

Consumer Rights Act 2015 (United Kingdom): Is it a Good Model in Protecting Banking Consumers from Unfair Terms in Islamic Banking Consumer Contracts in Malaysia?

(Consumer Rights Act 2015 (United Kingdom): Adakah Ia Model yang Baik Perlindungan Konsumer Perbankan daripada Terma Tidak Adil dalam Kontrak Konsumer Perbankan Islam di Malaysia?)

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ABSTRACT

As the Islamic banking industry becomes more advanced and complex, it is crucial that transactions in acquiring goods and services are reduced in writing of whatever terms and conditions agreed upon. These terms and conditions could potentially be deemed as unfair when relied on, would cause detriment (whether financial or otherwise) to banking consumers and, can cause significant imbalance in the rights and obligations of contracting parties. The objective of this article is to discuss the current flaws and highlight the inadequacies of consumer protection laws on unfair terms in consumer contracts in Malaysia. Findings in this study reveals that the abuse of power by the Islamic banks is due to one-sided contract which is not negotiated between the contracting parties. Furthermore, it is offered on a 'take it or leave it' basis and can make it difficult for banking consumers to discern risks in the contracts. Using content analysis and doctrinal legal method, this article analyses the potential of unfair terms in Islamic banking consumer contracts and to consider whether the wider scope of fairness and transparency assessment under the Consumer Rights Act 2015 (CRA) of the United Kingdom could provide a potential practical solution. Therefore, this article recommends that a statutory controlling mechanism such like the CRA of the United Kingdom, should be adopted to protect banking consumers from unfair contract terms in Malaysia. This article intends to contribute to policy priorities for the Malaysian government towards a better protection for banking consumers from unfair contract terms.

Keywords: Banking consumers; Consumer Rights Act (UK) 2015; Islamic banking standard form consumer contracts; unfair; terms, Malaysia

ABSTRAK

Memandangkan perbankan Islam menjadi semakin maju dan kompleks, maka adalah menjadi suatu keperluan untuk semua transaksi bagi pembiayaan membeli barangan dan perkhidmatan dimeterai secara perjanjian bertulis. Terma dan syarat yang terkandung dalam perjanjian bertulis itu mempunyai kebarangkalian yang tinggi untuk menjadi berat sebelah dan menyebabkan kerugian (sama ada daripada segi kewangan atau yang berkaitan) kepada pengguna. Objektif artikel ini adalah untuk mmbincangkan kekurangan dan kelemahan akta dalam melindungi hak pengguna di Malaysia. Hasil kajian ini menunjukkan kebanyakan perjanjian adalah berat sebelah dan menyebelahi institusi perbankan Islam. Pengguna tidak mempunyai pilihan lain sama ada menerima tawaran ataupun tidak dan ini boleh menyulitkan mereka untuk mengenal pasti kemungkinan risiko yang bakal ditanggung. Berdasarkan beberapa penemuan akta dan kes-kes berkaitan, artikel ini telah membuktikan keberkesanan 'fairness and transparency test' di dalam Consumer Rights Act (UK) 2015 (CRA) yang mempunyai asas yang kukuh untuk dijadikan penyelesaian yang praktikal. Oleh itu, adalah disarankan agar kerajaan dapat meluluskan suatu akta yang diadaptasi daripada CRA ini bagi tujuan melindungi pihak pengguna dan menjadikannya prioriti di dalam menentukan polisi bagi melindungi pihak pengguna daripada kontrak yang berat sebelah.

Kata kunci: konsumer perbankan; Consumer Rights Act (UK) 2015; kontrak tetap konsumer perbankan Islam; terma kontrak tidak adil; Malaysia

INTRODUCTION

Despite commanding a small share of the global finance, the Islamic finance has grown rapidly in strength and geographical reach. The robust and systematic growth of Islamic finance has led to Islamic banking sector to become systematically important in many countries and making considerable progress in other jurisdictions. Generally, Malaysia is recognised as the pioneer, front-runner and global leader in Islamic banking and finance industry due to the state-of-the-art infrastructure and unparalleled government support. The Islamic banking sector has registered phenomenal growth with RM742 billions of asset in 2016, compared to RM685 billion in 2015.¹ To date, the Islamic banking assets in Malaysia stand at 27 per cent of the total banking system which surpasses the targeted 20 percent under the Central Bank of Malaysia or Bank Negara Malaysia's (BNM) Financial Sector Master Plan.² Since its inception in 1983 with the first establishment of Islamic bank, Bank Islam Malaysia Berhad, the Islamic banks in Malaysia have made a considerable progress. There are now 16 licensed Islamic banks registered with BNM, 10 full-fledged local banks and 6 foreign banks.³ Malaysia's rapidly growing Islamic banking sector has consistently gain market share for Islamic banking services due to strong demand from the population, combined with facilitative regulatory support.

