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The case for regulating unfair terms in online food delivery services in Malaysia

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Publication date

2026

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Bin M Fuad, M. N. A. (2026). *From menu to misuse: The case for regulating unfair terms in online food delivery services in Malaysia*. [Thesis, fully internal, Universiteit van Amsterdam].

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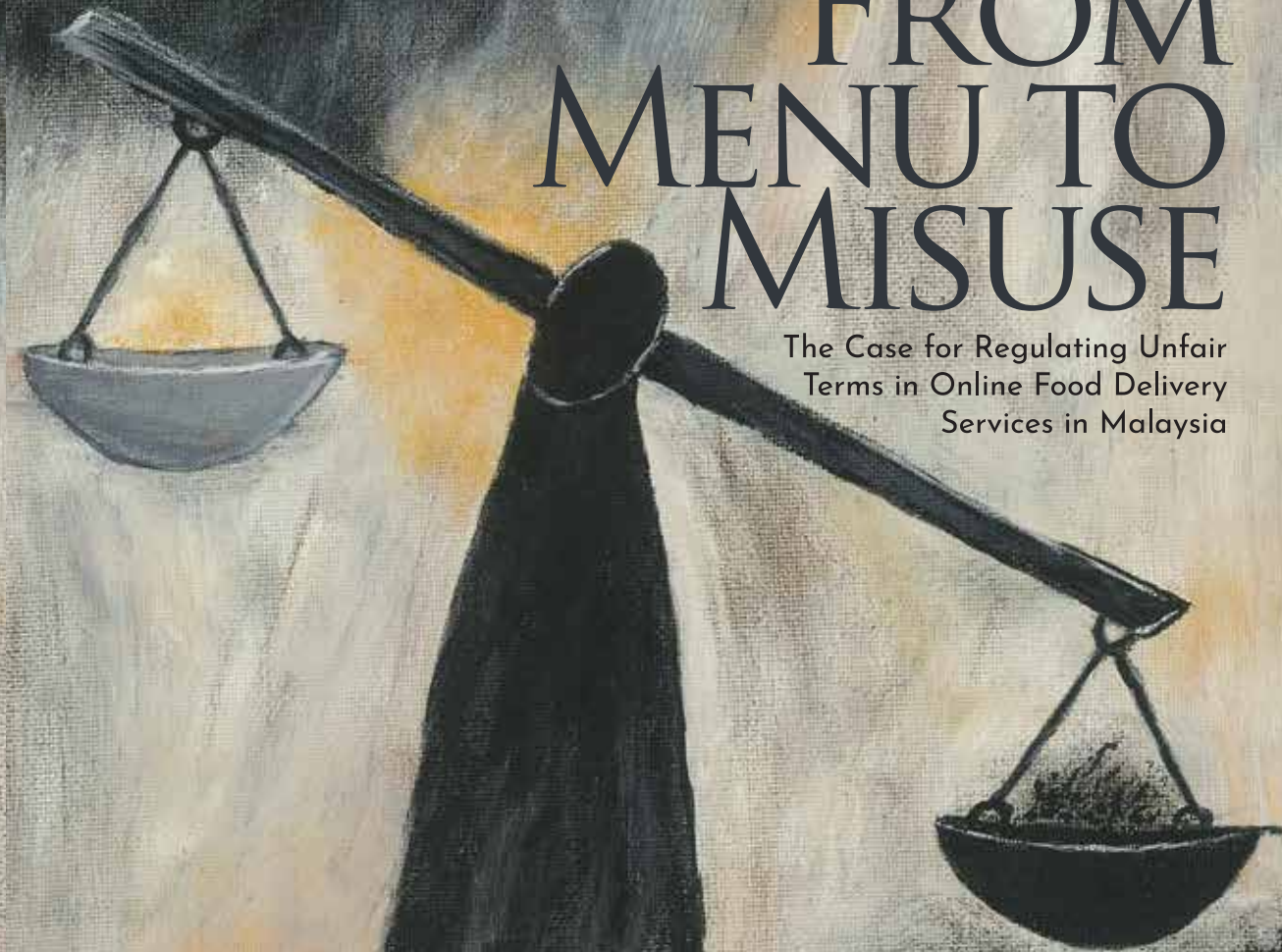
Behind every platform-mediated food delivery lies a network of relationships shaped by rules few notice. This thesis uncovers the tensions beneath the surface and explores the contractual terms shaping the relationships between platforms, restaurants and delivery riders, where unchecked power tilts the scales against fairness.

From Menu to Misuse

Muhammad Nabil Afham bin M Fuad

FROM MENU TO MISUSE

The Case for Regulating Unfair
Terms in Online Food Delivery
Services in Malaysia



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Muhammad Nabil Afham bin M Fuad

Cover Artwork: Gaffari Yalçin & Yonca Yalçin
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From Menu to Misuse: The Case for Regulating Unfair Terms in Online Food Delivery Services in Malaysia

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor

aan de Universiteit van Amsterdam

op gezag van de Rector Magnificus

prof. dr. ir. P.P.C.C. Verbeek

ten overstaan van een door het College voor Promoties ingestelde commissie,

in het openbaar te verdedigen in de Aula der Universiteit

op woensdag 6 mei 2026, te 14.00 uur

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geboren te Kuala Lumpur

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ACKNOWLEDGEMENTS

In the name of Allah, the Most Gracious, the Most Merciful.

The journey of finishing this book was far from easy. On 27 August 2022, I left my beloved country behind, parting from my family and friends and from the familiar food and weather that had long been part of my life. The moment I boarded the flight at Kuala Lumpur International Airport, I had many second thoughts.

“Do I really want to do this?”

“I am not smart enough to finish a PhD.”

While the Oman Air crew members were still busy boarding other passengers, I video-called my mother. I asked, *“Can I go home? I still have time to deboard.”* We both started crying (typical criers that we are). Unsurprisingly, she said *“Baliklah Nabil (Come home, Nabil)”*. I chuckled. I knew she would definitely say that. But I always remembered her words, *“Change the fate of our family”*. I then realised that this journey was never only about me. It is bigger than that. Growth requires me to step into the very things I fear.

Approximately 15 hours later, I arrived at the Schiphol Airport. I took a deep breath outside the airport, with my four pieces of luggage beside me as I waited for my Uber. The air somehow carried a distinct scent, one I had come to associate only with Europe. In that moment, I was transported back four years, to my backpacking journey across the continent, including my days in Amsterdam.

You may wonder why all these self-centric stories in this acknowledgment section? Since the past three years, I have realised that I often undermine myself and the value of my own journey. *“If I can do it, everybody can do it.”* I frequently feel unworthy, doubting whether my research would ever measure up to that of my academic peers at UvA. From falling short in sophistication to the lack of theoretical elegance, you name it. My supervisors attempted to convince me otherwise. Candida once reminded me that everyone’s research is different, and comparing yours with others is unfair. I nodded, but deep down, I was still in doubt.

Even when I did things right, receiving compliments seemed to be impossible. Nothing I did felt substantial, worthy of praises. My go-to reaction to “*I like what you wrote*” was always waiting for the follow-up ‘*but...*’. I was always waiting for the catch. Marco was, I believe, well aware of this so-called impostor syndrome (or whatever you want to label it), and he casually (repeatedly and consistently) told me that I have to start believing in myself. If he and Candida say that my work is good, then it is good. They have no reason to lie nor sugarcoat anything.

And today, you did it, Nabil. You really did it, and I am so proud of you. What once seemed impossible three years ago has now become reality. You proved yourself wrong this time. For that, I want to thank you for not giving up, even when your mind was telling you otherwise. I dedicate this thesis to you, for it is not merely a book, nor just a piece of research, but to remind you that this is the epitome of perseverance, growth and self-discovery (and yes, the realisation of just how much caffeine one can handle each day).

Enough of thanking myself. I would like to take this opportunity to offer my sincere gratitude to both of my supervisors, Marco Loos and Candida Leone (or *Prof.* Marco and *Dr.* Candida, as I used to call them during my first few weeks in Amsterdam, until they told me there was no need for such formalities). I recognise that supervising me may not have been all rainbows and sunshine. For that, I sincerely thank you for your unwavering support, understanding and compassion throughout this challenging journey. Truly, choosing both of you as my supervisors was an absolute no-brainer. Whatever future successes and accomplishments that I will achieve as an academic, I owe them to both of you.

Of course, my journey would not have been possible without my beloved parents, M Fuad and Nooralizan. I cannot thank you enough for everything you both have sacrificed throughout the years. Financially or otherwise, I could not stand here without your unconditional support and love. I hope I have made you both proud. *Terima kasih*, Papa Mama.

Huge shoutout to the best hype squad: Dr. Nabila, Dr. Shukri, Najihah, and Nazrin. Whether I was stressing out or finally dropping some good news, you guys were always ready with the moral support (and a lot of excitement through silly emojis and GIFs). I hope what I have done today means something to Seif, Hayyan, Ayyash and Khadijah down the road. If

my hard work helps motivate them to reach for even bigger things, then it was all worth it.

To my good friends that I made at UvA, Eva, Mirthe, Nena, Yevai, Laura, Francesca and Kim Bierhoff, thank you for always letting me tag along, checking up on me and making me feel like I actually belonged. Life in Amsterdam would have been a lot grayer and gloomier without you guys bringing the chaos and laughs. Big shout out to Ling Yu-thanks for always being around! I will never forget our 'study sessions' at the Student Experience's lobby that somehow always turned into late-night chats instead. Those are pure gold.

To my beloved friends in Malaysia, who patiently answered all my endless questions, academic or otherwise, and sent prayers and good vibes whenever I was in need: no amount of thank-you could ever repay you. Thank you Rahman, Rohana, Ikmal, Aisyah, Amiera, Atiqah, Faritz, Izzati, Faliq, Patricia and Dr. Abbas. It would be impossible to mention everyone who has made this journey possible, but please know that each of you holds a special place in my heart, and your support has meant the world to me.

Of course, I could not have defended my thesis without the kind approval of Prof. Chantal Mak, Prof. Marija Bartl, Prof. Guido Smorto, Dr. Nuna Zekić and Dr. Suzi Fadhillah. Thank you for taking the time out of your busy schedules to read and assess my work. I truly appreciate your time and consideration.

Last but not least, to my second family in Istanbul, Türkiye. I truly could not have made it through these past three years without you. Thank you for your endless hospitality every time I came to Istanbul for a short mental escape from reality. I am grateful for all the late-night hangouts, for listening to my rants and for putting up with my stressful moments. Thank you for taking me in as if I were part of the family. We were strangers three years ago, and now I am proud and privileged to call you all my family. *Çok teşekkür ederim. Allah sizi mübarek etsin.*

PREFACE

This research was conducted between August 2022 and August 2025, during which time there was no statutory protection afforded to any individual gig workers and restaurants engaging with the online platforms within the online food delivery services in Malaysia. The empirical data and legal analysis were therefore grounded in that earlier legal context.

At the end of the research trajectory, the Gig Workers Bill 2025 was tabled and passed by the House of Representatives on 28 August 2025 and subsequently passed by the House of Senate on 9 September 2025. As of December 2025, the Bill has yet to be gazetted and enforced. The Bill introduces significant changes to the legal landscape of the gig economy, including the platform business model. Through this Bill, the Parliament has, amongst others:

- (a) confirmed the status of the delivery riders as independent contractors, engaged by the online platforms under a contract for service;
- (b) introduced regulatory control over the terms and conditions of the said contract (although not strictly through unfair terms control mechanism); and
- (c) explicitly recognised the obligations of the online platforms and the rights of gig workers (including delivery riders).

Recognising the importance of this development, the thesis has therefore been revised to consider how this new legislation may contribute to the overall protection of the business users in the online food delivery services. In this respect, I have incorporated a general overview of the Gig Workers Bill 2025 in Chapter 4 of the thesis, as well as discussions regarding its potential and limitations in protecting the business users in the online food delivery services. Be that as it may, this subsequent legislative intervention does not alter the discussions and/or findings discussed in the earlier substantive chapters (i.e. Chapters 2 and 3 of the thesis), which, therefore remain relevant notwithstanding the Bill's introduction.

1. INTRODUCTION

1.1 Online Food Delivery Services: Two Sides of the Coin

The online food delivery services (“OFDS”) business model functions by allowing consumers to place food orders through the online food delivery platform (“OFDP”), with meals prepared by partner restaurants and delivered to consumers' doorsteps by designated delivery riders (together referred to in the thesis as “Non-Consumer Users”).¹ In facilitating this transaction, the OFDPs usually regarded themselves as merely technological intermediaries, connecting the providers (i.e. the Non-Consumer Users) with the consumers.² Through this business model, restaurants are able to expand their consumer base and delivery riders have the opportunity to earn income by fulfilling orders placed by consumers. As pointed out by Ibrahim et al., the operation of the OFDS in Malaysia has become essential for sustaining restaurant operations and providing employment opportunities to those facing job insecurity.³

However, every coin has two sides. In Malaysia, one of the most pressing issues concerning delivery riders is the OFDPs' ability to unilaterally alter the riders' payment structure.⁴ Grab (one of the OFDPs in Malaysia), for instance, has in the past exercised its unilateral authority to lower the minimum delivery fare from RM5.00 (approximately EUR1.00) to RM4.00 (approximately EUR0.80).⁵ As noted by Ahmad et al., these issues within the OFDS are likely driven by a lack of regulatory oversight and the OFDPs' claim of being intermediaries, which distances them from accountability for riders' well-being.⁶ To aggravate this predicament, the delivery riders in Malaysia are also prevented from enjoying the protection afforded under the employment law, given that they are currently deemed to be independent contractors and/or self-employed individuals under a contract for service.⁷

¹ Praveen Puram and Anand Gurumurthy, 'Sharing Economy in the Food Sector: A Systematic Literature Review and Future Research Agenda' (2023) 56 *Journal of Hospitality and Tourism Management* 229, 231

² Arianna Seghezzi, Matthias Winkenbach and Riccardo Mangiaracina, 'On-Demand Food Delivery: A Systematic Literature Review' (2021) 32 *The International Journal of Logistics Management* 1334, 1343

³ Muhammad Azman Ibrahim, Harlina Abd Hamid and Mohamad Fariz Bin Abdullah, 'The Impact Of Online Food Delivery Services On The Financial Performance Of Restaurant Businesses In Malaysia' (2022) 10(252) *Journal of Entrepreneurship, Business and Economics* 55, 56

⁴ Yosuke Uchiyama, Fumitaka Furuoka and Siti Aminah Omar, 'The Rise and Contestation of Platform Capitalism: Evidence from Two Food Delivery Blackouts in Malaysia' (2025) 67 *Journal of Industrial Relations* 1, 20

⁵ Naveen Prabu, '300 Grab Riders Stage Protest, Want Issues Resolved in 5 Days' *Free Malaysia Today* (*Free Malaysia Today*, 19 January 2024) <<https://www.freemalaysiatoday.com/category/nation/2024/01/19/300-grab-riders-stage-protest-want-issues-resolved-in-5-days>> accessed 10 April 2025.

⁶ Khaizie Sazimah Ahmad and others, 'Policies Improving the Well-Being of Gig Workers in Malaysia' (2024) 16 *Information Management and Business Review* 182, 186

⁷ Malaysian High Court's decision in *Loh Guet Ching v. Menteri Sumber Manusia & Ors* [2022] 1 LNS 2388. This position has been further confirmed through the recently passed Malaysian Gig Workers Bill.

The controversial implications of the OFDS business model go beyond the delivery riders, affecting the participating restaurants alike. In this respect, Ma et al. observed that the high dependence of the restaurants on the OFDPs has resulted in imbalanced power relations between the two parties, adversely affecting restaurants, especially SMEs.⁸ One of the most glaring issues that impacts the restaurants is pertaining to the high and unpredictable commission fees payable to the OFDPs.⁹ It has been reported that OFDPs' commission fees consume up to 25-35% of the restaurants' revenue.¹⁰ Although the OFDS may drive higher revenue for restaurants, this is frequently offset by a significant drop in profitability,¹¹ considering the industry's average profit margin is only between 4–5%.¹² Not only are restaurants facing high commission fees, it has also been reported that these fees are sometimes unilaterally increased, and this aggravates the financial burden on the restaurants, particularly micro to small-sized restaurants, which do not have the leverage to negotiate with the OFDPs.¹³

Another notable issue within the OFDS business model is the question of liability, which arises from the high level of interdependence between the service providers. As mentioned previously, the OFDS' peculiarity lies in the collaboration of multiple parties (i.e. the OFDPs, restaurants and delivery riders) and these parties need to cooperate with each other in fulfilling consumers' orders.¹⁴ Be that as it may, this collaboration comes with its associated risks.¹⁵

For instance, delivery riders' ratings may be adversely affected by any late delivery of the consumers' orders.¹⁶ This situation is often contributed by, amongst others, restaurants' understaffing and orders coming in during peak hours. Such delays in preparing the meals on the part of the restaurants may not only affect the restaurants' ratings, but may also cause undue effects on the

⁸ Shigui Ma, Yong He and Ran Gu, 'Impacts of Fairness Concerns on Online Food Delivery Service Supply Chain' [2025] *International Transactions in Operational Research* 2 <<https://onlinelibrary.wiley.com/doi/10.1111/itor.70051>> accessed 18 June 2025.

⁹ Izhar Hafifi Zainal Abidin, Mohd Onn Rashdi Abd Patah, and Mohd Aliff Abdul Majid, 'Adoption of Online Food Delivery by Micro Food Service Businesses: A Conceptual Paper' (2024) 16 *Journal of Tourism, Hospitality & Culinary Arts* 139, 141

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Pnina Feldman, Andrew E Frazelle and Robert Swinney, 'Managing Relationships Between Restaurants and Food Delivery Platforms: Conflict, Contracts, and Coordination' (2023) 69 *Management Science* 812, 812

¹³ Ibrahim, Hamid and Abdullah (n 3) 64.

¹⁴ Bryan Teoh Phern Chern and Fauziah Binti Sh Ahmad, 'Supply Chain Evolution. A Study Of Opportunities And Challenges Of Virtual Kitchens In Malaysia' (2020) 7 *Journal of Critical Reviews* 361, 362.

¹⁵ *ibid.*

¹⁶ Cheng Ling Tan, Zi Ying Knee, and Sook Fern Yeo, 'From Clicks to Doorstep: Exploring Service Quality and Stakeholder Challenges in the Online Food Delivery Supply Chain' (2025) 17 *SEARCH Journal of Media and Communication Research* 149, 160 <<https://fslmjournals.taylors.edu.my/wp-content/uploads/SEARCH-2025-P10-17-CLESS2024.pdf>> accessed 17 August 2025.

riders as they may also be implicated by the bad ratings for late delivery. As demonstrated in Uchiyama et al.'s interview with delivery riders in Malaysia, one respondent (delivering for Foodpanda, another Malaysian OFDP) noted that *"Since some customers do not understand us, they complain to us due to late of delivery. But the blame is not on us and the food preparation by the restaurant is late. That's why we sent it late, but the customers did not understand it they complained to Food Panda then which causes our rating to decrease"*.¹⁷

The same interdependency (and the liabilities that are attached to it) may also be observed on the part of the restaurants. The difficulty of maintaining control over food quality in the OFDS model is a common source of frustration amongst the restaurants.¹⁸ In this respect, it has been noted that food quality preservation during delivery is often hindered by logistics processes that fall outside of the restaurant's control.¹⁹ Although the said issue is not caused by the restaurants, inconsistencies in the food quality may result in negative customer feedback and reviews, consequently jeopardising the restaurants' ratings and reputation.

To aggravate matters, the restaurants usually bear the burden of resolving customer complaints and may be required to compensate the consumer, including arranging replacement meals. The OFDPs may even, through their terms and conditions, be empowered to issue a refund directly to consumers without prior consultation with the restaurants, even though in some instances, the delivery issues are entirely not the restaurants' fault (e.g. missing items due to dishonest riders).²⁰ Where liability issues arise due to the interdependency among service providers, the OFDPs' tendency to shift this risk to non-consumer users is clearly problematic.

Given the aforesaid predicaments faced by the Non-Consumer Users in the OFDS industry, a protest known as the 'Food Delivery Blackout' was launched in Malaysia on 5 August 2022, affecting major cities such as the capital city of Kuala Lumpur.²¹ The strike was held to demand immediate action from the OFDPs and the government to address, amongst others, the precarious working conditions faced by the OFDPs' workers and the OFDPs' unfair business

¹⁷ Yosuke Uchiyama, Md Nasrudin Md Akhir, and Fumitaka Furuoka, 'Gig Workers, Social Protection and Labour Market Inequality: Lessons from Malaysia' (2022) 56 *Jurnal Ekonomi Malaysia* 165, 176.

¹⁸ Guan Yuchen, 'Factors Affecting Online Food Quality Control among Deliverers in Delivery Process in Malaysia' 22 *IOSR Journal of Business and Management* 26, 28.

¹⁹ Izhar Hafifi Zainal Abidin, Mohd Onn Rashdi Abd Patah, and Mohd Aliff Abdul Majid (n 9) 142.

²⁰ Charlene Li, Miranda Miroso and Phil Bremer, 'Review of Online Food Delivery Platforms and Their Impacts on Sustainability' (2020) 12 *Sustainability* 1, 7 <<https://www.mdpi.com/2071-1050/12/14/5528>> accessed 28 November 2025.

²¹ Yosuke Uchiyama, Md Nasrudin Md Akhir, and Fumitaka Furuoka (n 17) 168.

practices. However, despite the strike, the OFDPs reacted nonchalantly and many delivery riders continued working, likely out of financial necessity.²²

The precarious and/or dubious contractual arrangements between the OFDPs and the Non-Consumer Users in Malaysia as observed above are neither an exceptional nor isolated case. Studies in other jurisdictions have shown that large businesses (including OFDPs) have been implementing contractual terms that are exploitative in nature against their business counterparts. Both reports published by the Australian Competition and Consumer Commission²³ (“**ACCC Report**”);²⁴ and one commissioned by the European Commission (“**EU Report**”)²⁵ have found several common instances of unfair terms being imposed in business-to-business (“**B2B**”) and platform-to-business (“**P2B**”) contracts involving small businesses and independent contractors. These terms include, but are not limited to, clauses pertaining to unilateral variation of terms, limited and/or wide exclusion of liability and unilateral termination.²⁶

In the context of adhesion contracts drafted by several Australian online platforms that are active across multiple sectors, Stewart and Williams found that clauses, amongst others, permitting only one party to avoid or limit performance, restricting one party’s right to sue and allowing unilateral variation are very common in gig economy contracts.²⁷ Their study revealed that, of the 15 online platforms operating in Australia, every single one imposed the first type of clause, while 14 reserved the right to unilaterally modify their contractual terms at will and to curtail their counterparties’ rights to legal redress.²⁸

Within the context of the OFDS industry specifically and by way of an example, the Australian Competition and Consumer Commission had, in 2019, compelled Uber Eats to amend its contractual provisions that were detrimental to its business users.²⁹ As pointed out by Shanahan and Smith, there are some

²² Nora Mahpar, “Boycotts Don’t Work”, Food Delivery Riders Opt out of Protest’ (*Free Malaysia Today*, 5 August 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/08/05/boycotts-dont-work-food-delivery-riders-opt-out-of-protest>> accessed 25 May 2025.

²³ The Competition and Consumer Commission is an independent statutory authority in Australia responsible for, amongst others, protecting consumer rights, promoting fair trade and ensuring competition in the Australian markets. It also plays a key role in regulating business practices to benefit consumers and the economy in general.

²⁴ Australian Competition and Consumer Commission, ‘Unfair Terms in Small Business Contracts: A Review of Selected Industries’ (2016) <https://www.accc.gov.au/system/files/B2B%20UCT%20-%20Final%20-%20Unfair%20terms%20in%20small%20business%20contracts%20%20A%20review%20of%20selected%20industries_0.PDF> accessed 30 November 2025.

²⁵ European Commission, ‘Study on Contractual Relationships between Online Platforms and Their Professional Users: Final Report.’ (2018) <<https://data.europa.eu/doi/10.2759/950526>> accessed 30 November 2025.

²⁶ Australian Competition and Consumer Commission (n 24) 14–15.

²⁷ Andrew Stewart and Penny Williams, ‘Regulating the Fairness of Work Contracts in the Gig Economy’ (2023) 51 *Federal Law Review* 466, 477.

²⁸ *ibid* 477–478.

²⁹ David Chau, ‘Uber Eats Imposes “unfair Contracts” and Ruins Deliveries, Restaurateurs Allege’ (*ABC*, 22 April

concerns regarding delivery riders in the OFDS business model, including the exercise of the OFDPs' power in unilaterally modifying contractual terms such as their fee structure and the lack of transparency in their automated decision process related to the riders' account termination.³⁰

Considering the adverse circumstances in Malaysia as well as similar developments globally, the contractual relationship between the OFDPs and the Non-Consumer Users in Malaysia merits scrutiny. In this respect, particular attention should be given to how the OFDPs have shaped their contractual relationship with the Non-Consumer Users through adhesion contracts imposed by the former, under which the rights and obligations of the latter are unilaterally determined by the terms and conditions contained therein.

This call for scrutinising the OFDPs' adhesion terms and conditions in Malaysia is further amplified by the economic and societal factors at play. In this respect, the Department of Statistics Malaysia reported that e-commerce transactions (including food delivery services) have increased by MYR 71.7 billion (approximately EUR 15.1 billion) to MYR 268 billion (approximately EUR 56.5 billion), just within a one-year period between the first quarter of 2020 to the second quarter of 2021.³¹ Further, it is also observed that the consumption of food delivery services has expanded by 35% in 2021 compared to the previous year.³² Recently, the Malaysian OFDS industry generated USD2.7 billion in 2023 and is projected to reach USD6.1 billion in 2032.³³ Undeniably, the tremendous reliance on the OFDS business model by consumers and service providers has contributed to this growth.

With regard to the restaurants in Malaysia, in the second half of 2020, Grab reported a substantial 30% increase in deliveries (compared to the first half of the year), coupled with the addition of 8,000 new merchants restaurants, which recorded a 25% growth in their online revenues.³⁴ This development not only ensured business continuity through the pandemic but also offers a

2018) <<https://www.abc.net.au/news/2018-04-22/uber-eats-criticised-over-conditions-on-restaurant-owners/9662814>> accessed 30 November 2025.

³⁰ Genevieve Shanahan and Mark Smith, 'Fair's Fair: Psychological Contracts and Power in Platform Work' (2021) 32 *The International Journal of Human Resource Management* 4078, 4087.

³¹ BERNAMA, 'E-Commerce, Food Delivery Services GMV Expand by US\$7 Bln in 2021-Mustapa' (*BERNAMA Biz*, 13 January 2022) <<https://www.bernamabiz.com/news.php?id=2042877/>> accessed 30 November 2025.

³² *ibid.*

³³ Acumen Research and Consulting, 'Malaysia Online Food Delivery Market Size to Reach USD 6.1 Billion by 2032 Growing at 9.5% CAGR - Exclusive Report by Acumen Research and Consulting' (25 December 2025) <<https://www.acumenresearchandconsulting.com/press-releases/malaysia-online-food-delivery-market>> accessed 25 December 2025.

³⁴ Harizah Kamel, 'Food Delivery Services: From Odd Job to the Most In-Demand' (*The Malaysian Reserve*, 1 January 2021) <<https://themalaysianreserve.com/2021/01/01/food-delivery-services-from-odd-job-to-the-most-in-demand/>> accessed 30 December 2025.

valuable opportunity for the SME restaurants aiming to expand their presence in the digital marketplace.

As of October 2025, there are 22,303 restaurants operating in Malaysia, with approximately 94.79% being single-owner establishments.³⁵ Whilst specific data on the number of restaurants engaging with OFDPs is lacking, a significant increase in the participation of restaurants in the upcoming years would not be surprising given the rapid growth of the OFDS business model and the benefits that this business model offers to the restaurants (e.g. increased revenue and improved market competitiveness).

The OFDS business model has also played a vital role in job creation, especially for individuals who lost their income due to the coronavirus pandemic. Between March and September 2020 alone, more than 10,000 individuals joined Grab as drivers and delivery partners, and Foodpanda (another Malaysian OFDP) recorded an addition of 20,000 new delivery riders joining the company between March and July 2020, reflecting 7.5% increase in their rider registrations.³⁶

Moreover, it is evident that the OFDS business model is expanding rapidly and is likely to continue doing so in the foreseeable future. In this regard, the OFDS industry has not only functioned as a vital lifeline for the unemployed during economic crises (as can be observed above during the coronavirus pandemic), but may also become a key component of the future labour market. For instance, as of 2022, workers associated within the gig economy across different services and/or industries constitute approximately 18% of the Malaysian workforce.³⁷ It has also been reported that approximately 20% of students who completed the Sijil Pelajaran Malaysia³⁸ have opted to enter the gig sector instead of pursuing tertiary education.³⁹ As such, it appears that this industry (including the OFDS) no longer serves merely as a fallback option but has instead evolved into a potential long-term source of employment.

In light of the foregoing, ensuring a fairer level playing field between the OFDPs and the goods/service providers (i.e. the Non-Consumer Users) is no longer optional, especially considering the OFDS' rapid expansion and

³⁵ Smartscrapers, 'List of Restaurants in Malaysia' (Smartscrapers, 15 October 2025) <<https://rentechdigital.com/smartscraper/business-report-details/list-of-restaurants-in-malaysia>> accessed 30 December 2025.

³⁶ Harizah Kamel (n 34).

³⁷ Yosuke Uchiyama and Fumitaka Furuoka, 'Uberisation and Resistance to Online Food Delivery Gig Work in Asia: Lessons from Malaysia' [2025] *Journal of Contemporary Asia* 1, 3 <<https://www.tandfonline.com/doi/full/10.1080/00472336.2024.2449081>> accessed 17 June 2025.

³⁸ Sijil Pelajaran Malaysia is the final examination in the Malaysian secondary education. It serves as a key academic qualification for entry into pre-university programs, vocational training or the workforce.

³⁹ R. Loheswar, 'Report: Food Delivery Group Expects 20pc of SPM Grads to Become Riders as Households Struggle with Money' (*Malay Mail*, 18 June 2023) <https://www.malaymail.com/news/malaysia/2023/06/18/report-food-delivery-group-expects-20pc-of-spm-grads-to-become-riders-as-households-struggle-with-money/74968#google_vignette> accessed 28 December 2025.

substantial societal and economic impact. The OFDS industry is here to stay. If the abovementioned adverse issues arising from the contractual relationship between the OFDPs and the Non-Consumer Users continue to be overlooked, we may soon find the latter risk becoming increasingly prejudiced by the unfair practices of the OFDPs.

One may wonder then, should we abolish the business model in totality? This may be the most straightforward approach. However, in my view, this may not be the most appropriate recourse as it will also eliminate its associated economic and social benefits as explained above. Therefore, I propose here (and will so demonstrate throughout this thesis) that a regulatory/monitoring approach might produce a better outcome. Specifically, by overseeing and scrutinising the terms and conditions imposed by the OFDPs, it is possible to promote a fairer playing field, one where the interests of the Non-Consumer Users are protected and exploitation is mitigated. This way, the benefits of the business model can be preserved without totally disregarding its inherent risks against the relevant stakeholders (i.e. the Non-Consumer Users).

1.2 Research Questions & Thesis Structure

1.2.1 The Non-Consumer Users in Malaysia: The Forgotten Ugly Duckling

Considering the significant growth of the OFDS business model and its mass-contracting nature, it is not unusual for the OFDPs to employ standard form contracts to govern their relationships with the Non-Consumer Users. Standard form contracts may be understood as any contract terms that are pre-formulated by one party in view of its contractual relationships in general and later provided to its counterparties.⁴⁰ However, the usage of standard form contracts may easily be abused by the party drafting them.⁴¹ This legitimate concern usually arises within the realm of consumer contracts where the consumers as the weaker parties do not have the leverage of bargaining nor read and/or comprehend the terms and conditions.⁴²

In business-to-consumers contracts (“**B2C**”), the consumers are typically in a weaker bargaining position, with contract terms imposed unilaterally by sellers on a “take-it or leave-it” basis.⁴³ Essentially, standard form contracts may place the consumers in a position of unequal bargaining power against the

⁴⁰ James R Maxeiner, ‘Standard-Terms Contracting in the Global Electronic Age: European Alternatives’ (2003) 28 *Yale Journal of International Law* 109, 110.

⁴¹ Syuhaeda Mat Ali, Rusni Hassan, and Ahmad Azam Othman, ‘Inadequacy of Consumer Protection from Unfair Contract Terms in Musharakah Mutanaqisah Home Financing In Malaysia’ (2017) 6 *Journal of Islamic Finance*(Special Issue) 231, 232.

⁴² Mark R Patterson, ‘Standardization of Standard-Form Contracts: Competition and Contract Implications’ (2010) 52 *William and Mary Law Review* 327, 332

⁴³ Shmuel Becher, ‘A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law’ [2009] *University of Michigan Journal of Law Reform* 747, 748

sellers.⁴⁴ Consequently, the latter may impose various kinds of unfair terms that may lead to the transfer of the commercial risks to the former, with them having no choice but to assent (or worse, unaware of) such transfer.⁴⁵

Given the plausibility of unfair terms being imposed via adhesion contracts, the classical view holds that legal intervention through the review of unfair terms serves as a mechanism to protect the weaker party.⁴⁶ In Malaysia, the only available statutory protection against the imposition of unfair terms could be found in Part IIIA of the Malaysian Consumer Protection Act 1999 ("**Malaysian CPA**"). As the title of the act suggests, however, the Malaysian CPA only protects the consumers⁴⁷ from the imposition of unfair terms by suppliers of goods or services.

In this respect, terms that are found to be procedurally or substantively unfair would be deemed unenforceable and void.⁴⁸ However, given that the Malaysian CPA exclusively deals with B2C contracts, the Non-Consumer Users are excluded from the protection given under the Malaysian CPA. Therefore, they (restaurants and delivery riders) are exposed to unfair terms imposed by the OFDPs. Indeed, one may perceive them as the overlooked and the outcast.

Recent legislative developments mark a promising shift (at least insofar as the delivery riders are concerned). As mentioned previously, upon the completion of this research in August 2025, the Malaysian Parliament had proceeded to table the Gig Workers Bill 2025 ("**Bill**"), with the aim to, amongst others, protect the rights of gig workers, impose the duties of platforms and regulate the terms and conditions imposed by the platforms against the gig workers. The Bill was passed by the House of Representatives (following its three readings) on 28 August 2025 and subsequently approved by the upper house (i.e. House of Senate) on 9 September 2025. However, as of early December 2025, the Bill has not come into force, as it has yet to be gazetted.

Although this development is certainly welcomed, the Bill is not without its limitations. At the outset and within the context of my study, it must be emphasised that the Bill (as indicated by its title), extends protection solely to the delivery riders. Therefore, the restaurants within the OFDS business model are still out of the loop and remain susceptible to the imposition of unfair terms by

⁴⁴ Adnan Trakic, 'Statutory Protection of Malaysian Consumers against Unfair Contract Terms: Has Enough Been Done?' (2015) 44 *Common Law World Review* 203, 204

⁴⁵ *ibid.*

⁴⁶ Martijn Hesselink, 'Unfair Terms in Contracts Between Businesses' in Reiner Schulze and Jules Stuyck (eds), *Towards a European Contract Law* (Sellier-de Gruyter 2011) 132

⁴⁷ "Consumer" is defined as a person who:- "(a) acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and (b) 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- (i) resupplying them in trade; (ii) consuming them in the course of a manufacturing process; or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land".

⁴⁸ Section 24G of the Malaysian CPA

the OFDPs.⁴⁹ Notwithstanding its limited scope, the potential (and limitations) of the Bill in safeguarding the interests of the delivery riders within the OFDS industry will be examined in this thesis.

1.2.2 Research Questions and Methodology

In view of the identified exploitative practices and/or terms in the OFDS business model (as pointed out in section 1.1 above), the main question that this thesis attempts to answer is *whether there is a need for Malaysia to enact a dedicated unfair terms legislation to protect the Non-Consumer Users within the OFDS business model?*

In order to answer the abovementioned question, a set of sub-questions has been formulated:-

- (a) *To what extent are the Non-Consumer Users vulnerable and/or susceptible to the imposition of unfair terms? (see Chapter 2 of the thesis);*
- (b) *To what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs? (see Chapter 3 of the thesis); and*
- (c) *To what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users (see Chapter 4 of the thesis).*

The findings of the first sub-question would provide a theoretical justification to protect the Non-Consumer Users from the imposition of unfair terms whilst the second sub-question would complement the former by advancing practical justifications for a systematic unfair terms control within the OFDS industry. Flowing from these sub-questions, the final sub-question would essentially suggest that there is a need for Malaysia to implement a dedicated unfair terms control review mechanism governing P2B relationships in the OFDS industry.

⁴⁹ For further discussions on the Gig Workers Bill, see section 4.7 of Chapter 4 below.

In the following paragraphs, each sub-question will be discussed separately, as well as the methodological choices employed to answer it.

(i) *To what extent are the Non-Consumer Users vulnerable and/or susceptible to the imposition of unfair terms?*

At its core, unfair terms control intervention within B2C contracts is underpinned by a normative commitment to protect the consumers as the weaker party (i.e. consumers). For instance, the Court of Justice of the European Union (“**CJEU**”) has consistently held that the protection of consumers against the imposition of unfair terms is grounded in the notion that consumers are in a weaker position than sellers, including their weaker bargaining power and informational asymmetry.⁵⁰ These factors render the consumers more vulnerable and/or susceptible to the implications of unfair terms. Building upon this premise, I contend that if it can be demonstrated that the Non-Consumer Users exhibit, to a comparable extent, similar types/dimensions of vulnerabilities as the consumers, there is a compelling justification for extending unfair terms control to the Non-Consumer Users.

Through Chapter 2 of this thesis, I will delve into the concept of consumer vulnerability. The notion of consumer vulnerability is commonly employed to identify a group of individuals that need regulatory attention, given, amongst others, their inferior bargaining position and other external conditions that render them more susceptible to harm.⁵¹ In answering this sub-question, the utilisation of this concept as the entry point for justifying protection for the Non-Consumer Users serves as an explanatory framework that identifies circumstances under which contracting parties are exposed to harm by their stronger counterparties (e.g. unfair terms/practices), thereby warranting systematic protection.

Once these circumstances are identified (i.e. surrounding B2C contracts) and where similar circumstances arise in other types of relationships involving actors with distinct formal legal status (i.e. P2B contracts), the same normative reasoning underpinning protection may be utilised. In this respect, although the Non-Consumer Users hold distinct legal status compared to consumers, their contractual position and circumstances surrounding their relationship vis-à-vis OFDPs are functionally analogous to consumers (e.g. the adoption of standard form contracts is equally present in both B2C and P2B contracts). Through this

⁵⁰ See, amongst others, Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* and Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*

⁵¹ Natali Helberger and others, ‘Structural Asymmetries in Digital Consumer Markets, A Joint Report from Research Conducted under the EUCP2.0 Project’ (2021) BEUC-X-2021-018 7 <https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-018_eu_consumer_protection_2.0.pdf> accessed 29 November 2025.

route, employing the concept of consumer vulnerabilities as an analytical framework would enable us to theoretically assess the Non-Consumer Users' susceptibility to unfair terms.

However, due to its elastic nature, the notion of consumer vulnerability is perceived as a slippery concept, rendering it difficult to be grounded from legal perspective.⁵² However, the said notion has been conceptualised in different ways across disciplines such as marketing.⁵³ In this regard, the literature across various disciplines reveals a fragmented understanding of consumer vulnerability, with scholars recognising distinct sources of vulnerability, ranging from individual traits (e.g. age or illiteracy) to external and situational circumstances (e.g. market conditions). Hence, in exploring the concept of consumer vulnerability, I will adopt an interdisciplinary approach, by analysing the debates surrounding the conceptualisation of this notion of vulnerability. These interdisciplinary contributions are intended to be used instrumentally to enhance understanding of, and to frame, the conceptual foundations of consumer vulnerability.

Having examined the normative justification for unfair terms control within the realm of B2C contracts (via the concept of consumer vulnerability and the circumstances that render them weaker against their counterparties), the next question is whether this notion of vulnerability (and the factors rendering consumers weaker in relation to sellers) can be mobilised to the Non-Consumer Users with regard to their relationships with the OFDPs? If the answer is in the affirmative, this would provide us with a theoretical basis/justification in protecting the Non-Consumer Users, given the absence of a convincing justification for affording the Non-Consumer Users lesser protection than consumers.

In ascertaining whether similar factors/circumstances also exist in the relationship between the Non-Consumer Users and the OFDPs, the concept of subsistence entrepreneurs will also be explored. This notion of subsistence entrepreneurs is chosen in order to demonstrate that, despite the Non-Consumer Users' status as businesses and/or self-employed, their functions in the market are distinguishable from other forms of business dealings. Essentially, the term 'subsistence entrepreneurs' may be understood as those who are self-employed and/or trading out of necessity, and who usually lack skills and entrepreneurial characteristics. In other words, this category of entrepreneurship refers to those

⁵² Christine Riefa, 'Protecting Vulnerable Consumers in the Digital Single Market' (2022) 33 *European Business Law Review* 1, 4 <<https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/33.4/EULR2022028>> accessed 29 November 2025.

⁵³ Organisation for Economic Co-operation and Development, 'Understanding and Responding to Financial Consumer Vulnerability' (83rd edn, Organisation for Economic Co-operation and Development 2025) OECD Business and Finance Policy Papers 83 12 <https://www.oecd.org/en/publications/understanding-and-responding-to-financial-consumer-vulnerability_111daec8-en.html> accessed 17 December 2025.

who are trading (whether goods or services) for their own subsistence and nothing more. Through this notion, scholars have (re)conceptualised entrepreneurs as a spectrum rather than a solid block of categorisation. The use of this reconceptualisation would be helpful in: (1) defeating the myth that all businesses are dealing on an equal footing; and (2) mitigating the doctrinal and ideological resistance in protecting businesses from the implication of unfair terms (especially amongst common law judges).

Further, the concept of subsistence entrepreneurs adds nuance to the assessment of vulnerability of business entities, allowing us to assess the Non-Consumer Users' susceptibility at a functional level, rather than relying on their formal legal status *per se*. It is also to be noted that the choice to assess the (alleged) vulnerability of the Non-Consumer Users through the lens of subsistence entrepreneurship is not meant to establish a new legal classification, but the said categorisation is merely used as a descriptive concept reflecting their restricted bargaining power and heavy reliance on the OFDPs as their source of subsistence. These factors mirror the structural disadvantages/weaknesses that exist in the B2C relationship, rendering them functionally comparable to consumers in their exposure to unfair terms and practices.

As will be demonstrated in Chapter 2, I will argue that the Non-Consumer Users may fit into this type of entrepreneurship and this categorisation may render them, to an extent, vulnerable to the imposition of unfair terms by the OFDPs. The Non-Consumer Users are, to an extent similar to consumers, susceptible to unfair terms despite their status as business entities. The answer to this first sub-question would serve as a justification for the need for legal intervention to regulate the OFDS business model through the OFDPs' terms and conditions.

(ii) *To what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs?*

If it can be established that the Non-Consumer Users are, to an extent, susceptible to exploitative practices such as the imposition of unfair terms, there is no convincing reason to deny them similar protection granted to the consumers. The discussions in Chapter 2 of the thesis therefore may serve as a sufficient theoretical normative justification for protecting the Non-Consumer Users despite their status as entrepreneurs.

However, I am of the view that the said theoretical justification may be further enforced by substantiating it from a practical perspective, by demonstrating how such vulnerabilities have been actually abused and/or taken advantage of by the OFDPs through their terms and conditions. This proposition may be supported by referring to, for instance, Preamble 9 of the EU Council

Directive 93/13/EEC on Unfair Terms in Consumer Contracts (“UCTD”), where it provides that “*Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes: 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'*”. According to Svensson, one of the rationales of the UCTD is to ensure that consumers are not subjected to abuses of power, which may take place through standard form contracts.⁵⁴

The same position is also prevalent in Australia, in which the Australian courts mentioned that one of the underlying rationales for protection against unfair terms is “*principally to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated*”, as per the judgment of Cavanough J in the Australian case of *Jetstar Airways*.⁵⁵ This position as propounded by Cavanough J has been consistently adopted and affirmed in subsequent cases in Australia, including but not limited to *Turner*,⁵⁶ *TPG Internet Pty Ltd*⁵⁷ and *AIBI Holdings Pty Ltd*.⁵⁸

In light of the above, investigating whether the OFDPs in Malaysia have abused the Non-Consumer Users’ vulnerabilities is imperative. In doing so, I will examine the Malaysian OFDPs’ terms and conditions to identify if their adhesion contracts are riddled with terms that may be deemed unfair. This exercise serves as real-life evidence, reinforcing the general call for extending protection against unfair terms in the Non-Consumer Users’ favour. To that extent, the abuse of the Non-Consumer Users’ vulnerability by the Malaysian OFDPs will be discussed in Chapter 3 of this thesis in two parts. Before we delve into the Malaysian OFDPs’ contracts, I will first identify the most commonly observed unfair terms imposed in B2B and P2B contracts that negatively impact small businesses, self-employed individuals and/or independent contractors. In doing so, the studies/reports conducted in other jurisdictions (i.e. Australia and the European Union) will be referred to, in gauging whether large businesses (including platforms) have been implementing terms that are exploitative in nature against their smaller business counterparts. The purpose of this preliminary step is to identify whether the issue of exploitation (through unfair terms) in the B2B and/or P2B transactions is prevalent, even in other jurisdictions.

⁵⁴ Ola Svensson, ‘The Unfair Contract Terms Directive: Meaning and Further Development’ (2020) 3 Nordic Journal of European Law Issue 24, 24.

⁵⁵ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539

⁵⁶ *Turner v MyBudget Pty Ltd* [2018] FCA 1407

⁵⁷ *Australian Competition & Consumer Commission v TPG Internet Pty Ltd* [2019] FCA 1677

⁵⁸ *AIBI Holdings Pty Ltd v Virtual Technology Services Pty Ltd* [2022] FCA 696

The second part of Chapter 3 will then shift our focus to our case study, the Malaysian OFDPs' adhesion contracts. Chapter 3 will adopt a qualitative, desk-based doctrinal approach by analysis the terms and conditions imposed by the selected Malaysian OFDPs, and whether the said terms may be deemed unfair if assessed against the chosen normative legal benchmark of unfairness. In this respect, two Malaysian OFDPs (collectively referred to herein as "**Platforms**") were selected for a case study of the terms and conditions that were in force in August 2025 will be examined to identify if the said contracts are riddled with terms that may be considered unfair.

These OFDPs were chosen through purposive sampling, due to two reasons:- (1) market share; and (2) accessible terms and conditions. With regard to the market share, Grab's operations in Malaysia yielded approximately MYR 2.7 billion (approximately EUR 571 million) in revenue in 2023, reflecting a 32% rise compared to 2022, thereby maintaining Malaysia as the company's most significant market.⁵⁹ This huge market share signifies that there is a huge pool of business users in Malaysia (i.e. the Non-Consumer Users) registered with Grab. Given the standardised nature of Grab's adhesion contracts as well as this extensive user base, it follows that a considerable segment of these business users in Malaysia may potentially be subject to unfair terms. Consequently, there is a pressing need to put Grab under a magnifying glass to assess the (un)fairness and impact of Grab's adhesion terms on the Non-Consumer Users. Grab's terms and conditions applicable to its delivery riders and restaurants are publicly available on its website.⁶⁰

It is to be noted that Foodpanda, despite being the second largest OFDP in Malaysia,⁶¹ has only published its terms and conditions applicable to the end-users (i.e., consumers) on its website, but not those applicable to the Non-Consumer Users. Rather than attempting to directly obtain these terms from Foodpanda, I opted to exclude this particular OFDP from the assessment to avoid selective disclosure. In this respect, to ensure consistency in terms of sources of my analysis, this study confines its selection to contractual terms that are uniformly and publicly disseminated by the OFDPS. Although the purported terms and conditions may be requested directly from the said OFDP, it may risk in selective or incomplete disclosure by Foodpanda. For this reason, the accessibility of these contractual terms is a key factor in the selection of my case study, as it

⁵⁹ Chelsea Lee Jia Shi, 'Cover Story: E-Hailing Market Heats up with Fresh Competition' (*The Edge Malaysia*, 9 December 2024) <<https://theedgemalaysia.com/node/736694>> accessed 29 December 2025.

⁶⁰ Grab, 'Terms of Service: Transport, Delivery and Logistics' <<https://www.grab.com/my/terms-policies/transport-delivery-logistics/>> accessed 28 August 2025.

⁶¹ As of 2023, Grab held 65% of the total OFDS market share, followed by Foodpanda at 30% and Shopee at 5%. Momentum Works, 'Food Delivery Platforms in Southeast Asia 2024' <<https://momentum.asia/insights/detail/food-delivery-platforms-in-southeast-asia-2024>> accessed 20 June 2025

facilitates an in-depth analysis of the alleged unfair practices within the OFDS business model in Malaysia.

Further, the objective of this assessment is to primarily identify structural contractual features that may demonstrate the exploitation of the Non-Consumer Users' vulnerabilities through unfair terms in Malaysia, rather than evaluating the conduct of individual platforms. This objective, in my view, may be sufficiently achieved through the analysis of Grab and another platform that publishes its terms and conditions on its website. This is the case for Shopee. For this reason, I have decided to include Shopee in the case study, even though Shopee (compared to Grab and Foodpanda) does not hold a significant market share in Malaysia.⁶²

In order to assess the terms and conditions, a doctrinal framework has been established as a normative evaluation, to ascertain the appropriate standard and/or yardstick of 'unfairness', both in consumer law legislation and in the emerging regulation of platform contracts. The unfairness test provided under the Malaysian CPA has been taken as the starting point. Given that Malaysia does not have a specific unfair terms legislation governing B2B nor P2B transactions, it logically follows that the only available unfair terms legislation in the country serves as an appropriate starting point.

Given the relative scarcity of case-law developing the rules in the Malaysian CPA and the still nascent Malaysian debate on P2B contracts, it is appropriate to supplement the purported assessment with a comparative analysis with other jurisdictions where these debates have been developing and more case-law can support a detailed analysis. By including jurisdictions:- (1) with more comprehensive unfair terms control; and/or (2) well-developed digital economy regulations; the analysis of whether the Platforms have actually abused the Non-Consumer Users' vulnerability through their adhesion contracts may be strengthened. However, it is to be noted that these foreign benchmarks are only employed instrumentally, as interpretative aid to assess the Platforms' terms and conditions. The said benchmarks, therefore, are not meant for a direct legal transplant. For the purposes of this analysis, a choice has been made to rely chiefly on two jurisdictions, namely the European Union and Australia.

Australia is one of the earliest common law countries that has implemented a comprehensive unfair terms legislation governing both B2C and B2B contracts, introduced as early as 2016. Although the United Kingdom, for instance, has enacted an unfair terms legislation 39 years earlier (i.e. Unfair Contract Terms Act 1977), it is not as comprehensive as the Australian unfair terms legislation, where the former is extremely limited in application and scope. In this regard, the UK Unfair Contract Terms Act 1977 ("**UCTA**") only deals with

⁶² Uchiyama and Furuoka (n 37) 9.

exclusion clauses that restrict/exclude, amongst others, liability in the event of negligence causing death or personal injury⁶³ and any liability arising from breach of contract that cannot reasonably be excluded.⁶⁴ In contrast, Part 2-3 of the Australian Consumer Law (Schedule 2, Competition and Consumer Act 2010) (“**Australian CCA**”) deals with a wide range of unfair terms, and incorporates a general unfairness test that can be applied to assess any type of contractual term. Therefore, considering that the Australian CCA is broader in scope and application, this study elects to use its legislative approach as one of the models in assessing the Platforms’ terms and conditions.

The European Union, on the other hand, while yet to update its unfair terms legislation to include B2B/P2B contracts, provides a highly developed framework and doctrinal discussion concerning unfair terms/practices in standardised contracts, including in P2B relations. For example, recent legislation such as Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services has expressly sought to address imbalances in P2B contractual relationships through the promotion of transparency on the part of the platform providers. Further, the European Union’s commitment in addressing workers’ working conditions within the platform economy can be seen in, amongst others, Directive (EU) 2024/2831 on Improving Working Conditions in Platform Work. Hence, Chapter 3 of the thesis will adopt a cross-cutting perspective in analysing the Platforms’ terms and conditions, by relying on a synthesis of parameters emerging from the regulation of unfair terms in consumer contracts, as well as insights drawn from emerging P2B rules and/or other regulatory frameworks governing the platform economy, to elicit a framework for assessing unfairness in the Platforms’ contracts with the Non-Consumer Users.

Upon scrutinising the Platforms’ terms and conditions and assessing them according to the threshold of unfairness provided under the related unfair terms legislation and/or other relevant statutes as provided under the chosen legal framework, it appears that both Platforms’ adherence contracts may be tainted with terms that could be deemed unfair. In this way, Chapter 3 complements the arguments developed in Chapter 2 on the basis of the structural vulnerability of the Non-Consumer Users and their deserving of comparable protection *vis-à-vis* consumers, by showing how such vulnerabilities have actually crystallised into observable realities as Platforms have been using their terms and conditions as the vehicles to their advantage. The findings in this chapter aim, thus, to provide us with the practical justification of protecting the Non-Consumer Users in Malaysia.

⁶³ Section 2 of the UCTA

⁶⁴ *ibid*, section 3

(iii) *To what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users?*

The findings from the two sub-questions above will shed light on whether there is a need to safeguard Non-Consumer Users from the ramifications of unfair terms. This is given the fact that the Non-Consumer Users may, theoretically, possess a degree of vulnerability (comparable to consumers) and that this vulnerability has been crystallised given the act of the stronger parties (i.e. Platforms) through the imposition of unfair terms. The final pivotal question is: how should we protect the Non-Consumer Users within the OFDS business model?

As stated previously, this research primarily intends to investigate *whether there is a need for Malaysia to enact a dedicated unfair terms legislation to protect the Non-Consumer Users within the OFDS business model in Malaysia?* The first step requires an examination of whether Malaysian law, in its current form, could already be mobilised to provide the same protection, in other words, whether it can effectively replace the functions of an unfair terms legislation. If the current legal framework is sufficient to protect both the restaurants and the riders, it follows logically that a specific unfair terms control mechanism within the OFDS industry may not be strictly necessary. However, should our analysis yield a negative outcome, it would underscore the need for Malaysia to enact specific legislation addressing unfair terms governing the OFDS business model.

Chapter 4 of this thesis will adopt a doctrinal legal research approach, supplemented by analytical and evaluative reasoning. Several provisions embedded under the Malaysian Contracts Act 1950 ("**Malaysian Contracts Act**") and judicial doctrines developed by various common law courts (as applied/adopted by the Malaysian courts) will be analysed to determine whether these rules can serve as effective substitutes for unfair terms legislation. These rules include the doctrine of unconscionability and the rules of contractual interpretation, to name a few. The analysis will be conducted in two stages:- (1) the scope of these legal instruments under the Malaysian contract law framework; and (2) the potential applicability of the rules to address unfair terms and to what extent they are (or may not) practically effective in protecting the Non-Consumer Users. In gauging the potential and effectiveness of these rules in addressing unfair terms, the allegedly unfair terms as identified in Chapter 3 will serve as the proxy/benchmark for the purported evaluation.

These rules have been included in this analysis due to their potential in dealing with unfair terms and their inherent doctrinal features and operational scope that align closely with the objectives of unfair terms legislation. For instance, the doctrine of unconscionability targets unconscionable bargains that arise from an abuse of contractual imbalance. Similarly, the rules of

interpretation are designed to address the problem of contractual opacity or lack of transparency. Given that both contractual imbalance and lack of transparency are also among the central concerns targeted by unfair terms legislation (see chapter 3), the selected rules possess similar doctrinal importance and hence, their potential as a substitute for unfair terms legislation should be examined.

However, each of these rules may possess its own unique inherent flaws that would render the implementation of the rules in the real world ineffective and/or impractical. Therefore, despite their apparent utility to the Non-Consumer Users, these limitations may eventually diminish their value as a dependable replacement for unfair terms legislation. Given the foregoing, the aim of Chapter 4 is not constrained to ascertaining whether the existing Malaysian law has the theoretical potential of addressing unfair terms, but whether they are practically effective and capable of replacing the core function of unfair terms legislation. The theoretical breadth of a rule's applicability to unfair terms does not in itself ensure practical efficiency. Conversely, a rule that is practically easier to invoke may nevertheless lose its appeal due to its narrowly confined scope, thereby excluding many forms of unfair terms. Be it the former or the latter, neither situation demonstrates that it can be an adequate substitute for unfair terms legislation.

Additionally and in light of the passing of the Bill, Chapter 4 will also observe the applicability of the Bill and the extent to which it may effectively address unfair terms. In doing so, several relevant provisions will be analysed and whilst its potential in addressing unfair terms is acknowledged, the Bill is not without limitations. In this respect, Chapter 4 will further consider the Bill's shortcomings as a substitute for a dedicated unfair terms legislation within the OFDS industry, such as its limited scope of protection (which affects its ability to provide a comprehensive remedy for the Non-Consumer Users involved in the OFDS ecosystem) and its debatable enforcement mechanisms.

1.3 Delimitations & Limitations

As evident in sections 1.1 and 1.2 above, the scope of this research is purposefully delimited. In this respect, other types of contracts and/or business models are excluded from my analysis, including non-platform B2B contracts and other types of services under the P2B business model (e.g. ride-sharing). Therefore, no analysis is made on whether the business actors involved in those B2B/P2B relationships are vulnerable to exploitation, nor can it be established that the same pattern of unfair terms exists in those types of contracts. Consequently, this implies that the findings of this research may not automatically be extrapolated to those actors and/or sectors.

Apart from the deliberate delimitation as mentioned above, this research also faces certain limitations that warrant acknowledgement. These limitations include, but not limited to:- (1) possible changes to the Platforms' terms; and (2) limited access to the terms and conditions post-sign-up. With regard to the first limitation, it is to be noted that the version of the Platforms' terms and conditions referred to at the time when this study was completed was last accessed in August 2025. Thus, the evaluation of unfairness (as per Chapter 3 of the thesis) relies on the specified version. Subsequent modifications to the terms, particularly those which may be made by the Platforms after the Bill is officially enforced, fall outside the scope of this study.

With regard to the second limitation, these terms and conditions were readily available on the Platforms' websites, enabling anyone, including the Non-Consumer Users, to access them before registering an account with the Platforms. After reviewing these terms, it appears that both Grab and Shopee may have a separate agreement (in addition to the general terms and conditions posted on their website) with the restaurants. As mentioned in Clause 1.2 (Section B) of Grab's T&C, "*As a merchant [restaurants], in addition to provisions applicable to Partners [all service providers such as delivery riders, restaurants and e-hailing drivers] in general and other terms or contracts which you have entered into with Grab, you are subject to the additional terms below*". The phrase "*other terms or contracts*" suggests that a separate contract will be entered into upon account registration,⁶⁵ setting out all other additional terms applicable exclusively to the restaurants.

Similarly, Shopee also mentioned in clause 7.1 of Shopee's T&C (Merchants) that "*In consideration for the ShopeeFood Services provided by Shopee, Merchant shall pay Shopee a service fee ("Service Fee") as set out in the ShopeeFood Merchant Registration Form*". Hence, it may be concluded that there is a separate and/or additional set of agreements (including information on the percentage of Service Fee) between Shopee and the restaurants, besides the general terms as published on Shopee's website.

In an attempt to access these additional agreements, letters requesting access to these agreements were sent to both Grab and Shopee on 26 September 2025. Unfortunately, as of the beginning of December 2025, these requests elicited no response from the Platforms. Given the above, these separate contracts (which may or may not have additional terms and conditions that materially differ from the publicly available terms) are, technically, out of reach. This

⁶⁵ Upon downloading the Grab Merchant mobile application and selecting the "*Sign Up*" option (a mandatory step before accessing the application), the subsequent page stated: "*Review and sign your contract, then get ready to receive orders!*" This supports my assumption that a separate agreement may exist between Grab and the restaurants upon account registration.

limitation may have an impact on our analysis of the restaurants, should the separate contracts contain clauses more problematic or friendlier to the Non-Consumer Users than those already available online.

1.4 Outlook

As pointed out in sections 1.2 and 1.3 above, the three sub-questions devised in this study and their findings will be discussed accordingly in Chapters 2, 3 and 4 of the thesis. To recap:

- (a) Chapter 2 will deal with the first sub-question, *to what extent are the Non-Consumer Users vulnerable and/or susceptible to the imposition of unfair terms?*
- (b) Chapter 3 will address the second sub-question, *to what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs?*; and
- (c) Chapter 4 will explore the last sub-question, *to what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users?*

Chapters 2 and 3 will essentially serve as the justifications for protecting the Non-Consumer Users, despite their status as businesses and self-employed. Whilst Chapter 2 provides a theoretical framework to justify why such a protection is warranted, Chapter 3 complements it by offering a practical reasoning to do so. Lastly, Chapter 4 will demonstrate the adequacy (or lack thereof) of the current state of Malaysian law in protecting the Non-Consumer Users from the imposition of unfair terms. The findings of these chapters, collectively, will assist us in ascertaining whether or not Malaysia is in need of a systematic unfair terms legislation in order to protect the Non-Consumer Users within the OFDS industry.

2. VULNERABLE STAKEHOLDERS IN THE ONLINE FOOD DELIVERY SERVICES

2.1 Introduction

As mentioned previously in Chapter 1, there are two elements that I intend to establish in calling for legal intervention for unfair terms control within the OFDS industry:- (1) the Non-Consumer Users are vulnerable stakeholders, susceptible to harmful practices (including through the imposition of unfair terms by the OFDPs); and (2) there is some degree of abuse/exploitation of the said vulnerabilities by the OFDPs via their terms and conditions. Whilst the latter will be dealt with in Chapter 3 of the thesis, this chapter aims to deal with the former. In this respect, we will investigate in which respect (and under what circumstances) the Non-Consumer Users could be regarded as weak, vulnerable and/or susceptible to abuse/exploitation by their OFDPs counterparts, in a way not too dissimilar from consumers. This establishes (on the assumption that the law ought to treat similar cases alike), a normative theoretical basis for extending the protection against unfair terms to the Non-Consumer Users.

