

Standard Form Contracts in Online Business

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Abstract

People have been directly selling and purchasing products and services in the past, but with the rapid development of technology nowadays, people prefer online transaction because it is easy, fast and efficient. Online business platforms are becoming increasingly relevant for the sale and purchase of goods and services. The seller can earn a profit, and the buyer can easily find something they wanted to purchase. Standard form contracts are usually used to legalize transactions. Before the payment and execution of the agreement, customers must agree and consent to all the standard terms. The implementation of online contracts has resulted in the increasing use of unfair contract terms in standard form contracts in the commercial industry. This paper aims to study the standard form contracts in online business and to discuss the unfair contract terms in online standard form contracts. The approach of this study is purely qualitative where it is based on a library research and involving conceptual discussion and legal analysis. Therefore, it is hoped this article provides valuable knowledge concerning standard form contracts, online business and unfair contract terms.

Keywords: Online Business, Contract, Standard Form Contracts, Unfair Contract Terms

Introduction

Contracts are essential for the successful operation of commercial developments. A contract is an enforceable promise that involves at least two parties; a promisor and a promisee (Beatson et al., 2016). When parties agree to enter into a contract, they are deciding to enter into a contractual relationship (Loos & Luzak, 2016). The idea of a contract is shifted from traditional to online. Online contracts are usually very lengthy, often reaching a thousand words, and written with no respect for plain English drafting concepts or considerations for lay audience understanding (Clapperton & Coronas, 2007). Besides that, the legal systems demonstrate the inability to grasp legal innovation and developments in the business environment (Lorenzo, 2016). Khan (2016) argued that the modern legislation in electronic transactions is not well developed by legal and judicial systems. Zulhafiz & Rahman (2020) discovered that most contracts have one-sided terms and conditions because the weaker party could not negotiate the terms of the contract prepared by the dominant party.

Therefore, this paper aims to study the standard form contracts in online business and to discuss the unfair contract terms in online standard form contracts because they are frequently favourable to the legal rights of sellers and detrimental to buyers.

Discussion

Transforming the traditional business systems to online business has evolved the marketplace by creating relationships between industry players; this phenomenon has contributed to market structure developments (Shahjee, 2016). According to Yusoff et al (2012), unfair contract terms in standard form contracts have been debated since the 1990s on online contracts, consumer contracts, and other types of contracts. The buyer has no other option to the terms and conditions provided by the seller, especially when they are really in need of the services or goods. Hence, the law needs to protect the weaker party, such as the buyer, when they accept the seller's terms and conditions in the standard form contracts.

Online Business

Technology advancement can lead to changes in consumer's behaviour. Online shopping and buying through smart devices and application are commonly used every day. The internet introduces e-commerce and expands businesses to the online world. The transformation creates a new approach for the formation of contracts with challenges between sellers and buyers.

Online business is much easier for the parties involved in commercial activity. The introduction of online business in this era has resulted in the implementation of an online contract, which is a type of contract formed by electronic means. Referring to (Nemat, 2011), online business is defined as the use of the internet and the web in conducting business transactions among individuals or organizations using information technology under the control of the business. Online business is designed to reduce operational costs as well as to remove the need to convert electronic files to paper (Lucking-Reiley & Spulber, 2001). It has developed into a global marketplace for people to sell and buy goods and services. Sellers, buyers, and partners communicate with one another in most businesses through the exchange of commodities (Abdollahi, 2011).

In online business, it is common to use a standard form contract. Referring to Bolgar (1972), modern commercial contracts are made on a "take-it or leave-it" basis, with one side giving over terms to the other and in this situation, the standard form contract has become extensively used.

Contracts

Contract law is a branch of private law. The legal concept under contract law is the rules for a promise to be legally binding on the person who makes the agreement (Beatson et al., 2016). A promise is an expression of willingness to perform an obligation while a contract consists of a promise made in such a way that the law allows as sufficient to enter into a legally enforceable obligation (Valente, 2010). The terms and conditions are important to the parties in a contract because they establish the right and obligations (McKendrick, 2016).

In Malaysia, the legislation governing contracts is the Contracts Act 1950 ("hereinafter referred to as "CA 1950") (Pheng, 2005). By virtue of section 2(b) of the CA 1950, "contract" is an agreement enforceable by law. The purpose of the contract law is to preserve the legality

of the contract and to facilitate economic activities (Yusoff & Abdul Aziz, 2015). By virtue of section 11 of the CA 1950, to make a contract valid, the contracting parties must reach the age of majority, have a sound mind, and not be disqualified from contracting any laws.