The growth of Islamic banking industry worldwide leads to the increase in new consumers in Islamic banking services tremendously and by December 2013 it was estimated at 30 million.⁴ In the light of the past global financial crisis of 2008, the emphasis on financial consumer protection has become a major concern of international and national governments.⁵ It was against this backdrop that led many policy-makers to integrate consumer protection in their regulatory frameworks to address the unique risks of Islamic finance. In Malaysia, it is important to develop a strong regulatory framework for prudential regulation and supervision in Islamic finance industry as part of the broader government agenda of gaining 40% share for Islamic financing coming from the banking sector by 2020.

As the Islamic banking industry become more advanced and complex, and as a safeguard to business transactions in acquiring goods and services, it becomes crucial that transactions are placed in written contracts or legal documentation.⁶ It is wise for contracting parties to reduce in writing whatever terms and conditions agreed upon. Thus, it becomes common for banking consumers to enter into standardised contracts or standard form contracts when acquiring financial products and services from the Islamic banks.⁷ Standard form contract is defined as 'a consumer contract drawn up for general use in a particular industry irrespective that it differs from other contracts normally used in that industry.'⁸

Given the banking consumers lack of resources and bargaining power to effectively review and negotiate unfair terms, or resist their enforcement, as such there exist clear incentives for banks to include unfair terms in standard form banking contracts. The abuse of power is evidenced by the one-sided standardised banking contract.⁹ These adhesion contracts are criticised for killing the bargaining power of the weaker party,¹⁰ the banking consumers, and open up wide opportunity for exploitation by the Islamic banks. The Islamic banks being the party with greater bargaining position, generally drafts the terms which suit them most, and to the extreme of excluding or limiting their liability, disregarding for the interest of the banking consumers.¹¹

This article argues that the protection of banking consumers against unfair contract terms is essential to ensure fair dealings while sustaining consumer confidence and trust in the banking industry because without the support and goodwill of banking consumers, in the long run, the robustness of the Islamic banking institutions will certainly dwindle. Malaysia does not have a specific legislation that governs unfair contract terms between financial institutions and financial consumers.¹² This article suggests that statutory intervention is pertinent since the objective of having an unfair contract terms legislation is to enhance the rights of banking consumers in Malaysia to counter unfair terms in Islamic banking documentation. An unfair term legislation such as the Consumer Rights Act 2015 (United Kingdom) (CRA 2015) will ensure that the substance and the outcome of contracts must be fair as well as stating the genuine grounds for regulatory and judicial intervention to counter unfair contract terms. This article employs a doctrinal legal research on the inadequacy of legal protection regarding unfair terms in Islamic banking consumer contracts in Malaysia. The emphasis here is analysing the legal rules, principles and doctrines relevant to unfair contract terms. Thus, to reach the finding for this research, relevant laws in Malaysia such as the Consumer Protection Act 1999 (CPA 1999), Consumer Protection (Amendment) Act 2010 and Islamic Financial Services Act 2013 (IFSA 2013) are analysed, together with other judicial pronouncements, commentaries, textbooks, journals and debates. In this study, to improve the Malaysian law on unfair terms, a comparative legal research is carried out. Since Malaysia is a common law based system, so it makes sense to focus on United Kingdom, as an influential former coloniser with a similar system whereby most of Malaysian legal system has been imported from the English framework.

BACKGROUND

There is a large literature exploring unfair contract terms in consumer contracts by scholars.¹³ To begin with, promoting a sound financial market supported by appropriate financial consumer protection has been

top priority of financial regulators in many countries which is an indispensable guarantee towards a sound and stable development of the financial markets.¹⁴ Dubious clauses of unfair terms in banking contracts such as risk premium, unilateral modification of the credit interest level, declaring of early maturity, call for additional money on top of those already mentioned in the contract, hidden bank charges, as well as the costs on ancillary services.¹⁵ Another example of unfair contract term which is the termination for convenience clause and raised concern on the increased trend in business contracts to allow dominating party to a contract to terminate at their convenience.¹⁶ On the other hand, unfair terms in financial services contracts can also be found in the characters of the standard form contracts which in general are non-negotiable, presented in a 'take-it-or-leave-it' form, and drafted in advance such that the consumers are unable to influence the substance of the term.¹⁷ Similarly, the mass production of standard form contract in facilitating market transactions more often than not contains unfair terms like exclusion clauses, which has been used as a device that oppresses and abuse consumer rights.¹⁸

To prohibit unfair terms in consumer contracts, the CPA 1999 was amended by the Consumer Protection (Amendment) Act 2010 by inserting Part IIIA entitled 'Unfair Contract Terms.' However, some provisions in Part IIIA have "most troubling inconsistencies and loopholes."¹⁹ The provisions of procedural and substantive unfairness are "not entirely clear and easy to understand despite the long list of guidelines in determining whether a contract or a term of contract is procedurally or substantially unfair since it does not cover other possible instances" that may prejudiced the legitimate interest of consumers due to unfair terms.²⁰ The CPA as the main statute on consumer protection is under the jurisdiction of Ministry of Domestic Trade, Co-operatives and Consumerism.²¹ This indicates that financial consumers are not under the purview of such ministry but rather by BNM as the financial regulator in Malaysia.