B2B contracts are often excluded from unfair terms control because of the assumption that business parties deal with one another on equal terms with balanced bargaining power.⁶⁶ In reality, entrepreneurs and firms are diverse and commonly deal with businesses that are comparatively dominant. It has been recognised that, comparable to consumers, small businesses typically lack the bargaining power to shape their contractual terms as *“SMEs often have to accept their co-contractor’s standard terms and the law of the latter as the applicable law due to their weaker negotiating power”*.⁶⁷ Hesselink even went further to contend that small businesses can, at times, be more vulnerable than consumers themselves, as their contracts are not tailored for personal consumption, resulting in significantly higher stakes.⁶⁸

For the purposes of the current research, I further argue that the Non-Consumer Users, despite their status as business entities and independent contractors in Malaysia, may share similar traits as subsistence entrepreneurs, further differentiating them from the overall discussion on “small business” which has been occasionally carried out in different legal systems. This acknowledgement would distinguish them from other form of entrepreneurship and

⁶⁶ Adam Škarka, ‘Protection of Weaker Party in the EU Case Law’ (Masaryk University 2018) 49 <https://is.muni.cz/th/p7uyk/Protection-of-weaker-party-in-the-EU-case-law_MT_Ad-amSkarka_116585.pdf> accessed 30 November 2025.

⁶⁷ European Commission, Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law – An Action Plan (COM/2003/0068 final), OJ C 63 (March 15, 2003): 1–44, 30.

⁶⁸ Martijn W Hesselink, ‘Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive’ (2010) 18 European Review of Private Law 57, 93.

highlight their heightened vulnerability to exploitation with regard to their relationship with the OFDPs.

According to the Longman Dictionary of Law, “*vulnerability*” is defined as the “*susceptible of injury*” and “*less able to fend for oneself so that injury or detriment might result*”.⁶⁹ Hence, this notion may be generally understood as circumstances in which parties, due to certain factors, are potentially exposed to harm and/or exploitation. This chapter intends to investigate whether the Non-Consumer Users are, despite their status as business entities and self-employed, vulnerable to the imposition of unfair terms by their OFDPs counterparts. In doing so, the following matters will be discussed:

- (i) The concept of subsistence entrepreneurs and how the assumption that all entrepreneurs represent a homogenous group is, arguably, an oversimplification, as not all entrepreneurs are dealing on an equal playing field. In this respect, it may be argued that most of the Non-Consumer Users (if not all) may resemble the qualities/characteristics similar to those of subsistence entrepreneurs, who are trading primarily for the purpose of maintaining and/or supporting themselves, and nothing more. This discussion would, arguably, distinguish them from other forms of entrepreneurship and challenge the view that all business entities possess equal capacity to bear commercial risks (see section 2.2 below);
- (ii) The conceptualisation of the theory of consumer vulnerability (see section 2.3 below); and
- (iii) How the identified factors/circumstances contributing to consumers’ vulnerability are similarly, to a certain extent, present in the relationship between the Non-Consumer Users and the OFDPs (see section 2.4 below).

The answer to all the questions posed above will demonstrate that the factors and/or circumstances which consumers may find themselves in a vulnerable position against harmful conduct (such as the imposition of unfair terms) are not exclusively present in B2C contracts. Instead, the Non-Consumer Users may also face similar situations as the consumers within the context of their contractual relationships with the OFDPs. Relying on these similar circumstances, this provides us with a theoretical basis for extending the protection against unfair terms to the Non-Consumer Users, as two similar cases ought to be treated similarly.

⁶⁹ L.B. Curzon and Paul H. Richards, ‘The Longman Dictionary of Law’ (7th edn, 2007)

However, this thesis does not treat vulnerability as a legal status that automatically warrants protection. Instead, this study adopts the notion of vulnerability only as an analytical lens to examine how susceptibility to harm (e.g. unfair terms) may arise from the interaction between contractual parties, owing to the circumstantial factors surrounding the said contractual relationship (whether in B2C or P2B). Consumer vulnerability is used as a proxy to understand vulnerability in contractual relations with business providers, even though protection against unfair terms based on the notion of consumers' vulnerability is somehow contested (as will be discussed in section 2.3.1 below). Despite being commonly associated with specific legal questions in some jurisdictions (see section 2.3.2 below), the considerable elaboration of the concept in legal and non-legal (especially marketing) literature provides a helpful basis for the analysis in this thesis.

2.2 Introduction to Subsistence Entrepreneurship

Before we can ascertain in which ways the Non-Consumer Users are in a vulnerable position against the imposition of unfair terms by the OFDPs, it is imperative to first debunk the idea that all businesses are to be treated as a homogenous group. According to Schoar, a substantial number of researchers and policymakers tend to view entrepreneurs as a single homogeneous group that responds uniformly to economic conditions and policy measures,⁷⁰ but this view may be inaccurate. In this section, I will first delve into the notion of subsistence entrepreneurs, through which scholars have (re)conceptualised entrepreneurs as a spectrum rather than a solid block of categorisation. This notion of subsistence entrepreneurs is chosen in order to demonstrate that, despite the Non-Consumer Users' status as businesses and/or self-employed, their functions in the market are distinguishable from other forms of business dealings.

Further, the utilisation of this concept of subsistence entrepreneurs may add nuance to the assessment of vulnerability of business entities, permitting us to gauge the Non-Consumer Users' susceptibility at a functional level, rather than relying on their formal legal status per se as business entities (including independent contractors). These factors mirror the structural disadvantages/weaknesses that exist in the B2C relationship, rendering them functionally comparable to consumers in their exposure to unfair terms and practice.

⁷⁰ Antoinette Schoar, 'The Divide between Subsistence and Transformational Entrepreneurship' (2010) 10 Innovation Policy and the Economy 57, 58.

According to Viswanathan and Venugopal, the term “subsistence” reflects the ongoing challenges faced by individuals, households and communities in securing life's fundamental necessities.⁷¹ It simply denotes people’s struggle to sustain their own livelihood and nothing more. The term “subsistence entrepreneurs” essentially means those who are self-employed out of necessity, and who usually lack skills and entrepreneurial characteristics. As per Gindling and Newhouse’s findings, as of 2014, about 55% of workers worldwide are self-employed, and nearly 75% of these individuals are likely subsistence entrepreneurs.⁷²

Based on the above, the concept of ‘subsistence entrepreneur’ relates to the general meaning of people who are working and/or trading to meet their basic needs of life and to support their subsistence at a minimum level without any surplus for trade.⁷³ Based on this definition, it can be concluded that any self-employed person and/or entrepreneur who is trading (via tangible capital or human capital) with the aim to maintain or support oneself at a minimum level could be deemed as subsistence entrepreneur.

Additionally, scholars have attempted to dissect the concept of entrepreneurship and its categories based on:- (1) the roles and/or effects that they will (or potentially) produce out of their entrepreneurship activities, so-called outcome-approach; and (2) their motivation and goals in conducting their businesses, so-called incentive-approach. Regarding the former, Schoar made a clear distinction between subsistence and transformational entrepreneurs. Subsistence entrepreneurship’s end goal is, as the name suggests, to provide subsistence income and fulfil their minimum basic needs of life whilst transformational entrepreneurs’ businesses are projected to grow beyond subsistence sufficiency.⁷⁴

Further, while the former may only have the capacity to provide alternative employment opportunities to the entrepreneurs themselves (and potentially their family members at most), the latter has the ability (and motivation) to grow bigger to the extent of providing a stable source of income and employment for others in the community. In other words, transformational entrepreneurs serve bigger purposes and roles in the market as a whole, particularly with regard to, including, their functions in driving innovations.⁷⁵

⁷¹ Madhubalan Viswanathan and Srinivas Venugopal, ‘Subsistence Marketplaces: Looking Back, Looking Forward’ (2015) 34 *Journal of Public Policy & Marketing* 228.

⁷² TH Gindling and David Newhouse, ‘Self-Employment in the Developing World’ (2014) 56 *World Development* 313, 318.

⁷³ Viswanathan and Venugopal (n 71) 228.

⁷⁴ Schoar (n 70) 58.

⁷⁵ Samuel Kortum and Josh Lerner, ‘Assessing the Contribution of Venture Capital to Innovation’ (2000) 31 *The RAND Journal of Economics* 674

According to the incentive-approach, in contrast, entrepreneurs can be distinguished between those who are 'necessity-driven' and those who are 'opportunity-driven'.⁷⁶ This distinction emphasises the varying stimuli for entrepreneurship, beyond the outcomes achieved. In essence, necessity-driven entrepreneurs start businesses to meet basic household needs, whereas opportunity-driven entrepreneurs view entrepreneurship as an opportunity to grow their businesses beyond subsistence needs and simultaneously enhance their household's living standards.⁷⁷ Based on these definitions, it appears that both the 'outcome' and 'incentive' approaches somehow overlap, in which the necessity-driven entrepreneurs share similar traits with subsistence entrepreneurs, whilst the opportunity-driven entrepreneurs resemble transformational entrepreneurs. Given the overlapping qualities and/or characteristics between the concept of subsistence entrepreneurs (derived from the outcome-approach) and necessity-driven entrepreneurs (derived from the incentive-approach), the term 'subsistence entrepreneurs' and 'necessity-driven entrepreneurs' will be used interchangeably below.

Based on these distinctions (whether via outcome or incentive-approach), it appears that entrepreneurs differ in their economic goals, skill sets and roles within the economy. This distinction is vital in ensuring, amongst others, the development of appropriate regulatory policy. In this respect, some entrepreneurs may require promotional approaches (e.g. to increase income and opportunities to create innovations), but others need a better protective scheme more than anything. Without a clear understanding of the differences between these sets of entrepreneurs, many policy interventions could lead to unintended consequences or even produce outcomes opposite to what was intended.

For instance, measures that are intended to benefit subsistence entrepreneurs (or necessity-driven entrepreneurs) might adversely affect transformational entrepreneurs (or opportunity-driven entrepreneurs), and the omission of some policies that were considered unnecessary for the latter might have negative impacts on the former (e.g. the lack of unfair terms control mechanisms in B2B transactions may not prejudice transformational entrepreneurs but would be detrimental to the subsistence entrepreneurs). This is why identifying the category of entrepreneurs to which the Non-Consumer Users belong is important in order to ensure that the appropriate parties are being protected. This would include, as will be further argued below, both the restaurants and

⁷⁶ Aglaya Batz Liñeiro, Jhon Alexander Romero Ochoa and Jose Montes De La Barrera, 'Exploring Entrepreneurial Intentions and Motivations: A Comparative Analysis of Opportunity-Driven and Necessity-Driven Entrepreneurs' (2024) 13 *Journal of Innovation and Entrepreneurship* 1, 3 <<https://innovation-entrepreneurship.springeropen.com/articles/10.1186/s13731-024-00366-8>> accessed 3 December 2025.

⁷⁷ *ibid.*

delivery riders within the OFDS ecosystem, trading based on both tangible (i.e. foods and beverages) and non-tangible capital (i.e. delivery services).

2.2.1 Are Subsistence Entrepreneurial Features Present Among the Non-Consumer Users?

In light of section 2.2 above, it appears that subsistence entrepreneurs have distinct characteristics that may exacerbate their vulnerabilities, particularly when compared to other types of entrepreneurs, such as larger market players or firms. Therefore, it is crucial to assess whether the Non-Consumer Users exhibit characteristics commonly associated with subsistence entrepreneurs and/or whether they operate under subsistence-like conditions. If the answer is in the affirmative, this thesis argues that this finding would have the effect of heightening the Non-Consumer Users' vulnerability to harmful conduct by the OFDPs. Based on the criteria identified above (particularly regarding the characteristics of subsistence entrepreneurship), it is argued here that most (if not all) of the Non-Consumer Users may possess the qualities and/or characteristics that are commonly associated with subsistence entrepreneurs. How so?

By putting the incentive-approach into context (i.e. whether the Non-Consumer Users are necessity or opportunity-driven), there are several reasons that motivate the Non-Consumer Users to participate in the gig economy. Some existing research can be used to shed light on the motivations (i.e. incentives) and outcomes pertaining to Malaysian gig workers (including delivery riders). In identifying the motivations behind Malaysian gig workers' participation in the gig economy, Muhyi et al. compartmentalised them into two categories:- 'push' and 'pull' factors.⁷⁸ 'Push' factors would include financial needs (i.e. the desperation to sustain their livelihood) and alternative job deprivation (i.e. lack of job opportunities) whilst the 'pull' factors may include job autonomy (i.e. control over working hours).⁷⁹

Based on the surveys conducted, they have observed that the main incentive of joining the gig economy in Malaysia was financial constraints and the need to find a decent income to survive.⁸⁰ This observation can be supported by Fang et al. qualitative findings that around 72% of the participants regarded their gig work as their primary source of income (full-time job), and only 28% of the participants were treating it as a side-income (part-time job).⁸¹ Based on the

⁷⁸ Siti Nur Aisyah Muhyi, Shida Irwana Omar and Syuhada Farhana Adnan, 'The Drivers Force The Gig Workers Into Gig Economy: The Case Of Malaysia' (2023) 11 *Journal of Business and Social Development* 1, 1 <<https://jbsd.umt.edu.my/wp-content/uploads/sites/53/2023/10/1-JBSD-VOLUME-11-NUMBER-1-MARCH-2023-FINAL.pdf>> accessed 22 May 2024.

⁷⁹ *ibid.*

⁸⁰ *ibid.* 7.

⁸¹ Borui Fang and others, 'Perceptions, Emotions and Motivations of Gig Workers: Insights from Malaysia' 2022 *IEEE International Conference on Industrial Engineering and Engineering Management (IEEM)* (IEEE 2022)

foregoing, a similar conclusion may be reached under the outcome-approach, where the outcome/effect of participation in the digital economy is limited to maintaining subsistence income, and nothing more.

Further, it has also been observed that the lack of skilled job opportunities plays a role in 'pushing' the gig workers to join the workforce given a substantial number of less-well-educated individuals amongst the gig workers in Malaysia. According to the survey of 1,500 participants by the Centre for the Fourth Industrial Revolution Malaysia,⁸² around 41% of the respondents have a lower education level (secondary school and below).⁸³

With regard to the restaurants, it may also be similarly argued that the OFDS business model has been increasingly relied on by small businesses as they have limited resources to operate their own in-house delivery system.⁸⁴ In this regard, the OFDS industry has become a crucial lifeline for these restaurants to sustain their operations.⁸⁵ Perhaps due to this reason, it has been further pointed out by Liu and Li that many restaurant owners have no option but to keep relying on the OFDPs.⁸⁶ Otherwise, they will lose a significant portion of their customers and/or revenue. Therefore, one may argue that most of the restaurants are *pushed* to engage with the OFDPs due to their financial and/or resources constraints, and reliance on the OFDS business model is crucial for the sustainability of their businesses.

As mentioned previously in Chapter 1, there is no specific data on the number of restaurants engaging with the OFDPs in Malaysia. As of May 2025, there are 22,303 restaurants operating in Malaysia, with approximately 94.79% being single-owner establishments. Considering the rapid growth of the OFDS business model, it is not unreasonable to infer that there will be a significant increase in the participation of these single-owner restaurants in the upcoming years. As pointed out by Li and Wang, the heavy reliance on the OFDPs is

1060 <<https://ieeexplore.ieee.org/document/9989952/>> accessed 30 November 2025.

⁸² Established in 2023 by the Ministry of Economy, the Centre acts as a collaborative hub connecting government, business and academia, amongst others. It seeks to promote partnerships and initiatives that apply technology in order to strengthen Malaysian economy and society.

⁸³ Centre for the Fourth Industrial Revolution Malaysia, 'What Gig Workers Really Want: Understanding Gig Workers' Work and Welfare Preferences in Malaysia' (2024) 6 <<https://www.mydigital.gov.my/wp-content/uploads/2024/06/GigWorkerWhitepaper.pdf>> accessed 30 November 2025.

⁸⁴ Mark Traynor and others, 'Investigating the Emergence of Third-Party Online Food Delivery in the U.S. Restaurant Industry: A Grounded Theory Approach' (2022) 107 *International Journal of Hospitality Management* 1, 5.

⁸⁵ Suganya Devi.J, Sakthi Jayalakshmi.J, and Monisha.G, 'Outsourcing to Online Food Delivery Services: Perspective of F&B Business Owners' (2019) 4 *EPRA International Journal of Research and Development* 40, 41.

⁸⁶ Yang Liu and Sen Li, 'An Economic Analysis of On-Demand Food Delivery Platforms: Impacts of Regulations and Integration with Ride-Sourcing Platforms' (2023) 171 *Transportation Research Part E: Logistics and Transportation Review* 103019, 2 <<https://linkinghub.elsevier.com/retrieve/pii/S1366554523000066>> accessed 30 December 2025.

particularly beneficial for small restaurants, as they often operate under tighter financial constraint.⁸⁷

Based on the above (particularly the survival motivation of the restaurants), it appears that most of the Non-Consumer Users (if not all) may be viewed as necessity-driven entrepreneurs and hence, it can be argued that they possess the qualities and/or characteristics similar to those associated with subsistence entrepreneurs. Given this notion of subsistence entrepreneurs and how this form of entrepreneurship may affect and/or heighten the Non-Consumer Users' susceptibility to harm, the next task is to:-

- (i) explore how the concept of vulnerability is being employed within B2C contracts including its definition(s) and circumstances/sources under which consumers may find themselves in a position of vulnerability vis-à-vis the sellers; and
- (ii) gauge whether the Non-Consumer Users (which share certain commonalities with subsistence entrepreneurs), to an extent, experience similar vulnerabilities as encountered by the consumers in the B2C contracts?

The answer to these questions would determine whether or not the Non-Consumer Users are, to an extent, vulnerable/susceptible against the imposition of unfair terms, despite their status as entrepreneurs and/or business entities.

2.3 Vulnerabilities in B2C Contract

As most jurisdictions started to adopt legislation on unfair terms exclusively for B2C contracts, it is appropriate to identify and set out the rationales of this control before we can investigate whether the same rationales can be applied within the context of the P2B contracts involving the Non-Consumer Users. In this section, the following issues will be discussed:-

- (i) consumer weaknesses/vulnerability as one of the common rationales of unfair terms control in B2C contracts (see section 2.3.1 below);
- (ii) conceptualisation of vulnerability (see section 2.3.2 below); and
- (iii) mapping the notion of vulnerability within the legal context (see section 2.3.3 below).

In section 2.4, the factors identified in the preceding sections will be further elaborated upon and applied to the context of relations between OFDPs and the Non-Consumer Users.

⁸⁷ Zhuoxin Li and Gang Wang, 'On-Demand Delivery Platforms and Restaurant Sales' (2025) 71 Management Science 5788, 5802.

2.3.1 Weaker Party Protection: Rationale for Unfair Terms Control

As mentioned previously in Chapter 1, one of the most commonly recognised rationales of unfair terms control is the weaker party protection.⁸⁸ For instance, within the EU legal framework, the CJEU in *Océano*⁸⁹ ruled that consumer protection against unfair terms is founded on the notion that “*the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge*”.⁹⁰ A similar position is also evident in other common law jurisdictions such as Australia. According to Greenhow, the core objective of consumer protection law (including unfair terms control) is to address the bargaining position of the weaker party and to provide them with stronger rights of redress in cases where the stronger party attempts to misuse their advantage.⁹¹ In this jurisdiction, unfair terms legislation operates to protect consumers as well as small businesses who often lack the resources and bargaining strength necessary to negotiate contract terms effectively.⁹²

Based on the above, it can be safely presumed that consumers have been consistently safeguarded against unfair terms due to their weaknesses/vulnerabilities. However and as acknowledged previously, there is resistance in positioning the concept of consumer vulnerability as the gateway for policing unfair terms. For instance, Howells et al. argued that the concept of vulnerability conveys the impression that legal protection is reserved solely for those regarded as weak, a characterisation that some consumers may be reluctant to accept.⁹³ Moore further pointed out that unfair terms (enabled through adhesion contracts) are not imposed and/or accepted because the recipients of the contracts are weak, but as a “*rational calculation of self-interest*”,⁹⁴ where none of the parties intends to negotiate the terms for cost efficiency reason.

This brings us to another prevalent rationale, where it has been argued that legal intervention in policing unfair terms is justified when there is a market failure, which relates to transaction costs and information deficiency.⁹⁵

⁸⁸ Martijn Hesselink (n 46) 132.

⁸⁹ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I4941, paragraph 25 of the Judgment.

⁹⁰ *ibid*, paragraph 25

⁹¹ Annette Greenhow, ‘Sharpening the Blue Pencil in Australian Consumer Law : The Striking Out of Unfair Contract Terms in Land Transactions’ [2011] ASLI Working Paper 1, 2 <<https://law1a.nus.edu.sg/asli/pdf/WPS021.pdf>> accessed 30 December 2025.

⁹² The Treasury (Australian Government), ‘Enhancements to Unfair Contract Term Protections: Regulation Impact Statement’ (The Treasury (Australian Government) 2020) 5 <<https://treasury.gov.au/sites/default/files/2020-11/p2020-125938-ris.pdf>> accessed 30 November 2025.

⁹³ Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (1st edn, Routledge 2017) 28.

⁹⁴ Marcus Moore, ‘The Future of Unfair Terms Regulation in Commercial Contracts’ in Mads Andenas and Maren Heidemann, *Commercial Contract Law and Arbitration* (1st edn, Routledge 2024) 226.

⁹⁵ Michael G Faure and Hanneke A Luth, ‘Behavioural Economics in Unfair Contract Terms: Cautions and Considerations’ (2011) 34 *Journal of Consumer Policy* 337, 340.

Pertaining to the former, consumers may find themselves in a situation where the costs of bargaining would outweigh the benefits that may be enjoyed from it,⁹⁶ leading to the reluctance to negotiate the contract terms in the first place. Therefore, legal intervention may be helpful in correcting this purported market failure, as consumers no longer have to worry about the imposition of terms that may be detrimental to their interests. With regard to the latter, consumers often cannot easily evaluate product/service quality (due to limited information), and their purchasing decisions tend to rely largely on the price offered.⁹⁷ This may lead to a market failure, resulting in higher quality products being slowly excluded from the market.⁹⁸ In this respect, legal intervention in the form of policing unfair terms serves as a remedial tool to correct such market failure.

Notwithstanding the above, I argue that the foregoing alternative justifications (although bear their own merits) do not diminish the potential of the theory of vulnerability as one of the underpinning reasons that may be employed to justify protection against unfair terms. Indeed, for the policymakers, safeguarding consumers during their most vulnerable moments has always been a central priority.⁹⁹ According to Ássimos et al., vulnerability reflects the consumer's inferior position vis à vis the seller, which justifies legal intervention, given that the former is regarded by the legislature as more susceptible to harm arising from the stronger power of the latter.¹⁰⁰ The question then would be how do we conceptualise vulnerabilities?

2.3.2 Definition & Conceptualisation of Vulnerabilities

Though it is commonly recognised that consumer protection exists due to the presumption that they are weak/vulnerable in the market, the Non-Consumer Users have so far not benefited from such a presumption. The coming sections will then develop a positive case for the consideration of the notion of vulnerability within the context of the Non-Consumer Users and their contractual relationship with the OFDPs. Existing literature on the notion of, in particular, consumer vulnerability was opted as the entry point for justifying protection for the Non-Consumer Users because, amongst others, it has been extensively

⁹⁶ *ibid.*

⁹⁷ *ibid* 341.

⁹⁸ *ibid.*

⁹⁹ Nicholas McSpedden-Brown and Reiko Odoko, 'Consumer Vulnerability in the Digital Age' (Organisation for Economic Co-operation and Development 2023) 355 12 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/consumer-vulnerability-in-the-digital-age_85b498eb/4d013cc5-en.pdf> accessed 30 December 2025.

¹⁰⁰ Bruno Medeiros Ássimos, Marcelo De Rezende Pinto and Adriana Ventola Marra, 'Vulnerability of the Young Adult Consumer to Food Consumption' (2021) 15 *Revista Pensamento Contemporâneo em Administração* 54, 56.

engaged with by legal scholars to understand how protection of users of mass services (such as platforms or financial services) could be best understood, interpreted and, where necessary, expanded in contemporary economies.

Although the concept of consumer vulnerability has been the core focus of the consumer scholars and policymakers, the concept in itself is intricate and multifaceted, lacking a universally agreed-upon definition.¹⁰¹ As per Riefa, given the notion's elastic nature, the notion of vulnerability is perceived as a slippery concept, rendering it difficult to be grounded from a legal perspective.¹⁰² For instance, in the European Union, the Unfair Commercial Practices Directive ("**UCPD**")¹⁰³ employs the term 'vulnerable consumers' as a doctrinal adjustment to the 'average consumer' benchmark. Simply put, the understanding of the 'vulnerable consumer' is treated as an exception, rather than a general rule.

On the contrary, in Argentina, the concept of 'vulnerable consumers' is treated differently, in the sense that there is a legal presumption that all consumers are structurally vulnerable.¹⁰⁴ Simply put, the notion is being utilised as a norm, rather than exception (as employed in the EU). Further, the EU's approach in employing the term vulnerable consumers as an exception is equivalent to the Argentine concept of 'hyper-vulnerable consumers'. In this respect, 'hyper-vulnerable consumers' refers to those who are in "*a situation of aggravated vulnerability due to age, gender, physical or mental state or social, economic, ethnic and/or cultural circumstances, any of which may cause special difficulty for the full exercise of their rights as consumers*".¹⁰⁵ The contrast between the EU and Argentine approaches highlights the difficulty of treating consumer vulnerability as a coherent legal category, depending on the regulatory framework adopted.

Further, according to Helberger et al., the term 'vulnerability' (at least as employed within the context of the EU UCPD) is a loaded term.¹⁰⁶ It carries a certain normative meaning, which in turn triggers legal protection. As evident in the UCPD, a particular group of consumers may be regarded as vulnerable if their vulnerability arises from a "*mental or physical infirmity, age or credulity*".¹⁰⁷ However, the choice of adopting the said factors in measuring consumer

¹⁰¹ Eleni Kaprou, 'The Legal Definition of "Vulnerable" Consumers in the UCPD: Benefits and Limitations of a Focus on Personal Attributes' in Christine Riefa and Séverine Saintier (eds), *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (1st edn, Routledge 2020) 51.

¹⁰² Riefa (n 52) 4.

¹⁰³ Directive 2005/29/EC on Unfair Business-to-Consumer Commercial Practices in the Internal Market

¹⁰⁴ María Guadalupe Martínez Alles, 'Reducing Inequality in Consumer Transactions: The Significance of Aggravated Vulnerabilities' in Kevin E Davis and Mariana Pargendler (eds), *Legal Heterodoxy in the Global South* (1st edn, Cambridge University Press 2025) 78.

¹⁰⁵ *ibid* 79.

¹⁰⁶ Helberger and others (n 51) 47.

¹⁰⁷ Article 5(3) of the UCPD

susceptibility to harm appears to be arbitrary¹⁰⁸ and too narrow.¹⁰⁹ Further, the UCPD approach is viewed as creating a false narrative, as if consumers are either vulnerable or not.¹¹⁰

Given the doctrinal uncertainties and controversies surrounding the notion of consumer vulnerability, it is helpful to look at non-legal literature, as it allows for a more comprehensive understanding of consumer vulnerability theory.¹¹¹ After all, the theory is not purely a legal concept and it is widely adopted in other disciplines.¹¹² In this regard, scholars from various disciplines have come up with their own definitions of consumer vulnerability.¹¹³

For instance, scholars in the field of marketing such as Smith and Cooper-Martin defined vulnerable consumers as those who are “*more susceptible to economic, physical, or psychological harm in, or as a result of economic transactions because of characteristics that limit their ability to maximise their utility and well-being*”.¹¹⁴ Echoing this view, Barnhill adopted a perspective centred on consumers' intrinsic traits, positioning typical consumers on one end of the spectrum and functionally disabled consumers on the other.¹¹⁵ The latter group consists of five vulnerable populations, such as the elderly, low-income individuals, young married couples, adolescents and immigrants.

The abovesaid approach may be labelled as the ‘class-based approach’ (as it pertains to a certain group of people such as the elderly, children etc.)¹¹⁶ or ‘inherent vulnerability’ as proposed by Mackenzie et al.¹¹⁷ Regardless of the label attached, principally, this approach solely focuses on the internal and/or inherent factors embodied in consumers as the sources of vulnerability. One of the advantages of this class-based or inherent vulnerability approach is the assurance of legal clarity regarding which individuals may be qualified as vulnerable, subsequently simplifying the legislative process governing them.¹¹⁸

¹⁰⁸ Eleni Kaprou (n 101) 53.

¹⁰⁹ Nikolina Šajn, ‘Vulnerable Consumers’ (European Parliamentary Research Service 2021) PE 690.619 2 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI\(2021\)690619_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI(2021)690619_EN.pdf)> accessed 30 November 2025.

¹¹⁰ Helberger and others (n 51) 3.

¹¹¹ Eleni Kaprou (n 101) 54.

¹¹² *ibid.*

¹¹³ Aimee Riedel and others, ‘Consumers Experiencing Vulnerability: A State of Play in the Literature’ (2022) 36 *Journal of Services Marketing* 110.

¹¹⁴ N Craig Smith and Elizabeth Cooper-Martin, ‘Ethics and Target Marketing: The Role of Product Harm and Consumer Vulnerability’ (1997) 61 *Journal of Marketing* 1, 4.

¹¹⁵ J. A. Barnhill, ‘Market Injustice: The Case of the Disadvantaged Consumer’ (1972) 6 *Journal of Consumer Affairs* 78.

¹¹⁶ Nikolina Šajn (n 109) 2.

¹¹⁷ Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 7.

¹¹⁸ Nikolina Šajn (n 109) 2.

The foregoing approach may seem to be restrictive in the sense that a lot of external factors may be neglected. In this respect, the class-based approach or one that only considers individual personal characteristics is indeed narrow, as it fails to consider the roles of other surrounding factors at play, creating and/or amplifying those vulnerable characteristics. Other scholars have suggested that there is no convincing empirical evidence to suggest that individual characteristics such as age and illiteracy, should be the sole foundation of which consumer vulnerability can be defined.¹¹⁹ As per Helberger et al., vulnerability is not merely an inherent trait but is shaped by external market and societal conditions, including power imbalances.¹²⁰ This shifts the focus from consumers as inherently weak to the recognition that certain institutional structures and surrounding circumstances contribute to, or even capitalise on, the consumers' vulnerability.

In light of the foregoing, the understanding of consumer vulnerability has evolved from a class-based to a more universal approach, recognising vulnerability as context-dependent, situational and relational.¹²¹ Simply put, the primary concern is the question of 'how' and under what circumstances consumers may find themselves vulnerable against harm, rather than 'who' they are or what legal status they hold in the market. This is what Mackenzie et al. categorised as 'situational vulnerability',¹²² which denotes vulnerability that is context specific, that may be caused and/or heightened by personal, social, political, economic or environmental situations of any individuals or groups. The same approach (although without any specific label) was also similarly advanced by Garrett and Toumanoff, whereby they are of the view that it is time to adopt a broader conceptual framework of vulnerability, rather than relying on the traditional approach that focuses on consumers' personal characteristics such as age and race.¹²³ This suggestion is also consistent with the approaches/definitions of vulnerability provided by other scholars, including Baker et al. and Hill and Sharma.

In this regard, Baker et al. define vulnerability as *"state of powerlessness that arises from an imbalance in marketplace interactions or from the consumption of marketing messages and products. It occurs when control is not in an individual's hands, creating a dependence on external factors (e.g., marketers)*

¹¹⁹ Stacey Menzel Baker, James W Gentry and Terri L Rittenburg, 'Building Understanding of the Domain of Consumer Vulnerability' (2005) 25 *Journal of Macromarketing* 128, 130.

¹²⁰ N Helberger and others, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 *Journal of Consumer Policy* 175, 182.

¹²¹ Mackenzie, Rogers and Dodds (n 117) 7.

¹²² *ibid.*

¹²³ Dennis E Garrett and Peter G Toumanoff, 'Are Consumers Disadvantaged or Vulnerable? An Examination of Consumer Complaints to the Better Business Bureau' (2010) 44 *Journal of Consumer Affairs* 3, 20.

to create fairness in the marketplace".¹²⁴ Baker et al. further emphasised that "The actual vulnerability arises from the interaction of individual states, individual characteristics, and external conditions within a context where consumption goals may be hindered and the experience affects personal and social perceptions of self".¹²⁵ Although Baker et al. did not confer any specific label to this approach, the foregoing definition, implicitly, resembles the 'situational vulnerability', where one does not focus solely on consumers' personal characteristics (or protecting them merely because they belong to a specific group), but rather the interaction of all factors (whether internal or external) surrounding the consumers' interaction with the sellers.

Consistent with the above, Hill and Sharma (in the field of consumer psychology) further built their definition of vulnerability on two antecedents:- the lack of *access* and *control* over the resources. In this respect, they proposed to define vulnerability as "a state in which consumers are subject to harm because their access to and control over resources are restricted in ways that significantly inhibit their ability to function in the marketplace".¹²⁶ Hill and Sharma further argued that the class-based approach (i.e. by focusing solely on consumers' personal characteristics such as age and illiteracy) is actually an attempt to define 'disadvantage consumers', rather than vulnerable ones.¹²⁷ In this respect, they argued that it is not one's given designation (i.e. the elderly, the children, the poor etc.) that render one vulnerable against harm,¹²⁸ but rather the circumstances that the consumers face in acquiring the goods and/or services.¹²⁹

Given the above, it is submitted here that the situational vulnerability approach is more dynamic as it takes into account all surrounding factors. This approach recognises not only an individual's personal traits, but also their personal situations, the economic market and broader societal factors. It also perceives consumers' vulnerability as "the exposure to the risk of detriment in consumption due to the interaction of market, product, and supply characteristics and personal attributes and circumstances".¹³⁰ For example, consumers may be hindered from making rational decisions in the marketplace due to external situations/factors such as:- (1) events that temporarily lower their ability to make

¹²⁴ Baker, Gentry and Rittenburg (n 119) 134.

¹²⁵ *ibid.*

¹²⁶ Ronald Paul Hill and Eesha Sharma, 'Consumer Vulnerability' (2020) 30 *Journal of Consumer Psychology* 551.

¹²⁷ *ibid* 553.

¹²⁸ *ibid.*

¹²⁹ *ibid* 554.

¹³⁰ Consumer Affairs Victoria, 'Discussion Paper: What Do We Mean by Vulnerable and Disadvantaged Consumers?' (Consumer Affairs Victoria 2004) C-10-01-771 23 <<https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/what-do-we-mean-by-vulnerable-and-disadvantaged-consumers-discussion-paper-2004.pdf?>> accessed 30 November 2025.

such a decision (e.g. financial distress); and (2) the market characteristics itself (e.g. how the market operates, complexity of the products offered etc.).

With regard to the former, such events may include temporary illness, financial distress and other stressful life events. Compared to the strict class-based approach, Mackenzie's situational vulnerability theory focuses more on the actual situation endured by the consumers that affects their vulnerabilities, rather than their class per se. Concerning the latter (i.e. market characteristics), consumers often find themselves more susceptible to vulnerability, as they encounter challenges in comparing various offers and comprehending intricate contracts. This susceptibility may also be aggravated due to the market's competitiveness (particularly the lack of it), as a non-competitive market will not only leave the consumers with limited choices in the market but will also dis-incentivise the traders to provide the best value for their products for the benefit of the consumers.

Through this approach, one may observe that the interplay/intersection between individual traits, external factors such as personal circumstances (e.g. financial distress) as well as the market characteristics may conjunctively affect consumers' vulnerabilities. Therefore, it is argued here that the situational vulnerability approach provides a more comprehensive way of identifying one's vulnerabilities, as it considers all factors that may enhance/amplify one's vulnerabilities. As pointed out by Peroni and Timmer, the employment of the theory of vulnerability should not be used as a label, but instead, should be treated as 'layered concept'. In this regard, it was asserted that focus should be shifted to the *circumstances* that render a group of people vulnerable to harm, and not on which *group* is vulnerable.¹³¹

2.3.3 Navigating the Notion of Vulnerability within the Legal Sphere

As discussed previously, a class-based approach, such as the one employed by the UCPD through its reliance on inherent qualities, may lead to the exclusion of other potentially vulnerable populations and, at the same time, result in the homogenisation of the consumers whilst disregarding their actual surrounding circumstances.¹³² As per Riefa, to mention a few, vulnerability is not so much about the consumers' individual traits, but it depends on the situation they find themselves in.¹³³

¹³¹ L Peroni and A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056, 1073–1074.

¹³² Eleni Kaprou (n 101) 51.

¹³³ Riefa (n 52) 4.

This suggests that vulnerability (for the purposes of this research) should not be understood as connected to the inherent personal characteristics of the Non-Consumer Users (e.g. age or education factors). Instead, we can shift our focus to other external factors, such as structural characteristics of the relevant stakeholders, the market condition and the contracting environment. This approach is both more adapted to the minimum of legal certainty that is required by market operations, and more apt for our investigation of whether the Non-Consumer Users, as a group, should be afforded protection against unfair terms in relation to their contractual relationships with the OFDPs.

In this sense, although the inquiry concerns the protection of the Non-Consumer Users as a group, the question is not whether they should be protected because of *who* they are (i.e. the '*group*'), but rather, on the basis of *how* these business actors are facing similar circumstances that make them liable to be vulnerable within the context of their relationships with the OFDPs. Simply put, protecting the Non-Consumer Users as a group is just the outcome arising from the discussions put forward in this chapter, not the normative basis of the proposed protection.

We know that, in the European Union context, the CJEU has consistently referred to, at least, two circumstances in the marketplace that render consumers weaker than their seller counterparts:- (1) weaker bargaining power; and (2) information asymmetry.¹³⁴ Although these two circumstances have helped develop the doctrine of unfair terms control under the UCTD, their exact meaning is a matter of controversy within EU scholarship and arguably too indeterminate to provide guidance for our specific purposes.

Therefore, the discussion in this chapter will make use of a taxonomy of structural elements denoting vulnerability which has been developed by UK-based consumer lawyer Peter Cartwright with the aim of achieving a better understanding of vulnerabilities in sensitive markets (in his case, financial products).¹³⁵ In this regard, Cartwright acknowledged that consumers' vulnerability is both dynamic and relative.¹³⁶ Through his taxonomy, Cartwright identifies a number of elements/circumstances that are liable to put consumers in a vulnerable state, namely:-¹³⁷

¹³⁴ *Océano* (n 89). See also Case C-147/16 *Karel de Grote-Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers* and Case C-488/11 *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*.

¹³⁵ Peter Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38 *Journal of Consumer Policy* 119.

¹³⁶ *ibid* 121.

¹³⁷ It is to be noted that these factors explain several circumstances under which consumers vulnerabilities may transpire. Accordingly, the factors operate disjunctively, and the presence of any one of them suffices to establish vulnerability.

- (a) weaker bargaining power;
- (b) information asymmetry;
- (c) situational pressure;
- (d) supply deficit;
- (e) redress vulnerability; and
- (f) impact vulnerability.

Although Cartwright did not explicitly put a specific label to his approach in identifying vulnerability (e.g. situational vulnerability), the elements identified as mentioned above closely resemble the situational approach, where it does not focus on consumers' inherent characteristics nor justify protection solely on the basis of group membership. Rather, the identified elements amount to circumstances that may drive vulnerability, and in my view, may fit neatly onto Mackenzie's theory of situational vulnerability. However, as Mackenzie's theory of vulnerability is very context-dependent (i.e. situational vulnerability), it can be operationalised with the utilisation of Cartwright's taxonomy. In the following sections, each of these factors/circumstances will be first outlined as it has been discussed in the context of consumer protection and subsequently transposed to the context of the Non-Consumer Users as understood in the thesis, to assess to what extent these circumstances also affect the relationship between the Non-Consumer Users and the OFDPs.

2.4 Vulnerabilities and the Non-Consumer Users

As mentioned in section 2.3.3 above, Cartwright has identified a number of elements/circumstances that are liable to put consumers in a vulnerable state. These circumstances will be further elaborated upon and applied to the context of relations between OFDPs and the Non-Consumer Users below (see sections 2.4.1 to 2.4.6).

2.4.1 Weaker Bargaining Power

Bargaining may be described as a negotiation process where buyers and traders discuss the terms of the contract to arrive at a consensus.¹³⁸ According to Sharma and Krishnan, the main purpose of the bargaining process is, amongst others, for all parties to achieve a greater value for their dealings.¹³⁹ This bargaining process may bring several benefits to the consumers (and the traders),

¹³⁸ Metin Kozak, 'Bargaining Behavior and the Shopping Experiences of British Tourists on Vacation' (2016) 33 *Journal of Travel & Tourism Marketing* 313.

¹³⁹ Varinder M Sharma and Krish S Krishnan, 'Recognizing the Importance of Consumer Bargaining: Strategic Marketing Implications' (2001) 9 *Journal of Marketing Theory and Practice* 24.

such as influencing the customer's willingness to purchase and eventually creating a more competitive market and/or competition amongst the traders.¹⁴⁰

However, not everyone can bargain effectively. A party can only be considered as possessing bargaining power (an effective one, to the least) if they have the capability to achieve their preferred outcome in a negotiation. But this is not the reality of most (if not all) consumers. This is why the legislative intervention comes into the picture (via unfair terms control mechanisms), to somehow compensate for this imbalanced equilibrium. From the EU law perspective, for instance, consumer protection as embodied in the UCTD is "*based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge*".¹⁴¹ This disparity of bargaining power is particularly evident and/or apparent when sophisticated businesses utilise standard forms contracts on a take-it-or-leave-it basis upon their non-sophisticated individual counterparties. Hence, when the consumers are faced with this type of contract, they would not be able to influence the content of the contract and consequently, agreeing (willingly or otherwise) to the imposed terms even when they do not serve their best interest.

Do the Non-Consumer Users also possess weaker bargaining power with regard to their contractual relationship with the OFDPs? As mentioned previously, the strength of one's bargaining power can simply be measured/indicated by observing how influential their voices are in crafting their contractual terms. One of the main reasons why transactions between businesses are often excluded from unfair terms control is due to the misconception that all business parties are dealing with each other on an equal level playing field and hence, holding a similar level (if not balanced) of bargaining power.¹⁴² Be that as it may, entrepreneurs and firms come from a diverse array of sizes and backgrounds and they are often contracting with other businesses that are relatively more superior.¹⁴³ Hence, a perfectly balanced bargaining power is not easy to be achieved in business relationships. In fact, absolute equality between entities is almost unattainable.¹⁴⁴

This imbalance in bargaining power becomes even more apparent when one of the parties in a business transaction is a small business/self-employed. In this respect, it has been recognised that small businesses typically lack the

¹⁴⁰ Zongwei Li and others, 'Price Dispersion, Bargaining Power, and Consumers' Online Shopping Experience in e-Commerce: Evidence from Online Transactions' (2023) 2023 *Mathematical Problems in Engineering* 6638665, 2 <<https://onlinelibrary.wiley.com/doi/10.1155/2023/6638665>> accessed 30 November 2025.

¹⁴¹ *Océano* (n 89), paragraph 25 of the Judgment

¹⁴² *Škarka* (n 66) 49.

¹⁴³ Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?' (2009) 5 *European Review of Contract Law* 304.

¹⁴⁴ Jarmila Lazíková and Ľubica Rumanovská, 'The Notion of Consumer in the EU Law' (2016) 5 *EU Agrarian Law* 1, 1 <<https://www.sciendo.com/article/10.1515/eual-2016-0006>> accessed 30 November 2025.

bargaining power to shape their contractual terms as “SMEs often have to accept their co-contractor’s standard terms and the law of the latter as the applicable law due to their weaker negotiating power”,¹⁴⁵ akin to consumers. Further, Hesselink also employed economic strength as an indicator to measure bargaining power and therefore, when a party is economically inferior relative to their contractual partner, they lack an effective bargaining power to substantially assert any influence to the terms.¹⁴⁶ Due to this imbalanced bargaining power, Hesselink even went further to contend that small businesses can, at times, be more vulnerable than consumers themselves, as their contracts are not tailored for personal consumption, resulting in significantly higher stakes.¹⁴⁷ Given the disparity in bargaining power between the contracting parties, meaningful negotiation regarding the terms becomes unfeasible.

Within the context of the Non-Consumer Users in the OFDS, it is argued here that they appear to have significantly weaker bargaining power (if at all) compared to their platform counterparts given the inability to influence and/or negotiate the content of the contracts. This is evident through the standard form contracts commonly imposed by the OFDPs on a take-it-or-leave-it basis. Though one may argue that the Non-Consumer Users have the choice not to conclude the contract given the unfavourable terms, this may not be an alternative and/or reasonable way out. As subsistence entrepreneurs who are offering their goods/services to sustain their livelihood, there is no (or very little) room to manoeuvre these unfortunate circumstances. No delivery gig would mean that there would be no food on the table. Likewise, small business restaurants that do not utilize online platforms might find it impossible to stay afloat, as they depend on these services to reach a larger audience quickly.

This predicament also relates to the “pressure” vulnerability that will be discussed below in section 2.4.3, in which the Non-Consumer Users may be somehow ‘pressured’ to either accept the OFDPs’ terms (and be able to accept orders and gigs) or reject them altogether with the consequences of not be able to sustain their lives. Their survival hangs by a thread. The Non-Consumer Users had no power to negotiate the contract presented to them. Nevertheless, they chose to accept the ambiguous terms due to their desperate circumstances. After all, there is no chance of bargaining, let alone changing the terms proposed.

¹⁴⁵ European Commission, ‘Communication From The Commission To The European Parliament And The Council: A More Coherent European Contract Law-An Action Plan’ (Commission of the European Communities 2003) OJ C 63 COM (2003) 68 Final 30.

¹⁴⁶ Hesselink (n 68) 93.

¹⁴⁷ *ibid.*

2.4.2 Information Asymmetry

The notion of weaker party protection within the consumer contracts is also commonly associated with the idea that consumers lack information and the capacity to handle information properly and thus are prone to make mistakes.¹⁴⁸ Traders who are enforcing a standard term in a contract typically possess superior knowledge about the terms and their legal implications compared to the consumers. Moreover, they often have the capacity/ability to invest in drafting and analysing it since they commonly apply the same terms to multiple customers as recurring participants (repeat players).¹⁴⁹ As opposed to the consumers who are not repeat players, they typically participate in infrequent, low-value transactions, which renders it impractical (or simply due to less awareness and motivation) to thoroughly examine the contract terms and their legal implications should they materialise.

In a perfect market, rational and well-informed consumers make consistent decisions following their preferences and what serves their interests the best. However, in reality, this is not simply the case. As pointed out by Hadfield et al., the issue of information asymmetry between the consumers and the traders has been the “*key analytical basis for early consumer protection law*”.¹⁵⁰ Cartwright further argued that information asymmetry between consumers and traders is one of the most common factors that amplifies consumers’ vulnerabilities, warranting legal intervention to remedy said issue.¹⁵¹

The core issues concerning the information disparity involve the difficulty in:- (1) obtaining; and (2) comprehending information.¹⁵² With regard to the former, consumers may be prevented (directly or indirectly) from accessing full disclosure/information regarding their purchase due to several factors. For instance, some consumers may find it challenging to access information sources, whether due to physical disabilities, lack of familiarity with information technology or even due to shady practices of the traders by “hiding” the important terms and conditions from being evident to the consumers (e.g. drafting clauses that are ambiguous and/or failing to highlight vital clauses by drawing the consumers’ specific attention to it). Additionally, it was also suggested that certain consumers may be less motivated to seek information, potentially due to a lack of confidence or negative prior experiences.¹⁵³

¹⁴⁸ Josse Klijnsma, ‘Contract Law as Fairness: A Rawlsian Perspective on the Position of SMEs in European Contract Law’ (University of Amsterdam 2014) 104.

¹⁴⁹ Johannes Ungerer and Matthias Lehmann, ‘Save the Mittelstand: How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms’ (2017) 25 *European Review of Private Law* 313, 323.

¹⁵⁰ Gillian K Hadfield, Robert Howse and Michael J Trebilcock, ‘Information-Based Principles for Rethinking Consumer Protection Policy’ (1998) 21 *Journal of Consumer Policy* 131, 134.

¹⁵¹ Cartwright (n 135) 122.

¹⁵² *ibid.*

¹⁵³ Victoria (n 130).

Even when the consumers have the ability to access to such information, some may have difficulties in comprehending and/or processing it. This predicament may not only relate to the consumers' personal characteristics (e.g. illiteracy),¹⁵⁴ but can also be exacerbated by the shady practices of drafting the terms and conditions with difficult phrases and verbiage as well as unclear/ambiguous wordings. Without having proper access to vital information and the ability to process such information, the consumers would potentially be hindered from making rational choices to maximise their interests. Given the ambiguity of these terms, one might question why consumers still agreed to them.

Is information asymmetry also present in the relationship between the Non-Consumer Users and the OFDPs? Contrary to the consumers, business entities are commonly presumed to have (or ought to have) better knowledge, expertise and diligence in conducting their B2B transactions. There's an implicit expectation for businesses to self-regulate to reduce the risks associated with informational imbalances. However and as argued previously, this may not be necessarily accurate as entrepreneurs come from various backgrounds.¹⁵⁵ In this respect, entrepreneurs come with different sizes and capacities and such diversity may lead to different capabilities in assessing business risks associated with the terms imposed by their counterparties.

Worse, small businesses and/or self-employed individuals such as the Non-Consumer Users certainly do not have the same leverage to absorb the losses arising from the implication of the unfair transfer of risks, as bigger corporations do. For instance, bigger corporations may have the financial resources to employ legal experts to manage all relevant information, but for small businesses, such expenses could be financially burdensome.¹⁵⁶

Further, it may not be feasible for the small businesses and the self-employed to dedicate time and effort to secure more favourable terms for their transactions.¹⁵⁷ After all, as they do not have similar bargaining power comparable to the OFDPs (if at all), meticulously going through the terms and conditions is akin to beating a dead horse, when the only outcome would be strictly confined to either accepting or rejecting the same. Again, they do not even have substantial bargaining power to begin with. Even if they inspect the terms with magnifying glasses, it is not breaking news that they would not be able to change

¹⁵⁴ Cartwright (n 135) 122.

¹⁵⁵ Aviva Freilich and Eileen Webb, 'Small Business – Forgotten and in Need of Protection from Unfairness?' (2013) 37 University of Western Australia Law Review 134, 138.

¹⁵⁶ Klijnsma (n 148) 104.

¹⁵⁷ Carlotta Rinaldo, *Business Negotiations and the Law: The Protection of Weak Professional Parties in Standard Form Contracting* (1st edn, Routledge 2020) 32 <<https://www.taylorfrancis.com/books/9781000030884>> accessed 30 November 2025.

the unfavourable terms anyway. In my view, these predicaments may put the Non-Consumer Users in an even deeper hole.

2.4.3 Circumstantial Pressure

In an ideal market, consumer actions are entirely voluntary; however, in reality, consumers may sometimes make decisions under various forms of pressure. Though sometimes the issue of information disparity is not present, there are cases where the vulnerabilities are sourced from some form of pressure experienced by the consumers. In this regard, consumers may not be able to exercise their best judgment as rational decision-makers (and thus, be vulnerable) if they are being put under pressure, including financial distress.

Financial distress as one of the external factors that may produce vulnerabilities is evident in a sensitive market such as the financial sector. For instance and as identified by Cartwright, the financial sector is one of the markets where providers will frequently be in a higher position of power compared to the consumers, and hence there is the possibility of that power being abused.¹⁵⁸ Another instance in the past that most of us experienced was during the COVID-19 pandemic, when the majority of consumers did not have many choices if they did not want to cook themselves: they had to use online food delivery services due to the ban on dining out. Hence, in cases where consumers face challenges due to their unfavorable financial situations, it might be reasonable to expect exceptionally high standards from the traders they engage with, not to exploit such a state of vulnerability.

To what extent may the Non-Consumer Users experience circumstantial pressure within the OFDS business model? As the online market has already been dominated by some big players (due to the lack of providers in the online platform economy), the Non-Consumer Users would have no choice but to accept the unfair terms and conditions imposed by their OFDP counterparts as they might be under, amongst others, financial distress. As mentioned previously, financial needs and economic desperation are the main motivation for digital subsistence entrepreneurship. Hence, it is appropriate to investigate the link between financial need and how it may produce (or even aggravate vulnerabilities).

In this respect, Lakemann defines vulnerability in self-employment as the risk of having business income below a living wage threshold.¹⁵⁹ Lakemann further mapped out a link between this 'vulnerability-to-poverty' approach with subsistence farming (i.e. farmers who are farming on a smaller scale for their

¹⁵⁸ Cartwright (n 135) 122.

¹⁵⁹ Tabea Lakemann, 'How Vulnerable Are the Self-Employed? Evidence from Ugandan Small-Scale Entrepreneurs' (2023) 59 *The Journal of Development Studies* 1391, 1392.

subsistence). In this respect, it was highlighted that subsistence farmers are often vulnerable due to their highly stochastic income. However, Lakemann is of the view that this ‘vulnerability-to-poverty’ approach does not fit exclusively into the agricultural sector but instead, may also be applied in the world of self-employment in general. Hence, subsistence entrepreneurs in the gig economy who earn stochastic income may also be exposed to exploitation based on their financial desperation.

Although entrepreneurs are generally expected to bear business risks, it is unreasonable to demand the same responsibility from subsistence entrepreneurs such as the Non-Consumer Users. More often than not, they do not possess high tolerance against business risks considering their limited household wealth, low levels of savings, and small amounts of capital.¹⁶⁰ In essence, it can safely be inferred that the higher the level of poverty (and the potential fluctuation of it), the higher the level of vulnerability. Consequently, without a proper safeguard against exploitative practices, most subsistence entrepreneurs (if not all) can easily be exploited due to their financial vulnerabilities.

For illustration, reference may be made to the study conducted by Muhyi et al., where it appears that the main drive for joining the gig economy in Malaysia was the need to find a decent income to survive.¹⁶¹ This desperation for subsistence may easily be exploited by online platforms with the imposition of unfair terms detrimental to their entrepreneurship. Further and as per the surveys conducted by Muhyi et al., even after joining the digital platform workforces, 40.4% out of 235 respondents earned less than MYR 1,000 per month (approximately EUR 195).¹⁶² This monthly income is approximately 40% below the minimum salary in Malaysia (as of 20 August 2025, the minimum monthly salary in Malaysia is MYR 1,700 (approximately EUR 294)).¹⁶³

Based on this data, it is argued here that small businesses/self-employed such as the Non-Consumer Users may also be vulnerable due to their financial conditions, pressuring them to make decisions that are not necessarily in their best interests (e.g. agreeing to any contractual terms even when they are explicitly dubious). Consequently, when these unfair terms are materialised, they would work to the detriment of the Non-Consumer Users, as their financial condition would hinder them from effectively absorbing/cushioning the business risks/impact that come with the one-sided terms and conditions. This

¹⁶⁰ *ibid.*

¹⁶¹ Muhyi, Omar and Adnan (n 78) 7.

¹⁶² *ibid* 6.

¹⁶³ Malay Mail, ‘Minimum Wage Order at RM1,700 to Be Enforced Nationwide from August 1, No More Deferments, Says Ministry’ (22 July 2025) <<https://www.malaymail.com/news/malaysia/2025/07/22/minimum-wage-order-at-rm1700-to-be-enforced-nationwide-from-august-1-no-more-deferments-says-ministry/184772>> accessed 30 December 2025.

unfortunate situation further proves that small business/self-employed such as the Non-Consumer Users are undeniably vulnerable.

2.4.4 Supply Deficit

Consumers may also become vulnerable due to supply deficits. In this respect, vulnerability can exist when there is a small/limited pool of providers in a market, leading to the consumers having restricted options in choosing a provider that best serves their interest. Ideally, a market shall have numerous buyers and traders as a wider pool of actors would expand the choices available in the market.¹⁶⁴ A larger pool of actors would also contribute to the competitiveness of the market and consequently, traders would compete with one another with the view to offer the best deal for the consumers' buck.

Conversely, a smaller pool of traders would mean that the consumers will have a limited number of options to choose from in the market. This would include with whom they are contracting as well as the type of products/services that may be available for them. For instance, when the market has a limited number of traders, consumers may be prevented from selecting those who offer the best terms that serve the consumers' interests. This predicament would also be evident when most traders in the market (if not all) offer similar bad terms, making it more difficult for the consumers to "transition"¹⁶⁵ from one trader to another. This difficulty in transitioning (or simply lack of choices in the market) may be a sign of vulnerability on the part of the consumers, justifying a legal protection guarding them from the imposition of unfair terms.

Is the issue of supply deficit also present in the OFDS business model? As discussed previously, a supply deficit may also lead to vulnerability. For instance, when there is a small pool of suppliers, the choices to shop around for the best terms that serve the consumers' best interests will be difficult. This situation is not entirely foreign in P2B relationships. For instance, as of 2021, it was estimated that there were approximately 1.12 million gig workers in Malaysia and around 76% of them were registered with location-based online platforms (including OFDPs). Out of this number and as of 2023, the OFDS industry only consists of small number of OFDPs, whereby it is only dominated by Grab, Foodpanda, and Shopee holding 65%, 30% and 5% market shares respectively.¹⁶⁶

Based on this data, it appears that the OFDS industry is essentially dominated by only a small number of platforms. With a high number of gig workers dependent on these platforms, the range of options available is quite narrow.

¹⁶⁴ Cartwright (n 135) 123.

¹⁶⁵ "Transitioning" is a form of redress and may be understood as an action that can be exercised by the consumers to "punish" the sellers/providers who do not meet their reasonable expectations. See Cartwright (n 135) 124.

¹⁶⁶ Momentum Works (n 61)

With regard to the restaurants, unfortunately, no data exists on the exact number of restaurants engaging with these OFDPs. Regardless, this limited pool of 'providers' not only restricts the Non-Consumer Users from exploring better terms but also reduces the incentive for OFDPs to compete by offering more favourable terms. As a result, the Non-Consumer Users are left with few choices and are often forced to settle for less.

Additionally, when there is a limited supply of providers, one may argue that the small businesses and the self-employed (including the Non-Consumer Users) may not have sufficient liberty to 'transition' from one platform to another. This circumstance is even more aggravated when this smaller pool of providers imposes similar terms to the Non-Consumer Users, making it even more difficult to 'transition'. One might argue that they could hop on and off different platforms, but what's the point of switching ships if all captains enforce the same rules? As will be discussed in Chapter 3 of this thesis, it will be shown that the two platforms examined in the case study impose comparable terms, to the detriment of the Non-Consumer Users.

Even if there are other providers whose terms and conditions may serve the Non-Consumer Users' interests better, the market power of the dominating OFDPs indeed plays a role in the users' choice. Bigger dominance in the market means a bigger pool of consumers. In other words, the Non-Consumer Users nevertheless may be 'forced' and 'steered' to choose the bigger platforms to have better access to the bigger pool of end-users, no matter how unfair the terms are. Based on these factors, one may conclude that market conditions and/or lack of suppliers would indeed affect the vulnerability of small businesses/self-employed (including the Non-Consumer Users). After all, less choices means less autonomy, and less autonomy leads to a higher probability of making irrational choices that do not align with their best interests.

2.4.5 Redress Vulnerability

Consumers play a crucial role in maintaining market discipline, not only through their product choices, but also via their ability (in theory, to the least) by holding suppliers accountable and seeking remedies when products fail to meet their reasonable expectations. This is what an ideal market looks like. According to Cartwright, redress can also be in the form of 'transitioning', in which consumers can find satisfaction by transitioning from one supplier to another.¹⁶⁷ Be that as it may, it is argued here that 'transitioning' to another seller is not as easy as it seems. As discussed above in section 2.4.4 above regarding supply deficit, consumers may be hindered from transitioning when the pool of sellers is small, leading to the market being saturated with unfair terms. Simply put,

¹⁶⁷ Cartwright (n 135) 124.

even when there are alternatives for the consumers to shop around and find terms that serve their best interests, the reality is most sellers (if not all) offer similar bad terms.

When transitioning does not seem plausible, holding the sellers accountable via a dispute resolution process would be the last resort. This is what Cartwright called as switching or suing.¹⁶⁸ However, the paramount consideration in seeking redress would be the enforcement cost (e.g. litigation costs). Though the courts may serve as an affordable avenue and/or remedy to the consumers, a lengthy court process would potentially deter a consumer from enforcing their rights against the seller. This dilemma can be even further aggravated if the sellers incorporate a clause on alternative dispute resolution including mandatory arbitration clause. Though an arbitration process may be speedier than litigation, consumers might be hindered from pursuing their claim via this route due to the associated high costs. Without an effective redress mechanism, sellers/providers may not have any substantial motivation to supply good-quality products and engage in appropriate business conduct.¹⁶⁹ This lack of motivation would indeed negatively impact the consumers and/or the market as a whole.

Does the same issue exist in the OFDS business model? As has been discussed above, the difficulty in seeking redress may be in the form of either 'switching' or 'suing'. However, switching might not necessarily viable and sometimes can be difficult to be exercised due to several factors, including the lack of competition between the suppliers. This is what actually transpired within the context of the OFDS market segment.

To reiterate, the OFDS market in Malaysia appears to be oligopolistic, with market participation limited to a small number of platforms. Given this limited pool of providers (i.e. OFDPs), as argued previously, it may reduce the incentive for the OFDPs to compete amongst each other by offering more favourable terms. Consequently, it will restrict the Non-Consumer Users from shopping around for better terms from other OFDPs, as all OFDPs are offering similar terms (if not the same), rendering their option to "switch" futile. As a result, the Non-Consumer Users are left with few choices and are often forced to settle for less.

If the option to switch is difficult to be exercised, how about the option to sue? Whether the dispute is to be brought to the courts or any other alternative avenue such as arbitration, the primary barrier to seeking redress is the costs of enforcement. For instance, where the OFDPs' adherence contracts provide for arbitration as the sole dispute resolution mechanism, the Non-

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

Consumer Users may be hindered from pursuing their claim due to the monetary costs involved and such costs are not commensurate with the value of the claim. As pointed out by Stone and Colvin, one of the most common disadvantages of arbitration is the costs associated with the arbitration, which costs are generally higher than those pertaining to court litigation, and to engage a legal practitioner representing them in the proceedings would most likely cost more than what the disputes are worth.¹⁷⁰

This factor alone would definitely impact the working class families, hindering them from having an effective and smooth dispute resolution recourse.¹⁷¹ Gebert also expressed a similar stance regarding the cost of arbitration which may stand as a barrier and/or obstacle of access to justice as it can be presumed that not everyone would have the financial resources and/or capability needed to resort to this particular branch of alternative dispute resolution.¹⁷² Based on the monetary costs involved, it would indeed affect the Non-Consumer Users as subsistence entrepreneurs, as their financial capabilities (similar to circumstantial pressure as discussed in section 2.4.3 above) would be the most concerning issue in initiating any action against the OFDPs.

