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Transfer of Personal Data as Counter Performance: Comparison of the Illegality and Unfairness Doctrine between European and Malaysian Context

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Abstract

This article examined the differences between the European Countries' and Malaysia's stances in terms of the illegality and unfairness of transferring personal data as counter performances. The research was based on law cases and legal provisions of both Malaysia and Europe. References were also made to cases from the United Kingdom and India as their law is in pari materia with Malaysia's law. Research showed that in economic value, personal data in both Malaysia and European Countries are still ambiguous. However, in Malaysia, there is a possibility that the transfer of data is already sufficient and therefore constitutes a valid consideration. It was also found that, as an unlawful consideration will automatically be prima facie void, the doctrine of illegality should be extended to general contracts in Malaysia. Under unfairness, European Countries are provided with the Unfair Contract Terms Directive, Malaysia however still lacks statute to address unfair contract terms, therefore, Malaysia still depends a lot on the previous court judgement. This paper opines that Malaysia should enact its own legislation concerning unfairness especially when it comes to personal data as consideration. Theoretical and practical implications were discussed.

Keywords: *Contract; Doctrine of Illegality; Unfairness; Personal data; Counter Performance*

1.0 Introduction

Big Data is a term that was popularised by John Mashey in the late 90's.[1] It refers to a large set of diverse information that grows at a very rapid rate. Big Data can be deliberately collected through personal devices and applications, across surveys, online purchases, digital payment, and public publication remarks on social media and other websites.[2] To cope with complex data volumes, Big Data has often been stored in systems and analysed with special software support that can be done internally or relying on the third-party that specialise on processing Big Data into understandable representations of data. There is a significant correlation between Big Data and personal data. It is undeniable that the profits from Big Data are sourced by personal data collected. For instance, in the article titled *Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive* by Dr. Phillip Hacker, it mainly discusses the issues of the value of personal data as a counter performance and its stances in economic perspective and legal perspective in the light of illegality doctrine and unfair contract terms. To further discuss and review the article, this paper will do a comparative analysis regarding the European position of illegality and unfair contract terms of personal data as counter-performance and the position in our country Malaysia.

[1] Where does 'Big Data' come from? *Enterprise Big Data Framework*. https://www.bigdataframework.org/short-history-of-big-data/ [26 May 2022].
[2] Segal T. 2022. Big Data. *Investopedia.* https://www.investopedia.com/terms/b/big-data.asp [26 May 2022]

2.0 ILLEGALITY

2.1 Author's Stance

General Data Protection Regulations (GDPR) is the law that governs personal data in European Union countries. It establishes data protection authorities with the goal of guiding and regulating the digital commerce realm to manage their customers' personal information and ensuring comprehensive data protection for all individuals in the European Union. The author of this article focuses on the general contract law and data protection law verdicts. On the question of whether the illegality doctrine under data protection law should be extended to illegality doctrine under general contract law, two opposing viewpoints arise.

To begin, some authors[3] supported the view that the verdict of general contract law should strictly follow the verdict of data protection law. If the act has already violated the data protection law, then there must not be a valid counter-performance under the general contract law. For example, when users gave their consent for the Facebook application to access the user's data, but if Facebook sold users' data to third parties, this violates the data protection law. Subsequently, the data shared by Facebook users to Facebook as a counter-performance of social media services cannot be a valid one.

Contrarily, some believed that data protection and general contract law should be treated individually and separately. In other words, four reasons had been highlighted by the author to support the view that general contract law should maintain its independence from data protection laws.

Firstly, regarding data protection violations, the illegality concept would invalidate any contract that relates to the supply of services to the transfer of personal data. This is since the data protection law does not define unlawful data sharing practices between two parties; alternatively, the illegality only applies to certain data processing activities. Referring to the Facebook situation, authorities show that only some of Facebook's current processing practices are illegal under data protection. If the general contract law is implemented because of partial illegal data being used, it will render the user's contract with Facebook to be void completely.