The financial consumer protection framework in Malaysia is based on 'fair treatment of consumers' and has been an integral component of a vibrant banking system.²² According to BNM, the introduction of IFSA 2013 has marked another major milestone in Malaysian financial market since it expanded powers of BNM to set and enforce good business conduct standards on Islamic Banking Institutions (IBIs) such as disclosure requirements, fairness in contract terms, complaints handling to name a few. However, IFSA is only a general protection for consumers with no specific mention of unfair terms. The lacuna in the current legal framework makes it imperative that a specific statutory framework prohibiting unfair terms is urgently needed.

Nonetheless, specific literatures on protection of banking consumers from unfair terms in Islamic banking contracts are non-existence. Based on this research gap,

this study intends to fill the lacuna of literatures on banking consumer protection from unfair terms in Islamic banking consumer contracts in Malaysia to elucidate the proposal towards a comprehensive legal framework for banking consumer protection.

CURRENT LEGAL PROTECTION IN MALAYSIA

Prior to the coming of Part IIIA in the Consumer Protection (Amendment) Act 2010, Malaysian consumers who had problems with unfair contract terms had to resort to common law for redress. For example, in the case of *Saad Bin Marwi v Chan Hwan Hua & Anor*,²³ the Malaysian Court of Appeal applied the 'doctrine of unequal bargaining power' by virtue of section 3(1) of the Civil Law Act 1956,²⁴ in assisting parties 'whose bargaining power was grossly impaired.' Among others this case has been seen as an attempt to fill the loophole in the Malaysian law to counter unfair contract terms. The Malaysian law does not regulate unfair contract terms. It seems that Malaysia is lagging behind its counterparts of Commonwealth jurisdictions and neighboring ASEAN countries that already have existing specific legislation such as Unfair Contract Terms Act that protects consumers from unfair terms in standard form contracts.

On 15th November 1999, the CPA 1999 came into force which aims to provide protection for consumers from business malpractice, safety for consumer goods, ensuring the provision of adequate information to consumers and monitor the quality of services. It also established the National Consumer Advisory Council and the Tribunal for Consumer Claims for aggrieved consumers to seek redress. The Act applies to all goods and services that are offered or supplied to consumers by traders. However, there are inherent weaknesses and limitations of the Act because not only does the Act appeared vague in the aspect of interpretation but its scope is also limited. For instance, it does not cover areas like unfair contract terms which is important to incorporate fairness in contracts.

In 2010, the CPA 1999 was amended by the CPA (Amendment) 2010 (CPA 2010) which inserted Part IIIA entitled 'Unfair Contract Terms.' With the amendment of the CPA 1999, consumers are able to seek remedies from unfair contract terms under the new legislation. Part IIIA of CPA 2010 that deals specifically on unfair contract terms to some extent have addressed such lacuna in CPA 1999. The ambit of CPA 1999 firmly covers business to consumer (B2C) contracts and if relevant, consumer to consumer contracts (C2C) as well. Section 3 defines a "consumer" as:

A person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of resupplying them in trade;

consuming them in the course of a manufacturing process; or in the case of goods, repairing or treating, in trade, other goods or fixtures on land.

This indicates that B2C between Islamic banks and banking consumers falls under the ambit of CPA 1999. However, the Act does not apply to business to business (B2B) contracts such as when banking consumers who acquires goods and services for commercial or business purposes (B2B) like trade, manufacturing for trade or consumption for trade purposes. Furthermore, on a positive note, the CPA has significantly increased the court's ability to intervene in standard form consumer contracts whereby now courts are able to declare a term in standard form contract void if it is unfair.

Critics have argued that the new Part IIIA of the CPA 1999 contains many weaknesses, all of which could and should be addressed by enacting a single comprehensive piece of legislation on unfair contract terms, rather than by simply amending an existing statute.²⁵ On a plain reading of Part IIIA, it clearly limits its scope to standard form contracts only, and does not mention notices. Thus, while a consumer can now worry less about whether he or she may claim about the potential unfairness of contract terms, the same might not be said for consumer notices. For example, notices (including website terms, advertising, other information related to the run up to sell services) that exclude or restrict the liability of Islamic banks or unfair to any extent, is not covered by the new Part IIIA.

Part IIIA also makes an unnecessary distinction between procedural and substantive unfair contract terms. It fails to make provision as to what types of contracts exactly are covered by Part IIIA and extending the application to 'all' contracts could possibly have unexpected and unfavourable ramifications. It also crucially fails to address the issue of application when the contract is concluded (i.e. whether in or outside Malaysia) or what happens when a contract applies foreign law. A test for determining what amounts to 'without adequate justification' is absent, as well as a list of examples of unfair contract terms. What offence created is not clearly defined and the potential effects are not carefully studied. On the other hand, initiative is demonstrated by providing that a term of a continuing contract can also be struck down for being unfair. On the whole, it is remarked that some form of bulwark against unfair contract terms in consumer contracts is better than nothing but there is room for improvement.