Even if the adhesion contracts provide for courts as the dispute resolution mechanism, it would still, to a certain extent, hinder the Non-Consumer Users from pursuing their claims against the OFDPs. In this regard, costs in enforcing legal rights do not only revolve around monetary expenses (or the proportionality of the monetary costs with the amount of claim) but also the consumption of time. For instance, while courts may provide an accessible remedy to the Non-Consumer Users (due to lower fees), lengthy proceedings may deter them from pursuing claims against the OFDPs. Given their continuous and heavy reliance on the OFDPs, the Non-Consumer Users may find that time spent in litigation is more productively used pursuing additional gigs from the OFDPs. As a result, the Non-Consumer Users may effectively be deprived of meaningful access to justice.

¹⁷⁰ Katherine VW Stone and Alexander JS Colvin, 'The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights' (Economic Policy Institute 2015) 414 3 <<https://files.epi.org/2015/arbitration-epidemic.pdf>> accessed 29 November 2025.

¹⁷¹ Kate Hamaji, 'Justice For Sale: How Corporations Use Forced Arbitration to Exploit Working Families' (Center for Popular Democracy 2017) 4 <https://populardemocracy.org/sites/default/files/Forced-Arbitration_web%20%283%29_0.pdf> accessed 29 March 2025.

¹⁷² Alexander Gebert, 'Legal Protection for Small and Medium-Sized Enterprises through Investor-State Dispute Settlement: Status Quo, Impediments, and Potential Solutions' in Thilo Rensmann (ed), *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 295.

2.4.6 Impact Vulnerability

Apart from the circumstances as discussed in sections 2.4.1 to 2.4.5 above, Cartwright also highlighted an additional factor, which he labelled as “*impact vulnerability*”. Whilst the previous factors may be perceived as the sources of vulnerability (hence, requiring consumers to be protected), impact vulnerability appears to be concerned more about the consequences that will be materialised (in the absence of such protection). Impact vulnerability essentially denotes that consumers may become vulnerable not only because they are more likely to make poor judgments/choices, but also because they tend to suffer more from making those bad choices. The impact of bad choices in a market may have a more severe repercussion upon one consumer but less severe on another. For instance, a person who has a poor financial situation may be gravely impacted by poor choices compared to someone who has the financial capacity to absorb/remedy the implications of such choices.¹⁷³

Stearn states that, unlike those who are more financially fortunate, consumers who come from low-income households have to pay more to acquire goods/services.¹⁷⁴ Stearn gives an example of utility bills where someone could not gain the same benefit (e.g. a discount) due to the inability to pay the bills.¹⁷⁵ Another example would be the inability to buy goods in bulk (due to limited financial resources) which will reduce the costs per item compared to acquiring them at retail. Within the context of financial services, for instance, stable middle-to-high-income consumers would typically enjoy a better interest rate when applying for banking facilities, compared to those who are economically precarious.

Regarding the position of the Non-Consumer Users, it can be argued that though they are considered as business users, they can still be considered as vulnerable as any wrong decisions in the market will greatly impact them. These poor decisions may take place by, amongst others, agreeing to the OFDPs’ terms and conditions, even when such agreement does not serve their interests (or worse, clearly detrimental to them as subsistence entrepreneurs). This willingness to agree to dubious terms may stem from the factors that I have discussed above, including weaker bargaining power, information asymmetry and circumstantial pressure such as their financial situation.

One may even argue that they might have the option to resort to other platform providers, but the current market condition would not reasonably grant the Non-Consumer Users of such privilege. This is because all of the competitors (as far as the chosen platforms in this case study are concerned) are

¹⁷³ Consumer Affairs Victoria (n 130) 4.

¹⁷⁴ Jonathan Stearn, ‘Tackling Consumer Vulnerability: An Action Plan for Empowerment’ (Consumer Focus 2012) 41.

¹⁷⁵ *ibid.*

employing similar terms and conditions (as will be discussed in Chapter 3 later). This is what we labelled as supply deficit, as discussed in section 2.4.4 above.

However, it is to be noted here that agreeing to adhesion contracts with unfavourable terms does not necessarily impose an immediate grave impact on the Non-Consumer Users. The true impact arises when these terms are invoked or enforced, at which point the Non-Consumer Users may be unable to bear the ramifications of their crystallisation. Within the context of B2B contracts, it can be argued that there are ranges of vulnerabilities within the spectrum of business entities.

In other words, some businesses will be more impacted (hence, more vulnerable) by poor choices in the market, compared to other businesses. In this respect, independent contractors/businesses who share similar traits as subsistence entrepreneurs (such as the Non-Consumer Users) may be severely affected by their poor decisions as they do not have a similar capacity as the bigger corporations to absorb the negative repercussions of poor market decisions.

For instance, if the OFDPs' contracts allow for a unilateral termination of the delivery rider's account without justification (let alone for valid justification), delivery riders would lose their job without having any recourse under the contract. This concern is reinforced by a survey conducted by Muhyi et al., which found that 33.2% of respondents worked full-time,¹⁷⁶ meaning that losing their sole source of income without just cause would significantly impact their livelihood.

As mentioned previously, Muhyi et al. found that 40.4% out of their respondents only earned less than MYR 1,000 per month (approximately EUR 195).¹⁷⁷ Therefore, if the OFDPs' contracts contain any unilateral increment of fees payable to the OFDPs, this clause (when invoked) would disproportionately burden riders whose earnings are already at subsistence levels. Simply put, their status as subsistence entrepreneurs would denote that any *wrong/poor* decisions (e.g. agreeing to unfavourable terms) would significantly impact them, financially or otherwise. In light of this potential impact, it can be concluded that Non-Consumer Users are vulnerable to exploitation, which supports the need for regulatory intervention to safeguard them from such risks posed by their OFDP counterparts.

¹⁷⁶ Muhyi, Omar and Adnan (n 78) 6.

¹⁷⁷ *ibid.*

2.5 Conclusion

As mentioned previously, the aim of Chapter 2 is to answer the first sub-question: *to what extent are the Non-Consumer Users vulnerable and/or susceptible to the imposition of unfair terms?* In this regard, Chapter 2 addressed this question from a theoretical perspective, demonstrating the reason why protection for the Non-Consumer Users is justified. Based on the discussions throughout this chapter, I submit here that the factors contributing to consumer vulnerabilities are, to an extent, also present in the relationship between the Non-Consumer Users and the OFDPs. Therefore, the former deserve a systematic legal protection against the imposition of unfair terms by the OFDPs.

Relying on Cartwright's taxonomy, there are six identified dimensions along which consumers may find themselves vulnerable in their relationships with sellers/traders counterparts, which are:- weaker bargaining power, information asymmetry, situational pressure, supply deficit, redress vulnerability and impact vulnerability. In extrapolating these circumstances to the Non-Consumer Users, the notion of subsistence entrepreneurs is also considered.

In this respect, I argue that the Non-Consumer Users (who mostly (if not all) resemble the characteristics of subsistence entrepreneurs), are merely conducting businesses and/or work out of necessity and usually lack skills and entrepreneurial characteristics. Further, the Non-Consumer Users are simply working and/or trading to meet their basic needs of life and to support their subsistence at a minimum level without any surplus for trade.

Given the similarities that most of the Non-Consumer Users share with subsistence entrepreneurs, it is argued here that they also may find themselves in similar situations as the consumers in their marketplace interaction with the OFDPs. As mentioned previously, the case for protecting the Non-Consumer Users is not solely because they belong to a certain group (e.g. subsistence entrepreneurs) nor because they are vulnerable due to their inherent characteristics, but rather, because similar circumstances that render consumers vulnerable against their seller counterparts are also similarly present in the relationship between the Non-Consumer Users and the OFDPs. Therefore, such notion is helpful in explaining whether the Non-Consumer Users' susceptibility to harmful conduct may be liable to occur/heightened, but not the determinative factor. Hence, even if one may argue that not all delivery riders/restaurants may be considered as subsistence entrepreneurs, that does not mean that they are not vulnerable against the imposition of unfair terms. The notion is employed in a descriptive manner, rather than a normative reasoning for protection.

Further, the notion of vulnerability as discussed in this chapter does not seek to confer a new formal legal status to the Non-Consumer Users nor an attempt to equate the Non-Consumer Users as consumers for all sort of purposes. It is merely used as a conceptual benchmark and/or explanatory framework that

may explain how susceptibility to harm may arise from contextual and/or relational factors, regardless of the stakeholders' formal legal status (i.e. consumer or otherwise). This study does not claim that the Non-Consumer Users are inherently vulnerable, but the *situations* that they experience in *relation* to their contractual relationship with the OFDPs make them liable to be vulnerable. It is within this particular *context*, *that* the Non-Consumer Users are susceptible to harm.

In addition to the arguments above, some form of evidence (i.e. real-life abuse of these vulnerabilities) would indeed corroborate the call for protecting the Non-Consumer Users. After all, vulnerabilities are purely theoretical unless acted upon, and although it is sufficient to protect the Non-Consumer Users due to their vulnerabilities alone, an effective protection framework requires a clear identification of the threat.

By clearly identifying the actual abuse of the said vulnerabilities that have actually occurred in the industry, we may have a better idea to craft a policy to protect the Non-Consumer Users. This brings us to the second sub-question: *to what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs?* This issue will be examined further in the following chapter.

3. THE PLATFORMS' ADHESION CONTRACTS: A PANDORA BOX OF SHE-NANIGANS

3.1 Introduction

Whilst Chapter 2 provides us with the theoretical justification for protecting the Non-Consumer Users, this chapter aims to investigate the second sub-question of this thesis: *to what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs?* The findings of this inquiry may offer practical justification for protecting the Non-Consumer Users by revealing actual conditions on the ground, particularly concerning the terms and conditions set by the Malaysian OFDPs.

By way of reiteration, while it may be argued that the Non-Consumer Users exhibit a certain degree of vulnerability, the key issue is identifying the specific threats that may crystallise this vulnerability. In my view, the policymaking process cannot rest simply on broad claims of vulnerability, but it also requires clear evidence of abuse/exploitation of that vulnerability. Simply put, if we are seeking for some sort of protection, it is first best to know what kind of protection is being asked for. For instance, if the aim is to safeguard against unfair terms, it is intuitive for those terms to be clearly identified.

Thus, while vulnerability offers a sound theoretical justification for policing unfair terms in the OFDS model, this justification may be strengthened if it is supported by empirical evidence of actual abuse of such vulnerabilities. As highlighted by, amongst others, Cavanough J in *Jetstar Airways*,¹⁷⁸ the core purpose of unfair contract terms legislation is to shield parties from the abuse of standard form contracts. Accordingly, I contend that both the recognition of vulnerability and the demonstration of abuse of that vulnerability are essential to reinforce the normative case for protecting the Non-Consumer Users.

3.2 Commonly Identified Unfair Terms in B2B and P2B Contracts

Before we delve into the terms and conditions and/or potential exploitations within the contracts devised by the Malaysian OFDPs, it is helpful to first explore the most commonly observed unfair rules imposed in B2B and/or P2B contracts that negatively impact small businesses, self-employed individuals, or independent contractors. To do so, we will observe the studies/reports conducted in both Australia and the European Union, where the findings of the studies demonstrate that large businesses (including platforms) have been implementing terms that are exploitative in nature against their business counterparts.

¹⁷⁸ *Jetstar* (n 55)

Based on:- (1) ACCC Report¹⁷⁹; and (2) EU Report,¹⁸⁰ several common unfair terms imposed in B2B and P2B contracts have been identified, including but not limited to:-¹⁸¹

- (a) Unilateral variation; (*see section 3.2.1 below*)
- (b) Limited liability and wide indemnity; and (*see section 3.2.2 below*)
- (c) Unfair termination clause. (*see section 3.2.3 below*)

3.2.1 Unilateral Variation Clause

After reviewing 46 contracts across 7 different industries, the ACCC¹⁸² discovered that the most concerning clauses in contracts involving independent contractors were those that grant large businesses the right to unilaterally modify the agreement at any time, as they saw fit.¹⁸³ This alteration may cover all aspects of the contracts, from prices to policies, from liability to indemnity. Additionally, according to the study conducted by Stewart and Williams, this type of clause is also evident in contracts drafted by online platforms within the gig economy.¹⁸⁴ In this respect, the said study found that out of 15 online platforms operating in Australia, 14 of them reserve their rights to unilaterally vary their contractual terms.¹⁸⁵

Similarly, in the EU Report, it was highlighted that provisions allowing for unilateral change of terms and conditions are also evident in the contracts drafted by online platforms and it was noted that this would potentially bring negative financial impact to the business users.¹⁸⁶ It was also pointed out that there is a need for certainty and security in the contractual relationship between parties.¹⁸⁷ In this respect, a business user must be afforded some level of protection against unilateral changes of terms, especially concerning those terms that the business users would not have agreed to if they had been included in the original agreement at the time of its formation.¹⁸⁸

Is this type of clause also evident in the contractual arrangement between the Non-Consumer Users and the OFDS platforms? As pointed out by Liu and Li, the practice of unilaterally changing contractual terms is indeed also

¹⁷⁹ Australian Competition and Consumer Commission (n 24).

¹⁸⁰ European Commission (n 25).

¹⁸¹ In addition to the identified terms in the following sections, the findings of the EU Report also discusses other types of unfair terms such as non-transparency (see page 44 of the EU Report), terms preventing the business users from leaving the platform (see page 72 of the EU Report) and unilateral choice of law/place of jurisdiction (see page 77 of the EU Report).

¹⁸² Australian Competition and Consumer Commission

¹⁸³ Australian Competition and Consumer Commission (n 24) 14.

¹⁸⁴ Stewart and Williams (n 27) 476–477.

¹⁸⁵ *ibid* 477–478.

¹⁸⁶ European Commission (n 25) 61.

¹⁸⁷ *ibid* 63.

¹⁸⁸ *ibid*.

evident in the OFDS, where the online platforms were leveraging the surge in the food orders by increasing their commission fees payable by the restaurants through their unilateral amendment clause.¹⁸⁹ It was also pointed out that restaurants may be charged as high as 30% per order.¹⁹⁰ Any reservation of right allowing the platforms to increase this commission fee would definitely harm the small businesses even more, since they already have a very small profit margin.¹⁹¹

Clauses of this nature may also impact the commission fees that are payable by the delivery riders, as will be shown below. In this regard, an ex-post alteration of the commission fees payable by the Non-Consumer Users would adversely impact their survival as the share of revenue/profit accruing to the platforms is invariably set based on the platforms' sole discretion. This variation may be tolerable for the big players, but it is certainly detrimental (and exploitative) to the small businesses/self-employed such as the Non-Consumer Users.

3.2.2 Exclusion of Liability and Indemnity Clauses

As per the ACCC's findings, B2B contracts involving independent contractors also contain numerous indemnity clauses that raise potential concerns, with the most common being terms requiring independent contractors to indemnify the larger business for any losses, even when the loss or damage was caused or partially contributed by the larger business itself.¹⁹² Further, the study conducted by Stewart and Williams shows that whilst 7 out of 15 online platforms put a maximum cap on their liability, the remaining 8 precluded themselves from all forms of liability completely.¹⁹³ Additionally, 12 out of 15 platforms include broad indemnity provisions, with several requiring workers to indemnify the platforms even when the loss did not result from the workers' fault or breach.

As per the EU Report, a wide exclusion clause is one of the most widespread unfair terms that is employed by online platforms to the detriment of the business users.¹⁹⁴ Essentially, an unfair exclusion of liability clause may be viewed as an attempt of the platforms to shift the operational and business risk to the business users. In this respect and depending on the circumstances (e.g. types of liability and the vulnerability of the business users), unfair liability provisions could have a significant negative financial impact on the business users. In some cases, instead of shielding themselves from liability arising from causes

¹⁸⁹ Liu and Li (n 86) 2.

¹⁹⁰ *ibid.*

¹⁹¹ Feldman, Frazelle and Swinney (n 12) 812.

¹⁹² Australian Competition and Consumer Commission (n 24) 15.

¹⁹³ Stewart and Williams (n 27) 478–479.

¹⁹⁴ European Commission (n 25) 68.

beyond their control, there are instances where this exclusion clause also excludes liability caused by their own negligence. As suggested in the EU Report, this type of clause should be considered as unfair since the party causing the damage should typically be held accountable for it.¹⁹⁵

This wide and/or unfair exclusion of liability clause is also evident within the OFDS industry, as will be discussed later in sections 3.4.4 and 3.4.5 of this chapter. This is particularly evident when the riders are treated as ‘partners’ rather than employees. In this respect and as pointed out by Parwez, this label was intentionally adopted by online platforms as it is easier for the platforms to manoeuvre their liabilities.¹⁹⁶ By wholly disclaiming any liability, the online platforms are actually leveraging their power over their business users by considering themselves not liable in any way whatsoever whilst disproportionately placing the burden on the latter.¹⁹⁷

Further, given that there is no similar corresponding exclusion/limitation granted to the weaker parties, such exclusion and/or limitation of liability may lead to a significant imbalance between the platforms and the Non-Consumer Users.¹⁹⁸ Indeed, it is a win-win situation for the Platforms as all commercial and/or legal risks have been inordinately transferred to the Non-Consumer Users alone. Thus, one may argue that disproportionately allocating the risks to the Non-Consumer Users as the weaker parties would indeed cause a significant imbalance in the parties’ rights and obligations.

Within the context of the restaurants, a very wide exclusion of liability clause may be burdensome, for instance, when they are supplied with unreliable riders to deliver their foods, leading to refunds being made by the platforms to the consumers, despite that the restaurants have no say whatsoever in choosing the delivery riders. On the contrary, the assignments are wholly controlled and arranged by the platforms and yet, the platforms are not taking any responsibility concerning the delivery riders they have chosen. By way of this example, one may argue that there is an unjust distribution of risks and as argued by Maultzsch, the operators of online platforms should be accountable for

¹⁹⁵ *ibid* 69.

¹⁹⁶ Sazzad Parwez, ‘COVID-19 Pandemic and Work Precarity at Digital Food Platforms: A Delivery Worker’s Perspective’ (2022) 5 *Social Sciences & Humanities Open* 1, 5 <<https://linkinghub.elsevier.com/retrieve/pii/S2590291122000134>> accessed 30 November 2025.

¹⁹⁷ Guido Smorto, ‘The Protection of the Weaker Parties in the Platform Economy’ in Nestor M Davidson and Michèle Finck (eds), John J Infranca, *The Cambridge Handbook of the Law of the Sharing Economy* (1st edn, Cambridge University Press 2018) 444.

¹⁹⁸ New Zealand Commerce Commission, ‘Energy Retail Contracts Review: Unfair Contract Terms’ (New Zealand Commerce Commission 2016) 14 <https://www.comcom.govt.nz/__data/assets/pdf_file/0019/86122/Unfair-contract-terms-Energy-retail-contracts-review-August-2016.pdf> accessed 30 December 2025.

any damage/breach resulting in the usage of such platform for the sake of just allocation of risks and fair remedy for the damaged parties.¹⁹⁹

3.2.3 Termination Clause

Another type of unfair term that is commonly used in B2B and/or P2B transactions is a term allowing one party to unilaterally terminate the contract, with or without assigning reasons supporting such a decision. As per the study conducted by Stewart and Williams in Australia, all 15 platforms incorporated terms allowing them to terminate (or suspend) the worker's account with the platform and to unilaterally determine the basis of this termination (if at all).²⁰⁰ Though the platforms may provide grounds for termination, it was also found that the business users could bring 'no claim whatsoever' in relation to any suspension or termination of their account. One may wonder then, does the knowledge of the grounds of termination even matter anymore if there is no possibility of challenging it?

The same observation within the context of online platforms was also noted in the EU Report. In this respect, with regard to the 102 platforms' (and their terms) that were scrutinised, it was observed that this type of clause is "*widely used*".²⁰¹ A term allowing platforms to terminate without cause is problematic in several ways, including the lack of transparency, and will significantly lower the degree of certainty of the contract. It was then suggested, via the EU Report, that platforms should set out potential grounds for termination at the very outset and avoid using general terms as a 'catch-all' clause.²⁰²

Within the context of the OFDS, it was pointed out by Parwez that when there is no employment relationship between the platforms and delivery riders, this renders the delivery riders easily replaceable, allowing them to be hired or dismissed at any time (without just cause or otherwise).²⁰³ It is also important to note that the adoption of rating-based assessment via the platforms' algorithmic monitoring system may raise several problems. For instance, as Prassl argued, ratings affecting the workers' performance are often unpredictable and may be arbitrarily applied.²⁰⁴ Hence, it is argued that the platforms' reliance on algorithmic monitoring systems, coupled with contractual terms permitting unilateral termination, prejudices Non-Consumer Users by providing no clarity on

¹⁹⁹ Felix Maultzsch, 'Contractual Liability of Online Platform Operators: European Proposals and Established Principles' (2018) 14 *European Review of Contract Law* 209, 213.

²⁰⁰ Stewart and Williams (n 27) 476.

²⁰¹ European Commission (n 25) 75.

²⁰² *ibid* 76.

²⁰³ Parwez (n 196) 4.

²⁰⁴ Jeremias Prassl, 'Lost in the Crowd' *Humans As a Service: The Promise and Perils of Work in the Gig Economy* (1st edn, Oxford University Press 2018) 62 <<https://research-ebSCO-com.proxy.uba.uva.nl/linkprocessor/plink?id=6007e505-b640-3f6f-b472-fd6f4e191f07>> accessed 30 December 2025.

how their performance is evaluated or on the reasoning behind termination decisions.

This situation is further exacerbated by the fact that online platforms do not, given their reliance on their algorithmic monitoring system, provide some form of human intervention (e.g. general human resources procedure), in the event that the Non-Consumer Users wish to contest the platforms' decision to terminate their accounts. As pointed out by Salleh et al., the absence of human resource management regulations results in gig workers facing mistreatment and wrongful termination.²⁰⁵ This conundrum is also evident within the OFDS business model, affecting the Non-Consumer Users as will be demonstrated in section 3.5.3 below.

Based on sections 3.2.1 to 3.2.3 above, the usage of unfair terms within B2B and/or P2B contracts is not a novel issue. This practice, as argued therein, may be detrimental to small businesses that are contracting with bigger players in the market as the vulnerabilities of the former may easily be exploited via the imposition of unfair terms drafted by the latter. As can be observed in both the ACCC Report and the EU Report, it was indeed found that the practice of incorporating unfair terms by larger businesses is common within the scope of both B2B and P2B transactions. In this respect, several types of unfair terms have been identified, including but not limited to:- (1) unilateral variation clause; (2) limited liability and wide indemnity clause; and (3) unilateral termination clause.

These findings led us to the next pertinent question:- are these terms also evident within the context of the chosen case study between the selected Malaysian Platforms (i.e. Grab and Shopee) and the Non-Consumer Users (i.e. restaurants and delivery riders) in Malaysia or could we uncover additional categories of unfair terms beyond those previously identified in Chapter 2? This chapter is devoted to answering this question. Principally, the terms and conditions that are imposed by both Grab and Shopee pertaining to their relationship with the Non-Consumer Users will be analysed to answer our second research sub-question:- *to what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs*. For the purposes of our analysis, this chapter will address the following:-

- (a) the legal frameworks employed to assess the element of unfairness allegedly contained in the selected Malaysian Platforms' terms and conditions (*see section 3.3 below*);

²⁰⁵ Noorziah Mohd Salleh, Sri Norfitriani Mohamed Shukry and Velarie Maylyn Claudius Jokinol, 'Analyzing the Challenges, Effects, and Motivations of Gig Economy Workers' (2023) 13 International Journal of Academic Research in Business and Social Sciences 2125, 2138.

- (b) the general test of unfair terms as provided under the chosen legal frameworks (*see section 3.4 below*); and
- (c) the adhesion contracts imposed by the Platforms, considering the threshold available under the selected legal frameworks (*see section 3.5 below*).

3.3 Legal Framework Selection: Underlying Reasons

As highlighted in Chapter 1, Malaysia does not have a dedicated unfair terms legislation specifically designed for B2B and/or P2B contracts. Although the Gig Workers Bill was passed in September 2025, this Bill is not strictly considered as unfair terms legislation, as it does not invalidate terms on the basis of unfairness, but rather based on departure of the Bill's default rules (*see section 4.7 below*). Hence, for the purpose of our analysis, it is imperative to explore other relevant legal frameworks, be it consumer-centric or P2B-specific, locally or otherwise, that may act as a benchmark in assessing the purported terms imposed by the Platforms. Essentially, the unfairness assessment embodied in three pieces of legislation from different jurisdictions would be used as a central benchmark,²⁰⁶ a useful threshold in determining what is unfair and what is justified. This would include the Malaysian CPA, the Australian CCA and the UCTD, amongst others.

Notwithstanding that the abovementioned legislation (with the exception of the Australian CCA) are exclusively designed for the benefit of the consumers, it is submitted here that these legal rules are still beneficial, at least as a starting point, in providing us valuable insights in identifying dubious terms imposed by the Platforms in their P2B relationships with the Non-Consumer Users. Apart from these B2C-driven legal frameworks, reference will also be made to B2B/P2B legislation (particularly within the context of the European Union) to supplement and/or fortify our analysis. For instance (and as will be explored further in section 3.5 below), several more recent EU directives and/or regulations explicitly designed for B2B and P2B transactions may further supplement our analysis given that they may offer some additional insights on what could be considered as unfair in a P2B relationship, especially within the context of our case study.

²⁰⁶ Other types of legislations such as those which do not necessarily deal directly with the assessment of unfair terms (but are directly relevant to the P2B business model) will also be referred to throughout this chapter. The rationale behind this approach is to provide a more comprehensive and tailored discussions and to ensure that the peculiarity of the business model is also being considered.

One may wonder why these jurisdictions (i.e. Malaysia, Australia and the European Union) were chosen to analyse ‘unfairness’. At the outset, reference to the Malaysian legal framework via the Malaysian CPA is self-explanatory. Given that Malaysia does not have a specific unfair terms legislation governing B2B nor P2B transactions, it logically follows that the only available unfair terms legislation in the country serves as an appropriate starting point. After all and as argued previously in Chapter 2, both consumers and the Non-Consumer Users share some commonalities in regard to their contractual relationship with their contractual counterparties:- vulnerabilities and abuse of such vulnerabilities.

These commonalities imply that it is reasonable for the consumer-based legislation to be utilised as the basis of our discussions in identifying potentially unfair terms within the scope of our OFDS case study. Additionally and when relevant, reference will also be made to the Malaysian Contracts Act where several provisions may be useful in arguing that a term should be deemed unfair. While the Malaysian Contracts Act does not explicitly address unfair terms, provisions relating to the voidability of specific clauses, such as those that restrain a party from exercising their legal rights, may serve as indicators of potential unfairness.

Regarding the EU legal framework, it is important to highlight that not only has the EU been implementing unfair terms control for B2C contracts as early as 1993 via the UCTD, but it has also shown an ongoing commitment to advancing its legal infrastructure. This includes efforts to empower small businesses and to address structural power imbalances between contracting parties, particularly within sectors such as the digital economy. For instance, the adoption of legislation such as the Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (“**P2B Regulation**”), Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions in the European Union (“**Working Conditions Directive**”) and the Directive (EU) 2024/2831 on Improving Working Conditions in Platform Work (“**Platform Work Directive**”), Regulation (EU) 2022/2065 on a Single Market for Digital Services (“**DSA**”), Regulation (EU) 2023/2854 on Harmonised Rules on Fair Access to and use of Data (“**Data Act**”) and Directive (EU) 2019/770 on Certain Aspects Concerning Contracts for The Supply of Digital Content and Digital Services (“**Digital Content and Digital Services Directive**”) clearly signifies substantial progress in this area, leaving Malaysia miles behind.²⁰⁷

²⁰⁷ The application and relevancy of each legislation mentioned herein will be further discussed throughout this chapter.

Australian law on the other hand, is one of the earliest common law jurisdictions that extended the protection against unfair terms to small businesses via its Australian CCA in 2016. The United Kingdom had introduced unfair terms control for businesses earlier than its Australian counterpart (i.e. through the UCTA in 1977), but its reach is limited to exclusion and limitation clauses only. In this respect, Australia's regime is far broader and includes a general test of unfairness applicable to various contractual terms. Hence, this study relies on the Australian model for comparative assessment.

Since 2016, the Australian authorities have also consistently worked to strengthen protections against unfair terms for small businesses. For instance, starting from 9 November 2023, the **Treasury Laws Amendment (More Competition, Better Prices) Act 2022** ("2022 Amendment") was enacted to strengthen the existing protection available in the Australian CCA. These measures include the removal of the contractual value threshold (i.e. contractual value must be under AUD300,000.00, or AUD 1,000,000.00 for contracts lasting more than 12 months) as well as an increment of the number of employees required to be qualified as "small business" (i.e. from less than 20 to less than 100 employees post 2022 Amendment).

The abovesaid changes made via the 2022 Amendment can be seen as an attempt to render the legal protection more inclusive by, amongst others, including more businesses to be qualified as "small businesses" and thus, enjoy the protection offered against the imposition of unfair terms. Additionally, the 2022 Amendment further made a crucial improvement to the Australian CCA, by introducing financial penalties for businesses that use them. The financial penalty operates not only punitively but also as a deterrent to prevent larger players from exploiting small businesses. These measures clearly demonstrate the Australian authorities' commitment to protect small businesses, and these initiatives may be emulated, modelled after and served as a precedent.

Apart from the advantages that the EU and Australian legal framework may offer as discussed above, another interesting reason for referring to all of these legal frameworks is that they, despite sharing some commonalities regarding the elements of unfairness, do differ to some extent. To mention a few, for instance, though the Malaysian CPA embodies a similar threshold of unfairness as embodied in the UCTD and the Australian CCA (i.e. any terms that caused a significant imbalance in the rights and obligations of the parties), the Malaysian CPA also segregates between substantive and procedural unfairness whereas the EU and Australian framework do not have such a distinction.

Additionally and unlike the UCTD, both the Malaysian and Australian unfair terms control legislation employ a rebuttable presumption mechanism, in which the stronger party may rebut the presumption of unfairness by arguing that the purported terms are necessary to protect their legitimate business

interests. One may argue that this approach is more fluid and less restrictive, as it allows the stronger parties to be relieved from the negative implications of employing unfair terms, as long as it can be proven that it is fundamental to their business needs. Further, it is interesting to note that Malaysian law does not provide any sort of list of terms that may potentially be deemed unfair in consumer contracts (i.e. unlike the Annex of the UCTD and section 25 of the Australian CCA).

The similarities and differences between these legal frameworks are interesting to be further explored and compared, as it may broaden our discussions and/or perspectives in assessing whether the terms imposed by the Platforms are unfair. In this respect, the general test of unfairness under these three legal frameworks will be explored further in section 3.4 below.

3.4 General Test of Unfair Terms under Malaysian, European Union and Australian Law

Before we delve into the Platforms' terms and conditions and whether they may be deemed as unfair, the first crucial step is to gauge: what is the benchmark for 'unfairness'? Throughout this section, we will explore the general test of unfairness and the threshold provided under the chosen legal frameworks (i.e. Malaysian, European Union and Australian law).²⁰⁸

3.4.1 Malaysian Threshold

Unfair terms in B2C contracts are currently regulated via Part IIIA of the Malaysian CPA, which Part was introduced in 2010, 11 years after the said Act was initially enacted.²⁰⁹ In this respect, section 24A(c) defines "unfair term" as a term in a consumer contract which, with regard to all circumstances:- (1) causes a significant imbalance in the rights and obligations of the parties; (2) to the detriment of the consumers.²¹⁰ Notwithstanding the aforesaid definition, unfortunately, the Malaysian CPA does not define the said threshold (i.e. the meaning of "*significant imbalance*" or "*to the detriment*") nor is there any publicly available decision made by the Tribunal for Consumer Claims clarifying the same.²¹¹

In addition to the core elements of unfairness that need to be satisfied under section 24A(c) of the Malaysian CPA, the Malaysian legislature decided to take it one step further, by differentiating procedural and substantive

²⁰⁸ A summary of the unfairness tests across the respective jurisdictions is provided in Appendix 2 of this thesis.

²⁰⁹ The relevant provisions as embodied in Part IIIA of the Malaysian CPA are set out in verbatim in Appendix 1 of the thesis. The version cited therein is the official English text of the Act.

²¹⁰ See section 24A(c) of the Malaysian CPA in Appendix 1 of the thesis.

²¹¹ Ilyana Ilias and Norazlina Abdul Aziz, 'Navigating Unfair Contract Terms: Drawing Insights From Australia In Addressing The Legal Conundrum In Malaysia' (2023) 11 International Journal on Consumer Law and Practice International Journal on Consumer Law and Practice 147, 163.

unfairness. This distinction between procedural and substantive unfairness, as introduced in Part IIIA of the Malaysian CPA, has been shaped by the approach recommended in the Law Commission of India's August 2006 report on Unfair (Procedural & Substantive) Terms in Contract.²¹² Recognising that common law jurisdictions predominantly vitiate contracts (and/or the terms) on procedural grounds, the Law Commission of India advocated for a broader approach, asserting that unfairness may also arise from the substance of the contracts (i.e. the essence of the terms).

The Commission maintained that an absence of procedural issues per se does not automatically legitimise provisions that are inherently unjust. Thus, distinguishing between procedural and substantive unfairness was seen, at least in the eyes of the Commission, as a necessary step toward creating a more effective and context-sensitive legal framework for addressing unfair contract terms.²¹³ Procedural unfairness concerns the process of contract formation, where, for instance, a consumer may remain unaware of certain terms due to the (mis)representation in fine print at the time of signing and/or due to difficulty in reading them. In contrast, substantive unfairness concerns the fairness of the contractual terms and/or their implications, focusing on the resulting obligations and rights established within the agreement.²¹⁴ In this context, if a term is determined to be procedurally unfair, it does not require further proof of substantive unfairness. Conversely, a term's procedural fairness does not preclude a finding of substantive unfairness.²¹⁵

Pertaining to substantive unfairness (as per section 24D(1) of the Malaysian CPA), a term may be considered as substantively unfair if it falls under any of the following limbs:- (1) harsh; (2) oppressive; (3) unconscionable; (4) excludes or restricts liability on negligence; and (5) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.²¹⁶ When assessing whether a term may be classified as substantively unfair, the court or tribunal may consider various factors, including whether the term grants the supplier the unilateral right to terminate the contract without just cause or without providing reasonable compensation, or whether it permits the supplier to unilaterally modify the contract's term.²¹⁷ However, it is

²¹² Adnan Trakic (n 44) 210.

²¹³ Law Commission of India, '199th Report on Unfair (Procedural & Substantive) Terms in Contract' (Law Commission of India 2006) 136.

²¹⁴ Farhah Abdullah and others, 'The Legal Approaches on Regulating Unfair Contract Terms in Malaysia and Australia' (2022) 1 Law, Policy, and Social Science 1, 10 <<http://lpssjournal.com/index.php/journal/article/view/11>> accessed 30 November 2025.

²¹⁵ Ilias and Aziz (n 211) 162.

²¹⁶ See section 24D(1) of the Malaysian CPA in Appendix 1 of the thesis. Unfortunately, the Act does not define the terms "*harsh*", "*oppressive*" nor "*unconscionable*".

²¹⁷ Section 24D(2) of the Malaysian CPA

interesting to note that contrary to the procedural unfairness, the finding of substantive unfairness is rebuttable, where the supplier may justify that the purported term is reasonably necessary for the protection of their legitimate business interests, as per section 24D(2)(a)(ii) of the Malaysian CPA.²¹⁸

Notwithstanding the above, the Malaysian CPA framework in assessing unfairness may cause some confusion. In this respect, confusion may arise as to what threshold one needs to fulfil in proving that a term is indeed unfair under the Malaysian legal framework? On one hand, one might assume that the general threshold of “*significant imbalance*” under section 24A(c)²¹⁹ serves as the primary criterion for determining unfairness.

However, if that is the case, it raises a critical question: what is the role of the specific thresholds outlined in section 24D (substantive unfairness) of the Malaysian CPA? Can substantive unfairness be assessed independently by relying solely on section 24D, or should they also meet the overarching requirement of “*significant imbalance*” under section 24A(c)? Conversely, if satisfying the criteria under either section 24D is sufficient on its own, does section 24A(c) merely function as a catch-all provision, intended to address situations where a term does not clearly fall within either procedural or substantive unfairness?

To shed some light on this interpretive challenge, several legal scholars in Malaysia contend that section 24D of the Malaysian CPA is not a standalone provision. Instead, they are viewed merely as illustrative tools meant to guide the application of the broader standard of “*significant imbalance*” set out in section 24A.²²⁰ Hence, the principal test of unfairness as laid down under section 24A(c) would still have to be fulfilled.²²¹ In this regard, whether a term is deemed to be substantively unfair, it eventually has to fulfil the requirements of:- (1) causing a significant imbalance in the rights and obligations of the parties; and (2) such imbalance is to the detriment of the consumers.

Further, given that there is no concrete definition and/or threshold on what would amount to “*significant imbalance*” in the Malaysian CPA, Amin suggested that the tribunal and/or court may consider whether the burdens placed on consumers (via the terms) are disproportionate to the rights or benefits afforded to the supplier.²²² This suggestion was substantiated by her reference to the English case of *First National Bank*,²²³ where Lord Bingham in the House of Lords observed that:-

²¹⁸ See Appendix 1 of the thesis.

²¹⁹ *ibid*

²²⁰ Naemah Amin, ‘Protecting Consumers Against Unfair Contract Terms In Malaysia: The Consumer Protection (Amendment) Act 2010’ (2013) 1 *Malayan Law Journal* Articles 1, 7.

²²¹ *ibid*.

²²² *ibid* 13.

²²³ *First National Bank v Director General of Fair Trading* [2001] 3 WLR 1297

*“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”.*²²⁴

3.4.2 European Union Threshold

Article 3 of the UCTD provides that a non-individually negotiated term in a consumer contract will be regarded as unfair if:- (1) the term is contrary to good faith; and (2) the term causes a significant imbalance between parties in terms of their rights and obligations, prejudicial to the consumers. With regard to the former, the national courts have to assess whether the sellers could reasonably expect that the consumers would have accepted the purported term in a genuinely negotiated agreement.²²⁵ If so, the term may be regarded as having been imposed in good faith and vice versa.

The question of whether a term causes significant imbalance between parties depends on the domestic default rules that would apply if the term were absent. If the purported terms undermine the default rules, then it is likely that it has caused a significant imbalance in the parties’ rights and obligations.²²⁶ However, suppose there are no default rules for comparison, fair market practice as well as parties’ rights and obligations in the context of the contract as a whole may be taken into account.²²⁷

Article 3(3) of the UCTD further makes reference to the Annex attached to the UCTD as a non-exhaustive list of terms that may be considered as unfair.²²⁸ Based on the aforesaid provisions and contrary to the Malaysian CPA, it can be observed that the EU’s approach slightly varies:- (1) by taking into account the element of good faith; and (2) by providing a non-exhaustive list of terms that may potentially be considered unfair.

Further and contrary to the Malaysian CPA, the UCTD explicitly emphasises the transparency rule, a rule that the courts shall consider in carrying out their unfairness assessment. By virtue of Article 5 of the UCTD, the terms shall always be drafted in “*plain, intelligible language*”. This is what one may understand as ‘formal transparency’. However, as noted by Junuzović, recent rulings

²²⁴ *ibid* page 1307

²²⁵ Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms [2019] OJ C 323/04, 30. See also Case C-415/11 *Mohamed Aziz v. Caixa d’Estalvis de Catalunya*, paragraph 69 of the Judgment.

²²⁶ *ibid*. See also Case C-226/12 *Constructura Principado SA v José Ignacio Menéndez Álvarez*, paragraph 21.

²²⁷ *ibid*

²²⁸ The terms set out in the Annex are merely an indication and not an absolute assessment of their unfairness.

by the CJEU, supported by scholarly discourse over the years, indicate a growing emphasis on the requirement that contract terms be both formally and substantively transparent.²²⁹ Formal transparency demands that terms be accessible and clearly written, while substantive transparency ensures that consumers can understand the contractual and financial implications of the agreement.²³⁰

For instance, the CJEU in *Invitel*²³¹ ruled that the transparency rule in the UCTD encompasses the consumer's right and opportunity to examine all the terms appearing in the contract and the ramifications of those terms.²³² Therefore, transparency goes beyond grammatical and vocabulary accuracy. As ruled in *Gutiérrez Naranjo*,²³³ the CJEU went beyond text legibility and was of the view that transparency shall not be constrained to formality but also pertain to substantive compliance. In this respect, for a term to be considered as transparent, the party who is affected by the terms shall adequately be informed and understand (substantively) as to the legal and financial consequences of all terms proposed in the contract.²³⁴

3.4.3 Australian Threshold

With regard to Australian law, Part 2-3 of the Australian CCA provides that a term shall be regarded as unfair if it satisfies the following requirements.²³⁵ Firstly, the existence of the alleged clause would “*cause a significant imbalance in the parties' rights and obligations*”.²³⁶ Secondly, the purported term is not necessary to secure the drafter's legitimate interest, unless proven otherwise.²³⁷ Lastly, such term (if acted upon) would be prejudicial and/or detrimental to the counterparty, be it financial or otherwise.²³⁸

With regard to the first requirement, the Australian courts²³⁹ have consistently relied on the English case of *First National Bank*,²⁴⁰ where a term is considered to “*cause a significant imbalance*” in a contract when such a term is so weighted in favour of the supplier/seller as to distort the parties' rights and

²²⁹ Mía Junuzović, ‘Through a Magnifying Glass: A Study of the Concept of Transparency in European Consumer Contract Law’ (University of Amsterdam 2024) 52 (under embargo; on file with the author).

²³⁰ For a full list of rulings decided by the CJEU, see *ibid.*

²³¹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*

²³² *ibid.*, paragraph 27 and 28 of the Judgment

²³³ Joint cases of C-154/15, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU*

²³⁴ *ibid.*, paragraph 20 of the Judgment

²³⁵ Section 24(1) of the Australian CCA

²³⁶ Section 24(1)(a) of the Australian CCA

²³⁷ Section 24(1)(b) of the Australian CCA

²³⁸ Section 24(1)(c) of the Australian CCA

²³⁹ Amongst others, see *Australian Competition and Consumer Commission v Mitolo Group Pty Ltd* [2019] FCA 1257, *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 and *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377.

²⁴⁰ *First National Bank* (n 223)

obligations under the contract significantly in the supplier/seller's favour. According to the decision by the House of Lords, this distortion of contractual balance may take place by way of giving the seller a favourable option, discretion or authority, or placing on the consumer an unfavourable burden, risk or obligation.²⁴¹

Despite these indications, Lord Millett in *First National Bank* explicitly mentioned that “*there can be no one single test of this*”.²⁴² However, His Lordship proposed a practical means of assessment on this particular issue:- to compare the contract's effect when the term is present with its effect when the term is absent.²⁴³ Through this comparison, one can determine whether the contractual balance has been significantly distorted. This approach was also cited with approval by Gilmour J in the Australian Federal Court's case of *CLA Trading*.²⁴⁴ Apart from this *comparison* approach, Edelman J in the Australian case of *Chrisco*²⁴⁵ mentioned two factors in assessing the element of “significant imbalance”:- (1) whether there is an opt-out clause; and (2) whether the contract grants one party (i.e. seller) a right without a corresponding duty or substantial reciprocal right to the other party (i.e. consumers).²⁴⁶

Pertaining to the second element, a term may be regarded as unfair unless if it is necessary to protect the legitimate interest of the party that imposes the said term.²⁴⁷ This requirement creates a rebuttable presumption, placing the burden on the imposing party to prove that the term is necessary to secure its legitimate interest.²⁴⁸ In the case of *Ashley & Martin*,²⁴⁹ Banks-Smith J was of the view that any attempt to define ‘legitimate interest’ would be futile, as its meaning is contingent upon multiple factors, including the nature of the business and the context of the contract as a whole.²⁵⁰

In gauging whether a term is “*necessary*” to protect the aforementioned “*legitimate interest*”, Her Honour mentioned that it is appropriate to consider two factors:- (1) the existence of other alternatives; and (2) proportionality.²⁵¹ With regard to the former, the party that imposes the term must demonstrate that there are no other available alternatives to protect its business interests,

²⁴¹ *ibid*, page 494 of the Judgment

²⁴² *ibid*, paragraph 54 of the Judgment

²⁴³ *ibid*

²⁴⁴ *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377

²⁴⁵ *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204

²⁴⁶ *ibid*, paragraph 51-53 of the Judgment

²⁴⁷ Section 24(4) of the Australian CCA

²⁴⁸ *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716, paragraph 25 of the Judgment

²⁴⁹ *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436

²⁵⁰ *ibid*, paragraph 48 of the Judgment

²⁵¹ *ibid*, paragraph 59 of the Judgment

but through the term in question.²⁵² If there are other alternatives to secure its interests, such a term in question would be deemed unfair as it is no longer necessary to be imposed. The proportionality factor, on the other hand, concerns the assessment of whether the benefits conferred by a term outweigh the potential loss a party may suffer if the term were absent.²⁵³

The last requirement provided under section 24(1) of the Australian CCA requires a claimant (i.e. the party who seeks the court's declaration that a term is unfair) to prove that the impugned term "*would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on*". As Banks-Smith J clarified in *Ashley & Martin*, as per the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth),²⁵⁴ this requirement must be established as more than a mere possibility.²⁵⁵ However, the proof of an actual detriment is not required, but it must be established that the alleged detriment would occur in the future if the term were applied and/or relied upon.²⁵⁶

Apart from the three requirements as mandated under section 24(1) of the Australian CCA, it is to be noted that section 24(1) shall be read together with section 24(2) of the Australian CCA, which, similar to the UCTD, makes the importance of the transparency requirement explicit. In this regard, the court shall also, in assessing whether a term is indeed unfair, take into account:- (1) the extent to which the term is transparent (or not); and (2) the contract in its entirety. Further, comparable to the Annex of the UCTD, section 25 of the Australian CCA also sets out instances of terms that may be considered as unfair. Be that as it may, it shall be noted that the list set out in section 25 of the Australian CCA is not an absolute indication that the term is indeed unfair. In this regard, the requirements as set out in section 24 of the Australian CCA take precedence over the list and shall be satisfied in its entirety before a term can be deemed as unfair.

By virtue of the Explanatory Memorandum of the Trade Practices Amendment (Australian Consumer Law) Bill 2009, the lack of transparency may be a strong indication of a significant imbalance in the rights and obligations of the parties in question,²⁵⁷ which is one of the elements that need to be considered before a term may be classified as unfair as per section 24(1) of the Australian CCA. However, it shall be noted that transparency alone cannot overcome the

²⁵² *ibid*, paragraph 53 of the Judgment

²⁵³ *ibid*, paragraph 55. See also *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709, paragraph 344.

²⁵⁴ This Bill is the key instrument that inserted the Australian Consumer Law (including the law on unfair terms) into the Australian CCA 2010, which replaced the Trade Practices Act 1974 (Cth).

²⁵⁵ *Ashley & Martin* (n 249), paragraph 60 of the Judgment

²⁵⁶ *ibid*

²⁵⁷ Paragraph 2.45 of the Explanatory Memorandum

underlying unfairness of a term. Vice versa, a term will not simply be deemed as unfair just because it is not transparent, as other factors may also be taken into account including the nature and ramifications of such term to the affected party.²⁵⁸

The absence of transparency has been utilised to reinforce allegations of unfairness in various instances. An illustrative example can be found in a case where a refund clause was challenged on the basis of its lack of transparency, the Australian Federal Court in *ACN*²⁵⁹ ruled that the impugned 'refund term' lacked transparency given that, inter alia, the basis on which the administration fee was calculated was not disclosed to the patient at all and the patient was told about the refund term in a recorded message which was either read out very fast and softly or monotonously at a fast pace.²⁶⁰ Given its non-transparency and the Court's finding that it did not protect any legitimate interest, it was held that the alleged clause was indeed unfair to the consumers.

In contrast, the clarity and explicit disclosure of a term have played a significant role in rebutting claims of unfairness, coupled with other factors that need to be taken into account as provided under the Australian CCA (e.g. whether such a "transparent" term is necessary to protect the legitimate interest of the party imposing it). This can be observed in *Employsure*,²⁶¹ where the ACCC's claim that *Employsure*'s terms and conditions were unfair was rejected by the Australian Federal Court. The Court was satisfied that the terms were sufficiently transparent and necessary to protect *Employsure*'s legitimate interests.²⁶²

²⁵⁸ *ibid*, paragraph 2.46

²⁵⁹ *Australian Competition and Consumer Commission v ACN Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368

²⁶⁰ *ibid*, paragraph 53 of the Judgment

²⁶¹ *Australian Competition and Consumer Commission (ACCC) v Employsure Pty Ltd* [2020] FCA 1409

²⁶² *ibid*, paragraph 465 of the Judgment

3.5 Assessment of the Platforms' Terms and Conditions

Throughout this section, the terms and conditions imposed by the selected Malaysian Platforms (i.e. Grab and Shopee) will be scrutinised, to ascertain whether there are any unfair elements in their contracts to the detriment of the Non-Consumer Users. In doing so, the unfairness test provided under each selected jurisdiction will be utilised as the appropriate benchmark, as follows:-

(a) Malaysian Framework

Based on section 3.4.1 above, the unfairness test under the Malaysian CPA may essentially be categorised into two parts: (1) a specific test of substantive unfairness;²⁶³ and (2) the overarching test (i.e. the element of significant imbalance).²⁶⁴ Pertaining to the former, a term is considered as substantively unfair if it can be determined that it is, amongst others, harsh, oppressive or unconscionable.²⁶⁵ Its unfairness is assessed in light of the factors set out in section 24D(2), including whether or not such term is necessary to protect the legitimate interest of the Platforms. With regard to the overarching test, a term is considered as causing a significant contractual imbalance when it is so weighted in favour of the sellers. The Platforms' terms will be analysed according to these two thresholds accordingly.

(b) EU Framework

From the EU perspective, the Platforms' terms will be analysed from the UCTD point of view and other relevant B2B/P2B legislation. As to the general test of unfairness under the UCTD, a term may be deemed unfair if it is:- (1) contrary to good faith; and (2) causes a significant imbalance in the rights and obligations of the parties. With regard to the former, a term is not imposed in good faith if the sellers could reasonably expect that the consumers would not have accepted the purported term in a genuinely negotiated agreement. As to the latter, I will investigate whether such a term may significantly tilt the contractual balance, taking into account all relevant factors, including the Annex of the UCTD.

²⁶³ Sections 24D(1) and 24D(2) of the Malaysian CPA

²⁶⁴ Section 24A(c) of the Malaysian CPA

²⁶⁵ Section 24D(1) of the Malaysian CPA

(c) **Australian Framework**

Under the Australian CCA, the unfairness test will be conducted by considering:- (1) the significant imbalance test as well as the indicative list of unfair terms as provided under section 25 of the Australian CCA; and (2) whether the term is necessary to protect the legitimate interest of the Platforms. With regard to the former, other factors such as whether the term grants a corresponding benefit to the Non-Consumer Users will also be considered. In determining if the said term is necessary to protect the interest of the Platforms, the assessment will consider the proportionality element and the availability of other alternatives (instead of imposing the purported terms).²⁶⁶

Upon perusing the Platforms' terms and conditions, six categories of terms have been identified as potentially unfair. These categories are as follows:-

- a) Unilateral power of the Platforms to Amend Contractual Terms (*see section 3.5.1*);
- b) No-Refund Policy (*see section 3.5.2*);
- c) Platforms' Power to Unilaterally Terminate the Users' Accounts (*see section 3.5.3*);
- d) Non-Guarantee of the Reliability of the Platforms' Operating System (*see section 3.5.4*);
- e) Wide Exclusion of Liabilities (*see section 3.5.5*); and
- f) Arbitration as the Sole Dispute Resolution Avenue (*see section 3.5.6*).

The publicly available terms and conditions posted by the Platforms will be referred to and quoted verbatim.²⁶⁷ However, the excerpts reproduced in this chapter contain only the relevant parts of the said clauses. The complete text of all the relevant clauses is set out in Appendix 3 of this thesis. Further, it is to be noted that:

- (i) Shopee's terms are organised in a way that distinctly identifies whether they govern restaurants or riders; and
- (ii) Grab's terms quoted herein apply to both restaurants and riders, unless expressly stated otherwise.

²⁶⁶ See section 3.4.3 above.

²⁶⁷ The terms and conditions referred to in this chapter are based on the publicly available terms and conditions published on the Platforms' website as of 28 August 2025.

3.5.1 Unilateral Power to Amend Contractual Terms

One of the most common terms that online platforms offer on a “take-it or leave-it” basis is the grant of power for the platforms to unilaterally amend their own terms and conditions as they wish, without any prior consultation and/or consent from their counterparties.²⁶⁸ In this respect, both Platforms impose a similar clause allowing them to unilaterally amend any provision contained in their contracts with the Non-Consumer Users from time to time as they desire. The relevant terms are as follows:-²⁶⁹

Grab		Shopee	
Clause	Term	Clause	Term
1.2	<i>Grab may amend the terms in the Agreement at any time...Your continued use of the Service after any such amendments, whether or not reviewed by you, shall constitute your agreement to be bound by such amendments.</i>	21.5 (Riders)	<i>Unless provided otherwise in these Terms of Service, you agree that we may do any of the following, at any time, without notice:...</i> <i>(b) modify or change any applicable policies or terms, including, but not limited to these Terms of Service and Shopee Policies by posting the revised policy or terms on the Platform. Your continued use of the Platform after the revised policy or terms has been posted on the Platform shall constitute your acceptance of the revisions;...</i>

²⁶⁸ See section 3.2.1 above

²⁶⁹ For the full quotation of the terms, see Table 1 of Appendix 3 of the thesis.

		20 (Mer- chants)	<p style="text-align: center;"><i>Amendment</i></p> <p><i>Shopee may modify this Merchant General Terms and Conditions at any time by posting the revised Merchant General Terms and Conditions on the Shopee Platform. Your continued use of the ShopeeFood Services and/or receipt of ShopeeFood Services after such changes have been posted shall constitute your acceptance of such revised Merchant General Terms and Conditions.</i></p>
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TABLE 1

Flowing from the above, this unilateral power to revise and/or modify their terms and conditions at any time after the conclusion of the contract is also evident within the context of contract price, or in this instance, the service fee charged by the Platforms. In general, the term ‘Service Fee’ and ‘Commission’ are the terms employed by Shopee and Grab respectively, to represent the amount of fee that will be charged for the Non-Consumer Users’ usage of the Platforms’ services. For the purpose of uniformity, the term “Service Fee” will be used throughout this chapter. In this respect, for each and every order and delivery gig, the Platforms are entitled to deduct a portion from the payment ought to be received by the Non-Consumer Users. This Service Fee may also be unilaterally revised by the Platforms. The relevant terms imposed are highlighted below:²⁷⁰

²⁷⁰ For the full quotation of the terms, see Table 2 of Appendix 3 of the thesis.

Grab		Shopee	
Clause	Term	Clause	Term
6.1.1*	<i>Grab charges a fee for your use of the Service ("Commission"). The Commission may be up to 20% of the Consumer Charges unless otherwise communicated to and accepted by you before you commence provision of the Solution(s)...</i>	5.7 (Riders)	<i>...Subject to Applicable Laws, Shopee may, at its absolute discretion, update the basis on which the Delivery Partner Service Fee is calculated at any time. Shopee shall provide you with prior reasonable notice of any such updates...</i>
6.1.4*	<i>...Grab may change the Commission at any time at its sole discretion.</i>	7.4 (Merchants)	<i>Shopee may, at its sole discretion, amend the Service Fee, Contributions or any other applicable fee or include any additional fee at any time by written notice to the Merchant.</i>

** This clause applies only to the delivery riders. As evident in this table and unlike Shopee, Grab does not, at least explicitly, reserve its right to amend the Service Fee against the restaurants. However and as will be pointed out below, Grab's broad amendment clause would imply that the restaurants may also be affected by Service Fee variation.*

TABLE 2

The abovementioned terms essentially grant the exclusive right to the Platforms to alter any aspects of their contractual relationship (arguably, even to its very essence). Becher and Benoliel refer this practice as a sneak-in contract. In this regard, a sneak-in contract represents a practice of:- (1) employing a broad modification clause allowing for a unilateral alteration of contractual terms; (2) modifying contractual agreements without express consent of the counterparty; and (3) facilitating a non (or less) transparent method of varying contractual terms via a less effective communication against the affected

party.²⁷¹ Essentially, this type of contract allows a business to modify any contractual provisions on their own accord without the need to obtain any prior consent and/or agreement from their counterparty.

3.5.1.1 Malaysian Law

A clause permitting one party to unilaterally amend the terms and conditions may, if it is measured by the standard provided under the Malaysian legal framework, be deemed as substantively unfair.²⁷² In assessing whether a clause of this nature is substantively unfair, the relevant factors set out in section 24D(2) of the Malaysian CPA may be helpful, where it states that:-

“(2) For the purposes of this section, a court or the Tribunal may take into account the following circumstances:

...

(a) whether or not the contract or a term of the contract imposes conditions—

(i) which are unreasonably difficult to comply with;

or

(ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract;

...

(h) whether the contract or a term of the contract—

...

(v) entitles the supplier to modify the terms of the contract unilaterally.”

Based on the abovementioned factors that need to be taken into account in assessing substantive unfairness, one may argue that the unilateral power to amend contractual terms imposed by both Grab and Shopee (if assessed under the Malaysian CPA) may be considered as substantively unfair due to two reasons:- (1) it entitles the stronger party to unilaterally alter the contractual provisions; and (2) the clause is not necessary to protect the legitimate interests of the Platforms. Whilst the first ground is self-explanatory, it is argued here that such unrestrictive power to amend contractual terms is not necessary to protect the legitimate interests of the Platforms either. Given that Platforms already possess high bargaining power from the outset (especially since they were the ones who prepared the terms and were able to conduct their own due diligence), they should already know how to safeguard their interests at the earliest

²⁷¹ Shmuel I. Becher and Uri Benoliel, ‘Sneak In Contracts’ (2021) 55 Georgia Law Review 657, 664.

²⁷² Section 24D(1) of the Malaysian CPA

stage possible (perhaps at the point of contract formation). Allowing them to reserve the right to unilaterally modify the terms at any time after the contract is formed is unreasonable. The Platforms cannot have their cake and eat it too.

Notwithstanding the above test regarding substantive unfairness and as mentioned previously in section 3.4.1 above, the overarching unfairness test under section 24A(c) of the Malaysian CPA would still need to be satisfied. In this regard, it has to be proven that such a clause causes a significant imbalance in the rights and obligations of the parties, to the detriment of the consumers (in this context, the Non-Consumer Users). It is argued here that allowing the Platforms to unilaterally amend the terms creates a situation in which the stronger parties receive a significant privilege without a corresponding benefit to the weaker parties, as the same privilege is not extended to the Non-Consumer Users.

According to Bridgeman and Sandrik, the broad and self-serving discretion to unilaterally amend any terms of the contract will certainly render the original promises and/or undertaking nugatory and purposeless.²⁷³ This absurd broad power to amend contractual terms will be prejudicial to the counterparty as the one who holds the stronger bargaining power may steer clear of its original obligations and intensify its counterparty's apportionment of risks and liabilities.

Alces further argues that the law shall not tolerate a practice that allows a contractual party to simply "*weaving in and out*"²⁷⁴ of their contract for the sake of accommodating their everchanging interests to the detriment of their counterparties. He also argues that parties have already decided to commit to the transactions based on their original agreed upon contractual terms and by allowing the dominant party to alter the said terms, no matter how reasonable the grounds are, would indeed affect the weaker party adversely.²⁷⁵

Therefore, it is argued here that the Platforms clause in granting them the absolute right to amend contractual terms would undoubtedly place the Platforms on a pedestal while leaving the Non-Consumer Users in limbo at the former's mercy, a situation that significantly tilts the parties' rights and obligations under the contract. Therefore, this type of clause may (and should) be deemed as unfair by virtue of the Malaysian legal framework as set out above.

²⁷³ Curtis Bridgeman and Karen Sandrik, 'Bullshit Promises' (2009) 76 Tennessee Law Review 379, 381.

²⁷⁴ Peter A. Alces, 'They Can Do What!? Limitations on the Use of Change of Terms Clauses' (2012) 26 Georgia State University Law Review 1099.

²⁷⁵ *ibid* 1100.

3.5.1.2 European Union Law

Can a term permitting unilateral amendments to contractual terms (including price variation clause) be deemed unfair under the general unfairness test provided under Article 3 of the UCTD? Arguably, it can. Firstly, it is argued here that allowing a stronger party to absolutely reserve its right to unilaterally amend its own contractual terms would indeed be contrary to the requirement of good faith. In this respect, no reasonable seller or supplier would have assumed that a consumer would have agreed to this type of clause, should there be a meaningful negotiation between parties in the first place. Parties bargaining on equal terms would, in all likelihood, object to a term that allows one party to unilaterally determine the contract's post-formation dynamics.

Secondly and as argued previously in section 3.5.1.1 above, a clause of this nature would most likely distort the contractual balance of the parties and will be detrimental to the Non-Consumer Users as the weaker parties. Additionally and in support of this contention, reference to the Annex of the UCTD may be useful. Point 1(j) of the Annex of the UCTD states that a term "*enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract*" may be considered as unfair. Hence, a term allowing for a unilateral modification of contractual terms would be considered as unfair, if the contract does not provide any explicit grounds justifying such an amendment. In this respect, both Platforms' terms do not explicitly mention any ground and/or reason, in advance, which may allow them to unilaterally vary the terms of the contract. This omission contradicts the requirement set out in point 1(j) of the Annex of the UCTD whereby a unilateral variation clause may be deemed as unfair if the reasons behind the potential modification are not spelt out in the contract.

Notwithstanding point 1(j) of the Annex of the UCTD as mentioned above, such an indication of unfairness may be neutralised with the following conditions:- (1) the contract in question is for an indeterminate duration; (2) consumers are required to be informed of the terms variation with reasonable notice; and (3) the consumer is given the liberty to put an end to the contract following the terms modification.²⁷⁶ Additionally and contrary to point 2(b) of the Annex of the UCTD where unilateral amendment may be justified if reasonable notice is given, Shopee maintains that it may amend its terms and conditions "*without notice*",²⁷⁷ adding fuel to the fire.

