

STANDARD CONSUMER AGREEMENTS*

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ABSTRACT

The use of standard form contract is extensively widespread in the era of globalization. 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. It is known as a contract which was prepared by one party without any negotiation between the parties and its formation is based on a 'take it or leave it basis.' 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, standard form contract reflects a new dimension of oppression of the consumers. The rise of this type of contract to deprive consumers of their rights have indeed inspired the laws in many countries to react against the increasing decline of the individual's capacity to make a free choice and bargain.

INTRODUCTION

Consumer protection enters the new millennium with a more vigorous role in ensuring a fair marketplace and a just and equitable society. 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, 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. 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 Furmston¹ put it, "In the complex structure of modern society, the device of the standard form contract has become prevalent and pervasive."

Although not in themselves novelties, standard form contracts as pointed out by Lord Diplock in *Shroeder Music Publishing Co Ltd v. Macaulay*² 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, Tillotson³ 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."

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

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

² [1974] 1 WLR 308

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

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' Armement 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 he 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*⁴; "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 identifying the extent of legal protection given to consumers in those respective countries

1. Reasonable Notice:

It is the prime duty of the person delivering the document to give proper notice to the offeree of the printed terms and conditions, especially ones which can create a situation of ambiguity. Where this is not done, the acceptor will not be bound by the terms of the contract. The same was laid down in *Henderson v Stevenson* by the House of Lords:

The plaintiff brought a steamer ticket on the face of which was these words only: "Dublin to Whitehaven"; on the back of the ticket certain conditions were printed which excluded the liability of the company for any loss, injury or delay to the passenger or his luggage. The plaintiff did not see the back of the ticket and was unaware of these conditions and nor were they brought to his notice. The plaintiff's luggage was lost in shipwreck caused by the company's fault. He was held entitled to recover the loss in spite of the exemption clauses because the same were not brought to his notice.

The case would have been entirely different if the terms would have been to the notice of the plaintiff eg : through the words "For conditions see back". This was clearly stated in the subsequent case of *Parker v South Eastern Rly Co.*

The plaintiff deposited his bag at the cloakroom at a railway station and received a ticket, on the face of which were printed, among other words, "see back" and on the back there was a notice that "the company would not be responsible for any package exceeding the value of £ 10". A notice of the same was hung up in the cloakroom. The plaintiff lost his bag and claimed full value of the same. The company relied upon the exemption clause. The plaintiff contended that although he knew that there was something written on the ticket he did not bother to read it. The ticket was a mere receipt for him.

Mellish LJ stated that if the plaintiff "knew there was writing on the ticket, but he did not know or believe that the writing contained conditions, nevertheless he would be bound", for there was reasonable notice that the writing contained conditions.

2. There Should Be A Contractual Document

Now, the dilemma was that to apply this principle, the courts had to clearly distinguish between contractual documents and receipts. Mellish LJ clearly solves this problem in *Parker v. South Eastern Railway Co.* and the conclusion was that a document was said to be contractual if it embodies the contract, that is to say, of the persons to whom it is delivered should know that it is supposed to contain conditions. But if the paper does not express or imply conditions of the contract then it will be regarded as a voucher, receipt etc. In *Chapelton v Barry Urban District Council* the same was reiterated. To bring the exemption clause to the notice of the receiver, Lord Denning MR remarked in *Thornton v Shoe Lane Parking Ltd* : "In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it, or something equally startling". If this is not done then the agreement would not form part of the contract. One can clearly distinguish between a contractual document and a receipt from the following passage:

"The document must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions. Thus a cheque-book, a ticket for a deck chair, a ticket handed to a person at public bath house, and a parking ticket issued by an automatic machine have been held to be cases where it

⁴ [1971] 2 All ER 708

would be quite reasonable that the party receiving it should assume that the writing contained no conditions and should be put in his pocket unread.”

Contract signed by the Acceptor

It was laid down in *L'Estrange v Graucob Ltd* that when a party signs a written contract thereby accepting it, he becomes bound by all its terms whether he has read it or not. But in such cases the affected party can be protected by the doctrine of fundamental breach or by finding that the terms are unreasonable or that there was a misrepresentation about them.

3. There Should Be No Fraud Or Misrepresentation:

The leading authority in the case of misrepresentation is *Curtis v Chemical Cleaning & Dyeing Co.* : The plaintiff delivered a white satin wedding dress to the defendant for cleaning. She was asked to sign a receipt, which made her responsible for any damage to beads and sequins, which she did without reading the receipt. Now, the receipt contained a clause that excluded the company from any damage to the dress. When the dress was returned there was a stain on it. When plaintiff sought damages the defendants pleaded the exemption clause.

Even though the acceptor had signed the document, the defendants were held liable and the reasoning was that A party to the contract cannot rely on the exclusion clause to avoid liability or misrepresentation or fraud. The same was held in *Chau v Van Pelt*. A rule, which is a modern development in this regard, is stated in American RESTATEMENTS OF CONTRACTS. It stated that when the other party has a reason to believe that the party manifesting written assent would not do so if he knew that the writing contained a particular term; the term is not a part of the agreement.

4. The Notice Should Be Contemporaneous With The Contract:

The reasonable notice of the terms should be given before or at the time of the contract. A subsequent notification would amount to modification of the original contract and will not be binding on the other party unless he has given his assent for the same. Now, when the contract materializes by the issue of a ticket by an automatic machine, the dilemma faced is that whether the notice printed on the ticket has been given contemporaneously with the contract or subsequent to it. Lord Denning MR. considered this matter in *Thornton v Shoe Lane Parking Ltd*. The theory in case of tickets issued by clerks is that the company makes the offer of the ticket and the customer by paying for the ticket without objection accepts it with all its terms. He has a chance to reject the ticket. But where the ticket is issued by an automatic machine, the customer cannot refuse it. He is committed the moment when puts his money into the machine. The contract is then made. The terms of the offer are contained in the notice placed on the rear of the machine. The customer is bound by its terms if they are sufficiently brought to his notice beforehand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the contract has already been made and the ticket comes too late. The ticket is therefore no more than a receipt for money. Hence, it is the duty of the party relying on the exclusion clause to make the terms and conditions clear to the other party at the time of contract that the same has been incorporated into the contract.

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 has shown a very alarming development which give more light to the area of consumer protection, specifically the implication of standard form contract in consumer transactions. The enactment of Part 111A of the Consumer Protection (Amendment) Act 2010 has to some extent contributed to the legal protection mechanism to Malaysian consumers. The experience of Israel and Thailand, in countering this problem through legal enforcement could best be taken as a motivation factor for Malaysia in regulating the use of standard form contract in consumer transaction.