For various reasons, IBIs are likely to abuse their power by unilaterally drafting the contract and imposing on banking consumer terms that go beyond what is reasonably necessary to protect their own legitimate interests. Such overwhelming bargaining power would lead to IBIs to draft the contractual terms that goes beyond their self-protection. Widespread use of unfair terms and the bad experience of consumers who suffered detriments from the use of unfair terms would create the risk of

reducing banking consumer confidence and depressing their spending.

In the realm of Islamic banking sector, ensuring that terms are fair is quite a new concept to Islamic bankers. Furthermore, there is no existing legislation that specifically protects financial consumers from unfair terms in a standard form contract or consumer notices. However, for financial consumers in Malaysia, IFSA 2013 is available to champion the protection of their rights and interests. There are numerous provisions on consumer protection as contained in Part IX of IFSA 2013. Also, Schedule 7 prohibits Financial Service Providers (FSPs) from engaging in prohibited business conduct that is unfair to financial consumers where contravention may result in imprisonment not exceeding five years and/or fine of not more RM10 million, or both. As the regulator of banking industry, BNM has issued numerous guidelines in promoting transparent and fair banking practices. For instance, the Guideline on 'Prohibited Business Conduct' provide guidance on descriptions of prohibited business conduct as set out in Schedule 7 of IFSA and the circumstantial factors to determine whether FSPs have engaged in prohibited business conduct. Also, the Guidelines on Product Transparency and Disclosure, requires the advertisements, marketing materials as well as contractual terms and conditions of FSPs to be fair, appropriate and not misleading to banking consumers. These guidelines and circulars are binding to all banks in Malaysia as decided in *Affin Bank Berhad v Datuk Ahmad Zahid Hamidi*.²⁶ Judge Abdul Malik explained that:

It is a matter of policy and it is for the good of the country that all the banks in the country should adhere to the BNM guidelines since BNM being the Central Bank is the regulatory body.

However, even if IFSA 2013 and various BNM guidelines impose specific requirements and expectations on FSPs to protect consumer interest but it does not specifically mention unfair contract terms. IFSA merely prohibits FSPs from engaging in conduct which is deemed to be inherently unfair to financial consumers.

APPLYING CONSUMER RIGHTS ACT 2015 TO ISLAMIC BANKING CONSUMER CONTRACTS

The Consumer Rights Act 2015 (CRA 2015) came into force on 1 October 2015. It replaced three major pieces of consumer legislations namely: the Sale of Goods Act 1979, Unfair Terms in Consumer Contracts Regulations (UTCCRs) 1999 and the Supply of Goods and Services Act 1982. It also gives consumers a number of new rights and redress. CRA 2015 has made available Alternative Dispute Resolution (ADR) to all businesses. The CRA 2015 addresses four main areas: digital content; goods; services and unfair terms. As of now, the statutory protection from unfair terms and notices between traders and consumers is afforded by Part 2 of the CRA 2015. It replaces Unfair Contract Terms Act 1977 (UCTA) to the

extent that it relates to B2C contracts and the UTCCRs (in their entirety) respectively. All of the provisions on unfair terms in consumer contracts in UCTA and UTCCR are now streamlined in the CRA 2015 which removed and rectified conflicting provisions.

The changes in this legislation are mainly in scope rather than substance which must be understood and interpreted in the light of both UK and European Union case law. CRA 2015 is the most important piece of consumer law in the UK since the UCTA 1977. The CRA 2015 widens the scope of fairness assessment and makes it easier for consumers to challenge hidden fees and charges, whereby key of a contract terms and price may not be assessed for fairness provided they are 'transparent and prominent.' It is also a landmark in the field of consumer law because as of now, the majority of consumer rights in various contracts to provide goods and services are contained in one place.

FOCUS ON "UNFAIR WORDINGS"

The unfair term regime of CRA 2015 covers all 'consumer contracts' or contracts made between 'businesses/traders' and 'consumers' and 'consumer notices.' The concept of 'fairness and transparency' tests are the central feature and main focus of the CRA 2015 which are applied to contractual terms and consumer notices in assessing unfairness. This paper argues that, the wider scope of the fairness and transparency assessment as provided by the CRA 2015 should be applied and adopted in Islamic banking contracts and consumer notices to afford protection to banking consumers from unfair terms and notices. Overall, the CRA 2015 has major impact on consumer protection from unfair terms and notices which increased the rights of consumers. It is also argued that the new duty for the court to examine at its own motion whether there is unfair terms in consumer contracts, should be adopted by the Malaysian courts. Such judicial intervention in banking litigation is crucial as a matter of public interest to provide consumers with effective remedies against unfair terms as well as allowing consumer organisations to make collective complaints.²⁷

The relevant sections in Part 2 of CRA 2015 that need to be considered here are sections 61, 62, 63, 64, 67, 68, 69 which state the general position about fairness of contract term and notices. Supplementary provisions that will also be considered which include section 70 on law enforcement, section 71 on duty of court to consider fairness of terms, section 72 on application of rules to secondary contracts, Schedule 2 Part I which list consumer contract terms which may be regarded as unfair, as well as Schedules 3 and 5 which state the investigatory powers of the enforcers.

