

The Role of The Modern Contract Law in The Purview of Consumer Protection

Sheela Jayabalan¹ and Daleleer Kaur Randawar²
Faculty of Law, Universiti Teknologi Mara, 45400, Shah Alam, Selangor

E-mail: jsheelathana@yahoo.com.my
dolly_uitm@yahoo.com

Abstract

Consumer welfarism especially has created an impact in the sustainability of the law. Contract law becomes a significant feature to be discussed because the law of contract is the foundation on which commercial law rests. Both consumers and businesses rely on contract law to resolve disputes in business transactions. The status of laissez faire of the 17th century developed contract law based on freedom of contract. Since contracting parties have the freedom to impose obligations, rights and liabilities, they were presumed to have protected themselves from any shortcomings. The freedom of contract however was deemed insufficient to protect consumers. Social realism namely consumer welfarism became imminent to achieve contractual justice. Courts had to use equity as a tool to remedy injustices of the consumer society. Even though equity is in hand to apprehend unfairness or injustice, consumer welfarism necessitates the need to legislate the equitable principles especially for the sustainability of consumer protection. Therefore, there is call world over for contract law to be modified by legislation to afford greater protection to consumers because of consumer behaviourism. Adapting doctrinal analysis, this article discusses how consumer behaviourism has influenced the transition of the traditional law of contract to that of modern law of contract where the core value of the law is concerned about consumers' vulnerability to unjustifiable domination, the equivalence of exchange and the need to ensure co-operation. Consumer behaviourism eviscerates the formalism role of contract law and integrates contractual justice for the benefit of the community.

Keywords: Modern Contract Law; Consumer Behaviourism; Contractual Justice

Introduction

Consumer behaviorism plays a very pivotal role in the sustainability of consumer sovereignty specifically in commerce. A consumer's behavior to select, purchase, use, or dispose of products, services, ideas, or experiences to satisfy needs and desires, puts a control on the markets desire to dominate (Sharifah Mariam Alhabshi, 2014). So much so it has been said, "There is only one boss the customer. And he can fire everyone from the Chairman down" (Sam Walton, Founder, WalMart Stores). Consumer behavior becomes an important factor for businesses because marketing management rests upon some conception or other of how customers

behave and of the consequences their reactions to product, price, promotion and distribution strategies are likely to have for the attainment of corporate objectives.

In a classic paper on the managerial significance of behavioral decision theory, (Itamar Simonson, 1993) concludes: In some situations, consumers do have a clear and strong preferences for product or service characteristics. In such cases, none of the (behavioral science) manipulations are expected to affect purchase decisions. ... (However,) companies can increase their sales significantly by supplementing the voice of the customer with a better understanding of the various irrational influences on purchase decisions and translating that knowledge into specific sales, positioning, pricing, and communications tactics." Hence, based on the observations of these scholars, it can be deduced that the consumer plays a significant

role in the sustainability of market behavior. As much as consumer behavior decides the confluence of market sustainability, to sustain the sustainability of consumer protection, the law plays a very important role to sanctify the protection accorded to consumers. The law however should not be seen in its abstract tradition but more towards attaining contractual justice. Attainment of contractual justice through law is only made possible through consumer behaviorism which is the exposition of the author. Since the law of contract is said to be the child of commerce, the author contends the law of contract in Malaysia is lacking in contractual justice because the law of contract is dominated by market individualism and not consumer welfarism. The author suggests a distinct legal framework for consumer contracts which incorporates consumer welfarism should be the way forward for Malaysia and other ASEAN countries. This article thus discusses in the Malaysian perspective comparing the United Kingdom and the United States of America as bench mark; (i) that the law of contract of Malaysia does not incorporate consumer welfarism; (ii) the reasons why consumer behaviorism necessitates a different outlook in the law of contract and (iii) a modern law of contract which incorporates contractual justice which reflects consumer behaviourism should be the way forward for the sustainability of consumer protection.

