Asian Journal of Accounting and Governance **2**: 61–65 (2011) ISSN 2180-3838

Towards Harmonisation of the Asean Contract Law: The Legal Treatment of Unfair Consumer Contract Terms Among Selected ASEAN Member States

Azimon Abdul Aziz*, Suzanna Mohamed Isa, Sakina Shaik Ahmad Yusoff & Ong Tze Chin

ABSTRACT

The rise of standard form contracts and the use of unfair terms to deprive consumers from their rights have indeed inspired the law in many countries to react against the increasing decline of the individual's capacity to make free and rational choice. The legal development in this area illustrates the role of contract law, that is, to develop criteria and procedures through which contractual fairness can be assured. The development of contract laws throughout the Southeast Asian region is impacted by the tremendous historical and social diversity among the various countries, as demonstrated by the Malaysian, Singaporean and Bruneian contract laws, which reflect English common law due to historical development. However, countries such as Indonesia have been profoundly affected by long periods of civil law influence. The experience of the common law countries of the ASEAN member states in controlling the use of unfair terms in consumer contracts demonstrate a different regime of protection as opposed to the civil law countries. Harmonisation of ASEAN contract laws is essential for the regional cooperation of ASEAN countries in order to accelerate the economic growth, social progress and cultural development of the region. Bringing harmony between various contract laws of ASEAN countries would enhance economic prosperity as the laws of contract serve the economical and cultural values of society, in particular, consumer protection. Adopting the content analysis method, this paper aims at exploring the legal treatment of unfair terms in consumer contracts among the selected ASEAN member states. The paper will discuss and analyse the legislative provisions on unfair terms in Singapore, Brunei and the Philippines, focusing both on the legislative provisions as well as the judicial treatment of these terms. An analysis in the legal treatment in these three countries will then be undertaken in respect of harmonizing ASEAN contract law. The legal regime of all three countries reflects that the statutory control of exemption clauses in Singapore, Brunei and Philippines has taken many forms, however, since there are common features in the legislation, harmonizing it in respect of consumer protection can be achieved by reasonable compromises among the member states.

Keywords: Unfair terms; consumer; contract law; common law; ASEAN

Introduction

The Association of the Southeast Asian Nations, commonly known as ASEAN, is an economic group of ten countries in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam (Leong 1998). Among others, the aims and purposes of ASEAN include the acceleration of economic growth, social progress and cultural development among its member states, the promotion of regional peace and stability, the promotion of active collaboration and mutual assistance on matters of common interest, the assistance and collaboration among member states so as to maintain close and beneficial cooperation among member states.

The ASEAN market is a market of vast potential with a population of approximately 590 million consumers and a combined GDP of US$1.7 billion. The change in the global legal and economic environment of ASEAN countries has led to the need to develop a sustainable regional market in order to remain competitive in the world economy (Thanadsillapakul 2004). Deeper economic integration among ASEAN's member states is necessary in order to facilitate the free movement of goods, capital, services and labour and create a more favourable consumers' market to enhance free economics. The harmonisation of laws is necessary to further eliminate barriers to trade and investment to encourage economic activities within the regional market. Regional harmonisation of contract laws, in particular, consumer contracts, would provide an effective protection for the consumers in the ASEAN market, which, in turn, will provide self-confidence to the traders and investors in the regional market.

In order to achieve the aims and purposes of ASEAN, ASEAN leaders are committed to establish an ASEAN Community that contains three pillars, namely, the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community, where each pillar has its own Blueprint. ASEAN Member States

formulated these Community Blueprints to accelerate the formation of the ASEAN Community by 2015. According to the ASEAN Economic Community Blueprint, section B2 clause 42, consumer protection is important in building an integrated economic region with a people-centred approach. Thus, the resolution to harmonise unfair contract terms under the auspices of the ASEAN Economic Community is indeed a good way forward.

Regional Harmonisation

The globalisation of international trade has led to the harmonisation of laws at the international level through international instruments, such as the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), the 1988 UNIDROIT Convention on International Financial Leasing and International Factoring, the 2001 Cape Town Convention on International Interest in Mobile Equipment with its associated Aircraft Equipment Protocol and the 2002 Hague Convention on law applicable to certain rights in respect of securities held with an intermediary. However, harmonisation of laws at the international level is always lengthy as it involves the infusion of many experts' opinions and is time consuming and costly. It is a process that should not be taken lightly as bringing harmony between various national laws is not an easy task. Moreover, these international instruments are often the product of international political influence, hence, the interests of countries such as those within ASEAN are often neglected.