Another reason that data protection law and general contract law should be separated is to avoid adding insult to injury for data subjects. Invoking the Facebook example, users give their consent to Facebook to access their data in return to use the Facebook services. However, if Facebook sells users' data to other parties illegally, the contract between Facebook users and Facebook will become void under the doctrine of illegality. In other words, an unintended consequence of invalidating the contract will cause data subjects who already face unlawful processing to be denied their contractual rights which is unreasonable and unfair for them.

In addition, under Art 5(1) GDPR, data protection law has highly unclear terms. Hence, if such unclear principles of data protection is extended to general contract law which is comparatively clear, it is unfair to the innocent party as it will surely bring legal uncertainty into general contract law. Lastly, invoking the illegality doctrine in general contract law is unnecessary due to the existence of effective authorities under data protection law to sanction unlawful data processing such as Art 17 (1)(d) GDPR and Art 18(1)(b) GDPR. Therefore, it is redundant and unreasonable for one to extend the illegality doctrine under data protection law to general contract law to render personal data as counter-performance void.

As a result, based on the four reasons above mentioned, it can be reflected that the author is more towards the opinion that data protection law and general contract law should function separately and independently.

[3] Florian Faust, 'Digitale Wirtschaft – Analoges Recht: Braucht das BGB ein Update?', Gutachten [Legal Opinion], Deutschen Juristentag, (2016), Nils Lölfing, *Die App-Ökonomie des Schenkens* (LIT Verlag 2017), Langhanke and Schmidt-Kessel (n 40) 220 et seq.

2.2 Personal Data As Consideration In Malaysia

Personal data has become a kind of new currency for the digital world in recent years.[4] However, consumer contracts, including situations where "paying with one's own personal data" is involved, do not usually deal with consumer data under terms like "consideration" or "payment." On the contrary, numerous services, types of digital content in the digital realm are said to be provided "for free". Notably, the word "for free" is only limited to the fact that the contract does not provide for a monetary consideration, whereas the fact that the supplier is given the other party's personal data and that the other party's consent to deal with the personal data is frequently neglected in advertisement and contract terms descriptions. In other words, consumers have imperceptibly traded their personal data which values a lot in the era of digital commerce.

In his article,[5] Dr Philip has made several arguments and discussions on whether personal data can be deemed as a valid counter-performance under general contract law. To illustrate, counter performance is a performance which is due in exchange for another performance.[6] Nevertheless, in countries that follow consideration doctrine such as Malaysia, the word consideration can be used to substitute the word counter-performance in the European context.

To illustrate, by virtue of s 2(d) of Malaysian Contracts Act 1950 (CA 1950), consideration is defined as an act, forbearance, or promise by one party to a contract that constitutes the price in exchange for the promise of the other. Thus, both parties to the contract must provide something in return for the other's promise. To constitute a valid contract, consideration must be provided by contracting parties. In other words, this is in line with the European context of counter performance whereby under the Big Data era personal data has been used as a consideration by consumers in return for the use of online services provided by social media platforms or online shopping services such as Facebook, Twitter, Shopee and Lazada. Therefore, a concern arose as to whether the transfer of personal data in Malaysia can be deemed as a valid and sufficient consideration under Contracts Act 1950.