Literature Review

1.1. The law of contract in Malaysia does not incorporate consumer welfarism

The law of contract in Malaysia is governed by the Contracts Act 1950 and English common law principles (Sinnadurai, 2003). The Contracts Act 1950 was not enacted to protect consumers. The Contracts Act 1950 does not have any correlation with the consumer society. It does not reflect consumer welfarism because, 114 years ago, during the time the Contracts Act 1950 was enacted, consumerism was never in the thought. The Contracts Act 1950 was an initiative undertaken by the British during their rule in Malaya. The Contracts Act 1950 is the codified version of the English common law principles of contract law though some common-law principles were left out. The substance of the Contracts Act 1950 indicates that it was enacted to facilitate the formation of a contract. Contract law was deemed to be significant in its role to facilitate because; “the law of contract is said to be the child of commerce,” (Goode, R.M., 1995). The law of contract is the “foundation on which commercial law rests,”

(Goode, R.M., 1995). Contract law developed to fulfill the need to resolve disputes in business transactions. As commercial transactions increased in volume and complexity, the need to recognise a legal relationship in the exchange of goods and services became even more apparent. Historical background on the evolution of contract law states that contract law gained prominence and developed as legal principles in the latter part of 17th century when judges began to hear increasing number of cases regarding commercial transactions, resulting in the genesis of contract but it evolved on the basis freedom of contract and sanctity of contract which suited market individualism and reflected market behaviorism i.e. the businesses were given a free hand to enter into a contract based on their desires. The bargain contract, formed between equal parties, also meets the demand of the market place for a vehicle to facilitate the orderly and efficient exchange of goods and services. Parties mold contract rights and obligations to meet their expectations, thus satisfying market needs for flexibility (Atiyah, 1988)

Furthermore, the premise of contract law was that, “Men should learn to order their lives according to some definite plan, that they should be encouraged to aim for particular goals that they should co-operate with others in attempting to seek those goals that those who let down their fellows should be made to pay cost of doing so. It was thought to be desirable that men should be free to develop their skills and ambitions, and it was accepted as a natural corollary that some would rise and some would sink,” (Atiyah, 1988).

In other words, a contract is a vehicle through which autonomy and rational planning could be simultaneously promoted because of the freedom of contract and the sanctity of contract. This rudiment explains why supporters of freedom of contract demanded that the freedom of contract is unrestricted by legislative enactments or judicial decisions. There was no need for legislative or judicial interference because a contract under the premise of freedom of contract sufficiently protects the interest of the parties for the following reasons (Beatson, J., 2002);

- contract will establish the value of the exchange (consideration);
- contract will establish the respective responsibilities of the contracting parties;
- contract enables the economic risks involved in a transaction to be allocated in advance between the contracting parties; and

- contract may provide for what is to happen if things go wrong.

A contract therefore functioned as an instrument by which the separate and conflicting interests of the participants can be reconciled and brought to a common goal by the participants themselves which justifies why the proponents of freedom of contract championed this theory and restricted limitations by legislation and judicial processes. The contracting parties are said to be governed by 'rational self-interest' which means that the parties will seek to operate the contract in a way which produces the maximum utility or benefit to them. This was thought to be in harmony with a free market economy and the spirit of competition and the locus of the contractual relationship namely market individualism. Therefore, it is not part of the function of a court of justice to dictate the terms of the contracts into which they ought to enter. The only merits of the case are that parties who have bargained on equal terms in a free market should stick to their agreements. Justice is done by seeing that they do so or compensating the party who has kept his promise for any loss he has sustained by the failure of the other to keep his.

Thus, the contract law in Malaysia, the Contracts Act 1950 conforms to the English common law doctrine of freedom of contract. Its significance is merely to facilitate, that explains why The Contracts Act 1950 merely lays down the ground rules for the formation of a contract; offer, acceptance, consideration, free consent, capacity. The terms are however left to the contracting parties to decide for themselves as what they intend to be bound. The freedom given to the contracting parties conforms to the doctrine of freedom of contract but subject to the fact that the terms are entered voluntarily i.e. free consent. This explains why there is nothing in the Contracts Act 1950 about fairness or unconscionability. Fairness or values worth was left to the desire of the contracting parties to decide. As stated by prominent scholars, "the freedom of contract and sanctity of contract became the foundation on which the whole of contract law was built. Judges thought that it was just to enforce contractual duties strictly according to the letter," (Atiyah, 1988). Therefore, since contracting parties have the freedom to contract that is the choice to enter or not to enter a contract and the freedom to impose obligations, rights and liabilities, they were presumed to have protected themselves from any shortcomings. Thus, equality of consideration was not the appropriate issue or concern for the courts to address. Therefore,

the Contracts Act 1950 being a general Act was never meant to include consumer protection. Whereas, consumer transactions necessitated consideration of social spheres such as consumer welfarism. Consumerism demanded a different outlook of the contract law. The law of contract should not stop short in its function as a facilitator only. Consumer behaviorism calls for the law to be utilized to check some aspects of the content of a contract rather than simply the process of its formation.