In many instances, the process of harmonising international instruments, such as contractual obligations, causes conflict with the local application as the economic and cultural values of the society may differ. The law of contract is responsive to the social, cultural and economic background of a country, for example, contract law that is suitable for a country with a small volume of international financial transactions is not similar to the world's leading financial centres (Goode 2003). Likewise, a country's legal system that is strongly based on the concept of *laissez-faire* and self-help in commercial transactions is different from a country's legal system that is opposed to self-help remedies. Moreover, the western social, cultural and economic values are very different to the values in Southeast Asian Nations. Therefore, harmonisation of contract laws at the international level would not necessarily benefit ASEAN countries. Regional harmonisation, which underpins the gradual process of social, cultural and economic values of ASEAN countries, is more promising as ASEAN countries share an understanding of each other.

Harmonisation of Asean Contract Law

The effort of harmonising contract law in ASEAN ought to be followed by the implementation of member states into their respective national laws, despite the diversity of civil and common law in this region. Besides becoming a new cultural asset of enormous value for the ASEAN countries, the experience gained from such a harmonisation exercise at both the national and regional levels will further facilitate economic integration, active collaboration and mutual assistance among ASEAN member states (Kusuma-Atmadja 1996). In addition, it will also enhance the development of existing legal principles and provide a background for the interpretation of national and regional laws, which, in turn, would encourage further harmonisation of the region's contract law. The uniform principles may serve as a model law that could inspire legislators who strive for law reform (Hartkamp 2002). It may also facilitate ASEAN member states in modernising their existing legislation by using common regional standards as an inspiration. Furthermore, it may serve to enlighten parties negotiating a contract in order to identify the problems to be resolved in their contract and, possibly, to find suitable rules to settle them.

Regional harmonisation will encourage economic activities within ASEAN member states and the parties to a contract may be able to choose regional principles of contract law over international principles. As the international principles might not serve the common interests of ASEAN member states, regional principles will be more suitable for regional contracting parties. The parties to a contract may also choose to submit future disputes to the regional dispute resolution mechanism instead of arbitration. This will also provide a positive tendency for arbitrators to rely on regional principles of contract law rather than national laws. Additionally, regional principles of contract law will present an important academic and educational value to ASEAN member states.

The harmonisation of ASEAN contract law in a common area of importance, such as consumer protection, could be achieved through reasonable compromise. As the area of harmonisation contains only a relatively small part of the law, there will always be room for national law and legal idiosyncrasies. In conclusion, harmonisation of unfair consumer contract terms among ASEAN member states would demonstrate better substantive protection of the consumer.

Legal Regime of Unfair Consumer Contract Terms in Selected Asean Countries

SINGAPORE

The historical origin of Singapore has proved that as a result of being a British colony for nearly 150 years, English law continues to have a significant influence on Singapore law. Hence, the English common law system is the most important legal aspect to this country. This system comprises both written and unwritten law. According to Section 2(1) of the Singapore Interpretation Act 1965, the written law consists of the Federal Constitution, Acts of Parliament, Ordinances and Subsidiary Legislation,

whereas the unwritten law refers to those laws that have not been enacted and put in writing. The unwritten law in Singapore basically comes from case law and its custom. The law of contract in Singapore is based on the common law of contract in England. After its independence in 1965, Singapore's Parliament did not make any attempt to codify their law of contract. Accordingly, much of Singapore's law of contract remains in the form of judge-made rules of which some have been modified by specific statutes in England. As a result, 13 English commercial statutes have been incorporated as part of the Statutes of the Republic of Singapore by virtue of Section 4 of the Application of English Law Act 1993.

The statutory law in Singapore relating to exemption clauses is essentially based on English law. The UK Unfair Contract Terms Act 1977, which either invalidates an exemption clause or limits the efficacy of such terms by imposing a requirement of reasonableness, has been re-enacted in Singapore as the Unfair Contract Terms Act (as Cap 396, 1994 Rev Ed). It should be noted that the Unfair Contract Terms Act 1994 generally only applies to terms that affect liability for breach of obligations that arise in the course of a business or from the occupation of business premises. It also gives protection to persons who are dealing as consumers. Under the Unfair Contract Terms Act 1994, exemption clauses are either rendered wholly ineffective, or are ineffective unless shown to satisfy the requirement of reasonableness. Terms that attempt to exclude or restrict a party's liability for death or personal injury resulting from that party's negligence are rendered wholly ineffective by the 1994 Act, while terms that seek to exclude or restrict liability for negligence resulting in loss or damage other than death or personal injury, and those that attempt to exclude or restrict contractual liability, are subject to the requirement of reasonableness. The reasonableness of the exemption clause is evaluated as that of the time at which the contract was made. The actual consequences of the breach are, therefore, in theory at least, immaterial.