With regard to the issue of whether the Non-Consumer Users have the liberty to put an end to the contract following the Platforms' unilateral amendment, it is argued here that although this right is available to be exercised (as

²⁷⁶ Point 2(b) of the Annex of the UCTD

²⁷⁷ See Table 1, Clause 21.5 of Shopee's T&C (Riders)

the Non-Consumer Users may terminate their accounts at will), this right is merely fictitious. This is mainly attributable to Grab's no-refund policy (particularly against the riders).²⁷⁸ Under Grab's operational policy, the riders shall maintain a minimum amount of funds with Grab, which is called as Driver's Credit Balance. This Driver's Credit Balance consists of a pre-payment of commissions and other fees payable by the Non-Consumer Users to Grab for their future transactions.²⁷⁹ Following this Grab's no-refund policy,²⁸⁰ even if it is argued that the Non-Consumer Users have the option to terminate their contract after the unilateral changes took place, this right is nothing more than an illusion due to the consequences that are at stake here. One may argue that Grab's attempt to cover up its dubious unilateral variation clause by offering the Non-Consumer Users the right to terminate the contract post-variation without allowing them to claim back the funds made available to Grab is as good as trying to put lipstick on a pig. Based on the foregoing arguments, I submit that the Platforms' clauses allowing them to amend any contractual provisions may be considered unfair under the UCTD.

Concerning the price variation clause in particular (in this context, Service Fee variation clause), it is argued here that this clause may also significantly tilt the contractual balance in favour of the Platforms. In support of this, point 1(l) of the Annex of the UCTD deals specifically with a clause allowing unilateral amendment on the contract price, where such a clause may be deemed as unfair when sellers "*increase their price without...giving the consumer the corresponding right to cancel the contract*". In this regard, point 1(l) of the Annex may be circumvented, "*provided that the method by which prices vary is explicitly described*".²⁸¹ The CJEU in *RWE*²⁸² ruled that for a unilateral variation clause to be deemed as valid (and thus, not unfair), two conditions must be satisfied. Firstly, whether the unilateral variation clause was laid down transparently, in particular with regard to the plausible grounds for any future variation and the method of such calculating such variation. The rationale behind this transparency requirement is to ensure that the party who will be affected by such variation is not caught by surprise as they can foresee the modifications that may be made to the originally agreed-upon terms.²⁸³ The same requirement was also

²⁷⁸ For further explanation on Grab's No-Refund Policy, see section 3.5.2 below.

²⁷⁹ Clause 6.1.6 of Grab's T&C provides that "*Driver's Credit Balance: In addition to your Driver's Cash Balance, you must also maintain with Grab a Driver's Credit Balance. The Driver's Credit Balance comprises a pre-payment to Grab by you of commissions and other fees and charges applicable under these Terms of Service. You must at all times maintain a minimum credit balance ("Minimum Balance") in your Driver's Credit Balance in order for you to use the Service*".

²⁸⁰ Clause 6.1.8 of Grab's T&C which states that "*Funds in the Driver's Credit Balance are not redeemable for cash and cannot be refunded...*"

²⁸¹ Point 2(d) of the Annex of the UCTD

²⁸² Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*

²⁸³ *ibid*, paragraph 49 of the Judgment

stressed out in *Invitel*,²⁸⁴ where the CJEU held that the transparency requirement regarding grounds and methods of calculating variation is mandatory as to allow the consumer to expect the consequences of all terms that they will agree upon at the pre-contractual stage.²⁸⁵

Secondly, the CJEU in *RWE* case also emphasised the requirement that the counterparty (i.e. consumer as the weaker party affected by the variation clause) shall have the right to terminate and/or repudiate the contract following the variation.²⁸⁶ However, the right to terminate the contract shall not be purely formal and fictional but rather a genuine right to be exercised by the consumer. What does it mean by a genuine right of termination? In this regard, the Advocate General in *RWE* was of the opinion that factors such as the costs associated with the purported termination and market conditions shall be taken into consideration.²⁸⁷ For instance, an option to repudiate the contract may not be considered as genuine if the consumer has no real opportunity to change supplier due to several reasons, including the market conditions (e.g. how other competitors within the same industry behave).

By way of an application of those two requirements to the Platforms' unilateral price variation clauses, the question would be:- (1) whether the Platforms are being wholly transparent regarding their unilateral price variation clause; and (2) whether the Non-Consumer Users have a genuine and/or real opportunity to terminate the contract? With regard to the former, Grab reserves its right to unilaterally amend its Service Fee by stating that "*Grab may change the Commission at any time at its sole discretion*".²⁸⁸ Although this clause is expressly applicable only to riders, it is argued here that Grab's broad unilateral general amendment clause (see Clause 1.2 of Grab's T&C in Table 1 above) effectively empowers Grab to also amend the Service Fee imposed on the restaurants.

Similarly, as against the riders, Shopee states that "*Shopee may, at its absolute discretion, update the basis on which the Delivery Partner Service Fee is calculated at any time*".²⁸⁹ As against the restaurants, Shopee states that "*Shopee may, at its sole discretion, amend the Service Fee, Contributions or any other applicable fee or include any additional fee at any time by written notice to the Merchant*".²⁹⁰ Upon scrutiny, both unilateral price variation clauses by the Platforms appear to breach the strict requirement of transparency as they do not

²⁸⁴ *Invitel* (n 231)

²⁸⁵ *ibid*, paragraphs 24 and 27 of the Judgment

²⁸⁶ *RWE* (n 282) paragraph 54 of the Judgment

²⁸⁷ *Invitel* (n 231) paragraph 85 of the Opinion of the Advocate General

²⁸⁸ See Table 2, Clause 6.1.4 of Grab's T&C

²⁸⁹ See Table 2, Clause 5.7 of Shopee's T&C (Riders)

²⁹⁰ See Table 2, Clause 7.4 of Shopee's T&C (Merchants)

explicitly mention the grounds/basis of the variation nor the methods of calculation in the event of price variation, as mandated by both the P2B Regulation and the rules laid down in the *RWE* case.

Further, the omission of both Platforms to explicitly set out the basis for price alteration is critical, given that the grounds for price modification shall be explicitly set out in the terms and conditions.²⁹¹ Additionally, both Platforms clearly indicate that any revision to the terms and conditions will be effective once posted on either their website or application and the continued usage of the Platforms shall constitute a binding acceptance of such changes.²⁹² This dodgy practice by the Platforms would result in the Non-Consumer Users being unaware (or unable to be aware) of any changes made by the Platforms due to the onerous tasks on the part of the Non-Consumer Users to actively check and/or examine the Platforms' website, especially when the changes are regularly varied and not being specifically flagged.

Pertaining to the second requirement (i.e. the right to exit), it is argued here that although both Platforms give the option for the Non-Consumer Users to terminate their usage following the Service Fee modification, such privilege is qualified and the exercise of the said option is not as easy as it seems. For instance, most (if not all) platforms within the same industry employ a similar unilateral variation clause, rendering it difficult and/or useless for the Non-Consumer Users to shop around to find which platform offers the best terms and conditions.²⁹³ Considering how other competitors within the same industry behave and/or draft their terms and conditions, one may argue that there is no real and/or genuine option for the Non-Consumer Users to terminate their usage with their existing platform and switch to another. This is the real-life situation of out of the frying pan into the fire.

In conclusion, it appears that Platforms' price variation clauses may not fulfil the requirements of transparency and a genuine option to exit the contract. By just examining their potential issue on transparency deficiency alone, it must be noted that the lack of transparency could not be compensated by offering the Non-Consumer Users the option to terminate the contract. In other words, the right to terminate the contract post variation, no matter how genuine and non-fictional it is, would be rendered pointless if such a variation clause did not meet the transparency requirement in the first place.²⁹⁴ Hence, it may

²⁹¹ Marco Loos and Joasia Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 *Journal of Consumer Policy* 63, 68.

²⁹² Clauses 1.2 of Grab's T&C, 21.5 of Shopee's T&C (Riders) and 7.4 of Shopee's T&C (Merchants).

²⁹³ As can be observed and by way of an example, both Grab and Shopee adopt the same unilateral variation clause.

²⁹⁴ *RWE* (n 282) paragraph 51 of the Judgment

be concluded that the Platforms' unilateral variation clauses may be deemed as unfair due to the grounds as discussed above.

Apart from the UCTD, it is further argued here that the conduct of employing vague terms regarding the amount of Service Fee such as *"unless otherwise communicated"* and *"Grab may change the Service Fee at any time at its sole discretion"* flies directly in the face of Article 3(1)(a) of the P2B Regulation. Article 3(1)(a) of the P2B Regulation provides that *"Providers of online intermediation services shall ensure that their terms and conditions are drafted in clear and unambiguous language"*. In this regard, terms and conditions should not be considered as plain and intelligible when they are vague, unspecific or lack details on important commercial issues, as they have failed to give their Non-Consumer Users counterparts a reasonable degree of contractual predictability.²⁹⁵

The Platforms' price variation clauses may also be deemed unfair, if assessed through the lens of the recent EU Data Act. Although the Data Act operates within the domain of B2B data-sharing relationships, its normative foundation, aimed at preventing the imposition of unfair and adhesive terms on less powerful commercial actors,²⁹⁶ resonates with the contractual dynamics observed between the Platforms and the Non-Consumer Users. In this regard, Article 13 of the Data Act may offer some valuable comparative value in assessing the potential unfairness of the terms imposed by the Platforms.

In this respect, Article 13(5)(g) of the Data Act provides that a term that is unilaterally imposed may be deemed unfair if it enables a party *"to substantially change the price specified in the contract... where no valid reason and no right of the other party to terminate the contract in the case of such a change is specified in the contract"*. As discussed in section 3.5.1.1 above, although the Platforms' T&C contain a specific provision permitting amendments to the Service Fee for delivery riders, the publicly available terms of Grab are silent with respect to their restaurants partners. However, it can be argued that Grab may nevertheless amend the commission fees imposed on the restaurants owing to their wide-ranging unilateral amendment clauses. Essentially, this may be viewed as a form of contractual price variation. Under the Data Act, a clause allowing such amendments is not necessarily considered unfair, unless the party imposing the term fails to, in advance, specify the grounds for possible variation in the contract or does not provide the other party with a right to terminate the contract following the variation.

Unfortunately, neither of these two elements (i.e. provision on the reasons for a price change and the right to terminate) is present in the contracts drafted by the Platforms. Firstly, with regard to the grounds of possible

²⁹⁵ Recital 15 of the P2B Regulation

²⁹⁶ See Recitals 2, 5, 40 and 58 of the Data Act

variation, both Grab and Shopee's terms and conditions are silent on the basis of any future variation of their Service Fee. Secondly, while the riders technically retain the right to terminate, the utilisation of this right is questionable. As previously highlighted, Grab's enforcement of its no-refund policy²⁹⁷ effectively and indirectly penalises delivery riders who choose to exit the contract, thereby rendering the right to terminate largely illusory. For the reasons outlined above, it is argued that a clause allowing one party to unilaterally amend contractual terms (including the contractual price), may also be considered unfair under Article 13(5)(g) of the Data Act.

3.5.1.3 Australian Law

By way of reiteration, section 24(1) of the Australian CCA provides that a term would be considered as unfair if:- (1) it would cause a significant imbalance in the parties' rights and obligations; and (2) the clause is not necessary to protect any legitimate business interest. If the Platforms' unilateral amendment clauses are assessed from the perspective of the Australian CCA, the said clauses may be declared as unfair. With regard to the requirement of significant imbalance, it is argued here that this type of clause would indeed skew the contractual equilibrium between the Platforms and the Non-Consumer Users, as argued similarly in section 3.5.1.1 above.²⁹⁸

Further, as per Edelman J in *Chrisco*, a term will be deemed to significantly tilt contractual balance when there is no opt-out option and when there is no reciprocal right to the other party.²⁹⁹ Regarding the former, both Platforms do not offer any opt-out option to the Non-Consumer Users, granting them the choice to not be bound by the purported unilateral power of the Platforms. As to the latter, the wording of the clauses makes it clear that only the Platforms hold the right to unilaterally amend the contract, with no equivalent right granted to the Non-Consumer Users. Hence, allowing the more dominant Platforms to act at their absolute discretion (especially when such discretion attacks the core provisions of the contract such as the Service Fee) would place the weaker parties at risk, as their rights, obligations and liabilities would be entirely subject to the Platforms' control.

Further, it is contended here that this type of unilateral power is unnecessary to protect any legitimate interest of the Platforms, particularly the clauses on the variation of the Service Fee. In this respect, I perceive this reservation of power is nothing more but an attempt to increase the Platforms'

²⁹⁷ For further explanation on Grab's no-refund policy, see section 3.5.2 below.

²⁹⁸ See similar arguments on how the contractual balance will be significantly distorted in sections 3.5.1.1 and 3.5.1.2 above.

²⁹⁹ *Chrisco* (n 245) paragraphs 52 and 53 of the Judgment

profitability. Of course, this assumption may be rebutted, should the Platforms seek to do so. As ruled in *JJ Richards*,³⁰⁰ it was held that although businesses are entitled to increase their profitability, this type of interest is not considered as “*legitimate interests*” within the scope of unfair terms assessment.³⁰¹

As mentioned previously, the element of transparency is also mandatory in the assessment of unfair terms under the Australian CCA. In *ACN*, the issue of transparency was discussed by the Court regarding the refund term, should their patients elect to terminate their treatment. Once terminated, the patient are entitled for a refund, entitled to a refund for the unexpired period of their treatment program, less an administration fee of 15% and less the cost of any medication already provided to or prepared for the patient.³⁰² The Court found that the refund term lacked transparency, as the basis for calculating the administration fee and the costs of medication/treatment provided or prepared was never disclosed in detail to the consumers.³⁰³

Applying the same rationale to the present case, I argue that the Platforms’ terms allowing them to unilaterally amend any contractual provisions, including the Service Fee, lack transparency. In this respect, both Platforms do not explicitly set out in detail (or at all) the basis of their discretion to amend their contractual provisions, including their Service Fee, nor any manner in which their changes in the Service Fee are to be calculated. The absence of the foregoing justifications would violate the requirement of transparency, if they are assessed through the lens of the Australian CCA.

Additionally, section 25(d) of the Australian CCA also indicates that a term that “*permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract*” may be deemed as unfair. In *Fujifilm*,³⁰⁴ clauses imposed by Fujifilm allowing them to unilaterally vary either the price charged to their customers and/or the rights and obligations between the parties were found to be unfair, pursuant to sections 24 and 25 of the Australian CCA. The same finding is also evident in other cases, including *JJ Richards*,³⁰⁵ *Mitolo Group*,³⁰⁶ *Bank of Queensland*³⁰⁷ and *Bendigo*.³⁰⁸

³⁰⁰ *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224

³⁰¹ *ibid*, paragraph 58 of the Judgment

³⁰² *ACN* (n 259) paragraph 842 of the Judgment

³⁰³ *ibid*, paragraphs 853 and 854 of the Judgment

³⁰⁴ *Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd* [2022] FCA 928

³⁰⁵ *JJ Richards* (n 300)

³⁰⁶ *Australian Competition and Consumer Commission v Mitolo Group Pty Ltd* [2019] FCA 1257

³⁰⁷ *Australian Securities and Investments Commission v Bank of Queensland Limited* [2021] FCA 957

³⁰⁸ *Bendigo* (n 248)

Given the above, it appears that the Platforms' clauses allowing them to unilaterally amend any contractual provisions may potentially be considered as unfair, in light of the application of section 24(1) of the Australian CCA.

3.5.2 No-Refund Policy

As mentioned briefly in section 3.5.1 above, for every gig that is completed by the riders, a specified percentage is due to be paid to Grab as Service Fee. This deduction of the fee would usually be done by way of direct debit from the amount that the customers paid to Grab via their application. However, when the end users opt to pay by cash directly to the riders, there is no convenient way for the Service Fee to be deducted directly from the application. Hence, Grab introduced a mechanism called as Driver's Credit Balance to collect such Service Fee.³⁰⁹

Under Grab's operational policy, the delivery riders shall maintain a minimum amount of funds in the Driver's Credit Balance. However, these funds are not refundable to the delivery riders in any circumstances ("**No-Refund Policy**"), as evident in Grab's T&C below.³¹⁰

Grab	
Clause	Term
6.1.6*	<i>Driver's Credit Balance: In addition to your Driver's Cash Balance, you must also maintain with Grab a Driver's Credit Balance. The Driver's Credit Balance comprises a pre-payment to Grab by you of commissions and other fees and charges applicable under these Terms of Service. You must at all times maintain a minimum credit balance ("Minimum Balance") in your Driver's Credit Balance in order for you to use the Service. The amount of such Minimum Balance shall be prescribed by Grab, and shall be notified to you via the Application. It may be changed at any time at Grab's sole discretion. You agree Grab may retain, apply, or set off any sum due and owing, monies, deposits or balances held in, or standing to the credit of any account towards the satisfaction of any obligations and service quality due from you to Grab, whether such obligation be present or future, actual or contingent, primary or collateral and several or joint.</i>

³⁰⁹ Shopee similarly implemented an e-wallet system called as Driver Partner Wallet. However, unlike Grab, Shopee does not have a No-Refund Policy with regard to the funds deposited into the Driver Partner Wallet.

³¹⁰ For the full quotation of the terms, see Table 3 of Appendix 3 of the thesis.

6.1.8*	<i>Funds in the Driver’s Credit Balance are not redeemable for cash and cannot be refunded. They cannot be resold, exchanged or transferred for value under any circumstances. The funds shall not be regarded, construed, or used as valuable or exchangeable instruments under any circumstances. You will not receive interest or other earnings on your Credits. Grab may receive interest on amounts that Grab holds on your behalf. You agree to assign your rights to Grab for any interest derived from your Credits.</i>
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** This clause applies only to the delivery riders. As mentioned previously, this mechanism of collecting Service Fee is only relevant to the delivery riders in the event where the consumers choose to pay their order by way of cash directly to the former.*

Table 3

3.5.2.1 Malaysian Law

If these clauses are assessed through the Malaysian CPA, this No-Refund Policy will be most likely considered as (substantively) unfair. In light of the factors set out in section 24D(2) of the Malaysian CPA, Grab’s No-Refund Policy may be deemed as substantively unfair considering that, amongst others:- (1) it is contrary to reasonable standards of fair dealing; (2) it is not necessary to protect Grab’s legitimate interests.³¹¹

Pertaining to the first factor, I contend that this No Refund Policy is in blatant contradiction to reasonable standards of fair dealing. In this regard, in the event that the contract is terminated (especially when there is no contractual breach is involved), there will be a total failure of consideration as Grab has not (and could no longer) perform its part of the bargain by allowing the riders to be on its platform and thus offering gigs to them. Simultaneously, the riders can no longer utilise the platform and therefore, there will be no Service Fee due and payable towards Grab. Both considerations have failed and/or are no longer impossible to be exchanged between the parties. It is only reasonable and fair to return the said monies to the riders.

With regard to the second factor, I argue here that there is no legitimate reason for Grab to retain the unutilised sums or any legitimate interests that need to be protected by doing so. To reiterate, the very purpose of implementing the e-wallet is to ensure that Grab would be able to procure the Service Fee if the end-users pay for their orders in cash, directly to the riders. Within the context of this purpose, it is perfectly rational for Grab to implement the said mechanism in order to protect their legitimate interests. However, when the

³¹¹ Section 24D(2)(a)(ii) of the Malaysian CPA

riders are no longer providing their services through Grab, the e-wallet (and the funds therein) no longer serve their purpose. There is no more necessity or any interest to be protected.

In addition to the above analysis, the clauses on No-Refund Policy is still subjected to the overarching test of significant imbalance as per section 24A(c) of the Malaysian CPA. In this respect, I argue that Grab's No-Refund Policy will significantly distort the parties' rights and obligations under the contract. Given the facts that Grab may simply retain any unutilised sums that remain in the Driver's Credit Balance (even when the riders' accounts are no longer valid), Grab essentially has everything to gain and nothing to lose. This retention of funds is even more problematic as Grab can unilaterally terminate the delivery riders as and when they wish³¹² and subsequently forfeit all the funds belonging to the riders without consequences. The Platforms cannot have their cake and eat it too. From the riders' perspectives, these terms will put them in a lose-lose situation, should they decide to terminate their contract with Grab. In this respect, the riders may be hindered from exercising their free will to end their service with Grab and/or forced to provide their services through Grab until they have fully utilised the funds in the Driver's Credit Balance. This, in my view, will significantly distort the contractual balance between Grab and its delivery riders.

3.5.2.2 European Union Law

Grab's clauses regarding its No-Refund Policy are also likely be deemed as unfair if they are assessed through the lens of the EU legal framework. Within the context of the UCTD, it is argued here that such clauses would contradict the element of good faith, cause significant imbalance in the parties' rights and obligations and would indeed be detrimental to the Non-Consumer Users. As argued in section 3.5.2.1 above, by imposing a term that allows them to retain all sums paid in the Driver's Credit Balance under all circumstances, it will put Grab in a position in which they have everything to gain and nothing to lose.

Furthermore, this No-Refund Policy is nothing more than an unjust distribution/allocation of risks and benefits. In this regard, this policy would effectively allow Grab to retain the monies without having the obligation to provide any service in exchange of the benefit received (i.e. the unutilised funds) and the riders would have to take the loss by losing their funds, regardless of the reason behind the termination. In a situation where the contract is terminated willingly by the riders, it would only be logical that the unused sums to be returned to the riders.

³¹² On this issue, see section 3.5.3 below.

Additionally, it is argued here that allowing this type of clause to stand would heighten the risk of opportunistic behaviour on the part of Grab. Given that these clauses authorise them to retain all the sums paid into the Driver's Credit Balance regardless of the circumstances, this may potentially lead to a situation where riders are at risks for being terminated. In other words, if Grab can profit from terminating riders' accounts and retaining all of the unutilised funds, it may create a structural incentive to close as many accounts as possible (or worse, without just cause).³¹³

When there are no adverse consequences for terminating users without cause, but instead tangible/monetary benefits for doing so, it is clear that the contractual balance will be skewed entirely in Grab's favour. Grab cannot be both the arsonist and the beneficiary of the fire insurance. This situation is also consistent with point 1(f) of the Annex of the UCTD where it provides that a clause may be considered unfair when it permits "*the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract*".

3.5.2.3 Australian Law

An assessment of Grab's No-Refund Policy under the Australian CCA would likely yield a similar conclusion regarding its unfairness. It is argued here that Grab's No-Refund Policy would satisfy the elements of unfairness as provided under section 24(1) of the Australian CCA. In this regard, the purported clauses would:- (1) cause significant imbalance in the parties' rights and obligations; and (2) not be necessary to protect Grab's legitimate interests. With regard to the first element, I reiterate that clauses of this nature would indeed tilt the contractual balance in favour of Grab, with no corresponding benefit whatsoever to the riders. Similar arguments regarding contractual imbalance as discussed in sections 3.5.2.1 and 3.5.2.2 above are also reiterated herein.

As for the second element, I contend that Grab's policy is not necessary to protect its legitimate interest. Not only is it unnecessary, it is entirely unwarranted, as there is no valid justification for retaining the unutilised sums deposited by the riders to begin with. As discussed in section 3.5.2.1 above, the e-wallet's sole function is to collect Grab's Service Fee in situations where the consumers pay riders in cash. This mechanism is indeed justifiable as a means of protecting Grab's legitimate interests. However, once a rider discontinues their services (whether the termination is initiated by Grab or otherwise), the e-wallet including any balance it holds, loses its functional relevance, leaving no necessity or lawful interest to justify Grab's retention. In light of these reasons,

³¹³ See further discussion on the Platforms' unilateral power to terminate users in section 3.5.3 below.

Grab’s No-Refund Policy appears fundamentally unfair and should be subject to closer regulatory scrutiny.

3.5.3 Termination & Suspension of the Non-Consumer Users’ Accounts

The Platforms’ unilateral power does not cease at amending their terms and conditions after the contract is concluded. This power is further amplified via their unilateral power to terminate the Non-Consumer Users’ accounts, all of which are done through their algorithmic management system (“**AMS**”). The AMS essentially operates by collecting and matching data and thereafter efficiently assigns gigs and/or customers to the Non-Consumer Users. Given the nature of the AMS, it may be beneficial to both the Platforms and the Non-Consumer Users as it facilitates the procurement of tasks and/or orders as well as the collection of payments (i.e. commission fees for every order and delivery performed).³¹⁴ Therefore, the application of AMS would increase the plausibility of efficacy and efficiency of the decisions made by the platforms. These may be achieved considering the AMS’s ability to eliminate and/or eradicate human error and subsequently, speed up the decision-making process,³¹⁵ something that may be a hindrance in a traditional setting of human resources’ decision-making process.

The AMS is also utilised to evaluate the Non-Consumer Users’ performance and may subsequently make automated decisions, including terminating the Non-Consumer Users’ accounts, based on the data gathered on the users’ performance. This practice is evident in both Platforms, as can be observed in their T&Cs as follows:-³¹⁶

Grab		Shopee	
Clause	Term	Clause	Term
9.2	<i>Every rating will be automatically logged onto Grab’s system and Grab may analyse all ratings received. Grab may</i>	6.1 (Riders)	<i>You acknowledge that Customers rely on you for the provision of the Delivery Services. You agree that high and/or frequent cancellation rates or</i>

³¹⁴ Érika Sabrina Felix Azevedo, Diego Fillipe De Souza and José Ricardo Costa De Mendonça, ‘Algorithmic Management on Digital Labour Platforms: A Systematic Literature Review’ (2023) 21 *Contextus – Contemporary Journal of Economics and Management* 1, 11 <<http://www.periodicos.ufc.br/contextus/article/view/83099>> accessed 13 October 2023.

³¹⁵ Adrienn Lukács and Szilvia Váradi, ‘GDPR-Compliant AI-Based Automated Decision-Making in the World of Work’ (2023) 50 *Computer Law & Security Review* 105848 <<https://linkinghub.elsevier.com/retrieve/pii/S0267364923000584>> accessed 14 October 2023, 2.

³¹⁶ For the full quotation of the terms, see Table 4 of Appendix 3 of the thesis.

	<i>take all appropriate actions including suspending your use of the Service without any notice or compensation to you.</i>		<i>actions such as ignoring the Customers' bookings will impair the Customers' experience and negatively impact the reputation and branding of Shopee.</i>
7.1.1	<i>The Consumers rely on you for delivery or provision of the Solutions. You agree that high and/or frequent cancellation rates or ignoring the Consumers' bookings will impair the Consumers' experience and negatively impact the reputation and branding of Grab.</i>	15.2(a) (Riders)	<i>We may terminate these Terms of Service: (a) at any time, with prior notification to the Delivery Partner without assigning any reason;</i>
7.1.2	<i>While you may cancel a booking, the cancellation shall be based on acceptable cancellation reasons as shown in the Application. Grab reserves the right to amend the acceptable cancellation reasons from time to time. A cancellation that is not based on one of the acceptable reasons or ignoring a booking may be counted in determining if your access to</i>	12.1(e) (Merchants)	<i>Each Party may terminate the Agreement immediately if:-... (e) by giving the other Party 30 (thirty) days' prior written notice for any or no reason.</i>

	<i>the Service will be temporarily re-stricted.</i>		
29.1	<i>You agree that we may do any of the following, at any time, without notice: (i) to modify, suspend or terminate operation of or access to the Application, or any portion of the Application (including access to your Account and/or the availability of any products or services), for any reason;... We shall not be required to compensate you for any suspension or termination.</i>		

TABLE 4

Based on Table 4 above, it appears that both Platforms:- (1) reserve their power to unilaterally terminate the Non-Consumer Users' accounts without providing any reason whatsoever; and (2) do not explicitly set out, save for the high cancellation rate, a comprehensive list of possible termination grounds in their T&Cs. This brings us to the next pivotal question, are these types of clauses unfair and how can we assess their 'unfairness' characteristics through the lens of our chosen legal framework?

3.5.3.1 Malaysian Law

A clause permitting one party to unilaterally terminate the other and/or end the contract without providing grounds supplementing such a decision would, arguably, be deemed as substantively unfair, if it is measured by the standard provided under the Malaysian legal framework. By virtue of section

24D(2)(h)(iv) of the Malaysian CPA, it provides that a term may be deemed as substantively unfair if it “*entitles the supplier to terminate the contract unilaterally without good reason or without paying reasonable compensation*”. Although this is merely an indication of substantive unfairness, it signals that a term of this nature should be put under scrutiny. The next question then would be whether the term that allows for termination without basis would contravene the general test of unfairness under section 24A(c)?

It is argued here that the Platforms’ terms allowing for termination without justifiable grounds would indeed cause a significant imbalance in the rights and obligations of the parties to the detriment of the Non-Consumer Users. How so? By permitting one party (i.e. the stronger ones) to terminate the other without cause, the term may lead to arbitrary termination, creating an inherently unfair power dynamic.

Not only that the Platforms possess a greater bargaining power, but this potential arbitrary termination would also further exacerbate the Non-Consumer Users’ vulnerability. Additionally, it would also lead to a situation where the stronger party can arbitrarily dictate the sustainability of the contract (and the livelihood of the Non-Consumer Users) without being held accountable, which may lead to the abuse of power and aggravate unfair treatment against the Non-Consumer Users. Furthermore, without being informed of the grounds for termination, Non-Consumer Users would be unable to challenge the decision, thereby negatively impacting their livelihood. This predicament is compounded by the fact that no human review mechanism is provided by the Platforms, allowing the Non-Consumer Users to challenge such an automated decision.

Further, the Platforms’ omission in setting out, at the outset, the criteria used to assess the Non-Consumer Users’ performance in their T&Cs also aggravates the issue at hand. In this respect, Grab for instance, primarily relies on the ratings provided by the end-users in assessing the Non-Consumer Users’ performance.³¹⁷ In this regard, there is a danger of relying exclusively on the AMS data in monitoring the Non-Consumer Users’ performance as an objective truth because the absence of human intervention will eliminate the possibility of interpreting the reality and/or nuances of the actual working conditions.³¹⁸ As such, the ratings submitted to the AMS database may be perceived as schematic and wholly quantitative. Therefore, overdependence on oversimplified data without human intervention to assess the actual truth of what happened on the real-life world will definitely bear negative bearing to the assessment of the Non-

³¹⁷ Clause 9.2 of Grab’s T&C.

³¹⁸ James Duggan and others, ‘Algorithmic Management and App-work in the Gig Economy: A Research Agenda for Employment Relations and HRM’ (2020) 30 Human Resource Management Journal 114.

Consumer Users' performance, leading to the potential suspension and/or termination of their accounts with the online platforms.

Apart from being at the mercy of the end-users' rating, there are circumstances where these Non-Consumer Users may be affected by circumstances beyond their control, considering the multi-layers of parties involved in their services towards the end-users. This may not be evident in a ride-hailing service where the driver's performance is wholly dependent on his/her quality of work when transporting the consumer from one place to another. On the contrary, things might be knotty in the OFDS ecosystem. In this regard, as food delivery involves two distinct providers (i.e. restaurants preparing the food and the delivery riders delivering the food to the consumers), their quality of works and/or performances are directly interdependent on each other.

By way of an illustration, if the restaurant supplies a wrong order to the delivery riders, the latter would have been impacted by the low rating of the consumer; similarly, if the riders were supplied with the correct order but delivered it to the wrong address, the restaurant would also be indirectly implicated (financial or rating-wise) given the non-delivery. As pointed out by Kuhn and Maleki, these circumstances may lead to consumers' dissatisfaction and low ratings, which will eventually disrupt the delivery metrics and one's performance.³¹⁹ Simply put, one's success is dictated by everyone's success. Given that AMS heavily relies on ratings and these are purely quantitative, the Non-Consumer Users may be implicated even when the fault is not directly attributed to them.

By virtue of the above, it may be concluded that the Platforms' terms, which permit them to terminate Non-Consumer Users' accounts without the obligation to provide any justification, may be considered substantively unfair, as they are likely to fail the unfairness test under sections 24A(c) and 24D(2)(h)(iv) of the Malaysian CPA.

3.5.3.2 European Union Law

Based on the terms quoted in Table 4 above, it can be observed that both Platforms omit to set out, at the outset, a comprehensive set of criteria or factors in assessing the Non-Consumer Users' performance in their T&Cs. Be that as it may, it is also important to point out that both Grab and Shopee indeed made it explicit that high cancellation frequency would affect the performance score of the Non-Consumer Users. Prima facie, this explicit policy represents a positive starting point toward ensuring a fairer system and providing the Non-Consumer Users with a degree of certainty regarding how their performance is

³¹⁹ Kristine M Kuhn and Amir Maleki, 'Micro-Entrepreneurs, Dependent Contractors, and Instaserfs: Understanding Online Labor Platform Workforces' (2017) 31 *Academy of Management Perspectives* 183.

assessed. However, given that this is the only criterion that is mentioned in the T&C, it is argued here that this is indeed inadequate.

In this respect, both Platforms do not specifically define what would constitute as high/frequent cancellation rate or indicate the threshold at which such cancellations may compromise a user's account. Furthermore, it should be noted that the assessment of the Non-Consumer Users' performance is not confined solely to cancellation rates, but also encompasses factors such as end-user ratings, delays in task completion, and other relevant performance indicators. Hence, although the Platforms have taken a step toward better transparency by expressly stating that high cancellation rates influence performance evaluations, it is contended here that the lack of definitive and complete performance assessment criteria in the T&C presents a significant concern.

In my view, the lack of clearly defined key performance indicators in the T&C creates the risk of subjective and/or inconsistent assessments by the Platforms, which may ultimately and/or inevitably lead to arbitrary account suspensions/terminations. The omission of setting out the grounds of assessment in their T&Cs, flies directly in the face of Article 9(b)(iii) of the Platform Work Directive. In this respect, the said provision obliges the platforms to set out the *"main parameters that such systems take into account and the relative importance of those main parameters in the automated decision-making"* in their T&Cs.

Additionally, Article 3(1)(c) of the P2B Regulation also provides a similar obligation on the part of the online platforms to ensure that their T&Cs, clearly set out the grounds, at the outset, the potential basis for the platforms' *"decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users"*.³²⁰ As pointed out previously, the performance of the Non-Consumer Users is influenced not only by high cancellation rates but also by, amongst others, ratings provided by end-users.

Hence, the platforms are expected to explicitly set out, at the outset, how the ratings are being assessed in order to improve predictability on the part of the Non-Consumer Users, allowing them to better understand the functioning of the ranking mechanism.³²¹ Additionally, Article 5(1) of the P2B Regulation requires the platforms to set out in their T&C, the main parameters determining the users' ranking and the reasons for the importance of those main parameters (e.g. within the OFDS context, I contend that factors such as frequency of acceptance of gigs and cancellation of the same, customers' satisfaction on delivery time, manners of delivery and condition of foods would be expected).

³²⁰ See also Recital 22 of P2B Regulation

³²¹ Recital 25 of P2B Regulation

With regard to the issue of the Non-Consumer Users' accounts termination, to compound matters, both Platforms adopt a similar stance regarding their unilateral power to dictate whether or not the contract has been breached and therefore, may terminate the Non-Consumer Users' accounts as and when they please. Worse, both Platforms reserve their rights not to provide any explanation, reasoning and/or justification for their decision to suspend and/or terminate the Non-Consumer Users' accounts.³²²

From the UCTD point of view, the provisions enabling the Platforms to terminate the Non-Consumer Users' accounts without disclosing any reasons may be deemed as unfair as it is contrary to the requirement of good faith and would indeed cause a significant imbalance in the rights and obligations of the parties. Obviously, when a party is being denied and/or prevented from continuously using its account, especially when it involves their livelihood and financial requirement, such party should be sufficiently informed on the grounds behind such obstruction. The said grounds will not only justify such termination but also will allow the affected party to defend their case and present their side of story. Similar arguments on how clauses of this nature may significantly alter the contractual balance as discussed in section 3.5.3.1 above are also reiterated herein.

Additionally and by way of reference to the existing EU legal framework, this practice is contrary to the several rules such as Article 4 of the P2B Regulation. In this respect, Article 4(1) of the P2B Regulation dictates that prior to the suspension/termination of the business users' accounts, a statement of reasons shall be provided to the affected party justifying such a decision. This statement of reasons shall also reflect the grounds/basis that have already been clearly set out in the platforms' T&C when the contract was formed.³²³ Similarly, Article 18(2) of the Working Conditions Directive states that workers who have been dismissed may request the employer (or in this case, the Platforms) to provide them the basis and/or grounds justifying such dismissal.

Further, the transparency requirement requires that the automated decision-making system of the AMS shall inform the platform workers the grounds for decisions to, amongst others, "*restrict, suspend or terminate the platform worker's account*", as per Article 9(b)(iv) of the Platform Work Directive. Taken collectively, and in light of the aforementioned legislation, it becomes evident that contractual terms allowing the Platforms to unilaterally terminate the Non-Consumer Users' accounts without providing any justification are likely to be considered unfair when evaluated through the lens of these legal frameworks.

³²² See clause 9.2 of Grab's T&C, clauses 15.2(a) and 21.5(a) of Shopee's T&C (Riders). It is to be noted that Shopee does not impose the same practice against their restaurant partners (see clause 12.1(e) of Shopee's T&C (Merchants)).

³²³ Recital 22 of P2B Regulation.

Additionally, the unfairness of this type of clause may also be assessed through the DSA. While the DSA is not, in substance, a legislative instrument dedicated to the control of unfair contract terms, it nevertheless offers valuable regulatory insights for addressing power imbalances in platform-to-business relationships. For instance, reference to Article 14 of the DSA is a good starting point in providing a useful comparative lens in gauging whether the omission to provide reasonings/basis of termination may be deemed unfair. In this respect, Article 14(1) of the DSA imposes transparency obligations on online platforms, requiring them to disclose clear, comprehensible, and accessible information about terms and conditions affecting business users. This includes provisions on content moderation, suspension or termination of accounts³²⁴ and access to internal complaint-handling systems.³²⁵

Flowing from the above, the absence of explicit reasons for any decision to terminate/suspend the Non-Consumer Users' accounts would be inconsistent with the principles outlined in Article 17 of the DSA. In this respect, Article 17 of the DSA seeks to promote transparency and fairness in the relationship between online platforms and their users. It requires platforms to provide users with a clear statement of reasons should they decide to suspend, restrict or terminate the users' access to their services - whether by removing content or deactivating an account. This provision reinforces the fundamental principles of procedural fairness and serves to protect users from any potential arbitrary, unfair or unjustified decisions.³²⁶ Hence, it is argued here that the Platforms' clauses allowing them to terminate the Non-Consumer Users' account without the obligation to supplement/support such decision may be deemed unfair (at least, procedurally), particularly when evaluated through the lens of Article 17 of the DSA.

Notwithstanding the above, it is further argued here that transparency regarding the grounds for termination would still be insufficient if there is no proper channel for the Non-Consumer Users to challenge these grounds and present their point of view. In this respect, both Platforms also appear to neglect and/or omit any terms, via their T&Cs, allowing their decision to terminate to be challenged and/or inquired by the affected Non-Consumer Users. In other words, there is no procedure designed by the Platforms to handle internal complaints potentially lodged by the Non-Consumer Users, should they decide to contest and/or clarify their position in the event of unilateral termination by the Platforms.

³²⁴ Article 17 of the DSA

³²⁵ Article 20 of the DSA

³²⁶ Recital 45 of the DSA

According to Article 4(3) of the P2B Regulation, the platforms shall offer the affected business users the opportunity to “clarify the facts and circumstances in the framework of the internal complaint-handling process”. In this respect, the platforms are obligated to explicitly provide, via their T&Cs, all relevant information relating to the access to and functioning of their internal complaint-handling system to the benefit of their users should any complaint arise, as mandated under Article 11(3) of the P2B Regulation. The opportunity intended to be given to the business users is vital as they should be allowed to clarify the facts leading to the termination and possibly, re-establish compliance (if it is established that there was indeed incompliance).³²⁷

In support of the above, Article 11 of the Platform Work Directive requires the platforms to put in place a system where the decision of the AMS can be reviewed by human officers. In this respect, the platforms are obligated to ensure that the affected users “obtain, without undue delay, an explanation from the digital labour platform for a decision, the lack of a decision or a set of decisions taken or supported by automated decision-making system”.³²⁸ By having a relevant and/or competent contact person handling such enquiry, the Non-Consumer Users may be able to discuss and clarify the circumstances leading to the termination and effectively contest such decision when possible.³²⁹

Additionally, reference may also be made to Article 20 of the DSA. In the context of the DSA, the affected users shall be given the right to lodge complaints with regard to any decision taken by the online platform (e.g. removal of content). To this end, online platforms are expected to establish internal complaint handling systems that are transparent, efficient, impartial and fair, with human involvement and/or supervision, especially where automated tools are involved. This way, it would enable the users to challenge decisions and present their perspectives, allowing platforms to conduct further deliberation and helping to safeguard the affected users against any arbitrary decision-making.³³⁰

Based on the analysis above, it can indeed be argued that the Platforms’ practice (or malpractice) of relying heavily on the AMS in terminating the Non-Consumer Users’ accounts may be riddled with several issues, particularly on the transparency deficiency. The issues regarding to:- (1) the lack of explicit information in the Platforms’ T&Cs on the parameters of assessment; (2) the existence of terms legitimising the Platforms’ refusal to provide grounds of termination; and (3) the absence of terms allowing human review of such a decision for termination; collectively, warrant further scrutiny. After all, although the usage of the AMS for task evaluation and account suspension is a common practice

³²⁷ Recital 22 of the P2B Regulation

³²⁸ Recital 49 of the Platform Work Directive

³²⁹ Recital 48 of the Platform Work Directive

³³⁰ Recital 58 of the DSA

of online platforms (in fact, as one of their essential features) due to its inherent benefits, it shall not be utilised to the detriment of the Non-Consumer Users.

3.5.3.3 Australian Law

The assessment of the Platforms' autonomy in unilaterally dictating the termination of the business users' account from the perspective of the Australian CCA may also produce a similar result. In this regard, a clause of this nature would cause significant imbalance between the parties and it is not necessary to protect the legitimate interests of the Platforms.³³¹ Further, reference may also be made to section 25(h) of the Australian CCA, where a term allowing a party to unilaterally dictate and/or determine whether a contract has been breached may be considered as unfair.

In support of the above arguments, reference to the Australian case of *Bytecard*³³² is helpful. In *Bytecard*, the Federal Court of Australia ruled that a clause, amongst others, allowing ByteCard to unilaterally terminate the contract at any time with or without cause or reason is unfair. The application of such clause would:- (1) create a significant imbalance in the parties' rights and obligations; (2) not reasonably be necessary to protect ByteCard's legitimate interests; and (3) cause detriment to a customer. Based on this decision, it can be observed that so long such termination is being validated by legitimate reasons (which shall clearly be communicated to the affected party), the term allowing for a unilateral termination may not necessarily be unfair.

Further and consistent with the Australian court's decision in *Bytecard*, a clause of this nature is not necessary to protect the Platforms' legitimate business interests as this measure is entirely unnecessary and designed solely to relieve the Platforms from adhering to proper human resource procedures and from providing justifiable grounds before legitimising their decision to terminate an account. Perhaps the Platforms may argue that the discretion to automatically suspend/terminate users' accounts would ensure the smooth-running of their business operation (by swiftly eliminating providers with subpar service quality), this reasoning is not, in my view, a legitimate business interest warranted to be protected.

Additionally, as per the test proposed by Banks-Smith J in the case of *Ashley & Martin*, this type of clause will most likely be deemed to be unnecessary to protect one's business interest. Firstly, the Platforms have other alternatives in maintaining the integrity of their business partners and their services,

³³¹ Similar arguments on how clauses of this nature may significantly alter the contractual balance as discussed in sections 3.5.3.1 and 3.5.3.2 above are also reiterated herein.

³³² *Australian Competition and Consumer Commission v Bytecard Pty Limited* (Federal Court of Australia, Jessup J, unreported, orders made 24 July 2013). See <https://www.accc.gov.au/media-release/court-declares-consumer-contract-terms-unfair>

aside from simply terminating them without providing any justification. These alternatives may include appropriate human resources procedures and the issuing of warnings prior to termination, to name a few. Secondly, it can also be argued that opting for an automated termination without giving the Non-Consumer Users the opportunity to defend themselves would seem disproportionate to any alleged subpar performance, even if such an allegation is true. As mentioned previously, the Platforms could have, at least, resorted to other recourses first (e.g. issuing warnings to remedy the underwhelming performance) before simply terminating the accounts. This approach, in my view, would provide a more proportionate response to the allegations or findings of subpar performance.

3.5.4 Non-Guarantee on the Reliability of the Platforms' Operating System

Both Platforms explicitly disclaim and do not make any guarantee on the accuracy and/or reliability of the system they are operating on. The relevant terms are as follows:³³³

Grab		Shopee	
Clause	Term	Clause	Term
18.1	<i>The Application, its content and any related service(s) is provided to you on an "as is" basis. Grab makes no representations or warranties of any kind, express or implied, in connection with the Software, Application, Platform, Service, these Terms of Service, the content or any related service(s)...We shall not be liable for any direct, indirect or consequent loss arising from the modifications or amendments to the Software, Application,</i>	12.1 (Riders)	<i>Shopee makes no representation, warranty or guarantee as to the reliability, timeliness, quality, suitability, availability, accuracy or completeness of the Platform...The Platform is provided to you strictly on an "as is" basis. All conditions, representations and warranties, including any implied warranty of merchantability, fitness for a particular purpose, or non-infringement of third-party rights, are hereby</i>

³³³ For the full quotation of the terms, see Table 5 of Appendix 3 of the thesis.

	<i>Platform, Service, or Terms of Service.</i>		<i>excluded to the extent permissible by law.</i>
		9.1 (Merchants)	<i>9. No warranty 9.1 The ShopeeFood services are provided “as-is” and without any representation or warranty, whether express, implied or statutory. Shopee and any of its subsidiaries and affiliates, officers, directors, agents, joint ventures, employees and suppliers specifically disclaim any implied warranties of title, merchantability, fitness for a particular purpose and non-infringement...</i>
		11.1 (Riders)	<i>The Parties are released from responsibility to all obligations and delay of work as consequence of Force Majeure. “Force Majeure” means any extraordinary circumstances which is an unforeseeable, inevitable event and/or beyond reasonable control of the Parties...</i>
		18.1 (Merchants)	<i>The non-performance of either Shopee or you of any obligations under these</i>

			<p><i>Terms of Service shall be excused to the extent and during the period that performance is rendered impossible by strike, fire, flood, earthquakes, governmental acts or orders or restrictions, failure of suppliers, or contractors, or any other reason where failure to perform is beyond the reasonable control and is not caused by the negligence of the non-performing party.</i></p>
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TABLE 5

Based on Table 5 above, it appears that both Grab and Shopee claimed that their platforms are offered on an ‘as is’ basis and therefore, refused to make any guarantee regarding the reliability of the same. However, it can be observed that Shopee, contrary to Grab, qualified their disclaimer to be only applicable in the case of *force majeure*. This is exemplified by Shopee’s T&C (i.e. see clauses 11.1 (Riders) and 18.1 (Merchants) in Table 5 above). In this respect, although Shopee does not guarantee that its platforms would be free from interruptions, it also qualifies this exemption to be applicable in a situation beyond their control. Further and as can be seen in clause 18.1 of Shopee’s T&C (Merchants), any non-performance of any party due to its own negligence is not to be excused. On the contrary, the same qualification is not explicitly mentioned in the Grab’s T&C. Instead, Grab’s terms grant a blanket shield from any liability should their systems be interrupted.

3.5.4.1 Malaysian Law

Before we analyse whether these clauses may be deemed as unfair, it is prudent to consider first what the Malaysian CPA says regarding the rules on product liability. In this respect, Part VIII of the Malaysian CPA imposes that there shall be an implied guarantee that a product/service will be reasonably fit for

any particular purpose³³⁴ and that the supplier is required to exercise reasonable care and skill in achieving such an implied guarantee.³³⁵

Does the Malaysian CPA provide any avenues for redress if these implied guarantees are breached? The answer is in the affirmative. For instance, section 60 of the Malaysian CPA entitles the consumers to either:- (1) demand the supplier to rectify the defects within a reasonable time frame (when the defects are remediable);³³⁶ or (2) terminate the contract (when the defects cannot be remedied).³³⁷ In either case, the consumers are entitled to seek compensation from the supplier for any loss or damage, arising from the supplier's failure to fulfil its obligations.³³⁸

Drawing from the above authorities, I argue that the Malaysian legislature places significant emphasis on holding suppliers of goods or services accountable for any defects arising from the goods/services provided to the consumers (as the weaker parties). The next question then would be, whether the terms facilitating Grab's refusal to guarantee the reliability of their services may be regarded as unfair? In answering this, section 24D(1)(e) provides that a term may be regarded as substantively unfair if it "*excludes or restricts liability for breach of express or implied terms of the contract without adequate justification*". Given that the Malaysian CPA provides for an implied guarantee on any goods/services, Grab's attempt to circumvent this implied guarantee through their T&Cs may be deemed as substantively unfair.

Notwithstanding the above, the overarching unfairness test under section 24A(c) regarding the requirement of significant imbalance shall also be satisfied. In this respect, by refusing to make any guarantee on the reliability of the system they are operating on and that the system is being offered on an 'as is' basis, Grab is seeking to exclude any potential liability and/or claim from being made against them. Clauses of this nature would significantly tilt the contractual balance between parties, especially when the interruption of the systems have caused detriments to the Non-Consumer Users, financial or otherwise. A clause disclaiming the reliability of the platform supplemented with a clause qualifying the service provided on an 'as is' basis, would likely be deemed as unfair, according to Lagioia et al.³³⁹

³³⁴ Section 54(1)(a) of the Malaysian CPA

³³⁵ Section 53 of the Malaysian CPA

³³⁶ Section 60(1)(a) of the Malaysian CPA

³³⁷ Section 60(1)(b) of the Malaysian CPA

³³⁸ Section 60(1)(c) of the Malaysian CPA

³³⁹ F Lagioia and others, 'AI in Search of Unfairness in Consumer Contracts: The Terms of Service Landscape' (2022) 45 Journal of Consumer Policy 481, 499.

By way of this universal protection, Grab may, arguably, refute liability even when such interruption is caused by its own fault and negligence. By this reason alone, it is argued here that the contractual balance is significantly skewed. While Grab risks little to nothing, the Non-Consumer Users are left in a vulnerable position without any corresponding benefit or remedy to offset this imbalance. For instance, should Grab's system experiences disruption for even a single day, delivery riders would be left without assignments, while restaurants could be deprived of potential customer orders, thereby significantly undermining their daily income. In this situation, it would be unjust for Grab to exempt themselves from all forms of liability, particularly where the interruption arises from their own fault or negligence.

Further, according to Hajek, while occasional interruptions of online services may be inevitable, platforms' practice of adopting a passive stance and shielding themselves from liability by relying solely on an "as is" clause may raise some concerns. Instead, platforms are encouraged to adopt a more proactive approach by, among other measures, explicitly committing to minimise the frequency and duration of service interruptions. Such an approach reflects an acknowledgment of their duty to exercise reasonable care and skill in maintaining their platforms and/or operating systems, rather than seeking to absolve themselves of responsibility and due diligence entirely.³⁴⁰ In conclusion, as the Non-Consumer Users are highly dependent on the reliability of the Platforms' systems in the course of their entrepreneurship, it would be unconscionable, unwarranted and unfair if contractual terms are being exploited as instruments to absolve the Platforms from any liability concerning their operating system.

Given such prohibition on the total exemption of liability pertaining to the implied guarantee of services, is this the end for Grab? Would it be totally impossible for Grab to protect their legitimate interests in cases where their operating system is disrupted due to causes beyond their control? This is not necessarily the case. As per section 58(b) of the Malaysian CPA, the law does allow the providers of the services to shield themselves from liability if the disruption is caused by, amongst others, reasons "*independent of human control*". Hence, it is argued here that an exemption clause as imposed by Grab may still be incorporated into the contract, as long as it is drafted in a reasonable way (i.e. shielding themselves from any interruption of services that is not preventable), similar to Shopee's approach. This way, the rights and interests of all stakeholders may be duly preserved and maintained.

³⁴⁰ Bea Hajek, 'Online Platform Service Providers on Platform 9%: A Call for an Update of the Unfair Contract Terms Directive' (2020) 28 *European Review of Private Law* 1143, 1160.

3.5.4.2 European Union Law

From the EU law perspective, it can be argued that a term allowing Grab to absolve their liabilities for their faulty operating system (which constitutes the essential infrastructure of their service) to the detriment of the Non-Consumer Users may be considered incompatible with multiple strands of EU legislation, whether assessed under B2C or B2B/P2B regulatory framework. With regard to the former, reference may first be made to the UCTD where Grab's absolute disclaimer regarding the reliability of their operating systems would cause significant imbalance in the rights and obligations of parties, contrary to good faith. Such clauses are clearly one-sided, tipping the double pan balance-scale in favour of Grab as they are not attached with any sort of liability when the systems are not operating as they should (or at least at par with the Non-Consumer Users' reasonable expectations) and consequently, causing detrimental effects to the latter. On the other hand, the Non-Consumer Users will be the parties who would have to absorb the risks and/or repercussions arising out of the Grab's non/partial performance.

With regard to the requirement of good faith and given the reasons discussed above, it is unlikely that the Non-Consumer Users would have accepted these clauses in genuine negotiations. Similar arguments on how clauses of this nature may significantly alter the contractual balance as discussed in section 3.5.4.1 above are also reiterated herein. Additionally, reference to point 1(b) of the Annex of the UCTD may further support the abovementioned arguments. In this respect, a term that *"inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligation"*³⁴¹ may be deemed as unfair to the consumers.

Another important B2C legislation is the Digital Content and Digital Services Directive. When assessing the purported terms through the lens of the Digital Content and Digital Services Directive, it can be argued that providers of digital services are under an obligation to ensure the reliability and proper functioning of the services offered, in accordance with the conformity requirements set out in Articles 6 to 8 of the Directive.

In this respect, the provider of the digital service shall ensure that the service provided/offered to the recipient is, amongst others, fit for any particular purpose for which the user acquires it.³⁴² Additionally, the service should also objectively *"possess the qualities and performance features, including in relation*

³⁴¹ Point 1(b) of the Annex of the UCTD

³⁴² Article 7(b) and 8(a) of the Digital Content and Services Directive

to functionality, compatibility, accessibility, continuity and security”³⁴³ at par with other digital services of a similar type, parallel with the reasonable expectation of the recipient of such services. Applying the same principles to the present case, it can be argued that Grab shall take an assertive approach (rather than on an ‘as is’ basis) in guaranteeing the reliability of the systems that they are operating on to the benefit of the Non-Consumer Users.

Could a clause of this nature also be considered contrary to any provisions under any of the EU P2B/B2B regulatory frameworks? If being assessed through the lens of the EU Data Act, a clause excluding liability on the reliability of the Grab’s operating system may be deemed as unfair. As pointed out previously in section 3.5.1.2 above, although the Data Act (and its provisions pertaining to unfair contract terms) is explicitly framed within the context of B2B data sharing, its underlying rationale (i.e. safeguarding weaker commercial actors from exploitative and adhesion terms imposed by the stronger parties)³⁴⁴ has clear parallels to the predicament experienced by the restaurants and delivery riders engaged with Grab. Accordingly, reference to the Data Act, particularly Article 13, may be instructive in assessing whether such a practice could be considered unfair.

At the outset, Article 13 of the Data Act primarily addresses contractual terms that are deemed to be unfair based on a tripartite test framework.³⁴⁵ First, the general standard for assessing unfairness is provided in Article 13(3), which considers a term unfair if it "*grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing.*" Second, Article 13(4) introduces a set of so-called ‘black list’ terms, which are categorically and unconditionally deemed unfair. Third, Article 13(5) establishes a rebuttable presumption, or referred to by Omlor as the ‘grey list’,³⁴⁶ where listed terms are presumed to be unfair unless the contrary is demonstrated. As such, the general unfairness test under Article 13(3) is only applicable where the purported contractual term does not fall within the scope of either the black or grey lists.³⁴⁷

In light of the foregoing and as can be observed in Table 5 above, Grab excludes themselves from any liability should their operating system be interrupted. As per Article 13(4)(b) of the Data Act, a clause of this nature shall be deemed as unfair as it excludes "*the remedies available to the party upon whom the term has been unilaterally imposed in the case of non-performance of*

³⁴³ Article 8(b) of the Digital Content and Services Directive

³⁴⁴ See Recitals 2, 5, 40 and 58 of the Data Act

³⁴⁵ Sebastian Omlor, ‘Unfair Contractual Terms under the EU Data Act’ (2024) 32 European Review of Private Law 173, 186.

³⁴⁶ *ibid.*

³⁴⁷ See also Article 13(5)(a) of the Data Act, where a clause limiting liability (instead of excluding it in totality as per Article 13(4)) may be deemed as unfair, unless proven otherwise.

contractual obligations". Pursuant to this provision and by way of application to our case study, it is submitted here that allowing a party (especially the stronger parties such as Grab) to wholly exclude their liabilities when it fails to fulfil its contractual obligations as reasonably expected would be unwarranted and unfair.

Given that the platforms' operating systems (i.e. the applications) are entirely developed, maintained, and controlled by the platforms themselves, it would be illogical to absolve them of responsibility when the systems do not function as intended. While it is acknowledged that online services are inherently susceptible to occasional disruptions or technical errors, this does not justify a complete exemption from liability. Shielding platform operators from all responsibility or even from the basic duty to exercise due care and diligence in mitigating such disruptions would be unreasonable and should be deemed as unfair.

3.5.4.3 Australian Law

A term of this nature may also be deemed unfair under the Australian CCA as it causes significant imbalance between parties and it is not necessary to protect the legitimate interest of Grab. With regard to the requirement of significant imbalance, similar arguments as discussed in section 3.5.4.1 above are also reiterated herein. Additionally, the Australian CCA also sets out several instances of provisions that may indicate some elements of unfairness. For instance, section 25(a) of the Australian CCA provides that a term permitting one party to limit its performance in a contract and consequently be relieved from any liability for any non/partial performance under the contract may be deemed as unfair. It is further argued here that not only it is not necessary to protect one's business interests, it is also unduly excessive. It is contended here that the term is nothing more than an attempt to exonerate themselves from taking any responsibility behind their own operating system, which Grab is in a better position (compared to the users) to control/prevent the interruption from materialising.

In illustrating the above arguments, reference may be made to the case of *JJ Richards*.³⁴⁸ In *JJ Richards*, the Australian Federal Court ruled that a clause removing any liability stemming from any potential interrupted/hindered services (despite that the customer is not in any way responsible for the prevention of such interruption or where the provider is better placed to manage the risk of the interruption), is unfair according to section 24 of the Australian CCA. In this respect, clause 6 of the contract provides that JJ Richards will "*use all reasonable endeavours to perform the collection at the times agreed but accepts no*

³⁴⁸ *JJ Richards* (n 300)

liability where such performance is prevented or hindered in any way".³⁴⁹ Essentially, this is an attempt of JJ Richards to relieve themselves from any form of liability in the event that they fail to perform their obligations under the contract.

Moshinsky J agreed that such a clause had fulfilled all the requirements under section 24 of the Australian CCA and ruled that it was indeed unfair. In this regard, Clause 6 of the contract causes a significant imbalance between the parties as it attempts to absolve the service provider (i.e. JJ Richards) from its performance obligations whilst simultaneously requiring the customers to assume the risk of non-performance without any corresponding benefit to the latter.³⁵⁰ The Court further noted that this clause was not necessary to protect JJ Richards' legitimate interest.³⁵¹

Based on *JJ Richards* as explained above, it may be argued that a clause legitimising non/partial performance on the part of Grab may be considered as an abuse of bargaining power and would potentially distort the contractual imbalance in the parties' rights and obligations. Such a clause would also grant no corresponding benefit to the Non-Consumer Users as it will leave them with no appropriate remedy to be compensated for any damage (e.g. loss of income) that the disruption of the systems may have caused. According to, amongst others, the Australian Competition and Consumer Commissions, a clause of this nature would indeed have the potential to cause a significant imbalance in the parties' rights and obligations under a contract.³⁵²

Of course, one cannot deny that interruption in online services is inevitable. However, it is unreasonable for the Platforms to wholly disclaim liability when things go south. According to the Australian Competition and Consumer Commissions, it was suggested that contractual term of this type may be less prone to being regarded as unjust if, amongst others, any compensation or redress is offered to the consumers when the said provision is triggered.³⁵³ After all, one should be accountable for the goods and/or services that one offers and an attempt to wholly defeat such a notion should be scrutinised to the bone.

³⁴⁹ *ibid*, paragraph 47 of the Judgment

³⁵⁰ *ibid*, paragraph 56(c) of the Judgment

³⁵¹ *ibid*, paragraph 58(c) of the Judgment

³⁵² Australian Competition and Consumer Commission, 'Unfair Contract Terms A Guide for Businesses and Legal Practitioners' (Australian Competition and Consumer Commission 2016) 13 <<https://www.accc.gov.au/system/files/Unfair%20contract%20terms%20-%20A%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>> accessed 20 July 2023.

³⁵³ *ibid*.

3.5.5 General Exclusion of Liability Clauses

Apart from disclaiming the reliability of the Platforms' operating system as one of the ways to insulate them from liability, the Platforms are also known to craft their liability terms to discharge them from any kind of liability (including those which are stemmed from their own negligence) that may arise from their business arrangement/business model. Liability terms denote those provisions that limit or exclude certain rights that one party would typically have under the law. These terms may also reduce the available remedies for the party affected.³⁵⁴ The relevant clauses are set out below:³⁵⁵

Grab		Shopee	
Clause	Term	Clause	Term
21.1	<i>Unless otherwise stated, and to the fullest extent allowed by law, any claims against grab by you shall be limited to the aggregate amount of all amounts actually paid by and/or due from you in utilising the service during the event giving rise to such claims. Grab and/or its licensors shall not be liable for any loss, damage or injury which may be incurred by or caused to you or to any person for whom you have booked the service or solution...</i>	1.3 (Riders)	<i>...The actual contract for delivery service of the products is directly between you and customers. Shopee is not a party to that contract or any other contract between you, merchants, and/or customers, and accepts no obligations or liabilities in connection with any such contract.</i>

³⁵⁴ Hajek (n 340) 1145.

³⁵⁵ For the full quotation of the terms, see Table 6 of Appendix 3 of the thesis.

