Inequality of Bargaining Power
A Matter of Common Fairness…

A. Introduction

“…where the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.”

In referring to the English common law doctrine of inequality of bargaining power, Lord Denning MR in Lloyds Bank v Bundy [1975] QB 326 commented that the courts will set aside a contract if the stronger party imposes terms on the other party which unfairly favour him and takes advantage of the weaker position of the other party. This doctrine supplements the English Unfair Contract Terms Act 1977 (“UCTA”), which mostly deals with unfair exemption clauses.

An example where an inequality of bargaining power arises is when an educated businessman acquires property from an illiterate at a gross undervalue. The question then is whether there is an equivalent principle of law in Malaysia?

B. Inequality of Bargaining Power

No legislation in Malaysia provides for such a doctrine and there is no Act similar to UCTA. However, the Malaysian Contracts Act 1950 (“CA”), recognises the concept of undue influence, which is somewhat narrower in scope when compared to the doctrine of inequality of bargaining power. According to Mason J in the Australian High Court case of Commercial Bank of Australia Ltd v Amadio [1983] 152 CLR 447, the will of the innocent party is not independent or voluntary where there is undue influence, and usually arises when parties enter into the contract. The doctrine of inequality of bargaining power, on the other hand, arises where the stronger party takes advantage in an unconscionable manner of the weaker party’s position to further his own interests, regardless of whether the weaker party’s will is independent or voluntary. This could arise at any point in the contract.

The Position in Malaysia

Does the doctrine of inequality of bargaining power apply in Malaysia in the absence of express legislation? This question was considered by the Court of Appeal in Saad Bin Marwi v Chan Hwan Hua [2001] 3 CLJ 98, where Gopal Sri Ram JCA (as he then was) raised two questions:

“Firstly, did our law recognize a general doctrine of inequality of bargaining power? And, secondly, what is the nature and scope of the doctrine?”

As to the first question, Sri Ram held that, “…we should recognise the wider doctrine of inequality of bargaining power...We may adopt the English doctrine of unconscionability in toto. That is a choice that is available to us because of s. 3(1)(a) of the Civil Law Act 1956.”
For the second question, Sri Ram was of the opinion that the English doctrine could be adopted, but applied in a broad and liberal way as in Canada, being “…a method by which practical justice may be achieved within a framework of principle.”

Sri Ram referred to the Canadian cases of Paris v Machnick [1972] 32 DLR 723 and Black v Wilcox [1976] 70 DLR (3d) 192 which were more flexible in granting relief and focused on doing justice according to the particular facts of the case, for example, by giving compensation, instead of allowing rescission and offering relief to a wider range of claimants. It would appear, therefore, that the doctrine of inequality of bargaining power applies in Malaysia today as a result of Saad’s case.

However, in the following year, the Court of Appeal in American International Assurance Co Ltd v Koh Yen Bee [2002] 4 CLJ 49 expressed some doubts on the decision in Saad’s case. First, they felt that the Court in that case went beyond its judicial role and into the legislature’s function, which should be Parliament’s prerogative. Secondly, consent was only voidable by coercion, undue influence, fraud, misrepresentation or mistake under Section 14 of the CA. There was also a concern that this doctrine would be at odds with a fundamental principle of contract law – parties’ freedom to contract. However, the Court did not reject the decision in Saad’s case but distinguished it on its facts.

Given the fact that such strong and opposing views were expressed, the Federal Court may at some point be asked to re-examine this issue. In the meantime, Saad’s case is authoritative, and the doctrine in Saad’s case was subsequently applied by the High Court in Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd [2004] 6 CLJ 320.

C. Conclusion

The lack of laws in Malaysia curbing unfair contract practices has long been lamented. UCTA and other English laws such as the Unfair Contract Terms in Consumer Contracts Regulations 1999 limiting unfairness in contracts have always been regarded as exemplary laws which should be adopted. The adoption of the doctrine of inequality of bargaining power in Malaysia, whether through case law or statute, with a focus on dispensing justice according to the particular facts of the case, must be a step in the right direction for the simple reason, as surmised by Denning, that “…it is not right that the strong should be allowed to push the weak to the wall.”

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