Besides the Unfair Contract Terms Act 1994, in respect of unfair terms in consumer contracts, another relevant Act is the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed), which was largely drawn from fair trading legislation enacted in Alberta and Saskatchewan. The Consumer Protection (Fair Trading) Act 2003 is the leading Act of consumer protection in this country. In relation to standard form contracts containing exemption clauses, the use of these types of contract have been identified as an unfair practice according to the Consumer Protection (Fair Trading) Act 2003. The Second Schedule of this Act lists 20 specific unfair practices as a protection to their consumers of which five portray the actual characteristics of standard form contracts as follows:

List 9: Representing that a transaction involving goods or services involves or does not involve rights, remedies or obligations where that representation is deceptive or misleading.

List 10: Representing that a person has or does not have the authority to negotiate the final terms of an agreement involving goods or services if the representation is different from the fact.

List 11: Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.

List 12: Taking advantage of a consumer by exerting undue pressure or undue influence on the consumer to enter into transaction involving goods or services.

List 20: Using a small print to conceal a material fact from the consumer or to mislead a consumer as to a material fact, in connection with the supply of goods or services.

Hence, it is clear that the above said provisions do touch on the substance and form of the standard form contract, which has been recognised as constituting unfair practices by the traders to their consumers. This indicates that the law pertaining to consumer protection in Singapore emphasizes the element of oppression in the use and practice of standard form contracts as well as discussing the characteristic of small print as fulfilling the oppression element in this type of contract.

BRUNEI

Brunei has, like Malaysia, a Contracts Act (Cap 106, the Laws of Brunei Darussalam, 1984, Rev Ed) and a Specific Relief Act (Cap 109, the Laws of Brunei Darussalam, 1984, Rev Ed), which are identical in all substantive respects. Brunei has adopted the UK Unfair Contract Terms Act 1977 (UK UCTA) as part of their law. The relevant law on exclusion clauses in Brunei is the Bruneian Emergency (Unfair Contract Terms) Order 1994. The title of the Order may be somewhat misleading, for in addition to re-enacting the provisions of the UK UCTA, the salient features of the UK Misrepresentation Act 1967 are also re-enacted and would now have to be read together with the Contracts Act. The provisions of the Order, though a correlation between the section numbering with the UK UCTA is needed, the substance is the same as that of the UK UCTA. The correlation of the more significant provisions of the Order can be seen in Table 1 below:

According to UK UCTA, section 2 to section 7 only apply to business liabilities such as liability for breach of obligations or duties arising from things done or to be done in the course of a business; or from the occupation of premises used for business purposes. Although no definition of 'business' is given, section 14 of the UK UCTA defines 'business' to include 'a profession and the activities of any Government department or local or public authority'. This Act itself, although it applies widely in the United

TABLE 1. Correlation between the Section Numbering in the Bruneian Emergency (Unfair Contract Terms) Order 1994 and the UK Unfair Contract Terms Act 1977

UK Unfair Contract Terms Act 1977	Bruneian Emergency (Unfair Contract Terms) Order 1994
14	2(2)
1	3
2	4
3	5
4	6
5	7
6	8
7	9
9	13
10	14
11	15
12	16
13	17
26	18
27	19
28	20
29	21
First Schedule	Schedule 1
Second Schedule	Schedule 2

Kingdom, does not apply to all contracts. In principle, it does not deal with all unfair contract terms but only with unfair exception clauses. Even in those circumstances, there is no introduction to a test of fairness.

THE PHILIPPINES

Unlike Malaysia, Singapore and Brunei, the Philippines consumer protection is mandated in its Constitution. Article 16 Section 9 of the Constitution of the Republic of the Philippines 1987 states:

> The State shall protect consumers from trade malpractices and from substandard or hazardous products.

Complementing this basic right is the Consumer Act of the Philippines (Republic Act No.7394). Containing 173 articles, this Act declares that it is the policy of the State to protect the interests of the consumers, promote their general welfare and to establish standards of conduct for business and industry (Article 2 of the Act). 'Consumer' is defined as 'a natural person who is the purchaser, lessee, recipient or prospective purchase, lessor or recipient of consumer products, services or credit. Title III of the Act stipulates matters pertaining to protection against deceptive, unfair and unconscionable sales acts or practices. Article 52 specifically outlines unfair or unconscionable sales acts or practices, among others:

> An unfair or unconscionable sales act or practice by a seller or supplier in connection with a consumer transaction violates this Chapter whether it occurs before, during or after the consumer transaction. An act or practice shall be deemed unfair or unconscionable whenever the producer, manufacturer, distributor, supplier or seller, by taking advantage of the consumer's physical or mental infirmity, ignorance, illiteracy, lack of time or the general conditions of the environment or surroundings, induces the consumer or grossly one-sided in favor of the producer, manufacturer, distributor, supplier or seller.