The scope of the CRA 2015 is set out in section 61 of Part 2 of the Act. It applies, with certain exceptions,

to consumer contracts and notices used by traders in transactions with consumers under section 61(1), whether individually negotiated or non-negotiated (standard terms) contracts and consumer notices.²⁸ Contracts that relate to apprenticeship or employment are excluded in section 61(2) and (5). The CRA 2015 has important consequences especially on 'traders' and 'consumers.' It adopts the European term of 'trader' as opposed to 'supplier.' A 'trader' is broadly defined in section 2(2) as 'a person (including natural and legal persons such as companies) acting for the purposes relating to his trade, business or profession, whether acting personally or through another person acting in his name or on behalf.' This wide definition also captures employees and agents of the trader. A 'consumer' being individuals acting as part of their business for purposes that are "wholly or mainly outside that person's trade, business, craft or profession" under CRA 2015 section 2(3). The Competition and Markets Authority (CMA)²⁹ of the UK, take the words 'wholly and mainly' to mean transactions entered into for purposes of personal and business. A business/trader that claims an individual is not acting as a consumer in court proceedings, bears the burden of proving such status under section 2(4). In addition, section 61(3) specifies what qualifies as a 'consumer contracts.' It includes implied and express terms between a trader and a consumer, as well as non-contractual 'consumer notices' under section 61(4) (a) and (b). Such notices includes any statement "intended to be seen or heard by the consumer" under section 61(6). A 'consumer notice' as in section 61(8) are announcement or other communications which is deemed reasonable to be read by a consumer. Section 72 also covers terms included in secondary contracts that have been agreed upon together with the original contract irrespective whether they are not consumer contract.

Section 62 and 67 of the CRA 2015 deals with the requirements for contract terms and notices to be fair. It provides that contractual terms (section 62(1)) and/or notices (section 62(2)) which are "unfair" are not binding on the consumers provided they satisfy 'fairness' requirement. However, the contract will continue to bind the contracting parties if it is capable to continue without the existence of the unfair terms. Irrespective that a term and/or notices is "unfair," section 62(3) indicates that consumers can still choose to rely on them. The wider scope of the fairness test laid down in section 62(4), contains two limbs which must be satisfied simultaneously for a term to be adjudged unfair. Within the meaning of the CRA 2015, a term or notice will be "unfair" if it is "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."³⁰ Whether a term is fair is determined by the court by taking into account the 'nature of the subject matter of the contract' under section 62(5) (a) and with reference to 'all the circumstances existing when the term

was agreed upon,' as well as to 'all the other terms of the contract, or any other contract' on which it depends under section 62(5) (b). Should the court find that the term in question is unfair, the firm would have to stop relying on them. As for notices, they are treated with the same circumstances as contractual terms as per section 62(6), section 62(7) (a) and (b).

Under section 63, Schedule 2 was introduced to assist the courts in determining potential unfair contract terms. Schedule 2 contains an indicative but non exhaustive list of terms, known as the 'Grey List'³¹ which may be regarded as potentially unfair. Under section 63(2), a term in Schedule 2 may still be assessed for fairness even if it would otherwise be exempted under section 64 for "main subject matter" exemptions. The CRA also 'blacklists' some terms/notices to the effect of rendering them never binding and automatically unenforceable on the consumers. An example for a 'blacklist' term is found in section 57 of the CRA which provides "a term that excludes or restricts the trader's liability in a contract to supply service, is not binding on the consumer." This means that any attempts in B2C contracts to exclude liability arising from certain statutory implied terms are prohibited. If a term is found to be unfair under section 67, the consequences are, it will not be enforceable and not binding on the consumer. However, the rest of the contract remains valid and practicable.

Under section 64, terms which are transparent and prominent, are excluded from fairness assessment provided such terms emphasise the 'main subject matter of the contract or set the price'; and terms covered by the other legal provisions. An example of a term that specifies the 'main subject matter' of the banking contract is where one person agrees to pay the business/trader a sum of money for acquiring the latter's financial goods or financial services. The exclusion of terms that define the main subject matter of a banking contract ensures that a party cannot challenge the fairness of a term concerning the subject of the contract. However, it is important to be aware that such a term is required to be 'transparent' under section 68 and, to be expressed in plain and intelligible language which is legible, and 'prominent to the customer.' Failure to meet such a requirement does not render the term unenforceable but where there is ambiguity in a dispute with a consumer, it will be resolved in favour of the consumer under section 69(1). This requirement gives banking consumers real chance to understand all respective terms which could disadvantage them and decide whether to enter the contract or otherwise.