As mentioned in the article, the answer towards the economic value of personal data is by no means clear. Subsequently, this has brought ambiguity as to whether the transfer of personal data is a sufficient consideration under the general contract law in Malaysia. In fact, in Malaysia, if there is consideration, the law does not question the adequacy of the consideration. A consideration must be sufficient but need not be adequate by virtue of Explanation 2 and Illustration (f) of s 26 CA 1950. Similarly, by applying this concept to transfer of data as consideration in Malaysian contract law context, despite the value of personal data, while unclear, and is subjective among individuals, it can still constitute a sufficient consideration as long as the data subject consents to it. Therefore, despite there is a lack of clear wordings under Malaysian contract law allowing the transfer of data as consideration, by applying the sufficiency but not adequacy principle as well as provision enshrined under Personal Data Protection Act 2010,[7] there is the possibility that the transfer of personal data to be a sufficient and valid consideration which forms part of the contract. Notably, this conclusion only stands provided that the transfer of personal data is lawful under Personal Data Protection Act 2010 (PDPA 2010) in Malaysia which is a set of data protection principles akin to that found in the Data Protection Directive 95/46/EC of the European Union (EU)[8] as mentioned in the article. Therefore, it is said to be in line with Art 3(1) of GDPR that recognizes personal data as a kind of monetary form counter-performance.

2.3 Doctrine Of Illegality In The Context Of Malaysia

Nevertheless, another issue emerged as to whether unlawful transfer of data that violates PDPA 2010 Malaysia can be considered as a valid consideration in the context of Malaysia. Several discussions had been made in the

[4] See 2011.Personal Data: The emergence of a New Asset Class, *World Economic Forum*.
[5] Hacker P. 2019. Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive. *SSRN*. http://dx.doi.org/10.2139/ssrn.3391772.
[6] *European Encyclopedia of Law*. https://lawlegal.eu/ [30 May 2022].
[7] Section 6, Personal Data Protection Act 2010.
[8] The EU Data Protection Directive 95/46/EC has now been replaced with the EU General Data Protection Regulation, which came into force on 25 May 2018.

article on whether the illegality doctrine under data protection law should be extended to the illegality doctrine under the general contract law of European context. However, this discussion brought by the author can only be supported by opinions and views from different authors instead of clear provisions in the European general contract law context. To clarify, in Malaysia, the doctrine of illegality is stipulated under s 24 of CA 1950 which reads that the consideration or object of an agreement is lawful, unless —it is forbidden by a law; it is of such a nature that, if permitted, it would defeat any law; it is fraudulent; it involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy.

However, it is worth noting a few other provisions to resolve the issue stated in the paragraph above. Nevertheless, before discussing further, what is an unlawful transfer of data? Under PDPA 2010, many circumstances could constitute an unlawful data transfer. To name a few, s 130 of PDPA 2010 prohibits the collection of data without users' consent, whereas s 5(2) PDPA 2010 stipulates the compliance of all seven principles of the PDPA among others. In short it could be said that an unlawful data transfer is one that contravenes the laws that govern data processing. Thus, considering all these provisions the issue is not even worth debating as it is evident that s 24 of CA 1950, notably paragraphs (a) and (b) would bar the transfer of data from becoming a valid consideration. Simply because an unlawful data transfer is forbidden by a law and if permitted would defeat such law (notably the PDPA). It is clear here that the general contract law extends to data protection simply because of the way it is worded in the Malaysian context. The problem highlighted by the author in the article arises here as well, where the doctrine of illegality completely invalidates the contracts although there is only partial illegality under data protection law.

This then poses another question as to what happens to the validity of the contract? Under s 10 of CA 1950, a contract is void if it is not for a lawful consideration and with a lawful object. Thus, at this juncture it is important that we identify the epithet 'void' that ever so happens to appear in this provision. Applying the classification favoured by Cheshire and Fifoot where contracts can be void due to illegality or void due to infringement of public policy at common law. If we were to interpret s 24 of CA 1950 broadly under its jurisdiction it may include all types of contracts which are classified to be illegal under common law. The effect of such contract is said to be void under s 24 of CA 1950, however under common law it is treated as void ab initio. Thus it would only be logical to infer that void can only mean void ab initio for if the legislature had intended the term to mean otherwise, it would have stated so.[9]