And that in determining whether an act or practice is unfair and unconscionable, the following circumstances shall be considered:

1. that the producer, manufacturer, distributor, supplier or seller took advantage of the inability of the consumer to reasonably protect his interest because of his inability to understand the language of an agreement, or similar factors;
2. that when the consumer transaction was entered into, the consumer was unable to receive substantial benefit from the subject of the transaction; and
3. that the transaction that the seller or supplier induced the consumer to enter into was excessively one-sided in favor of the seller or supplier.

Thus, it would appear that an unfair term, which would benefit one party to a consumer contract, could be within the purview of this Article. Anyone found in contravention of Article 52 can be subjected to a fine or imprisonment or both (As provided by Article 60 on Penalties). It must be remembered that the legal framework in the Philippines is civil based, with ingredients for the formation of contract and obligations derived from Spanish legal principles (Callangan 2006). Hence, it is not surprising that the approach undertaken is slightly different from the countries seen thus far.

CONCLUSION

The concern for better consumer protection has been expressed in many countries in the Southeast Asian region such as Singapore, Brunei and the Philippines. This can be seen from the regulatory framework of most ASEAN countries where recognition has been given to the control of unfair terms in consumer contracts. ASEAN member states must face up to the fact that, very often, common trade practices lead traders to commit anti-competitive acts. The reality is that, presently, consumers have to accede to terms and conditions that are considered unfair, unreasonable or unacceptable. Some form of legal control over this unethical conduct is required to ensure healthy trade surroundings, thus, protecting the consumers and the ethical traders. The control of these unfair consumer contract terms through the regime of contract law of these selected ASEAN member states substantially reflect their varied albeit not dissimilar colonial experiences and the way in which the law reform in each country is taking form. The statutory control of exemption clauses in Singapore, Brunei and the Philippines, as the selected Southeast Asian countries above, has taken many forms. Nevertheless, since

there are common features in the legislations, harmonizing it in common areas such as consumer protection can be achieved by reasonable compromises among all the member states.

REFERENCES

ASEAN Economic Community Blueprint. 2008. Jakarta: ASEAN Secretariat, January: 19.

Convention on the Law Applicable to certain Rights in respect of Securities held with an Intermediary, Concluded 5 July 2006, full text available at http://www.hcch.net/index_en.php?act=conventions.text&cid=72.

Goode, R. 2003. Contract and commercial law: The logic and limits of harmonisation. Electronic Journal of Comparative Law. November 2003, from http://www.ejcl.org/ejcl/74/art74-1.html.

Hartkamp, A.S. 2002. Modernisation and harmonisation of contract law: Objectives, methods and scopes. Paper of the Worldwide Harmonisation of Private Law and Regional Economic Integration, Rome, 27-28 September

Kusuma-Atmadja, M. Seminar on Legal Aspect of Regional Cooperation: Harmonisation of Laws in the Region, Asian Development Bank from http://www.adb.org/Documents/Conference/Seminar_ Cooperation/coop2110.asp.

Leong, A.P.B. 1998. *Cheshire, Fifoot and Furmston's law of contract*. Students' edition. Butterworths Asia.

Callangan, A.L.P. 2006. *Philippines Law on Obligations and Contracts*, 1st edition. Central Books.

Thanadsillapakul, L. 2004. The harmonisation of ASEAN competition laws and policy and economic integration. Unif. L. Rev.

The 2001 Cape Town Convention on International Interest in Mobile Equipment with its associated Aircraft Equipment Protocol, UNIDROIT Convention on International Financial Leasing, Ottawa, 28 May 1988, http://www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm.

United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19,1489 UNTSh Visu Sinnadurai, Exemption Clauses v. Public Policy and Inequality of Bargaining Power [1978] 2 *MLJ* cxxx.

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

http://www.aseansec.org/18619.htm.

http://www.aseansec.org/about_ASEAN.html.

http://www.dfat.gov.au/geo/fs/asean.pdf

http://www.aseansec.org/about_ASEAN.html.

Azimon Abdul Aziz*
School of Accounting
Faculty of Economics and Management
Universiti Kebangsaan Malaysia
43600 Bangi
Selangor, D.E.
Malaysia

Suzana Mohamed Isa, Sakina Shaik Ahmad Yusoff
& Ong Tze Chin
Faculty of Law
Universiti Kebangsaan Malaysia
43600 Bangi
Selangor D.E.
Malaysia

*Corresponding author; email: azimon@ukm.my.