2.2 The reasons why consumer behaviourism necessitates a different outlook in the law of contract

The traditional role of the contract law to facilitate was more suited for the *laissez-faire* era where the doctrine of freedom of contract was advocated for the benefit of market individualism. In the twentieth century, however particularly after the end of World War II, concepts of social welfare expanded especially when consumers became pivotal in commerce. The social change was stated to be taking place at a rate of knots that certain doctrines of contract law did not serve its purpose with the societal change such as the doctrine of freedom of contract. The transition was described as, "the twentieth century tide has turned away from the nineteenth century obsession towards unrestrained freedom and sanctity of contracts to that of fairness and cooperation." Legal formalism was being superseded by substantive qualities especially in commercial transaction. The doctrine of freedom of contract gradually eroded with the change in commerce when consumers' role in the global market gained credence and prominence. The doctrine of freedom of contract was commented to be unsuitable to transactions involving consumers because; "Previous laws, especially the law of contract, assumed that the parties are legally equal in terms of power and information. In substance, in real markets, almost invariably consumers have markedly less power and information than suppliers. The law deems the action of a consumer in buying a commodity to be making of a contract, in theory a free, consensual act. In practice, the legal consequences are attributed to the action by the law without any consideration of what the consumer knows or want," (Goldring, J., 2004).

Thus, the freedom was deemed to be an illusion because contracting parties did not enter a contract on an equal footing or equal bargaining power (Pound, R., 1940). The significance of the doctrine of freedom declined especially in consumer transactions because

consumers lacked the leverage and were forced to acquiesce into controlled marketplace transactions dictated by standard form contracts of industrial and commercial monopolies on a ‘take it’ or ‘leave it’ basis. Hence, courts had to use equity as a tool to remedy injustices by lifting the veil of formalism and penetrate social realism namely social welfarism to achieve contractual justice. Contractual justice is theory of social justice which is formulated around the concept of justice as fairness. The justice of fairness was only attainable through equity (DiMatteo, L., 1999) Even though equity was in hand to apprehend unfairness or injustice, there was a call to legislate the equitable principles because;

i. It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that one of the parties to it imposed the objectionable term in a morally reprehensible manner in a way which affects his conscience.

ii. Unconscionable relates not merely to the terms of the bargain but to the behavior of the stronger party, which must be characterized by some moral culpability or impropriety.

iii. Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, it was not right that the strong should be allowed to push the weak to the wall.

iv. A contract cannot be set aside in equity as an unconscionable bargain against a party innocent of actual or constructive fraud. Even if the terms of the contract are unfair in the sense that they are more favorable to one party than the other (contractual imbalance), equity will not provide relief unless the beneficiaries are guilty of unconscionable conduct.

v. In situation of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.

Equity was not an effective tool to assist consumer behaviorism. Therefore, there was a call world over for contract law to be modified by legislation in order to afford greater protection to consumers than they can negotiate individually for themselves especially in the

European Union (Goldring J, 2004). Contract law with the fusion of consumer welfarism was to be the modern contract law. The modern contract law is seen in light of social market where the core value of the law should concern about; unjustifiable domination, the equivalence of exchange and the need to ensure co-operation especially when manipulation became evident in consumer related transactions (Stone.R, 1997). Hence, contract law should not be conceived as an abstract and general set of rules applicable to all transactions and meant only to facilitate. Instead the role of contract law should be “to regulate markets, market practices and social practices of making contracts with a view to controlling the types of relationships established through contracts and their distributive consequences” (Hugh Collins, 2003).

In other words, contract law should be utilized to discourage the wrong done so that it is not repeated in the future for the benefit of the community and consumer welfarism should be the core value of the contract law. Core values of consumer welfarism is stated to be and strongly advocated as follows (Brownwoods, 2000), see Table 1.