This was highlighted by the author in the article on the note of seeking contractual remedies. This is very much relevant in the Malaysian context of illegality as it does not allow any contractual remedy to the users as there was never a contract to begin with. This can be seen in the case of *Mohori Bibee v Dharrmodas Ghose*[10] where the respondent who was at the age under 21, had executed a mortgage in favour of Brahmo Dutt, a moneylender. Subsequently, before the completion of the mortgage the moneylender had received a letter stating that the respondent was underage, but this was ignored, and the transaction continued. Thus, Ghose and his mother and friend commenced an action praying for a declaration that the transaction was void and inoperative and should be delivered up to be cancelled. The court held that the contract was *void ab initio*. Although the Contracts Act allocates a provision for restitution under s 66 it only caters to contracts that are void or voidable. Since the contract here is *void ab initio* and not voidable or void, the statutory remedy prescribed in s 66 for voidable or void contracts cannot be applied as the contract never existed in the first place. This was held by the Privy Council in the case of Mohori.

2.4 Closing Thoughts

To summarise, a consideration must be lawful for a contract to be properly formed. Hence, whether the illegality doctrine under data protection law should be extended to the illegality doctrine under general contract law in Malaysia is not even an issue as an unlawful consideration will *prima facie* void the contract itself. Hence, it is clear that the illegality doctrine under data protection law should be extended to general contract law in

[9] Look at, "void to that extent", as stated in Section 28 of Contracts Act 1950.
[10] [1903] 1 LR 30 Cal 539.

Malaysia. To exemplify, in the recent case of *Genting Malaysia Bhd v Pesuruhjaya Perlindungan Data Peribadi & Ors*,[11] it was held that s 81 of the Income Tax Act does not allow the defendant to make such blanket demands for personal data and by allowing such blanket disclosure of personal data would amount to a breach of the provisions of the Personal Data Protection Act 2010 (PDPA 2010). Hence, it is clearly reflected that laws in Malaysia strictly prohibited the transfer of personal data to a third party without consent.

When discussing consumer data as a consideration, one must first examine the fact that personal data is being commercialised in the digital world. Nonetheless, Malaysia still has to establish and implement rules governing the use of personal data as a contract consideration.

3.0 Unfairness

3.1 Author's Stance

The Unfair Contract Terms Directive (UCTD) is an EU Member State provision that governs the laws and regulations regarding unfair contract terms between a seller or supplier and a consumer. According to Art 3 of the UCTD,[12] an unfair term is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the consumer.[13] Therefore, any consumer contract, including digital content contracts, that contains unfair terms will be subject to the Directive's application. In the article, however, the author mentions that before a contract (where data acts as counter-performance) is deemed to be contractual imbalance contrary to good faith or not, there must be a prove that the UCTD applies to the data dimension of the contract and an acceptable yardstick for unfairness assessment has been found.

As such, once the unfairness assessment is found, a yardstick must be determined, which entails finding a significant contractual imbalance in bad faith. First, is by way of data protection law under the UCTD (German transposition), and second, is by way of the data protection principles, under Art 5 (1) GDPR,[14] data protection by design and default principle, and also under Art 25 GDPR, which provides advice.

When a clause that allows for data processing activity has a conflict with the data protection principle, this might indicate a serious contractual imbalance, even if the principle is not explicitly breached. The CJEU[15] has concluded that unfairness can be assessed by simulating a contract negotiation. This contract negotiation involves a hypothetical negotiation where the clause is claimed to be unfair if the consumer and trader would not agree with the clause in the discussion. Although it's difficult to find the exact result of this hypothetical bargaining process with scientific rigour, it does provide a procedural plausibility test for unfairness assessment. These general concerns will be applied to two cases as mentioned in the author's article.

In addition, using data instead of money as counter-performance does not necessarily mean a major imbalance. Taking the example of social network access or third-party tracking. The hypothetical negotiating criteria in this scenario are bound to success as the consumer gets a complicated product in return. It would be a different answer however if the supplier sells an app that is limited such as activating a flashlight, that is not complicated and has no use for the personal data to make it functional. The author also mentioned that if the value cannot be approximated and data collection and sharing seem inadequate relative to the product's limited usefulness, the hypothetical bargaining test would have failed.