Contract laws only apply to parties who have implied their intention to be bound (Wilkinson-Ryan & Hoffman, 2015). The idea of a contract is shifted from traditional to online. However, the online contract is not negotiated, and the standard form contract is used widely. Concerning this issue, online contracts have the same loophole especially in preventing or restricting the use of unreasonable terms in a contract. Therefore, the parties of the online contract must always be aware of the terms and conditions that bind them.

An online contract is formed through the use of e-mail, electronic data interchange, world wide web platforms or a chat service (Jalil & Pointon, 2004). According to McMahon (2018), online contracts can be formed when the user visits a website that shows a link to contractual terms, requiring minimal user action and cause uncertainty until the consumer has consented to it.

Standard Form Contracts

Standard form contracts are often used in consumer contracts. The type of contract allows companies to easily and efficiently design and executes contracts. David Sterkin (2004) argued that standard form contracts are embedded in the lives of all consumers since they often engage in standard form contract before services are provided. A standard form contract creates a power imbalance in which the seller, who is usually the drafting party, determines all of the contractual terms (David Sterkin, 2004). According to Mallor (1986), the introduction of the standard form contract erupted with the theories of fair bargaining power and free consent in a contract.

Standard form contracts are often used in businesses (Beatson et al., 2016) and is defines by section 24A(b) of the CPA 1999 as “a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry.” Standard form contracts are not negotiable contracts because they have already been drafted by the dominant party and are based on the ‘take it- or leave it’ concept, which requires the buyer to have only two options: (i) to agree with the contract’s terms as they accept the offer in a contract, or (ii) to leave it by not continuing with the transaction. According to Ghirardelli (2015), standard forms used are similar for every customer of a particular business, and companies do not have to employ lawyers to structure every single contract.

Some terms and conditions implemented in standard form contracts use unfair terms that are also detrimental to buyers as sellers offer one-sided benefit contract. Diega & Walden (2016) contended that the consumer is the weaker party due to the inability to grasp the contract thoroughly without any reasonable possibility of negotiating the terms and conditions. As contended by Amin (2013), the standard form contract is drawn up by the seller and buyers must predict the existence of unfair contract terms that normally found in the receipts, invoices, and other sales documents.

Unfair Contract Terms

When a contracting parties enters into a contract, they must understand and accept the terms stated in a contract. However, in some situations, the contracting parties ignore the terms of the contract; if they read them, they will find some terms to be unfair. In Malaysia, the CPA 1999 was amended and Part IIIA was added in 2010 to include laws governing unfair contract

terms. Additionally, CA 1950 was silent on the matter of unfair terms in a contract. By referring to (Che Hashim, 2019), the terms of Part IIIA of the CPA 1999 are restricted, unclear and cause legal issues of interpretation.

Unfair contract terms are described as a contract that lacks protection for the weaker party as well as the contracting parties' rights and obligations are imbalanced and to the detriment of one party in a contract. Furthermore, other variables such as inability to notice and lack of understanding of the terms specified in the agreement due to the use of jargon in law, do not achieve *consensus ad idem*, and non-negotiable agreement becomes other factors that result in contract unfairness. Eorsi (1975) opined that the large businesses have misused their negotiation power by imposing standard form contract and unfair terms on clients, hence eliminating the freedom of contract.

Methodology

The approach of this study is purely qualitative where it is based on a library research and involving conceptual discussion and legal analysis. Referring to Fitri et al (2017), a conceptual analysis of the study attempted to identify the legal issues and the legislation. This article is a conceptual paper that employs doctrinal research to explain the standard form contracts and an online business; and to discuss the unfair contract terms. According to Abdullah (2018), the research is qualitative because it does not engage with statistical data analysis. The primary data of this study are based on Contracts Act 1950, Consumer Protection Act 1999, law cases and secondary data from various literature.

Conclusion

This study believes that unfair terms in standard form contracts are extensively used with advent of technology because the contract may be made with a single click. Unfairness is the opposite of justice and equality. Every judicial system has its interpretation of fairness depending on its particular customs and theories. When standard form contracts become a general practice, the buyer has no option but to accept the terms offered by the seller. Hence, it is found that the standard form contracts and non-negotiated agreements have resulted in an imbalance in the bargaining power of the contracting parties in an online business.

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