Table 1: Core values of consumer welfarism

1. The principle of proportionality:	An innocent party’s remedies for breach should be proportionate to the seriousness of the consequences of the breach.
2. The principle of reasonable reliance:	A person should not encourage another to act in a particular way or form a particular expectation only then to act inconsistently with that encouragement. In such a circumstance the person relying on pre-contractual situations should be protected as illustrated in <i>High Trees</i> case [1947] KB 180 or <i>Errington v Errington and Woods</i> [1952] 1 KB
3. The principle of bad faith (and good faith):	A party who cites a good legal principle in bad faith should not be allowed to rely on the principle where legal doctrines are abused

	<p>as illustrated in <i>Nicole v Simmonds</i> [1953] 2 W.L.R.717, <i>Beswick v Beswick</i> [1967] 3 W.L.R. 932, <i>D&C Builders v Rees</i> [1966] 2 W.L.R. 288.</p>		<p>bargains where justice so requires.</p>
<p>6. The better loss- bearer principle:</p>	<p>Where a loss has to be allocated to one of two innocent parties, it is reasonable to allocate it to the party who is better able to carry the loss as illustrated in <i>Ingram v Little</i>[1960]3 W.L.R. 504and <i>Oscar Chess</i> [1957] 1 All E.R.325</p>	<p>Therefore, as more consumers took part in commerce and the fact that contract law is the child of commerce, it was deemed necessary to incorporate consumer welfarism to contract law. Hence resulting in the fusion of contract law with consumer welfarism; this fusion is known as the modern contract law. The development of modern contract law can be seen in some of the legislative measures taken in certain countries. For example, in the United Kingdom(UK) growing pressure to regulate a framework for consumer contracting led to the enactment of Unfair Contract Terms Act 1977 (UCTA) which is described by scholars, “as a highly paternalistic measure” because the UCTA (Atiyah, 1988),</p> <ul style="list-style-type: none"> (i) constraints the power of the parties to enforce certain terms even though they may have been freely agreed; (ii) compels business contractors to accept certain kind of risks; and (iii) allows courts to strike out terms which are considered unreasonable. 	
<p>7. The principle of exploitation:</p>	<p>A stronger party should not be allowed to exploit the weakness of another’s bargaining situation.</p>	<p>Apart from the UCTA the Unfair Terms in Consumer Contracts Regulations 1999 was enacted to protect consumers against unfair terms in standard form contracts.</p>	
<p>9.The principle of informational advantage:</p>	<p>Representors who have special informational advantage must stand by their representations; but representees who have equal informational opportunity present no special case for protection. The positive aspect of the principle of informational advantage is protective (<i>Esso Petroleum Co Ltd v Mardon</i>) [1976] 2 W.L.R. 583 but its negative aspect offers no succor to representees who are judged able to check out statements for themselves.</p>	<p>In the United States (USA), the drive to instill human and community values of fairness and justice resulted in the codification of the doctrine of unconscionability in the Uniform Commercial Code (hereinafter known as UCC). It is provided in S2-302 of the UCC that, “if the courts as a matter of law find the contract or any clause to have been unconscionable the court may refuse to enforce the contract.” The ‘codification’ (Dimatteo, A.L., 1999) of the common law ‘just principle’ or ‘fairness principle’ was incorporated into the UCC to give the law more congruity, fulfilling dictates which says that, “a way to lessen potential injustice is to grant judge’s discretion to impose equitable corrections when applying the rule would produce unfair terms,” (Dimatteo, A.L.,1999). The drive for codification also drew upon the desire for certainty, stability, uniformity and law as a scientific enterprise (Stychin, F. C. 1993).</p>	
<p>10.The principle of responsibility for fault:</p>	<p>Contractors who are at fault should not be able to avoid responsibility for their fault. This principle threatens both exemption clauses which deal with negligence.</p>	<p>2.3 Consumer Protection Act 1999</p>	
<p>11. The paternalistic principle</p>	<p>Contractors who enter imprudent agreements may be relieved from their</p>	<p>In Malaysia, consumer welfarism is evident in the Consumer Protection Act 1999. The significance and</p>	

prominence of having a statutory call for consumer protection became a reality in 1999 with the enactment of the Consumer Protection Act 1999. The Consumer Protection Act came into force on the 15 November 1999 after ten years of discussion and five years of drafting.¹ The Act comprises of 14 parts and 150 sections dealing with selected areas of the law. The Act gives inalienable rights to consumers such as guarantees of fitness and quality as to the goods. The Act also protects consumers from misleading and deceptive conduct, false representation and unfair trade practices. All the rights alienated to the consumer in Consumer Protection Act 1999 cannot be contracted out as provided in section 6 of the Act. It comprises of civil and criminal liability.