The UCTD or other legal instruments must remain an exception in a market economy, the unfairness assessment does provide a mechanism to remedy the excessive data collecting and sharing activities in the presence of market failures, however, the test should only be used where the hypothetical negotiating test would have failed. As for

[11] [2022] 4 CLJ 399.
[12] Article 3 of the Unfair Contract Terms Directive (93/13/EEC).
[13] Leskinen, C., & de Elizalde, F.. The control of terms that define the essential obligations of the parties under the Unfair Contract Terms Directive: Gutiérrez Naranjo (Common Market Law Review, 55(5)), 1-4.
[14] Article 5 of General Data Protection Regulation (GDPR): Regulation (EU) 2016/679.
[15] Court of Justice of the European Union.

Broad Service Obligation, courts should not assume broad service duties are unfair when they allow for more data processing since to produce a large imbalance, three criteria must be met. First, the requirement should not have an obvious functional link to the trader's commitment. Second, the requirement should not deliver the consumer considerable marginal utility compared to market procedures. Third, it must allow further data processing via Art 6(1)(b) GDPR.

3.2 Unfairness Under Consumer Protection Act 1999

In the context of Malaysia, we can see that the main piece of legislation dealing with contractual matters, i.e., Contracts Act 1950, does not expressly protect a party to the contract against unfair terms. As a result, it is left to our judiciary to remedy and decide the disputes arising from the contractual unfairness, in which a landmark decision has been held in 2014 in the case of *CIMB Bank Berhad v Maybank Trustees Bhd & Other Appeals*.[16] The Federal Court in this case by referring to the United Kingdom landmark decision, *Photo Production Ltd v Securicor Transport Ltd*,[17] opined that the upholding of the exemption clause agreed to by the parties depended upon the construction of that clause, whereby the courts are not allowed to intervene no matter how unfair it may appear to be.

Nonetheless, the position of a consumer in a business to consumer contract seems to have been better protected by virtue of the Consumer Protection Act 1999 (CPA 1999). Hence, the main question is, whether an internet end user is a consumer? According to s 3(1) of the CPA 1999, a consumer is an individual who acquires consumer goods or services for his personal, domestic or household purpose, and not for commercial purpose. Therefore, it is submitted that, an end user, using not for gaining any commercial advantages, falls within the ambit of the "consumer", and in turn, the Act applies.

To further illustrate, Part IIIA of CPA 1999 recognizes two types of unfairness's: procedural and substantive. In terms of procedural unfairness, s 24C (2) has listed down the circumstances that the court may take into consideration when determining the existence of procedural unfairness, which will be further discussed followingly. It is submitted that the most important question with regards to the collection of personal data is whether such collection has been made sufficiently transparent with the contractual terms to enable the consumer to make an informed decision. In this case, paragraphs (a), (f), (h), and (i) are relevant. Basically, these paragraphs concern with the readability of the contractual terms, whether they are clear enough to gain consumers' attention, and whether they are understandable to a legal layman.[18] If it is hard to understand, then perhaps the terms need to be explained accurately by legal experts.[19] Indeed, it seems illogical to send any legal experts to users whose personal data will be collected from since such contracts are usually "Click Wrap Contract", whereby the users will be required to confirm their acceptance to the terms of the contract by clicking on a button that says "I accept" or "I agree", hence it is advisable for those companies to make the relevant terms as understandable as possible to the users.