<p>21.2</p>	<p><i>Grab does not warrant or represent that it assesses or monitors the suitability, legality, ability, movement or location of any consumers or partners including merchants, advertisers and/or sponsors and you expressly waive and release Grab from any and all liability, claims or damages arising from or in any way related to the consumers or partners including merchants, advertisers and/or sponsors.</i></p>	<p>11.1 (Riders)</p>	<p><i>By agreeing to these Terms of Service through the use of the Platform, you agree that you shall indemnify and hold Shopee...harmless from and against any and all claims, costs, damages, losses, liabilities and expenses (including attorneys' fees and costs and/or regulatory action) which any of the Indemnified Party incurs, resulting from, arising out of or in connection with: (a) your use of the Platform in your dealings with Customers, Merchants, service providers, partners, advertisers and/or sponsors...</i></p>
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<p>21.3</p>	<p><i>Grab will not be a party to disputes or negotiations of disputes between you and consumers or partners including merchants, advertisers and/or sponsors....You expressly waive and release Grab from any and all liability, claims, causes of action, or damages arising from your use of the service and/or the platform, or in any way related to the third parties including merchants, advertisers and/or sponsors introduced to you by the service and/or the platform.</i></p>	<p>16.1 (Riders)</p>	<p><i>Shopee and/or its licensors shall not be liable whether in contract, warranty, tort (including, but not limited to, negligence (whether active, passive or imputed), product liability, strict liability or other theory), or other cause of action at law, in equity, by statute or otherwise, for any loss, damage or injury, whether direct or indirect, which may be incurred by you, any customer or merchant...</i></p>
		<p>16.3 (Riders)</p>	<p><i>Nothing in these terms of service shall limit or exclude any liability for death or personal injury caused by Shopee's negligence, for fraud or for any other liability on the part of Shopee that cannot be lawfully limited and/or excluded under applicable laws.</i></p>

		<p>16.4 (Riders)</p>	<p><i>Shopee shall not be a party to any disputes or negotiation of disputes between you and the customers and/or merchants.</i></p>
		<p>4.5 (Merchants)</p>	<p><i>...Shopee makes no representations or warranties and does not ensure the quality, safety and/or legality of any Products. Shopee does not guarantee the identity of any Customers or ensure that a Customer will complete a Transaction.</i></p>
		<p>4.6 (Merchants)</p>	<p><i>...Shopee is not a party to such contracts, and accepts no responsibility, liability, or obligations in connection with any such contract and any dispute arising out of any Product is between the Merchant and the relevant Customers only.</i></p>

		<p>4.7 (Merchants)</p>	<p><i>...the Merchant further agrees that Shopee may, at its sole and absolute discretion, refund the Customer the Transaction Funds without the prior approval of the Merchant.</i></p>
		<p>14.4 (Merchants)</p>	<p><i>Shopee does not and shall not guarantee the safety, reliability, compatibility, or capability of the Driver during the delivery of his/her obligation in delivering the Products from Merchant Outlets to the Customer. Therefore, Merchant hereby holds Shopee harmless and discharge Shopee from any and all responsibility, claim, cause, or damage which occurs from such delivery service by Drivers.</i></p>
		<p>15 (Merchants)</p>	<p><i>The Merchant shall fully indemnify and hold Shopee...harmless from any loss, liability, costs and expenses (including full reimbursement of any legal and professional costs) which the Indemnified Party suffers or incurs as a result of, or in connection with, any claim made or threatened by a third party</i></p>

			<i>relating to any Products, the use of Merchant of ShopeeFood Services or ShopeeFood Platform and/or any breach of any provisions of the Agreement, except for resulting from the negligence, bad faith or wilful misconduct on the part of Shopee.</i>
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TABLE 6

Via the abovementioned terms, both Platforms further refuse to accept any other forms of liability against the Non-Consumer Users. As shown in Table 6 above, both Grab and Shopee clearly disclaim any liability for losses incurred while using their services. Whilst Grab’s exclusion of liability clauses are more general (i.e. blanket exclusion), Shopee, on the other hand, goes a step further by explicitly stating that it cannot be held liable even in cases involving its own negligence (except if Shopee’s negligence causes death or personal injury).³⁵⁶ Although Grab’s exclusion clauses are less detailed than Shopee’s, their broad and generic wording may, arguably, function as a ‘catch-all’ provision. As such, it can be inferred that Grab, like Shopee, seeks to disclaim all forms of liability, including those arising from its own fault/negligence.

The Platforms abstained themselves from any involvement in any potential disputes either between the Non-Consumer Users and consumers or between the Non-Consumer Users themselves.³⁵⁷ In the event that such disputes lead to litigation, the Platforms explicitly preclude themselves from becoming one of the litigants. Further, in the event that the Platforms are sued by any third parties, the Platforms made it mandatory for the Non-Consumer Users to indemnify the Platforms for all liabilities and/or costs associated with such litigation, without any clear segregation on whether or not such liability was accrued due to the Platforms’ fault.³⁵⁸

³⁵⁶ Clause 16.1 of Shopee T&C (Riders). However, Shopee made an exception in connection to their contract with the restaurants. Via clause 15 of Shopee T&C (Merchant), the restaurants are obliged to indemnify Shopee harmless from any loss, liability, costs and expenses as a result of any claims made by a third party against Shopee, except when the claim was due to Shopee’s negligence. The same exception was not granted towards the delivery riders.

³⁵⁷ Clause 21.3 of Grab T&C, clauses 16.3 and 16.4 of Shopee T&C (Riders) and clause 4.6 of Shopee T&C (Merchants).

³⁵⁸ Clause 17 of Grab T&C, Clauses 11 of Shopee T&C (Riders) and 15 of Shopee T&C (Merchants).

3.5.5.1 Malaysian Law

If assessed through the lens of the Malaysian CPA, the exclusion clauses outlined in Table 6 may be considered unfair, especially where drafted broadly to exclude a wide range of liabilities, particularly those arising from negligence. In this respect, section 24D(1)(d) of the Malaysian CPA provides that a term “*excludes or restricts liability for negligence*” may be considered as substantively unfair. However, this authority and/or provision may not be sufficient. As pointed out by Ilias et al.,³⁵⁹ Amin³⁶⁰ and Trakic,³⁶¹ the general threshold of unfairness provided under section 24A(c) would still need to be fulfilled.

In this respect, a term shall be unfair if it causes a significant imbalance in the rights and obligations of the parties arising under the contract, to the detriment of the consumers. Pertaining to the Platforms’ broad exclusion clauses, it is contended here that those clauses may undermine the contractual equilibrium by allowing the Platforms to offload all business risks onto the weaker parties (i.e., the Non-Consumer Users), effectively shielding themselves from any form of liability while continuing to benefit from the arrangement without accountability. The situation would be different if, for instance, the exclusion clauses were not entirely absolute or if similar exclusions were correspondingly extended to the Non-Consumer Users, as this would help restore contractual equilibrium. However, that is not the case.

As argued by Smorto, by wholly disclaiming any liability (especially on this scale), online platforms are actually leveraging their power over the users by considering themselves not liable in any way whatsoever, whilst disproportionately placing the burden on their users.³⁶² Indeed, it is a win-win situation for the Platforms as all commercial and/or legal risks have been inordinately transferred to the Non-Consumer Users alone. Accordingly, such an exclusion of liability may result in a significant imbalance between the parties, particularly as there is no equivalent exclusion of liability afforded to the weaker parties.³⁶³

Smorto further pointed out that it would be inappropriate for the online platforms (which have control over the business model and the system) to shift the burden of responsibility to their users alone, particularly when the issues are outside of their control.³⁶⁴ This exclusion of liability may be troublesome to, for instance, the restaurants, when they are supplied with unreliable riders to deliver their food which will lead to refunds being made by the Platforms to the

³⁵⁹ Ilias and Aziz (n 211) 163.

³⁶⁰ Amin (n 220) 7.

³⁶¹ Adnan Trakic (n 44) 210.

³⁶² Smorto (n 197) 22.

³⁶³ New Zealand Commerce Commission (n 198) 14.

³⁶⁴ Smorto (n 197) 15.

consumers, despite that the restaurants have no say whatsoever in choosing the delivery riders.

On the contrary, the assignments are wholly controlled and arranged by the Platforms and yet, the Platforms are not taking any responsibility concerning the same. By way of this example, one may argue that there is an unjust distribution of risks and as argued by Maultzsch, online platform operators shall bear responsibility for any harm and/or breach arising from the use of their platforms, ensuring a fair distribution of risks and providing appropriate remedies to affected parties.³⁶⁵

Apart from the Malaysian CPA, reference to the Malaysian Contracts Act may also offer some additional insights. In *Bourke*,³⁶⁶ the Malaysian Federal Court had to deal with an important legal predicament:- whether an absolute exclusion of liability clause imposed by the bank in dispute may be legally enforced as it has been mutually agreed by the contractual parties? In answering this question, the Court ruled that a clause of this nature (particularly when it is drafted in a way that it absolves a party from any form of contractual liability) would be considered as an attempt to negate *“the rights of the Plaintiffs to a suit for damages, and the kind of damages as spelt out in the said clause encompasses and covers all forms of damages under a suit for breach of contract or negligence. There is an absolute restriction”*.³⁶⁷

In this respect, the Court referred to section 29 of the Malaysian Contracts Act, where it provides that a term would be void if *“any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals”*. The Court was of the view that an absolute exclusion clause (like the one imposed by the bank) would indeed have the effect of preventing a party from exercising their legal rights and hence, shall be rendered void. By way of application, both of the Platforms’ exclusion clauses, especially when they also exclude liability arising from negligence, may contravene section 29 of the Malaysian Contracts Act. While the provision in question does not explicitly address unfair terms (unlike the Malaysian CPA), it is argued here that if a contractual term can be invalidated under other legal frameworks (e.g. Malaysian Contracts Act), this may indicate that the term is inherently unfair and, as such, warrants further scrutiny.

³⁶⁵ Maultzsch (n 199) 213.

³⁶⁶ *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor* [2018] 1 LNS 1887. For more detailed facts surrounding the case, please see section 4.4 of Chapter 4 of the thesis.

³⁶⁷ *ibid* paragraph 37 of the Judgment

3.5.5.2 European Union Law

Similarly, such an exemption clause may also be deemed unfair under the UCTD regime as it will, contrary to the requirement of good faith, significantly distort the contractual balance between the parties. As pointed out in section 3.5.5.1 above, an exclusion clause that shields a party from any types of liabilities may be viewed as an attempt to preclude another from exercising their rights to commence legal action and/or hinder a party from lawfully exercising their legal rights. Through this blanket disclaimer of liability, the Platforms are leveraging their superior position by absolving themselves of responsibility while disproportionately shifting the burden onto their business users. This argument may further be reinforced by reference to point 1(q) of the Annex of the UCTD indicates that a term which has the effect of precluding one's rights to take legal action against the seller may be deemed unfair.³⁶⁸

In addition to the UCTD, reference to the provisions on unfair terms provided under the EU Data Act may also be helpful in assessing the Platforms' exclusion clauses.³⁶⁹ In this respect, a term shall be treated as unfair if it excludes/limits "*the liability of the party that unilaterally imposed the term for intentional acts or gross negligence*", as per Article 13(4)(a). As can be observed in Table 6 above, both Platforms have a very wide exclusion of liability clauses. Whilst Grab's exclusion clauses³⁷⁰ are drafted in a very broad manner, Shopee's terms³⁷¹ regarding their liabilities categorically exclude liabilities arising out of their negligence. If those terms are assessed using the threshold provided under the Data Act, one may conclude that the said clauses would indeed be deemed as unfair. After all, such a clause is viewed as excessive and reflective of an unequal bargaining position, even in business-to-business contexts, potentially constituting an abuse of that power.³⁷²

3.5.5.3 Australian Law

By virtue of section 24 of the Australian CCA and similar to the argument posed in sections 3.5.5.1 and 3.5.5.2 above, excluding the Platforms' liability and placing most (if not all) of the business/legal risks on the Non-Consumer Users' shoulders would certainly tilt the balance of the parties' rights and obligations as the Platforms have, by way of immunity, all but nothing to lose. Simply put, the said clauses give the Platforms a wide array (if not absolute) form of shield

³⁶⁸ Similar arguments on how a blanket exclusion of liability clause may significantly alter the contractual balance as discussed in section 3.5.5.1 above are also reiterated herein.

³⁶⁹ Though focused on B2B data sharing, the Data Act's aim to protect weaker parties mirrors the situation of imbalanced bargaining power between contractual parties (i.e. the Platforms and the Non-Consumer Users), making Article 13 a useful reference for assessing fairness.

³⁷⁰ Clauses 21.1, 21.2 and 21.3 of Grab's T&C

³⁷¹ Clause 16.2 of Shopee's T&C (Riders)

³⁷² Recital 61 of the Data Act

whereas on the other side of the coin, the same privilege is not granted upon the Non-Consumer Users.

Is the clause necessary to secure the Platforms' legitimate interest? Highly unlikely. It would be different if the exclusion clauses were to be enforced in the event of *force majeure* and/or liabilities related to circumstances beyond the Platforms' control. Unfortunately, that is not how the clauses were drafted. Therefore, a blanket exclusion clause relieving the Platforms from any kind of liability (including those which arise from the Platforms' negligence) would indeed be deemed as unjust and unfair, pursuant to section 24 of the Australian CCA. Further and similar to section 29 of the Malaysian Contracts Act and point 1(q) of the Annex of the UCTD, section 25(k) of the Australian CCA also provides that a term that limits, or has the effect of limiting, one party's right to sue another party may potentially be deemed as unfair. As argued previously, the exclusion clauses are clear examples of limiting (or even wholly barring) the Non-Consumer Users from taking any legal action against the Platforms, a benefit that is not similarly granted to the Non-Consumer Users.³⁷³

In *Servcorp*,³⁷⁴ the Australian Federal Court found that the exclusion of liability clause imposed by Servcorp against their SMEs counterparts to be unfair pursuant to section 24 of the Australian CCA. Servcorp (and its subsidiaries) offered serviced and virtual offices with office suites, secretarial assistance and communication support in 24 locations across Australia. These services were governed by their adhesion contracts with many small businesses as their clients. Amongst the clauses that were found to be unfair were clauses 5(b) and 5(d) of Servcorp's terms and conditions. The former obliges the small businesses to insure all goods kept on the premises and stipulates that Servcorp bears no responsibility for any loss, theft or damage to those goods (regardless of cause), whilst the latter expressly provides that "*The client will not make any claim in tort, contract or otherwise against Servcorp*".

In line with the ACCC's contention, the Court ordered that both of Servcorp's exclusion clauses (i.e. clauses 5(b) and 5(d) were unfair according to section 24 of the Australian CCA). In this respect, the Court mentioned that such clauses have the effect of limiting or purporting to limit the small businesses' right to sue Servcorp, even when the former has legitimate claims against the latter.³⁷⁵ There is no clause which imposes any reciprocal limitation on Servcorp, which has the absolute liberty to commence legal actions against the small businesses. The Court also agreed that these clauses are not necessary to protect Servcorp's legitimate business interests. Taken together, these findings

³⁷³ Although this is particularly pronounced in the Grab's policy, as a result of distinctions in how the exclusion clauses were formulated compared to Shopee's. See footnote 356 above.

³⁷⁴ *Australian Competition and Consumer Commissions v Servcorp Ltd* [2018] FCA 1044

³⁷⁵ *ibid*, paragraph 43 of the Judgment

demonstrated that the said clauses produced a significant imbalance in the rights and obligations of the parties and would cause detriment to the small businesses, if enforced.

Further, in *JJ Richards*, JJ Richards incorporated an unreasonably broad indemnity clause, requiring its customers to indemnify JJ Richards from and in respect of all liabilities, claims, damages, actions, costs and expenses which may be incurred by them on a full indemnity basis as a result of the services provided.³⁷⁶ The Australian Federal Court ordered that such an indemnity clause is indeed unfair as:- (1) it creates an unlimited indemnity in favour of JJ Richards, even where the loss incurred by JJ Richards is not the fault of its customers or could have been avoided or mitigated by JJ Richards; (2) the indemnity clause does not grant any corresponding benefit on its customers; and (3) it causes a significant imbalance in the parties' rights and obligations under the contract.³⁷⁷

In conclusion and as can be observed via the unfairness assessment provided under the Australian CCA as well as the supporting judicial precedent, it can be argued that the exclusion of liability clauses as incorporated by the Platforms would be considered as unfair. This is considering the fact that the purported clauses would indeed cause a significant imbalance between the parties and are not required to protect the Platforms' legitimate business interests. Instead, the clauses are drafted in a one-sided manner in which the Non-Consumer Users would have no comparable benefit nor the same level of immunity, the level of which is exclusively enjoyed by the Platforms alone.

3.5.6 Arbitration as the Sole & Exclusive Dispute Resolution Avenue

Clauses precluding disputes from being referred to litigation in court have become the bread and butter of big corporations in designing their dispute resolution process against their counterparties, including consumers, their own employees and even their commercial B2B contractual partners.³⁷⁸ Upon perusal of the Platforms' T&C, both Platforms take the same stance on the forum of dispute in which both Grab and Shopee unilaterally dictate arbitration as the sole forum mediating any dispute between them and the Non-Consumer Users. However, Shopee provides that there shall be an attempt to reach to an amicable settlement should there be any dispute between the restaurants and Shopee. Interestingly, the same internal grievance mechanism process is not afforded to the riders. The relevant terms and conditions are set out in Table 7 below.³⁷⁹

³⁷⁶ *JJ Richards* (n 300), paragraph 51 of the Judgment

³⁷⁷ *ibid*, paragraph 56(g) of the Judgment

³⁷⁸ Richard M Alderman, 'Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers' (2009) 12 *Journal of Consumer & Commercial Law* 151, 156.

³⁷⁹ For the full quotation of the terms, see Table 7 of Appendix 3 of the thesis.

Grab		Shopee	
Clause	Term	Clause	Term
24.1	<p><i>This Terms of Service shall be governed by Malaysian law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Terms of Service or the Service shall be referred to the Asian International Arbitration Centre (“AIAC”)...</i></p>	20.1 (Riders)	<p><i>These Terms of Service shall be governed by and construed in accordance with the laws of Malaysia. Any dispute, controversy, claim or causes of action arising out of or in connection with these Terms of Service against or relating to Shopee shall be referred to and finally resolved by arbitration administered by the Asian International Arbitration Centre (“AIAC”)...</i></p>
		16 (Merchants)	<p><i>The Agreement shall be governed by the laws of Malaysia. In the event any dispute, controversy, claim or difference of any kind whatsoever shall arise between the Parties in connection with this (“Dispute Notice”), the Parties shall attempt, for a period of thirty (30) days after the receipt by one (1) Party of a notice from the other Party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions between the senior management of each of the Parties. If the Dispute cannot be settled by mutual discussions within the</i></p>

			<i>thirty (30) days period, it shall be referred to and finally resolved by arbitration administered by the Asian International Arbitration Centre (“AIAC”)...</i>
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TABLE 7

3.5.6.1 Malaysian Law

The Malaysian CPA, unfortunately, does not have a specific provision dealing with a clause mandating arbitration as the sole and exclusive dispute resolution avenue. However, it is argued here that this type of clause may be deemed as substantively unfair by virtue of section 24D(2)(a) of the Malaysian CPA whereby:-

“(2) For the purposes of this section, a court or the Tribunal may take into account the following circumstances:

(a) whether or not the contract or a term of the contract imposes conditions—

(i) which are unreasonably difficult to comply with;

or

(ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract;”

Pursuant to the two factors set out in section 24D(2)(a) above, one may argue that the Platforms’ clauses pertaining to the dispute resolution process may be deemed unfair given that:- (1) it is unreasonably difficult to be exercised upon; and (2) it is not reasonably necessary to secure the Platforms’ legitimate interest. With regard to the former, the costs of conducting an arbitration proceeding are, more often than not, substantially higher than court’s proceedings. These costs may include arbitrator’s fee, administrative fees and legal professional’s fees.

For example, when an arbitration is to be conducted at the Asian International Arbitration Centre in Malaysia (as mandated under the Platforms’ T&Cs), the minimum costs of the proceeding would amount to approximately MYR 17,800 (around EUR 3,528).³⁸⁰ This fee covers administrative and arbitrator fees only. The Non-Consumer Users has to also consider the legal fees in order to engage their own legal representative. Hypothetically, if we take a one-

³⁸⁰ <https://www.aiac.world/fee-calculator>

month's minimum salary of MYR 1,700³⁸¹ (around EUR 366) as the total amount of dispute, the Non-Consumer Users would have to spend approximately 1,000 times more on the dispute than what the dispute is actually worth. Therefore and due to this reason alone, it is argued here that compelling the Non-Consumer Users to resolve disputes through arbitration imposes an undue burden, making the term difficult and often impractical to comply with.

It is also argued here that a term conferring arbitration as the exclusive dispute resolution mechanism is not necessary to protect the Platforms' business interests. In this respect, the Platforms can always opt for other dispute resolution processes such as mediation and/or litigation, which are not only more transparent than arbitration but also more cost-effective for both the Platforms and Non-Consumer Users. These reasons alone are sufficient to debunk the idea that arbitration may serve as the best dispute-resolution mechanism for all the parties involved. In essence, there are not enough reasons to justify the Platforms' choice of arbitration as the sole dispute resolution avenue.

As pointed out previously, section 24D (i.e. substantive unfairness) is merely illustrative and therefore, the general threshold of significant imbalance as laid down under section 24A(c) of the Malaysian CPA would still need to be fulfilled. This raises the question of whether a clause imposing arbitration as the sole forum for dispute resolution has the potential to significantly alter the contractual equilibrium to the detriment of one party?

Consistent with the arguments put forward in the preceding paragraphs, it is reiterated here that the primary concern regarding the arbitration term is the associated costs, which are generally higher than court litigation, and to engage a legal practitioner in representing them in the proceedings would most likely cost the Non-Consumer Users more than what the disputes are worth.³⁸² This factor alone would definitely impact the working-class families, hindering them from having an effective and smooth dispute resolution recourse.³⁸³ Gebert also expressed a similar stance regarding the cost of arbitration, which may stand as a barrier and/or obstacle to access to justice as it can be presumed that not everyone would have the financial resources and/or capability needed to resort to this particular branch of alternative dispute resolution.³⁸⁴

In light of the above, it is contended here that electing arbitration as the sole method of dispute resolution is, among other things, financially burdensome and may therefore deter the Non-Consumer Users from pursuing legal action against the Platforms through this (only) channel. Consequently, where

³⁸¹ The Minimum Wages Order 2024 [P.U.(A) 376/2024]

³⁸² Stone and Colvin (n 170) 3.

³⁸³ Kate Hamaji (n 171) 4.

³⁸⁴ Alexander Gebert (n 172) 295.

the likelihood of initiating legal action is diminished, it appears that this may serve as one of the ways in which the platforms shield themselves from potential legal liability. In this context, the arbitration clause can be seen as a secondary line of defence, complementing the exclusion clauses previously discussed in section 3.5.5 above, which serve as the primary safeguard. Therefore, when the Platforms enjoy almost-absolute immunity from legal accountability, it can be argued that this creates a substantial imbalance, granting the platforms a dominant contractual position whilst effectively placing the Non-Consumer Users in a significantly disadvantaged position.

3.5.6.2 European Union Law

From the UCTD perspective and given a similar line of arguments discussed in section 3.5.6.1 above, the Platforms' clauses regarding arbitration will most likely cause significant imbalance in the parties' rights and obligations. In support of this contention, reference may also be made to point 1(q) of the Annex of the UCTD, where a term may be considered unfair if it has the effect of *"excluding or hindering the consumers right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration"*. Further, in *Zsolt Csaba Kővári*,³⁸⁵ the CJEU ruled that a consumer is not bound by an arbitration term if:- (1) the arbitration clause has the purpose or effect of excluding or hindering the consumer's right to commence legal action via any other remedy; and (2) the mere fact that the consumer was informed about the ramifications of resorting to arbitration instead of court litigation would not automatically negate the assessment of unfairness of such clause.

Additionally, Article 18 of the Platform Work Directive provides that *"persons performing platform work, including those whose employment or other contractual relationship has ended, have access to effective and impartial dispute resolution and a right to redress..."*. Similarly, Article 16 of the Working Conditions Directive states that *"workers, including those whose employment relationship has ended, have access to effective and impartial dispute resolution and a right to redress..."*. It is also interesting to note that Recital 40 of the Working Conditions Directive illustrates *"effective and impartial dispute resolution"* as *"...such as civil or labour court"*, while omitting arbitration as one of the examples of *"effective dispute resolution"*. Whilst the Directive employs the words *"such as"* and one may assume that the examples cited are simply non-exhaustive, one may wonder the reasoning behind it and whether forcing the workers to solely refer to arbitration would amount to an ineffective dispute resolution avenue.

³⁸⁵ Case C-342/13 *Katalin Sebestyén v Zsolt Csaba Kővári and Others*

Both the Platform Work Directive and the Working Conditions Directive also emphasise “access”, which in my view, implies that the mere reference to arbitration may not be unconscionable and/or unfair per se. What matters the most is offering the counterparty the opportunity to access to an effective dispute resolution process. Of course, the Platforms are free to argue that arbitration may also serve as an effective dispute resolution. The question is whether the Non-Consumer Users indeed have access to the same? If the answer is in the negative, logic dictates that such a clause may be rendered unfair.

For instance, Grab dictates that “*the fees of the Arbitrator shall be borne equally by you (Non-Consumer Users) and Grab*”³⁸⁶. As pointed out previously, arbitration is significantly more expensive than court proceedings, often requiring high administrative and legal costs.³⁸⁷ Therefore, one can argue that owing to this financial factor, arbitration may not be accessible to the vast majority of the Non-Consumer Users (if not to all). In this respect, Grab's 2023 annual report highlights a net income of US\$60 million (approximately EUR 51 million), with Malaysia remaining its largest market, generating US\$673 million (EUR 573 million) in revenue, representing a 32% year-on-year increase.³⁸⁸ Given the assumed indicative income levels of the Non-Consumer Users (particularly the riders) discussed in section 3.5.6.1 above and the financial disparity between parties, it would be inequitable to expect the Non-Consumer Users to shoulder the arbitration costs equally with the Platforms. Whether the case is decided in favour of the Non-Consumer Users or otherwise, they would still have to bear half of the arbitration costs, as per the agreement. Due to this inaccessibility, it would indeed deter the Non-Consumer Users from even initiating any legal action against the Platforms.

The issue of ‘accessibility’ may also be assessed by the language that is to be used in the proceedings. Both Platforms make it mandatory for the arbitration procedure to be conducted fully in the English language.³⁸⁹ This particular requirement imposed by the Platforms is, arguably, burdensome and/or unfair to the Non-Consumer Users, as English, though widely spoken across the globe, is not the primary language in Malaysia. Additionally, considering the probabilities that a substantial number of the Non-Consumer Users are not professionals and may not have high level academic background, having to participate in proceedings in a foreign language may be (too high) an obstacle. Thus, one may argue that constricting the Non-Consumer Users to a particular forum and imposing a non-native language as the only acceptable medium of

³⁸⁶ See Table 7, Clause 24.1 of Grab's T&C

³⁸⁷ See section 3.5.6.1 above

³⁸⁸ Chelsea Lee Jia Shi (n 59).

³⁸⁹ Clause 24.1 of Grab's T&C, clause 20.1(a) of Shopee's T&C (Riders) and clause 16 of Shopee's T&C (Merchants).

communication in dispute resolution proceedings may be argued as preventing the Non-Consumer Users from resorting to an effective dispute resolution mechanism.

3.5.6.3 Australian Law

Section 25(k) of the Australian CCA provides that a term may be deemed unfair if such term “*limits, or has the effect of limiting, one party's right to sue another party*”. One may argue that by incorporating a clause forcing the Non-Consumer Users to refer their dispute to arbitration, it may have the effect of limiting the latter’s right to sue the Platforms as the clauses essentially forced the Non-Consumer Users to waive their rights to other dispute resolution avenue (e.g. litigation). The application of section 25(k) of the Australian CCA with regard to the arbitration clause was discussed by the Australian Federal Court in *Dialogue*.³⁹⁰

In this case, Dialogue’s access to Instagram was suspended due to the allegation of breaching Instagram’s terms of service. While the mediation in court took place between the parties, Instagram decided to file a stay of proceeding with the view to refer their dispute to arbitration in California, the United States of America. Opposing the application, Dialogue contended that Instagram’s arbitration clause is unfair due to, amongst others, section 25(k) of the Australian CCA. Dialogue’s contention was rejected by the Court, partly on the basis that, amongst others, it had the opportunity to opt out of the arbitration clause within 30 days of the contract’s conclusion; however, Dialogue chose not to exercise this right.

The Federal Court went further and ruled that even if there was no option to opt-out to begin with, the arbitration clause would still not be caught under section 24(1) of the Australian CCA. In this respect, the Court was of the view that the arbitration clause did not create a significant imbalance between Instagram and Dialogue given that, amongst others, the arbitration agreement gave both parties an equal right to refer a dispute to arbitration.³⁹¹

With due respect, I beg to differ on this particular reasoning. It is argued here that the mere fact that an arbitration clause offers equal opportunity to all parties to initiate arbitration (as pointed out in the *Dialogues’* case) does not necessarily mean that each party possesses the actual capacity to do so. The determination of unfairness remains inherently context-dependent and must be assessed on a case-by-case basis. As rightly pointed out by the Court, whether or not a term “*causes significant imbalance is a question of fact*”.³⁹²

³⁹⁰ *Dialogue Consulting Pty Ltd v Instagram, Inc.* [2020] FCA 1846

³⁹¹ *ibid*, paragraph 346 of the Judgment

³⁹² *ibid*, paragraph 344 of the Judgment

In practice, one party often enjoys a significant advantage in terms of financial resources to bear the costs of arbitration, while the other may lack such means. Accordingly, there remains a valid basis to argue that a clause mandating disputes to be resolved exclusively through arbitration, particularly when unilaterally imposed by a stronger party on substantially weaker counterparts such as the Non-Consumer Users, may be deemed unfair. It is reiterated here that the Non-Consumer Users are significantly weaker than the Platforms, in terms of their bargaining power and their capabilities in absorbing the costs associated with the said arbitrations (particularly the riders and micro to small-sized restaurants). Therefore, it is reasonable to conclude that the arbitration clauses as imposed by the Platforms may be deemed as unfair, due to the foregoing justifications as discussed above.

3.6 Conclusion

Drawing from the above analysis, the presence of multiple unfair terms in the adhesion contracts of both Platforms' T&C is evident. Although Malaysia, at present, does not have a specific unfair terms legislation catering to the OFDS industry (or P2B contracts in general), the purported terms may nevertheless be deemed as unfair when the said terms are assessed through the lens of the chosen legal framework. These impugned unfair terms may be grouped into six distinct categories:- (1) the Platforms' unilateral power to amend any contractual terms; (2) Grab's No-Refund Policy; (3) the Platforms' unilateral power to arbitrarily terminate the Non-Consumer Users' accounts without basis; (4) non-guarantee of the platforms' reliability; (5) the Platforms' wide exclusion and/or restriction of liabilities; and (6) arbitration as the sole dispute resolution avenue.

These terms, upon close scrutiny, are clearly drafted solely for the benefit of the Platforms to the detriment of the Non-Consumer Users, causing a significant imbalance in the rights and obligations of the parties. Moreover, as previously argued, these terms are imposed unilaterally on a take-it-or-leave-it basis, and none of them are necessary to secure or protect the Platforms' legitimate business interests. One could even argue that these terms may well stem from the Platforms' abuse of their strong bargaining power, to the detriment of the Non-Consumer Users.

These findings lead us to the next pertinent question:- given the absence of a specific unfair terms control designed to regulate the OFDS business model in Malaysia, are there any other legal recourses available under the Malaysian legal framework that may be utilised as a safety net to safeguard the Non-Consumer Users from the implications of the Platforms' unfair terms? If the answer is in the affirmative, then it goes without saying that the Non-Consumer Users are sufficiently protected against the implications of unfair terms. However, if

the answer is in the negative, this would further support our normative claim in warranting a systematic unfair terms legislation governing P2B transactions (particularly within the context of the OFDS business model) in Malaysia. This pivotal question will be discussed further in Chapter 4 of the thesis.

4. EXISTING MALAYSIAN LEGAL RULES AS ALTERNATIVE SAFEGUARDS

4.1 Introduction

As a common law country, Malaysia places great emphasis on respecting parties' freedom to negotiate, define and allocate their contractual risks. Be that as it may, Malaysian courts are willing and able to restrict this freedom by reviewing agreements that may be tainted with procedural issues such as contracts that were concluded under undue influence, fraud and duress (to name a few). The courts' intervention in reviewing procedural issues in any given contract stems from the enabling provisions enacted by the Malaysian Parliament in the Malaysian Contracts Act. For instance, section 14 of the Malaysian Contracts Act sets out five factors that vitiate one's free consent:- coercion, undue influence, fraud, misrepresentation and mistake.³⁹³

The development of contract law in Malaysia has gone beyond a mere focus on procedural issues as potential reasons for judicial intervention. In this respect, Malaysian contract law has widened the courts' power to review unfair terms/contracts from the substantive point of view, especially when parties do not stand on an equal level playing field and do not meet on equal terms. This is evident through the Malaysian Parliament's initiative to introduce a specific unfair terms control mechanism for consumers through Part IIIA of the Malaysian CPA. The applicability of this mechanism, however, is limited as it is only available to consumers.

In my view, this restriction/limitation could raise some concerns. As shown in Chapter 2 of this thesis, vulnerability against the imposition of unfair terms is not exclusively present in B2C transactions. Rather, these vulnerabilities may also exist within B2B/P2B contracts, particularly where one party holds significantly weaker bargaining power compared to the other, such as the contracts between the Platforms and the Non-Consumer Users. In this situation, there is ample room for the stronger party to impose unfair terms to the detriment of the weaker, as evident in Chapter 3 of this thesis.

The said analysis so far has revealed that there are at least six categories of terms ("collectively referred to herein as "**Identified Terms**") within the Platforms' adhesion contracts that may be deemed unfair against the Non-Consumer Users. These terms are:-

- (a) Platforms' power to unilaterally amend contractual provisions (section 3.5.1) (hereinafter referred to as "**Unilateral Amendment**");

³⁹³ Contract is voidable at the option of the party whose consent was impacted in the case of coercion, fraud, misrepresentation and undue influence. A contract that is tainted with undue mistake will be void if all parties to the agreement are under a mistake as to a matter of fact essential to the agreement.

- (b) Grab’s no-refund policy (section 3.5.2) (hereinafter referred to as “**No-Refund Policy**”);
- (c) Platforms’ power to unilaterally terminate the users’ accounts (section 3.5.3) (hereinafter referred to as “**Unilateral Termination**”);
- (d) Non-Guarantee of the reliability of the Platform’s system (section 3.5.4);
- (e) Wide exclusion clauses shielding the Platforms from various forms of liabilities (section 3.5.5) and
- (f) Arbitration as the sole dispute resolution avenue (section 3.5.6) (hereinafter referred to as “**Arbitration Clause**”).

In this chapter, I will collectively refer to the non-guarantee of the reliability of the Platform’s system (i.e. point (d) above) and the wide exclusion clauses shielding the Platforms from liability (i.e. point (e) above) as “**Exclusion Clauses**”.

Considering our findings above and the limited applicability of the Malaysian CPA, it can be said that Malaysian contract law, *prima facie*, leaves vulnerable and/or weaker business entities such as the Non-Consumer Users out of the loop and hence, exposed to potential exploitation by their stronger counterparts (i.e. Platforms). This predicament gives rise to an important question: *to what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users?* This chapter is primarily devoted to addressing this question.

Throughout this chapter, I will analyse first several provisions embedded under the Malaysian Contracts Act and judicial doctrines developed by various common law courts (as applied, adopted and/or further developed by the Malaysian courts) to determine whether these rules can serve as effective substitutes for unfair terms legislation. In doing so, I will examine:- (1) the scope of these legal instruments under the Malaysian contract law framework; and (2) to what extent they may offer protection to the Non-Consumer Users (i.e. the effectiveness of the rules). As to the former, the analysis will cover the general scope of each rule, its key components/elements and the conditions under which they are triggered.

Pertaining to the latter, the effectiveness of the rules as effective substitutes of unfair terms control within the OFDS industry will be tested. This test of effectiveness will be conducted in two stages. Firstly, I will examine whether the legal rules possess the doctrinal capacity to offer protection to the Non-Consumer Users. In this stage, the five Identified Terms will be utilised as the proxy/benchmarks to evaluate the extent to which each rule’s theoretical potential may affectively address unfair terms. However, each rule possesses its own flaws and/or challenges in terms of its implementation. In this stage, we

will identify any procedural, doctrinal or institutional challenges that may hinder their overall effectiveness as a genuine replacement for unfair terms legislation.

The abovementioned analysis will, in my view, help to assess whether the time has come for Malaysia to acknowledge that there is a need for a separate and systematic statutory protection against unfair terms in P2B contracts, especially within the context of the OFDS business model involving the Platforms and the Non-Consumer Users.

Building on the Identified Terms discussed in Chapter 3 and the existing Malaysian contract law framework, this chapter will consider and analyse the following rules:

- (i) The doctrine of unconscionability (*see section 4.3 below*);
- (ii) Rules of construction in interpreting ambiguities in a contract (*see section 4.4 below*);
- (iii) Section 29 of the Malaysian Contracts Act, which prohibits any terms that absolutely prevent a party from exercising its legal rights (*see section 4.5 below*); and
- (iv) The common law doctrine of unjust enrichment and section 71 of the Malaysian Contracts Act (*see section 4.6 below*).

The selection of the abovementioned legal rules (whether statutory or judicial principles) is mainly based on two criteria: (1) functional potential; and (2) doctrinal relevancy. With regard to the former, the rules were selected based on their potential to address unfair terms, particularly the Identified Terms discussed in Chapter 3. These Identified Terms are then used as benchmarks to gauge the applicability of each rule, serving as illustrations to demonstrate whether the existing legal rules embodied in the Malaysian contract law framework may sufficiently serve as a substitute for unfair terms legislation, particularly in the context of P2B transactions.

As the Identified Terms concern substantive rather than procedural unfairness, it is appropriate to examine legal rules that have the functions of policing contractual content, rather than those aimed at procedural deficiencies such as mistake or undue influence. For instance and as will be shown in sections 4.3 to 4.6 below, each rule may address some (if not all) of the Identified Terms, depending on their elements and the way they function generally. These findings indicate that despite the absence of a specific unfair terms legislation in P2B contracts, there are plausibilities of addressing unfair terms by utilising the existing legal instruments to the Non-Consumer Users' advantage.

These legal rules were also identified due to their doctrinal relevance. In this respect, these rules were selected because they have been, directly or indirectly, recognised in addressing issues of contractual imbalance, unconscionability, transparency or fairness in general, concepts that are central to the

regulation of unfair terms. In other words, these issues are precisely the types of predicaments that commonly exist in the realm of contract law, which unfair terms legislation primarily seeks to address. For instance, the doctrine of unconscionability targets unconscionable bargains that arise from an abuse of contractual imbalance. Similarly, the rules of interpretation are designed to address the problem of contractual opacity or lack of transparency. Given that both contractual imbalance and lack of transparency are among the central concerns of unfair terms legislation, the chosen rules are doctrinally relevant and therefore warrant further exploration.

In addition to the Malaysian Contracts Act and the selected judicial doctrines, I will also discuss the Gig Workers Bill 2025, which was recently passed by the Parliament in September 2025. In section 4.7 below, I will discuss the applicability of the Bill and to what extent it may protect the Non-Consumer Users. I will also assess the Bill's limitations as a substitute for dedicated unfair terms legislation, including its restricted scope of protections and debatable enforcement mechanisms.

4.2 Brief Overview of the Malaysian Legal System

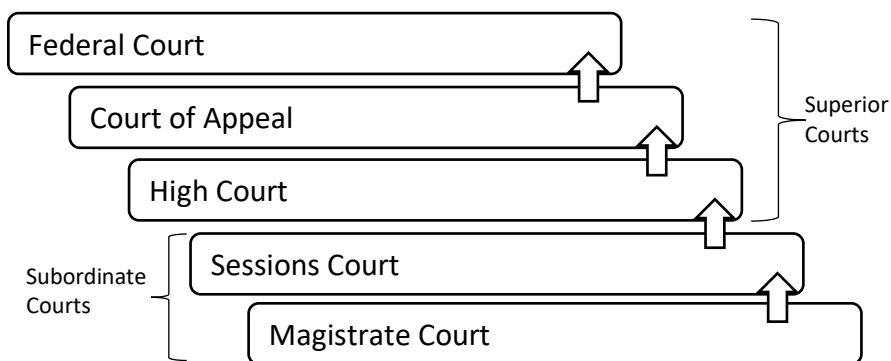
Before we delve into the analysis and given that this chapter is mainly devoted to Malaysian law, it is helpful to first outline the key features of this common law-based system, especially with regard to the rules governing contractual relationships. Unlike other common law countries, Malaysia codified the rules and/or principles of contract law via its Malaysian Contracts Act. This act sets out various provisions on the fundamental rules of contract law, covering everything from the elements necessary for contractual formation to the rules for contractual performance, as well as the consequences of non-performance.

In Malaysia, there are two recognised sources of law: primary and secondary.³⁹⁴ Primary sources consist of legislation enacted by the Parliament and judicial precedents decided by the Malaysian courts. On the other hand, secondary sources refer to, amongst others, journal articles, academic textbooks and law reviews. Whilst the former is binding on the courts, the latter does not (though it may be persuasive). The Malaysian Contracts Act, being a piece of statutory legislation, is classified as a primary source of law. As highlighted previously, the provisions contained in the Malaysian Contracts Act are the basic rules that act as foundational guidelines in governing contractual relationships. Often, these provisions need to be interpreted and developed further by the courts, in order to apply the rules to each and every dispute brought before them.

³⁹⁴ Edzan N N, 'Malaysian Legal Sources' (2000) 5 Malaysian Journal of Library and Information Science 19.

In interpreting statutory provisions, the Malaysian courts are also bound by the principle of *stare decisis*.³⁹⁵ *Stare decisis* simply means that a lower court is always bound by the decision of a court that is higher in the hierarchy. This principle would provide a degree of certainty in the law by ensuring that courts consistently apply the same rules or legal principles whenever the factual background of a dispute is comparable. Courts in Malaysia are essentially divided into two tiers: superior and subordinate. The superior courts consist of three levels: starting with the High Court, the Court of Appeal and the Federal Court, which serves as the highest court in Malaysia.

In contrast, the subordinate courts include the Magistrates' Court and the Sessions Court, with the Magistrates' Court being the lowest in the judicial hierarchy. Any civil dispute can be initiated and heard in either the Magistrates' Court, the Sessions Court or the High Court, depending on the amount claimed and the type of relief sought.³⁹⁶ Within the context of the said proceedings, the roles of the Court of Appeal and the Federal Court are confined to hearing appeals arising from decisions of the lower courts.³⁹⁷ In general and as previously mentioned, the decisions of higher courts are binding on lower courts. For instance, all courts are bound by the decisions of the Federal Court; the decisions of the Court of Appeal are binding on all courts below it; and both the Magistrates and Sessions Courts (as subordinate courts) are bound by the rulings of all superior courts.³⁹⁸



³⁹⁵ *Kejuruteraan Bintang Kindenko Sdn Bhd v Fong Soon Leong* [2021] 2 MLJ 234, paragraphs 72 to 73 of the Judgment and *Kerajaan Negeri Pahang Darul Makmur & Os v Seruan Gemilang Makmur Sdn Bhd* [2008] MLJU 406, page 3 of the Judgment.

³⁹⁶ See sections 65 and 90 of the Malaysian Subordinate Courts Act 1948.

³⁹⁷ See sections 67, 96 and 97 of the Malaysian Courts of Judicature Act 1964.

³⁹⁸ It is important to note that although the Sessions Court is hierarchically higher than the Magistrates Court, its decisions are not binding on the latter. Nonetheless, such decisions may carry persuasive authority.

In terms of composition, Malaysia has a single Federal Court and a single Court of Appeal. At the High Court level, institutionally, there are two courts of co-ordinate jurisdiction, namely the High Court of Malaya and the High Court of Sabah and Sarawak. Operationally, it is to be noted that the High Court sits in each of the 13 states and 3 Federal Territories of Malaysia. Pertaining to the subordinate courts, both Sessions and Magistrates' Courts sit throughout Malaysia, with multiple courts established in each state and federal territories.

In ascertaining the current state of law on any legal rules, especially when there are conflicting rulings/outcomes by the same court (but presided by different judges in different cases), the rule of stare decisis may work differently (i.e. whether vertically or horizontally). Horizontally, judicial rulings issued by the same courts (presided over by different judges) are not binding on each other. For instance, the ruling of the High Court in one state is not binding on another High Court in another state, just as a ruling by the Court of Appeal in one case does not bind another case presented to the same court in the future. However, if there are conflicting decisions made by the Federal Court, the most recent decision will take precedence over the earlier one.

Vertically, if there are conflicting legal rulings pertaining to the same legal issue and if the conflicting judgments were issued by, for instance, the High Court in one state and the one in other state, the subordinate courts (i.e. Magistrates and Sessions Court) may choose any of the legal rulings as they think fit. The same principle applies if the conflicting decision was made by the Court of Appeal in two separate cases. In this situation, the lower courts (i.e. including the High Court) may choose any ruling as they think appropriate. However, if there are conflicting decisions made by the Federal Court in two different cases, the lower courts are bound by the latest decision as it represents the current state of law.

Additionally, this chapter will also refer to case-law decided by courts in other common law countries, including England, Canada and India. In general, none of these decisions are strictly binding upon the Malaysian courts. However, when there is a *lacuna* in the Malaysian law, the local courts are bound by the common law of England and the rules of equity (whether via their statutory legislations or judicial precedents), provided that the said laws were enacted/decided before the cut-off date prescribed under section 3 of the Malaysian Civil Law Act 1956.³⁹⁹ With regard to the laws that were developed after the cut-off date, though they are not binding, the Malaysian courts readily consider them from time to time as they carry persuasive value. In any event, the

³⁹⁹ For Peninsular Malaysia, the cut-off date is 7 April 1956, 1 December 1951 for the State of Sabah and 12 December 1949 for the State of Sarawak.

application of English law in the event of a *lacuna* shall only be permitted if it suits the circumstances in Malaysia.⁴⁰⁰

4.3 Common Law Doctrine of Unconscionability

4.3.1 Doctrinal Framework of the Law

The doctrine of unconscionability has been employed by the Malaysian courts to overcome circumstances of unequal bargaining power that may lead to a grossly unfair and/or unconscionable bargain.⁴⁰¹ This doctrine has been applied by the Malaysian courts as early as 1983. However, it is pertinent to note that the Malaysian Courts often do not explicitly and structurally articulate the necessary elements to be proven for the doctrine to be triggered (as can be seen in our discussions below). In *Loi Hieng Chiong*,⁴⁰² the Appellant and Respondent entered into an agreement to exchange two parcels of land, one in Kuching (owned by the Respondent, an old farmer) and the other in Sibü (owned by the Appellant).

The Appellant falsely represented that the Sibü land was worth RM175,000, far exceeding its true value at the time of the transaction. Relying on this misrepresentation, the Respondent agreed to the exchange. Upon discovering the truth, the Respondent sought to void the contract. Upon inspection, the Court found that the land was grossly overvalued and set aside the agreement on the basis of fraud as the Appellant was not honest about the true value of the land.

According to the Court, the exchange was “*not fair, just and reasonable*”, having regard to the true value of the land.⁴⁰³ Despite that this case has been decided on the ground of fraud, the Court further mentioned that fraud can manifest when there is “*an unconscientious use of power arising out of the circumstances and conditions*”,⁴⁰⁴ and therefore, such a transaction cannot stand. This suggests the Malaysian court was not only ready to invalidate a contract based on substantive unfairness, but to also incorporate the doctrine of unconscionability into Malaysian law and underscores the need for it to be reconsidered in future cases, as and when necessary.⁴⁰⁵

⁴⁰⁰ Section 3 of the Malaysian Civil Law Act 1956.

⁴⁰¹ Cheong May Fong, ‘A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After Saad Marwi?’ [2005] 4 MLJ i’ 4 Malayan Law Journal 1, 5.

⁴⁰² *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31

⁴⁰³ *ibid*, 36

⁴⁰⁴ *ibid*, 35

⁴⁰⁵ Adnan Trakic, ‘The Inequality of Bargaining Power: Does Malaysia Need This Doctrine?’ 17 Australian Journal of Asian Law 23, 31.

In *Fui Lian Credit*,⁴⁰⁶ the Malaysian High Court had to decide whether a lease agreement should be set aside due to it being an unconscionable bargain. However, Siew Fai J (as he then was) also considered the doctrine of inequality of bargaining power alongside the unconscionability principle. With regard to the former, the Court referred to the well-known (and highly controversial) case of *Bundy*,⁴⁰⁷ where the application of the doctrine of unconscionability becomes increasingly complex, as it is somehow intertwined/overlapped with the concept of inequality of bargaining power. In this case, Lord Denning's dictum was intensely debated in subsequent judgments, including those of Malaysian judges (as will be discussed further below).

In this case and for the first time, Lord Denning had explicitly endorsed the notion of 'inequality of bargaining power' (instead of directly affirming/applying the doctrine of unconscionability as in previous cases) as a stand-alone ground to annul a contract. This 'inequality of bargaining power' principle as formulated by Lord Denning was rather an unfortunate choice of words, as it suggests that the court will give relief simply due to unequal bargaining power rather than to an exploitation of that inequality.⁴⁰⁸

According to Lord Denning, the courts may annul a contract if the parties did not negotiate on equal terms-when one party holds significantly more bargaining power than the other. This is what the Lordship called as the doctrine of unequal bargaining power, where three requirements must be satisfied:- 1) there is an inequality of bargaining power between the parties; (2) the terms are unfair; and (3) the weaker party did not receive independent advice.⁴⁰⁹

However, despite Lord Denning's bold efforts, the introduction of the unprecedented doctrine of inequality of bargaining power was short-lived and did not gain lasting traction. For instance, Lord Denning's principle was rejected by Lord Scarman in two subsequent English cases, namely *Pao On*⁴¹⁰ (decision by the Privy Council) and *Morgan*⁴¹¹ (decision by the House of Lords). In *Pao On*, the application of the doctrine of inequality of bargaining power was rejected as the usage of such doctrine would cause uncertainty in law. Lord Scarman further ruled that "*where businessmen are negotiating at arm's length it is*

⁴⁰⁶ *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522

⁴⁰⁷ *Lloyds Bank v Bundy* [1975] 1 Q.B. 326

⁴⁰⁸ Siti Aliza Alias and Zuhairah Ariff Abdul Ghadas, 'Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts' (2012) 6 Australian Journal of Basic and Applied Sciences 331, 332.

⁴⁰⁹ As per Lord Denning: "*By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other*". See *Bundy* (n 407) page 339 of the Judgment.

⁴¹⁰ *Pao On v Lau Yiu Long* [1980] AC 614.

⁴¹¹ *National Westminster Bank Plc v Morgan* [1985] AC 686

unnecessary for the achievement of justice...[it] would also create unacceptable anomaly".⁴¹² Contractual parties should be strictly held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If their consent was never impacted procedurally, "*there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal*".⁴¹³ Similarly, in *Morgan*, the Court explicitly rejected Lord Denning's view by urging it to "*be destroyed now once and for all time*".⁴¹⁴

Coming back to the case of *Fui Lian Credit* and considering this case was decided after the ruling of *Bundy*, Chong Siew Fai J (as he then was) cited with approval both the (1) doctrine of unconscionability and (2) Lord Denning's doctrine of inequality of bargaining power (at least implicitly). The Court made it clear that for a party to be relieved from his obligation in a contract, it must be shown that the contract and/or its terms are unfair and unconscionable. However, unfairness goes beyond mere unreasonableness. It must be shown that "*one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means*".⁴¹⁵

Unfortunately, the Court did not explicitly set out the requirements that need to be fulfilled for the doctrine to be triggered. However, the Judge also cited the ruling of the English cases of *Alec Lobb*⁴¹⁶ and *Hart*⁴¹⁷, from which the necessary elements of the doctrine of unconscionability may be derived. In *Alec Lobb*, Lord Millet established that for a contract to be set aside on the ground of unconscionability, three elements need to be fulfilled:-⁴¹⁸

- (1) a party has found itself at a significant disadvantage compared to the other (this resembles the doctrine of inequality of bargaining power as per *Bundy*);
- (2) the stronger party exploits/takes advantage of the weakness of the other to their benefit in a morally culpable manner; and
- (3) resulting in a transaction that is overreaching and oppressive.

The first element may be demonstrated where a party is at a serious disadvantage to the other, creating circumstances in which unfair advantage could be taken. Pertaining to the second element, the Court gave example of someone who entered into the alleged unfair/unconscionable contract without any

⁴¹² *Pao On* (n 410) page 634 of the Judgment

⁴¹³ *ibid*

⁴¹⁴ *Morgan* (n 411) page 707 of the Judgement

⁴¹⁵ *Fui Lian Credit* (n 406), page 619 of the Judgment

⁴¹⁶ *Alec Lobb (Garages) Ltd and others v Total Oil GB Ltd* [1983] 1 All ER 944

⁴¹⁷ *Hart v O'Connor* [1985] 2 All ER 880

⁴¹⁸ *Alec Lobb* (n 416) page 961 of the Judgment

proper independent advice. However, this is just one of the factors that is relevant in determining whether exploitation has occurred. In assessing whether the stronger party has exploited the disadvantaged party in a '*morally culpable manner*', it must be shown that the stronger party has imposed the purported terms "*in a way which affects his conscience*".⁴¹⁹ The Court in *Alec Lobb* further ruled that there must be some impropriety, "*both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phrase 'shocks the conscience of the court'.*" What does this mean?

In the later case of *Burch*,⁴²⁰ Lord Millet explained that "*In either case it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the court may in a proper case infer the presence of the impropriety from the terms of the transaction itself*".⁴²¹ Simply put, it must be demonstrated that the stronger party knew (or ought to know) of the disadvantage of the weaker party, but yet proceeded to make/offer/incorporate the alleged unfair terms.⁴²² Further explanation regarding the second element may also be found in the English case of *Hart*, where Lord Brightman emphasised the element of victimisation must be present and that it can take place in two forms: either by way of "*the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances*".⁴²³

Pertaining to the last element, unfortunately, the Court in *Alec Lobb* did not sufficiently explain the test to be employed in assessing whether the questionable term is 'overreaching and oppressive'. In this regard, we may refer to another English case of *Multiservice Bookbinding Ltd.*⁴²⁴ (which was also cited by the Malaysian court in *Fui Lian Credit*), where the Court ruled that:- "*The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted*".⁴²⁵ In light of this decision, a term may be considered overreaching and oppressive if it can be deduced that no reasonable person would have accepted the terms, had the parties bargained on a level playing field.

⁴¹⁹ *ibid*

⁴²⁰ *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 14

⁴²¹ *ibid* page 153 of the Judgment

⁴²² *Alias and Ghasas* (n 408) 336.

⁴²³ *Hart* (n 417), page 892 of the Judgment

⁴²⁴ *Multiservice Bookbinding Ltd. and Others v Marden* [1979] Ch. 84

⁴²⁵ *ibid*, page 110 of the Judgment

Based on the abovementioned cases, it appears that the doctrine of inequality of bargaining power may be perceived to be subsumed under the broader doctrine of unconscionability. Hence, unequal bargaining power alone does not necessarily lead to unconscionable bargains. Instead, it forms one of the elements before the doctrine of unconscionability may be triggered.

Three years later and notwithstanding the decision in *Fui Lian Credit*, Visu Sinnadurai J (as he then was) held a different point of view. In the Malaysian High Court case of *Polygram Records*,⁴²⁶ Sinnadurai J explicitly refused to consider Lord Denning's doctrine of inequality of bargaining power as part of Malaysian law. Interestingly, Visu Sinnadurai J did not, for unknown reasons, refer to the ruling made by his colleague in *Fui Lian Credit* in considering whether or not the doctrine of inequality of bargaining power can, though may not be a stand-alone ground to invalidate an unconscionable bargain, be part of the doctrine of unconscionability. The Court also, unfortunately, did not elaborate on the application of the doctrine of unconscionability.

In 2001, 8 years after the decision of Sinnadurai J in *Polygram Records*, the doctrine of inequality of bargaining power as propounded in *Bundy* was recognised and accepted in *Saad Marwi*,⁴²⁷ the first time that this issue has come up for decision at the appellate level (i.e. Court of Appeal). In this case, Saad (the Appellant), was a farmer who earned part of his living by harvesting coconuts in a rented land belonging to the Respondent, a businessman. The Appellant also owned a different piece of land, which the Respondent convinced the Appellant to sell to him for only MYR 42,000.

The agreement was in English, a language Saad did not understand, and he was not represented by a lawyer. Moreover, the agreement stated that the Respondent was supposed to pay a deposit of MYR 4,200, but this deposit was never paid. Instead, and without it being made known to Saad, the said deposit was to be offset against the rental payments that Saad owed to the Respondent for the land on which the coconuts were being harvested. Additionally, Saad was required to obtain an indefeasible title within 12 months of the agreement and secure a court order establishing his ownership, which was eventually unable to be fulfilled by the Appellant.

Later, Saad decided to call off the deal with the Respondent. The Respondent then commenced a legal proceeding against the Appellant. The High Court (the court of first instance) rejected the defence of undue influence raised by Saad. However, on appeal, the Appellant argued that though the High Court had the right to reject the defence of undue influence, the Court should not disregard the fact that there was indeed a case of unfair advantage on the part

⁴²⁶ *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127

⁴²⁷ *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98

of the Respondent in which the inferior bargaining power of the Appellant was duly exploited.

The questions posed before the Court of Appeal were, mainly, whether Malaysian law recognises the doctrine of inequality of bargaining power as per Lord Denning's dictum in *Bundy* and what is the nature/scope of application of such doctrine. Gopal Sri Ram JCA was of the view that "*this is an important case. It has to do with whether our jurisprudence recognizes a doctrine of inequality of bargaining power independent of the well-established doctrine of undue influence. This is the first time, at least as far as I am aware, that this issue has come up for decision at the appellate level*"⁴²⁸ and that "*the time has arrived when we should recognise the wider doctrine of inequality of bargaining power*".⁴²⁹

The Court then made further analysis on both the doctrine of unconscionability and inequality of bargaining power in other jurisdictions, including England and Canada. While analysing the position in England, Gopal Sri Ram JCA acknowledged that the doctrine of inequality of bargaining power as suggested by Lord Denning in *Bundy* has been rejected in the subsequent English cases.⁴³⁰ However, the English doctrine of unconscionability itself is still valid and a good law, as can be found in several English cases such as *Morris*⁴³¹ and *Fry*.⁴³² Given the rejection of the doctrine of inequality of bargaining power in England, Gopal Sri Ram JCA was of the view that the Canadian broader approach may supplement this deficiency. As pointed out by the Court, "*What is therefore called for is a fairly flexible approach aimed at doing justice according to the particular facts of a case... That brings me to the third alternative. This is to adopt the English doctrine [of unconscionability] but apply it in a broad and liberal way as in Canada*".⁴³³ In what manner is the Canadian approach on the doctrine of unconscionability broader and more flexible compared to their English counterpart?

Unfortunately, the Court of Appeal did not clearly or explicitly articulate these distinctions. However, upon analysing the cited case law from both English and Canadian jurisdictions, it appears that the Canadian doctrine departs from the English model in at least two key ways. Firstly, whilst the English courts post *Bundy* have explicitly rejected Lord Denning's doctrine of inequality of bargaining power as an independent basis to annul unconscionable transactions, Canadian courts demonstrate greater flexibility by considering unequal bargaining power as one of the factors when determining whether a transaction is

⁴²⁸ *ibid*, page 103 of the Judgment

⁴²⁹ *ibid*, page 114 of the Judgment

⁴³⁰ See *Pao On* (n 410) and *Morgan* (n 411)

⁴³¹ *Earl of Aylesford v Morris* (1873) 8 Ch. App 484

⁴³² *Fry v Lane* (1888) 40 Ch D 312

⁴³³ *Saad Marwi* (n 427) pages 115 to 116 of the Judgment

unconscionable (with the resulting improvident/unconscionable bargain forming the second requirement). The second difference concerns the remedial aspect of the doctrine. In contrast to English law, which nullifies an unconscionable contract in its entirety, Canadian courts adopt a more flexible approach. Rather than fully rescinding the contract, Canadian courts instead review and/or revise only the specific terms that were deemed unconscionable, as will be shown below.

Pertaining to the consideration of unequal bargaining power as one of the core elements in determining unconscionability, the Court of Appeal in *Saad Marwi* referred to the Canadian case of *Wilcox*,⁴³⁴ where the Ontario Court of Appeal set aside an agreement to sell an undervalued land on the basis of unconscionability. In this case, the vendor was suffering from the effects of alcohol and had no independent advice, facts of which the purchaser was fully aware. The Court set aside the agreement and ruled that a transaction may be set aside if: (1) there is a pronounced inequality of bargaining power; and (2) the transaction appears unconscionable and improvident even on its face.

Based on the analysis on these authorities, the Canadian approach of the doctrine of unconscionability appears to be broader than the English law approach in the sense that: (1) it takes into consideration the unequal bargaining power between parties (whilst the English apex court in *Morgan* have rejected Lord Denning's suggestion); and (2) there is no need for a confidential relationship/relationship of trust to exist between parties before exploitation can occur (as found in *Bundy*).

With regard to the remedial aspect in Canada, the Court of Appeal in *Saad Marwi* referred to *Machnick*⁴³⁵ as an example of the adaptability of Canadian equity in providing remedies. In that case, an illiterate farmer sold her farm that was worth C\$9,000 for only \$2,500. Hart J upheld the plaintiff's claim of unconscionability given her illiteracy and that such disadvantage was exploited by the defendant, leading to an unconscionable bargain (i.e. grossly undervalued price of her property). Consequently, the Court reviewed and revised the unconscionable term (i.e. the price of the subject matter), instead of rescinding the contract of sale as a whole. The Court later awarded additional compensation in lieu of rescission. This approach in the aspect of relief awarded signifies that the Canadian courts' view on the doctrine of unconscionability is broader and more flexible than English law.

⁴³⁴ *Black v Wilcox* [1976] 70 DLR (3d) 192

⁴³⁵ *Paris v. Machnick* [1972] 32 DLR 723

The application of the doctrine of unconscionability in Canada, as explained above, was recently tested by the Supreme Court of Canada (i.e., the apex court), which held an arbitration clause to be unconscionable. In *Heller*,⁴³⁶ Heller had entered into a standard form contract with Uber as an independent contractor. The adhesion contract contains an arbitration clause, mandating that any disputes to be resolved through arbitration in the Netherlands, under the rules of the International Chamber of Commerce. Initiating such arbitration would have required an upfront fee around US\$14,500, a sum nearly equivalent to Heller's annual earnings.