Section 70 states the main powers of the courts, regulators and unfair contract term enforcers under the CRA 2015. It introduces Schedule 3 which sets out the various means of enforcing law on unfair contract terms. In the UK, CMA and other bodies like Financial Conduct Authority (FCA) can investigate and apply for injunctions to prevent the use of unfair, not transparent or void terms

and notices.³² Schedule 3 includes provisions for the CMA to collate or make public information on action taken against certain terms/notices; CMA may issue guidance when appropriate and also private action by consumer through courts or public body. Schedule 5 includes the power to require the production of information. Section 71 of the CRA 2015 imposes a duty upon the courts to consider fairness of terms at its own motion even if the parties do not specifically raise it as an issue. However, in doing so the courts must be satisfied that there exist sufficient legal and factual material.

THE TESTS OF FAIRNESS AND TRANSPARENCY

The main aim of the CRA 2015 on unfair terms in consumer contracts is to afford protection to consumers from the abuse of power by firms, specifically from one-sided standard consumer contracts and the unfair exclusion of contractual essential rights.³³ The new CRA 2015 widens the scope of fairness assessment beyond the normal contract terms documented in consumer contracts. A key point in Part 2 of the CRA 2015 is for all businesses/traders to ensure that their contract terms in consumer contracts and relevant notices used in dealing with consumers are not 'unfair.' This is done by applying the fairness test and transparency test to all wordings in consumer contracts or notices used by businesses in transacting with consumers, irrespective of whether individually negotiated or in standard form. However, the application of these tests is subject to the 'core' and 'mandatory statutory or regulatory' exemptions.

A term falling within the scope of CRA 2015 is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer which is contrary to the requirement of good faith (section 62). Three elements that make up the fairness test: 'good faith,' 'significant imbalance' and 'consumer detriment.' However, in assessing fairness the overall requirement is a unitary one rather than broken into separate parts since the elements of the tests are capable of overlapping with each other in their application. Lord Bingham³⁴ stated that:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the regulations seek to address. The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or

unconsciously, take advantage of the consumer's necessity, indigence, and lack of experience, and unfamiliarity with the subject matter of the contract, weak bargaining position.

The fairness test considers the contract as a whole which includes the subject matter of the contract, all the circumstances existing when the terms were agreed, as well as other terms relevant to the contract. Relevant circumstances include whether the consumer was given time to read and understand the term. Terms used in contracts or notices will only be binding on banking consumers provided they are fair. The CRA 2015 illustrates the meaning of unfairness by listing indicative and non-exhaustive types of terms which may be regarded as unfair. This indicative list is stated in Schedule 2 and referred to as the Grey List which is only under the suspicion of unfairness, but not necessarily unfair. The Grey List is essentially the same, except with the addition of three new terms,³⁵ as in the Schedule 2 of the UTCCRS. The CRA 2015 also includes "blacklisted" terms and notices which are automatically unenforceable without the need to apply the fairness test. The CMA and FCA can take enforcement action to stop the use of terms/notices which they consider unfair in accordance to the CRA 2015, or breaches the transparency requirement, or those that are blacklisted. Examples of the blacklisted terms include those which exclude or restrict the trader's liability and remedies arising from breach of certain consumer rights provided by the Act.

The general rule about fairness and transparency in the CRA 2015 remain the same as in the UTCCRS. However, the CRA 2015 brought about changes in the general requirements to fairness that 'relevant contractual terms' are only exempted from the 'fairness test' provided they are 'transparent' and 'prominent.' It is a separate and distinct requirement that terms in consumer contracts or notices is transparent. The Court of Justice of the European Union (CJEU)³⁶ underlines the primary requirement of transparent in assessing fairness is that the terms in consumer contracts to be expressed in "plain, intelligible language and legible." According to the CJEU:

The requirement of plainness and intelligibility means that the term should not only make grammatical sense to the average consumer but must put the consumer into the position of being able 'to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it [the term].

Otherwise, any contractual terms that are regarded as unfair will not be legally binding and enforceable on consumers. However, consumers can still rely on them if they prefer. The CRA enables consumers to challenge terms they consider unfair, and if the trader refuses to accept it, the former may consider to access the help of Financial Ombudsman Service (FOS) or to take legal proceedings. Consumers may wish to seek legal advice before taking any legal proceedings. The requirement

of prominence has been added to main exemption that wordings are brought to the consumer's attention such that an 'average consumer'³⁷ would be aware of such term. The exemption allows such term to escape the fairness test. Other exemptions from the fairness test include "the core exemption" which relates to terms that specify the main subject matter of the contract and price-setting terms, provided they are transparent and prominent. "Mandatory statutory or regulatory" exemption is relevant where the terms are covered by legal provision especially where its use is required by legislation.