Additionally, the court will also take the parties' equality of bargaining power into consideration. By saying so, the court will also look whether the terms were negotiated or part of a standard form contract,[20] and whether it was reasonably practicable for the consumer to negotiate for the alteration of the contract or a term of the contract or to reject the contract or a term of the contract.[21] It is submitted that, since as aforementioned, such term to collect users' personal data is usually a standard term in a "Click Wrap Contract", and the users can either accept or refuse it as a whole, it might be thus deemed by the courts as procedurally unfair since there is totally no room for the users to negotiate such standard terms. Moreover, the plight that users can either "take it or leave it" is also

[16] [2014] 3 CLJ 1.
[17] [1980] AC 827.
[18] Section 24C(2)(a) and (f) of the Consumer Protection Act 1999.
[19] Section 24C(2)(h) and (i) of the Consumer Protection Act 1999.
[20] Section 24C(2)(d) of the Consumer Protection Act 1999.
[21] Section 24C(2)(e) of the Consumer Protection Act 1999.

in the Federal Court's view as in *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor*,[22] reflecting the unequal bargaining powers of the contracting parties. The Court also opined that such a situation merits the application of the principle of public policy,[23] which will be further discussed below. Therefore, due to such unfairness in terms of "either-take-it-or-leave-it", the recommendation made by the authors that traders might provide another option for users to either "pay with data" or "pay with money" as counter-performance[24] is more than welcomed.

S 24(D) of the CPA 1999, on the other hand, deals with the circumstances whether a contract or a term of a contract is substantively unfair. One of the considerations that will be taken into account by courts to check the existence of substantive unfairness is whether the contract has resulted in a substantive imbalance between the parties.[25] Even though as aforementioned, the exact value of personal data is unclear, the courts can still resort the two ways to compare it with the approximate value of the service provided, as opined by the author.[26] In short, when it comes to CPA 1999, it seemingly offers decent protection to the users as discussed above.

3.3 Unfairness Under Section 24(E) Contracts Act 1950

In s 24(e) of Contracts Act 1950 (CA 1950) it states that the consideration or object of an agreement is lawful unless the court regards it as immoral or opposed to public policy. Nik had pointed to a view specifying that public policy under s 24(e) CA 1950 may be used as a tool for judicial flair in dealing with unjust conditions and exemption clauses in proposed law should have a clear set of rules of interpretation. In circumstances involving consumers, it is also proposed that the legislation provide the courts judicial discretion to apply a rigorous interpretation based on the contra proferentem rules.[27] Therefore, the Malaysian expert opinions really sync with the author's views regarding how courts should be cautious to invoke unfairness when it comes to data protection subjects in a contract.[28]

The case of *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v Dato James Ling Beng King*[29] is a good example to understand this section. In this case, the plaintiff did not obtain the necessary consent on an agreement for the purchase of shares. The High Court held that the agreement was void because it was contrary to public policy as the prior approval of the Minister of Finance was not obtained. Linking to the author stance, our court can possibly raise an issue whether the contractual clauses regarding data opted received necessary consent or not.[30]

In the case of *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors*,[31] the doctrine of unconscionability together with the doctrine of inequality of bargaining power was revisited. In this case, Chong Siew Fai J had to decide whether a lease agreement for equipment was unenforceable on the ground of being an unconscionable bargain. The learned judge considered and explored the limits of the theory of unconscionability, considering the number of established English authorities, and found that in order to be released from the agreement, it must be demonstrated that the bargain or some of its provisions were unfair and unconscionable. The learned judge further reaffirmed that the theory of bargaining power inequality, as in *Lloyds Bank Ltd v*

[22] [2019] 2 CLJ 1.
[23] CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 at 20 para [66].
[24] Hacker P. 2019. Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive. *SSRN*. http://dx.doi.org/10.2139/ssrn.3391772. p 22.
[25] Section 24D(2)(e) and (f) of the Consumer Protection Act 1999.
[26] Hacker P. 2019. Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive. *SSRN*. http://dx.doi.org/10.2139/ssrn.3391772. p 20.
[27] Nik, R.M., 1993. Unfair terms in Malaysian consumer contracts-The need for increased judicial creativity. Asian Seminar on Consumer Law. p 9-12.
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[29] [1989] 2 MLJ 249.
[30] Hacker P. 2019. Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive. *SSRN*. http://dx.doi.org/10.2139/ssrn.3391772. p 18.
[31] [1991] 2 CLJ 614.

