that exclusion clauses was a common practice by businesses to limit the extent of their responsibility towards the consumer by incorporating clauses to the effect in standard form contracts drawn up on behalf of the businesses. These contracts would then operate in a way detrimental to the consumer by ousting normally applicable common law rights regarding the merchantability of goods. This situation, although inexpedient, has come to be tolerated because of the unequal bargaining positions of both the business and the consumer, with the business indubitably being placed on the higher pedestal. As Visu Sinnadurai reports in his book, *Law of Contract*¹ the only extent to which the law in Malaysia controls this practices is via the position of the courts in local common law, and this includes such a clause having to satisfy generally only three requirements, namely adequacy and contemporaneousness of notice, clarity of provision and interpretation in the consumer's favour in such an absence of clarity². This is similar to the position in England on the same subject prior to 1977. In England however, although attempts by Lord Denning to formulate a stricter regime (including a test of reasonableness) were rejected³, the position did improve somewhat with the enactment of the Unfair Contract Terms Act 1977, which provided power for the courts to invalidate outright

¹ Visu Sinnadurai, *Law of Contract*, 3rd Ed, Lexis Nexis Butterworth, 2003.

² Note 1, page 198-199.

³ Ewan McKendrick, *Contract Law : Text, Cases and Material*, 2nd Ed, Oxford University Press, 2005.

certain exemption clauses attempting to oust risks related to death or personal injury, and subjecting others to a reasonableness test. This development, although beneficial, especially as regards consumer protection, was unfortunately not followed in Malaysia, and this has left Malaysian consumer protection law with much to be desired as a result.

1.1.2 Abstract

Another piece of legislation governing unfairness of exclusion clauses in the United Kingdom is the Unfair Terms in Consumer Contracts Regulations 1999, which implement the European Union Directive on Unfair Consumer Contract Terms (Directive 93/13/EC) into English law. These Regulations, enacted pursuant to the European Communities Act 1972 which in turn empowers Britain to implement European Union obligations, overlap somewhat with the Unfair Contract Terms Act 1977 with regard to limiting the effectiveness of exclusion clauses against the consumer, but are not limited to those.⁴ The Regulations also empower consumers to apply to strike out offending terms in their contracts for purchase of goods with businesses, and also empowers the UK Office of Fair Trading (OFT) to apply to the courts for injunctions against the continued use of unfair contract terms by businesses in their standard form contracts. It should be stressed that this research in no way extends beyond exclusion clauses for one, and consumer protection on the other, as clearly will be indicated in the limitations chapter of this proposal.

As enumerated, this is a legal research proposal commissioned by us four, that is, the researchers, with the stated aim of looking into the current United Kingdom position vis-à-vis exclusion clauses in contracts between businesses and consumers, and study the feasibility of importing this position into the Malaysian context. The United Kingdom position on exclusion clauses will be examined and evaluated, and a feasibility study having regard to its applicability in Malaysia will be made. Eventually it is hoped that our findings will enable us to recommend in favour of such a move, and we hope even to draft our own Unfair Contract Terms Bill to be included within our eventual report on the research. This Bill will complement other Acts of Parliament in Malaysia that already go towards protecting consumers, such as the Sale of Goods Act 1957 and the Consumer Protection Act 1999, by providing the same protection the English

⁴ Wikipedia, *Unfair Terms in Consumer Contracts Regulations 1999*, Accessed 22 March 2008.