It was then contended that such a clause was unconscionable, given that it would make it difficult for the Respondent (i.e. Heller) to initiate any legal action against Uber. The (large) majority of the Judges ruled that such a clause was indeed unconscionable.⁴³⁷ In this regard, the Court made it explicit that for a term to be regarded as unconscionable, there are two elements that need to be satisfied:- (1) unequal bargaining power; and (2) a resulting improvident bargain.⁴³⁸

Pertaining to the first requirement, the Court found that there is a clear imbalance of bargaining power between Uber and Heller, given that the arbitration clause was embedded in a non-negotiable standard form contract. Regarding the element of improvident outcome, Heller, as an individual contractor, could not have reasonably anticipated that invoking arbitration would require an upfront payment of US\$14,500 (an amount that is nearly equivalent to his annual income). As noted by the majority of the Judges, this initial cost alone was unreasonable given the likely value of any potential claim or arbitral award, rendering the clause disproportionately burdensome against Heller and thus, improvident.⁴³⁹ On this basis, the Court considered that the specific arbitration clause could be invalidated on the basis of unconscionability, without affecting the validity of the contract as a whole.

Based on the authorities mentioned in *Saad Marwi* (and the recent application in *Heller*), in cases of alleged unconscionable bargains where existing laws may not adequately address the situation, Gopal Sri Ram's interpretation in *Saad Marwi* could be seen as a relatively adaptable approach to achieving a fair and just outcome. The Court of Appeal then allowed the appeal and decided the case in favour of Saad, ruling that the contract was indeed unconscionable on the ground of the exploitation of the parties' unequal bargaining power. In this respect, the Court found that the fact that the Appellant was relying on the

⁴³⁶ *Uber Technologies Inc. v. Heller* [2020] 2 S.C.R. 118

⁴³⁷ Out of the nine Justices who heard the case, eight held that the arbitration clause was invalid. Of these, seven relied on the doctrine of unconscionability, while one relied on considerations of public policy.

⁴³⁸ *Heller* (n 436) page 122 of the Judgment

⁴³⁹ *ibid*

Respondent for his livelihood (i.e. harvesting coconuts on the Respondent's land), the Appellant was in a disadvantageous position vis-à-vis the Respondent.

Secondly, the Appellant's inferior bargaining power has been exploited by the Respondent considering the fact that the Appellant did not obtain any independent legal advice on the agreement that was prepared by the Respondent's solicitors in English, a language which the Appellant did not understand. Lastly, the exploitation has resulted in an unconscionable transaction. All of these factors, when scrutinised carefully, fit into the criteria laid down in the English case of *Alec Lobb* (which was later cited with approval in the Malaysian case of *Fui Lian Credit*).

Based on the said outcome, it appears that the current Malaysian position regarding the equitable doctrines of unconscionability and inequality of bargaining power is that the latter is subsumed under the former. Therefore, the doctrine of inequality of bargaining power in itself may not be sufficient to annul an unconscionable transaction, but rather forms one of the integral elements of the doctrine of unconscionability. As pointed out in another Malaysian Court of Appeal's decision in *AEH Capital*,⁴⁴⁰ the doctrine of inequality of bargaining power is "a narrower scope of the doctrine of unconscionability".⁴⁴¹

4.3.2 Application & Effectiveness as Unfair Terms Control Mechanism

Given the decisions in both *Fui Lian Credit* and *Saad Marwi*, these three requirements need to be fulfilled:

- (1) a party has found itself at a significant disadvantage compared to the other (this resembles the doctrine of inequality of bargaining power as per *Bundy*);
- (2) the stronger party exploits/takes advantage of the weakness of the other to their benefit in a morally culpable manner; and
- (3) resulting in a transaction that is overreaching and oppressive.

This section will now consider how the doctrine could be mobilised to assist the Non-Consumer Users in dealing with all of the Identified Terms. *Prima facie*, this question may be answered in the affirmative. In my view and based on the scope of application of the doctrine as discussed in section 4.3.1. above, it appears that the judicial doctrine of unconscionability may be invoked to address various forms of unfair terms, owing to its universal and broad nature, which allows for potentially extensive applicability across different types of unfair contractual provisions.

⁴⁴⁰ *AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal* [2008] 4 MLJ 487

⁴⁴¹ *ibid*, paragraph 134 of the Judgment

Within the context of the Non-Consumer Users, it is argued here that all of the Identified Terms may be found unconscionable, provided the criteria set out above are met, as discussed below. Notice that the first two elements are uniformly applicable for all of the Identified Terms, while only the third prong needs to be discussed separately for each type of terms.

1st element:- Disparity in the Bargaining Power

The Non-Consumer Users clearly hold inferior bargaining power compared to the Platforms. As discussed previously in Chapter 2 of this thesis, I argued that the Non-Consumer Users may be argued to possess characteristics commonly associated with subsistence entrepreneurs, whose livelihood is largely (if not solely) dependent on the gigs/orders procured from the Platforms. The Platforms, being the superior parties in the contracts are repeat players. On the contrary, the Non-Consumer Users are not equipped with sufficient business experience. In general, the lack of business experience may put a party in an inferior/disadvantageous position and therefore, create unequal bargaining power between parties. The “*lack of business experience*” is, as pointed out in Chapter 2, evident in the dynamics between the Platforms and the Non-Consumer Users. After all, most of them (if not all) are merely self-employed and/or small businesses who offered goods and/or services for their own subsistence. Further, considering the fact that the adhesion contracts and the terms and conditions were offered on a take-it or leave-it basis, this situation aggravates and widens the gap of bargaining power between parties as there is very little room for bargaining (if at all).

2nd element: Leveraging on the Superior Bargaining Power in a Morally Culpable Manner

As pointed out previously, the mere fact that a party has superior bargaining power as against its counterpart is not enough to raise the presumption of unconscionability. There must be some form of victimisation of the weaker party: whether through an active act of taking advantage of the superior position to the detriment of the weaker parties or passive acceptance of a benefit in unconscionable circumstances. In this respect, it has been established that the Platforms have superior bargaining power compared to the Non-Consumer Users as the subsistence entrepreneurs.

Given the evident disparity in bargaining power between the Platforms and the Non-Consumer Users, heavy reliance of the Non-Consumer Users on the Platforms as well as the lack of competition in the market (as per Chapter 2), the Platforms have exploited and leveraged (at least passively) these circumstances (i.e. the Non-Consumer Users’ lack of bargaining power) by imposing terms that are, arguably, unfair and/or commercially insensible (as discussed in

Chapter 3). In this respect, the fact that the Platforms knew (or ought to know) the glaring imbalance in the bargaining power between them and the Non-Consumer Users, the Platforms nevertheless proceeded to impose unreasonable terms such as unilateral termination without just cause on a take-it or leave-it basis (to name a few), without any room for bargain.

3rd element: Resulting in a Transaction that is Overreaching and Oppressive

Whilst the first and second elements can universally be applied to all of the Identified Terms, can the same be said for this final element? It is reiterated here that the Malaysian Courts did not explicitly set out the threshold to be employed in assessing whether a term is considered overreaching or oppressive. However, given that both *Fui Lian Credit* and *Saad Marwi* relied on the English case of *Multiservice Bookbinding*, it can be deduced that a term may be deemed as overreaching and oppressive if no reasonable person would have accepted the terms, had the parties bargained on a level playing field.

Pertaining to the Unilateral Amendment clauses, both Platforms have the power to alter any terms, including the Service Fee payable by the Non-Consumer Users at any time and as they wish, without providing the basis/justification of such alteration beforehand (i.e. in the Platforms' T&Cs). This unilateral variation clause would be considered as overreaching and oppressive, not only because they are granting an absolute power to the Platforms in dictating the dynamic of the contractual relationships, but also because no reasonable person/businesses would have agreed to this type of term had there been a genuine bargaining process to begin with.⁴⁴²

Further, terms allowing the stronger party to unilaterally terminate a contract without any cause is not only unreasonable but also, arguably, overreaching and oppressive. In this regard, such a term not only lacks transparency, but also creates significant information asymmetries between the parties.⁴⁴³ Without having knowledge on the reasons behind their termination and the absence of designated mechanism to challenge such termination, it will prevent the Non-Consumer Users from having the opportunity to defend their cases effectively (if at all). In circumstances involving genuine bargaining, no reasonable person or business would have agreed to a termination clause of this nature.⁴⁴⁴

Pertaining to the Exclusion Clauses, it is argued here that a wide exclusion clause insulating the Platforms from any liability would have the potential of being oppressive as against the Non-Consumer Users. This applies in particular to Grab's exclusion clause, as that clause shields Grab even from liabilities

⁴⁴² See the discussions in section 3.5.1 above.

⁴⁴³ Mareike Möhlmann and Lior Zalmanson, 'Hands on the Wheel: Navigating Algorithmic Management and Uber Drivers' Autonomy' (2017) 9.

⁴⁴⁴ See the discussions in section 3.5.3 above.

arising from negligence. Exclusion clauses may result in granting immunity to an already stronger party, which could be seen as an attempt to absolutely restrict the weaker from exercising their legal rights. Apart from the current state of law that would prohibit the incorporation of absolute exclusion clauses,⁴⁴⁵ it can be argued that such a total allocation of commercial risk to a single party is not one that reasonable contracting parties would have agreed to.⁴⁴⁶

Further, clauses mandating parties to refer any dispute to arbitration may also be considered unfair and/or oppressive. At the outset, it is argued that several factors such as the high costs associated with arbitration could prevent/hinder the Non-Consumer Users from exercising their legal rights where appropriate. A clause of this nature can be seen as an attempt to hinder the Non-Consumer Users from having an effective access to justice, and hence, arguably oppressive and unconscionable.⁴⁴⁷ Therefore, it may be argued that no reasonable man/business would have consented to a term that has the effect of depriving them from enforcing their claims.

Lastly, it is argued here that Grab's No-Refund Policy may also be deemed as an unconscionable bargain. This No-Refund Policy, in my view, is clearly unfair and unconscionable as the payments made to the e-wallet essentially serve as prepayment for the Service Fee imposed by Grab on a per-gig basis.⁴⁴⁸ For example, in the event that the contract is terminated, there will be a total failure of consideration as Grab will not allow the riders to be on its platform and the riders can no longer procure gigs through the platforms and therefore, there will be no Service Fee due and payable towards Grab. The abovesaid circumstances where the riders have ceased to render services through Grab's platform, the retention of funds, over which Grab has no lawful or equitable claim, would constitute unconscionable conduct on Grab's part. In these circumstances, no contracting party would have agreed to relinquish its own entitlement to the funds to Grab when those funds were never, or were no longer, capable of being utilised.

Based on the analysis so far, it may be argued that the doctrine of unconscionability has a universal application, with the theoretical capacity to address all of the Identified Terms, as all elements are fulfilled. Nevertheless, employing the doctrine of unconscionability to the benefit of the Non-Consumer Users may be practically challenging in Malaysia due to several reasons:

- (1) uncertainty in law;
- (2) courts' reluctance in departing from classical contract law theory especially in commercial relationships; and

⁴⁴⁵ See section 4.5 below.

⁴⁴⁶ See the discussions in sections 3.5.4 and 3.5.5 above.

⁴⁴⁷ See the discussions in section 3.5.6 above

⁴⁴⁸ See the discussions in section 3.5.2 above.

- (3) existing statutory factors vitiating consent under the Malaysian Contracts Act.

With regard to the potential uncertainty, it is argued here that reliance on equitable principles (such as the doctrine of unconscionability) would usually produce uncertain and/or inconsistent judicial outcomes. As pointed by Trakic, though the notion of striving for fairness in a contract concluded between parties who do not possess equal bargaining power seems noble, the effort to do the same based on the doctrine of unconscionability may be riddled with uncertainty in law as judges may potentially apply the doctrine as and when they feel appropriate.

Additionally and as mentioned previously, the Malaysian Courts do not appear to explicitly or structurally set out the precise requirements to be fulfilled, nor the relevant tests to be applied in applying the doctrine of unconscionability. As pointed out by Alias and Ghadas, the courts in Malaysia tend to refer to unconscionability only in a broad and loosely defined manner, without articulating the elements necessary for its application.⁴⁴⁹ Consequently, it might open for an inconsistent interpretation regarding the application of the doctrine. A specific unfair terms legislation, on the other hand, may remedy this predicament. For instance and as evident in several unfair terms legislation mentioned in Chapter 3 of the thesis, an unfair terms legislative regime would typically entail the application of a structured unfairness test, as well as the possible incorporation of indicative lists specifying terms that may be considered unfair, as well as terms that are automatically rendered unfair (which is often called as 'black list'). On this basis, one may argue that reliance on the doctrine of unconscionability (as opposed to a systematic unfair term legislation) would be more challenging.

Pertaining to the plausible reluctance in departing from classical contract law theory that grants utmost respect to parties' freedom of contract, courts in common law jurisdictions (including Malaysia) usually restrict themselves by invalidating a contractual arrangement based on procedural grounds only, as opposed to substantive unfairness.⁴⁵⁰ According to Fong, the classical common law approach enforces contracts as long as they are freely entered into.⁴⁵¹ Therefore, courts are not supposed to interfere with a valid contract and rewrite such contract for the parties.⁴⁵² In contrast, the doctrine of unconscionability aligns

⁴⁴⁹ Alias and Ghadas (n 408) 340.

⁴⁵⁰ Adnan Trakic (n 44) 210.

⁴⁵¹ Cheong May Fong, 'The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract' (2009) 36 *Journal of Malaysian and Comparative Law* 53, 61 <<https://ejournal.um.edu.my/index.php/JMCL/article/view/16301/9808>> accessed 30 November 2025.

⁴⁵² "Chancery mends no man's bargain" per Lord Nottingham in *Maynard v. Moseley* (1676) 3 Swan. 653, page

with a modern view of contract law that seeks to achieve justice (on the basis of equity) by examining both the wrongful conduct of the stronger party and the fairness of the terms resulting from the imbalanced relationship.⁴⁵³

The tension between classical and modern theorists is further exasperated where courts are generally timid on re-examining substantive fairness of commercial contracts, even via the doctrine of unconscionability, in which such hesitance will hinder the goal to protect the Non-Consumer Users against unfair terms⁴⁵⁴. The Malaysian High Court in *Wee Lian Construction*⁴⁵⁵ quoted with approval the English case of *Photo Production Ltd*⁴⁵⁶, where Lord Wilberforce ruled that parties in commercial matters generally are free to apportion the risks as they think fit and therefore the courts have to respect the decisions of the commercial parties as to the apportionment of risks. Further, Ian Chin J in the Malaysian Court of Appeal's case of *Yewpam*⁴⁵⁷ ruled that "*In my view, the concept of "unconscionability" or "unequal bargaining power" has no place to play in transactions between businessmen or between businesses."*⁴⁵⁸

However, with the common usage of adhesion contracts in commercial matters on a "take it or leave it" basis, commercial parties might no longer necessarily stand on equal (or roughly equal) footing.⁴⁵⁹ This modern contract law approach is also accepted in Canada where Lambert JA. in *Kreutziger*⁴⁶⁰ ruled that a contract shall, when viewed as a whole, be rescinded where it deviates from "*community standards of commercial morality*". This tension between the proponents of both sides will also create uncertainty in the application of the doctrine.

Lastly, it has been pointed out by another Malaysian Court of Appeal's decision in *American International Assurance*⁴⁶¹ (which was decided a year after *Saad Marwi*) that the attempt to import the English doctrine of unconscionability and/or inequality of bargaining power into the Malaysian legal framework should be done with caution, given the existence of the "*specific provision of s 14 of the Contracts Act 1950 which only recognizes coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent*".⁴⁶²

655 of the Judgment

⁴⁵³ Cheong May Fong (n 451) 73.

⁴⁵⁴ *ibid* 74. See also *American International Assurance Co Ltd v Koh Yen Bee* [2002] 4 MLJ 301, *Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd* [2004] 6 CLJ 320 and *Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn Bhd* [2004] 4 MLJ 327.

⁴⁵⁵ *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2005] 1 MLJ 162

⁴⁵⁶ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827

⁴⁵⁷ *Yewpam Sdn Bhd v Mohd Salleh bin Sheikh Ahmad* [2001] 1 LNS 43

⁴⁵⁸ *ibid*, paragraph 33 of the Judgment

⁴⁵⁹ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803

⁴⁶⁰ *Harry v Kreutziger* (1978) 9 BCLR 166 (BCCA).

⁴⁶¹ *American International Assurance Co Ltd v Koh Yen Bee* [2002] 4 MLJ 301

⁴⁶² *ibid*, page 319 of the Judgment

The same concern was also expressed in *Yewpam*, where the Malaysian High Court was of the view that adopting the doctrine of inequality of bargaining power as an independent ground for the avoidance of contract would equate to adding new provisions into the Malaysian Contracts Act,⁴⁶³ which is not the task of the judiciary. The Court also was doubtful if the doctrine of unconscionability is even needed, especially when it is accepted as a stand-alone ground to annul a contract, given the similarities that it has with the doctrine of undue influence as embodied under section 16 of the Malaysian Contracts Act.⁴⁶⁴ Hence, instead of adopting the English doctrine of unconscionability, the Court suggested that the principle could be developed within section 16 itself.

Based on the analysis above, it appears that although the doctrine of unconscionability appears to possess the capability to address a wide range of unfair terms (in our context, it may address all of the Identified Terms), its overall effectiveness may be hindered due to its inherent shortcomings, including its uncertain reception within the Malaysian legal system and the conceptual confusion it creates, particularly regarding its overlap with the doctrine of inequality of bargaining power. These issues significantly undermine its utility as an effective substitute for a dedicated unfair terms control legislation. Hence, a rule may not serve as a sufficient shield for the Non-Consumer Users if it cannot be efficiently implemented.

4.4 Rules of Construction of Contractual Terms

4.4.1 Doctrinal Framework of the Law

A valid contract is fundamentally based on a mutual understanding between parties (*consensus ad idem*). An agreement was entered into because they have reached a consensus to perform (or refrain from performing) specific actions. However, things may not always be sunshine and rainbows. Poorly drafted terms may lead to ambiguity and/or contradiction to one another, causing the parties to interpret or comprehend the agreement differently. In some cases, even terms that appeared straightforward at the time the contract was made can later become contentious as the dispute between the parties evolves and becomes more intricate. What once seemed clear may be open to differing interpretations as the complexity of the disagreement increases. For instance and as will be discussed below, the most prevalent terms that have become the main point of contention between parties are exclusion clauses, particularly with regard to their broad scope and application.⁴⁶⁵

⁴⁶³ *Yewpam* (n 457) paragraph 17 of the Judgment

⁴⁶⁴ *ibid*, page 34-35 of the Judgment

⁴⁶⁵ *Ilias and Aziz* (n 211) 147.

When the contractual parties are faced with ambiguous contractual terms and/or terms that contradict each other, courts will have to intervene and exercise their interpretative role to resolve the dispute, including by (1) opting for interpretations that yield better commercial sense; (2) considering a holistic approach; (3) taking into account the main purpose of the contract; and (4) resorting to the common law rule of construction of *verba chartarum forties accipiuntur contra proferentum*. This contra proferentum rule means that any ambiguity in the wording of a document is to be interpreted against the party who prepared it. Be that as it may, it has to be noted that (in any case under Malaysian law), the contra proferentum rule should be the last resort⁴⁶⁶ and that the courts shall first endeavour to resolve the dispute and/or ambiguity by employing other rules of construction.⁴⁶⁷

Moreover, in *Bourke*⁴⁶⁸, the Malaysian Federal Court ruled that the *contra proferentum* rule will not apply if the wordings used (in this case, the exclusion clause) are clear and unambiguous.⁴⁶⁹ In arriving at that conclusion, the Federal Court cited multiple judicial precedents including the English case of *West Bromwich Building Society*⁴⁷⁰, where the House of Lord ruled that “*The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents*”.⁴⁷¹ This implies that a court will uphold the plain and unambiguous meaning of a contractual term as articulated by the parties involved. The court's role is to give effect to the precise wording used, without modifying its meaning or introducing interpretations that were not intended.

The doctrinal framework of each construction rule will be further explained below:

(a) Interpretation Yielding Better Commercial Sense

The application of the first rule of construction may be *observed in SPM Membrane*,⁴⁷² where the Malaysian Federal Court ruled that when there are two competing interpretations, the one that which makes more “*commercial sense should be preferred if the natural meaning of the words is unclear*”.⁴⁷³ In this

⁴⁶⁶ Visu Sinnadurai, *Law of Contract in Malaysia and Singapore: Cases and Commentary* (2nd Edn, Singapore Butterworths 1987) 102

⁴⁶⁷ Joseph Chitty and John William Carter Chitty, ‘Chitty on Contracts’ (H. G. Beale ed. 32nd edition, Sweet & Maxwell/Thomson Reuters 2015), 1231

⁴⁶⁸ *Bourke* (n 366)

⁴⁶⁹ *ibid*, paragraph 32 of the Judgment

⁴⁷⁰ *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] IWL 896

⁴⁷¹ *ibid*, page 912-913 of the Judgment

⁴⁷² *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464

⁴⁷³ *ibid*, paragraph 78 of the Judgment

case, the Respondent (i.e. the State Government of Selangor) appointed the Appellant to assist with the collection of outstanding quit rent in the state of Selangor, Malaysia. Clause 8.1(b) of the agreement allowed the Respondent to unilaterally terminate the agreement by giving thirty days' notice to the Appellant if the Appellant is "*unable to perform its Services as provided under the agreement*". The Respondent later sought to terminate the agreement on the basis that the Appellant had become unable to perform its obligations, as per Clause 8.1(b). Exercising its purported right under clause 8, the Respondent issued a notice of termination on 22 November 2004, providing 30 days' notice without any accompanying reasons.

The Appellant then initiated legal action against the Respondent for an outstanding sum of MYR 2,558,548.51, being the sum for services rendered before the termination occurred, as well as damages for wrongful termination and loss of profit. The Appellant argued that the agreement is ambiguous as clauses 9.2 and 9.3 shall be exercised first before the right of termination may arise under clause 8. In this respect, clause 9.2 states that "*In the event that the State Government shall determine the Company's performance of its obligations under this Agreement as unsatisfactory*", the Appellant shall be given 30 days to remedy the unsatisfactory performance.

Clause 9.3 further mentioned that where the *unsatisfactory* performance is not remedied within the given 30 days, the Respondent "*shall have the option of treating such unsatisfactory performance as an event of default which entitles the State Government to terminate this Agreement pursuant to Clause 8.1(b)*". Therefore, according to the Appellant, the right to termination under Clause 8.1 was not a stand-alone right and therefore, the Appellant shall be given the right to remedy before the right for termination may be exercised as per clauses 9.2 and 9.3 of the agreement. The Respondent, on the other hand, argued that they have the right to terminate the contract solely based on Clause 8.1(b).

In dealing with these contentions, the Federal Court was faced with two competing interpretations. The first interpretation allows the Respondent to unilaterally deprive the Appellant of the opportunity to remedy any of its performance that the Respondent has 'determined as unsatisfactory' (i.e. clause 8.1(b)), whilst the second interpretation would only allow the Appellant to be terminated upon the failure of the Appellant to remedy its "*unsatisfactory*" performance after 30 days, deeming the Appellant as "*unable to perform*" its obligation (i.e. clauses 9.2 and 9.3). The Court opined that the "*latter interpretation makes more commercial sense*".⁴⁷⁴

⁴⁷⁴ *ibid*, paragraph 80 of the Judgment

The Court mentioned that it is only logical that any problems arising from the performance of the contract will begin as “*unsatisfactory performance*” (as mentioned explicitly in clauses 9.2 and 9.3) before they can escalate the allegation that the Appellant is “*unable to perform*” its obligation under the contract (clause 8.1(b)). Clause 9 clearly allows for any “*unsatisfactory performance*” to be remedied before termination can be invoked. From a reasonable man’s point of view, it does not make any commercial sense for the Respondent to immediately allege the Appellant to be “*unable to perform*” under clause 8.1(b) (and later terminating the contract), without even notifying them of any issues to be solved beforehand, as stated in Clause 9. As held by Zainun Ali FCJ, it does not commercially make sense to allow the Respondent to discover any unsatisfactory performance on the part of the Appellant but thereafter “*roll over and play dead, and then wait for it to escalate so as to deprive the appellant of the opportunity to remedy what is ‘determined’ unsatisfactory*”.⁴⁷⁵

(b) Holistic Approach

In *SPM Membrane* above, the Federal Court also employed a holistic approach as one of the rules of contractual interpretation. As per the judgment of Zainun Ali FCJ, “*No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal*”.⁴⁷⁶ In essence, when ambiguity arises, the language of each clause should be interpreted in conjunction with the other clauses of the contract as a whole, in order to create consistency and ensure harmony. In reaching this conclusion, the Federal Court cited the English case of *Fagan*⁴⁷⁷ with approval, where the House of Lords ruled that the “*words (to be interpreted) must be set in the landscape of the instrument as a whole*”.⁴⁷⁸ With regard to the issues at hand, the Federal Court found that the right to terminate under clause 8.1(b) (i.e. on the ground that the Appellant is “*unable to perform*”) is not a stand-alone right, and though termination might be exercised under this clause, the Respondent would still have to prove how the Appellant has been “*unable to perform*” its obligations. Hence, the Court observed that clause 8.1(b) shall be read together with clause 9.2 and 9.3, in which the Respondent shall first review the Appellant’s performance and if it is found that the performance is “*unsatisfactory*”, the Appellant is entitled to remedy it within 30 days before the right to terminate can be exercised.

⁴⁷⁵ *ibid*

⁴⁷⁶ *ibid*, paragraph 51 of the Judgment

⁴⁷⁷ *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, page 384 of the Judgment

⁴⁷⁸ *ibid*, page 384 of the Judgment

The same holistic approach in resolving ambiguity was also adopted in *Berjaya Times Squares*.⁴⁷⁹ In this case, the Respondent purchased a shop lot (under construction) from the developer Appellant, to be delivered before 23 November 1998. According to clause 22 of the agreement, if the Appellant delayed in making delivery, it had to pay liquidated damages to the Respondent, calculated from day to day at the rate of 12% per annum of the purchase price. Clause 32 of the agreement made time an essence of the agreement. The Appellant failed to make delivery on the stipulated date. Despite this material failure, the Respondent did not repudiate the contract. Instead, the Appellant kept updating the Respondent on the progress of the construction and promised that the unit would be delivered by the end of 2002. Simultaneously, the Respondent kept making the progress payments and affirmed the contract by paying the purchase price in full, despite the material delay.

When the unit was not delivered by the end of 2002 (but the construction was eventually completed later), the Respondent then commenced proceedings against the Appellant claiming, inter alia, a declaration that the agreement had been rescinded and for an order that the Appellant had to refund the monies paid as well as damages. The claim that the contract had been rescinded relied on the fact that time was of the essence (i.e. clause 32) and that the Appellant's failure to deliver the purchased unit within the stipulated timeline was a fundamental breach of the agreement. The Appellant counter-argued that despite clause 32, time was not of the essence given the conflicting clause 22 on liquidated damages. According to the Appellant, all that the Respondent deserved in the event of delay was the liquidated damages, rather than rescinding the contract and claiming for restitution. How did the Court harmonise these two conflicting provisions?

In ascertaining the Respondent's contention on its right to terminate stemming from clause 32, the Court was of the view that this clause must be read together with clause 22 on liquidated damages. This is what a holistic approach is all about. In this regard, the Court found that "*A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence*".⁴⁸⁰ Thus, time was not of the essence and the right to terminate stemming from clause 32 did not arise. All that the Respondent was entitled to was the liquidated damages as agreed under clause 22 of the agreement, and not the relief of restitution nor rescission.

⁴⁷⁹ *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597

⁴⁸⁰ *ibid*, paragraph 44 of the Judgment

(c) Main Purpose Approach

Apart from the abovementioned rules of construction, the Court should also consider the main purpose of the agreement in resolving any contractual ambiguity.⁴⁸¹ In *Syarikat Uniweld Trading*,⁴⁸² the Appellant ran a workshop repairing and welding motor vehicles. The Appellant then subscribed to an insurance policy with the Respondent. Under this insurance policy, the indemnity clause provided that the Respondent will “*indemnify the Insured in respect of...all sums which the Insured shall become legally liable to pay for compensation in respect of...accidental personal bodily injury to third parties and accidental damage to property belonging to third parties caused by the fault or negligence of the Insured...*”. However, the exclusion clause of the policy excluded any damage caused by “*fire, earthquake, explosion, flood, fumes or water pollution*”.⁴⁸³ This exclusion clause was incorporated despite that the insurance agent was fully informed that the Appellant's business involved “*selling, fixing and welding exhaust, windscreen and radiator*” and that it was reasonably foreseeable that repairing exhausts would involve welding, which could result in a fire at the workshop.⁴⁸⁴

Whilst the insurance policy was in force, a fire broke out as a result of an accidental leakage of a gasoline gas pipe destroying an Appellant's customer's motor car. The Appellant compensated the owner of the motor car in the sum of MYR 9,000 for the damage caused, and thereafter sought indemnity from the Respondent. The Respondent relied on the exclusion clause. Upon refusal of the Respondent to indemnify the Appellant, the latter commenced a legal proceeding against the former but the claim was rejected by the Magistrates Court. On appeal, the High Court allowed the Appellant's appeal and reversed the decision made by the Magistrates Court.

In resolving the confusion and/or contradictory provisions (i.e. between the indemnity and the exclusion clauses), the High Court found that the exclusion clause must not be allowed to prevail where it would produce an unrealistic result such as to absolve the Respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy. After all, the purpose of such a policy is to cover the insured from any losses/liability against third parties due to its negligence in conducting its business (as per the indemnity clause of the policy). Hence, the Court ruled that “*It is not out of place to mention that in interpreting any clause of an insurance policy, one must bear in mind the*

⁴⁸¹ Chitty (n 467) page 1226

⁴⁸² *Syarikat Uniweld Trading v The Asia Insurance Co Ltd* [1996] 2 MLJ 160

⁴⁸³ *ibid*, page 165 to 166 of the Judgment

⁴⁸⁴ *ibid*, page 160 of the Judgment

commercial object or function of the clause and its apparent relation to the contract as a whole".⁴⁸⁵

(d) Contra Proferentum Rule

Should all of the abovementioned rules of construction not assist the courts in resolving the ambiguity/contradictory terms, only then it is open for the judges to apply the *contra proferentum* rule. As discussed previously, the Latin maxim of *verba chartarum forties accipiuntur contra proferentum* simply means that ambiguity in the wording of a document is to be interpreted against the party who prepared it. As per Lord Brightman in *Kandasami*,⁴⁸⁶ it was held that "*There is a principle of construction that if a document inter partes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution*".⁴⁸⁷

In *Ayob bin Salleh*⁴⁸⁸, the *contra proferentum* rule was applied against the insurance company who relied on their exclusion clause to reject the Plaintiff's claim over the loss of his vehicle. The Plaintiff insured his car with the 1st Defendant and subsequently, the car was taken from him by three persons who impersonated as motor repossessioners from the finance company that had given hire purchase financing for the car. At that material time, the Plaintiff was in default of the hire purchase agreement with his financier.

The insurance policy provided cover for loss due to theft. However, relying on section A(4)(e) of the policy (i.e. exclusion clause), the 1st Defendant (i.e. the insurer) rejected the Plaintiff's claim for loss of the insured vehicle. Section A(4)(e) of the policy provides that no liability will arise in "*any loss or damage caused by or attributed to the act of cheating/criminal breach of trust by any person within the meaning of the definition of the offence of cheating/criminal breach of trust set out in the Penal Code*".⁴⁸⁹ According to the 1st Defendant, given that the Plaintiff himself voluntarily handed the key to the impersonators, the Plaintiff was implicated and deemed as part of the 'cheating' orchestration. The Court was then tasked to resolve this tension on the interpretation of the exclusion clause: whether the exception only applies when the insured is implicated or whether it applies even when the insured is a mere victim of cheating by impersonation.

⁴⁸⁵ *ibid*, page 167 of the Judgment

⁴⁸⁶ *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85

⁴⁸⁷ *ibid*, page 88 of the Judgment

⁴⁸⁸ *Ayob bin Salleh v AmGeneral Insurance Bhd & Anor* [2015] 11 MLJ 301

⁴⁸⁹ Section 416 of the Malaysian Penal Code states that "A person is said to 'cheat by personation', if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is."

According to the ruling of S Nantha Balan JC, there is enough room for different opinions on this clause, warranting the *contra proferentum* rule to be applied.⁴⁹⁰ The Court then opined that it would be “rather strange that insurance cover is lost when the insured is not the cheat but only the victim...there is enough doubt about the exception to the said policy so as to trigger the *contra proferentum* rule in favour of the plaintiff”.⁴⁹¹ In essence, the Court applied the *contra proferentum* rule against the drafter of the policy (i.e. 1st Defendant) and decided that the exception clause does not apply to a situation when the insured was merely a victim of the cheating (despite that Plaintiff played a role in it by voluntarily handing the key to the impersonators). However, the Plaintiff's claim was ultimately dismissed as it was time-barred.⁴⁹²

In *Abdul Aziz Bin Mohamed Daud*,⁴⁹³ the Court applied the *contra proferentum* rule against the insurer and ruled that “if there were any doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to it”.⁴⁹⁴ In this case, the Respondent was driving his father's car when it was involved in an accident. The car's insurance policy stated that the Appellant shall not be liable whilst the motor car was being driven by any person other than an authorised driver. The Respondent and his father were indeed the authorised drivers named in the policy.

At the time of the accident, the Respondent had an expired driving license. The question arose whether the insurance policy was in force on the date of the accident. Denying its liability, the Appellant (i.e. the insurer) relied on the exemption clause of the policy. In this regard, it was stated in the policy that the Appellant's liability may only arise “Provided that the person driving is permitted in accordance with the licensing or other laws and regulations to drive the motor vehicle or has been so permitted, and is not disqualified by order of a court of law or by reason of any enactment or regulation in that behalf from driving the motor vehicle”. Therefore, given that the Respondent's license was expired at the time of the accident, the Appellant contended that it triggered the exemption clause, where the Respondent was no longer “permitted” to drive. The Respondent argued that based on the second limb of the proviso (succeeding the phrase “has been so permitted”), the policy was still enforceable as he has never been “disqualified by order of a court of law”.

⁴⁹⁰ *Ayob* (n 488) paragraph 38 of the Judgment

⁴⁹¹ *ibid*, paragraph 40 of the Judgment

⁴⁹² It is interesting to note that the Court in this case did not explicitly discuss/consider other rules of construction before resorting to the *contra proferentum* rule. However, it is argued here that if the Court would have considered other interpretation rules such as the ‘main purpose’ and ‘commercial sense’ approaches, the Court would potentially arrive at the same outcome.

⁴⁹³ *Malaysia National Insurance Sdn Bhd v Abdul Aziz Bin Mohamed Daud* [1979] 2 MLJ 29

⁴⁹⁴ *ibid*, page 29 of the Judgment

The Court was faced with the question of whether the first limb (i.e. “has been so permitted”) and the second limb (i.e. “is not disqualified by order of a court of laws”) shall be read conjunctively or whether the first limb is sufficient to disclaim liability to indemnify the Respondent. In dismissing the appeal, the Court preferred the first interpretation (i.e. read them conjunctively) and held that having an expired license is not equivalent to being disqualified by order of a court of law. In arriving at this conclusion, the Court opined that:-

*“It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say, if there is a doubt as to its extent, and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him...”*⁴⁹⁵

4.4.2 Application and Effectiveness as Unfair Terms Control Mechanism

Based on section 4.4.1 above, it is to be noted that the rules of interpretation/construction may not be able to target unfair terms directly. Rather, they work indirectly by stepping in only when contract terms are unclear and/or ambiguous. This would be useful in cases where unresolved ambiguities/contradiction contribute to the unfairness of a term. The question now would be whether any provisions within the Identified Terms contain ambiguity or contradiction that would trigger the application of the interpretative rules? Based on our analysis of the Platforms’ T&Cs in Chapter 3, I found that there are only two categories of the Identified Terms that appear to contain clauses that are ambiguous/conflict with other provisions:- (1) Unilateral Amendment (particularly the clause on Service Fee variation); and (2) Exclusion Clauses.

With regard to the former, Grab states that their “*Service Fee may be up to 20% of the Consumer Charges unless otherwise communicated to and accepted by you*”⁴⁹⁶. As argued previously in Chapter 3, not only that the wordings “*up to 20%*” are riddled with uncertainty, but the phrase “*unless otherwise communicated*” may aggravate the confusion. In this regard, the phrase “*unless otherwise communicated*” seems to suggest that Grab may even increase the Service Fee beyond the 20% threshold, as and when they wish. Should the change in the Service Fee be limited to 20% (i.e. given the words “*up to*” which puts a cap on the changes) or can the Platforms rely on the latter part of the provision to even go beyond 20%? Given the potential dispute on which interpretation

⁴⁹⁵ *ibid*, page 32 of the Judgment

⁴⁹⁶ Clause 6.1.1 of Grab’s T&C.

would prevail, how can the rules of construction assist the courts in resolving this predicament?

By virtue of the first rule of interpretation where the courts will opt for the interpretation that yields the most commercial sense, it may be argued that the courts may be inclined to interpret the clause as allowing Grab to increase its Service Fee but to the limit that has been imposed. After all, if Grab is allowed to increase the Service Fee beyond the 20% threshold despite the prescribed maximum cap, the ceiling mechanism would indeed lose its meaning and true purposes. Clearly, such interpretation of the ceiling mechanism would thus not make any commercial sense, does not align with sound commercial principles and is simply illogical. In this respect, it is only reasonable for the cap to be respected and honoured accordingly.

Further, the same outcome would, arguably, be produced if the court analyses the said clause via the main purpose approach. Arguably, a clause permitting for an amendment of Service Fee with a ceiling mechanism was implemented for a reason, which is to balance the interests of all parties in the contract (i.e. to offer the Platforms some level of flexibility concerning their pricing whilst simultaneously granting some assurance/certainty regarding the highest possible amount the Non-Consumer Users would be required to pay if there are changes in the Service Fee). Therefore, by allowing Grab to increase the Service Fee beyond the maximum threshold would defeat the main purpose of implementing the cap in the very first place.

Further, and as can be observed through the line of cases discussed in section 4.4.1 above, it appears that most ambiguity and/or conflicting interpretations arose from Grab's Exclusion Clauses. In this respect, reference may be made to, for instance, clause 21.1 of Grab's T&C:

"21.1. Unless otherwise stated, and to the fullest extent allowed by law, any claims against Grab by you shall be limited to the aggregate amount of all amounts actually paid by and/or due from you in utilising the service during the event giving rise to such claims. Grab and/or its licensors shall not be liable for any loss, damage or injury which may be incurred by or caused to you or to any person for whom you have booked the service or solution, including but not limited to:

21.1.1. Loss, damage or injury arising out of, or in any way connected with the service, the platform, application and/or the software;

21.1.2. The use or inability to use the service, the platform, application and/or the software;

21.1.3. Any reliance placed by you on the completeness, accuracy or existence of any advertising; or

21.1.4. As a result of any relationship or transaction between you and any consumer, partner, merchant, advertiser or sponsor whose

advertising appears on the website or is referred to by the service, the application and/or the software, Even if Grab and/or its licensors have been previously advised of the possibility of such damages.”

Based on clause 21.1 of Grab’s T&C above, it appears that Grab has constructed a wide exclusion of liabilities clauses, preventing the Non-Consumer Users from holding the former liable in all forms and manners. In this respect, the second sentence of the clause states that “*Grab and/or its licensors shall not be liable for any loss, damage or injury which may be incurred by or caused to you or to any person for whom you have booked the service or solution*”. Be that as it may, confusion arises when the same clause also provides a ceiling in terms of liability amount where Grab may be held liable to compensate. In this respect, clause 21.1 also mentioned that “*...any claims against Grab by you [NCU] shall be limited to the aggregate amount of all amounts actually paid by and/or due from You in utilising the service...*”, which seems to be contradictory to the blanket and absolute exclusion of liability as mentioned in the same clause. How so?

On one hand, Grab bestowed themselves an absolute exclusion of liability whilst on the other, allowing the Non-Consumer Users to obtain remedy/relief from them (though the amount of damages is capped). The question now is whether Grab is completely immune from liability towards the Non-Consumer Users or can they still be held liable against the Non-Consumer Users, albeit the limitation on the amount of damages? If there is a dispute between Grab and the Non-Consumer Users, can Grab rely on the second sentence of clause 21.1 and argue that they are not liable for any losses claimed by the Non-Consumer Users? If this is the case, could the Non-Consumer Users defeat such an argument by contending that the same clause also provides a cap on the amount of damages payable by the Grab (which then implies that Grab may nevertheless be held liable)?

By applying the holistic approach, the court may attempt to harmonise these contradictory statements in clause 21.1 of Grab’s T&C. In this respect, one may come to the conclusion that clause 21.1, when being read as a whole, exhibits the willingness and/or intention of Grab to be subscribed to a certain level of liability towards the Non-Consumer Users. It is illogical for a party to fully disclaim liabilities but simultaneously putting a cap on the amount of liability. These two contradictory statements in a clause cannot co-exist harmoniously. As a result, the Court may infer that if Grab had genuinely intended to exclude all liabilities, it would not have imposed any cap on the liability amount. Thus, the existence of this ceiling suggests that Grab’s disclaimer of liability is not (and was never) entirely absolute.

While the rules of construction may be applied to some of the terms contained in the Non-Consumer Users' contracts as outlined above, what potential challenges could emerge in implementing them as an effective unfair terms control mechanism? Firstly and as mentioned previously, the rules of construction will not apply when the term is unambiguous. In this regard, there is no justification for placing upon the language of any clause/term an artificial meaning with the view to avoid the plain and ordinary meaning of such term.⁴⁹⁷ The Malaysian Court of Appeal in *Lee Yaw Lin and Another*⁴⁹⁸ ruled that “...parties may agree to an exclusion clause that excludes or modifies such obligation...exclusion or exemption clauses, particularly where the words are crystal clear, ought to be given their full effect.”⁴⁹⁹

Secondly and as mentioned previously, the courts shall not attempt to improve upon any contractual terms via the rules of interpretation, no matter how unfair/unreasonable the terms appear to be. In the Malaysian Federal Court in the 2018 case of *Bourke* emphasized that when a clause is “susceptible to one meaning only [...] that meaning must be given effect to and enforced however unreasonable the court may think it is. The words in the clause are clear and one does not even need to resort to the *contra proferentum* rule of construction”.⁵⁰⁰ Similarly in *Berjaya Times Squares*, the Federal Court reiterated that “The court has no power to improve upon the instrument which it is called upon to construct, whether it be a contract, a statute or article of association. It cannot introduce terms to make it fairer or more reasonable”.⁵⁰¹

Within the context of the Non-Consumer Users, by way of example, a clause allowing the Platforms to terminate the accounts of the former without assigning any reasons and without compensation does not attract the applicability of any rules of construction, as long as the clauses are clear and unambiguous. For instance, Clause 29.1 of Grab’s T&C states that:-

“29.1. You agree that we[Grab] may do any of the following, at any time, without notice: (i) to modify, suspend or terminate operation of or access to the Application, or any portion of the Application (including access to your Account and/or the availability of any products or services), for any reason; (ii) to modify or change any applicable policies or terms; and (iii) to interrupt the operation of the Application or any portion of the Application (including access to your Account and/or the availability of any products or services), as necessary to perform routine or non-

⁴⁹⁷ Chitty (n 467) page 1224

⁴⁹⁸ *United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin and Another* [2016] MLJU 225

⁴⁹⁹ *ibid*, paragraph 19 of the Judgment.

⁵⁰⁰ *Bourke* (n 366) paragraph 32 of the Judgment

⁵⁰¹ *Berjaya Times Square* (n 479) paragraph 43 of the Judgment

routine maintenance, error correction, or other changes. We shall not be required to compensate you for any suspension or termination.”

Based on Clause 29.1 above, Grab may, without notice, (1) terminate the Non-Consumer Users’ account/access to the platform for any reason; and (2) Grab shall not be required to compensate the Non-Consumer Users for the said termination. This clause, *prima facie*, does not contain any ambiguity. The wordings used are clear and should be given their plain and ordinary meaning, no matter how unfair and/or unreasonable they are. Unfortunately, this is one of the shortcomings of the rules of construction when used as a tool to ‘strike out’ unfair terms in any given contract.

Lastly and concerning the *contra proferentum* rule specifically, one may argue that the application of *contra proferentum* rule is usually evident in disputes involving insurance policies. As can be observed in the cases discussed previously where the rule was applied, this observation might hold water. In a 2020 case of *Tirumeniyar a/l Singara Veloo* (where the *contra proferentum* rule was duly applied),⁵⁰² the Court pointed out that insurance contracts are, by their nature, regarded as being unique and “*sui generis*” (i.e. its own kind), as they are founded on the “*uberrimae fidei*” principle (i.e. of utmost good faith). Perhaps due to this reason, the Courts are more willing to apply the *contra proferentum* rule in this type of contract against the insurer.

On the contrary, one may argue that the contracts between the Platforms and the Non-Consumer Users are purely commercial in nature and that there is no element of *uberrimae fidei* for the courts to prefer interpretation that necessarily favours the Non-Consumer Users. This could be attributed to the (mis)conception that commercial parties are negotiating at arm's length and on equal terms, and thus should be held to the terms of their agreement as negotiated. Nonetheless, it should be noted that the *contra proferentum* rule is not limited to insurance contracts. However, one might question whether the lack of the *uberrimae fidei* element in commercial vis-à-vis insurance contracts would adversely affect how the courts interpret any ambiguity/contradictory terms in favour of the Non-Consumer Users.

Based on the limitations in utilising the rules of construction as a safety-net instrument for the Non-Consumer Users as discussed above, it is also crucial to acknowledge that these interpretative instruments do not directly address or strike down unfair terms. Instead, it works indirectly, intervening only when ambiguity is present, rather than because a term is inherently unfair. Simply put, this interpretative route deals with uncertainty in language (e.g. construction of

⁵⁰² *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440

sentences), not unfairness itself, and only offers protection when such ambiguity creates an opportunity to do so.

As evident in our analysis above, these rules are not sufficient to address all of the Identified Terms. Certain categories of terms may fall outside the scope of this route, due to the absence of any ambiguity and/or contradiction. Where ambiguity or contradiction is lacking, the said interpretive instruments offer little to no theoretical and practical assistance in contesting unfair terms, thereby leaving certain categories of the Identified Terms (i.e. Unilateral Termination, Arbitration Clauses and the No-Refund Policy) beyond reach and unaddressed.

4.5 Prohibition on the Complete Restriction of Legal Rights Enforcement - Section 29 of Malaysian Contract Act

4.5.1 Doctrinal Framework of the Law

Within the Malaysian contractual legal framework, an agreement to prevent a party from exercising their legal rights, including the right to sue and/or seek remedies/reliefs, is prohibited under certain conditions. In this regard, section 29 of the Malaysian Contracts Act states that:-

“Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.”

This statutory prohibition was brought to the attention of the Malaysian apex court in 2019 where the Federal Court tested the applicability of section 29 and ascertained the circumstances in which an exclusion clause may be considered as unfair, and thus, voided. In *Bourke*, the Plaintiffs were husband and wife from the United Kingdom, and they purchased from a developer a property in Malaysia that was under construction by entering into a housing loan with CIMB Bank (the Defendant). By virtue of the housing loan, the Defendant would release progressive payments on behalf of the Plaintiffs to the developer every time a certificate of completion for each stage was issued. Upon the failure of the Defendant to release payment on one of the invoices, the developer decided to terminate the sale and purchase agreement with the Plaintiffs. Dissatisfied with such termination, the Plaintiffs commenced a legal proceeding against the Defendant for its failure to perform its obligation under the loan agreement.

The claim was rejected by the Malaysian High Court (court of first instance), as the Defendant relied on clause 12 of the loan agreement which states that the Defendant is absolved from being liable to compensate the

Plaintiff for any loss or damage incurred by the Plaintiff, and hence, relieving the Bank from any sort of liability for any potential breach of contract. In this respect, clause 12 states that:

“Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed.”

Given the existence of clause 12, the High Court ruled that the Plaintiffs' cause of action could not stand. On appeal to the Court of Appeal, the decision was duly reversed. This reversal was later affirmed by the apex court (i.e. Federal Court). During the appeal, the Defendant argued that the clause is clear and unambiguous, such that the courts should give effect to it based on its plain and ordinary meaning, no matter how unreasonable it is. The courts then should not, according to the Defendant, read into the clause beyond what is stated. The Federal Court, unsurprisingly, agreed with the Defendant on this point and held that given the clause is clear and unambiguous, the Court will not read it beyond its ordinary meaning, no matter how unconscionable/unfair it is.⁵⁰³ The Court also mentioned that the doctrine of *contra proferentum* rule, as raised by the Plaintiff, would not lend assistance in this circumstance.

However, the Federal Court was of the view that clause 12 would nevertheless violate section 29 of the Malaysian Contracts Act. In this respect, the Court opined that clause 12 *“negates the rights of the Plaintiffs to a suit for damages, and the kind of damages as spelt out in the said clause encompasses and covers all forms of damages under a suit for breach of contract or negligence. There is an absolute restriction. Section 29 of the Contracts Act 1950 prohibits such restriction”*.⁵⁰⁴ Consequently, the Federal Court affirmed the decision of the Court of Appeal's ruling that an exclusion clause such as clause 12 of the loan agreement, though clear, unambiguous and mutually agreed by the parties, is void as the effect is to absolutely restrain a party from exercising its legal rights.

⁵⁰³ *Bourke* (n 366) paragraph 32 of the Judgment. See also section 4.4.2 above regarding the challenges in applying rules of construction.

⁵⁰⁴ *ibid*, paragraph 37 of the Judgment

Based on *Bourke*, it may be concluded that section 29 of the Malaysian Contracts Act will be triggered in two circumstances:- (1) where there is a clause prohibiting a party from exercising its legal rights (i.e. commencing legal action); or (2) where there is a term disclaiming any forms of liability. With regard to the latter, although there is no prohibition against initiating legal action, the fact that the party is not liable for any form of damages effectively renders any such legal action nugatory or merely academic. As rightly pointed out by the Court in *Bourke*, “it is not right to think that a right [to sue] can be dissociated from remedy “ and, therefore, “Once a plaintiff is restrained from seeking any relief or remedy against a defendant, the suit becomes futile”.

The application of section 29 of the Malaysian Contracts Act comes with a few exceptions. The relevant exception for the purposes of our analysis can be found in *Exception 1* of section 29 where it provides that:-

“Saving of contract to refer to arbitration dispute that may arise

Exception 1—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.”

Based on the aforesaid exception, it is clear that section 29 would not be triggered when parties have agreed to refer to arbitration in the event of dispute. Simply put, opting for arbitration as an alternative dispute resolution mechanism does not amount to ousting the court’s jurisdiction, nor does it prevent a party from enforcing their legal rights to obtain a remedy. To illustrate this, reference is made to the Malaysian Federal Court’s ruling in *Juara Serata Sdn Bhd*.⁵⁰⁵ In this case, the dispute arose from a construction contract between Alpharich (i.e. the Plaintiff) and Juara Serata (i.e. the Defendant), where the Defendant refused to pay for the work done by the Plaintiff despite the interim certificate issued by the architect of the project.

The Defendant alleged, amongst others, that the work was incomplete and defective. However, the Defendant never raised this issue via the proper channel, as mandated under the dispute resolution clauses of the contract. In this respect, the contract established a two-tier dispute resolution process, according to which: (1) first, the parties should refer the dispute to the architect (clause 16.1 of the contract); and (2) if no decision is given by the architect, or if

⁵⁰⁵ *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* [2015] MLJU 598

either party is dissatisfied with the decision, the dispute shall then be referred to arbitration (clause 17.1 of the contract).

The Malaysian High Court ruled in favour of the Plaintiff, emphasising that the dispute resolution clause was a condition precedent and that the Defendant had failed to follow the stipulated procedure. The Court of Appeal upheld this decision. Dissatisfied with the appeal, the Defendant appealed to the apex court (i.e. Federal Court). One of the issues brought to the Court's attention was whether the dispute resolution clauses in question were contrary to section 29 of the Malaysian Contracts Act.

The Federal Court answered this question in the negative. In essence, the Court held that the mere existence of an arbitration clause in a contract does not violate section 29 of the Malaysian Contracts Act as it is not an absolute restriction nor expressly oust the jurisdiction of the Court.⁵⁰⁶ The Court further ruled that section 29 would only be violated if the terms were drafted in a manner that explicitly prohibits a party from utilising the court process in its entirety. To this end, the Court quoted an excerpt from Julian Bailey on Construction Law, Volume II, page 1442:

“23.42 A contractual agreement for the resolution of a dispute other than by way of court proceedings may face the possibilities of being held to be unlawful, as an ouster of the court’s jurisdiction. However, the circumstances in which such an agreement will be struck down depend on the precise wording of the agreement, rather than its substance. The agreement must positively purport to prevent a party from taking a justifiable matter to court. If an agreement simply provides that the parties agree to their disputes being resolved by expert determination or arbitration, that will not of itself constitute an ouster, even though the effect of such agreements is usually to prevent a party from prosecuting a claim through the courts.”

4.5.2 Application and Effectiveness in Addressing the Identified Terms

Based on the current legal position in Malaysia regarding section 29 of the Malaysian Contracts Act as discussed above, the question now would be whether the same statutory protection can be of assistance to the Non-Consumer Users in dealing with all of the Identified Terms? Prima facie, one may assume that section 29 may deal with at least, two (2) of the Identified Terms:- (1) Exclusion Clauses; and (2) Arbitration Clause. The rest of the Identified Terms (i.e. Unilateral Amendment, Unilateral Termination and No-Refund Policy),

⁵⁰⁶ *ibid*, paragraph 33 of the Judgment

section 29 would not be applicable as the said terms do not involve a prohibition of exercising one's legal rights. However, considering *Exception 1* of the said provision (i.e. an arbitration agreement does not amount to a violation of section 29), the said provision appears to only be relevant in addressing the issue of Exclusion Clauses.

At the outset, it is necessary to distinguish between Grab's and Shopee's T&Cs. Grab's exclusion of liability clause absolutely absolves them from any forms of potential liabilities and thus, leaving the Non-Consumer Users with no legal remedy whatsoever in the event of a dispute. In this respect, clause 21.2 of Grab's T&C states that "*you [NCU] expressly waive and release Grab from any and all liability, claims or damages arising from or in any way*".⁵⁰⁷ As evident in *Bourke*, the right to obtain remedy cannot be distinguished from the right to initiate legal action. They are intertwined with each other. Therefore, a clause disclaiming total liability would effectively prevent and/or bar a party from even commencing any fruitful legal action. Consistent with the arguments put forward in Chapter 3 of this thesis, it appears that Grab essentially attempts to absolutely restrict the Non-Consumer Users from exercising any legal rights against them. Similar to the factual matrix in *Bourke*, it is argued here that Grab's exclusion clause may potentially violate section 29 of the Malaysian Contracts Act, and hence, be void.

Contrary to Grab's wide/absolute exclusion clause, it appears that Shopee did not absolutely restrict the Non-Consumer User's right to exercise their legal rights. For example, Shopee's terms and conditions provides that "*Nothing in these terms of service shall limit or exclude any liability for death or personal injury caused by Shopee's negligence, for fraud or for any other liability on the part of Shopee that cannot be lawfully limited and/or excluded under applicable laws*".⁵⁰⁸ In addition, Shopee also explicitly states that the Non-Consumer Users shall indemnify the platform in the event of a third-party claim, except where such a claim arises from Shopee's own negligence.⁵⁰⁹

Therefore, it can be concluded that one may indeed legally protect itself from various forms of liability. However, and by virtue of *Bourke*, an exclusion clause should not protect one party from all types of liabilities as it would eventually amount to an absolute restriction to exercise legal rights as per section 29. Whereas Shopee's terms, to certain extent, respect this boundary, Grab's exemption clauses violate section 29 of the Malaysian Contracts Act, and is, therefore, invalid on this basis.

⁵⁰⁷ See Table 6 in Chapter 3.

⁵⁰⁸ See clause 16.3 of Shopee's T&C (Riders), as shown in Table 6 of Chapter 3.

⁵⁰⁹ See clause 15 of Shopee's T&C (Merchants), as shown in Table 6 of Chapter 3.

Be that as it may, reliance on section 29 of the Malaysian Contracts Act may come with two hurdles: (1) section 29 may easily be circumvented; and (2) potential inapplicability where an arbitration agreement exists. With regard to the former, it appears that the application of section 29 of Malaysian Contracts Act is rather weak as it may easily be circumvented by the Platforms by introducing some minor changes into their exclusion clauses. This is evident in the instance cited above via Shopee's exclusion clauses, where Shopee, instead of guarding itself from all types of liabilities, shields itself from all liabilities except in the case of death or personal injury, fraud and other cases where Malaysian law does not allow for contractual exclusions or limitations of liability.

Although the T&Cs of Shopee may comply with section 29 (which, as such, is favourable from the legal perspective and beneficial to the Non-Consumer Users), this indicates that an exclusion clause can easily bypass section 29 as long as the Platforms agree to accept a degree of responsibility, no matter how nominal it is. This leaves a lot of room for the Platforms to manoeuvre around their exclusion clause by granting, still, a wide array of exclusions of liabilities upon themselves. For example and in an attempt to circumvent the requirement of section 29, the Platforms may be willing to accept responsibility for a type of liability that has a low likelihood of occurring. A small price to pay for a huge return.

Another potential setback in the application of section 29 in dealing with the Exclusion Clauses is its potential inapplicability when an arbitration agreement exists. In this regard, section 29 of the Malaysian Contracts Act provides that any agreement will be void if *"any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals"*. The term *"ordinary tribunal"* here means ordinary courts of law, as held by the Malaysian High Court in *Extra Excel (M) Sdn Bhd*,⁵¹⁰ where Evrol Mariette Peters JC explained that *"In my view, the expression "ordinary tribunals" generally in s. 29 means the ordinary courts of law, as s. 29 does not render illegal any contract by which parties have agreed to refer their dispute to arbitration under the exceptions 1 and 2."*⁵¹¹

As illustrated in *Bourke*, clauses that exclude legal remedy would amount to absolutely restricting one's right to commence legal action. However and consistent with the wordings used in section 29 (i.e. *"ordinary tribunals"* which means courts of law), the circumstances in *Bourke* may be distinguishable from our case study, as the agreement in *Bourke* did not contain an arbitration clause. This distinction is significant, as it would allow the Court to apply section 29 in a more direct manner (i.e. a bar to obtaining any legal remedy is equivalent to a

⁵¹⁰ *Extra Excel (M) Sdn Bhd v Quek Peck Keow* [2021] MLJU 2367

⁵¹¹ *ibid*, paragraph 28 of the Judgment

bar on referring the dispute to the courts). In the absence of an alternative dispute resolution mechanism such as arbitration, the exclusion clauses in *Bourke* effectively barred access to the courts, thereby contravening the principle that a party's right to seek redress through the “ordinary tribunals” must not be contractually excluded.

Hence, one may conclude that the prohibition on refraining a party from absolutely exercising their legal rights as embodied in section 29 of the Malaysian Contracts Act would, arguably, only be triggered when the clause prohibits a party from initiating claims in the courts of law. On the contrary, the Platforms' contracts provide that any dispute between parties must be dealt exclusively via an arbitration process as the sole dispute resolution avenue.⁵¹² One may wonder then, would section 29 apply (as in *Bourke*) when the contract contains an exclusive arbitration clause? Prima facie and upon strict interpretation of the wordings used in section 29, it appears that it may potentially lose its appeal in a situation where an arbitration clause exists. Regrettably, no judicial decision has yet been made that offers clarity on this potential predicament.

4.6 Restitutionary Remedies: Via Unjust Enrichment & Section 71 of the Malaysian Contracts Act

4.6.1 Doctrinal Framework of the Law

Restitution refers to the legal obligation of a party to return a benefit that they have unjustly received. At its core, the right to claim restitution is grounded in the doctrine of unjust enrichment, which serves as the foundational principle behind this remedy. But what exactly is unjust enrichment? Essentially, unjust enrichment may be understood as a legal framework concerning cases where a party is enriched at another party's expense, in circumstances deemed unjust by law. According to Goff and Jones:

*“Unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases. It is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the Defendant has been enriched by the receipt of a benefit that is gained at the Claimant's expense in circumstances that the law deems to be unjust.”*⁵¹³

Therefore, unjust enrichment constitutes a cause of action, forming the basis of one's claim. In contrast, restitution is the remedy designed to correct the alleged injustice by reversing the unjust gain and restoring the parties to

⁵¹² See Table 7 in Chapter 3

⁵¹³ Charles Mitchell, Paul Mitchell and Stephen Watterson, 'Goff & Jones: The Law of Unjust Enrichment' (9th Ed. Sweet & Maxwell 2016) 7.

their original positions. The application of unjust enrichment may be observed in the Malaysian case of *Dream Property*.⁵¹⁴ In this case, the Malaysian Federal Court has, whilst citing the English case of *Banque Financière de la Cité v Parc (Battersea) Ltd*,⁵¹⁵ set out four elements that must be satisfied to establish a claim based on unjust enrichment:

- (a) a party must have been enriched;
- (b) such an enrichment must be gained at the other party's expense;
- (c) the retention of the benefit will be unjust; and
- (d) there must be no defence available to extinguish or reduce the liability to make restitution.

With regard to the element of 'enrichment' (i.e. the first and second elements), it is important to note that benefit may only be restituted if it has monetary value.⁵¹⁶ In this regard, the first and second elements are generally easier to identify based on factual circumstances and are less likely to be disputed, as they depend more on concrete facts than abstract evaluation, unlike the third requirement. As required by the third element, it must be shown that retaining the benefit would be unjust if it is not returned. The question then would be, in what situations would retaining the money be deemed 'unjust' or contradict the principles of justice and fairness? Unlike the first and second elements, this requirement is more difficult to demonstrate, as it involves an evaluative process based on either legal reasoning or philosophical justification.