Bundy,[32] will only apply if the agreement was unfair because the weaker party was victimised as a result of its bargaining weakness. Therefore, in dealing data as consideration the whether the weaker party might possibly victimise because of it should be taken into consideration.

The matter of the relevance of the doctrine of inequality of bargaining power in Malaysia was also raised in the case of *Polygram Records Sdn Bhd v The Search*.[33] In the trial, Visu Sinnadurai decided the case very unlikely with other decisions before, his honour categorically refused to consider the doctrine of inequality of bargaining power as being part of the Malaysian law. He claimed that there was not any established judicial precedent in Malaysia by which the doctrine was acknowledged by the court. The learned judge, however, acknowledged the minority view that grossly unfair contracts, which are often the consequence of the unfairness in bargaining, could be set aside on 'public policy' grounds as per s 24(e) CA 1950. As per the learned judge declared, it could be right in only very few particular cases. Most of the cases in which the doctrine of inequality of bargaining power could apply are unlikely to be declared as void on the grounds of public policy. Therefore, to suggest that s 24(e) basis to the inequality of bargaining power doctrine would be wrong. This judgement points to a question mark since in European Countries they do have the Unfair Contract Terms (UCTD) whilst Malaysia did not have any specific act to deal with the unfairness terms in a contract and depend on the previous court judgement.[34]

3.4 Conclusion

The truth is Malaysia still somewhat lacks comprehensive statutory measures that would allow the court to address substantively unfair contract terms and contracts concluded as a result of unequal bargaining situations.[35] It's specially proven true as we look into the Consumer Protection Act 1999 (Malaysia) (CPA) in 2010's Part IIIA (Unfair Contract Terms) solely applies to consumer contracts.[36] The Malaysian Contracts Act of 1950, which controls contracts in general, gives no indication of contractual unfairness. There is urgency for Malaysia to consider enacting its own legislation to control exclusion clauses as it would greatly control the contractual unfairness which appears more frequent with the expanding use of standard form contracts and exclusion clauses found in these contracts especially when it comes to the personal data transfer as a consideration, which tends to be trickier since it involves virtual activity and extensive parties involved.

4.0 Conclusion

To conclude, the laws in European law and Malaysian law are completely different. The author impliedly expresses that European law should separate the doctrine of illegality from general contract law and data protection law. European law has also have enforced the GDPR in data protection. However, in Malaysia, Malaysian law states that the doctrine of illegality in data protection law should be extended to the general contract law because according to section 24(a) of CA, if the law is not extended, the doctrine of illegality is not a valid consideration in transferring data to a third party.

In the view of unfair contracts, European Law has enforced UCTD to regulate the unfairness of digital contracts. However, in Malaysia, the Malaysian Courts use the Contracts Act 1950 and the Consumer Protection Act 1999 (CPA) on unfairness contract cases as there are no specific laws that regulate on the scope of unfairness contract whereby the Contracts Act does not provide any indication to contractual unfairness and the CPA 'solely' applies to consumer contracts. To conclude on the matters of illegality and unfairness, there are still legal loopholes in the Malaysian Law system whereby Malaysia is in need of implementation of new strict and specific laws on the use of personal data transfer as a consideration under a contract, and exclusion clauses which will help control the unfairness contracts in Malaysia.

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[11] *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1991] 2 CLJ 614*
[12] *Genting Malaysia Bhd v Pesuruhjaya Perlindungan Data Peribadi & Ors [2022] 4 CLJ 399*
[13] *Lloyds Bank Ltd v Bundy [1974] EWCA 8*
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[26] of the parties under the Unfair Contract Terms Directive: Gutiérrez Naranjo. *Common*
[27] *Market Law Review*, *55*(5)
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