Initially, Section 2(g) of the Consumer Protection Act 1999 provided that the Consumer Protection Act does not apply to any transactions effected by electronic means, thereby excluding protection to consumers in e-commerce transactions. However, in August 2007 Section 2(g) was lifted to provide protection to consumers in Malaysia buying goods or services through any electronic means which includes e-commerce *via* the Internet. And In the year 2011, Part III A was incorporated in the Consumer Protection Act 1999 (CPA). Part III A of the Consumer Protection Act 1999 (CPA) brings a new paradigm to consumer protection because it protects consumers against unfair terms. These examples of legislative measures as stated above let it be (in the UK, USA or Malaysia) are measures taken in the light of modern contract law which embodies the rudiments of consumer welfarism. However, the Consumer Protection Act 1999 of Malaysia does not deal with all the contractual elements arising in a consumer transaction. For example, issues' arising in the formation of a contract remains as abstract rules. Rules on offer and acceptance are not seen in the light of consumer protection. It would be more favourable to consumers if (i) sale by advertisements are seen as offers instead of invitation to treat; (ii) rules on communication of offer and acceptance are construed to be binding upon actual knowledge of the consumer; (iii) jurisdiction of the courts extends to e-commerce consumer contracts; (iv) choice of law should be the choice of the consumers place of residence and (v) enforcement of foreign judgement be expanded to equitable remedies instead of only monetary judgement. These are some aspects of

modern contract law which would reflect on consumer welfarism. Modern contract law which incorporates consumer welfarism should be the way forward to achieve contractual justice.

Recommendations

Even though in Malaysia we have Acts that conforms to consumer welfarism such as the Consumer Protection Act 1999, it would be beneficial to consumers to further expand consumer welfarism to;

- i) Conflict of law issues which includes jurisdiction of the courts, choice of law and enforcement of foreign judgement;
- ii) Formation of contract
- iii) Unfair terms for individually negotiated contracts
- iv) Other types of contracts excluded by the CPA 1999

The Contracts Act 1950 should be retained only as an umbrella act to facilitate the formation of a contract to all type of contracts. Modern contract law approach should be regarded as enriching the general law of contract i.e. the Contracts Act 1950. The ideology of modern contract law should be cross-fertilized to other areas where appropriate.

Concluding remarks

Contract law should not be idolized in its abstract role to facilitate contract formation. To afford greater protection to consumers, contract law should be expanded to consumer protection.

References

- Atiyah, P.S. (1995). *Law & Modern Society*. New York: Oxford University Press.
- Beatson, J. (2002). *Anson's Law of Contract*. Oxford: Oxford University Press.
- Brownsword, R. (2000). *Contract Law Themes for the 21st Century*. London: Butterworth.
- Collins, H. (2003). *The Law of Contract*. United Kingdom: Lexis Nexis.
- DiMatteo, L. (1999). Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law. *33 New Eng. L. Rev.* p 38.

Goode,R.M. (1995). *Commercial Law*. London: Penguin Books.

Goldring, J.(2004).Consumer Protection, The Nation State, Law, Globalization, And Democracy. *Cardozo Journal of International and Comparative Law* 3.

Kennedy,D. Distributive And Paternalistic Motives In Contract And Tort Law, With Special Reference To Compulsory Terms And Unequal Bargaining Power.51 *Md. L. Rev* 563.

Pound,R. (1954). *Philosophy of Law*. New Haven: Yale University Press.

Rawls,J.(1999). *A Theory of Justice*. Oxford: Oxford University Press.

Stone,R.(1997). *The Modern Law of Contract*. London: Cavendish Publishing

Sinnadurai, V. (2003). *Law of Contract*. Malaysia: Lexis Nexus Butterworth.

Simonson, I. (1993). Get Closer To Your Customers By Understanding How They Make Choices. *California Management Review*, 80

Sharifah Mariam Alhabshi. (2014). Pelaksanaan garis panduan KPDNKK dalam konteks pembukaan perniagaan pasaraya di Malaysia: implikasi terhadap perniagaan runcit di Malaysia.

Stychin, C, F. (1993). The Commentaries Of Chancellor James Kent And The Development Of An American Common Law. *37 Am. J. Legal History*,440.

Weatherhill,S.(2005). *EU Consumer Law and Policy*. United Kingdom: Edward Elgar Publishing Ltd.