In answering this issue, the Malaysian Federal Court in *Dream Property* had, whilst acknowledging the English law approach in the assessment of 'unjust' (i.e. transfer of benefit due to mistake and/or when there is a total failure of consideration), declined to follow the tradition.⁵¹⁷ Instead, the Court adopted the civil law approach via the principle of 'absence of basis'.⁵¹⁸ In essence, the concept of 'absence of basis' would simply mean that restitution is a given, unless the enriched party may prove that there is a legal ground to retain the benefit.⁵¹⁹ As for the fourth element, I take the view that it is self-evident, and perhaps arguably redundant, since the 'absence of basis' essentially implies that there is no valid defence to justify the retention of the purported benefit.

⁵¹⁴ *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441

⁵¹⁵ *Banque Financière de la Cité v Parc (Battersea) Ltd and Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [1999] 1 AC 221

⁵¹⁶ *Dream Property* (n 514) paragraph 121 of the Judgment

⁵¹⁷ *ibid*, paragraph 128 of the Judgment

⁵¹⁸ *ibid*, paragraph 129 of the Judgment

⁵¹⁹ Siti Aliza Alias and Ida Madieha Abd Ghani Azmi, 'The Law Of Restitution Of Unjust Enrichment In Malaysia: A Search For Principle, Post 'Dream Property'' (2024) 32 IIUM Law Journal 153, 171.

Next to the common law concept of unjust enrichment as discussed above, the remedy of restitution may also be achieved statutorily. In this respect, section 71 of the Malaysian Contracts Act provides that:

“Obligation of person enjoying benefit of non-gratuitous act
71. *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”*

Based on the provision cited above, a party is bound to restore the benefit received from another, if such benefit was not intended to be given gratuitously. In *New Kok Ann Realty Sdn. Bhd.*,⁵²⁰ the Respondents claimed from the Appellant a sum of USD\$125,000, an amount that was transferred to the Appellant as a loan. The Appellant contended that there was never any application for a loan made by them, nor did they ever promise to repay the amount to the Respondent. The Court ruled in favour of the Respondent and ordered the Appellant to return the monies claimed, based on section 71 of the Malaysian Contracts Act.

In dismissing the Appellant’s appeal, the Court made it explicit that four conditions must be fulfilled before a claim made under section 71 of the Malaysian Contracts Act can be allowed. In this respect:- (1) the act/delivery must be lawful; (2) it must be done for another person; (3) it must not be intended to be done gratuitously; and (4) it must be such that the other person enjoys the benefit of the act or the delivery.⁵²¹ The party who received the benefit is only obligated to return it, if and when these requirements are met.

4.6.2 Application and Effectiveness as Unfair Terms Control Mechanism

Based on the scope and nature of both rules, it appears that both unjust enrichment and section 71 of the Malaysian Contracts Act have limited scope in terms of their application/relevancy in tackling the Identified Terms. As evident from section 4.6.1 above, it may be deduced that both legal rules concern the conferral of a benefit on another party, whether such benefit was unjustly procured (i.e. unjust enrichment) or not intended to be gratuitous (i.e. section 71). Hence, the doctrinal relevance of both legal principles appears limited, as they primarily apply to Platforms’ terms relating to monetary gain. Within the context of the Identified Terms, this restitutionary route may only be relevant in

⁵²⁰ *New Kok Ann Realty Sdn. Bhd. v. Development & Commercial Bank Ltd., New Hebrides (In Liquidation)* [1987] 2 MLJ 57

⁵²¹ See also *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118

addressing one category of the Identified Terms, which is the Grab's No-Refund Policy. For ease of reference, the relevant clauses are restated below:

(a) Clause 6.1.6 of Grab's T&C provides that:-

*"6.1.6 Driver's Credit Balance: In addition to your Driver's Cash Balance, you must also maintain with Grab a Driver's Credit Balance. The Driver's Credit Balance comprises a pre-payment to Grab by you of commissions and other fees and charges applicable under these Terms of Service. You must at all times maintain a minimum credit balance ("Minimum Balance") in your Driver's Credit Balance in order for you to use the Service. The amount of such Minimum Balance shall be prescribed by Grab, and shall be notified to you via the Application. It may be changed at any time at Grab's sole discretion. You agree Grab may retain, apply, or set off any sum due and owing, monies, deposits or balances held in, or standing to the credit of any account towards the satisfaction of any obligations and service quality due from you to Grab, whether such obligation be present or future, actual or contingent, primary or collateral and several or joint."*⁵²²

(b) Clause 6.1.8 of Grab's T&C:-

*"6.1.8 Funds in the Driver's Credit Balance are not redeemable for cash and cannot be refunded. They cannot be resold, exchanged or transferred for value under any circumstances. The funds shall not be regarded, construed, or used as valuable or exchangeable instruments under any circumstances. You will not receive interest or other earnings on your Credits. Grab may receive interest on amounts that Grab holds on your behalf. You agree to assign your rights to Grab for any interest derived from your Credits."*⁵²³

As stipulated in clause 6.1.6 of Grab's T&C, the Driver's Credit Balance will be administered by Grab for "any obligations and service quality due from you to Grab". For every gig that is completed by the riders, a specified percentage is due to be paid to Grab as Service Fee. This deduction of fees would usually be done by way of direct debit from the amount that the customers paid to Grab via their application. However, when the end users opt to pay by cash directly to the riders, there is no convenient way for the Service Fee to be deducted

⁵²² See Table 3 of Chapter 3

⁵²³ *ibid*

directly from the application. Hence, Grab introduced this Driver's Credit Balance as a mechanism to collect such Service Fee. In this regard, Grab may collect their Service Fee due from any delivery tasks completed by a delivery rider by debiting such sums from the Driver's Credit Balance. This whole mechanism of collecting Service Fee is, at first glance, a reasonable thing to be implemented.

However, the mechanism is susceptible to exploitation and the terms above make clear how. Pursuant to clause 6.1.8 of Grab's T&C, any amount remitted into the Driver's Credit Balance will not be refunded to the riders at all material times. Once it is deposited into the e-wallet maintained by Grab, it is no longer reachable by the riders. In this respect, the funds remitted into the Driver's Credit Balance will not be refundable in all circumstances, by virtue of clause 6.1.8 of Grab's T&C. This practice, in my view, is clearly unfair as the payments made to the e-wallet essentially serves as prepayment for the Service Fee imposed by Grab on a per-gig basis. One may even argue that Grab, arguably, is merely a 'trustee', holding the monies paid by the riders on their behalf. In circumstances where no cash-based gig is completed, or where riders have ceased to render services through Grab's platform, it would be unconscionable for Grab to retain funds to which it has no equitable or legal entitlement.

In the foregoing circumstances, does retaining the sums paid in the Driver's Credit Balance (despite the contract being terminated) constitute unjust enrichment? Arguably, it does. In this regard, the following requirements need to be satisfied under the principle of unjust enrichment:

(a) *Grab must be enriched*

When the contract between Grab and the riders is terminated, it is only logical that any unutilised Service Fee paid in advance into the Driver's Credit Balance be refunded to the riders. In this respect, Grab would clearly be enriched/benefitted by retaining such sums as there is no longer gig/task to be assigned to the delivery riders (and thus, no Service Fee to be deducted from the retained sum).

To compound the issue, once the funds are paid to Grab, Grab is permitted to earn interest on the amounts deposited, without extending the same benefit to the riders, who are the rightful owners of the funds. In this regard, clause 6.1.8 of Grab's T&C provides that "*Grab may receive interest on amounts that Grab holds on your behalf. You agree to assign your rights to Grab for any interest derived from your Credits*". It is therefore evident that Grab is not only enriched by retaining the riders' funds post-termination, but also benefits further by earning interest on those funds throughout the duration of the contract.

(b) *Such an enrichment must be gained at the rider's expense*

Closely related to the first requirement, it is undisputed that the benefits/enrichment gained by Grab as discussed above is procured at the expense of the riders, as the rightful owner of the funds. Again, as per Grab's policy, the riders have to maintain an e-wallet with Grab in order to accept delivery gigs. This e-wallet functions as a deposit system, whereby riders must top up a certain amount in advance, which serves as prepayment for the Service Fee imposed by Grab on a per-gig basis. Essentially, the deposited funds are deducted progressively as the riders undertake and complete future delivery assignments. Hence, it is clear that any enrichment on the part of Grab (i.e. by way of the no-refund policy clause) would be at the expense of the riders.

(c) *The retention of the monies paid in advance as the Service Fee is unjust & No Defence in Justifying the Retention*⁵²⁴

As per the ruling in *Dream Property*, the Malaysian Federal Court adopted the 'absence of basis' approach in assessing the requirement of 'unjust'. Based on this approach, Grab is obliged to refund the monies paid to the riders unless there is a legitimate/legal reason for Grab to do so (i.e. defence). In my view, there is no plausible legal reason nor any defence that may justify this no-refund policy. Why so? Once the contract is terminated, consideration between the parties fails, as there will no longer be any future gigs that can possibly be assigned to the delivery riders, nor will any Service Fee become payable for those gigs.

When there is a total failure of consideration between parties, it is argued here that it is no reason to justify the retention of the monies paid. On this issue, it is prudent to observe how the Malaysian Contracts Act defines "consideration" as one of the essential elements of contractual formation. Section 2(d) of the Malaysian Contracts Act defines "consideration" as:-

"(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;"

In *KLC Placement Services Sdn Bhd & Anor*,⁵²⁵ the Malaysian High Court ruled that:-

⁵²⁴ As discussed in section 4.6.1 above, it is in my view that the third and fourth elements may be cumulatively assessed together, as the 'absence of basis' approach (i.e. the third element) adopted by the Malaysian Federal Court in *Dream Property* would essentially denote that there is no defence (i.e. the fourth element) justifying the retention of such benefit.

⁵²⁵ *KLC Placement Services Sdn Bhd & Anor v Balakrishna Polanaido* [2014] MLJU 1934

“[22] The judgment of the Court of Appeal in Tan Ah Thong v. Chee Pee Saad & Anor and Other Cases (Consolidated) [2010] 6 CLJ 560 is instructive for its clarification of the doctrine of total failure of consideration. The Court said:

“... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract...but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due. (Stocznia Gdanska SA v. Latvian Shipping Co [1998] 1 All ER 883, per Lord Goff of Chieveley)”⁵²⁶

Similarly in *Koh Siak Poo*,⁵²⁷ the Appellant and the Respondent entered into an agreement in which the former was to procure joint venture agreements in favour of the Respondent. In consideration of those procurements, the Respondent paid the amount of MYR 633,000.00 to the Appellant. However, there were no successful deals secured by the Appellant, resulting in the claim by the Respondent for the said sum paid on the ground of money had and received. The majority of the Learned Judges in the Court of Appeal affirmed the decision of the High Court, that the Appellant is liable to return the said sum to the Respondent, as there had been a total failure of consideration.

Applying the above authorities to our case study, it is contended here that not only there is no legal justification for Grab to retain the funds, but there is, in fact, a legal obligation for them to return the same. Again, once the contract is terminated, there is indeed a total failure of consideration as the “promisor” (i.e. Grab) has not (and could no longer) perform its part of the bargain by allowing the riders to be on its platform and thus offering gigs to them. Consequently, the riders can no longer utilise the platform and therefore, there will be no Service Fee due and payable towards Grab. Both considerations have failed and/or are impossible to be exchanged between parties. It is only just and reasonable for the unutilised sums to be refunded to the delivery riders once the contract is terminated. Based on the application of the elements of unjust enrichment to our case study, it is argued here that Grab’s No-Refund Policy in retaining the monies paid into the Driver’s Credit Balance e-wallet would amount to unjust enrichment.

Having dealt with the principle of unjust enrichment, would the application of section 71 of the Malaysian Contracts Act produce a similar outcome? By way of reiteration, four elements need to be fulfilled before section 71 may be triggered:

⁵²⁶ *ibid*, page 4 of the Judgment

⁵²⁷ *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65

- (a) the act/delivery must be lawful;
- (b) it must be done for another person;
- (c) it must not be intended to be done gratuitously; and
- (d) it must be such that the other person enjoys the benefit of the act or the delivery.

With regard to the first and second elements, the advance payments made by the delivery riders to Grab (by way of deposit into the Driver's Credit Balance e-wallet) was, without a doubt, a lawful act. The third requirement requires that the sums remitted are not made on a gratuitous basis. It is reiterated here that the sums remitted into the Driver's Balance Credit was a "*pre-payment to Grab by you (riders) of commissions and other fees and charges*".⁵²⁸ It is essentially designed as an instrument to collect any Service Fee that may be owed to Grab when consumers opt to pay for the delivery services in cash. Therefore, the pre-payment is clearly an advance payment made by the delivery riders to cover their part of obligations in paying the Service Fee due to Grab in the said situation.

Hence, when there will be no more gigs to be assigned as a result of the termination of the contract, it is only reasonable and logical for the said sums to be repaid to the delivery riders. After all, any sums paid under this instrument were meant to be utilised for a specific purpose and not made gratuitously. The last requirement is also, in my opinion, self-explanatory. In this respect, by retaining the unutilised amounts paid by riders, even when there are no future gigs to be assigned - it is evident that Grab benefits from the ability to use these funds at its discretion. As previously noted, Grab has also reserved the right to earn interest on these funds from the moment they are credited to the e-wallet, a benefit that is not extended to the rightful owners of the funds (i.e. the riders).

Based on the application of both rules (i.e. unjust enrichment and section 71), it appears that these rules may be used as instruments to address the unfairness of Grab's No-Refund Clauses. Through the lens of restitution, it would only be fair for the monies paid by the riders to be refunded to their rightful owners upon the termination of the contract. It may be considered that this avenue provides the most straightforward approach in addressing unfair terms, owing to the clarity of its elements and the absence of significant doctrinal controversy (unlike the doctrine of unconscionability).

However, the simplicity of these rules may also be regarded as a double-edged sword. In this regard, although the operation of these rules is comparatively uncomplicated, this simplicity reflects a correspondingly narrow scope. As evident in our analysis, the restitutionary remedy applies only to instances

⁵²⁸ Clause 6.1.6 of Grab's T&C

involving an unjust transfer of benefits, and only when those benefits have monetary value. Therefore, any other categories of unfair terms that fall outside of this boundary are out of reach.

Additionally and for completeness, it may be prudent to mention that the rules are also open to be counterargued by Grab, by providing a reason for the retention of such funds (as per the fourth element as mentioned in the case of *Dream Property*).⁵²⁹ For instance, when there is a termination with just cause and excuse (e.g. breach of contract, misconduct, etc.) In this instance, Grab may argue that they have the right to forfeit any amount paid and/or unutilised balance left in the Driver's Credit Balance as a form of 'agreed liquidated damages'. In this regard, Grab may rely on section 75 of the Malaysian Contracts Act where it provides that:

"Compensation for breach of contract where penalty stipulated for

75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

Consequently, any attempt to recover the said sums on the ground of unjust enrichment and/or section 71 may be defeated by section 75 of the Malaysian Contracts Act. By way of illustration, the application of section 75 may be observed in the Malaysian Federal Court's case in *Cubic Electronics*,⁵³⁰ where the apex court ruled that when a contract has stipulated an agreed sum to be paid to the innocent party in the event of breach by the defaulting party, the former is entitled to receive the agreed sums without having to prove the damage actually suffered.⁵³¹ The Federal Court ruled:

"We turn now to the issue on burden of proof. The initial onus lies on the party seeking to enforce a clause under section 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject

⁵²⁹ See section 4.6.1 above

⁵³⁰ *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15

⁵³¹ However, it is still open for the defaulting party to argue that the liquidated damages is excessive, unreasonable and exorbitant.

*always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.*⁵³²

Therefore, although it appears that the doctrine of unjust enrichment and section 71 of the Malaysian Contracts Act may lend some assistance in addressing Grab's No-Refund Policy, its potential application may be defeated by Grab through the reliance on section 75. However, the door is not entirely shut. Although Grab may rely on section 75 and retain the monies paid on the ground of 'liquidated damages', it is submitted here that Grab may potentially fail to meet, at least, two key requirements as mentioned in *Cubic Electronics* above. Firstly, the contract must contain a clause that specifies the amount to be forfeited in the event of such a breach. Secondly, section 75 requires proof that the contract has been breached.

Pertaining to the former and as per the decision in *Cubic Electronics*, the party who wishes to rely on section 75 of the Malaysian Contracts Act shall, in advance, specify the amount to be forfeited in the case of any contractual breach. Not only is this absent from Grab's no-refund clauses, it is nowhere to be found in the terms and conditions either. On this reason alone, it is argued here that the application of section 75 in legitimising Grab's policy in retaining the sums paid in the Driver's Credit Balance would fail in its entirety. In regard to the second hurdle, Grab is obligated to prove that the termination is due to the breach committed by the riders. This could be done by way of, amongst others, providing a statement of reasons supporting such a decision to terminate.

In conclusion, the restitutionary remedy that may be achieved via the doctrine of unjust enrichment and/or section 71 of the Malaysian Contracts Act may, to some extent, be used as instruments to address unfair terms. However, as demonstrated above, the applicability of the rules is limited, in the sense that it may only govern terms that relate to the unjust conferment of benefits that have monetary value. As such, these rules may not be able to cast their net to other forms of unfair terms (compared to the doctrine of unconscionability), leaving the Non-Consumer Users remain exposed to other types of exploitative terms such as the terms pertaining to Unilateral Amendment, Unilateral Termination, Exclusion Clauses and Arbitration Clauses.

⁵³² *Cubic Electronics* (n 530) paragraph 70 of the Judgment

4.7 Gig Workers Bill 2025

As this study approached its completion in August 2025, the Malaysian Parliament has decided to table the so-called Gig Workers Bill⁵³³ on 25 August 2025. The Bill was subsequently passed by the House of Representatives on the same day and was later passed by the House of Senate on 9 September 2025. However, as of 1 December 2025, the Bill has not yet been gazetted and, consequently, has not come into operation. The Bill's arrival is most opportune, given the rapid growth of the gig economy in Malaysia and the large number of gig workers (more than 1.2 million workers as of 2025),⁵³⁴ amongst others. Although the Bill is not in operation yet, in order to determine whether it is still relevant to introduce unfair terms regulation in the area of the OFDS, it remains imperative to examine several of its key aspects, particularly those provisions that regulate terms and conditions imposed by online platforms against their gig workers and how these provisions may (or may not) lend some assistance to the Non-Consumer Users within the scope of this research. The full quotation of the relevant provisions cited herein may be found in Appendix 4 of the thesis.

The Bill was drafted with the aim to, amongst others, protect the rights of gig workers, define the obligations of contracting entities, regulate the terms and conditions governing service agreements between such entities and gig workers and provide for an appropriate mechanism to resolve disputes arising between the parties.⁵³⁵ Therefore, the Bill is not form of unfair terms legislation per se, but rather a statutory protection given to the gig workers in Malaysia, which includes among other things the regulation of contractual terms imposed on the gig workers. In this respect, the policing of contractual terms can be found in Part II of the Bill.⁵³⁶

4.7.1 Doctrinal Framework of the Law

Before we analyse to what extent the Bill may lend assistance to the Non-Consumer Users (or at least, to the delivery riders as gig workers within the context of our study), it is appropriate to set out the scope and several key provisions of the Bill, especially those that are relevant to our study. As mentioned previously, the objectives of the Bill are to, amongst others, protect the rights of gig workers, define the obligations of contracting entities, regulate the terms and conditions governing service agreements between such entities and gig

⁵³³ Gig Workers Bill 2025

⁵³⁴ Soo Wern Jun, 'Parliament Passes Landmark Gig Workers Bill, Extending Long-Overdue Protections to 1.2 Million Malaysians' (*Malay Mail*, 28 August 2025) <<https://www.malaymail.com/news/malaysia/2025/08/28/parliament-passes-landmark-gig-workers-bill-extending-long-overdue-protections-to-12-million-malaysians/189239>> accessed 30 November 2025.

⁵³⁵ See the Intitulement of the Bill.

⁵³⁶ Sections 3 to 7 of the Bill.

workers and provide for an appropriate mechanism to resolve disputes arising between the parties.⁵³⁷ In this respect, the Bill will only govern the relationship between the delivery riders as gig workers and the OFDPs, whilst precluding the restaurants operating within the OFDS from the protection granted under the Bill.

Under the Bill, the term “*contracting entities*” is not confined to online platforms, but broadly includes any individual or corporation who enters into a service agreement with gig workers for the purpose of obtaining services from the gig worker in consideration of payment.⁵³⁸ Similarly, “*gig workers*” are not restricted to individuals who provide services through online platforms, but also include any Malaysian citizen who provides services to any other contracting entities (i.e. non-platform entities),⁵³⁹ within the industries covered under the Bill, which include including filming activities, music and aesthetics.⁵⁴⁰ Under the Bill, gig workers continue to be treated as self-employed individuals working under a contract for services, rather than as employees under a contract of service.⁵⁴¹

Under the Bill, the contracts prepared by the contracting entities (whether platforms or otherwise) (“**Service Agreement**”) need to include several details, amongst others, parties to the agreement, obligations of the parties, services to be provided, period of agreement and rate of earnings.⁵⁴² In this respect, the existing Service Agreement (i.e. the terms and conditions that were already applicable prior to the Bill’s enforcement) between the parties is still deemed valid,⁵⁴³ unless it can be demonstrated that the terms therein are *less favourable* than those provided under the Bill.⁵⁴⁴ In this instance, the former will be replaced by the latter. However, if the Bill is silent on a particular matter, the matter shall not be “*prevented from being provided in a service agreement or from being negotiated between a contracting entity and a gig worker*”.⁵⁴⁵ Based on the foregoing, it appears that although the Bill aims to regulate the terms and conditions imposed on the gig workers, the Bill is not strictly considered as unfair terms legislation. Instead, the Bill adopts a default rule approach (i.e. striking down terms based on departure from the default rules), rather than striking down terms based on the basis of unfairness.

⁵³⁷ See the Intitulement of the Bill.

⁵³⁸ See section 2 of the Bill

⁵³⁹ *ibid*

⁵⁴⁰ For the full list of industry, refer to the Schedule of the Bill.

⁵⁴¹ Dewan Rakyat, ‘Parlimen Kelima Belas Penggal Keempat Mesyuarat Kedua’ (Dewan Rakyat 2025) 43 100, 159, 161 <<https://www.parlimen.gov.my/files/hindex/pdf/DR-28082025.pdf>> accessed 30 November 2025.

⁵⁴² Section 3 of the Bill

⁵⁴³ Section 4 of the Bill

⁵⁴⁴ Section 5 of the Bill

⁵⁴⁵ Section 7 of the Bill

4.7.2 Application and Effectiveness as Unfair Terms Control Mechanism

In light of my scope of research, I will analyse several provisions of the Bill that are relevant in potentially safeguarding the delivery riders against the imposition of unfair terms as well as some concerns regarding their potential shortcomings. Consistent with my approach in sections 4.3 to 4.6 above, the Identified Terms will be used as proxies to gauge the Bill's potential in policing unfair terms. In identifying if any of the Identified Terms may be addressed by the Bill, our primary consideration has to be placed on the *less favourable* test, given that this is the entry point employed by the Bill in regulating the terms and conditions involving the gig workers. In this respect, terms may be severed from the OFDPs' adhesion contracts if the terms are less favourable than the ones provided under the Bill. Simply put, the Bill may only be relevant when the subject matter of the alleged unfair term (in the context of this study, the Identified Terms) is covered under the Bill. On the contrary, if the subject matter of the Identified Terms is not provided by the Bill (i.e. no default rules), then the less favourable test is no longer applicable (since there is no legislative standard against which the alleged unfair terms may be compared).

Upon perusing the relevant provisions of the Bill, it appears that only three out of five of the Identified Terms may be addressed through the Bill, namely Unilateral Amendment, Unilateral Termination and Arbitration Clause, as these are the only matters (within the context of our study) that are governed by the Bill.

Firstly, as per my analysis of the Platforms' terms, it was discovered that both Grab and Shopee employ similar clauses, empowering them to amend any of the contractual terms unilaterally as and when they wish.⁵⁴⁶ Upon perusing the Bill, it is to be noted that there is no explicit outright prohibition of this type of term to be incorporated in the contract. Nevertheless, reliance may still be placed on section 8(1)(f) of the Bill where it states that the gig workers "*shall be consulted and informed if there is any variation of terms and conditions of the service agreement*". Pursuant to this clause, one may argue that the Platforms are not strictly forbidden from incorporating a term that grants them the unilateral power to amend any of the contractual provisions imposed on the delivery riders. Therefore, this mechanism appears to be tainted with one major flaw, in which, for the unilateral amendment to take place, all the Platforms have to do in order to be in compliance with the Bill is to consult and inform the delivery riders should there be any variation to the terms and conditions.

The Bill, unfortunately, does not clearly define the meaning of "*consult*" and to what extent this purported consultation should take place. Although this consultation seems to suggest that the riders' positions are meaningfully

⁵⁴⁶ Section 3.5.1 of Chapter 3 of the thesis.

incorporated into the decision-making process, this representation is illusory. Despite the purported consultation, I argue that the riders would still have very little bargaining power to begin with (if at all) to influence the outcome of such consultation. Such consultations are likely to be dominated by the Platforms, ultimately reducing the process to a mere formality and meaningless for the purposes of protecting the interests of the riders. Therefore, the riders' position has not improved in any meaningful way compared to the pre-Bill situation.

In light of the foregoing, one may argue that although the Bill may, to a certain extent, address the unilateral power of the Platforms to amend contractual terms, the effectiveness appears to be minimal at best. Given the absence of an outright prohibition of Unilateral Amendment clauses, it does not prohibit the Platforms from still retaining such power (through the imposition of the Unilateral Amendment clauses). Arguably, all the Platforms are required to do, post-Bill, is to incorporate a consultation requirement alongside their Unilateral Amendment clauses.

In addition to the above, the Bill may further improve the current condition of the riders regarding their account termination. At present and as discussed in Chapter 3 of the thesis, the Platforms currently have the absolute liberty to terminate the delivery riders without reasons through their Unilateral Termination clauses. The Bill puts a halt to these dubious terms/practices by mandating that gig workers shall not be terminated without just cause and excuse,⁵⁴⁷ a standard that mirrors the Malaysian employment law on unfair dismissal.⁵⁴⁸ Further, the Bill also puts into place a specific procedure before a termination may take place. In this respect, section 14(6) indicates that the Platforms may terminate the riders' access to the Platforms' systems due to either: (1) a violation of the Platforms' terms and conditions; and/or (2) misconduct.

If the Platform intends to make use of the possibility to terminate in accordance with section 14(6) of the Bill, the riders must be heard.⁵⁴⁹ Before a termination can take place, the Platform can either modify/suspend the rider's access to the platform in order to hold an internal inquiry, not exceeding 14 days.⁵⁵⁰ If the Platform finds that the rider did not violate any terms nor committed any misconduct, the Platform shall reactivate the accounts and pay the rider half of the amount of the average daily earnings.⁵⁵¹ However, if the Platform's allegation towards the rider is proven, the Platform may either: (1)

⁵⁴⁷ Section 8(1)(g) of the Bill

⁵⁴⁸ Section 20 of Industrial Relations Act 1967

⁵⁴⁹ Section 14(7) of the Bill

⁵⁵⁰ Section 14(3) of the Bill

⁵⁵¹ Section 14(5) of the Bill

terminate the contract; or (2) continue with the suspension for another period not exceeding seven days.⁵⁵²

The abovementioned requirements will, prima facie, prevent the Platforms (whether Grab or Shopee) from terminating the riders' accounts without providing any explanation, as currently enabled by their terms and conditions. In light of the foregoing, it appears that the Bill may address the Platforms' clauses regarding Unilateral Termination. However, there are some concerns regarding the said mechanism. As mentioned previously, the Platforms are required to pay only half of the riders' average earnings. This, in my view, is unfair to the riders. If the Platforms' allegations turned to be wholly unfounded/untrue, there is no reason for the riders not to be compensated in full.⁵⁵³ Additionally, I argue that this 'half-pay' mechanism as mandated by the Bill may inadvertently and/or indirectly encourage Platforms to commence inquiries against many riders (even without sufficient or substantiated grounds), and thereby affecting the riders' earnings.

Another concern worth noting is that the Bill does not define several key terms used in its termination provisions. In this regard, the Bill does not explicitly define the meaning of 'misconduct' and under what circumstances a misconduct would amount to a just cause or excuse for termination? In the absence of a definition of the term 'misconduct' in the Bill, reference to case law is instructive. In *Ong Wah Chong*,⁵⁵⁴ the Malaysian Industrial Court ruled that "*An employee has got certain obligations toward his employer. These obligations arise from the implied and express terms of the contract of employment. Any breach of these terms, unless i.e. be of a trifling nature, would amount to misconduct.*"⁵⁵⁵ Based on the ruling above and if it applies in the context of our case study, it appears that any violation of the Platforms' terms and conditions (whether implied or express), if proven, would constitute a misconduct. Once the allegation of misconduct has been proven, Platforms shall ensure that such misconduct constitutes a just cause and excuse that warrants termination of the employee.⁵⁵⁶ Unfortunately, the Bill is also silent on the standard of proof regarding the requirement of 'just cause and excuse'. As this principle mirrors the approach taken in Malaysian employment law on unfair dismissal,⁵⁵⁷ guidance may be drawn from the employment case law that has developed around the

⁵⁵² Section 14(6) of the Bill. Upon the expiry of the additional seven days, the account shall be reactivated, as per section 14(8) of the Bill.

⁵⁵³ The same concern has also been raised during the parliamentary debate of the Bill on 28 August 2025. However, no corresponding amendments were made to the Bill. See Dewan Rakyat (n 541) page 158.

⁵⁵⁴ *Ong Wah Chong v. Shell Global Solution Malaysia Sdn Bhd & Anor* [2020] 2 LNS 1777

⁵⁵⁵ *ibid*, paragraph 85

⁵⁵⁶ Section 8(1)(g) of the Bill

⁵⁵⁷ Section 20 of Industrial Relations Act 1967

said principle. In *The Store (M) Sdn Bhd*,⁵⁵⁸ the Malaysian High Court ruled that “Not all misconduct would justify a dismissal as there are different gradation of misconduct. Some misconduct would justify a warning letter, others a withholding of annual increment and others still a demotion”.⁵⁵⁹ The Court further held that the issue of proportionality can be ascertained by examining “whether the misconduct had resulted in a complete breakdown of the trust and confidence”⁵⁶⁰ between the parties.

Based on the above, it can be concluded that the Bill’s lack of definitions pertaining to several important provisions regarding termination of the riders is concerning. Although the judicial precedents as cited above may offer some clarification on this issue, it remains unclear whether the said precedents (which were decided on the basis of employment law) may even be adopted in the relationship between the riders and the Platforms, as the former is not regarded as an employee of the latter. Hence, although the Bill’s attempt to protect the riders from unfair termination should be commended, this deficiency risks undermining its overall effectiveness.

Besides the Bill’s potential in addressing (although with limitations) clauses regarding Unilateral Amendment and Unilateral Termination, the Bill may also address the Platforms’ Arbitration Clauses. Such an attempt to protect the gig workers is also evident in its introduction of a multi-tier dispute resolution mechanism. At present and as demonstrated in Chapter 3 of the thesis, both Platforms employ a single-tier dispute resolution mechanism (i.e. arbitration), with no internal grievance mechanism in place. However, under section 17 of the Bill, the online platforms are now obligated to establish an internal grievance mechanism, allowing the gig workers to lodge complaints and such complaints need to be resolved within 30 days.

If the gig workers, amongst others, are dissatisfied with the decisions made by the platforms via the internal grievance mechanism, they may refer the dispute for conciliation.⁵⁶¹ This conciliation proceeding will be facilitated by officers appointed under the Industrial Relations Act 1967 (“**Conciliator**”), and the Conciliator shall take any steps necessary for promoting an expeditious settlement between parties.⁵⁶² In the event that the Conciliator is of the view that there is no plausibility for an amicable settlement, the Conciliator shall refer the matter to the Gig Workers Tribunal (“**Tribunal**”)⁵⁶³ established under section 24 of the Bill. The Bill does not specify the maximum timeframe in which this

⁵⁵⁸ *The Store (M) Sdn Bhd v Ang Tin Huat & Anor* [2016] 4 ILJ 10

⁵⁵⁹ *ibid*, paragraph 32

⁵⁶⁰ *ibid*, paragraph 33

⁵⁶¹ Section 17 of the Bill

⁵⁶² Section 19(2) of the Bill

⁵⁶³ Section 19(5) of the Bill

conciliation proceeding shall take place, before the dispute has to be referred to the Tribunal.

The Tribunal may then conduct hearing(s) for the purposes of adjudicating the dispute raised by the gig workers and the Tribunal shall make an award within 30 days from the last date of the hearing.⁵⁶⁴ In this respect, the award issued is to be treated as good as the order made by a Sessions Court and therefore, parties may file an appeal to the High Court.⁵⁶⁵ According to the Malaysian Minister of Human Resources, one of the purposes of establishing these multi-tier dispute resolution mechanisms is to ensure a faster dispute resolution for the gig workers.⁵⁶⁶

Although the Parliament's intention should be applauded, this introduction does come with some concerns. Firstly, the internal grievance mechanism does not apply to any dispute concerning the termination of the gig workers.⁵⁶⁷ It is, however, unclear why the Parliament chose to make this exclusion. Secondly, section 19 of the Bill appears to set no maximum timeframe within which the Conciliation must be completed. In contrast to the internal grievance mechanism, which must be concluded within 14 days, and the Tribunal, which is required to issue an award within 30 days from the final hearing date, it is entirely unclear why the drafters of the Bill did not impose a similar time limit for the Conciliation.

The absence of this timeframe may, in my view, invite opportunistic behaviour on the part of the Platforms by prolonging the Conciliation process to delay the dispute from being escalated to the Tribunal. Consequently, the riders may be trapped in the Conciliation process for far too long, and the longer the dispute is kept in negotiation, the greater the prejudice they are likely to suffer. This is, arguably, against the Parliament's intention to speed up the dispute resolution process in favour of the gig workers.

Further, although the multi-tier dispute resolution process may work in favour of the riders by effectively replacing the Platforms' arbitration clauses,⁵⁶⁸ it is to be noted that such a mechanism is only available to the gig workers. In other words, the lodge of complaints to either the Conciliator or the Tribunal may only be initiated by the gig workers. This suggests that when the dispute is to be initiated by the Platforms, the reliance on the arbitration clauses as the sole dispute resolution avenue would not be prohibited by the Bill. Consequently, in the event where the Platforms intend to pursue a claim against the

⁵⁶⁴ Section 42(1) of the Bill

⁵⁶⁵ Section 44(1) of the Bill

⁵⁶⁶ Dewan Rakyat (n 541) pages 102 and 153

⁵⁶⁷ Section 17(3) of the Bill

⁵⁶⁸ This argument is premised on the assumption that the Platforms' Arbitration Clauses are less favourable than the introduced multi-tier dispute resolution mechanism provided under the Bill.

gig workers, the dispute may be brought to the arbitration and the gig workers may continue to face the same difficulties that they currently experience under the current contractual landscape. In this specific context, one may argue that the recently introduced multi-tier resolution process may only offer limited practical benefit.

Based on the analysis above, it appears that the Bill may address several types of unfair terms (i.e. Unilateral Amendment, Unilateral Termination and Arbitration Clauses). Notwithstanding its potential to address certain types of unfair terms, the Bill remains subject to a number of broader structural and substantive limitations. First and foremost, the Bill appears to be underinclusive and narrowly framed, leaving significant segments of the gig economy outside its protective reach. Whilst it is understandable that the Bill was specifically devised with individual workers in mind, the adoption of the term “*gig workers*” and definitions attached to it (i.e. confined to individuals per se) would definitely preclude other relevant stakeholders (i.e. businesses) in the platform economy business model from the Bill’s purview.

This is, unfortunately, a missed opportunity on the part of the Malaysian legislature to adopt a more holistic approach towards platform governance in Malaysia. In my view, the failure to seize this reform moment becomes even more compelling given that restaurants, as evident in Chapter 3 of this thesis, face similar types of unfair terms as the delivery riders. Given that both riders and restaurants are in a similar predicament, there appears to be no justification for excluding non-individual players from the Bill’s protective scope.

Further, this limited scope of the Bill may have its own negative implications for the restaurants. It is argued here that by conferring protection to the delivery riders per se would adversely affect the state of the restaurants, particularly with regard to the latter’s rights, obligations and liabilities under the contract with the OFDPs. As argued previously in Chapters 2 and 3, the business risks surrounding the OFDS business model have been unjustly shifted from the OFDPs to the Non-Consumer User. This is likely a consequence of the robust protections afforded to consumers under consumer law, leading platforms to reallocate these risks to the next party with the least bargaining power (i.e. the Non-Consumer Users). As pointed out by Vallas and Schor, the platform economy has inherently allowed the platforms to shift the commercial risks they were formerly obliged to bear onto other parties.⁵⁶⁹ Given that the riders are now, to an extent, protected under the Bill, it is not improbable for the risks to be redistributed to the restaurants alone, thereby compounding the risks they

⁵⁶⁹ Steven Vallas and Juliet B Schor, ‘What Do Platforms Do? Understanding the Gig Economy’ (2020) 46 Annual Review of Sociology 273, 280.

already shoulder. Simply put, the position of the restaurants within the OFDS contractual arrangement may have gone from bad to worse.

Another concern with adopting a 'less favourable' test is, in my view, that it captures a broader category of terms than those typically considered as substantively unfair. In this respect, a term may be marginally less favourable than the default protections under the Bill without actually creating any meaningful shift in the parties' rights or obligations. On one hand, this approach may benefit the delivery riders as there is a minimum protection level prescribed by the legislature. However, striking down terms on this basis (purely based on mandatory statutory rules rather than via unfairness assessment) risks creating an overly rigid contractual environment in platform contracting.

The next concern is regarding the methodology by which one is supposed to determine that a contractual term is, in fact, less favourable than its statutory counterpart. For example, the Bill provides for a multi-tier dispute resolution process (as discussed above) whilst the Platforms' adherence contracts (as discussed in Chapter 3 of the thesis) provide for a one-tier mechanism (i.e. arbitration). Indeed and as evident in Chapter 3 of this thesis, I have argued that mandatory reference to arbitration as the sole dispute resolution mechanism may be deemed unfair. However, the question now is whether the multi-tier dispute resolution mechanism (and the manner in which it is operationalised under the Bill) is more favourable than the arbitration clause? Both mechanisms, in my view, have their own advantages and disadvantages. Unfortunately, the Bill offers no guidance on the normative benchmark against which such assessments should be made. Should the inquiry adopt a subjective standard centered on the riders' own perception and/or expectations or objectively by considering all surrounding factors (and perhaps from a reasonable man point of view)? Without clear legislative direction, the adjudicative bodies are left without a coherent framework to determine whether a deviation from the statutory default rules should be intervened. Although this predicament may be remedied by any interpretive instruments (and hence, leaving the matter to the courts), clarification on this issue at the earliest opportunity would provide greater legal certainty.

Lastly, section 7 of the Bill may further complicate matters where it states that parties are free to negotiate any terms that are not provided under the Bill. However and as established in Chapter 2 of the thesis, there is a disparity in bargaining power between the Platforms and the Non-Consumer Users, rendering meaningful negotiation between parties highly unlikely. Consequently, when a term is not regulated by the Bill, the Platforms may still impose dubious terms against the delivery riders. This circumstance is evident concerning the No-Refund Policy and Exclusion Clauses, in which these types of clauses are left

to be *negotiated* between parties given that such matters are not addressed by the Bill.

4.8 Conclusion

As mentioned previously in Chapter 1 of this thesis, the analysis in this chapter is paramount in answering the final sub-question:- *to what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users?* If the discussions demonstrate that the existing state of Malaysian legal framework is insufficient/ineffective to replace the function of a systematic unfair terms legislation, it will then support my normative claim that an unfair terms legislation specifically designed for the Non-Consumer Users within the OFDS industry is indeed warranted.

Based on the discussion throughout this chapter, we may come to the conclusion that the current state of Malaysian contract law is not, arguably, capable of replacing, substituting and/or becoming an equivalent alternative to a systematic unfair terms legislation to protect the Non-Consumer Users. This finding stems from our analysis in which the effectiveness of each of the selected rules in addressing unfair terms is measured.

In assessing whether these rules possess the capability to operate as a substitute for unfair terms legislation, the Identified Terms as recognised in Chapter 3 of the thesis are used as the proxy. In this regard, the Identified Terms function as benchmarks for evaluating each rule's potential as an instrument to regulate unfair terms. However, this is just the first step of our test. It only signals to us that there are some feasible alternatives that the Non-Consumer Users may rely on in protecting themselves from the imposition of unfair terms. Some rules may have a wider cast (i.e. taking into account how each rule works in general), but their ultimate effectiveness may be hindered in their actual implementation (e.g. due to their inherent flaws).

In conducting my assessment, four legal rules have been duly identified and these rules, *prima facie*, may have the prospect to act as a substitute for unfair terms legislation due to their functional potential and doctrinal relevance:

- (a) Doctrine of Unconscionability;
- (b) Rules of Construction and/or Interpretation;
- (c) Section 29 of the Malaysian Contracts Act; and
- (d) Restitutionary Remedies via the Doctrine of Unjust Enrichment and section 71 of the Malaysian Contracts Act.

Based on our assessment, some rules have a higher potential to cast their net in dealing with various types of unfair terms whilst some are more limited in applicability due to their inherent scope. As evident in the previous sections, it is observable that the doctrine of unconscionability has the broadest level of theoretical capabilities in dealing with a wide range of unfair terms, owing to its wide scope of application and the nature of how the rule will be triggered in general. Whether the terms concern Unilateral Amendment, Unilateral Termination, Exclusion Clauses or Arbitration Clause, this doctrine's potential applicability is endless (at least in theory). A term may be deemed as unconscionable and wholly inoperative and thereafter severed from the contract, so long as it can be demonstrated that the terms in question are unconscionable to the detriment of Non-Consumer User. It represents a (theoretically) highly functional and adaptable legal vehicle.

As opposed to the doctrine of unconscionability which primarily deals with the normative question of what is fair or otherwise, the rules of interpretation are not specifically designed to combat unfairness. It merely serves as an instrument and/or vehicle to resolve contractual ambiguities and/or situations where the contracts are riddled with contradictory provisions. It only becomes useful as a replacement for unfair terms legislation when such ambiguities (when not resolved) may lead to unfairness, as evident in the application to our Identified Terms. Within the context of the Identified Terms, ambiguities (that may be detrimental to the Non-Consumer Users if not resolved) exist in clauses relating to two of the Identified Terms, which are Unilateral Amendment and Exclusion Clauses.

Compared to the doctrine of unconscionability and the rules of interpretation, the remaining rules' (i.e. section 29 of the Malaysian Contracts Act and the restitutionary remedy) potential capabilities in addressing unfair terms are more restrictive, given their limited scope. In this respect, section 29 of the Malaysian Contracts Act is only relevant to be invoked when dealing with a term that prohibits one party from exercising its legal rights in its entirety. As per section 4.5 above, section 29 may, at least in theory, be applicable to knock down and/or sever the Exclusion Clauses (particularly those imposed by Grab) as they absolutely restrict the Non-Consumer Users from initiating any legal action against them.

The same can also be said for the restitutionary remedy that can be achieved through the rule of unjust enrichment and section 71 of the Malaysian Contracts Act. In this respect, the potential capability in addressing unfair terms is also restrictive, in the sense that it may only govern terms that relate to the unjust conferment of benefits capable of being ascertained with monetary value. As such, these rules may not be able to cast their net to other forms of unfair terms, unlike the doctrine of unconscionability. As discussed in section

4.6 above, the restitutionary remedy may only become relevant within the context of the No-Refund Policy, leaving the Non-Consumer Users remain exposed to other types of exploitative terms such as the terms pertaining to Unilateral Amendment, Unilateral Termination, Exclusion Clauses and Arbitration Clauses.

Notwithstanding the findings as summarised above, each rule may also come with its own inherent flaws and criticisms that warrants scrutiny. It is important to note that just because a rule has the theoretical ability to address a wider range of unfair terms, the practical utilisation of such rule may nevertheless be limited due to its inherent flaws. A good illustration of this limitation is the doctrine of unconscionability. As discussed in section 4.3.2 above, one of the main challenges in implementing the doctrine of unconscionability lies in its uncertain reception within the current Malaysian legal system. The reluctance of the Malaysian courts in adopting this doctrine is amongst others, due to Malaysian courts' reluctance in departing from classical contract law theory that puts utmost respect to parties' freedom of contract. In this regard, the existence of a statutory provision (i.e. section 14 of the Malaysian Contracts Act) setting out procedural factors affecting consent (e.g. undue influence, mistake, etc.) was argued to be sufficient in addressing unfair bargain. Due to this reason, the Malaysian courts are more willing to set aside contractual arrangements on procedural, rather than substantive grounds of unfairness.

The rules of interpretation also have their own limitations in their actual implementation. As mentioned previously, these interpretative tools do not directly (or meant to) strike down unfair terms. Instead, it works indirectly, intervening only when ambiguity is present, rather than because a term is inherently unfair (unlike the doctrine of unconscionability). Where ambiguity or contradiction is lacking, the said interpretive instruments offer little to no practical assistance in contesting the alleged unfair terms. As consistently ruled by the Malaysian courts, a term will stand as it is if it is clearly worded, regardless whether or not it is blatantly unfair.

In regard to section 29 of the Malaysian Contracts Act, its overall effectiveness may be hindered by, amongst others, the fact that it is easy to be circumvented by the Platforms. In this respect, section 29 only renders a term as void if the term *absolutely* prevents a party from exercising their legal rights. As can be observed in *Bourke*, the Malaysian Federal Court ruled that the bank's exclusion clause relieving the bank from any forms of liability, amounted to preventing its customers from exercising their legal rights, and therefore void per section 29 of the Malaysian Contracts Act. However, this prohibition may easily be circumvented by the Platform by remoulding their exclusion clause. For instance, Platforms may agree to accept an insignificant degree of responsibility, no matter how nominal it is (e.g. accept responsibility for a type of liability that has a low likelihood of occurring). This leaves a lot of room for the Platforms to

manoeuvre around their exclusion clause by granting, still, a wide array of exclusions of liabilities upon themselves.

Pertaining to the remedy of restitution, although this avenue provides the most straightforward approach in addressing unfair terms (compared to, for instance, the doctrine of unconscionability) owing to the clarity of its elements and the absence of significant doctrinal controversy, the simplicity reflects a correspondingly narrow scope. As evident in our analysis, the restitutionary remedy applies only to instances involving an unjust transfer of benefits, and only when those benefits have monetary value. Therefore, any other categories of unfair terms that fall outside of this boundary are out of reach.

How about the Gig Workers Bill? Will this recent introduction to the Malaysian legal landscape have the capability to effectively protect the Non-Consumer Users and therefore, eliminate the need of having a dedicated unfair terms legislation within the OFDS business model? At the outset, this question must be answered in the negative. This is given the fact that the Bill has a very limited scope, as it only governs gig workers, leaving the restaurants in the OFDS industry remain vulnerable against the imposition of unfair terms by the OFDPs. On this reason alone, I argue that the Bill may not serve as an effective/comprehensive alternative to a dedicated unfair terms legislation within the OFDS industry.

Notwithstanding the above and as discussed in section 4.7 above, the Bill has nevertheless introduced several valuable provisions in protecting the gig workers (i.e. riders), including protection against some of the OFDPs' unfair terms. However, upon perusing the said relevant provisions (including the 'less favourable' test adopted in striking out dubious terms), it appears that the Bill would still need further refinement and several clarifications on certain aspects. In my view, failure to resolve these issues at the outset may hinder the Parliament's objective in protecting the gig workers (in our context, the delivery riders) from various unfair terms/practices by the OFDPs.

5. THE LAST WORD: KEY INSIGHTS AND FUTURE DIRECTIONS

5.1 Revisiting the Point of Departure: Context and Questions

Today, the OFDS industry has revolutionised our way of life. From the instant we place an order to the moment the restaurant prepares it and the rider delivers our meals, a seamless chain of actions unfolds. Our meals travel across the city for a few kilometres before they finally arrive at our doorstep. Yet, behind this convenience, we often overlook the entrepreneurs who make this modern lifestyle possible, the unseen actors behind this transformation. This development is unquestionably a game-changer for businesses, as they can leverage online platforms to reach as many customers as they want.

With all these conveniences and tools to expand their businesses and increase revenue, what are the trade-offs? Can the Non-Consumer Users indeed benefit from these developments, or are their efforts to improve their subsistence being taken advantage of? As argued in this thesis, the Non-Consumer Users are, arguably, susceptible to the imposition of unfair terms by the Platforms as the parties who hold stronger bargaining power. These risk manifests itself at the very outset of their relationships via the Platform's terms and conditions.

Given the aforementioned predicament, does the current Malaysian legal framework provide any systematic protection against unfair terms for the Non-Consumer Users? The answer is, unfortunately, in the negative, at least not through a unified or comprehensive statutory approach, unlike the protection granted upon the consumers. As pointed out previously, the Malaysian CPA (being the only legislation specifically designed to combat unfair terms in Malaysia) is restrictive in application. Under this Act, terms that are found to be procedurally or substantively unfair would be deemed unenforceable and void.⁵⁷⁰ Given that the Malaysian CPA only deals with consumer contracts, business entities and/or independent contractors are excluded from the unfair terms control, notwithstanding the plethora of academic studies suggesting that business entities (or at least a group of them) may also be vulnerable.⁵⁷¹

Unlike its common law sibling Australia, Malaysia has yet to recognise the importance of policing the terms within the P2B relationships, regardless whether or not the contracts contain any terms that appear to be (or even are blatantly) unfair.⁵⁷² Even with the introduction of the [name of the] Bill, the restaurants in the OFDS industry would still be left unprotected, as the Bill is specifically designed for the gig workers per se. Therefore, this research essentially aims to investigate whether a systematic statutory unfair terms control is

⁵⁷⁰ Malaysian CPA, section 24G.

⁵⁷¹ See discussions in Chapter 2.

⁵⁷² See Schedule 2 to the Australian CCA

needed in Malaysia, at least within the context of the OFDS business model. Throughout the discussions provided in this thesis, it appears that there are far more compelling reasons to take action now than to refrain and/or abstain.

It could reasonably be argued that the solution to exploitative practices in online platform models should be sought in other branches of the law, such as employment or competition law. These arguments, however, underestimate the advantages of a (complementary) contract law intervention. With regard to employment law, it goes without saying that its applicability is restricted within the sphere of employment contracts. Given that neither the restaurants nor the riders are employees of the OFDPs, this branch of law offers no meaningful avenue for addressing the contractual issues in the OFDS industry. Further, the predicaments faced by the Non-Consumer Users as discussed throughout this thesis stem from the imposition of unfair terms in the OFDPs' adhesion contracts. Hence, as the predicaments faced by the Non-Consumer Users arise directly from the contractual arrangements between the parties, they are most appropriately addressed through a contract law framework.

Further, resorting to competition law to address contractual unfairness that exists in the relationship between the Non-Consumer Users and the OFDPs may not be the most appropriate recourse either. In this respect, competition law concerns conduct that distorts market competition and does not deal with the issues of contractual (un)fairness, the latter of which falls under the purview of contract law. For instance, under the Malaysian Competition Act 2010, two categories of conduct are prohibited: participating in an anti-competitive agreement and abuse of dominant position. With regard to the former, enterprises are prohibited from engaging in, either vertical or horizontal agreement, that has the object (or effect) of *"has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services"*.⁵⁷³ This would include an agreement that is aimed to, amongst others, fix selling price or any other trading conditions and limit/control the production of any supply.⁵⁷⁴

Pertaining to the latter, enterprises are prohibited from, either independently or through collusion with others, abusing their dominant position in the market.⁵⁷⁵ This abuse would include, refusing to supply to a particular enterprise, imposing different trade conditions with regard to the same transactions with different enterprises and purchasing a scarce stock of intermediate goods/resources that a competitor depends on, without reasonable commercial justification.⁵⁷⁶

⁵⁷³ Section 4(1) of the Malaysian Competition Act 2010

⁵⁷⁴ *ibid*, section 4(2)

⁵⁷⁵ *ibid*, section 10(1)

⁵⁷⁶ *ibid*, section 10(2)

It is to be noted that whether an enterprise is participating in an anti-competitive agreement or abusing its dominant position, such conduct would only be prohibited if it has the object or effect of distorting competition in the market. Upon perusing the Identified Terms (as per Chapter 3), none of these terms clearly has the object of distorting the market competition. However, as per the decision in *Persatuan Insurans Am Malaysia*,⁵⁷⁷ the Malaysian Competition Appeal Tribunal ruled that where the object is not explicit, one may look at the effect that the purported conduct may produce (i.e. whether or not such conduct has the effect of distorting competition).⁵⁷⁸

Out of all of the Identified Terms, one may argue that Grab's No-Refund Policy may produce the effect of distorting the market competition. As argued previously (see Chapter 3), the delivery riders are at liberty to exit the contract as and when they wish. However, this freedom is merely illusory given the financial implications at stake, as the funds deposited into the Drivers' Credit Balance will not be refunded. Therefore, Grab's No-Refund Policy functions as, arguably, an exit barrier, incentivising riders to remain on the platform and potentially has the effect of distorting the competitive condition of the market. Interestingly, the Malaysian Competition Commission (MyCC) had previously, in 2019, issued a financial penalty of MYR 86,772,943.76 (approximately EUR 18 million) against Grab,⁵⁷⁹ based on the former's finding that the latter had abused its dominant position through the imposition of restrictive contractual clauses on its drivers, which limited its drivers' ability to promote Grab's competitors.⁵⁸⁰

To recap, the objective of competition law (as the name suggests) is to prevent any conduct that has the object or effect of distorting competition in the market.⁵⁸¹ As demonstrated in the preceding paragraphs, the reliance on competition law in protecting the Non-Consumer Users within the OFDS market

⁵⁷⁷ *Persatuan Insurans Am Malaysia (PIAM) & Ors v Competition Commission* [2023] 7 MLJ 691

⁵⁷⁸ *Persatuan Insurans Am* (n 577) paragraph 36 of the Judgment

⁵⁷⁹ Malaysia Competition Commission, 'News Release: MyCC Proposes to Fine Grab RM86 Million for Abusive Practices' (3 October 2019) <<https://www.myc.com.my/sites/default/files/pdf/decision/Proposed%20Decision%20against%20GRAB%20%28Eng%29.pdf>> accessed 5 January 2026.

⁵⁸⁰ Grab later filed an application for judicial review in the Malaysian High Court, claiming that the Malaysia Competition Commission's ("MyCC") findings were tainted with procedural issue and therefore, was invalid and should be quashed (see *MyTeksi Sdn Bhd & Ors v Suruhanjaya Pesaingan* [2020] 11 MLJ 93). While the High Court initially dismissed the application on the ground that the application was pre-mature, the Court of Appeal reversed the High Court's finding and remitted the matter back to the High Court to conduct a substantive hearing as the said application was not filed prematurely (see *MyTeksi Sdn Bhd & Ors v Competition Commission* [2022] 6 MLJ 767). Upon the conclusion of the substantive hearing in the High Court, the Court quashed the decision made by MyCC as it was procedurally flawed (see *MyTeksi Sdn Bhd & Ors v Suruhanjaya Pesaingan* [2023] MLJU 2142). This decision was later affirmed by the Court of Appeal (see *Suruhanjaya Pesaingan v MyTeksi Sdn Bhd & Ors* [2025] 3 MLJ 197). Therefore, although the rulings were in favour of Grab, it remains uncertain whether the substantive findings of the MyCC would have been upheld in the absence of any procedural impropriety.

⁵⁸¹ See the Intitulement of the Malaysian Competition Act 2010, where it provides that "and whereas in order to achieve these benefits, it is the purpose of this legislation to prohibit anti-competitive conduct".

may not be an appropriate recourse, as it is limited in scope and application. Although it may be useful (to a certain extent) in striking out unfair terms, the deployment of competition law as a comprehensive safety net for the Non-Consumer Users may be constrained, as not all unfair terms have the object or effect of distorting competition in the market (e.g. Unilateral Amendment, Unilateral Termination, Exclusion Clauses and Arbitration Clauses). Indeed, these types of clauses may be deemed unfair (as per Chapter 3), unfairness per se is not the primary concern of competition law, if it is a concern at all.

Considering the above and the loophole in the current state of Malaysian contract law framework, the main question that this thesis attempts to answer is *whether there is a need for Malaysia to enact a dedicated unfair terms legislation to protect the Non-Consumer Users within the OFDS business model in Malaysia?* I argue that the time has come for Malaysia to protect the Non-Consumer Users from a contract law perspective, by enacting a systematic unfair terms legislation dedicated to the OFDS industry in order to protect the Non-Consumer Users from the imposition of unfair terms by the Platforms. This normative push for reform is substantiated and/or supported by our findings with respect to the three sub-questions formulated earlier:

- (a) *to what extent are the Non-Consumer Users vulnerable and/or susceptible to the imposition of unfair terms?* (as per Chapter 2);
- (b) *to what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities via the imposition of unfair terms be detected in the standard terms used by Malaysian OFDPs?* (as per Chapter 3); and
- (c) *to what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users?* (as per Chapter 4).

5.2 Weaving the Threads: The Core Findings

The first sub-question is a vital preliminary step in answering the main question (i.e. *whether there is a need for Malaysia to enact a dedicated unfair terms legislation to protect the Non-Consumer Users*). In this respect, the purpose of this first sub-question is to discover whether the Non-Consumer Users may be deemed, to a certain extent, vulnerable to the imposition of unfair terms. If the answer to this question is in the affirmative, the existing protection should not be reserved for consumers alone, but should also extend to the Non-Consumer Users (despite their status as businesses and self-employed).

Accordingly, Chapter 2 approached this question from a theoretical angle, explaining how protection for the Non-Consumer Users may be justified. Chapter 2 begins with the notion of subsistence entrepreneurs, an attempt to erode the common (mis)conception regarding the homogeneity of business actors and

that all businesses (including independent contractors) stand on equal footing. I argued that subsistence entrepreneurs have distinct characteristics that may exacerbate their vulnerabilities, particularly when compared to other types of entrepreneurs, such as larger market players or firms. The discussions in Chapter 2 demonstrated that the Non-Consumer Users may exhibit characteristics commonly associated with subsistence entrepreneurs. The Non-Consumer Users (who mostly (if not all) resemble the characteristics of subsistence entrepreneurs) are merely conducting businesses and/or working out of necessity and usually lack skills and entrepreneurial characteristics. They simply work and/or trade to meet their basic needs of life and to support their subsistence at a minimum level without any surplus for trade.

Chapter 2 further examined how and under what circumstances consumers may find themselves vulnerable against harmful conduct (e.g. the imposition of unfair terms). In this respect, the theory of vulnerability drawn from various disciplines will be used as an entry point, establishing a conceptual benchmark that may explain how susceptibility to harm (e.g. unfair terms) may arise from contextual and/or relational factors, regardless of the stakeholders' legal status (i.e. consumer or otherwise). Relying on Cartwright's taxonomy, six circumstances that are liable to render consumers vulnerable were identified:- (1) weaker bargaining power; (2) information asymmetry; (3) situational pressure; (4) supply deficit; (5) redress vulnerability; and (6) impact vulnerability.

Chapter 2 then analysed whether the said circumstances may also be present in the OFDS industry. The findings of the said analysis demonstrated that these circumstances are also observable within the contractual relationship between the Non-Consumer Users and the OFDPs. As mentioned previously in Chapter 2, this study does not claim that the Non-Consumer Users are inherently vulnerable, but the situations that they experience in relation to their contractual relationship with the OFDPs make them liable to be vulnerable against the imposition of unfair terms. It is within this particular context, that the Non-Consumer Users are susceptible to harm. Given the findings in Chapter 2 of the thesis, collectively, it can be concluded that there is a valid justification to grant the Non-Consumer Users with a systematic legal protection against the imposition of unfair terms by the OFDPs.

Whilst Chapter 2 provides us with the theoretical normative justification for protecting the Non-Consumer Users, the said justification may be further corroborated from a practical perspective, by demonstrating how such vulnerabilities have been actually abused and/or taken advantage of by the OFDPs through their terms and conditions. In this respect, Chapter 3 was designed to investigate the second sub-question: *to what extent, and how, can abuse of the Non-Consumer Users' vulnerabilities be detected in the adhesion contracts imposed by the Malaysian OFDPs*. The examination of the terms and conditions

imposed by two Malaysian OFDPS namely, Grab and Shopee revealed that their adhesion contracts are riddled with unfair terms, if they are assessed through the chosen legal framework. In this regard, the unfairness assessment provided under the Malaysian, European Union and Australian legal framework were utilised as a normative benchmark, with the aim to ascertain the appropriate standard and/or yardstick of 'unfairness'.

The analysis in Chapter 3 identified multiple unfair terms in the adhesion contracts imposed by both Grab and Shopee. These impugned unfair terms may be grouped into six distinct categories:- (1) the Platforms' unilateral power to amend any contractual terms; (2) Grab's No-Refund Policy; (3) the Platforms' unilateral power to arbitrarily terminate the Non-Consumer Users' accounts without basis; (4) non-guarantee of the platforms' reliability; (5) the Platforms' wide exclusion and/or restriction of liabilities; and (6) arbitration as the sole dispute resolution avenue. These findings were also informed through an analysis of the relevant terms in light of other relevant legislation, including those applicable to platform economy business models. Based on these observations, it can be concluded here that the vulnerabilities of the Non-Consumer Users have indeed been taken advantage of by the Malaysian OFDPS (at least by Grab and Shopee), providing us with even more concrete reason to protect the Non-Consumer Users from the imposition of unfair terms.

Having been equipped with at least two justifications for protecting the Non-Consumer Users, the thesis moved on to the last pertinent question: *to what extent could existing legal rules in Malaysia, including the Gig Workers Bill, provide adequate protection to the Non-Consumer Users?* The answer to this last sub-question would assist us in answering the main research question. If the current state of the Malaysian legal framework can sufficiently and effectively protect the Non-Consumer Users, then there would be no immediate need for a dedicated unfair terms legislation to be enacted. Otherwise, it emphasises the need for Malaysia to protect the Non-Consumer Users via a systematic unfair terms control legislation.

In Chapter 4 of the thesis, several provisions embedded under the Malaysian Contracts Act 1950 (i.e. provisions regarding absolute exclusion clause and restitutionary remedies), the recently passed Gig Workers Bill and judicial doctrines (i.e. the doctrine of unconscionability and the rules of contractual interpretations) are examined to determine whether these rules can serve as effective substitutes for unfair terms legislation. These rules were examined in two stages: (1) the scope of these legal instruments; and (2) to what extent they may offer protection to the Non-Consumer Users (i.e. the effectiveness of the rules).