THE IMPACT OF CRA 2015 ON ISLAMIC BANKING CONSUMER CONTRACTS IN MALAYSIA

In a nutshell, it is important to analyse the application of CRA 2015 on Islamic banking contracts since the ambit the Act is on business-to-consumer sector. The CRA 2015 also further boosted the statutory rights of consumers. The definition of 'consumer' and 'trader/firms' have been updated and are wider than any existing definitions found in Malaysia, UK and European Union law. For example, the new definition for consumers means that individuals may still be considered as consumers even if they are acting "mainly," rather than "wholly" for non-business reasons. To ensure fairness in Islamic banking contracts, Figure 1 below state how Part 2 of the CRA is intended to apply to terms in consumer contracts and notices and the consequences to Islamic banks that use unfair terms. To begin with, the following Figure 1 provides a simplified overview of the CRA 2015's tests of fairness and transparency to all terms or notices used by Islamic banks. Begin with Q1 and work through the chart to check whether a wording of consumer contracts or notice falls within the meaning of unfair terms in CRA 2015.

Part 1 of the CRA 2015 made some contract terms and notices of Islamic banks not binding and unenforceable on banking consumer, refers to as the 'blacklisted' terms. Based on Q1, if they are blacklisted, then they are automatically unenforceable and the fairness test is not applied. This indicates that Islamic banks cannot use exclusion clauses or disclaimers to exclude or restrict liability for death or personal injury due to negligence. Otherwise, if the wordings are not blacklisted, Q2 considers whether the terms are used in consumer contracts or consumer notices.

Q3 considers the 'mandatory or regulatory' exemption from the assessment of fairness where wording is required by legislation. If wordings are not exempted, Q4 considers whether terms may be regarded as unfair under the 'Grey List' terms. For wordings that fall under the 'Grey list' and are not exempted from core exemption, thus continue to Q6 which sets transparency as fundamental to fairness test. Section 68 requires that written term or notice to be

transparent that they must be expressed in simple and easy to understand language and clear enough to read. They not only need to be comprehensible but banking consumers can also understand their practical significance or risks. This transparency requirement or the transparency test embodied the specific requirement of good faith, fair and open dealing in the use of contract terms and notices. There is additional consequences of unfair terms or notices that are not transparent since they are liable to potential enforcement action by BNM as the regulator. The CRA 2015 gives power to BNM as unfair terms enforcer to ask Islamic banks to amend or withdraw the unfair terms/notices or apply for injunction as the case may be. The Courts also have a duty to consider the fairness of a term and interprets ambiguous terms most favourable to the banking consumers. Terms that are not transparent and unlikely to meet the 'fairness test' will not be binding on banking consumers and Islamic banks would have to stop relying on such unfair terms. Where the terms are transparent, the chart continues to Q8.

In Q4, if the wordings do not bear similarities to any of the terms listed in the 'Grey List,' the chart would go to Q5. Q5 views the scope of the core exemption from fairness assessment for 'main subject matter' terms and 'price-setting' terms. From Q5, to benefit from the 'core exemption,' terms and notices must be fair and prominent as stated in Q7. Fair means terms are comprehensible that banking consumers can make an informed choice to enter the contract or otherwise. Prominent if the relevant terms are brought to banking consumers' attention that an average consumer would be aware of them. Finally Q8 applies the fairness test as stated in section 62 which includes the main elements of significant imbalance to the detriment of the banking consumer and good faith. This is a unitary test in assessing fairness whereby the contract is considered as a whole with regards to all circumstances when the contract was entered into. If the related terms or notices does not satisfy the fairness test, then they are regarded as unfair. Otherwise, they are considered as fair consumer terms and notices.

FIGURE 1. Chart for unfair terms

Q1	Is the term or notice falls within the blacklisted list?	Yes	Automatically unenforceable	No	Go to Q2
Q2	Is the term either in consumer contract or consumer notice?	Yes	Go to Q3	No	Outside scope of CRA
Q3	Is it laid down by law? (Mandatory statutory or regulatory exemption)	Yes	Outside scope of CRA (provided consumer understood its effect)	No	Go to Q4
Q4	Is it stated in the Grey List?	Yes	Go to Q6 (unlikely to meet 'fairness test')	No	Go to Q5
Q5	Does the term specifies main subject matter of the contract or price?	Yes	Go to Q7	No	Go to Q6
Q6	Is it transparent? (Must be in plain and intelligible language)	Yes	Go to Q8	No	Go to Q8 (unlikely to meet 'fairness test')
Q7	Is it fair and prominent?	Yes	Main subject matter or adequacy of price are no assessable for fairness	No	Go to Q8
Q8	Does it create significant imbalance, contrary to the requirements of good faith, to the detriment of consumers? (The fairness test)	Yes	Unfair terms or notice	No	Terms or notice are not unfair

In a nutshell, if banking consumers consider that contract terms on which Islamic banks seek to rely is unfair, they are entitled to challenge the Islamic banks. If any dispute arises, they may access the internal dispute resolution of the respective Islamic banks or complaint to BNM or bring their own legal proceeding. Then, the court would interpret the requirement of fairness. The court has the final say in deciding whether a term or notice is unfair. If the court finds a term to be unfair, it cannot be enforced to the banking consumer. Another alternative which is cheaper, quicker and increase the chance to settle out of court, is to enter into ADR and referral to the 'Consumer Ombudsman.' Under CRA 2015, consumers have a statutory right to enter into an ADR.

This article finds that the contract terms in banking contracts between Islamic banks and banking consumers,

while facilitating commercial transactions, at the same time also detriments the banking consumers. The Islamic Banking Institutions possess a considerable advantage by defining the terms in advance which are not individually negotiated. By applying the CRA 2015, a number of terms commonly included in Islamic banking consumer contract could be deemed potentially unfair and might fall under the 'Grey List' of the CRA 2015 as indicated below:

1. Terms that allow Islamic banks absolute discretion to consolidate and debit/set-off current or savings accounts either with/without notice to banking consumers to meet payments of other credit contracts they have with the bank.
2. Terms that restrict consumers' redress.
3. Terms that exclude/limit liability of one party for failure to perform contractual obligations.

4. Right to vary term generally.
5. Right to final decision.
6. Right to impose unfair financial burden.
7. Terms that allow one party to enforce unfair clauses.
8. Terms that give right to one party to decide meaning of terms in contract.

This article reveals that all the above terms are found in the standard form consumer contracts of Islamic banks. Such terms could be deemed “unfair” as it could cause a significant imbalance on the parties’ rights as it gives the Islamic banks absolute discretionary power which detracts the banking consumers. For example, the Islamic banks’ right to set-off can cause extreme hardship to lower income households as it may mean that bank takes income needed for essential living expenses. This right of the Islamic bank is similar to one of the examples in the ‘Grey List’ such as, “Consumers being tied into the contract beyond what they would normally expect.” A term allowing Islamic banks absolute discretionary power to take money from customers’ account could be seen as equivalent to the ‘Grey List’ as it effectively allows the bank to practice set-off, often to the detriment of vulnerable consumers.

CONCLUSION

If Malaysia adopts the CRA 2015, any failure to comply with Part 2 of CRA 2015 on unfair contract terms could have significant consequences for the Islamic banks, from both contractual and regulatory perspective. The CRA 2015 represents a substantial increase in the rights of consumers, powers of the court and unfair terms enforcers. The courts could consider the fairness of the terms in consumer contracts or notices even though the contracting parties do not raise it as an issue, provided the court has sufficient information to do so. This will add pressure on the Islamic banks to review their existing standard terms and conditions, including those provided on retail websites and mobile apps, for compliance with the CRA 2015. Islamic banks need to evaluate contracts to ensure that the rights of consumers and remedies provided by CRA 2015 will be observed and accommodated to ensure no liability gaps. Banks must also update statutory references in all respective documents. Overall, Islamic banks should review pre-contractual information supplied to consumers such as notices, advertisements and announcements are void of legal jargon so that they deal “openly and fairly” with banking consumers.

Under the CRA 2015, to avoid legal and regulatory risk, Islamic banks need to ensure that the liability of Islamic banks to consumers is managed effectively. The commencement of the CRA 2015 will mean that the BNM and banking consumers are likely to take particular interest in unfair contract terms and that Islamic banks should check that their contract terms are fair so as

to avoid disputes. Last but not least, banks would be obliged to update policies on customer cancellation or complaints, and to train relevant staffs with regards to the new consumer rights and remedies.

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NOTES

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- ²⁴ Under section 3(1) the courts in Malaysia shall apply the English common law and rules of equity in the absence of written law on 7th April 1956 in West Malaysia, 1st December 1951 in Sabah and 12th December 1949 in Sarawak. However, this general application is subject to the following qualifications: "absence of local legislation, cut-off dates and local circumstances."
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- ²⁸ It applies to contracts entered into and notices issued on and after 1 October 2015.
- ²⁹ The CMA is the national competition and consumer authority for the UK. It replaced the Office for Fair Trading (OFT) and responsible for unfair terms enforcement under the CRA.
- ³⁰ This definition follows the exact same definition as in the UTCCRs. The UCTA "reasonableness" test is replaced by the UTCCRs "fairness" assessment.
- ³¹ There are three additions to the 'grey list': disproportionate termination fees and consumers are required to pay services not supplied, rights to determine/change what is supplied and, price variation clause.
- ³² Under CRA, CMA and FCA under Schedule 3 CRA is afforded equivalent enforcement powers to apply for injunction on unfair contract terms and consumer notices.
- ³³ Proposal for Consumer Right Bill. *Citizen Information Board* 42(7) ISSN 0790-4290.
- ³⁴ *The Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, 17.
- ³⁵ The list of three new unfair terms are: trader can decide characteristics of subject matter after consumer has entered into the contract; trader can make disproportionate charges or make consumer to pay for services not supplied when contract ends; and trader is allowed discretion over price after contract is entered.
- ³⁶ CJEU case of C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.* [2013] 3 CMLR 10.
- ³⁷ Section 65 CRA 2015 defines average consumer as a 'reasonably informed, observant and circumspect' consumer.
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