The analysis revealed that none of the existing legal recourses currently available under the Malaysian legal framework may serve as effective substitute for unfair terms legislation. In this respect, although the rules may possess the theoretical capability in addressing unfair terms (or in the context of this study, the Identified Terms), their actual implementation is subject to a number of flaws and challenges, diluting their overall effectiveness in safeguarding the interests of the Non-Consumer Users. For instance, although the doctrine of unconscionability has an extremely wide theoretical breadth as it may address various types of unfair terms, the reception of this doctrine in Malaysia is still debatable. In fact and as highlighted in Chapter 4, the Malaysian courts have not explicitly and/or structurally set out the requirements for the doctrine to be invoked, and that the doctrine has usually been employed in its loose sense.

Another example would be the limited application of section 29 of the Contracts Act, where the prohibition of an absolute exclusion clause may easily be circumvented by the Platforms, as long as they are willing to accept a nominal degree of responsibility/liability. While one might argue that a minimal safeguard is preferable to none at all, I contend that its impact is merely a drop in the bucket. Hence, I argue that the rule is incapable of serving as a viable, adequate and/or effective replacement for unfair terms legislation. Further, although the recent introduction of the Gig Workers Bill is certainly welcomed, it is argued here that it would not be able to effectively protect all of the business users within the OFDS business models due to its limited scope, which excludes restaurants from its protective framework.

Based on the findings in Chapters 2, 3 and 4 of the thesis, it is concluded here that: (1) there are sufficient and convincing reasons to protect the Non-Consumer Users despite their formal legal status as businesses and independent contractors; and (2) the current state of the Malaysian legal framework may not serve as effective recourses that can be relied on by the Non-Consumer Users in safeguarding their interests from the implication of unfair terms by the Platforms. Therefore, I argue here that the time has come for Malaysia to enact and implement a dedicated unfair terms legislation to protect the Non-Consumer Users within the OFDS industry.

5.3 The Roadmap to Tomorrow's Insights: Where do we go from here?

Having concluded that there is a need for a dedicated unfair terms legislation governing the Non-Consumer Users in Malaysia, where do we go from here? This is the age-old question. This section distils, synthesises and translates the broader normative significance and/or contribution of this study and considers how the findings as demonstrated in the preceding chapters may not only shape legislative reform, but also inform judicial response/reasoning and

contribute to improved platform governance. With regard to the proposed legislative reform (which is the primary aim of this thesis), this study underscores the limitation of the present Malaysian legal framework (particularly from contract law perspective) in addressing unfair terms beyond the scope of B2C contracts. As demonstrated throughout this thesis, the imposition (and its negative implications) of unfair terms in adhesion contracts does not exclusively affect consumers but also business stakeholders/users in P2B contracts (i.e. the Non-Consumer Users).

Accordingly, the findings of this thesis may inform the Malaysian legislature to enact a sector specific unfair terms legislation governing the adhesion contracts imposed by the Malaysian OFDPs. However, although this recommendation would be preferred, it is also open for the Malaysian legislature to resort to other recourses which may nevertheless serve the same purposes and/or produce the same outcome. For example, the legislature may consider to either: (1) broaden the scope of the Bill to include more vulnerable business stakeholders within the platform economy (with necessary finetuning of its substantive provisions); or (2) extend the scope of the existing unfair terms legislation (i.e. Malaysian CPA) to include P2B contracts. In any event, the main goal is to ensure that the Non-Consumer Users are systematically protected against the imposition of unfair terms by the Platforms.

Irrespective of the route chosen, it is suggested here that the said law reform may act as a deterrence/preventive instrument, the first shield against online platforms' exploitations. The higher the risk of exploitation, the greater the necessity to establish preventive or protective measures to minimise the likelihood of such risks from materialising.⁵⁸² In what way can a specific legislation regulating unfair terms deter the stronger parties from exploiting their weaker counterparties?

Deterrence may be achieved via the purported legislation in several ways including:- (1) introducing clarity on the threshold of unfairness and what terms may likely be deemed unfair; and (2) imposing fines or penalties for the inclusion of unfair terms. As for the first strategy, it is argued here that establishing a clear definition, criteria and/or thresholds on what constitutes 'unfair terms' would be instrumental in deterring their inclusion from the outset. This approach could also be strengthened by introducing a black or an indicative list of unfair terms to supplement the definition, drawing inspiration from the Annex 1 of the UCTD and section 25 of the Australian CCA, both of which serve as examples of non-exhaustive indicative lists of unfair terms. Understanding the 'what' question:- what is prohibited, what is allowed and what may be subject to contestation:

⁵⁸² Sabrina Akram Ibrahim El Sabi, 'Platform Economy and Its Impact on Vulnerable Digital Consumers Rethinking the Effectiveness of UCTD' (2024) 3 *Journal of Law, Market & Innovation* 222, 224.

will help all parties, including online platforms, to minimise potential liabilities and mitigate the risk of being held accountable for the future use of unfair terms.

The purported legislation may also include rules on penalties/fines that may be imposed upon the platforms, should they incorporate any unfair terms in their contract. This strategy, though appears to be compensatory/punitive in nature, may discourage the platforms from inappropriately leveraging their stronger bargaining power at the expense of the Non-Consumer Users, particularly when the penalties involve substantial financial fines. This suggestion follows the approach of the Australian CCA, under which businesses face pecuniary penalties if found to have imposed unfair terms in violation of the Act. In this regard, the purported business may be fined not exceeding either:- AUD 50,000,000, three times the value of the benefit obtained from the reliance of the unfair terms or 30% of the business's adjusted turnover for the period in which the act or omission occurred.

The same approach (i.e. the imposition of fines) to sellers/suppliers who impose unfair terms is also evident in the EU. In this regard, Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules ("**Enforcement and Modernisation Directive**") introduced, through Article 1, a new UCTD provision permitting fines to be issued against sellers or suppliers who violate the domestic laws adopted by any Member States pursuant to the UCTD.⁵⁸³ In imposing the said fines, several factors shall be taken into consideration, including but not limited to, the gravity of the violation and any other previous record of infringement.⁵⁸⁴ With regard to the quantum the fines shall be no less than 4 per cent of the seller's annual turnover, or up to EUR 2 million where such turnover information is not available. The introduction of the foregoing rules on penalties is to ensure, amongst others, that the UCTD exerts a more effective deterrent impact, as mentioned in the Preamble 14 of the Enforcement and Modernisation Directive.

Notwithstanding the above and pending the proposed reform, it is suggested here that the Malaysian relevant authorities (e.g. the executive body) may consider establishing a code of conduct and/or sector-specific guidelines in order to set out clear minimum rules regarding the OFDPs' conduct within the OFDS industry. For instance, the code may require OFDPs to act in a reasonable manner, by, amongst others, providing advance notice and justifications when varying their terms and conditions and to redraw their limitation of liability

⁵⁸³ Article 8b(1) of the UCTD

⁵⁸⁴ Article 8b(3) of the UCTD

clauses to the extent that it is only necessary for the protection of their legitimate interests. Although a code of conduct and/or industry guidelines are, typically, not binding or authoritative, they may nevertheless establish a meaningful normative and behavioural influence, particularly when complemented by public oversight and governmental monitoring.

The establishment of a code of conduct may be exemplified through the Australian Competition and Consumer (Industry Codes-Food and Grocery) Regulations 2024 (“Code”), where the Code is aimed to, amongst others, “regulate standards of business conduct in the grocery supply chain”⁵⁸⁵ and “promote and support good faith in commercial dealings between large grocery businesses and suppliers”.⁵⁸⁶ However, instead of serving merely as a guideline, the Australian government decided to make the Code mandatory⁵⁸⁷ against all large retailers/wholesalers⁵⁸⁸ with regard to their grocery supply agreements with their suppliers.⁵⁸⁹

The Code, at its core, mandates the large retailer and/or wholesaler to deal with their suppliers lawfully and in good faith.⁵⁹⁰ The Code also sets out several terms/matters that should⁵⁹¹ and should not be incorporated in their supply agreement with the suppliers.⁵⁹² By way of an example, the Code regulates the imposition of terms relating to unilateral variation of the supply agreement. In this respect, a pecuniary penalty may be imposed on the large retailer/wholesaler in the event that any contractual term is varied without the consent of the supplier.⁵⁹³

The findings of this thesis may further inform the Malaysian judiciary and create ripple effects in reshaping the traditional and/or prominent judicial view that businesses shall bear the repercussions of their own commercial decision. Traditionally, most courts in common law jurisdictions (including Malaysia) are reluctant to protect businesses from unfair terms, as it is commonly assumed that all businesses are dealing on a level playing field. However, as argued in Chapter 2 of this thesis, this assumption is not entirely accurate and needs to be

⁵⁸⁵ Section 12(a) of the Code

⁵⁸⁶ *ibid*, section 12(d)

⁵⁸⁷ *ibid*, section 9

⁵⁸⁸ *ibid*, section 8. “Large retailer” and “large wholesaler” are defined as any retailer or wholesaler that exceeds AUD 5 billion in revenue in the preceding financial year.

⁵⁸⁹ *ibid*, section 6. “Supplier” is defined as “a person carrying on (or actively seeking to carry on) a business of supplying grocery products for retail sale to consumers by another person (whether or not that other person is the person supplied)”. However, a business that is considered as “large wholesaler” may not be deemed as “supplier” for the purposes of the Code.

⁵⁹⁰ Section 16(1) of the Code

⁵⁹¹ *ibid*, section 19(1)

⁵⁹² *ibid*, section 19(3)

⁵⁹³ *ibid*, section 20(1). However, unilateral variation of contractual terms may still be made if the conditions set out under section 20(2) of the Code are fulfilled.

revisited, especially with the emergence of new types of economy (such as the platform economy). In this regard, it is argued here that the Non-Consumer Users within the OFDS industry also face similar circumstances as the consumers that render them vulnerable against their counterparties.

This argument was further substantiated given the fact that the Non-Consumer Users should not be flatly placed in the broad category of entrepreneurs as they share certain characteristics commonly associated with subsistence entrepreneurs. Simply put, although businesses are commonly assumed to absorb their business risks without any legal intervention, businesses should not be treated as a homogenous group. In this regard, they come from diverse backgrounds and have varying degrees of capabilities in absorbing commercial risks, amongst others.

Based on the above and how the Non-Consumer Users may also find themselves in similar situations as the consumers in their marketplace interaction with the OFDPs, it is concluded here that there is a sufficient justification, at least in theory, to protect them from the imposition of unfair terms (whether such imposition has actually materialised or otherwise). By recognising that vulnerability against unfair terms may also be experienced by businesses/self-employed individuals (as evident in the OFDS industry), the Malaysian courts may consider applying a more calibrated application of the existing contract law doctrines/provisions (e.g. the legal rules explained in Chapter 4 of the thesis) to the benefit of the Non-Consumer Users. For instance, the Malaysian courts may revisit the applicability of the doctrine of unconscionability within the context of P2B contracts and mobilise it in favour of the Non-Consumer Users, considering the elements associated with the doctrine (e.g. disparity in bargaining power) are also present in the relationship between the Non-Consumer Users and the Platforms.

The discussions and findings of this thesis may also inform the OFDPs, where it underscores the need for a more critical reassessment of their adhesion contracts offered to the Non-Consumer Users. Through our analysis in Chapter 3 of the thesis, it has been demonstrated that the OFDPs' contracts are riddled with terms that may be prejudicial to the Non-Consumer Users and may, arguably, not necessary and/or proportionate to protect the OFDPs' legitimate interests. In this regard, the OFDPs may reconsider and acknowledge, amongst others: (1) the existing disparity of bargaining power between the contracting parties; (2) economic dependence of the Non-Consumer Users; and (3) how these factors may produce adverse effects to the Non-Consumer Users including their capacity to absorb the commercial risks that have been evidently transferred through the OFDP's terms and conditions.

This thesis further offers a normative basis for the OFDPs to reassess, amongst others, their contractual architecture (i.e. terms and conditions) in a

manner that accurately reflects the realities faced by most of the Non-Consumer Users as business actors that provide goods and services on a subsistence level. This may include greater transparency in contractual terms (and how the terms are enforced) and clearer limits on the OFDPs' discretionary powers, so as not to prejudice the Non-Consumer Users as the weaker parties. These (re)considerations, in my view, may foster greater trust between the contracting parties and promote the long-term sustainability of the OFDS business model.

As this thesis reaches its conclusion, several areas remain open for future research. Firstly, as this thesis only confines its study on the OFDS business model, future research may investigate whether the findings of this thesis would similarly apply to other services offered by location-based platforms. This would include, amongst others, ridesharing, courier services and other on-site services such as babysitting. In this respect, it can be further explored whether the adhesion contracts offered in those services demonstrate similar contractual arrangements with the present study, denoting comparable patterns of contractual imbalance and exploitation of the said circumstance by online platforms. Additionally, future research could also move beyond the platform economy to gauge whether similar concerns raised in this thesis (e.g. substantial imbalanced bargaining power, power asymmetry etc) may also be evident in other types of B2B contracts. For example and as demonstrated in the preceding paragraphs, attention may be shifted towards sector-specific contracts that exhibit contractual dynamics similar to those found in the OFDS industry (e.g. food supply chain involving SMEs suppliers).

The end of this thesis is just a new beginning. If there is one thing that we can take from this thesis, it is this: the time for change is now. The platform economy (particularly the OFDS) is here to stay, grow and prosper. However, growth comes with challenges, like a child whose every stage of maturity presents more complex challenges, the OFDS will encounter new trials as it grows. By addressing and finally acknowledging the vulnerabilities of the business stakeholders in the platform economy and ensuring fair treatment for all parties involved, Malaysia may certainly create a more just and equitable digital landscape, starting from the OFDS business model. No change is ever too late. The journey towards better regulation starts here.

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APPENDICES

APPENDIX 1

Provisions of the Malaysian CPA	Verbatim Quotation
Section 24A(c) (General Test of Unfairness)	<i>“unfair term” means a term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer.</i>
Section 24C(1) (Procedural Unfairness)	<i>A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and supplier.</i>
Section 24D(1) (Substantive Unfairness)	<i>A contract or a term of a contract is substantively unfair if the contract or the term of the contract— (a) is in itself harsh; (b) is oppressive; (c) is unconscionable; (d) excludes or restricts liability for negligence; or (e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.</i>
Section 24D(2) (Factors in Assessing Substantive Unfairness)	<i>For the purposes of this section, a court or the Tribunal may take into account the following circumstances: (a) whether or not the contract or a term of the contract imposes conditions— (i) which are unreasonably difficult to comply with; or (ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract; (b) whether the contract is oral or wholly or partly in writing;</i>

	<ul style="list-style-type: none"><i>(c) whether the contract is in standard form;</i><i>(d) whether the contract or a term of the contract is contrary to reasonable standards of fair dealing;</i><i>(e) whether the contract or a term of the contract has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;</i><i>(f) whether the benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to his or her circumstances;</i><i>(g) whether the consumer who entered into the contract was in a fiduciary relationship with the supplier; and</i><i>(h) whether the contract or a term of the contract—</i><ul style="list-style-type: none"><i>(i) requires manifestly excessive security for the performance of contractual obligations;</i><i>(ii) imposes penalties which are disproportionate to the consequences of a breach of contract;</i><i>(iii) denies or penalizes the early repayment of debts;</i><i>(iv) entitles the supplier to terminate the contract unilaterally without good reason or without paying reasonable compensation; or</i><i>(v) entitles the supplier to modify the terms of the contract unilaterally.</i>
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APPENDIX 2

LEGAL FRAMEWORKS	UNFAIRNESS TEST	REBUTTABLE PRESUMPTION	INDICATIVE LIST OF UNFAIR TERMS	DIVISION OF PROCEDURAL & SUBSTANTIVE UNFAIRNESS	TRANSPARENCY REQUIREMENT
Malaysian CPA	(1) the term causes a significant imbalance in the rights and obligations of the parties; (2) to the detriment of the consumers.	√	X	√	Implicit
UCTD	(1) the term is contrary to good faith; (2) the application of such term causes a significant imbalance between parties in terms of their rights and obligations; and (3) such term is to detriment to the consumers.	X	√	X	Explicit
Australian CCA	(1) the term would cause a significant imbalance in the parties' rights and obligations arising under the contract; (2) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and (3) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.	√	√	X	Explicit

APPENDIX 3

TABLE 1

Clause	Term	Clause	Term
1.2	<i>Grab may amend the terms in the Agreement at any time. Such amendments shall be effective once they are posted on http://www.grab.com or the Application. It is your responsibility to review the Terms of Service regularly. Your continued use of the Service after any such amendments, whether or not reviewed by you, shall constitute your agreement to be bound by such amendments.</i>	21.5 (Riders)	<i>Unless provided otherwise in these Terms of Service, you agree that we may do any of the following, at any time, without notice:...</i> <i>(b) modify or change any applicable policies or terms, including, but not limited to these Terms of Service and Shopee Policies by posting the revised policy or terms on the Platform. Your continued use of the Platform after the revised policy or terms has been posted on the Platform shall constitute your acceptance of the revisions;...</i>
		20 (Merchants)	<i>Amendment</i> <i>Shopee may modify this Merchant General Terms and Conditions at any time by posting the revised Merchant General Terms and Conditions on the Shopee Platform. Your continued use of the ShopeeFood Services</i>

			<i>and/or receipt of ShopeeFood Services after such changes have been posted shall constitute your acceptance of such revised Merchant General Terms and Conditions.</i>
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TABLE 2

Grab		Shopee	
Clause	Term	Clause	Term
6.1.1	<i>Grab charges a fee for your use of the Service (“Commission”). The Commission may be up to 20% of the Consumer Charges unless otherwise communicated to and accepted by you before you commence provision of the Solution(s). The Commission is payable by you immediately and are non-refundable. This no-refund policy shall apply at all times regardless of your decision to terminate your access to the Application / Platform, our decision to terminate or suspend your access to the Application / Platform, disruption caused to the Service whether planned, accidental or intentional, or any reason whatsoever.</i>	5.7 (Riders)	<i>The calculation of Delivery Partner Service Fee for each Delivery Service shall be calculated by Shopee and shall, subject to Applicable Laws, be applied to you at any time by Shopee. Subject to Applicable Laws, Shopee may, at its absolute discretion, update the basis on which the Delivery Partner Service Fee is calculated at any time. Shopee shall provide you with prior reasonable notice of any such updates. You agree that any Delivery Partner Service Fee payable on or after the date on which a new update takes effect shall be subject to the most recent calculation basis for the Delivery Partner Service Fee.</i>

<p>6.1.4</p>	<p><i>Grab may, at its sole discretion, make promotional offers with different features and different rates on the Solutions to any of the Consumer whereby these promotional offers shall accordingly be honored by you. Grab may change the Commission at any time at its sole discretion.</i></p>	<p>7.4 (Merchants)</p>	<p><i>Shopee may, at its sole discretion, amend the Service Fee, Contributions or any other applicable fee or include any additional fee at any time by written notice to the Merchant.</i></p>
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TABLE 3

Grab	
Clause	Term
6.1.6	<i>Driver's Credit Balance: In addition to your Driver's Cash Balance, you must also maintain with Grab a Driver's Credit Balance. The Driver's Credit Balance comprises a pre-payment to Grab by you of commissions and other fees and charges applicable under these Terms of Service. You must at all times maintain a minimum credit balance ("Minimum Balance") in your Driver's Credit Balance in order for you to use the Service. The amount of such Minimum Balance shall be prescribed by Grab, and shall be notified to you via the Application. It may be changed at any time at Grab's sole discretion. You agree Grab may retain, apply, or set off any sum due and owing, monies, deposits or balances held in, or standing to the credit of any account towards the satisfaction of any obligations and service quality due from you to Grab, whether such obligation be present or future, actual or contingent, primary or collateral and several or joint.</i>
6.1.8	<i>Funds in the Driver's Credit Balance are not redeemable for cash and cannot be refunded. They cannot be resold, exchanged or transferred for value under any circumstances. The funds shall not be regarded, construed, or used as valuable or exchangeable instruments under any circumstances. You will not receive interest or other earnings on your Credits. Grab may receive interest on amounts that Grab holds on your behalf. You agree to assign your rights to Grab for any interest derived from your Credits.</i>

TABLE 4

Grab		Shopee	
Clause	Term	Clause	Term
9.2	<i>Every rating will be automatically logged onto Grab’s system and Grab may analyse all ratings received. Grab may take all appropriate actions including suspending your use of the Service without any notice or compensation to you.</i>	6.1 (Riders)	<i>You acknowledge that Customers rely on you for the provision of the Delivery Services. You agree that high and/or frequent cancellation rates or actions such as ignoring the Customers’ bookings will impair the Customers’ experience and negatively impact the reputation and branding of Shopee.</i>
7.1.1	<i>The Consumers rely on you for delivery or provision of the Solutions. You agree that high and/or frequent cancellation rates or ignoring the Consumers’ bookings will impair the Consumers’ experience and negatively impact the reputation and branding of Grab.</i>	15.2(a) (Riders)	<i>We may terminate these Terms of Service: (a) at any time, with prior notification to the Delivery Partner without assigning any reason;</i>
7.1.2	<i>The Consumers rely on you for delivery or provision of the Solutions. You agree that high and/or frequent cancellation rates or ignoring the Consumers’ bookings will impair the Consumers’ experience and</i>	12.1(e) (Merchants)	<i>Each Party may terminate the Agreement immediately if:- ... (e) by giving the other Party 30 (thirty) days’ prior written notice for any or no reason.</i>

	<p><i>negatively impact the reputation and branding of Grab.</i></p>		
<p>29.1</p>	<p><i>While you may cancel a booking, the cancellation shall be based on acceptable cancellation reasons as shown in the Application. Grab reserves the right to amend the acceptable cancellation reasons from time to time. A cancellation that is not based on one of the acceptable reasons or ignoring a booking may be counted in determining if your access to the Service will be temporarily restricted.</i></p>		

TABLE 5

Grab		Shopee	
Clause	Term	Clause	Term
18.1	<i>The Application, its content and any related service(s) is provided to you on an “as is” basis. Grab makes no representations or warranties of any kind, express or implied, in connection with the Software, Application, Platform, Service, these Terms of Service, the content or any related service(s). Although we make reasonable efforts to keep the Application up-to-date, we make no representations, warranties or guarantees, whether express or implied, that such information is accurate, complete or up to date. We shall not be liable for any direct, indirect or consequent loss arising from the modifications or amendments to the Software, Application, Platform, Service, or Terms of Service.</i>	12.1 (Riders)	<i>Shopee makes no representation, warranty or guarantee as to the reliability, timeliness, quality, suitability, availability, accuracy or completeness of the Platform. Shopee does not represent or warrant to you that: (a) the use of the Platform will be secure, uninterrupted, free of errors or other harmful components, or operate in combination with any other hardware, software, system or data; (b) any stored data on the Platform will be accurate or reliable; or (c) the Platform, or quality of any products, services, information or other materials purchased or obtained by you through the Platform will meet your requirements or expectations. The Platform is provided to you strictly on an “as is” basis. All conditions, representations and warranties, including any implied warranty of merchantability, fitness for a particular purpose, or non-infringement of third-party rights, are</i>

			<p><i>hereby excluded to the extent permissible by law.</i></p>
		<p>9.1 (Merchants)</p>	<p><i>9. No warranty 9.1 The ShopeeFood services are provided “as-is” and without any representation or warranty, whether express, implied or statutory. Shopee and any of its subsidiaries and affiliates, officers, directors, agents, joint ventures, employees and suppliers specifically disclaim any implied warranties of title, merchantability, fitness for a particular purpose and non-infringement. Shopee does not have any control over products that are paid for through the ShopeeFood services. Shopee does not guarantee continuous, uninterrupted or secure access to any part of the food services, and operation of Shopee site may be temporarily suspended for maintenance or upgrade or interfered with by numerous factors outside of shopee’s control. Shopee will make reasonable efforts to ensure that ShopeeFood services are processed in a timely manner but Shopee makes no representations and warranties regarding</i></p>

			<i>the amount of time needed to complete processing.</i>
		11.1 (Riders)	<i>The Parties are released from responsibility to all obligations and delay of work as consequence of Force Majeure. "Force Majeure" means any extraordinary circumstances which is an unforeseeable, inevitable event and/or beyond reasonable control of the Parties including but not limited to epidemic or pandemic (except the epidemic/pandemic of Corona Virus Disease 2019 (Covid-19)), natural disaster, war, rebellion, aggression, sabotage, riot of mass, and existence of governmental regulations in monetary affairs which directly influence performance of the Agreement.</i>
		18.1 (Merchants)	<i>The non-performance of either Shopee or you of any obligations under these Terms of Service shall be excused to the extent and during the period that performance is rendered impossible by strike, fire, flood, earthquakes, governmental acts or orders or</i>

			<i>restrictions, failure of suppliers, or contractors, or any other reason where failure to perform is beyond the reasonable control and is not caused by the negligence of the non-performing party.</i>
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TABLE 6

Grab		Shopee	
Clause	Term	Clause	Term
21.1	<p><i>Unless otherwise stated, and to the fullest extent allowed by law, any claims against grab by you shall be limited to the aggregate amount of all amounts actually paid by and/or due from you in utilising the service during the event giving rise to such claims. Grab and/or its licensors shall not be liable for any loss, damage or injury which may be incurred by or caused to you or to any person for whom you have booked the service or solution, including but not limited to:</i></p> <p><i>21.1.1. Loss, damage or injury arising out of, or in any way connected with the service, the platform, application and/or the software;</i></p> <p><i>21.1.2. The use or inability to use the service, the platform,</i></p>	1.3 (Riders)	<p><i>Shopee is a technology company which provides services, including, but not limited to, an online platform service that provides a place and opportunity for the delivery of products by you. Shopee does not provide or act as provider of transportation service, courier, post, delivery service, etc, or act as agent of any person or entity. The actual contract for delivery service of the products is directly between you and customers. Shopee is not a party to that contract or any other contract between you, merchants, and/or customers, and accepts no obligations or liabilities in connection with any such contract. You shall act as an independent third-party service provider and shall not represent to be an agent, employee, or staff of Shopee. The delivery services shall not be deemed to be provided by Shopee.</i></p>

	<p><i>application and/or the software;</i></p> <p><i>21.1.3. Any reliance placed by you on the completeness, accuracy or existence of any advertising;or</i></p> <p><i>21.1.4. As a result of any relationship or transaction between you and any consumer, partner, merchant, advertiser or sponsor whose advertising appears on the website or is referred to by the service, the application and/or the software,</i></p> <p><i>Even if grab and/or its licensors have been previously advised of the possibility of such damages.</i></p>		
<p>21.2</p>	<p><i>Grab does not warrant or represent that it assesses or monitors the suitability, legality, ability, movement or location of any consumers or partners including merchants, advertisers and/or sponsors and you expressly waive and release Grab from any and all</i></p>	<p>11.1 (Riders)</p>	<p><i>By agreeing to these Terms of Service through the use of the Platform, you agree that you shall indemnify and hold Shopee, its licensors and each such party’s Affiliates, officers, directors, members, employees, attorneys and agents (collectively, “Indemnified Parties”) harmless from and against any</i></p>

	<p><i>liability, claims or damages arising from or in any way related to the consumers or partners including merchants, advertisers and/or sponsors.</i></p>		<p><i>and all claims, costs, damages, losses, liabilities and expenses (including attorneys' fees and costs and/or regulatory action) which any of the Indemnified Party incurs, resulting from, arising out of or in connection with: (a) your use of the Platform in your dealings with Customers, Merchants, service providers, partners, advertisers and/or sponsors; (b) your violation or breach of any term of these Terms of Service, any third party terms and conditions or any Applicable Laws, whether or not referenced herein; (c) your violation of any rights of any third party, including Customers; (d) your use or misuse of the Platform and/or Delivery Services; or (e) where applicable, your ownership, use or operation of any Vehicle, including your provision of Delivery Services to Customers.</i></p>
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<p>21.3</p>	<p><i>Grab will not be a party to disputes or negotiations of disputes between you and consumers or partners including merchants, advertisers and/or sponsors. Unless you are a corporate consumer with a current corporate account with grab, grab cannot and will not play any role in managing payments between you and the partners, including merchants, advertisers and/or sponsors. Responsibility for the decisions you make regarding services and products offered via the service and/or the platform (with all its implications) rests solely with and on you. You expressly waive and release Grab from any and all liability, claims, causes of action, or damages arising from your use of the service and/or the platform, or in any way related to the third parties including merchants, advertisers and/or sponsors introduced</i></p>	<p>16.1 (Riders)</p>	<p><i>Shopee and/or its licensors shall not be liable whether in contract, warranty, tort (including, but not limited to, negligence (whether active, passive or imputed), product liability, strict liability or other theory), or other cause of action at law, in equity, by statute or otherwise, for any loss, damage or injury, whether direct or indirect, which may be incurred by you, any customer or merchant, including, but not limited to:</i></p> <p><i>(a) any loss, damage or injury arising out of, or in any way connected with the platform;(b) the use or inability to use the platform; or(c) as a result of any relationship or transaction between you and any customer, merchant, advertiser or sponsor whose advertising appears on the platform or is referred to by the platform, even if shopee and/or its licensors have been previously advised of the possibility of such damages.</i></p>
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	to you by the service and/or the platform.	16.3 (Riders)	<i>Nothing in these terms of service shall limit or exclude any liability for death or personal injury caused by Shopee's negligence, for fraud or for any other liability on the part of Shopee that cannot be lawfully limited and/or excluded under applicable laws.</i>
		16.4 (Riders)	<i>Shopee shall not be a party to any disputes or negotiation of disputes between you and the customers and/or merchants.</i>
		4.5 (Merchants)	<i>Merchant acknowledges and agrees that Shopee does not provide transportation services, or act as the transportation provider, courier, postal services provider, deliver service provider, supplier of food and beverages, or the agent of any party. Shopee makes no representations or warranties and does not ensure the quality, safety and/or legality of any Products. Shopee does not guarantee the identity of any Customers or ensure that a Customer will complete a Transaction.</i>

		<p>4.6 (Merchants)</p>	<p><i>Merchant acknowledges and agrees that the actual contract for the sale of the Products is directly between Merchant and the Customers, and Shopee is not a party to such contracts, and accepts no responsibility, liability, or obligations in connection with any such contract and any dispute arising out of any Product is between the Merchant and the relevant Customers only.</i></p>
		<p>4.7 (Merchants)</p>	<p><i>The Merchant is required to deal with any refund and/or claim settlement, including, but not limited to, chargebacks, resulting from the Transaction. Shopee may assist the Merchant in the refund and/or claim settlement procedures and the Merchant further agrees that Shopee may, at its sole and absolute discretion, refund the Customer the Transaction Funds without the prior approval of the Merchant.</i></p>

		<p>14.4 (Merchants)</p>	<p><i>Shopee does not and shall not guarantee the safety, reliability, compatibility, or capability of the Driver during the delivery of his/her obligation in delivering the Products from Merchant Outlets to the Customer. Therefore, Merchant hereby holds Shopee harmless and discharge Shopee from any and all responsibility, claim, cause, or damage which occurs from such delivery service by Drivers.</i></p>
		<p>15 (Merchants)</p>	<p><i>The Merchant shall fully indemnify and hold Shopee, its affiliates, and its and their respective officers, directors, employees, agents and third party contractors (the "Indemnified Party"), harmless from any loss, liability, costs and expenses (including full reimbursement of any legal and professional costs) which the Indemnified Party suffers or incurs as a result of, or in connection with, any claim made or threatened by a third party relating to any Products, the use of Merchant of ShopeeFood Services or ShopeeFood Platform</i></p>

			<i>and/or any breach of any provisions of the Agreement, except for resulting from the negligence, bad faith or wilful misconduct on the part of Shopee.</i>
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TABLE 7

Grab		Shopee	
Clause	Term	Clause	Term
24.1	<i>This Terms of Service shall be governed by Malaysian law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Terms of Service or the Service shall be referred to the Asian International Arbitration Centre (“AIAC”), in accordance with the Rules of the AIAC as modified or amended from time to time (the “Rules”) by a sole arbitrator appointed by the mutual agreement of you and Grab (the “Arbitrator”). If you and Grab are unable to agree on an arbitrator, the Arbitrator shall be appointed by the President of AIAC in accordance with the Rules. The seat and venue of the arbitration shall be Kuala Lumpur, in the English language and the fees of the Arbitrator shall</i>	20.1 (Riders)	<i>These Terms of Service shall be governed by and construed in accordance with the laws of Malaysia. Any dispute, controversy, claim or causes of action arising out of or in connection with these Terms of Service against or relating to Shopee shall be referred to and finally resolved by arbitration administered by the Asian International Arbitration Centre (“AIAC”) in accordance with the Arbitration Rules of the AIAC (“Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.</i>
		16 (Merchants)	<i>The Agreement shall be governed by the laws of Malaysia. In the event any dispute, controversy, claim or difference of any kind whatsoever shall arise between the Parties in connection with this (“Dispute Notice”), the Parties shall attempt, for a period of thirty (30)</i>

	<p><i>be borne equally by you and Grab, provided that the Arbitrator may require that such fees be borne in such other manner as the Arbitrator determines is required in order for this arbitration clause to be enforceable under applicable law.</i></p>	<p><i>days after the receipt by one (1) Party of a notice from the other Party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions between the senior management of each of the Parties. If the Dispute cannot be settled by mutual discussions within the thirty (30) days period, it shall be referred to and finally resolved by arbitration administered by the Asian International Arbitration Centre (“AIAC”) in accordance with the Arbitration Rules of the AIAC for the time being in force, which rules are deemed to be incorporated by reference in this clause. There will be one (1) arbitrator who shall be jointly appointed by the Parties. If the Parties are unable to agree on the arbitrator, the arbitration shall be appointed by the Director of the AIAC in accordance with the AIAC Rules. The language of the arbitration shall be English. The place and seat of arbitration shall be Kuala Lumpur, Malaysia. Both</i></p>
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			<p><i>Parties agree that Part III of the Arbitration Act 2005 shall not apply to the Agreement or the arbitration proceedings arising out of the Agreement. The Agreement and the rights and obligation of the Parties shall remain in full force and effect pending the award in any arbitration proceeding hereunder, save for the part in dispute and is to be determined in the arbitration proceeding.</i></p>
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APPENDIX 4

Provisions of the Malaysian Gig Workers Bill	Verbatim Quotation
<p>Intitulement</p>	<p><i>An Act to protect the rights of a gig worker, to provide for the duties of a contracting entity, to regulate terms and conditions of the service agreement entered into between the contracting entity and the gig worker, to provide for dispute resolution mechanism, to provide for the establishment of the Consultative Council, to provide for the establishment of the Gig Workers Tribunal and to provide for related matters</i></p>
<p>Section 2</p>	<p><i>“contracting entity” means—</i></p> <ul style="list-style-type: none"> <i>(a) an individual;</i> <i>(b) any person including a body of persons incorporated or registered under any written law; or</i> <i>(c) any platform provider, who engages and enters into a service agreement with a gig worker for the performance of service by the gig worker in exchange for payment of earnings;</i> <p>...</p> <p><i>“gig worker” means an individual who—</i></p> <ul style="list-style-type: none"> <i>(a) is a citizen or a permanent resident of Malaysia;</i> <i>(b) enters into a service agreement with a contracting entity for the performance of—</i> <ul style="list-style-type: none"> <i>(i) any service with any contracting entity who is a platform provider; or</i> <i>(ii) any service as specified in the Schedule with any contracting entity who is not a platform provider;</i> <i>and</i> <i>(c) receives earnings for the service;</i> <p>...</p> <p><i>“platform provider” means any digital intermediary system provider who connects the service by a gig worker to a service user;</i></p>

<p>Section 3</p>	<p>Service agreement</p> <p>3. Every service agreement entered into between a contracting entity and a gig worker shall specify the terms and conditions as follows:</p> <ul style="list-style-type: none"> (a) parties to the agreement; (b) period of the agreement; (c) services to be provided by the gig worker; (d) obligations of the parties; (e) rate and details of earnings of the gig worker; (f) method of payment of earnings; and (g) any gig worker’s benefits or tip and gratuities, if any.
<p>Section 4</p>	<p>Saving of existing service agreement</p> <p>4. Every service agreement lawfully entered into between a contracting entity and a gig worker before the coming into force of this Act, shall if it is still legally binding upon the parties, continue in force for such period as may be specified in the agreement and the parties shall be subject and entitled to the benefits under this Act.</p>
<p>Section 5</p>	<p>Prevailing terms and conditions</p> <p>5. (1) If any terms and conditions of a service agreement, whether such agreement was entered into before or after the coming into force of this Act, is less favourable to a gig worker against the terms and conditions provided for under this Act, the terms and conditions of the service agreement shall be void.</p> <p>(2) The less favourable terms and conditions referred to in subsection (1) shall be substituted with the terms and conditions as provided under this Act.</p>
<p>Section 6</p>	<p>Validity of terms and conditions</p> <p>6. Notwithstanding section 5, a contracting entity and a gig worker may agree to any terms and conditions which is more favourable to the gig worker.</p>
<p>Section 7</p>	<p>Matters not provided under this Act</p> <p>7. If there is no provision made in respect of any matter under this Act, the matter shall not be prevented from being provided in a service agreement or from being negotiated upon between a contracting entity and a gig worker.</p>

<p>Section 8</p>	<p><i>Rights of gig worker</i></p> <p>8. (1) <i>A gig worker—</i></p> <ul style="list-style-type: none"> <i>(a) shall be informed of the agreed terms and conditions of the service agreement;</i> <i>(b) shall be informed of the agreed service to be performed;</i> <i>(c) shall be informed of the agreed rate and details of earnings before the gig worker agrees to perform the service;</i> <i>(d) shall be informed of the method of payment of earnings, tip and gratuities, and other benefits;</i> <i>(e) shall receive earnings for the service rendered within the period as agreed by the contracting entity and the gig worker;</i> <i>(f) shall be consulted and informed if there is any variation of terms and conditions of the service agreement;</i> <i>(g) shall not be terminated of his service without just cause or excuse; and</i> <i>(h) shall be provided with any dispute resolution mechanism.</i> <p><i>(2) In addition to the rights referred to in subsection (1), a gig worker who enters into a service agreement with a platform provider—</i></p> <ul style="list-style-type: none"> <i>(a) shall be informed of the automated monitoring systems through electronic means used by the platform provider to monitor, supervise or evaluate the gig worker, including the consequences arising from it;</i> <i>(b) shall be informed of the automated decision-making systems through electronic means used by the platform provider to make decision relating to assignment of the service and gig worker’s working conditions; and</i> <i>(c) shall be provided with the non-automated review mechanism to the systems referred to in paragraphs (a) and (b) used by the platform provider.</i>
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	<p><i>(3) Any terms and conditions in the service agreement which purports to contract out or waive a gig worker's rights shall be null and void.</i></p>
<p>Section 14</p>	<p><i>Deactivation under service agreement, etc.</i></p> <p>14. <i>(1) A platform provider shall have the right to deactivate the access of a gig worker to his digital intermediary system if—</i></p> <ul style="list-style-type: none"> <i>(a) the deactivation is in accordance with the terms and conditions under the service agreement; or</i> <i>(b) there is misconduct committed by the gig worker in the course of performing his service.</i> <p><i>(2) A gig worker is deactivated from the digital intermediary system if the platform provider modifies, suspends or terminates the gig worker's access to his digital intermediary system in a way that prevents the gig worker from performing his service under the service agreement.</i></p> <p><i>(3) The platform provider may modify or suspend the access of the gig worker to his digital intermediary system for a period not exceeding fourteen days for the purpose of holding an inquiry for the matters referred to in subsection (1).</i></p> <p><i>(4) The platform provider shall notify the gig worker in respect of such modification or suspension referred to in subsection (3) by giving a notice in writing to the gig worker.</i></p> <p><i>(5) Where the platform provider finds that there is no reason to deactivate the access of the gig worker to his digital intermediary system under paragraph 1(a) or (b), the platform provider shall—</i></p> <ul style="list-style-type: none"> <i>(a) reactivate the access of the gig worker to his digital intermediary system; and</i> <i>(b) pay to the gig worker half of the amount of the average daily earnings for such modification or suspension periods and the payment shall be calculated based on the earnings on the actual</i>

	<p><i>service day within thirty days period preceding the modification or suspension period.</i></p> <p><i>(6) Where the platform provider finds that the deactivation is in accordance with the terms and conditions under the service agreement or any misconduct has been committed by the gig worker, the platform provider may—</i></p> <p><i>(a) terminate the access of the gig worker to his digital intermediary system and the service agreement; or</i></p> <p><i>(b) continue with the modification or suspension of the access of the gig worker to his digital intermediary system for a further period not exceeding seven days without terminating the service agreement.</i></p> <p><i>(7) The platform provider shall give the right to be heard to the gig worker before taking any action under paragraph 6(a) or (b).</i></p> <p><i>(8) Upon the expiration of the period referred to in paragraph (6)(b), the platform provider shall reactivate the access of the gig worker to his digital intermediary system.</i></p> <p><i>(9) The platform provider shall give a written explanation to the gig worker for any decision made under subsection (6).</i></p> <p><i>(10) Any platform provider who contravenes subsection (4), (5), (7), (8) or (9) commits an offence.</i></p>
<p>Section 17</p>	<p><i>Internal grievance mechanism</i></p> <p><i>17. (1) Subject to paragraph 8(1)(h), a gig worker may lodge a complaint of a dispute in writing to a contracting entity other than an individual or a sole proprietor.</i></p> <p><i>(2) Upon receiving the complaint from the gig worker, the contracting entity other than an individual or a sole proprietor shall initiate and resolve the dispute by</i></p>

	<p><i>way of an internal grievance mechanism provided under the service agreement within thirty days from the date of the complaint is lodged.</i></p> <p><i>(3) This section shall not apply to any dispute in relation to deactivation under section 14.</i></p>
<p>Section 18</p>	<p>Conciliator</p> <p>18. <i>(1) The Director General for Industrial Relations, the Deputy Director General for Industrial Relations and any officer appointed under subsection 2a(2) of the Industrial Relations Act 1967 shall be the Conciliator for the purposes of this Part.</i></p> <p><i>(2) The Conciliator shall have the general direction, control, powers and supervision of all matters relating to this Part.</i></p> <p><i>(3) A gig worker may lodge a complaint of dispute for a conciliation in the case of—</i></p> <ul style="list-style-type: none"> <i>(a) a complaint of dispute is lodged against a contracting entity who is an individual or a sole proprietor;</i> <i>(b) the gig worker is dissatisfied with the decision of platform provider under subsection 14(9);</i> <i>(c) an internal grievance mechanism is not provided by the contracting entity under section 17;</i> <i>(d) the gig worker is dissatisfied with the decision of the contracting entity through internal grievance mechanism; or</i> <i>(e) the dispute failed to be resolved through internal grievance mechanism after thirty days period under section 17 has lapsed.</i>
<p>Section 19</p>	<p>Conciliation proceedings</p> <p>19. <i>(1) The complaint of dispute under subsection 18(3) shall be filed to the Conciliator in the manner as prescribed.</i></p> <p><i>(2) Upon receiving the complaint of dispute, the Conciliator shall take any step necessary or expedient to</i></p>

	<p><i>initiate conciliation proceedings for promoting an expeditious settlement.</i></p> <p><i>(3) Notwithstanding subsection (2), where a dispute occurs or is expected to occur, which in the opinion of the Conciliator is not likely to be settled between the parties, the Conciliator may, if he deems it necessary in the public interest, take any step necessary or expedient to initiate conciliation proceedings for promoting an expeditious settlement whether or not the dispute has been reported to him.</i></p> <p><i>(4) Where a settlement is reached between the parties, the Conciliator shall record the terms of the settlement between the parties.</i></p> <p><i>(5) Where the Conciliator is satisfied that there is no likelihood of the dispute being settled, the Conciliator shall refer the matter to the Tribunal.</i></p> <p><i>(6) The steps to be taken by the Conciliator under this Part shall be done in the manner as prescribed.</i></p>
<p>Section 33</p>	<p><i>Jurisdiction and power of Tribunal</i></p> <p><i>33. (1) The Tribunal shall have jurisdiction to hear and determine any dispute or matter referred to it by the Conciliator or the Minister under Part IV of this Act and may grant any award as it deems just and appropriate.</i></p> <p><i>(2) The Tribunal shall not have any jurisdiction for the provisions of offence under this Act and all matters under Part VIII of this</i></p> <p><i>(3) Any complaint referred to the Tribunal may include loss or damages of a consequential in nature.</i></p> <p><i>(4) The Tribunal shall have the power, in any proceedings before it—</i></p> <p style="padding-left: 40px;"><i>(a) to order that any party be joined, substituted or struck off; and</i></p>

	<p><i>(b) to direct and do all such things as necessary or expedient for the expeditious determination of the matter before it.</i></p>
<p>Section 42</p>	<p><i>Award of Tribunal</i></p> <p>42. <i>(1) The Tribunal shall make an order in the form of an award without delay and, where practicable, within thirty days from the last date of the hearing before the Tribunal.</i></p> <p><i>(2) Every award after the hearing shall be pronounced before the parties either on the conclusion of the hearing or on any subsequent day of which notice shall be given to the parties.</i></p> <p><i>(3) The Tribunal shall state in writing reasons for the award or dismissal of the complaint together with any finding of facts that the Tribunal has noted or recommendations that the Tribunal has made in those proceedings and shall be handed to the parties in the manner together with a fee as may be prescribed—</i></p> <ul style="list-style-type: none"> <i>(a) upon request of any party to the proceedings; or</i> <i>(b) if any party to the proceedings appeal against the award of the Tribunal under section 44.</i> <p><i>(4) An award of the Tribunal under subsection (1) may specify one or more of the following:</i></p> <ul style="list-style-type: none"> <i>(a) that a party to the proceedings compensate to any other party;</i> <i>(b) that a party complies with any terms and conditions in the service agreement;</i> <i>(c) that a party complies with any provision of this Act;</i> <i>(d) that a party is entitled to perform his service or to access the digital intermediary system;</i> <i>(e) that a party is given permission to deactivate the access of the other party from the digital intermediary system;</i> <i>(f) that a party is paid the full amount of earnings, tip and gratuities, or other benefits due and payable for his service;</i>

	<p>(g) that a party is refunded for wrongful deduction of earnings;</p> <p>(h) that a party is refunded for any overpayment;</p> <p>(i) that a party is compensated for any loss or damage suffered;</p> <p>(j) that a party is entitled to deduct the earnings of other party;</p> <p>(k) that the service agreement be varied or set aside, wholly or partly;</p> <p>(l) that costs to or against any party be paid;</p> <p>(m) that interest be paid on any sum or monetary award at a rate not exceeding eight per centum per annum, unless it has been otherwise agreed between the parties;</p> <p>(n) that the complaint is dismissed; or</p> <p>(o) to direct and do all such things as are necessary or expedient.</p> <p>(5) The Tribunal may rectify in any award any clerical error or mistake arising from any accidental slip or omission.</p>
<p>Section 43</p>	<p>Award of Tribunal to be binding</p> <p>43. (1) Every award made by the Tribunal under section 42—</p> <p>(a) shall be binding on all parties to the proceedings; and</p> <p>(b) shall be deemed to be an order of a sessions court notwithstanding any written law to the contrary, and may be enforced accordingly by any party to the proceedings.</p> <p>(2) For the purpose of paragraph (1)(b), the Registrar shall send a copy of the award made by the Tribunal to the sessions court having jurisdiction in the place to which the award relates to or in the place where the award was made and the court shall cause the copy to be recorded.</p>

Section 44	<i>Appeal to High Court</i> 44. <i>(1) Any person aggrieved by the decision of the Tribunal may appeal to the High Court.</i> <i>(2) The appeal referred to in subsection (1) shall be brought within fourteen days from the date of the award is pronounced by the Tribunal.</i>
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Summary

The online food delivery services (“**OFDS**”) industry has revolutionised our way of life. What begins as a simple order unfolds into a coordinated journey, as meals are prepared, carried across the city and delivered to waiting customers. The growth of this business model is undeniably a game-changer for individual delivery riders and restaurants, as they can leverage online platforms to procure gigs and reach a larger pool of customers. However, behind the scenes, the entrepreneurs who make this seamless transaction possible often remain unnoticed.

One of the concerns regarding the OFDS business model is the adhesion contracts prepared by the online food delivery platforms (“**OFDPs**”). In this regard, issues such as unilateral amendment, unilateral termination without just cause and extremely wide exclusion clauses were found to be frequently imposed by online platforms against the restaurants and delivery riders. Given that the Consumer Protection Act 1999 (being the only unfair terms legislation in Malaysia) is narrowly designed to only protect the consumers, both the delivery riders (who are considered as independent contractors in Malaysia) and the restaurants are precluded from enjoying the said statutory protection.

This thesis, therefore, intends to explore:- whether there is a need for Malaysia to enact a dedicated unfair terms legislation to protect the restaurants and the delivery riders (“**Non-Consumer Users**”) within the OFDS business model? In answering this question, Chapter 2 of the thesis provides us with the theoretical normative reasoning why protection for the Non-Consumer Users is justified. In this respect, the theory of vulnerability drawn from various disciplines will be used as an entry point, establishing a conceptual benchmark that may explain how susceptibility to harm (e.g. unfair terms) may arise from contextual and/or relational factors, regardless of the stakeholders’ legal status (i.e. consumer or otherwise). This thesis, however, does not treat vulnerability as a legal status that automatically warrants protection.

Chapter 2 begins with the notion of subsistence entrepreneurs, an attempt to erode the common (mis)conception regarding the homogeneity of business actors and that all businesses (including independent contractors) stand on equal footing. I argue that subsistence entrepreneurs have distinct characteristics that may exacerbate their vulnerabilities, particularly when compared to other types of entrepreneurs, such as larger market players or firms. The discussions in Chapter 2 demonstrate that the Non-Consumer Users may exhibit characteristics commonly associated with subsistence entrepreneurs and/or they operate under subsistence-like conditions.

Chapter 2 also examines how and under what circumstances consumers may find themselves vulnerable against harmful conduct (e.g. the imposition of unfair terms). In this regard, circumstances such as weaker bargaining power and information asymmetry were identified. The Chapter then proceeds to analyse whether the said circumstances may also be present in the contractual relationship between the Non-Consumer Users and the OFDPs. It is to be noted that this study does not claim that the Non-Consumer Users are inherently vulnerable, but the situations that they experience in relation to their contractual relationship with the OFDPs make them liable to be vulnerable. It is within this particular context, that the Non-Consumer Users are susceptible to harm.

Whilst Chapter 2 provides us with the theoretical normative justification for protecting the Non-Consumer Users, the said justification may be further enforced by substantiating it from a practical perspective, by demonstrating how such vulnerabilities have been actually abused and/or taken advantage of by the OFDPs through their terms and conditions. Chapter 3 then aims to explore to what extent, can abuse of the Non-Consumer Users' vulnerabilities be detected in the adhesion contracts imposed by the Malaysian OFDPs.

Via Chapter 3 of the thesis, we examine the adhesion contracts of two Malaysian OFDPs (i.e. Grab and Shopee), to assess whether these contracts are riddled with terms that may be deemed as unfair. In order to assess the terms and conditions, a doctrinal framework has been established as a normative evaluation threshold, to ascertain the appropriate standard and/or yardstick of 'unfairness'. In this regard, our analysis utilises:- (1) unfairness test provided under several existing unfair terms legislation (i.e. Malaysian Consumer Protection Act 1999, European Union Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts and Part 2-3 of the Australian Consumer Law (Schedule 2, Competition and Consumer Act 2010)); and (2) other relevant legal framework concerning unfair terms/practices in standardised contracts, including in P2B relations (e.g. Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services).

Chapter 3 highlights the presence of multiple unfair terms in the adhesion contracts imposed by both Malaysian OFDPs. These impugned unfair terms may be grouped into six distinct categories:- (1) the Platforms' unilateral power to amend any contractual terms; (2) Grab's No-Refund Policy; (3) the Platforms' unilateral power to arbitrarily terminate the Non-Consumer Users' accounts without basis; (4) non-guarantee of the platforms' reliability; (5) the Platforms' wide exclusion and/or restriction of liabilities; and (6) arbitration as the sole dispute resolution avenue. A detailed evaluation of these provisions indicates that they function almost exclusively to the benefit of the OFDPs, while imposing disproportionate burdens on the Non-Consumer Users, thereby materially disturbing the contractual equilibrium between the parties.

Based on the findings of Chapters 2 and 3, the thesis argues that there are sufficient reasons for protecting the Non-Consumer Users from the imposition of unfair terms by the OFDPs. Chapter 4 then aims to explore if the Malaysian legal framework, as it currently stands, may effectively and/or adequately protect the Non-Consumer Users. This analysis helps to assess whether the time has come for Malaysia to acknowledge that there is a need for a separate and systematic statutory protection against unfair terms in P2B contracts, especially within the context of the OFDS business model involving the OFDPs and the Non-Consumer Users. In this Chapter, several provisions embedded under the Malaysian Contracts Act 1950, the recently passed Gig Workers Bill and judicial doctrines developed by various common law courts (as applied, adopted and/or further developed by the Malaysian courts) are examined to determine whether these rules can serve as effective substitutes for unfair terms legislation.

Chapter 4 examines these legal rules in two stages:- (1) the scope of these legal instruments under the Malaysian contract law framework; and (2) to what extent they may offer protection to the Non-Consumer Users (i.e. the effectiveness of the rules). As to the former, the analysis covers the general scope of each rule, its key components/elements and the conditions under which they are triggered. Pertaining to the latter, the Chapter examines whether the legal rules possess the doctrinal capacity to offer protection to the Non-Consumer Users. In this respect, the unfair terms as identified in Chapter 3 will be utilised as the proxy/benchmarks to evaluate the extent to which each rule's theoretical potential may effectively address unfair terms. However, each rule possesses its own flaws and/or challenges in terms of its implementation. In this stage, our analysis identifies several procedural, doctrinal and/or institutional challenges that hinder the rules' overall effectiveness as a genuine replacement for unfair terms legislation.

Chapter 5 serves as the closing remark, concluding this study by advancing a set of recommendations aimed at strengthening contractual fairness within the context of the OFDS business model. It first suggests that the time has come for the Malaysian legislature to intervene via a dedicated unfair terms regime in order to fill the current regulatory gap. This thesis also underscores the capacity of the Malaysian judicial bodies to address the structural unfairness that is evident through the OFDPs' contractual terms, as and when the opportunity presents itself before the courts. This can be implemented by, amongst others, interpreting and applying existing Malaysian contract law doctrines/provisions, in a manner that recognises the vulnerability of the Non-Consumer Users (particularly in relation to their contractual dynamic with the OFDPs). Finally, this study highlights the role that OFDPs may play in improving the existing contractual environment within the OFDPs business model by revisiting their standard terms and governance practices, especially where these terms operate to

(or have the effect of) systematically undermining the interests of their delivery riders and partnered restaurants. It is also important for the OFDPs to recognise that their terms and conditions should only be mobilised to protect their legitimate interests, but this protection should not be abused nor excessively advanced at the expense of the Non-Consumer Users.

Samenvatting

De sector van online voedselbezorgdiensten (“online food delivery services”, **OFDS**) heeft het dagelijks leven ingrijpend veranderd. Wat begint als een eenvoudige bestelling, ontwikkelt zich tot een strak gecoördineerd proces waarin maaltijden worden bereid, door de stad vervoerd en bij wachtende klanten afgeleverd. De opkomst van dit bedrijfsmodel heeft onmiskenbaar nieuwe kansen gecreëerd voor individuele bezorgers en restaurants, die via digitale platforms toegang krijgen tot opdrachten en een groter klantenbestand. Tegelijkertijd blijven de ondernemers die deze transacties mogelijk maken in de praktijk vaak op de achtergrond.

Een belangrijk punt van zorg binnen het OFDS-bedrijfsmodel betreft de standaardcontracten die worden opgesteld door online voedselbezorgplatforms (“online food delivery platforms”, **OFDPs**). Uit deze contracten blijkt dat bepalingen over eenzijdige wijziging, eenzijdige beëindiging zonder geldige redenen en zeer ruime uitsluitingsclausules veelvuldig worden opgelegd aan zowel restaurants als bezorgers. Omdat de Consumer Protection Act 1999 - de enige Maleisische wetgeving over oneerlijke bedingen - uitsluitend consumenten beschermt, vallen zowel bezorgers (die in Maleisië als zelfstandige contractanten worden aangemerkt) als restaurants buiten het bereik van deze wettelijke bescherming.

Dit proefschrift onderzoekt daarom of er aanleiding bestaat voor Maleisië om specifieke wetgeving inzake oneerlijke bedingen in te voeren ter bescherming van restaurants en bezorgers (de zogenoemde “**Non-Consumer Users**”) binnen het OFDS-bedrijfsmodel. Ter beantwoording van deze vraag stelt hoofdstuk 2 een theoretisch-normatief kader op dat inzichtelijk maakt waarom bescherming van deze groep gerechtvaardigd kan zijn. Daarbij wordt de ‘kwetsbaarheidstheorie’, ontleend aan verschillende disciplines, als analytisch uitgangspunt genomen. Deze theorie verklaart hoe vatbaarheid voor schade-zoals het opgelegd krijgen van oneerlijke bedingen-kan voortvloeien uit contextuele en relationele factoren, ongeacht de juridische kwalificatie van de betrokken partij als consument of niet. Kwetsbaarheid wordt in deze dissertatie echter niet opgevat als een vaste juridische status die automatisch aanspraak geeft op bescherming.

Hoofdstuk 2 introduceert het begrip ‘subsistentie-ondernemers’, om de wijdverbreide veronderstelling te nuanceren dat alle ondernemingen-waaronder ook zelfstandige contractanten-zich in een vergelijkbare onderhandelingspositie bevinden. Betoogd wordt dat subsistentie-ondernemers over specifieke kenmerken beschikken die hun kwetsbaarheid kunnen vergroten, met name in vergelijking met grotere marktpelers. De analyse laat zien dat Non-Consumer

Users in het OFDS-model vaak dergelijke kenmerken vertonen en/of opereren onder omstandigheden die vergelijkbaar zijn met subsistentie.

Daarnaast wordt in hoofdstuk 2 onderzocht onder welke omstandigheden consumenten kwetsbaar kunnen worden voor schadelijk gedrag, zoals het opleggen van oneerlijke bedingen. Factoren als een zwakke onderhandelingspositie en informatie-asymmetrie spelen daarbij een centrale rol. Vervolgens wordt geanalyseerd of deze omstandigheden ook voorkomen in de contractuele relatie tussen Non-Consumer Users en OFDPs. Deze studie stelt niet dat Non-Consumer Users per definitie kwetsbaar zijn, maar laat zien dat de specifieke context waarin zij contracteren met OFDPs hen vatbaar kan maken voor benadeling.

Waar hoofdstuk 2 de normatieve rechtvaardiging voor bescherming uiteenzet, beoogt hoofdstuk 3 deze rechtvaardiging empirisch te onderbouwen door te analyseren in hoeverre dergelijke kwetsbaarheden daadwerkelijk worden uitgebuit via contractuele bepalingen. Daartoe worden de adhesiecontracten van twee Maleisische OFDPs - Grab en Shopee - onderzocht op de aanwezigheid van mogelijk oneerlijke bedingen.

Voor deze beoordeling is een doctrinair beoordelingskader ontwikkeld dat fungeert als normatieve maatstaf voor 'oneerlijkheid'. Daarbij wordt gebruikgemaakt van (1) de oneerlijkheidstoets uit bestaande wetgeving inzake oneerlijke bedingen, waaronder de Maleisische Consumer Protection Act 1999, Richtlijn 93/13/EEG van de Europese Unie en delen van de Australische Consumer Law, en (2) andere relevante juridische kaders met betrekking tot gestandaardiseerde contracten, waaronder regelgeving inzake P2B-relaties, zoals Verordening (EU) 2019/1150.

Hoofdstuk 3 laat zien dat de onderzochte contracten meerdere bedingen bevatten die als oneerlijk kunnen worden aangemerkt. Deze kunnen worden onderverdeeld in zes categorieën: (1) de eenzijdige bevoegdheid van platforms om contractuele voorwaarden te wijzigen; (2) het no-refundbeleid van Grab; (3) de mogelijkheid om accounts van Non-Consumer Users zonder motivering te beëindigen; (4) het ontbreken van garanties ten aanzien van de betrouwbaarheid van het platform; (5) vergaande uitsluiting of beperking van aansprakelijkheid; en (6) verplichte arbitrage als exclusieve geschillenbeslechtingmethode. Uit de analyse blijkt dat deze bepalingen voornamelijk de belangen van de OFDPs dienen en leiden tot een wezenlijke verstoring van het contractuele evenwicht.

Op basis van de bevindingen uit hoofdstuk 2 en 3 concludeert deze dissertatie dat er voldoende grond bestaat om Non-Consumer Users te beschermen tegen het opleggen van oneerlijke bedingen door OFDPs. Hoofdstuk 4 onderzoekt vervolgens of het huidige Maleisische rechtskader deze bescherming daadwerkelijk kan bieden. Daartoe worden onder meer de Contracts Act 1950,

de recent aangenomen Gig Workers Bill en relevante common law-doctrines geanalyseerd.

Deze analyse verloopt in twee stappen: eerst wordt de reikwijdte en toepassingsvoorwaarden van deze rechtsregels in kaart gebracht, waarna wordt beoordeeld in hoeverre zij in de praktijk bescherming kunnen bieden tegen de in hoofdstuk 3 geïdentificeerde oneerlijke bedingen. Daarbij wordt geconcludeerd dat deze instrumenten weliswaar een zekere beschermingspotentie hebben, maar dat zij worden beperkt door procedurele, doctrinaire en institutionele tekortkomingen, waardoor zij geen volwaardig alternatief vormen voor specifieke wetgeving inzake oneerlijke bedingen.

Hoofdstuk 5 vormt het slot van deze studie, en concludeert met aanbevelingen ter versterking van contractuele rechtvaardigheid binnen het OFDS-bedrijfsmodel. Allereerst wordt betoogd dat de Maleisische wetgever een expliciet wettelijk regime inzake oneerlijke bedingen zou moeten invoeren om het bestaande beschermingsvacuüm te dichten. Daarnaast wordt gewezen op de rol van de rechterlijke macht bij het aanpakken van structurele contractuele oneerlijkheid door bestaande doctrines contextgevoelig toe te passen. Tot slot wordt benadrukt dat OFDPs zelf verantwoordelijkheid dragen voor het verbeteren van hun contractuele praktijken, door hun standaardvoorwaarden te beperken tot de bescherming van legitieme belangen en deze niet op onevenredige wijze af te wentelen op bezorgers en restaurants.